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MEREDITH, C.J. NOVEMBER 21ST, 1906.

WEEKLY COURT.

RE LEAHY AND VILLAGE OF LAKEFIELD.

Municipal Corporations—Local Option By-law—Motion to Quash—Objections—Voting—Notices—Character of Type—Posting—Public Places—Tenants Voting without Right—Effect on Majority—Refusal to Swear Voter—Undue Influence—Bribery—Coercion—Boycotting—Proof of Offences—Promise to Erect Building in Village.

Motion by one Leahy, a ratepayer, to quash a local option by-law of the village of Lakefield.

D. O. Cameron and O. A. Langley, Lakefield, for the applicant.

W. E. Raney, for the village corporation, was not called upon.

MEREDITH, C.J.:—I do not think it is necessary to hear you in this case, Mr. Raney. I think all the objections to the by-law fail.

The objection to the notices that they were put in too small type and not posted in 4 of the most public places, as required by sec. 338 of the Municipal Act, is not made out upon the material. The evidence shews that notices were put up in 6 places, and the evidence in opposition to the application says that they were put in the places which were the most public.

It would be a most unfortunate thing if the Court was to set aside a by-law simply because the notice was not written in large enough characters or printed in large enough type; and that where there has been a substantial compliance with the Act, and an honest intention to put up the notices in four of the most public places, the Court should interfere with what had been done and set aside the by-law because, on a hypercritical examination of the circumstances, it might be found that one of these places was perhaps not to be included in the category of being one of the most public places.

The objection must be overruled.

Then with regard to the other, which is the only substantial ground of objection. There was a majority of 41 in favour of the by-law, out of a vote of 323. It is said that 5 tenants voted who had no right to vote, because they had not been resident within the municipality for one month before polling day. That is not controverted, and no doubt these 5 tenants improperly voted, and if a sufficient number of such tenants to have affected the result had voted, although it is impossible to tell which way they voted, it would have been necessary to set aside the by-law. However, if all the 5 votes were struck off, that would result only to reduce the majority to 36.

I think the refusal to swear one voter, Miss Graham, is not made out upon the material; and, even if it were, I should not think that would be a ground for quashing the by-law.

Then with regard to the undue influence, bribery, coercion, and boycotting, which is alleged to have been shewn, it has to be borne in mind that a by-law such as this differs very much from an electoral contest.

In an electoral contest the candidate, in promoting his own election, one may say, is a party, and he is affected, of course, by his own acts and by the acts of his agents which are in violation of the law.

In the case of a by-law which is submitted to the electors for the voting yea or nay upon it, the laws applicable to elections of members of a municipal council or a Legislative Assembly do not obtain, and therefore it is provided by sec. 381 that "any by-law the passage of which has been procured through or by any means of any violation of the provisions of secs. 245 and 246 of this Act, shall be liable

to be quashed upon an application made in conformity with the provisions hereinbefore contained."

That is the authority which is conferred upon the Court to quash a by-law upon a summary application; and, as has been seen, if, by means of a violation of the two sections referred to, the passing of the by-law has been procured, the Court may quash the by-law.

Now, turning to secs. 245 and 246: sec. 245 deals with and defines bribery, and sec. 246 defines undue influence.

The only class of acts charged which would come within sec. 246 is the alleged boycotting, and I am not satisfied upon the evidence that boycotting is made out.

The affidavit of Mr. Manning has not been drawn in such a way as to lead one to the conclusion that it can be relied upon. It is not a fair affidavit. He does not put forward anything which the opponents of this application, the supporters of the by-law, could answer. The general allegation that he has heard persons supporting the by-law make certain statements as to withdrawing trade, and his belief that that influenced voters, even though there had been no direct contradiction of it, is an unsatisfactory way of proving the charge made, and I am unable upon that evidence to come to the conclusion that acts in the nature of a boycott, such as to justify the quashing of the by-law, are shewn to have been committed.

In regard to the alleged bribery, it is said that the Rev. Mr. Campbell, in supporting the by-law, made statements, and that others made statements, publicly and to individual voters, that the temperance party, as it is called—those who were promoting the by-law—had provided a fund of some thousands of dollars with which they intended to erect, in the event of the by-law being passed, a building to be used as a temperance hotel, and that in connection with it there would be stables free for the use of those desiring that accommodation, and that there would also be in connection with the hotel a free reading-room and games.

Now, assuming all that to be proved—there is no contradiction of it—one must look at what the character of the voting was, and what the question before the electors was; and one, at the threshold, will see that the argument upon the one side would probably be: If you pass this by-law, you are going seriously to injure the business interests of the

town; when, as has followed the passing of such by-laws in other places, the taverns are closed, farmers will not come here, and so you will be directly injuring yourselves by passing such a by-law. Apparently, the temperance party, who were interesting themselves in having the local option by-law passed, had from their friends secured a sum of money which they intended to apply, in the event of the by-law being passed, in a certain way, that is, the way already mentioned. Now, all that was done was to make public the fact that that fund was ready to be used in the event of the by-law being passed. There was no other purpose for the fund. That distinguishes the case very much from the cases which have been relied upon by counsel for the applicant.

Possibly it may be said that it was not a legitimate argument to be used; I do not know that it can be said even that what was done was ethically wrong, and I certainly think it cannot be said it was bribery. There was no personal advantage promised to any one. At the most only an indirect advantage would be derived by persons living within the municipality from having such an hotel within its limits, with the free facilities that were intended to be provided in the event of the by-law being passed.

I do not think any of the cases require me to hold that what was said constituted bribery.

It was not any benefit to any individual voter. The argument was that the passing of the by-law would be a financial benefit to the whole community; but, even if technically that comes within the provisions of the statute, I think the applicant has failed to make out a case within sec. 381.

I am not at all satisfied that the by-law was procured by means of any such statements or promises.

As I have already pointed out, the majority in favour of the by-law was 41, from which there are to be deducted 5 tenant voters, leaving 36.

After searching the whole of this village, all that the applicant has been able to procure is an affidavit—not from electors who say they were influenced—but from a man who probably was an active opponent of the by-law, who says that two persons told him that they were influenced by the promises made by the promoters of the by-law.

I think the applicant has not satisfied the onus, resting upon him under the section, to shew that this by-law was procured by the promises, if these were promises amounting to bribery, within the meaning of sec. 245.

The application therefore fails and must be dismissed with costs.

CARTWRIGHT, MASTER. DECEMBER 3RD, 1906.

CHAMBERS.

WOODRUFF CO. v. COLWELL.

Pleading—Counterclaim—Motion to Strike out—Irrelevancy—Company—Parties—Joinder of Plaintiffs—Costs.

Motion by plaintiffs to strike out defendant's counterclaim.

W. E. Middleton, for plaintiffs.

C. A. Moss, for defendant.

THE MASTER:—The main facts of this case appear in a report of a previous motion, ante 302. On 12th November the statement of claim was delivered. The relief asked for is to have defendant restrained from acting as manager of the plaintiff company or dealing in any way with their assets, and to have him deliver over the books and documents and assets of the company, and account for his dealings with the same, and for damages sustained by the company through defendant's alleged misconduct.

No relief of any kind is asked by the Woodruffs personally. The point was not raised on the argument; but I do not see why the Woodruffs joined as plaintiffs. No doubt, in this way they give the best proof of good faith, as they thereby render themselves liable for costs and to give discovery. But having control of the company, on whose behalf they allege that the action is brought, it would not seem necessary to have had individual plaintiffs. See Saskatchewan Land and Investment Co. v. Leadley, 4 O. W. R. 39, 378; International Wrecking Co. v. Murphy, 12 P. R. 423.

On 27th November defendant delivered his statement of defence, together with a counterclaim, which does not ask any relief against the company, who are not made parties to it. It is directed solely against the Woodruffs, and is based on an agreement made between them and defendant in April last. Defendant asks a declaration that he is entitled to the 55 shares held by them; that the agrement may be rectified if necessary, to conform to the true agreement of the parties; and that the Woodruffs be restrained from further intermeddling or interfering with defendant in the management of the company's affairs.

All the plaintiffs have moved to strike out this counterclaim.

For the motion it was pointed out that the action was really one by the company, and is brought not by the Woodruffs personally, but as members of a class. Counsel relied on Macdonald v. Carrington, 4 C. P. D. 28, and Stroud v. Lawson, [1898] 2 Q. B. 44, which latter case shews that the Woodruffs could not bring an action on behalf of the whole body of the shareholders and unite with it a claim made by them personally. From this it would follow that the counterclaim would be improper; or else the defendant should have moved against the statement of claim. On the other hand, it was contended that the real controversy is between the Woodruffs and Colwell, the question being, who is entitled to the control of the company?

Assuming that this is so, it does not follow that this question can be decided in this way. The 5th paragraph of the statement of defence seems to set up the same matter, as it denies that the Woodruffs "are stockholders or directors, or that they have any status or right to interfere in the management of the said company." But, as no facts are there stated as supporting this contention, the meaning may be different. If it is the same contention that is made by the counterclaim, then it will be before the Judge at the trial, who will give such effect to it as may be proper after hearing the plaintiff's case.

The counterclaim must be struck out, but, as it was perhaps invited by the unnecessary joinder of the Woodruffs as plaintiffs, the costs of this motion will be in the cause. If defendant desires to do so, he may amend his statement of

defence, in which case this will be embodied in the order. But I do not wish to be understood as suggesting the need of any amendment.

MABEE, J. DECEMBER 3RD, 1906.

TRIAL.

CARRICK v. McCUTCHEON.

Vendor and Purchaser—Written Offer of Option to Purchase Land—Oral Acceptance—Refusal of Vendor to Carry out—Offer not under Seal—Consideration—Finding of Jury—Taking Unfair Advantage—Mistake as to Title—Statute of Frauds—Registry Law—Commission—Breach of Contract—Damages—Loss of Profits on Re-sale.

Action to recover damages for breach by defendant of his agreement to sell land to plaintiff at the price of $12,000.

H. Cassels, K.C., for plaintiff.

M. J. Kenny, Port Arthur, for defendant.

MABEE, J.:—On 23rd May, 1906, defendant gave to plaintiff the following option:—

"In consideration of $1.00, the receipt of which is hereby acknowledged, I hereby give L. J. Carrick a 30 day option upon my Cumberland street property, having a frontage of 33 feet, first south of Park on Cumberland, for the sum of $12,000, less 5 per cent. commission, payable $2,000 cash and $2,000 yearly till balance is paid, together with interest at 8 per cent."

Plaintiff orally accepted this option on the morning of 24th May.

The option was not under seal, and defendant contended that the one dollar paid by plaintiff to him at the time had not in fact been paid as the consideration for the option, but was a loan by plaintiff to him. The jury found that the dollar had not been lent, but had been paid as the consideration for the option. Plaintiff stated that at the time he obtained this offer from defendant he had in fact sold the

land to one Roice for $14,000, and afterwards, on 9th June, Roice signed an agreement to purchase at that sum. It was not contended at the trial that the land had not in fact been sold to Roice, and the bona fides of the sale, or of the written agreement, was not attacked.

Defendant stated at the trial that on the evening of 23rd May, after he had signed the option, he learned that he had only a life estate in the land; and that, subject to that estate, his daughter was the owner. He also stated that he told plaintiff on the morning of the 24th that he had made a mistake, and that plaintiff told him, at that time, that he (plaintiff) had sold the property. Defendant says he was satisfied with the price, and that he thought he had the power to sell. Plaintiff tendered a deed and mortgage, in the former joining the daughter as one of the grantors, it is stated, although the deed was not put in. The option makes no provision for a mortgage, but no objection was taken at the time of the tender, and the refusal to convey was not put upon the ground that a deed could not be called for until payment in full of the purchase money.

The defence was put upon the grounds, first, that the option, not being under seal, and no consideration passing, was not binding—the finding of the jury disposes of that ground of defence; second, that plaintiff took an unfair advantage of defendant while he was confused; third, that defendant was under the mistake that he was the owner of the property; fourth, the Registry Act and the Statute of Frauds.

I find that plaintiff did not take any advantage of defendant, and that the latter was in no way confused at the time he signed the offer. The price, defendant admits, was a good one, and he finds no fault with it.

I do not think defendant was under any mistake as to the position of the title; he had the will in his possession; he had been collecting the rents for years; and I have no hesitation in finding that he was perfectly aware of the position in which it stood, and only takes this ground now in order to avoid his contract. I do not, however, think that would be the effect, even had defendant been under the alleged mistake.

The Statute of Frauds is pleaded because, it is said, it was arranged that a mortgage should be given, and that was not embodied in the agreement or offer. I do not think that is a good ground of defence. Plaintiff is able to make out his case by producing defendant's written offer, and proving its acceptance, and I do not think that, because plaintiff stated in cross-examination that there had been some discussion about a deed and mortgage, that invalidates the agreement. . . .

[Queen's College v. Jayne, 10 O. L. R. 319, 5 O. W. R. 666, distinguished.]

Here the terms all appear in the writing; $2,000 is to be paid in cash and $2,000 yearly with interest at 8 per cent.; and because the parties may have arranged or discussed that these deferred payments should be secured by a mortgage, if defendant gave a deed, I do not think the contract would therefore become non-enforceable.

Defendant contended that plaintiff was limited in his right to damages to the expense incurred by him in searching title, etc. I find the fact to be that when the agreement was signed by Roice to purchase for $14,000, plaintiff expected defendant to carry out his agreement. Defendant did not on the 24th, or at any time prior to the Roice sale, inform plaintiff that he could not convey—he only asked for delay until the return of his daughter, and I do not think there was anything to indicate to plaintiff before he sold to Roice that there would be any trouble about making title, and he was of opinion all along that upon the daughter's return the matter would be carried out. Defendant has never asked his daughter to join in the conveyance. He says he told her that if she did not sign the deed of her own free will he would never ask her. I have no doubt defendant could make title to plaintiff by merely asking the daughter to join in the deed. She is living with and being supported by him, and it is clear that she is carrying out the tacit wish of defendant by not joining in the deed.

The matter was not argued at the trial, but it is not entirely clear, upon a perusal of the will of defendant's deceased wife, that it is necessary for the daughter to join in the deed.

I thought during the trial that the provision in the option about the commission of 5 per cent. might affect

plaintiff's rights, but defendant stated at the trial that plaintiff was not in any way acting as his agent in the matter.

Judgment for plaintiff for $2,600 with costs.

DECEMBER 3RD, 1906.

DIVISIONAL COURT.

BENNER v. DICKENSON.

Negligence—Injury to Animal—Fences—Failure to Shew Cause of Injury—Nonsuit—Contractor for Building of Fence along Right of Way of Power Company.

Appeal by plaintiff from judgment of County Court of Wentworth, of 13th June, 1906, dismissing the action with costs. The plaintiff, a farmer of Saltfleet township, sold a right of way across his property to the Toronto and Niagara Power Co. The defendant, as contractor for the building of the fence along the right of way, pulled down a cross-fence on plaintiff's farm, and left it in such a condition that a horse belonging to plaintiff got entangled in the wire fence and was killed. This action was brought to recover the value of the horse. Defendant set up that the injury was the result of the negligence of plaintiff in not keeping up fences and gates and in not keeping a proper watch and control over his horse.

W. M. McClemont, Hamilton, for plaintiff.

J. G. Farmer, Hamilton, for defendant.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

MABEE, J.:—The initial difficulty of plaintiff is that he failed to shew that his horse got entangled in the fence in the manner alleged. He says: "We suppose as he went down he caught his hind foot in the fence and struggled to get up;" it is not put higher than this; there are no facts given in evidence upon which the jury could pass upon this theory of the accident. The manner in which the horse got caught

in the fence is then left entirely to conjecture. The second difficulty is that there is no evidence upon which a jury could find that the fence was dangerous. It is true that some persons give their opinion that the strands of the wire are too close together, but the point for consideration is as to the legal liability of the defendant upon the undisputed fact as to the mode of construction of the fence. Under the special Act of incorporation the power company were compelled to fence in the same way that a railway company must fence. The result of plaintiff's contention would be that railway companies would be liable for negligence in erecting fences similar to the one complained of here, in the event of the happening of a like accident. The fence in itself is safe, and the mere fact of its being possible for a horse to get his foot caught fast between the strands of wire is no evidence that the fence is in itself dangerous—the same might happen in the case of the ordinary rail fence, board or picket fence.

The case as put at the trial was that the horse was rolling when his foot caught in the wire, and the whole argument of plaintiff's counsel at the trial proceeded upon that fact. There is no evidence whatever of this, nor is there any evidence of the condition of the ground, or of the horse, from which an inference might be drawn that he was rolling when the accident happened.

The County Court Judge was of the opinion that the evidence did not disclose any facts upon which a finding of negligence against defendant could be upheld, and in this, I think, he was right, and the nonsuit was proper.

The appeal should be dismissed with costs.

GARROW, J.A. DECEMBER 3RD, 1906.

C.A.—CHAMBERS.

PRESTON v. TORONTO R. W. CO.

Appeal to Privy Council—Amount in Controversy—Original Claim for $5,000 Damages—Abandonment of all in Excess of $1,000—Fixing Amount in Controversy.

Application by defendants to allow security on an appeal to the Privy Council from the judgment of the Court of

Appeal (ante 504) affirming an order of a Divisional Court ordering a new trial.

Plaintiff claimed in his statement of claim $5,000 as damages for injuries received in a collision with a street car operated by defendants' servants. At the trial before the Chancellor and a jury, the defendants' motion for a non-suit was granted, and the action dismissed with costs, but by agreement the damages were fixed at $1,000 in case an appellate court should hold plaintiff entitled to recover. A Divisional Court reversed the judgment at the trial, and ordered a new trial, unless the defendants consented to judgment for $1,000. Defendants did not consent, and the judgment actually issued simply directed a new trial, and that defendants should pay the costs of the previous trial and of the appeal.

Defendants then appealed to the Court of Appeal, and the appeal was dismissed with costs. They now sought to appeal to the Privy Council.

L. G. McCarthy, K.C., for defendants.

Shirley Denison, for plaintiff.

GARROW, J.A.:—Section 1 of R. S. O. 1897 ch. 48 gives a right of appeal to the Privy Council where the matter in controversy exceeds the sum or value of $4,000.

On this application plaintiff, by his counsel, alleges, and supports his allegation by an affidavit made by plaintiff, that he is not now claiming more than the $1,000 agreed upon at the trial, which he regarded as having been agreed upon for all purposes, in lieu of the amount originally demanded in the statement of claim, and undertakes to amend the statement of claim, if necessary, to so limit his claim.

A plaintiff in a superior court may at any stage, in my opinion, abandon a part of his claim, and upon such abandonment only the remainder can be said to be in controversy. I, therefore, think that whether the agreement as to damages at the trial had the permanent effect contended for by plaintiff or not, I must regard his abandonment before me of all claim in excess of $1,000 for damages, and consequently must refuse this application.

The order may recite the abandonment of all damages in excess of $1,000, which will, I suppose, be sufficient without a formal amendment of the statement of claim.

The costs should, I think, be costs in the cause.

CARTWRIGHT, MASTER. DECEMBER 4TH, 1906.

CHAMBERS.

RE DOMINION BANK AND KENNEDY.

Interpleader—Moneys on Deposit in Bank—Death of Depositor—Will—Judgment Establishing—Rights of Executor—Adverse Claim under Agreement.

Motion by the Dominion Bank for an interpleader order.

W. B. Milliken, for the bank.

L. V. McBrady, K.C., for James Kennedy, a claimant, opposed the motion.

W. A. Baird, for Robert Kennedy, a claimant, supported the motion.

THE MASTER:—The present motion is an outcome of the litigation as to the will and estate of the late David Kennedy, father of the above claimants.

After a prolonged trial his will was declared valid, and probate has been granted to James H. Kennedy. This decision has been submitted to, and that question is res judicata so far as these claimants are concerned.

Together with the action referred to, there was tried another brought to set aside certain conveyances of realty belonging to David Kennedy, and made by his son J. H. Kennedy, under a power of attorney.

The trial Judge set aside those conveyances. From this decision an appeal has been taken and is now standing before the Divisional Court. I understand that it has not been heard because the evidence has not been furnished.

In that action it was set up as a defence that the impeached conveyances were made in pursuance of an agreement dated 17th October, 1905, and made, as alleged, between the father and his children, that his estate should be equally divided between them. The trial Judge has found that no such binding agreement was made. But,

until the action is finally disposed of, the question is still open. If the appeal should succeed even to the extent of a new trial being ordered, the final determination of the action may be somewhat remote.

Besides the real property, the deceased had standing to his credit in the Dominion Bank about $20,000. On 27th January last the two claimants went to the bank with a cheque signed by both for $20,000 so as to have this sum placed to their joint credit. This would seem to have been in pursuance of the alleged agreement, but for some reason the transfer was not made. On 14th December, 1905, J. H. Kennedy had instructed the bank that all cheques given under his power of attorney were to be countersigned by Robert, which explains the joint signature of the cheque for $20,000.

Had that arrangement continued, the present motion might not have been necessary. But on 20th September last the present manager of the branch in which the money was deposited transferred it to the credit of J. H. Kennedy, as executor of the will of his late father, who died on 17th February last, and whose will was admitted to probate on 12th September following. On 4th October the solicitors for Robert notified the manager that no part of the $20,000 must be paid out without their client's consent, and he himself three weeks later sent a similar notice. On 25th October the appeal in the will action was withdrawn, and next day the solicitors of the executor demanded that the bank should honour his cheques in spite of any notice or claim from Robert to the contrary.

Thereupon the bank, on 2nd November, notified Robert that they would hand the money to the executor unless he got some order to the contrary at once. At the same time the executor's solicitors were informed of this letter, as well as Robert's solicitors, and the bank's solicitors at the same time stated that they would advise the bank to honour the executor's cheques after 6th November. Against this both the claimants objected, and threatened suit. Finally, after hearing from Mr. Horsey, who was the manager at the branch in question in January last, of his recollection of what took place on that occasion, the present motion was launched, and, as no agreement could be arrived at between the claimants, it came on for argument on 30th November.

A similar motion was made in Re Bank of Toronto and Dickinson, ante 323, where the authorities are cited. For the reasons given there, I think the motion should be granted.

So long as the question of the validity of the agreement for equal division is in doubt, the right of the executor to the money is not fully established. The decision in Kennedy v. Hill only establishes the validity of the will as having been made while the testator was of testamentary capacity, and without undue influence. It would, in any case, be operative perhaps as to the legatees other than testator's children. But, however that may be, the bank would be in peril if they paid out the money to the executor under the present circumstances. No doubt, they have paid out part of the money since 20th September. The dates of such payments have not been given. But, as costs and taxes were payable out of the estate under the judgment of the trial Judge, and, as prompt payment would be for the benefit of the beneficiaries, whoever they may ultimately be found to be, I do not think this should prejudice the bank's application. Indeed, it would be in the interests of all parties that all future payments necessary for the preservation of the estate should be consented to by them pendente lite. If this is done, it would be more convenient that the bank should retain the money if willing to do so. If I am right in thinking that the only ground of Robert's claim is the agreement to divide equally, there will be no necessity to direct any issues at present, as that will be determined in the pending action.

An undertaking or recital to this effect should, in that case, be inserted in the order. . . .

DECEMBER 4TH, 1906.

DIVISIONAL COURT.

CLARKE v. UNION STOCK UNDERWRITING CO. OF PETERBOROUGH.

Promissory Notes—Action on—Defences—Absence of Consideration—Plaintiff not Bona Fide Holder for Value—Collateral Contract—Oral Evidence—New Trial.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., at the trial, in favour of plaintiff in an action upon two promissory notes.

H. E. Rose, for defendants.

G. H. Watson, K.C., and S. T. Medd, Peterborough, for plaintiff.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

MABEE, J.:—Plaintiff claims recovery from defendants of $7,000, being the amount of two promissory notes for $3,000 and $4,000, dated 21st August, 1905, payable to Archibald Johnson or order, 2 and 5 months respectively after date, and indorsed by him, without recourse, to plaintiff. Defendants set up several defences, the effect of which was that they had never received any value for the notes, and that plaintiff was not a bona fide holder for value. It is clear that the case has not been fully tried out, and the facts connected with the transaction are not before the Court. The case at the trial went off on the pleadings, which, in some respects, raise matters that probably would form no answer to plaintiff's claim. The Chief Justice of the King's Bench offered to hear all the evidence, notwithstanding the position the pleadings were in, but counsel for plaintiff insisted that the proposed defences were not open to defendants, and judgment went for the sum claimed. Many cases were cited upon this appeal to shew that the terms of a promissory note cannot be contradicted, and the authorities are clear that oral evidence cannot be given to shew a contemporaneous agreement that the note should not be paid, or should be renewed or the like. The defendants contended that the notes were delivered as receipts, or as evidence of certain stock in the Henderson Roller Bearing Company having been transferred to them for sale, that they had never received value for the notes, and that the plaintiff, a clerk in the office of the plaintiff's solicitors, was not a holder for value. It may be that the maker of a note cannot give evidence that the note was given as a receipt, but I think it is open to him to shew that it was given without consideration, and then if he is able to establish that the plaintiff stands in no better position than the payee, he makes out his defence.

In the latter part of paragraph 5 of the defence it is alleged that plaintiff is not the bona fide holder, and paragraph 6 alleges that no value was received by defendants for

the note; evidence has not yet been given upon either of these defences.

The matter was further confused at the trial by an agreement for sale of the stock in question by plaintiff to E. C. Howson, one of the defendant partnership, and the defendants were denied the opportunity of shewing that the stock had not been in fact transferred under that agreement, or that it had not been acted upon, or had been abandoned. This agreement was prior to the giving of the notes, was not between the parties to this action, and the date of payment mentioned in the agreement is different from the dates of maturity of the notes. I think it was open to defendants to shew all the facts connected with the transaction in question upon the record as it stood, without any amendment, the issue being simply as above indicated, nor do I think the giving of such evidence would offend against any of the authorities. All the defendants were endeavouring to do was to assert that, although they gave the notes, yet no stock was transferred to them, or other consideration given therefor, that the alleged agreement was not acted upon or was abandoned; if they could establish this, and couple with it the fact that plaintiff was really the payee of the note, and suing for him, as they allege in their defence, the result might have been different.

The defendants may not be able to establish any of these things, but they have not yet had the opportunity.

The judgment should be set aside, and a new trial had. The defendants may amend if they desire. The costs of the last trial will be reserved for disposition at the next trial, but defendants must pay plaintiff's costs of opposing this appeal.

BRITTON, J. DECEMBER 5TH, 1906.

TRIAL.

BYERS v. KIDD.

Costs—Defamation—Verdict for Defendant—Depriving Defendant of Costs—Discretion—Rule 1130—Good Cause.

Action for defamation, tried with a jury at Peterborough.

R. F. McWilliams, Peterborough, for plaintiff.

D. O'Connell, Peterborough, for defendant.

BRITTON, J.:—Under circumstances mentioned below the jury found for defendant. Defendant asked for costs, and the question was reserved.

I am of opinion that defendant should not get costs. In exercising a discretion to deprive defendant of costs, I am acting under Rule 1130, and therefore not called upon to find what would necessarily be "good cause" within the meaning of decisions under the English Order LXV. To find "good cause" within that Order, it was held in Jones v. Curling, 13 Q. B. D. 262, that there must be facts shewing that it would be more just not to allow the costs to follow the event. I think there are facts here, although not such as in Jones v. Curling, establishing good cause.

Apart from that, it must be conceded at once that the discretion should not be arbitrarily exercised, should not be exercised "by chance medley, nor by caprice, nor in temper:" Huxley v. West London Extension R. W. Co., 17 Q.B.D. 373, 376. There must be some reason reasonably satisfactory to the Judge for depriving a person who has the verdict of the jury of the benefit or indemnity that usually results from such verdict.

I find in this case what satisfies me that the discretion as to costs should be exercised against defendant. Defendant's conduct provoked litigation when the dispute would probably have ended with the termination of proceedings before a justice of the peace. Defendant after the first altercation assaulted the plaintiff. He admitted the assault, and was fined for it. Up to this point he had apparently been accusing plaintiff only upon the authority of what had been said by a person named Campbell. After defendant had heard plaintiff's denial of cutting coal bags of defendant's, and after defendant knew that Campbell had taken back what he said, and called it "a joke," defendant said to plaintiff, "Campbell told me you cut the coal bags, and if it comes to that I can prove that you cut the coal bags."

It is true that the jury found for defendant, and it may be argued that they found that defendant did not use this language. I think defendant did use this language, and it is not necessarily going behind the verdict for me, for the purpose of determining the question of costs, to so find. That language had a good deal to do with bringing this action to trial.

Again it appeared before me that there were negotiations for settlement, and defendant agreed to pay part of plaintiff's costs; plaintiff agreed to accept such settlement, and defendant refused to carry it out.

Again, the jury came in, and, instead of rendering a verdict, said "No bill—each party to pay half the costs." They were told to find for plaintiff or defendant upon the issue. After considerable time in deliberating they again came in and said, "Verdict for defendant, the costs of the Court to be equally divided by the plaintiff and the defendant."

The jury upon being sent back by the County Court Judge, who, for the purpose of taking the verdict, acted for me, returned later with the verdict for defendant.

The decision of the jury, if the discretion had been with them, instead of the Judge, would have been as now rendered by me.

For these and other reasons, I think the judgment should be for defendant without costs.

DECEMBER 5TH, 1906.

DIVISIONAL COURT.

ALLAN v. McLEAN.

Bankruptcy and Insolvency—Preference—Chattel Mortgage—Actual Advance by Third Person—Money Applied on Insolvent's Debt—Creditor's Knowledge of Insolvency—Absence of Knowledge by Third Person.

Appeal by defendants from judgment of CLUTE, J., ante 223, in favour of plaintiff, assignee for the benefit of the creditors of George R. Levagood, in an action to set aside a chattel mortgage made by Levagood to defendant McLean for $560, as fraudulent and void as against the creditors. Levagood started a piano business in Guelph in 1904, and opened an account with the defendants the Traders Bank. His account being overdrawn, and the bank pressing for payment, defendant McLean advanced money upon a chattel mortgage made by Levagood, who handed the money over to

the bank. The trial Judge found that the loan was made at the instance of the bank manager, for the purpose of raising a sum of money to pay off Levagod's indebtedness to the bank; that McLean knew the purpose for which the loan was made; that the whole transaction was carried through at the instance and for the benefit of the bank; and that Levagood was insolvent at the time. He assigned to plaintiff 5 days later.

W. M. Douglas, K.C., for defendants the Traders Bank.

N. Jeffrey, Guelph, for defendant McLean.

J. J. Drew, Guelph, for plaintiff.

The judgment of the Court (ANGLIN, MAGEE, MABEE, JJ.), was delivered by

MABEE, J.:—The result of this case must depend entirely upon the findings of fact by the learned trial Judge. He finds that the manager of the bank believed Levagood upon the eve of insolvency; that McLean allowed himself to be used without question by the manager of the bank for the purpose of raising the money to pay off Levagood's debt to the bank; that it was not the ordinary case of a debtor applying for a loan in the usual way, obtaining that loan, and making application of it as he sees fit, but that it was a case where the intent of the parties was that a loan should be made for the special benefit of the bank, with the knowledge that if the security had been made directly to the bank it would have been void as against the other creditors of Levagood; that the advance was not made bona fide to Levagood, but was made for the bank; and that the mortgage had the necessary effect of defeating and delaying the other creditors of Levagood. The mere repetition of these findings must dispose of this appeal adversely to the defendants. The case is taken entirely outside the facts in Gibbons v. Wilson, 17 O. R. 290. The transaction there was sustained inasmuch as there had been a bona fide advance, the mortgagee knowing nothing about the insolvency of the mortgagor, why the money was wanted, or how it was to be applied. Here the finding is that the advance was not bona fide; that the money was to go to the bank in order that it might gain a preference over the other creditors of Levagood; and that that was the only object of the transaction. It is true that the Judge

finds that McLean was not aware of Levagood's insolvency, but the finding that he allowed himself to be used "without question" for the purpose of raising the money to work a preference to the bank, is, in effect, a finding that he intentionally refrained from making inquiry.

Unless all the findings are to be overturned, and it was not even contended that we should do that, the result is inevitable.

Appeal dismissed with costs.

DECEMBER 5TH, 1906.

DIVISIONAL COURT.

RE TAYLOR v. REID.

Division Court—Territorial Jurisdiction—Contract—Statute of Frauds—Cause of Action—Where Arising—Sale of Goods—Acceptance—Place of Delivery—Prohibition.

Appeal by plaintiff from order of TEETZEL, J., ante 623, prohibiting the 1st Division Court in the county of York from further proceeding with a plaint for the recovery of $45, the price of a frock coat made by plaintiff in Toronto and sent to defendant in Belleville, upon the ground that the whole cause of action did not arise within the territory of the 1st Division Court in the county of York.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

A. R. Clute, for plaintiff.

Grayson Smith, for defendant.

RIDDELL, J.:— . . . It was contended by Mr. Clute (1) that it was not necessary to prove acceptance as part of the cause of action, and (2) that, even if it were necessary to prove acceptance, letters written by defendant from Belleville and received by plaintiff at Toronto constitute an acceptance in Toronto. .

As to the first point, the position taken was that the contract is the cause of action, and the only cause of action, and acceptance is merely evidence of the existence of the contract. This position must needs be taken by plaintiff if he desires to avoid the result of the decision of this Court in Re Doolittle v. Electrical Maintenance and Construction Co., 3 O. L. R. 460, 1 O. W. R. 202. In that case it was pointed out that "cause of action" means "every fact that is material to be proved to entitle the plaintiff to succeed—every fact which the defendant would have a right to traverse," as distinguished from mere evidence necessary to prove such fact.

I think this contention cannot prevail. It seems now to be settled law that a contract to which the 17th section of the Statute of Frauds applies is not void ipso faco because the formalities of the Act may not have been complied with—the contract is still a contract, but is not enforceable against the will of the contracting party: Bailey v. Sweeting, 9 C. B. N. S. 843, per Williams, J., at p. 859, and Willes, J., at p. 861; Brittain v. Rossiter, 11 Q. B. D. 123, per Brett, L.J., at p. 127, and Thesiger, L.J., at p. 132; Maddison v. Alderson, 8 App. Cas. 417, per Lord Blackburn, at p. 488.

Indeed, the modern doctrine supports the contention of counsel for the defendant in Leaf v. Turton, 10 M. & W. 393, where it was decided that it was bad pleading and made the defendant open to a successful special demurrer to plead specially that the provisions of sec. 17 had not been complied with. At p. 395, Parke, B., says to counsel, "You say the effect of the plea is to admit a good contract at the common law, but to avoid it on the ground of the requisitions of the statute?" To which counsel answered, "Yes."

No doubt, some of the older cases made a distinction between the 4th section, which they held merely rendered the contract unenforceable, and the 17th section, which they held made the contract absolutely void.

Much of the old learning upon this has now become obsolete. The history and evolution of the doctrines may be traced by the curious in such decisions as Laythwaite v. Bryant, 2 Bing. N. C. 735; Cunningham v. Roots, 2 M. & W. 248; Johnson v. Dodgson, ib. 653; Elliott v. Thomas, 3 M. & W. 170; Butteman v. Hayes, 5 M. & W. 456; Eastwood v. Kenyon, 11 A. & E. 438, 5 M. & W. 462 (n.); Fricker v.

Tomlinson, 1 M. & G. 772, per Maule, J.; Reade v. Lambe, 6 Ex. 130; Leroux v. Brown, 12 C. B. 801.

But, even when such was considered to be the effect of the 17th section, it was held, under the strict system of pleading then in vogue, that where a plaintiff declared upon a contract within the statute, he must prove the acceptance or whatever act it was which took the case out of the statute, and this without a special plea setting up the statute as a defence. Such a plea, we have seen, was struck out on a special demurrer.

And under our present system of pleading in the High Court, suppose a contract set up in the statement of claim on its face within the statute, the defendant admitting the contract, but pleading simply the statute, can it be doubted that plaintiff could not succeed without proving something to take the case out of the statute? As at present advised, I think the defendant should plead thus in such a case; and if he did not admit the contract upon his pleading, he should be obliged to pay the costs of proving it, if established at the trial.

Plaintiff then must in this case prove not only the contract, but also something in the way of acceptance, that the contract may be "allowed to be good."

As to the second point, what was relied upon as constituting acceptance were certain letters written by defendant in Belleville and received by plaintiff in Toronto. These letters are, beyond question, good evidence of an acceptance sufficient to take the case out of the statute, but they are only evidence from which acceptance may be inferred, and are not the acceptance itself. Whether mere words can ever constitute an acceptance, as seems to be denied in some of the American cases, we need not decide; these letters clearly cannot be considered an acceptance; and the acceptance they tend to establish took place in Belleville.

The case is, therefore, brought within the decision in the Doolittle case.

Appeal dismissed with costs.

BRITTON, J., gave reasons in writing for agreeing with the decision of TEETZEL, J.

FALCONBRIDGE, C.J., agreed that the appeal should be dismissed with costs.

NOVEMBER 21ST, 1906.

C.A.

RE ONTARIO MEDICAL ACT.

Statutes—Ontario Medical Act—Construction—"Practising Medicine"—Use of Drugs or other Substances—Application of Statute to Christian Scientists and Others—Statute for Protection of Public—Reference of Question by Lieutenant-Governor in Council under R. S. O. 1897 ch. 84—Question of Provincial Concern—Scope of Act—Jurisdiction of Court—Application of Existing Law—Authority of Decided Cases.

Case stated by the Lieutenant-Governor of Ontario by order in council of 24th April, 1906, passed pursuant to R. S. O. 1897 ch. 84, for hearing and consideration by the Court of Appeal.

The question stated was as follows:

"Ought it to be held upon the true interpretation of sec. 49 of the Ontario Medical Act, R. S. O. 1897 ch. 176, that a person not registered under that Act, undertaking or attempting for reward to cure or alleviate disease does not practise medicine within the meaning of that section merely because the remedy advised, prescribed, or administered by him does not involve the use or application of any drug or other substance which has or is supposed to have the property of curing or alleviating disease, that is to say, do the words "to practise medicine" in the said section mean to attempt to cure or alleviate disease by the use of drugs, etc., or do they include cases in which the remedy or treatment advised, prescribed, or administered, does not involve the use of drugs or other substances which have or are supposed to have the property of curing or alleviating disease?"

The case was head on the 18th and 19th September, 1906, by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

W. Nesbitt, K.C., and H. S. Osler, for the College of Physicians and Surgeons of Ontario.

S. H. Blake, K.C., and J. E. Day, for the Osteopathists.

H. Cassels, K.C., and R. S. Cassels, for the First Church of Christ Scientists.

W. M. Hall, for other Christian Scientists.

THE COURT answered the question as follows:—

"That each case must depend or be determined on its own circumstances; but dependent upon the facts in each case there may be a practising of medicine which does not involve the use of drugs or other substances having or supposed to have the property of curing or alleviating disease."

The following opinions were certified to the Lieutenant-Governor.

MOSS, C.J.O.:— . . . Before dealing with the question, it is necessary to consider shortly an objection raised to the power of the Lieutenant-Governor in council to refer it. It is said that it not within the scope of the authority to refer conferred by the Act, and that it is not within the competency of this Court under the Act to make answer to it.

The power of the legislature to confer the most ample authority to refer to the Court questions of the widest and most extensive character can scarcely be doubted. And that the exercise of such power has not been deemed incompatible with the working of responsible government is shewn by the fact that in 1833 the Imperial Parliament, by the 3 & 4 Wm. IV. ch. 41, sec. 4, empowered the Sovereign to refer to the Judicial Committee of the Privy Council "for hearing or consideration any such other matter as His Majesty shall think fit," a power which exists and has been acted upon up to the present day; and that when the Supreme Court of Canada was established in 1875, a power similar to that in respect of the Privy Council was conferred on the Governor in council with respect to the Supreme Court: see R. S. C. ch. 135, sec. 37, as amended by 54 & 55 Vict. ch. 25, sec. 4.

And legislation similar to R. S. O. 1897 ch. 84 has been enacted by the legislatures of some of the other provinces of Canada.

The only question can be, has the legislature, by the Act in question, enabled the Lieutenant-Governor in council to submit the questions now before us?

The words of sec. 1 are very plain and free from ambiguity. They are: "The Lieutenant-Governor in council may refer to the Court of Appeal . . . any matter which he thinks fit to refer, and the Court shall thereupon hear or consider the same." There is no context to qualify or restrain the usual and ordinary signification of this language. There is nothing to control the ordinary grammatical meaning of the words used. It is true that the title of the Act is "An Act for expediting the decision of Constitutional and other Provincial Questions." The once apparently well settled rule that the title is not a part of the statute, and ought not to be taken into consideration in construing it, seems not to be always strictly adhered to in recent times. The relaxation may be due to the modern practice of inserting in the statute a section enacting that it may be cited by some short title, in which case the section may be looked at as a good general description of all that was done by the Act: Wilberforce on Statutes, 2nd ed., p. 205.

Here, however, there is no such section, and the words "other provincial questions" seem wide enough to include almost any manner of question. The legislature was content to trust to the Lieutenant-Governor in council to exercise a proper and judicious discretion in availing himself of the authority given him. The limitations must come in that way or from legislative amendment of the statute. In a case before the Judicial Committee a question as to the jurisdiction of the Committee under sec. 4 of 3 & 4 Wm. IV. ch. 41 was raised, and their Lordships held that the only construction which could be placed on the words of the section was a construction which should give full and complete meaning to them without limitation. Speaking for the Committee, Dr. Lushington said further: "Now these words have already been the subject of some discussion before the Judicial Committee, and I believe one or two attempts were made in the first instance to impose a limitation upon them; but the Judicial Committee were of opinion, though it did not come before the public, that they were not entitled to put any limitation upon these words in any of the matters referred to them by the Crown. The same opinion is entertained by their Lordships upon the present occasion. . . . Their Lordships are of opinion that there is enough in this reference not merely to justify but absolutely to require them to proceed, because this is referred to them by an order in council,

and the order in council which refers it to them falls within the purview of the provisions of the statute 3 & 4 Wm. IV. ch. 41, sec. 4, which enacts and prescribes what shall be their duty, and in compliance with that duty they must entertain the prayer of this petition and hear it:" In re Schlumberger, 9 Moo. P. C. 1, at p. 12.

It is to be presumed that the executive, in the exercise of the authority vested in it by the legislature, will be careful to see that only such questions are referred as reasonably fall within the purview of the statute, and as are reasonably proper to be heard or considered by a court of law.

I am not one of those who are of the opinion that the Ontario Medical Act is an Act not passed in the public interest. That it is a public Act in the fullest sense and not merely a private Act is shewn by its inclusion in the Revised Statutes. Its early origin was due to an intelligent, wise, and far-sighted apprehension by the legislature of the policy of protecting the public from the dangers and inconveniences arising from unskilful and unqualified persons assuming to practise as physicians and surgeons. The legislature of that early day shewed its appreciation of the need of thorough education in medicine, as in every other department of knowledge. Experience has proved that the means then adopted of requiring all persons desirous of so practising to submit to examination and obtain a license, were undoubtedly productive of benefit and advantage to the province. They have since developed into the system of study, preparation, and examination now provided for by R. S. O. 1897 ch. 176, and it cannot be doubted but that the public at large share very largely in the advantages derived from the presence in their midst of a body of learned and skilled practitioners. It is not merely by what has been and can be done in the cases of individual patients, but (as has been well said by a great modern physician) as much by what is accomplished in the way of protection of the public generally against disease and contagion, that medicine proves itself a great science as well as a delicate craft.

And it cannot but be in the public interest to secure to the community the services of persons accredited as they must be under the Ontario Medical Act.

I think, also, that in placing a construction on the Act or the section in question, we are not to have regard only to

the terms of the earlier Acts to the exclusion of the later, and to say that only what may have been understood as included in the term "prescribe for the sick" or "practise physic" or "practise medicine," at the time when they were first used in the legislation, shall be included, and that all else shall be excluded

By the terms of the Interpretation Act, sec. 8 (1), the law is to be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same is to be applied to the circumstances as they arise, so that effect may be given to each Act, and to every part thereof, according to its spirit, true intent, and meaning.

And in placing a construction upon the part of the Act in question, we are not to close our eyes to the great changes which have taken place in recent years in therapeutic methods. It is common knowledge that there has been a marked change, almost a revolution, in the position assigned to drugs as therapeutic agents. While they are not discarded, their use or application is by no means so extensive as formerly, and the well equipped practitioner of to-day seeks to study thoroughly and apply scientifically a few real medicines or healing agents, and does not feel under obligation to give any medicine in cases where in earlier times he would have considered any treatment that dispensed with it unscientific and improper.

Section 49 ought not to be read otherwise than in the light of considerations such as here suggested.

But when we come to consider the question referred many difficulties present themselves.

Much difficulty in dealing with it in a satisfactory manner is created by its nature and frame. No facts are stated. There is nothing but the bald question. It is to be borne in mind that, in dealing with questions under the statute, the Court is not exercising its ordinary appellate jurisdiction.

Dealing with the powers of the Supreme Court under sec. 37 of the Supreme Court Act referred to above, Taschereau, J., said: "Our answers are merely advisory, and we have to say what is the law as heretofore judicially expounded, not merely what is the law according to our opinion. We determine nothing. We are mere advisers, and the answers we give bind no one, not even ourselves:" In re Provincial Fisheries, 26 S. C. R. at p. 639.

The words "although advisory only," which occur in sub-sec. 6 of sec. 37, as amended, are not in our statute, but their insertion was scarcely necessary. All the other provisions of the statute go to shew that the opinion given is only for the information of the Lieutenant-Governor in council. It is to be certified to him, and no judgment or report in open Court is delivered. The same practice is observed in the Judicial Committee: Safford & Wheeler's Privy Council Practice, p. 33, note (n.) It is not a judgment appealable to the Supreme Court of Canada in Union Colliery Co. v. Attorney-General for British Columbia, 27 S. C. R. 637, a case under a similar Act of the legislature of British Columbia.

As I read the Act, the Court is to be guided in giving its opinion by the settled decisions, and, unless in the case of conflicting decisions, it is not to pronounce whether they ought or ought not to have been decided as they were.

Therefore, in considering the question, regard must be had to the decided cases bearing upon it. Having regard to the way in which the second part of the question interprets the first part, we are asked to put a legal interpretation on the words "to practise medicine" in sec. 49 of the Ontario Medical Act, which interpretation is to be applied to every possible kind of case that may arise. We are asked to say whether their meaning is to be confined to treatment of illness or disease, or whether their meaning extends to include treatment which does not involve the use of drugs or similar therapeutic agents. The generality of the question prevents a categorical answer. It would not be possible, even by attempting a process of exclusion, to cover all cases that might arise. It is possible to say—because it has been so decided by a Court of competent jurisdiction—that the defendant in the case of Regina v. Stewart, 17 O. R. 4, in doing what he did in that instance was not practising medicine. But, unless there is a concrete case with the facts proved or known, how is it possible to say whether or not the words of sec. 49 are applicable? If the answer given was that if it were shewn that a person not registered under the Ontario Medical Act attempted to cure or alleviate disease by methods and courses of treatment known to medical science and adopted and used in their practice by medical practitioners registered under the Act, or advised or prescribed treatment for disease or illness such as would be advised or prescribed by the registered practi-

tioner, then, although what was done, prescribed, or administered did not involve the use or application of any drug or other substance having or supposed to have the property of curing or alleviating disease, he might be held to be practising medicine within the meaning of sec. 49, it would still leave the matter to be dealt with in a concrete case, in which the ultimate decision must turn upon the facts found.

And yet, as the case presents itself to me, this is the only way in which the question is capable of being answered without, as I have said before, endeavouring by some process of exclusion to imagine and provide for all possible cases.

In the case of the Lord's Day Act of Ontario, I ventured to remark, with reference to some of the questions there propounded, that to undertake to answer them would be to endeavour to give an exhaustive definition of "works of necessity," or to lay down a series of abstract propositions not having application to any particular case or set or circumstances, a thing dangerous to attempt, and if attempted likely to lead to embarrassing and probably mischievous results when afterwards sought to be applied to actual cases: 1 O. W. R. at p. 316.

When the same case was before the Judicial Committee of the Privy Council, Lord Chancellor Halsbury, referring to the questions other than the first, said: "They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to and the extent to which they are applicable would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient, that opinions should be given upon such questions. Where they arise they must arise in concrete cases involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of the particular words, when the concrete case is not before it:" [1903] A. C. at p. 529.

The question referred in the present instance is attended by the same difficulties, dangers, and mischiefs. It does not permit of an unqualified affirmative or negative answer, and no other answer can be framed to meet all the possible cases and facts that might occur.

OSLER, J.A.:—The difficulty in the way of answering satisfactorily questions submitted under the Act for "expediting the decision of constitutional and other provincial questions" has frequently been commented on by the Courts which have been invited—or ordered—to solve them. Generally, they are abstract questions, the answers to which must almost necessarily be of an academic or advisory character, and practically not binding upon the Court in a real litigation. I may refer to what I have said on this subject in Re Lord's Day Act of Ontario, 1 O. W. R. 312, and other like cases, and to the observations of Lord Halsbury in delivering the opinion of the Judicial Committee in the same case, [1903] A. C. 524; and to the certificate of the Judges respecting a Court Martial (1760), 2 Eden 371 (Appx.).

The question now proposed does not admit of an answer covering definitely and categorically all cases which may arise under sec. 49 of the Ontario Medical Act, R. S. O. 1897 ch. 176. To practise medicine has long since ceased to convey the idea that it is confined to the administration of drugs, nor do I agree that this expression in the Medical Act is limited to so bald a meaning. To hold that it is, would be to refuse to recognize that the thoughts of men in the most liberal of all the learned professions have widened in the past half century, and to affirm that legislation has gone backward, instead of keeping pace with the knowledge of the times.

Nevertheless, we cannot say that the profession, wide as have been its conquests and extended the scope of its practice, has taken all knowledge of the art of healing for its province, and therefore the question submitted (in its alternative form) does not admit of a universal answer in the affirmative. We can only say that the words to practise medicine *may* include cases in which the remedy prescribed, etc., does not involve the use of drugs or other substances. Every case must stand and be determined upon its own facts and circumstances. We cannot lay down a rule or formulate an answer which will include all. I ought to add that I regard the Medical Act as one passed, as its predecessors have been from a very early period, mainly in the interest of the public, and not for the purpose of creating a close professional corporation. The observations addressed to us during the argument founded on the latter assumption, as if the present proceeding had been promoted, as certain

rules of equity are said to have arisen, less from a spirit of piety—sc., public policy—than the love of fees, seem hardly warranted.

GARROW, J.A.:—. . . R. S. O. 1897 ch. 84 is intituled "An Act for Expediting the Decision of Constitutional and other Provincial Questions;" and, although sec. 1 provides that the Lieutenant-Governor in council may refer "any matter" which he thinks fit to refer, the "any matter" ought, I think, to be construed as meaning any matter of a constitutional or provincial nature.

The question submitted is certainly not constitutional, and I doubt if it can properly be called provincial, in the sense in which, in my opinion, that somewhat vague term is used in the statute. Otherwise there is nothing to prevent a similar submission in any case, however trivial, involving the construction of a provincial statute. This would, of course, be objectionable, and would speedily bring the statute into disrepute. However, as my doubt is addressed more to the policy of submitting them than to the strict power to submit, I shall proceed to answer the question as best I can.

Before doing so, however, there are one or two preliminary matters. . . .

First, what is the general meaning and purpose of the statute R. S. O. 1897 ch. 176? Was its prime object . . . the protection of the public against quackery in medicine, or was it the, perhaps, no less laudable and entirely proper one of organizing and protecting the profession? . . .

The Act is intituled "An Act respecting the Profession of Medicine and Surgery." Its history in one form or other goes back for many years, and sec. 49, the section in question, has had substantially its present form since at least 1874, 37 Vict. ch. 30, sec. 40 (O.), except that the prohibition there is against practising "physic," etc.—an unimportant difference, in my opinion. And the plain object of the statute, in its various evolutions and developments, was, I think, to organize the profession of medicine, and to create an examining and licensing body, and to prohibit the unlicensed from practising in competition with the licensed, and whatever protection the public receives comes incidentally from presumably having under the statute a learned

body of practitioners, who have passed the necessary examinations before being admitted to practise, upon whom to call when required. . . . The prime object of the section in question is the protection of the monopoly of practising, and not the protection of the public against the quacks or unregistered. . . .

In my opinion, we are bound in answering the question to regard the decisions already given upon the construction of the section in question. The decisions so given, so far as they go, for they have probably not covered the whole ground, establish the law upon the subject, and cannot be reviewed by us as if this was an appeal from them or any of them. If the law as so declared is wrong, or if from any cause they are unsatisfactory, the proper forum for their reconsideration is, of course, the legislature, where all parties are presumably represented, and can be properly heard, and full justice done. . . .

"Practising medicine" is not a definite and finally established term. There is much room for argument both as to what should be called "medicine," and as to what should be called "practising." . . . The question asked, which must always depend for its proper and complete answer upon the facts as well as the law, is, in my opinion, incapable of a satisfactory or categorical answer, yes or no, upon the material before us.

The nearest I can come to it is this. The term "practising medicine" need not and does not, in my opinion, necessarily involve only the prescribing or administering of a drug or other medicinal substance, but may well include all such means and methods of treatment or prevention of disease as are from time to time generally taught in the medical colleges and practised by the regular or registered practitioner. . . .

When these words were first used in the statute, it is probable that the main reliance of the profession was upon treatment by means of drugs. But it is, I think, common knowledge that drug treatment has at least diminished in modern practice, and that greater attention is being paid to other methods, either in addition to drug treatment or in substitution for it, such as food, drink, regulated exercise, fresh air, bathing and other uses of water, electricity in its

various forms, massage, etc.; and, in my opinion, the words "practising medicine" may in certain circumstances include these and similar methods of treatment of disease, actual or threatened, as well as the mere administration of drugs.

The difficulty, however, is in the practical application of the prohibition to the other methods. The thing practised must, to be illegal, be an invasion of similar things taught and practised by the regular practitioner; otherwise it does not affect his monopoly, and is outside the statute. And it must be practised as the regular practitioner would do it, that is, for gain, and after diagnosis and advice. And it must be more than a mere isolated instance, which is insufficient to prove a "practice:" see Apothecaries Co. v. Jones, [1893] 1 Q. B. 89.

A patient may always do his own diagnosing and buy and use what he chooses (except certain poisons) upon himself. See Regina v. Howarth, 24 O. R. 561. . . . Regina v. Coulson, 27 O. R. 59. . . .

And if the patient may legally go to the druggist in such circumstances, he ought reasonably to be held to be at liberty to go to the Christian Scientist, the Osteopath, the Medical Electrician, the Masseur, etc., and request, obtain, and pay for the treatment which these persons give, so long as he does his own diagnosing and prescribing. This is simply to say, in another form, that the patient may, as he always, so far as I know, might, be his own doctor, just as he may, however unwisely in both cases, be his own lawyer. See as illustrative cases: Regina v. Stewart, 17 O. R. 4; Regina v. Valleau, 3 Can. Crim. Cas. 435. . . .

MACLAREN, J.A.:—We were asked on behalf of the College to review the cases in our Courts bearing upon the question asked, from Regina v. Hall, 8 O. R. 407, to Regina v. Coulson, 27 O. R. 59, and to say whether they were correct; and we were urged particularly to say that Regina v. Stewart, 17 O. R. 4, was not good law. I do not think that we can properly undertake such a task. . . .

As the question has been submitted to us by the proper authority, and may be said to be a provincial question, as it asks for an interpretation of a provincial statute directly affecting a large class of citizens, and indirectly affecting the whole community, I consider it to be our duty to answer it as best we can.

The part of sec. 49 of R. S. O. 1897 ch. 176 which we are asked to interpret has been on our statute book, substantially in its present form, for nearly a century. In the first Act, 50 Geo. III. ch. 10, the term used was to "practise physic." This phrase was used up to the Act of 1869, 32 Vict. 45, when the words used were "practise medicine." In the Act of 1874, 37 Vict. ch. 30, the old words were restored, but in the revision of 1877, ch. 142, the words "practise medicine" were substituted, and these have been retained in the revisions of 1887 and 1897. I think the words have been used interchangeably and as synonymous, although "physic" may be more suggestive of the use of drugs. . . .

I think we should endeavour to ascertain what was the fair meaning of the words "to practise medicine" when they were last enacted by the legislature. In my opinion, they were used in their usual or popular signification. . . .

[Reference to Murray's New Oxford Dictionary, "Medicine."]

Diagnosis and the giving of advice are usually important elements. This appears in the oldest case to which we have been referred, No. 62 in 6 Mod. (1703.) Rose, the apothecary who was convicted in the Queen's Bench of practising physic, obtained a reversal of the judgment in the House of Lords, as would appear from the report, largely on the argument that he had not given advice: 5 Bro. P. C. 553. This view is, in my opinion, strengthened by some words which follow those we are asked to interpret in sec. 49 of R. S. O. 1897 ch. 176. I refer to the fact that it is made an offence for an unregistered person to "advertise to give advice in medicine." . . .

Not only have the changes which have taken place in the practice of medicine a bearing upon the subject, but also the minute specialization which has gone on increasingly of late years. Many things might be a practising of medicine to-day that could not have been properly so described years ago. This is an additional reason why it is difficult for the Court to give a comprehensive definition, so some of these matters could only be determined by satisfactory evidence.

If, however, the question submitted to us is to be categorically answered, and the word "substances" is to be interpreted as something of the same nature as drugs on the

rule of ejusdem generis, I could have no hesitation in giving a negative answer to the first part of the question and an affirmative answer to the last part of the question as to the possibility of the words "to practise medicine" including cases where drugs, etc., may not be prescribed or administered.

MEREDITH, J.A.:—. . . Our first duty is to ascertain what, if any, jurisdiction the Court has in the matter. . . . The question referred is really whether Regina v. Stewart, 17 O. R. 4, was rightly decided; and that question is raised solely at the instance and in the interests of the medical profession of Ontario, under the name and style of "The College of Physicians and Surgeons of Ontario." The province is not directly interested in, and did not present, the case; nor indeed was it at all represented on the argument of it. . . .

The words of the Act are very broad—"May refer . . . any matter which he thinks fit to refer;" but obviously all that the broadest meaning of the words might cover cannot be meant. . . . The Act must, in my opinion, be restricted to (1) legal questions, (2) respecting matters within the jurisdiction of the Court, and (3) of provincial concern. . . .

My conclusion . . . is: (1) that there was no power to refer the matter in question because it was one without the jurisdiction of this Court, or else that the order referring it was improvidently made, under the mistake that the question could not be brought up to this Court through the ordinary channels; and (2) that there was no power to refer it because it is not a provincial question, but one raised and referred wholly at the instance and for the benefit of the Ontario College of Physicians and Surgeons.

But, as a majority of this Court is of a different opinion, it becomes necessary to answer the question; and, in my opinion, it should be answered in accordance with the judgment of the Divisional Court in the case of Regina v. Stewart, 17 O. R. 4, first because it was so decided nearly 18 years ago, and that decision has ever since been deemed to have, and has been treated as having, settled the law upon the subject, and hundreds, if not thousands, of reputable persons have established themselves in business on

the faith of it and under its protection, and the legislature, not slow to speak when its words have been misinterpreted, has given to it the assent of 18 years' silence—if there can be legislative assent by silence; and second, because that case was rightly decided. In my opinion, the word "medicine" thrice used in the section in question—sec. 49 of the Ontario Medical Act—should be given its primary and popular meaning, and not the very far-reaching interpretation the College contends for. If it mean the art or science of preserving and restoring health, in the sense of wholeness or soundness, of body and mind, it would include the art of surgery, for a broken limb is unsoundness, just as much as disease, and would make the use of that word unnecessary and improper. So too, though not altogether so plainly, the use of the word midwifery, which really is the art of preserving the health of the mother and child in child-birth. Some meaning ought to be given to each word. They should not be treated as a case of tautology; and the best method of so doing is to give to each its popular — its generally understood—meaning. So treating them, each of the three words has its distinct place; medicine, any substance used for the prevention, healing, or alleviation of disease; surgery, the art of healing or alleviating disease or injuries of the body by manual operation; and midwifery, the art of assisting women in child-birth. To most minds, the words "practise medicine" would mean practise the art of healing the sick by means of medicines or drugs; and "practise surgery" would mean the healing of injuries and diseases by surgical operations; and such was, speaking generally, in my opinion, the meaning of the legislature. If not, if the very widest meaning is to be given to each word, the dentist, the chiropodist, the manicure, and even the barber, frequently brings himself within the penalty of the section. The section was not intended to have such a far-reaching effect. Every member of the medical profession is, or is supposed, and ought, to be skilled in the use of drugs or medicaments—generally called medicines—and use them in his practice; to the ordinary patient it is generally, if not always, a treatment of drugs; that, in some cases, patients may not be given drugs—may be required to abstain from all sorts of drugs—does not alter the general rule, nor do away with the fact that the practice of medicine by members of the medical profession is largely a practice in drugs.

It therefore seems difficult to say that one who has nothing to do with drugs, or one who reprobates their use in sickness and in health, one who would not throw physic even to dogs, practises medicines. Or that the laying on of hands, whether in a devout manner, or after the more robust fashion of the "osteopathist" or of the "masseur," is practising medicine. That is really more like practising surgery. But no question as to that is asked. Or that the healing of the sick by faith alone is an infraction of the Act.

If the larger meaning is to be given to the word "medicine," that must now be done by legislation, not by adjudication, or by way of opinion under the Act for expediting the decision of constitutional and other provincial questions. And if the public, and not merely the medical profession, need protection against "Christian Science," "Osteopathy," massage, or any other "cure," it might be better not to limit the penalties to those who so practise for hire, gain, or hope of reward, but extend it to all who do the wrong, for wrong it then will be just as much without as with a fee.

MEREDITH, C.J. DECEMBER 7TH, 1906.

CHAMBERS.

CAMPBELL v. CLUFF.

Parties—Joinder of Defendants—Cause of Action—Pleading—Negligence.

Appeal by defendants the Corporation of the City of Ottawa from order of local Master at Ottawa, ante 740, dismissing a motion by the appellants for an order requiring plaintiff to elect against which of the defendants he would proceed.

H. E. Rose, for appellants.

H. S. White, for defendants the Cluffs.

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

MEREDITH, C.J., dismissed the appeal; costs in the cause.

Baines v. City of Woodstock, 6 O. W. R. 601, 10 O. L. R. 694, commented on.

MACMAHON, J. DECEMBER 7TH, 1906.

TRIAL.

CARTON v. WILSON.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Offer to Sell Land—Absence of Consideration—Right to Withdraw before Acceptance—Company—Service of Notice of Withdrawal on Secretary—Notice Addressed to Secretary Personally.

Action for specific performance of an alleged contract for the sale and purchase of land.

A. P. Poussette, K.C., and G. Edmison, K.C., for plaintiff.

D. O'Connell, Peterborough, for defendant.

MACMAHON, J.:—The Trent Valley Sugar Provision and Cold Storage Company, Limited, was incorporated under the Ontario Joint Stock Companies Letters Patent Act. At a meeting of the provisional board of directors of the company, held on 23rd September, 1905, Mr. J. E. Dixon was by resolution appointed president, Mr. A. P. Poussette, secretary, and Messrs. Edminson & Dixon, solicitors of the company. After appointing the officers of the company, and on the same day, the directors passed by-law No. 1, entitled "A By-law to regulate the Affairs of the Company," to which is attached the seal of the company, attested by J. E. Dixon, the president, and A. P. Poussette, the secretary.

Section 1 of the by-law provides that the affairs of the company shall be managed by 5 directors, of whom not less than 3 shall constitute a quorum.

By sec. 15, the officers of the company to be appointed by the board of directors shall consist of a secretary, manager, and such other officers as the board may deem advisable.

On 24th March, 1906, Mr. Poussette, the secretary, and George Carton (the husband of the plaintiff), who acted as

underwriter for the company, went together to defendant and obtained from him the following offer:—

"To the Trent Valley Sugar Provision and Cold Storage Company, Limited: I hereby offer you my property, park lots Nos. 12 and 13 in No. 14 in the 11th concession of North Monaghan, at the price of $6,000, and in the alternative said park lot No. 12 at the price of $3,000. This offer is to be open and irrevocable for 6 months from the date hereof, and subject to the condition that I am to have the right to take off this year's crop. If the boundary between lots 12 and 13 turns out to be north of my house, I am to have the land covered by my house. Dated March 24th, 1906. Hermon Wilson."

The offer not having been accepted, defendant on 12th September handed to Mr. A. P. Poussette the following letter:—

"A. P. Poussette, Esq., K.C., Peterborough. Dear Sir:—Please take notice that the option which I gave you and Mr. George Carton last spring covering land in Monaghan is withdrawn. Hermon Wilson."

When defendant handed the letter to Mr. Poussette, the latter told defendant he did not think he could withdraw the option. The defendant replied that that was what it meant. Mr. Poussette then said that Mr. Carton would be back on Saturday the 15th, and he would see Carton about it, and there would be a meeting of the directors on the 15th, and the option would probably be dealt with at that meeting. Defendant told Poussette that while the option as to both lots was withdrawn, he would be willing to sell the company one of them.

At the directors' meeting on the 15th no action was taken, but at a meeting of the directors on 17th September a motion was carried that defendant's offer of both lots for $6,000 be accepted, and that he be notified thereof.

This further resolution was then passed by the board:—

"That in the event of the company being unable to provide the necessary funds to take up the option, the president and secretary are hereby authorized to assign the company's right to any person or persons who, in their judgment, should have the advantage of the option."

On 19th September defendant was sent a notification under the seal of the company, attested by the president

and Mr. Poussette, as secretary, that his offer to sell the lots at the price mentioned had been accepted.

The directors then passed a resolution by which the company agreed to assign to Charlotte Carton, wife of George Carton, and on the same day (19th September) the company, in consideration of $1, assigned to her all their rights and interests under the offer and acceptance, and all their right, title, and interest in the lands.

By the action specific performance is sought of what is alleged by the plaintiff to be a binding agreement to sell.

Two questions arise for determination in this case. First, did the offer of defendant, by reason of its containing the words "to be open and irrevocable for 6 months," prevent its withdrawal or revocation by defendant prior to acceptance within the time limited. Second, was the service of notice of retractation on Mr. Poussette, the secretary of the company, sufficient notice?

As to the first question, it was admitted, that there was no consideration moving from the company to defendant for the offer made by him. And Mr. Pollock in his work on Contracts, 6th ed., p. 24, says: "An offer may be revoked at any time before acceptance but not afterwards. For before acceptance there is no agreement, and therefore the proposer cannot be bound to anything. So that, even if he purports to give a definite time for acceptance, he is free to withdraw his proposal before that time has elapsed. He is not bound to keep it open unless there is a distinct contract to that effect founded on a distinct consideration."

The words "to be open and irrevocable for 6 months" cannot, in my opinion, alter the rights or power of the person making the proposal, for it is not the less a nudum pactum, although having these words in it, and is not binding on the promissor. . . .

[Reference to Dickinson v. Dodds, 2 Ch. D. 463; Warner v. Millington, 3 Drew. 523; Larkin v. Gardiner, 27 O. R. 123, and the cases there cited.]

As to the second question. Consolidated Rule 159 reads: "Where a corporation is a party to a cause or matter, a writ or summons or other document may be served on the . . . president or other head officer . . . or on the cashier, treasurer or secretary, clerk or agent, of such corporation." . . .

[Reference to Newby v. Von Open, L. R. 2 Q. B. at p. 296.]

As the Rule makes the services of process on the president or secretary good service on a corporation, service of notice of revocation on the secretary of the plaintiff company must be good service.

It was argued that, as the letter of revocation was addressed "A. P. Poussette, K.C.," and not to him as secretary of the company, notice of the revocation could not be imputed to the company. That argument appears to me to be far-fetched. The letter of revocation refers to the option given to "you" (Mr. Poussette) "and George Carton," which option was written by Mr. Poussette, who was secretary of the company, and was addressed to the company, and Mr. Poussette knew the letter of revocation was intended for the company, for when it was delivered to him he said that the question of the option would be brought up at the directors' meeting on 15th September, and he cannot now be allowed to say that he did not receive the letter of revocation on behalf of the company, or that its receipt by him was not notice to the company.

As the option was revoked before the company passed the resolution to accept, the company had no right or power to assign the option to plaintiff (Mrs. Carton), and the action must therefore be dismissed with costs.

MULOCK, C.J. DECEMBER 7TH, 1906.

TRIAL.

GYORGY v. DAWSON.

(TWO ACTIONS.)

Master and Servant—Injury to Servant and Consequent Death—Action under Fatal Accidents Act—Action Maintainable although Deceased an Alien and Action Brought for Benefit of Aliens Resident abroad.

Actions to recover damages for the deaths of Andrew Muszkulki and Joseph Gabor, by the alleged negligence of de-

fendants. The actions were brought under the Fatal Accidents Act, by one Gyorgy, who had taken out letters of administration to the estate of the two deceased men, for the benefit of their families.

The two actions were tried together with a jury at Welland, and resulted, the first, in a verdict for plaintiff for $200, and the second, in a verdict for plaintiff for $100. Thereupon defendants moved to dismiss the actions, because the deceased were aliens, and the beneficiaries aliens resident abroad.

F. W. Griffiths, Niagara Falls, and McGuire, Niagara Falls, for plaintiff.

F. W. Hill, Niagara Falls, and T. F. Battle, Niagara Falls, for defendants.

MULOCK, C.J.:—Andrew Muszkulki and Joseph Gabor were, at the time of the accident hereinafter mentioned, citizens of Hungary, but resident in the county of Welland, and were employed by defendants to work in a wheel-pit on the Ontario side of the Niagara river. When being lowered by a bucket into the pit, a chain which supported one side of it became unhooked, whereby they were thrown from the bucket and instantly killed. At the time of the accident Muszkulki was a married man with one child, his wife and child being aliens resident in Hungary, and Gabor was an unmarried man, who left a mother, also an alien, resident in Hungary.

These actions are brought by the administrator of the two deceased men for the benefit, in the one case of the widow and child, and in the other for the benefit of the mother.

The provincial laws being, as they are, applicable to foreigners within the province, the deceased if only injured would have been entitled to sue defendants in respect of the injury, but they were killed, and it is contended that any cause of action arising under the circumstances in question died with them. The amendment to Lord Campbell's Act, being sec. 2 of R. S. O. 1897 ch. 135, enacts as follows:—"Where the death of a person has been caused by such wrongful act, neglect, or default as would (if death did not ensue) have entitled the party injured to maintain an action and recover damages in respect thereof, in such a case the person who would have been liable, if death did not ens shall be liable

to an action for damages notwithstanding the death of the person injured," etc.

Defendants in this case, borrowing the argument advanced in Adam v. British and Foreign Steamship Co., [1898] 2 Q. B. 430, contend that it is not the policy of Parliament to legislate for persons over whom it has no control, either in the way of imposing burdens on them or of conferring benefits, and that, in the absence of an expression of such intention, the amendment to the Act does not give a cause of action under the circumstances present in these cases.

The same question came up in Davidson v. Hill, [1901] 2 K. B. 606, which expressly overruled Adam v. British and Foreign Steamship Co., supra. Davidson v. Hill dealt with a cause of action arising under the laws of the United Kingdom, and the reasoning in that case would apply with still greater force to a cause of action arising under the laws of a province of the Dominion of Canada.

If persons beyond the legislative control of the province of Ontario are not entitled to the benefit of the amendment to Lord Campbell's Act, then British subjects resident in other provinces, equally with aliens resident in a foreign country, would be beyond its scope. The amending Act draws no distinction between relatives who may be aliens resident abroad and relatives being British subjects resident in another province, but, in general words, in effect declares that if the death of a person happens under circumstances which if he had been only injured would have entitled him to maintain an action for damages, the person causing such death shall be liable in damages to the relatives of the deceased.

Could it be seriously contended that the legislature intended that the amendment should not apply for the benefit of relatives of the deceased being British subjects resident in another province? And yet that would be the necessary construction to place upon the Act if defendants' contention were to prevail.

Following Davidson v. Hill, I consider plaintiffs entitled to maintain these actions.

During the argument I expressed my surprise at the smallness of the verdicts, which I thought wholly inadequate, and counsel for plaintiff thereupon requested me to state my views upon the point when dealing with the motion. Inasmuch as any exception to be taken to the verdicts is a mat-

ter entirely for a Divisional Court, I do not wish to add anything to what I have above stated.

Let judgment be entered for plaintiff for the amount of the verdicts in question, with costs of action in each case on the High Court scale.

DECEMBER 7TH, 1906.

GREEN v. GEORGE.

Judgment—Issue as to Validity of Default Judgment—Motion to Set aside Judgment after 15 Years—Service of Writ of Summons—"Signing Judgment"—Sufficiency—Form of Judgment—Special Indorsement of Writ—Price of Goods Sold—Stated Account—Interest—Nullity of Judgment—Irregularity—Setting aside Judgment—Terms.

Appeal by plaintiff from judgment of BRITTON, J. (8 O. W. R. 247), in so far as in favour of defendant, upon the trial of an issue directed by an order of the Master in Chambers.

C. Millar and C. McCrea, Sudbury, for plaintiff.

C. A. Moss, for defendant.

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

ANGLIN, J.:—The Master in Chambers directed this issue to determine whether or not plaintiff is entitled to have a default judgment entered against him in an action of George v. Green set aside and vacated. Plaintiff alleged (a) that he had not been served with the writ of summons in that action; (b) that judgment was never actually signed against him; (c) that the judgment entered is a nullity because the writ of summons was not specially indorsed. The trial Judge found against plaintiff upon the question of service, and it is conceded that against this finding plaintiff cannot successfully appeal. On the second point we expressed upon the argument our concurrence in the view of the trial Judge that the signature upon the back of the judgment by the local registrar, under the words "judgment signed 6th October, 1890," was a good and sufficient signing of judgment. Upon the third branch the trial Judge held with plaintiff, but

he imposed terms as a condition of vacating the judgment, to which plaintiff is unwiling to submit. Hence his appeal on this branch, in which he asserts his right to have the judgment vacated unconditionally.

The propriety of directing that a question as to the validity of a default judgment, impugned because of alleged defects in the indorsement of claim upon the writ of summons, should be determined by the trial of an issue, is open to grave doubt. But, as there was no appeal taken from the Master's order, and as the trial Judge has dealt with it, we should, I think, entertain the appeal taken from his judgment.

The questions for determination are: (1) whether the claim made for interest vitiates the special indorsement on the writ in the original action; (2) whether, if that be so, the judgment entered for default of appearance to such writ is a nullity incapable of rectification by amendment, or merely an irregularity which may now be cured by directing that the judgment be amended by confining it to the portion of the claim which was a proper subject of special indorsement; (3) whether, if the judgment be a nullity, the trial Judge had power to impose terms as a condition of vacating it. That he would have such power if the judgment were merely irregular, can scarcely be gainsaid.

The indorsement on the writ of summons in George v. Green is: "The plaintiff's claim is for the price of goods sold and delivered by plaintiff to defendant, the account for which goods has been stated between plaintiff and defendant. The following are the particulars:—

"1890

"April 4.	To balance due the plaintiff on an account for goods sold and delivered by him to the defendants, and which account has been rendered by the plaintiff to the defendant and admitted by him to be correct and stated between them, and which balance of account has also been rendered by the plaintiff to the defendant and admitted to be correct and stated at the sum of	$2,389 46
"July 29.	To interest for 3⅝ mos. at 6 per cent.	45 79
		$2,435 25

"April 19. By cash	$50 00	
"July 29. By int. for 3⅓ mos. at 6 per cent.	83	50 83
		$2,384 42"

The authorities make it clear that a plaintiff can specially indorse a writ with a claim for interest, only where such interest is payable by statute, or by contract, express or implied, and that in the latter case an allegation of such contract must form part of the indorsement.

The only statutory authority for the claim of interest made by plaintiff George is that found in sec. 113 of the Judicature Act: "Interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it." There being no allegation that the balance claimed is payable at a fixed time by virtue of a written instrument, or of a demand for payment, the case is not within sec. 114. Although it may be clear that in actions upon stated accounts it has been usual for juries to allow interest, we are, I think, bound by decisions of Courts of concurrent jurisdiction to hold that interest upon stated accounts is not, by virtue of sec. 113 above quoted, payable by statute so as to make it a proper subject of special indorsement: Solmes v. Stafford, 16 P. R. 78, 83, 85; Hollender v. Ffoulkes, ib. 175. Neither is this a case in which interest was before the Judicature Act payable by law.

There is no allegation in the indorsement of a contract for payment of interest, unless such contract be implied from the allegation of an account stated. No such implication arises upon the mere stating of an account, though it may arise if the act of stating the account is accompanied by an agreement for immediate payment: Chalie v. Duke of York, 6 Esp. 45; or for payment at a fixed future date: Mountford v. Willis, 2 B. & P. 337.

A subsequent demand for payment would bring the case within sec. 114; and see Pinham v. Tuckington, 3 Camp. 468. But neither an agreement for immediate payment or for payment at a fixed future date, nor a subsequent demand, is alleged in this indorsement. . . . Blaney v. Hendrick, 3 Wils. 205, is merely an instance of a refusal by the Court to set aside a verdict of a jury awarding interest as damages upon an account stated. This case is not an authority for the

proposition that such interest is payable by law or upon contract implied, and that a jury should be instructed that they must allow it.

Notwithstanding some American decisions that an account stated entitles the creditor to interest—see McClelland v. West, 70 Penn. 183, 187; Case v. Hotchkiss, 1 Abb. App. Dec. (N.Y.) 324, 326; Patterson v. Choate, 9 Wend. 441, 446—I think the weight of English authority is against that proposition, and that, in the absence of an allegation that a fixed time for payment was agreed upon or that a demand for payment was subsequently made, or of an account indorsed shewing that the parties had themselves in adjusting their accounts allowed interest upon balances outstanding (Nichol v. Thompson, 1 Camp. 52 n.), it cannot be said that a creditor upon an account stated is entitled to claim interest either by law or upon implied contract, though a jury might and probably would allow such interest as damages.

It follows, I think, that the claim for interest made by plaintiff George was not a proper subject of special indorsement.

The judgment in George v. Green was signed on 6th October, 1890. At this time there was not the power of amendment of a special indorsement, upon motion for judgment after appearance, now conferred by Rule 603 (3). Prior to this amendment of Rule 603 it was held that a plaintiff seeking such summary judgment must come "with all his tackle in order:" Paxton v. Baird, [1893] 1 Q. B. 139; and could not ask to have a defective indorsement made good by amendment: Clarkson v. Dwan, 17 P. R. 208; or be allowed to sign judgment for so much of his claim as was susceptible of special indorsement: Solmes v. Stafford, 16 P. R. 264, 269, 270; Wilks v. Wood, [1892] 1 Q. B. 684, 686. If such amendment should not formerly have been made on a motion for judgment upon which the defendant was represented, a fortiori it would seem that it should not have been made to cure a judgment entered against a defendant in his absence for default of appearance. I cannot understand why, except for the special provision as to default judgments to which I allude below, a plaintiff's motion for judgment after appearance was properly refused because of a defect in his special indorsement, which he then sought to cure by amendment, if a judgment entered for default of appear-

ance upon an indorsement similarly defective might be amended, when challenged by defendant, as merely a curable irregularity. Osler, J.A., in Clarkson v. Dwan, 17 P. R. 208, said, at p. 215: "Had judgment for non-appearance been signed, it must have been set aside." . . .

[Reference to McVicar v. McLaughlin, 16 P. R. 450; Rogers v. Hunt, 10 Ex. 474; Smurthwaite v. Hannay, [1894] A. C. at p. 501.]

The default judgment depending upon an implied admission, and such admission not being presumed except upon a special indorsement strictly regular, the moment it was shewn that the indorsement relied upon was not warranted by some Rule of Court which authorized the special indorsement of writs of summons, the whole foundation on which the judgment rested was gone, and the judgment itself could not stand. An amendment of the indorsement cannot, without a fresh service of the writ, import an admission by defendant of plaintiff's claim. It clearly follows, I think, that a judgment signed for default of appearance to a writ, the indorsement upon which is not a special indorsement authorized by the Rules of Court, would be a nullity, and not merely irregular and susceptible of cure by amendment: Hoffman v. Crerar, 18 P. R. 473, 479; Appleby v. Turner, 19 P. R. 145, 149. I have not overlooked the language of Osler, J.A., in this latter case in dealing with a Chambers motion for leave to appeal, reported in 19 P. R. at p. 178, where he makes an allusion to the discretion of the Court to decline to set aside proceedings where the applicant is chargeable with laches, but it will be noted that his language is confined to "objections of irregularity," and affords no ground for questioning the proposition that a judgment by default "entirely unwarranted by the practice is a nullity not curable by delay or acquiescence," as enunciated by the Divisional Court: ib., p. 148.

I have so far dealt with the argument presented at Bar in support of the proposition that the judgment here entered was merely an irregularity and not a nullity, which proceeded upon the assumption that a judgment for default of appearance was in the same position as a judgment upon motion under former Rule 739. But this ignores altogether the pro-

visions of Rule 711 of the consolidation of 1888—which was in force when the judgment in George v. Green was entered. While under Rule 739 the indorsement was required to conform to Rule 245, which permitted special indorsement "where the plaintiff seeks only to recover a debt or liquidated demand," Rule 711 dealt with the case where "the writ is indorsed with a claim for detention of goods and pecuniary damages or either of them, and is further specially indorsed with a liquidated demand under Rule 245," and permitted the plaintiff, in default of appearance to such a writ, to enter final judgment for the liquidated demand and interlocutory judgment for the value of the goods and the damages, or the damages only, as the case might be. This Rule was not carried into the consolidation of 1897 without change—which may account for its having been overlooked by counsel. But Rule 575 of the consolidation of 1897, if applicable, would be wide enough to cover the present case.

The effect of the provisions of former Rule 711 is discussed by Osler, J.A., delivering the judgment of the Court of Appeal in Solmes v. Stafford, 16 P. R. 264, at pp. 270, 271, and its history is outlined in Hollender v. Ffoulkes, ib. at p. 177; and see Huffman v. Doner, 12 P. R. 492.

It follows that, notwithstanding the addition of a claim for interest in the nature of unliquidated damages, final judgment might have been rightly signed for the liquidated demand upon the account stated. As to the rest of the claim, the judgment should have been interlocutory only. Final judgment for the whole claim entered in these circumstances was not, in my opinion, a nullity, but was merely irregular, and, in the circumstances of this case, terms were rightly imposed on setting it aside.

Plaintiff Green was allowed by the trial Judge a definite period within which to accept these terms. Of that indulgence he failed to take advantage. He could not, therefore, complain if his present appeal were now to be simply dismissed with costs. But it may be that if this course can be taken without undue prejudice to the position of defendant George it would not be unfair still to permit plaintiff to defend the original action upon the terms indicated by the trial Judge, and such additional terms, if any, as may seem necessary to fully protect defendant.

If plaintiff so desires, he may apply to the Court for such relief. Unless he gives notice of such an application within one week, however, an order will issue dismissing this appeal with costs.

DECEMBER 7TH, 1906.

DIVISIONAL COURT.

FLEUTY v. ORR.

Negligence—Injury to Person by Omnibus in Highway—Action against Owner—Relation between Driver and Owner—Master and Servant or Bailor and Bailee—Question of Fact—Evidence—Inferences—Review by Appellate Court.

Appeal by defendant from judgment of Judge of County Court of Huron in favour of plaintiff in an action for damages for injuries sustained by her as a result of a carriage in which she was driving being run into by an omnibus driven by one Mullen, who was, as plaintiff alleged, the servant of defendant.

The appeal was heard by MULOCK, C.J., ANGLIN, J., CLUTE, J.

E. L. Dickinson, Goderich, for defendant.

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

MULOCK, C.J.:—The defendant was a hotel keeper at the town of Wingham, and obtained possession of a pair of horses and an omnibus for the transportation of passengers and luggage between his hotel and the railway station. On 2nd October, 1904, he entered into a contract with a man named Mullen, whereby the latter was given the use of the omnibus and horses, and was entitled to keep for his own use all earnings from the omnibus, in consideration of his paying to defendant 70 or 75 cents a day for the feed of the horses and use of the omnibus, and carrying, by the omnibus, free of charge, between his hotel and the railway station, all persons patronizing defendant's hotel.

On the night in question Mullen was driving the omnibus to the station, when he collided with a carriage containing plaintiff, whereby she was injured, and this action was brought to recover damages from defendant because of the injury.

It is contended by plaintiff that Mullen, while thus in personal charge of the omnibus, was the servant of defendant, and that, therefore, the latter was responsible for Mullen's negligence.

Applying to this case the rule stated in Saunders v. City of Toronto, 26 A. R. 265, the test as to whether the relationship of master and servant existed between defendant and Mullen is whether defendant had the right to exercise personal control over Mullen when in charge of the omnibus.

The agreement between them is silent upon the point. Nevertheless, its true meaning is, I think, quite apparent.

Defendant's object was to secure free transportation by the omnibus for his guests. Mullen so understood it, and agreed to furnish such free transportation. The attainment of that result was the whole object of defendant, it being immaterial to him who drove the vehicle, provided the desired end was attained. It was no term of the agreement that Mullen was to be in personal charge of the omnibus. So far as appears, it was intrusted to him at his own discretion, to be used or remain idle, except that defendant's hotel should enjoy free service. Subject to this qualification, for the whole 24 hours of each day, Mullen was entitled to the use of the omnibus for his own benefit. The full enjoyment of this right would necessarily have involved changes of horses and drivers. Yet this right he would not have been able to enjoy if he were defendant's servant, for, as his servant, he would not, without his authority, which he had not, appoint other servants in his stead, or hire other horses, on defendant's account. Thus, regard for Mullen's rights makes it necessary to reject the contention that the relationship of master and servant existed between the parties. Apart, however, from this illustration of the impossibility of giving effect to the agreement if Mullen were held to be a servant, it is to be observed that the parties themselves did not stipulate, and defendant never attempted to control Mullen, as to the manner in which he should perform his contract, nor did Mullen submit to defendant's directions. That Mullen considered himself entitled to manage the omnibus according to his own uncontrolled discretion is shewn by the fact that on one occasion, of his own motion and without consultation with defendant, he appointed his son to drive in his place. In one respect only

did defendant assert any right, namely, by requiring the maintenance of a free omnibus service to his hotel. All the acts of the parties shew that their understanding of the arrangement was, that, whilst defendant was to be entitled to the free omnibus service, it was Mullen's right to arrange the means for the attainment of that end. Where such is the case, the result, and not the means of its attainment, being the subject matter of the agreement, the inference is that the relationship of master and servant does not arise: Goldman v. Mason, 2 N. Y. Supp. 337; Hexamer v. Webb, 101 N. Y. 385. Whether Mullen was defendant's servant is a question of fact, and, there being no conflict of evidence, we are at liberty to draw inferences.

For these reasons, being of opinion that the relation of master and servant was not established, and consequently defendant was not responsible for Mullen's negligence, I find myself, with great respect, unable to agree with the conclusions of the trial Judge, and think this appeal should be allowed with costs and the action dismissed with costs.

ANGLIN, J., gave written reasons for the same conclusion. As to the duty of an appellate tribunal to review inferences of fact drawn by the trial Judge, he referred to Russell v. Lefrancois, 8 S. C. R. 335; Gallagher v. Taylor, 5 S. C. R. 368; North Perth Election Case, 20 S. C. R. 331. Upon the question as to whether the relation between defendant and Mullen was that of master and servant or bailor and bailee, he referred to Saunders v. City of Toronto, 26 A. R. 265, 270, 272; Venables v. Smith, 2 Q. B. D. 279; King v. London Improved Cab Co., 23 Q. B. D. 281, 283; Keen v. Henry, [1894] 1 Q. B. 292; King v. Spurr, 8 Q. B. D. 104, 105, 108.

CLUTE, J., dissented, for reasons stated in writing, in the course of which he referred to Powles v. Hider, 6 E. & B. 207; Venables v. Smith, 2 Q. B. D. 279; Laugher v. Pointer, 5 B. & C. 547; Dean v. Branthwaite, 5 Esp. 35; Sammell v. Wright, 5 Esp. 263; Quarman v. Burnett, 6 M. & W. 499, 509; Patten v. Rea, 2 C. B. N. S. 606; Booth v. Mister, 7 C. & P. 66; Moreton v. Hardern, 4 B. & C. 223; Waland v. Elkins, 1 Stark. 272; Fromont v. Coupland, 2 Bing. 170; Roscoe's N. P., 17th ed., p. 763; Saunders v. City of Toronto, 26 A. R. at p. 273; Stephen v. Thurso Police

Commissioners, 3 Ct. of Sess., 4th series, 542; and concluded:—

In the present case, I think it cannot be doubted that defendant had control over Mullen while he was running a free omnibus for defendant's hotel, and the accident having occurred during this time, defendant, in my judgment, is liable, and the appeal should be dismissed with costs.

DECEMBER 7TH, 1906.

DIVISIONAL COURT.

GUNN v. TURNER.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Title—Recital in Deed more than Twenty Years old—Evidence—Onus.

Appeal by plaintiff from judgment of TEETZEL, J., dated 12th October, 1906, dismissing an action for specific performance. On 9th April, 1906, the defendant contracted to sell to the plaintiff certain lots on the north side of Dupont street in the city of Toronto for $10,000 cash. Defendant alleged that plaintiff refused to accept the title to the land, and neglected to carry out the contract by the time given him, and that therefore the contract was at an end.

H. S. Osler, K.C., for plaintiff.

C. H. Ritchie, K.C., for defendant.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—By the provision of R. S. O. 1897 ch. 134, sec. 2 (1), recitals in deeds 20 years old shall be taken to be sufficient evidence of the truth of the matter therein, unless and except in so far as they are proved to be incorrect, and sec. 3 extends the rule to actions, and provides that the evidence of the recital which is declared to be sufficient as between vendor and purchaser shall be prima facie sufficient for the purposes of the action. There was no evidence here

given to displace the statement in the deed that the grantee was in 1864 administrator of his father's estate. The piece of evidence adduced that Mrs. Crossley was appointed administratrix ad litem in 1860 for a limited purpose in Ontario, does not prove the statement as to 1864 to be inaccurate or erroneous. The onus was on the purchaser to shew a different state of facts, and he has failed to do so.

Appeal dismissed with costs.

MEREDITH, C.J. DECEMBER 8TH, 1906.

WEEKLY COURT.

RE GAMBLE.

Will—Construction—Death of Devisee before Testator—Subject of Devise Falling into Residue—Death of One of Two Residuary Legatees and Devisees—Tenants in Common—Lapse as to Lands Devised—Survivor Entitled to Personalty.

Originating notice for the determination of questions arising upon the will of Joseph Gamble.

H. Morrison, Lucknow, for the executors.

P. A. Malcolmson, Lucknow, for Mary Ann Carter.

F. W. Harcourt, for infants and other persons represented by him under order of Britton, J., dated 15th November, 1906.

MEREDITH, C.J.:—The will is dated 8th March, 1898, and by it the testator devised to his nephew Michael Gamble a farm in the township of Kinloss, and another farm in the same township to his sisters Mary Ann Carter and Catharine Harbourne, and, after bequeathing a legacy of $300 to his nephew Wilfred Gamble to be paid by Michael Gamble, and appointing his executors, he devised and bequeathed the residue of his property to Mary Ann Carter and Catharine Harbourne.

Catharine Harbourne died in the testator's lifetime, and, by force of sec. 27 of the Wills Act, the undivided one-half

of the Kinloss farm to which she would have been entitled if she had survived the testator, is included in the gift of the residue.

The residue consists of the Kinloss farm and certain personal property of which the testator died possessed, and the question for decision is, whether the share of the residue which Catharine Harbourne would have taken had she survived the testator, lapsed, and is therefore undisposed of, or whether she and Mary Ann Carter were joint tenants of the subject of the residuary disposition, and the survivor, Mary Ann Carter, is therefore entitled to the whole.

There can be no doubt, I think, that as to so much of the residue as is real estate, the devisees would have taken as tenants in common had Catharine Harbourne survived the testator: R. S. O. 1897 ch. 119, sec. 11; and it follows that as to the undivided half devised to her there was a lapse, and it is undisposed of.

As to so much of the residue as consists of personalty, the residuary bequest is to the legatees as joint tenants, and the survivor is therefore entitled to the whole of it.

It was suggested as leading to a contrary conclusion that the blending together in the residuary gift of the real and personal estate was an indication of a contrary intention, within the meaning of sec. 27 of the Wills Act, but I am not of that opinion.

There is no more reason for thinking that this blending indicates an intention that the beneficiaries should take in the same way as legatees of personal property take, than that it is an indication that the personal property should go as real estate which is devised to two or more persons does under the provisions of sec. 11 of R. S. O. ch. 119. The disposition is not, therefore, taken out of the ordinary rule, and the devise of the real estate is to the devisees as tenants in common, and the bequest of the personal property is to them as joint tenants. . . .

Order declaring the true construction of the will in accordance with the opinion expressed. Costs of all parties out of the estate, those of the executors as between solicitor and client.