The
Ontario Weekly Notes

Vol. IV. TORONTO, OCTOBER 18, 1912. No. 5

HIGH COURT OF JUSTICE.

RIDDELL, J., IN CHAMBERS. OCTOBER 7TH, 1912.

*RE McLEOD v. AMIRO.

Mandamus—Division Court—Appeal from Police Magistrate's Conviction—Decision upon Sufficiency of Information and Complaint—Criminal Code, sec. 753—Misconstruction by Division Court Judge—Power of High Court to Supervise Decision—Consent—Decision on Merits, not on Preliminary Point.

Motion by Arthur McLeod for a mandamus to the Judge presiding in a Division Court. The motion was made upon consent.

T. H. Peine, for the applicant.

RIDDELL, J.:—McLeod laid an information against Amiro for operating his automobile on the highway contrary to the statute; the accused was tried before the Police Magistrate at Napane and convicted, being fined $10 and costs. No objection was taken before the Police Magistrate as to any defect in form or substance in the information.

An appeal was taken to the Division Court of the division, under sec. 749(a) of the Criminal Code. The Division Court Judge (the Judge of the County Court of the County of Frontenac) sat to hear the case. Counsel for the appellant (Amiro) took objection to the information and complaint as insufficient in form and in substance. No evidence was taken; although counsel for the informant requested that the merits on the facts should be gone into, the Judge refused; and the appeal was

*To be reported in the Ontario Law Reports.

allowed on the sole ground that the information and complaint was insufficient. It was not shewn (as indeed it could not be) that the objection had been taken before the Magistrate—nor was it shewn or contended that Amiro had been deceived or misled.

A motion is now made for an order setting aside the order of the Division Court and "for an order of mandamus requiring the Judge . . . to reopen the appeal from the conviction . . . and to hear the evidence of the . . . witnesses . . . and to adjudicate upon the same or for such other order as . . . the justice of the case may require . . . ."

Amiro through his counsel consents; and a consent is also filed by the learned Judge.

Contrary to the opinion which some seem to entertain, an order is not made by His Majesty's Courts of Justice simply because all persons directly interested consent to such order or even ask for it. The Court must see whether the order is a proper one to make; and is not to be made a convenience for achieving some desired end.

Assuming all the facts to be as stated, I do not think mandamus can issue.

No doubt, the High Court of Justice, exercising the powers of the traditional Court of King's Bench, may by mandamus command an inferior Court to hear a case within the jurisdiction of that Court. But where such Court has decided a matter within its jurisdiction, however wrong that decision may be, mandamus does not lie to compel a reconsideration. . . .

[Reference to In re Long Point Co. v. Anderson (1891), 18 A.R. 401, at p. 408; Township of Ameliasburg v. Pitcher (1906), 13 O.L.R. 417.]

It is, no doubt, contended in the present case that, if the Court below decides on a preliminary point without going into the merits, there is no real decision on the case, and mandamus will lie. No doubt—but we must be sure that the point upon which the decision rested was preliminary in reality and not on the merits.

It is in the view that what the learned Judge decided was preliminary, that both the applicant and his solicitor swear that "there was no argument before the said Judge of the legal merits of the case—the only question being argued was the question of the insufficiency of the information and complaint." And it is pointed out that the Criminal Code, sec. 753, expressly provides that no judgment shall be given in favour of the appellant upon an objection to the information and complaint

which objection was not taken before the Magistrate. The learned Judge was, in my opinion, wrong in the view he took of the appeal (I am of course speaking only upon the material before me—and the facts may be quite different); but he has the same power to go wrong that any other Judge has.

That such a decision is not on a matter preliminary, but on the merits, is to my mind, quite clear. . . .

[Reference to The Queen v. Justices of Middlesex (1877), 2 Q.B.D. 516, 519, 520.]

In the present case the Court did enter into the appeal, and "did decide upon the legal merits of it."

It makes no difference if the learned Judge misconstrued sec. 753 of the Code—he has the power untrammelled by us to make mistakes: and I can find no reason why a misconception of the meaning of a statute is any worse than a misconception of a common law principle or equitable rule.

If the statute was not present to the mind of the Judge, then his judicial mind was not "applied to the construction of the statute," just as in the case in 2 Q.B.D.; and that can make no difference. It is no worse to fail to take into consideration a statutory provision than a well-established common law or equity principle. "In the hurry of business . . . the most able Judges are liable to err," says Lord Kenyon, C.J., in Cotton v. Thurland (1793), 5 T.R. 405, 409; and, if Popham, C.J., could say of himself and his brethren, as he did in Sir Walter Raleigh's Case (1603), 2 How. St. Tr. 18, "But we know the law," a greater than he has said, "God forbid that an attorney or even a Judge should be held to know all the law."

It would be going too far to assert a jurisdiction in this case to grant a mandamus—and considerations which should be elementary would have prevented the application being made. . . .

[Reference to Lucy v. Bishop of St. David's (1702), 7 Mod. 59; Body v. Halse, [1892] 1 Q.B. 203, 207; Berkeley Peerage Case (1811), 4 Camp. 401, 419; In re Watkins, [1896] 2 Ch. 339; Jones v. Owen (1848), 5 D. & L. 674; The Golubchick (1840), 1 Rob. Ad. Rep. 147; In re Thompson (1861), 9 W.R. 208, per Wilde, B.; In re Aylmer (1887), 57 L.J.Q.B. 168, per Lord Esher, M.R.]

The motion must be dismissed. I have not considered whether, all parties consenting, the Court below cannot open up the matter proprio motu.

DIVISIONAL COURT. OCTOBER 10TH, 1912.

*RE DICKSON CO. OF PETERBOROUGH AND GRAHAM.

Landlord and Tenant—Proceeding to Eject Overholding Tenant—Order of County Court Judge "Dismissing Application"—Refusal of Writ of Possession—Appeal—Landlord and Tenant Act, secs. 75 et seq.—Powers of Divisional Court—Discharging Order of Judge—Landlord Left to Bring Action—Costs.

Appeal by the company from an order of the Judge of the County Court of Peterborough.

Graham had been a tenant of certain premises in Peterborough, the company being his landlords. After the termination of the tenancy, the plaintiffs applied to the County Court Judge to make the inquiry provided for in sec. 75 of the Landlord and Tenant Act, 1 Geo. V. ch. 37. The Judge gave an appointment under sec. 75 (2), and all parties appeared (sec. 77 (2)). The parties and their witnesses were heard and argument had; and the Judge, instead of issuing a writ of possession, or specifically refusing to do so, ordered "that the application of the landlords be and the same is hereby dismissed with costs."

The facts were disputed, and the Judge made no specific finding.

The appeal came on for hearing before RIDDELL, KELLY, and LENNOX, JJ.

G. H. Watson, K.C., and E. L. Goodwill, for the appellants, the landlords.

I. F. Hellmuth, K.C., and F. D. Kerr, for the tenant, objected that no appeal lay, as sec. 78 (1) gives an appeal only "from the order of the Judge granting or refusing a writ of possession;" and here the Judge had done neither.

RIDDELL, J. (after setting out the facts):—We think that the application to the County Court Judge, whatever its form, was in substance an application for a writ of possession; and that his refusal to decide was in effect a refusal of a writ of possession. Consequently, we consider that an appeal lies.

I agree with what is said by my brother Britton in Re St. David's Mountain Spring Water Co. and Lahey, ante 32, 35: "It is competent for and the duty of the County Court Judge

*To be reported in the Ontario Law Reports.

to determine the question of tenancy, and the termination of it, and that the Judge may do this on conflicting evidence." The judgment of the other members of the Court in that case required an agreement by them in that statement of the law.

It is now the duty of the County Court Judge to determine whether the tenant "wrongfully holds against the right of the landlord" (sec. 77 (2))—and no colour of right set up by the tenant justifies him in declining to exercise his statutory duty. He need not fear that in a proper case his decision will be final, even if that were a sufficient reason for failing to decide, which, of course, it is not. And it is not for the County Court Judge to decide whether the right of the tenant should be determined under the Act—that function is vested in the Divisional Court (sec. 78 (2)), but not in the County Court Judge. . . .

If, then, there were no more in the case than the refusal of the learned Judge to determine the rights of the parties, we should allow the appeal and send the case back to be disposed of on the merits.

But we are of opinion that the right to possession in this particular case should not be determined in such a proceeding. . . . The Act (sec. 78 (2)) then gives us the power, in these circumstances, to "discharge the order of the Judge, and the landlord may in that case proceed by action for the recovery of possession."

It is argued that there is no necessity for setting aside the order. Perhaps so; but, on the other hand, it would probably be argued that no action lay unless the order were set aside—"expressio unius est exclusio alterius," etc. To avoid any possible difficulty and doubt, the order will be set aside—costs here and below to be costs in any action to be brought by the landlords for possession. If no such action is brought within thirty days, the costs aforesaid are to be paid by the landlords. The County Court Judge will not take any further steps in the matter without the consent of both parties.

KELLY, J., agreed.

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

Order accordingly.

RIDDELL, J. OCTOBER 11TH, 1912.

CORDINER v. ANCIENT ORDER OF UNITED WORKMEN OF THE PROVINCE OF ONTARIO.

Fraternal and Benevolent Society—Constitution—Amendment by Grand Lodge—Increase of Insurance Rates—Instruction of Representatives—Failure to Give Notice of Proposed Amendment—Interim Injunction—Balance of Convenience.

Motion by the plaintiffs for an interim injunction restraining the defendants from taking any proceedings under an amendment to the constitution of the defendant society, passed by the Grand Lodge at a meeting held on the 21st June, 1912.

The plaintiffs were persons affected by the change, and the action was brought for a permanent injunction in the same terms.

The defendants were a fraternal and benevolent society.

Section 63 of the constitution contained a tariff indicating the amount to be paid monthly by each member by way of assessment, running from 74 cents per $1,000 of benefit at the age of 16 to $2.69 at the age of "49 and over." This assessment corresponds to the premium payable for a life insurance; and failure to pay it voids the member's insurance.

The amendment adopted was as follows:—

"Amend section 63, sub-section 1, by striking out all of that part of the said sub-section on pages 39 and 40 and substituting therefor the following:—

"From and after the 1st day of October, 1912, each and every member of this Order, who joined prior to the 1st day of May, 1905, shall, without notice, pay to the Financier of the Lodge a monthly assessment of the amount designated opposite the age of the member on the 1st day of May, 1905; members over 65 years of age to be taken as at age 65; and each and every new member, commencing with the month of receiving the Workman Degree, shall, without notice, pay to the Financier of the Lodge a monthly assessment of the amount designated opposite the age of the member at the date of admission to the Order, according to the following graded plan."

The "graded plan" set out ages and amounts from 16 to 49, the same as in the original, and then continued from 50 to 65 inclusive, according to the figures recommended by the executive committee, but stopping at the age of 65 years.

The recommendation of the executive committee was that the tariff should be increased year by year till 82 years and $16.12 monthly instalment—"provided that any member who shall have joined the Order prior to the said 1st day of October, 1912, shall have the option of having his or her certificate rated at his or her attained age as of the 1st day of May, 1905, or at his or her attained age at date of joining, if he or she shall have joined the Order subsequent to the 1st day of May, 1905, upon either paying an additional assessment, consisting of the difference between the rate hereinbefore provided for and the rate theretofore paid by such member, which is according to the following schedule." The schedule set out ages and rates as in the original.

The constitution required (sec. 169) that a copy of all proposed amendments should be forwarded to the Grand Recorder on or before the 31st October, in order that he might send a copy to each subordinate Lodge in time for a full discussion of the proposed amendment before selection of a Grand Lodge representative.

In all important matters the representative in Grand Lodge of a subordinate Lodge has as many votes as his Lodge has members.

No notice of the amendment which was adopted was forwarded to the Grand Recorder.

I. F. Hellmuth, K.C., for the plaintiffs.

E. F. B. Johnston, K.C., for the defendants.

RIDDELL, J. (after setting out the facts) :—It must be perfectly manifest that this amendment never was submitted to the subordinate Lodges for the consideration of their members, and that the members of the Order at large have had no opportunity of considering and discussing the same and of instructing their representatives in respect thereof. This, of course, would—or might—be no objection where the representative was a representative, as in the Dominion and Province, of the whole Dominion or Province, and not of a particular constituency.

It may perhaps not be a prerequisite, taking sec. 169 strictly, for the Grand Recorder to send a copy of the amendment to the Lodges; but it is, in any reading, necessary that the amendment shall be forwarded to the Grand Recorder on or before the 31st October before the meeting at which it is to be considered.

There are other objections to the amendment upon which I do not pass.

Were it the case of an incorporated company, and were it certain that the proper number of votes would be secured to carry the amendment, the Court might not—probably would not—interfere; but this is quite a different case.

I do not lose sight of the principle laid down in many cases that the Court will not interfere unless and until all the domestic remedies are exhausted. There are many provisions for appeal in the constitution of this Order, but none for an appeal from the action of the Grand Lodge itself—and that is what the plaintiffs complain of.

Zilliax v. Independent Order of Foresters, 13 O.L.R. 155, is perhaps the latest case in which the principle is applied—and the numerous decisions need not here be cited or discussed. There is no doubt of the general principle.

I cannot entirely disregard the consideration of the evil effects upon the Order which may result from this order—any more than I can disregard the hardship on old and on aging men arising from the amendment if held valid. That the Order may suffer if the present plan is retained, is clear enough. Life insurance does not differ from any other matter to which the inexorable truths of mathematics can be applied. Assumptions of antiquity, a euphonious, well-sounding name, the enthusiasm of fraternity, are well enough; but, when it comes to paying a death claim, they are found wanting. The cold gray light of a failing bank account makes perfectly manifest that cheap insurance is a sin against actuarial science—and the wages of this sin, too, is death.

On the other hand, these aged and aging men have paid for years money which went to pay for the support of those left behind by their comrades, believing that so long as they, during their own lifetime, paid their fees as fixed for them, their widows and orphans would in like manner be provided for: they now are told that they must pay an increased amount, which many of them will find it most difficult, some impossible, to pay, or lose all the benefit of their past payments of money which they could ill spare. It would be hopeless for them to expect to be admitted to another benevolent society—their lot is a hard one. Truly those who organise such societies undertake a tremendous responsibility—the failure of any such always results in tragedy.

On a balancing of convenience I cannot but think that these individuals have the higher claim to consideration. I cannot think the Order is so rotten, so near bankruptcy, that it will go to pieces before a regular meeting can be held at which will appear delegates fully instructed—while, if I permitted the new rates to go into operation, very great hardship might result.

An injunction will go as asked, but all parties must speed the trial. Costs to be in the cause unless otherwise ordered by the trial Judge.

If all parties consent, this may be turned into a motion for judgment, in which case judgment will go as asked with costs.

RIDDELL, J., IN CHAMBERS. OCTOBER 12TH, 1912.

PARISH v. PARISH.

Husband and Wife—Interim Alimony—Arrears—Date of Commencement—Delay in Proceeding—Amount of Interim Alimony.

An appeal by the defendant from an order of the Local Judge for the County of Elgin directing the defendant to pay $104 as arrears of interim alimony since the service of the statement of claim up to the date of the order and $8 a week thereafter; also $40 for interim disbursements.

Joseph Montgomery, for the defendant.
Shirley Denison, K.C., for the plaintiff.

RIDDELL, J.:—The appellant asks that the order be not effective unless and until the plaintiff returns their child to the defendant and chattels of his which she has; and, in any event, that the amount be reduced; and, moreover, that the sum of $113 taken away by the plaintiff from the defendant's house, part of his money, be taken into account.

In Karch v. Karch, 3 O.W.N. 1032, I discussed the circumstances under which interim alimony should be allowed; and do not now depart from the conclusions there arrived at. I think that I cannot stay the operation of the order until the plaintiff does something which it may turn out she is not bound to do.

But as to the amount—while it is clear that interim alimony may be and often is granted from the service of the writ (or statement of claim), that is only if there has been no delay in making the application: Howe v. Howe, 3 Ch. Ch. R. 494; Thompson v. Thompson, 9 P.R. 526; and a claim for interim alimony is endorsed on the writ: Peterson v Peterson, 6 P.R. 150. Here the second requisite is found—the writ is properly

endorsed; but the writ was served on the 20th April; and, for some reason, the statement of claim was delayed till the 29th June, thereby allowing the statement of defence to be delayed till the 9th September. Even then, notice of motion or interim alimony was not served for two weeks, i.e., the 21st September, and for the 27th September. The delay has not been accounted for; and I think the interim alimony should run only from the date of the order.

In this view, I do not direct the $113 to be taken into account, as it otherwise should or might. Probably the possession of the money accounts for the delay in making application.

In view of the short time to elapse before the trial may be had, I do not at present, at least, weigh in apothecaries' scales the means of the defendant and the amount which the plaintiff should receive as interim alimony. If, for any reason, the case is not tried at the coming St. Thomas non-jury sittings, the matter may be brought before me again, either on the same or other material.

No costs.

RIDDELL, J. OCTOBER 12TH, 1912.

GOLD v. MALDAVER.

Company—Religious Corporation—Property Rights—Powers of Directors—Sale of Pews—Lease of Part of Building—Resolution—Constitution and By-laws—Injunction.

Motion by the plaintiffs to continue an injunction granted by MIDDLETON, J.

W. E. Raney, K.C., for the plaintiffs.
L. F. Heyd, K.C., for the defendant.

RIDDELL, J.:—"The Shaare Tzedek Congregation" is a corporation formed by letters patent under the Ontario Companies Act to take over the assets and liabilities and in every way to stand in the place of a previously existing Hebrew congregation in Toronto, to maintain a place of worship for Hebrews according to the Sephardic Ritual, a school, etc. In the letters patent it was (amongst other things) ordained that the congregation should determine the conditions upon which future members should be admitted; that the officers, who should together be known as directors, should be: (1) the Presi-

dent; (2) Parnas; (3) Gabboh; (4) Treasurer; (5) Secretary; (6) five trustees; (7) Senior Gabboh for burial ground; and (8) Junior Gabboh for burial ground; that at any general meeting, unless a poll is demanded, a declaration by the president that a resolution has been carried, and entry to that effect in the minutes of the proceedings of the corporation, shall be sufficient evidence of the fact without any proof of the number or proportion of the votes recorded in favour of or against such resolution; that the affairs of the corporation shall be managed by the directors, who . . . may exercise all such powers of the corporation as are not by the Act or the charter required to be exercised by the corporation in general meeting, "subject nevertheless to any regulations not inconsistent with the above regulations or provisions as may be prescribed by the corporation in a general meeting. . . ." Clause 26 has also been considered in argument material, though I think it applies only to committee meetings. It is as follows: "26. A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, except where otherwise provided by the by-laws."

In general meeting a "constitution" was drawn up, which may be considered as containing the by-laws of the company. . .

In this "constitution" appear the following:—

Article 3, sec. 1: "Any person of the Jewish creed, 18 years old and over, is eligible for membership to this congregation."

Article 5, sec. 4: "Each member is entitled to a seat in the Synagogue, and, if married, also to a seat for his wife; each pew to be rented for the period of one year, i.e., from one New Year's day to the other."

Article 5, sec. 5: "All members have a right to vote in all affairs of the congregation except on property affairs, which are to be voted on only by those members who have their pews bought."

Article 6, sec. 1: "The seats in the Synagogue may be sold at any regular or special meeting called for such purpose."

Article 6, sec. 2: "The seats must be sold by auction to the highest bidder, and are to become the property of the buyer, his executors and heirs. When there are no heirs, the seat shall belong to the Synagogue."

As all the seats are individual, the words "seat" and "pew" are synonymous.

The subsequent provisions of article 6 make it plain that only a member can buy a seat or pew.

The result is, that the members are divided into two classes: (1) those who have "their pews bought;" and (2) those who have not. All may vote at general meetings, "except on property affairs"—on these only the first class.

At a meeting of the congregation-corporation, with the defendant, the president, in the chair, it was proposed to lease the basement of the Synagogue for two years, at a rental of $200 per annum. A number of pew-owners protested, as an offer for $500 per annum had been received. It is said that the tenant in either case was to sweep out the Synagogue, also. The president, against the protest of the majority of the pew-owners, allowed the general body of members to vote, and declared the motion carried.

I am asked to continue the injunction restraining the president from acting on this resolution.

There are two arguments which might be advanced to support this resolution, but I pass over them, as the defendant does not object to the injunction being continued on this branch.

But there is another and more important matter. The defendant, the president of the Synagogue, intends, it is said, to sell pews "notwithstanding . . . that fully two-thirds of the total number of fifty-nine pew-owners in said congregation are opposed to the sale of any further pews or seats at the present time." There does not seem to have been any vote of the congregation directing such sale; and, therefore, the first ground suggested why the leasing was proper does not here appear. That was, that in the charter the declaration by the president, etc., is made sufficient evidence of the passing of a resolution without any proof of the number of the votes, etc. But, while the declaration of the president and entry in the books are sufficient evidence, they are not conclusive evidence; and there is nothing to operate by way of estoppel or otherwise to prevent the truth appearing.

What is mainly relied upon is, that the directors, including the president, are charged with the management of the affairs of the corporation; that the directors may exercise all the powers of the corporation except as specifically excepted. It is to be observed that these powers are to be "subject . . . to any regulations not inconsistent . . . prescribed by the corporation in general meeting. . . ." Regulations were made in general meeting (article 6, secs. 1, 2) as to the sale of pews; and these do not prevent the exercise by the directors of the power to sell the pews, provided the sale be: (1) at a regular or special meeting called for the purpose; and (2) at auction, to mem-

bers only. It is not a matter which requires to be brought at all before the congregation, any more than the sale of part of an ordinary company's land by the board of directors of such company.

Article 5, sec. 5, then, has no application, in my view.

I do not think that the injunction as to this branch can be sustained, as I do not think the approval of a majority of the present pew-holders is necessary.

The defendant seems to be proceeding in good faith to sell so as to raise money to pay off pressing liabilities; and, if he has the authority of the directors, I do not think he can be restrained. . . .

But, if the parties cannot agree, the injunction will be dissolved as to the last part, continued as to the first on the defendant's consent: costs in the cause, unless otherwise ordered by the trial Judge.

FALCONBRIDGE, C.J.K.B. OCTOBER 12TH, 1912.

MAITLAND v. MACKENZIE AND TORONTO R.W. CO.

Limitation of Actions—Period of Limitation—Action for Personal Injuries—"Damages"—Limitations Act, sec. 49 (*g*), (*h*)*—Postponement of Trial—Costs of the Day.*

Action for injuries by collision with a motor vehicle.

J. M. Godfrey, for the plaintiff.

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

FALCONBRIDGE, C.J.:—The defendants plead the Statute of Limitations. If the limitation is two years, the plaintiff has brought his action too late.

Mr. McCarthy contends that the case falls under the Limitations Act, 10 Edw. VII. ch. 34, sec. 49 (*h*), "an action for a penalty, damages, or a sum of money given by any statute. . . ."

I think it clearly is not. It is an action upon the case under clause (*g*) of the same section. See Corporation of Peterborough v. Edwards (1880), 31 C.P. 231; Thomson v. Lord Clanmorris, [1900] 1 Ch. 718.

The trial is postponed until next jury sittings.

In view of the long delay in bringing the action (about three

and a half years), the defendants have been unable to find the chauffeur, and I shall not order them to pay forthwith the costs of the day. They will be costs to the plaintiff in any event of the cause.

RICKART v. BRITTON MANUFACTURING CO.—MASTER IN CHAMBERS—OCT. 8.

Pleading—Statement of Defence—Con. Rule 298—*Denial—Non-payment of Interlocutory Costs—Remedy.*]—The facts of this case are to be found in the note of a previous motion, 3 O.W.N. 1272. The statement of defence was delivered on the 10th September. The plaintiffs moved to strike out parts of paragraphs 3 and 5 and all of paragraphs 6, 7, 8, 9, and 13, on the usual grounds, under Con. Rule 298. The Master said that paragraph 13 was not objectionable at this stage, as it merely denied the plaintiffs' right to the assistance of the Court. —Paragraphs 6, 7, 8, and 9 set out the fact (which was not denied) that certain interlocutory costs awarded to the defendants, amounting in all to over $230, had not been paid, and alleged that, by this default, the plaintiffs had abused the process of the Court, and were thereby disentitled to any relief which might otherwise have been given to them. On this point, the Master referred to Stewart v. Sullivan, 11 P.R. 529, and Wright v. Wright, 12 P.R. 42; and said that the remedy in such cases is by application to the Court for a stay until payment has been made. The fact of non-payment, though admitted, is no defence to the action; and paragraphs 6, 7, 8, and 9 should be struck out, leaving the defendants to move, if so advised, for a stay of procedings.—The part of paragraph 5 objected to alleged that the plaintiffs, by their use of the word "registered" in their alleged trade mark, were "guilty of the indictable offence" defined in secs. 335 and 488 of the Criminal Code, and were thereby debarred from any relief in respect thereof. On this question the Master referred to and followed the similar case of Ontario and Minnesota Power Co. v. Rat Portage Lumber Co., 3 O.W.N. 1078, 1182; saying that the part of paragraph 3 objected to was useful only as leading up to paragraphs 6, 7, 8, and 9; and, these being struck out, it followed that paragraph 3 should be curtailed as asked for in the motion. Costs of the motion to be in the cause, as success was divided. J. G. O'Donoghue, for the plaintiffs. C. G. Jarvis, for the defendants.

BLACK v. CANADIAN COPPER CO.—RIDDELL, J., IN CHAMBERS—OCT. 9.

Particulars—Statement of Claim—Motion before Delivery of Defence—Absence of Affidavit—Nuisance—Damages.]—An appeal by the defendants from the order of the Master in Chambers, ante 62. RIDDELL, J., said that, so far as was made to appear, the telegram of the plaintiff's solicitor might be absolutely correct—the defendants might have been fully informed of all the acts of negligence on their part, and the fullest particulars of damage might have been given to the defendants. But, aside from that consideration, it was quite too early to move, and the order of the Master in Chambers was the right one. RIDDELL, J., agreed that the case would probably be tried by a Judge without a jury; but said that in any case the defendants were not at present injured. Appeal dismissed. Costs to the plaintiff in any event. H. E. Rose, K.C., for the defendants. C. M. Garvey, for the plaintiff.

DICK & SONS v. STANDARD UNDERGROUND CABLE CO.—RIDDELL, J., IN CHAMBERS—OCT. 9.

Appeal—Leave to Appeal to Divisional Court from Order of Judge in Chambers—Con. Rule 777 (3) (*a*), (*c*).]—Motion by the defendants for leave to appeal from the order of BOYD, C., ante 57, whereby he allowed an appeal from an order of a Local Judge, forever staying the action. RIDDELL, J., said that it was, he thought, admitted—at all events it was plain—that the conditions of Con. Rule 1278, i.e, 777 (3) (a), were not present here; and, as he agreed with the Chancellor in the disposition he had made of the matter, clause (c) does not apply either. Motion dismissed with costs to the plaintiffs in any event. G. H. Levy, for the defendants. E. C. Cattanach, for the plaintiffs.

LAKE ERIE EXCURSION CO. v. TOWNSHIP OF BERTIE—DIVISIONAL COURT—OCT. 9.

Highway—Boundaries of Lots—Allowance for Road—Encroachment—Failure to Prove—Erection of Fence—Removal—Injunction—Dedication—Estoppel.]—Appeal by the plaintiffs

and cross-appeal by the defendants from the judgment of KELLY, J., 3 O.W.N. 1191. The appeal and cross-appeal were heard by MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ. The Court dismissed the plaintiffs' appeal without costs and allowed the defendants' cross-appeal without costs. C. A. Moss, for the plaintiffs. E. D. Armour, K.C., and G. H. Pettit, for the defendants.

SANDWICH LAND IMPROVEMENT CO. v. WINDSOR BOARD OF EDUCATION—DIVISIONAL COURT—OCT. 9.

Public Schools—Expropriation of Land for Site—Action for Injunction to Restrain Arbitrators from Proceeding—School Sites Act, 9 Edw. VII. ch. 93—Remedy by Summary Application to County Court Judge—Dismissal of Action—Costs.]—Appeal by the plaintiffs from the judgment of KELLY, J., 3 O.W.N. 1150. The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ. The Court dismissed the appeal with costs. D. W. Saunders, K.C., for the plaintiffs. C. A. Moss, for the defendants.

ROBINSON v. REYNOLDS—DIVISIONAL COURT—OCT. 9.

Principal and Agent—Employment of Agent to Sell Land—Purchaser Procured by Agent Refusing to Carry out Purchase—Right to Commission—Contract—Scope of—Finding—Appeal.]—Appeal by the plaintiffs from the judgment of BRITTON, J., 3 O.W.N. 1262. The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ. The Court dismissed the appeal with costs. G. H. Watson, K.C., for the plaintiffs. C. A. Moss, for the defendant.

RICKART v. BRITTON MANUFACTURING CO.—MASTER IN CHAMBERS—OCT. 10.

Particulars—Statement of Claim—Motion for Particulars after Delivery of Defence, but before Examination for Discovery—Plaintiffs Resident Abroad—Default in Payment of Interlocutory Costs.]—Motion by the defendants for particulars of certain paragraphs of the statement of claim. The statement of defence had been delivered, but there had been no examin-

ation of the plaintiffs for discovery. The Master said that it followed, under Smith v. Boyd, 17 P.R. 463, that the motion was at least premature at present.—It was submitted that the one plaintiff who was resident in the Province would not be competent to give the defendants the information to which they were entitled, and which was necessary for their defence; and it was said that, as the other plaintiffs were resident in the United States, it would be an expensive proceeding to examine them. The Master said that this might be met by the decision in Lick v. Rivers, 1 O.L.R. 57; and the defendants could urge in support of a similar order, if such was found necessary, that the plaintiffs were in default in respect of the payment of over $230 of interlocutory costs. Without deciding anything as to that, it was enough to say at present that the motion should be dismissed, with costs in the cause to the plaintiffs, but without prejudice to its renewal after discovery, if still considered necessary. C. G. Jarvis, for the defendants. J. G. O'Donoghue, for the plaintiffs.

BROWN V. GRAND TRUNK R.W. CO.—MASTER IN CHAMBERS—OCT. 10.

Venue—Motion to Change—Failure to Set Case down at Proper Time—Avoidance of Delay.]—Motion by the plaintiff to change the venue from Beleville to Toronto. The motion was made for similar reasons to those in Taylor v. Toronto Construction Co., 3 O.W.N. 930. The action was begun on the 30th March, 1911. The plaintiff's claim was for damages for the death of her husband on the 24th November, 1910. The cause was at issue nearly a year ago, and notice of trial was given for the jury sittings at Belleville at the end of February, 1912; but, by an oversight, the case was not set down. A new notice of trial was given in due time for the sittings commencing on the 16th September, 1912. But, owing to the absence of the agent of the plaintiff's solicitors, the case was again not set down. No other jury cases were set down within the time required by 9 Edw. VII. ch. 34, sec. 63 (2); and, under the further provisions of that section, the jurors were notified not to attend, so that there was no way of getting the action tried at that time. It was stated that, on this appearing, other arrangements had been made by the defendants' counsel and witnesses, on the supposition that the case could not be heard until the spring sittings. The Master said that Belleville was admittedly

the proper place of trial in this case. The delay, however unfortunate for the plaintiff, was not in any way attributable to the defendants; and there was nothing to distinguish this case from the Taylor case, supra. Motion dismissed with costs to the defendants in any event. R. U. McPherson, for the plaintiff. Frank McCarthy, for the defendants.

MOSHIER v. TOWNSHIP OF EASTNOR—RIDDELL, J.—OCT. 10.

Municipal Corporations — Drainage — Non-completion of Works — Negligence—Damages — Mandatory Order—Referee's Report—Appeal.]—An appeal by the defendants from the report of A. B. Klein, of Walkerton, as special referee, finding that the defendants were guilty of negligence in not completing certain drainage works; that the plaintiff was entitled to $800 damages; and that the defendants should be ordered to complete the works. Upon a perusal of the evidence, the learned Judge found that the Referee was wholly justified in his conclusions. There were no questions of law which required examination or discussion. Appeal dismissed with costs. J. H. Scott, K.C., for the defendants. D. Robertson, K.C., for the plaintiff.

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*SIBBITT v. CARSON—DIVISIONAL COURT—OCT. 10.

Principal and Agent—Agent's Commission on Sale of Land —Contract—Time-limit—Sale Effected after Expiry—Introduction of Purchaser by Agent.]—Appeal by the plaintiff from the judgment of MIDDLETON, J., 26 O.L.R. 585, 3 O.W.N. 1491. The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ. The Court dismissed the appeal with costs. R. G. Code, for the plaintiff. G. F. Henderson, K.C., for the defendants.

ALSOP PROCESS CO. v. CULLEN—MASTER IN CHAMBERS—OCT. 12.

Venue—Action for Infringement of Patent of Invention—R.S.C. 1906 ch. 69, sec. 31—"May."]—This was an action for infringement of the plaintiffs' patent by the defendant, who

*To be reported in the Ontario Law Reports.

resided at Woodstock, as was admitted. The plaintiffs laid the venue at Toronto. The defendant moved to change it to Woodstock, in reliance on R.S.C. 1906 ch. 69, sec. 31, which is a statutory re-enactment of the provision in the Patent Act, and was judicially interpreted in Aitcheson v. Mann, 9 P.R. 253, 473, where it was held "that the word 'may,' as governed by the context of the Act, was obligatory, and not merely permissive" (as contended now for the first time in the Master's experience), "and that the reasonable construction of the Act was that the venue *must* be laid at the place of sittings of the Court in which the action is brought nearest to the residence or place of business of the defendant." In accordance with this decision, the venue was changed to Woodstock; costs to the defendant in any event. Grayson Smith, for the defendant. R. McKay, K.C., for the plaintiffs.

RE CARNAHAN—RIDDELL, J., IN CHAMBERS—OCT. 12.

Infant—Money in Hands of Trustees—Payment to Guardian for Maintenance.]—Motion by the grandmother of an infant for an order authorising trustees to pay her a sum for the maintenance of the infant, out of moneys of the infant in their hands—not in Court. The learned Judge reluctantly yielded to the authority of Re Wilson (1891), 14 P.R. 261, and Re Coutts (1893), 15 P.R. 162, and made the order asked for. The minutes to be settled by the Official Guardian, and to be spoken to before the Judge, if necessary. G. M. Gardner, for the applicant. F. W. Harcourt, K.C., Official Guardian, for the infant.