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MASTER-IN-ORDINARY. OCTOBER 27TH, 1913.

RE FARMERS BANK OF CANADA.

MURRAY'S CASE.

SPROAT'S EXECUTORS' CASE.

5 O. W. N. 272.

Bank—Winding-up—Contributories—Subscribers for Shares—Action for Rescission of Subscriptions—Fraud and Misrepresentations—Settlement of Action—Order Dismissing — Recitals—Assignment of Shares—Completion of Settlement before Organisation Meeting of Shareholders—Subsequent Attempt to Allot Shares—Absence of Notice of Allotment—Finding that Subscribers Never Became Shareholders.

In a proceeding for the winding-up of the bank, the liquidator presented a list of proposed contributories, among whom were James Murray, personally, and James Murray and John Murray, as executors of John Sproat, deceased.

The liquidator's application to have these persons' names settled on the list of contributories was heard and evidence thereon was taken before the Master-in-Ordinary.

James Bicknell, K.C., and Morley, for the liquidator.

George Bell, K.C., for the alleged contributories.

ALCORN, MASTER:—I think that the names of the above alleged contributories should be removed from the list as presented by the liquidator, and that they are not indebted for the amount said to be unpaid on their subscriptions or under the double liability imposed by the Bank Act.

By writ of summons, tested of the 22nd October, 1906, they brought an action against the Farmers Bank of Canada, its provisional directors and executive officers, asking

by the endorsement, among other things, for a declaration that their subscriptions were void, for rescission, and for an injunction restraining the defendants from proceeding thereon, and alleging that such subscriptions were obtained by fraud and misrepresentation.

The liquidator now asks to retain James Murray on the list for double liability under two subscriptions, one for 25 and one for 10 shares of $100 each, and James Murray and John Murray, executors of John Sproat, for double liability for a subscription for 100 shares of like amount each, obtained from them by one W. J. Lindsay, an agent of the bank.

On the return of a motion by the plaintiffs for the injunction prayed, on the 27th October 1906, an affidavit of Lindsay was filed, in which he says that on the previous day, he had interviewed all the eleven plaintiffs, including Sproat and James Murray, with the concurrence of the manager of the bank and its solicitor; that he had at that interview paid back to each all moneys paid for stock, had given an undertaking to return notes for unpaid balances, and had obtained from each an assignment of his stock to him, Lindsay. He had in fact paid James Murray $300—all the latter had paid. Sproat had paid nothing. The assignments by James Murray and John Sproat so obtained are produced by the liquidator, each having annexed a writing intituled in the Court and cause, duly signed and witnessed, in which each states that he has "now no interest in this litigation, and desires that this action be not proceeded with."

James Murray was examined before me, and detailed the grounds of fraud and misrepresentation alleged in his case, and his repudiation of his first subscription alleged to be for 25 shares, within a day or two days; he said that that subscription paper was then, on the spot, returned to him, when he destroyed it in Lindsay's presence, as he distinctly recollects, and signed one for 10 shares only.

W. R. Travers made an affidavit, filed on the said motion, in which he says that he produces the Murray subscription for 25 shares marked as exhibit N, and the Sproat subscription as exhibit D. The liquidator now produces such subscriptions. Neither is so marked. He further says (agreeing with James Murray's evidence) that the second Murray subscription, for 10 shares, was substituted

for the first, for 25 shares, which was intended to be cancelled, and that he produces the former as exhibit O to his affidavit. The liquidator also produces this 10 share subscription, which is not so marked. A letter is put in, dated the 21st July, 1906, purporting to be from John Sproat, per his wife, charging that his subscription had been raised by Lindsay from 10 to 100 shares, and Lindsay's promise to make it right.

In answer, on the same motion, there were filed affidavits of the defendants, Gallagher, Ferguson, Fraser, and Lown, provisional directors, stating that the proceedings in the action, and particularly the motion for an injunction "are calculated to and will, if proceeded with, very seriously injure and prejudice the Farmers Bank of Canada and seriously prejudice and injure the interests of the shareholders or subscribers for stock of the said bank, of whom there are now in all over 500," and each deponent adds his belief "that it is absolutely essential and in the interest of the said bank and in the interest of the shareholders hereof, and also in the interest of the plaintiffs in this action, that the said motion and the proceedings thereunder should be forthwith stayed." Part of the "proceedings thereunder" was an endeavour (up to that point unsuccessful) to procure an examination before a special examiner at Toronto of the defendants in support of the motion for an injunction. The importance to the bank of preventing such an examination and of smothering the action is apparent. The assignments to Lindsay by the eleven plaintiffs, all produced as exhibits to his affidavit, as appears by those of Sproat and James Murray, produced before me, were, no doubt, prepared in type-writing in the office of the defendant bank's solicitor, and Lindsay took the bundle, accompanied by the written disclaimers above mentioned, armed and ready with pen and ink, to the plaintiffs' and procured their execution the day before the plaintiffs' motion came on. So confronted—all moneys being repaid and notes provided against—the bank's solicitor had matters his own way. He astutely took, by consent, as upon his own motion for an order setting aside the subpœna and appointment for examination of the defendants, an order staying all proceedings thereon and on the plaintiffs' injunction motion, and concluding as follows: "And it appearing that the said plaintiffs John

Sproat, George Castle, William A. Dixon, William McLean, Finlay McCallum, Robert Hume, James Murray, George Denoon, and John McLeod, have assigned and transferred their applications for the issue of shares of stock of the Farmers Bank of Canada, and their right to shares in accordance with the said applications to one William J. Lindsay, and that the claims of the plaintiffs last above-named and also the obligations and liabilities of the said plaintiffs have ceased; it is ordered, and adjudged that this action be and the same is hereby dismissed out of Court without costs."

The judgment carefully refrains from any statement or admission that the plaintiffs—including Sproat and James Murray — were shareholders. Both had promptly repudiated, and brought an action for a declaration that the subscriptions were void.

On the 27th October, 1906, W. R. Travers, acting general manager of the bank, wrote to James Murray a letter informing him of the judgment, expressing regret that the bank had lost Murray and Sproat as subscribers, and concluding: "You will understand that you are now relieved from any further responsibility to this bank." A copy of this letter is produced by the liquidator.

All the foregoing was complete a month before the organization meeting and election of directors. Months afterwards, the directors apparently assumed to attempt to allot shares on the said subscriptions. There is no evidence that any notices of allotment or of calls were ever sent to either Sproat or Murray. I am of opinion, from the appearance of the books, that no notices were sent, and that there was no intention to send any to Sproat or Murray, but it served the purposes of the directors to proceed on the assumption—as Lindsay was their creature—that such shares existed, and they apparently, as shewn by the evidence of Mr. Frederick Clarkson, used those alleged shares, sold them, and probably got the money for them. Neither Sproat, to the date of his death, the 25th June, 1910, nor James Murray, before or since, had anything further to do with the matter—never received dividends, never attended meetings, voted, or knowingly allowed their names to appear on the bank's books, nor did they, or either of them, receive any certificate of shares or other

communication from the bank until notice by the liquidator claiming to put them on the list.

The touchstone is, did they or either of them ever become shareholders? I think they did not. Counsel for the liquidator bases his long and luminous argument and instructive exposition of the banking law on the assumption that they did. He opens his argument by saying: "Undoubtedly Mr. Sproat and Mr. Murray subscribed for shares. Undoubtedly they became shareholders. Undoubtedly they executed to their attorney, Mr. Lindsay, transfers of their shares or some of them," etc. If his assumption were correct, then his elaborate argument, that they could not and did not legally assign under the Bank Act and could not and did not rid themselves of their liability, including the double liability, but got only Lindsay's guaranty, has the greatest force. I, however, do not agree that they became shareholders, and I think it not very material what the form of the judgment relieving them was. The plainly evident intention of what took place, which I have detailed, shewed feverish haste by the provisional directors to get rid of the plaintiffs and their action, on any terms. I do not think that any argument against Sproat and Murray can be built on the assignments which Lindsay obtained not complying with the Bank Act. There was nothing to assign, and the idea of assignment came wholly from the bank. At that time the matter rested wholly on the application—there were no directors or books or certificate allowing the bank to commence business for a month afterwards. When the directors were elected, there was no attempt, as I think, to allot to Sproat or Murray, and no notice of allotment. There is a right to go behind the words of the judgment and shew the real transaction: *Cockburn* v. *Kettle* (1913), 28 O. L. R. 407; *Sauermann* v. *E. M. F. Co.* (1913), 4 O. W. N. 1510.

The requirement of sec. 13 of the Bank Act is, that there be $500,000 *bona fide* subscribed, and that $250,000 thereof has been paid to the Minister. If, as I gather, Sproat's and Murray's alleged subscriptions were used, it is impossible to say, in the light of the judgment and what preceded it, that their subscriptions were *bona fide* or that any part thereof had been paid. All that Sproat and Murray had under the subscriptions was a right (if the subscriptions had been *bona fide*) to receive shares from

the directors when selected. The judgment wiped out the right, and neither the provisional directors nor the directors had a right to deal further with or recognize those subscriptions. The bank should not have taken the assumed transfer to Lindsay, or made the subsequent transfer, and Sproat and Murray are not responsible for acts of the bank assuming to deal with shares that did not exist. The subscriptions never ripened into shares. The effect of the judgment was to find no binding subscriptions, and that the subscriptions were, as alleged in the endorsement of the writ, void. No authority is, or I think can be, cited holding that one who signs a subscription never can be relieved of his liability otherwise than under the formalities of the Bank Act. Fraud can be, and I think in this case was, relieved against to the extent of declaring in effect that there never was a binding subscription.

The names of James Murray, and of James Murray and John Murray, executors of John Sproat, deceased, should be struck off the list of contributories as submitted by the liquidator.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. MARCH 13TH, 1914.

MULHOLLAND v. BARLOW.

6 O. W. N. 72.

Trespass to Lands—Trifling Claim—Counterclaim — Fence—Right-of-Way—Injunction—Damages.

FALCONBRIDGE, C.J.K.B., 25 O. W. R. 572; 5 O. W. N. 654, dismissed plaintiff's action for trespass to lands and gave judgment in favour of defendant on his counterclaim for an injunction and damages.

SUP. CT. ONT. (2nd App. Div.) varied the judgment below by striking out paragraphs 2, 3, and 4 thereof, and by declaring that neither party shall build a fence on the centre line north and south of lot 180 further north than a point 11 ft. 2 in. north-westerly from the corner of the plaintiff's house; and also (by consent) declaring that no part of the plaintiff's house is on the defendant's land, and directing that the plaintiff shall, within one month, re-erect and maintain the fence that formerly extended from the north-west corner of her house. In other respects appeal dismissed. No costs of appeal.

Appeal by the plainiff from the judgment of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., 25 O. W. R. 572.

Appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

W. M. McClemont, for the appellant.

S. F. Washington, K.C., for the defendant, the respondent.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. MARCH 4TH, 1914.

KREUSZYNICKI v. CANADIAN PACIFIC Rw. CO.

6 O. W. N. 1.

Negligence—Railway — Yardman Injured in Shunting Operations—Bar of Action under Workmen's Compensation Act — Alleged Defect in System—Pleading—Sufficiency of—Findings of Jury—Piece of Work Temporary in Character — Work in Charge of Foreman—Fellow Servant — Defendants not Liable at Common Law.

MIDDLETON, J., 25 O. W. R. 262; 5 O. W. N. 312, *held*, that where no allegation was made against the defendants' general system of operating their railway that where there was negligence in a purely subsidiary and accidental piece of work such as shunting placed by the defendants in charge of a foreman, the same must be attributed to the foreman, a fellow workman of the plaintiff, and not to the system employed by the defendants so as to make them liable at common law.

SUP. CT. ONT. (2nd App. Div.) granted a new trial; plaintiff given leave to amend pleadings.

Appeal by the plaintiff from a judgment of HON. MR. JUSTICE MIDDLETON, 25 O. W. R. 262.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

C. M. Garvey, for the plaintiff, appellant.

Angus MacMurchy, for the defendant railway company, respondents.

Their Lordships' judgment was delivered by

HON. SIR WM. MULOCK, C.J.Ex. (v.v.):—The question of defective system, as before the Court, failed on account of the pleadings, and the question is as to whether the Court should direct a new trial on terms.

We have come to the conclusion that there should be a new trial, and the costs of the trial, and of this motion, will be costs to the defendants in any event.

The plaintiff is granted leave to amend as he may be advised.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. FEBRUARY 26TH, 1914.

LEONARD v. CUSHING.

5 O. W. N. 952.

Writ of Summons—Service out of Jurisdiction—Breach of Contract —Non-Payment for Goods Sold — Place of Payment—Duty of Debtor to Seek out Creditor—Con. Rule 25 (e)—Appeal.

LENNOX, J., 25 O. W. R. 471; 5 O. W. N. 453, *held*, that where certain goods were sold by an Ontario firm, delivery to be made at Edmonton and no provision was made as to the place of payment, that non-payment of the purchase-price was a breach of the contract occurring in Ontario, as it was the debtor's duty to seek out his creditor and make payment, and that therefore issuance of a writ for service out of the jurisdiction was proper.

Comber v. *Leyland*, [1898] A. C. 524, discussed.

Judgment of HOLMESTED, Registrar, reversed.

SUP. CT. ONT. (1st App. Div.) affirmed above judgment.

Appeal by the defendants from an order of HON. MR. JUSTICE LENNOX, 25 O. W. R. 471.

Appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WILLIAM MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

Glyn Osler for the defendants, appellants.

Fetherston Aylesworth for the plaintiffs, respondents.

Their Lordships' judgment was delivered by

HON. SIR WILLIAM MEREDITH, C.J.O. (v.v.):—We think it is not necessary to hear the respondent's counsel.

Mr. Osler has presented his case with ability and said everything that can be said in support of it. I do not understand him to contend that the legal effect of the agreement was not that the subsequent payments were to be made at the place of business of the respondents in London.

It is conceded, although Mr. Osler says the rule works injustice, that it is an implied term of a contract such as this, that the debtor is to seek his creditor; but it is said that the authorities shew that the implication of such a term may be displaced by the course of dealing between the contracting parties.

I am unable to agree with the contention of Mr. Osler as to the force which he would attach to the various terms of the agreement, which he says indicate that the locus of the contract was fixed in the province of Alberta. And I do not think that this course of dealing displaces the implication which I have mentioned.

The first proposal was that the delivery of the machinery was to be f.o.b., London. That was objected to by the appellant, and the delivery was arranged to be f.o.b., Edmonton: that I think only indicates that the appellant was unwilling to take the risk of any loss happening to the machinery, which was being manufactured for him in London, in the course of its transportation to him at Edmonton.

In order to shew that the course of dealing was inconsistent with its having been intended that the payments should be made at London, reliance was placed on the fact that a draft for $1,000, on account of the purchase price, was drawn by the respondent at London, on the appellant, and accepted payable at Edmonton: and the fact that another payment was made by cheque of the appellant drawn on his bankers in Alberta and sent by him by mail to the respondents at London.

It is probably not open to question that the respondents could not have sued on the draft in an Ontario Court, but as far as the cheque is concerned the course of dealing makes against the contention of Mr. Osler. The cheque was sent by the appellant by mail to the respondents at London, and was received by them there. We cannot shut our eyes as to what the ordinary course of business in such cases is. The cheque was accepted by the respondents and was then forwarded to the Bank upon which it was drawn, for payment.

There can be no doubt that if the respondents had delayed the presentation of the cheque, and the Bank had failed, the loss would have been theirs.

It seems to me it is just the same as if the appellant had taken the money in his own hands to respondents at London.

Mr. Osler also attacked the soundness of the distinction between the wording of our rule and the corresponding English rule, and invited us to overrule that case.

Even if this contention were entitled to prevail it would have no bearing upon this case, because so far I have treated the obligation of the appellant as if the rule were the same as the English rule, and the English cases were applicable to the full extent. But I desire to say that that decision was come to by a Divisional Court several years ago. It has been accepted as settling the practice in this province ever since, and has been followed in numerous cases; and it would be wrong, even if we doubted the correctness of the decision, to disturb the settled practice. One of the most unfortunate things is to have an unstable practice; better a settled practice, even though, in some cases, it may result in hardship.

I think the appeal must be dismissed.

Costs in the cause to the respondent.

The time for appearance will be extended for thirty days.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. MARCH 11TH, 1914.

HOPKINS v. CANADIAN NATIONAL EXHIBITION ASSOCIATION.

6 O. W. N. 71.

Contract—Exhibition "Concession"—Exclusive Right to Sell "Ice Cream Cones"—Dispute as to—Decision of Manager—Clause in Contract Making Manager Sole Interpreter of Same—Binding Force of—Good Faith—Domestic Forum—Action for Damages—Dismissal of.

LATCHFORD, J., 25 O. W. R. 557; 5 O. W. N. 639, *held*, that where by a contract it is provided that all questions of interpretation shall be decided by A. and the latter in so deciding acts reasonably and in good faith, his interpretation will not be reviewed by the Courts.

McRae v. *Marshall*, 19 S. C. R. 10, approved.

SUP. CT. ONT. (2nd App. Div.) affirmed above judgment.

Appeal by the plaintiff from a judgment of HON. MR. JUSTICE LATCHFORD, 25 O. W. R. 557.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

R. U. McPherson, for the appellant.

G. R. Geary, K.C., and Irving S. Fairty, for the defendants.

THEIR LORDSHIPS (v.v.), dismissed the appeal with costs.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. MARCH 5TH, 1914.

MERCANTILE TRUST v. STEEL CO. OF CANADA, LTD., & GRAND TRUNK RW. CO.

6 O. W. N. 1.

Negligence—Railway — Operation of Cars on Siding—Negligence of Those in Charge of Cars—Damages—Apportionment—Allowance for Maintenance.

MIDDLETON, J., 25 O. W. R. 272; 5 O. W. N. 307, in an action for damages for the death of a foreman employed by the defendant steel company by reason of the operation of cars upon a siding upon the property of such company, found the railway company guilty of negligence in connection with such operation and awarded the plaintiff $2,500 damages.

SUP. CT. ONT. (2nd App. Div.) affirmed above judgment.

Appeal by the defendants, the Grand Trunk Rw. Co., from a judgment of HON. MR. JUSTICE MIDDLETON, 25 O. W. R. 272.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

E. L. McCarthy, K.C., for the appellants.

W. S. McBrayne, for the plaintiffs, respondents.

THEIR LORDSHIPS (v.v.) dismissed the appeal with costs.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. MARCH 12TH, 1914.

RE JONES AND TUCKERSMITH.

6 O. W. N. 71.

Way—Highway—By-law Closing Same—Dedication—No Acceptance by Municipality—Surveys Act, 1 Geo. V. c. 42, s. 44—Registry Act, 10 Edw. VII. c. 60, s. 44, s.-s. 6—Quashing of By-law.

MIDDLETON, J., 25 O. W. R. 680; 5 O. W. N. 759, *held*, that where a highway had been dedicated but never accepted by the municipality the latter could not by by-law assume to close the same and sell it.

SUP. CT. ONT. (2nd App. Div.) set aside the order quashing the by-law, and referred the matters in question upon the appeal and motion to quash to the Judge assigned for the trial of the action of *Jones* v. *Township of Tuckersmith*, and directed that the Judge should not be bound by the decision of MIDDLETON, J., upon the motion to quash. Costs of the motion to quash and of this appeal to be in the discretion of the trial Judge.

Appeal by the Township of Tuckersmith, from an order of HON. MR. JUSTICE MIDDLETON, 25 O. W. R. 680.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

R. S. Robertson and R. S. Hays, for the appellants.

W. Proudfoot, K.C., for certain ratepayers, the respondents.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. NOVEMBER 25TH, 1913.

BROWN v. THOMPSON.

5 O. W. N. 351.

Statute of Limitations—Charge on Land—Power of Attorney—Laches —Forty Years' Delay.

LENNOX, J., 24 O. W. R. 967; 5 O. W. N. 19, dismissed an action brought upon a power of attorney alleged to form a charge on certain lands in favour of plaintiff's assignor, where no attempt had been made to enforce the alleged charge for over 40 years.

SUP. CT. ONT. (2nd App. Div.) affirmed above judgment.

Appeal by the plaintiff from a judgment of HON. MR. JUSTICE LENNOX, 24 O. W. R. 967.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

F. D. Davis, for the plaintiff.

No one appeared for the defendant.

THEIR LORDSHIPS (v.v.) dismissed the appeal without costs.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. NOVEMBER 21ST, 1913.

JEWELL v. DORAN.

4 O. W. N. 1518; 5 O. W. N. 303.

Conversion of Chattels—Return or Payment of Value—Reference—Costs—Appeal.

Action to recover from defendants a possession of certain goods and chattels of which he had been wrongfully deprived, to recover $5,000 their value, or in the alternative, damages for conversion.

BRITTON, J., held, that plaintiff was entitled to return of certain goods and chattels or their value and directed a reference to the Local Master to enquire, ascertain, and report with respect to the same.

SUP. CT. ONT. (1st App. Div.) varied above judgment holding that defendants were guilty of conversion and liable to pay plaintiff the value of the goods so converted. Reference to Master to ascertain amount due.

SUP. CT. CAN. refused leave to appeal 25 O. W. R. 804.

Appeal by the plaintiff from the following judgment of HON. MR. JUSTICE BRITTON.

P. T. Rowland, for the plaintiff.

V. McNamara, for the defendants.

HIS LORDSHIP in a written opinion, summarized the facts, made certain findings thereon in favour of the plaintiff, and directed that judgment should be entered for the plaintiff, for the return to him by the defendants of the furniture, furnishings, and chattels belonging to the plaintiff, in the possession of the defendants, or for payment of their value; and for a reference to the Local Master at Sault Ste. Marie to inquire, ascertain, and report

what furniture, furnishings, and chattels belonging to the plaintiff were taken possession of by the defendants, or any of them, and what of said property is now in the possession of the defendants, or any of them; and what is the present value of all such property of the plaintiff as is in possession of the defendants or any of them; and also the amount of loss, if any, to the plaintiff by reason of any of the property being lost, damaged, or destroyed while in the possession of the defendants, where such loss has not been occasioned by ordinary wear and tear. Further directions and costs reserved.

The appeal of the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WILLIAM MEREDITH, C.J.O., HON. MR. JUSTICE MAGEE, HON. MR. JUSTICE HODGINS, and HON. MR. JUSTICE SUTHERLAND.

W. M. Douglas, K.C., for the plaintiff.

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

Their Lordships' judgment was delivered by

HON. SIR WILLIAM MEREDITH, C.J.O.:—Judgment will be vacated declaring that the defendant is guilty of a conversion on the 31st December, 1911, of the articles mentioned in the list attached to the lease, except those stated to be missing, and except the cuspidor and omnibus; and that the defendant is liable to pay to the plaintiff for the then value of the articles, with interest from 31st December, 1911.

Reference as to the value to the local Master at the Sault.

The respondent to pay the costs of the appeal.

Judgment not to be enforced against the defendant Mackie except as to costs up to the present time.

Costs of the action up to, and including, judgment, to be paid by the defendants.

Further directions, and question of subsequent costs reserved until after the report.

Defendants were refused leave to appeal to the Supreme Court of Canada, 25 O. W. R. 804.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. NOVEMBER 11TH, 1913.

REX v. HAMILTON.

5 O. W. N. 265.

Municipal Corporations—County By-law Regulating Pedlars—Offence on Boundary Road—No Jurisdiction over—3 & 4 Geo. V. c. 43, s. 433—Conviction Quashed.

KELLY, J., 25 O. W. R. 33; 5 O. W. N. 58, *held*, that a county by-law regulating the peddling of goods did not apply to a boundary road between one county and another, and that 3 and 4 Geo. V. c. 43, s. 433, did not confer such jurisdiction.

Conviction quashed with costs, protection order to magistrate.

SUP. CT. ONT. (2nd App. Div.), affirmed above judgment.

Appeal by Albert Whiteside, the informant, from the order of HON. MR. JUSTICE KELLY, 25 O. W. R. 33.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

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

J. G. Stanbury, for the defendant.

THEIR LORDSHIPS (v.v.) dismissed the appeal with costs.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. NOVEMBER 24TH, 1913.

RE STANDARD COBALT MINES LTD.

5 O. W. N. 351.

Company—Winding-up—Claim on Assets—Assignments—Evidence—Finding of Referee—Notice of Adjudication.

FALCONBRIDGE, C.J.K.B., 25 O. W. R. 103; 5 O. W. N. 144, dismissed an appeal from a report of the Official Referee allowing a claim in the winding-up matter.

SUP. CT. ONT. (2nd App. Div.), affirmed above judgment.

Appeal by the Bailey Cobalt Mines Limited from an order of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., 25 O. W. R. 103.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR. WM. MULOCK, C.J.Ex., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

J. Grayson Smith, for the appellants.

W. R. Smyth, K.C., for the liquidator.

H. E. Rose, K.C., and J. A. McEvoy, for the Security Transfer and Register Company.

S. S. Mills, for H. H. Hitchings.

THEIR LORDSHIPS (v.v.) dismissed the appeal with costs.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. NOVEMBER 18TH, 1913.

UNITED NICKEL COPPER CO. v. DOMINION NICKEL COPPER CO.

5 O. W. N. 301.

Contract—Mining Location — Exclusive License — Grant by Four Joint Owners out of Six—Rescission of Agreement—Evidence—Counterclaim—Reference—Costs.

KELLY, J., 24 O. W. R. 462; 4 O. W. N. 1132. *held*, that where a mining property was owned by six owners jointly, four of them could not grant an exclusive license to work it, and that in any case the agreement granting such license had been subsequently terminated by the parties.

SUT. CT. ONT. (1st App. Div.) affirmed above judgment.

Appeal by the plaintiffs from a judgment of HON. MR. JUSTICE KELLY, 24 O. W. R. 462.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

J. T. White, for the plaintiffs, appellants.

R. McKay, K.C., for the defendants, respondents.

THEIR LORDSHIPS (v.v.) dismissed the appeal with costs.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. NOVEMBER 13TH, 1913.

ST. CLAIR v. STAIR.

5 O. W. N. 269.

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SUP. CT. ONT. (2nd. App. Div.), affirmed above judgment.

Appeal by the plaintiff from an order of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., 24 O. W. R. 981.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

S. H. Bradford, K.C., for the plaintiff.

R. McKay, K.C., and A. R. Hassard, for the defendants.

THEIR LORDSHIPS (v.v.) dismissed the appeal with costs.

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Pension fund — *Bank Act, R. S. C. (1906), c. 29, s. 18 (2) — Inchoate scheme — Claim on assets of bank — Money raised by assessment of shareholders for "Double Liability"—Charitable trusts—Order of Referee disallowing claim—Appeal—Costs.*]—Boyd, C., *held*, that the officers' pension fund of the defendant Ontario Bank should go to the relief of the shareholders under double liability. That the officers' pension fund was an inchoate scheme, not a charitable trust. *Re Ontario Bank (Pension Fund)* (1913), 25 O. W. R. 99; 5 O. W. N. 134.

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Agreement to leave property by will—*Enforcement by beneficiaries not parties to agreement—Death of promisor intestate — Evidence — Corroboration—Interest—Costs—Infants.*] — Britton, J., *held*, that an agreement for valuable consideration with A to leave A's children certain property by will was capable of enforcement by the said children against the estate of the promisor. *McArthur* v. *McLean* (1913), 25 O. W. R. 465; 5 O. W. N. 447.

Building contract—*Action by contractor—Location of building — Duty as to—Mistake by contractor — Power of clerk of works to bind employers—Certificate of architect not obtained—Condition precedent — Action premature—No evidence of mala fides on part of architect—Work not performed to satisfaction of owners—Appeal—Costs.*]—Kelly, J., 24 O. W. R. 133, dismissed an action by contractors against the owners of certain buildings and the architect thereof, for the price of certain excavations and concrete work done for the said buildings upon the ground that as the contract provided for payment to be made upon the certificate of the architect, which had not been obtained, and as no collusion or improper motives had been shewn to have actuated the latter, the action was premature.—"The power of a clerk of works is only negative, his power being only to disapprove of material and work, and not to bind the owner by approving of them."—Sup. Ct. Ont. (1st App. Div.) *held*, that as the work had not been done strictly according to the plans and specifications of the architect and to his satisfaction, plaintiff could not recover.—Appeal dismissed with costs if respondents pay for extras ordered verbally, otherwise without costs. *Vanderwater* v. *Marsh* (1913), 25 O. W. R. 178; 5 O. W. N. 213.

Building contract—*School building—Penalty clause — Primary default of trustees and architect — Acquiescence in delay—Damages — Teacher's salary — Change in doors—Default of contractor — Architect's certificate — Interest — Costs.*]—Middleton, J., *held*, that a penalty clause in a contract for the erection of a school building could not be enforced where, owing to the dilatoriness of the officials of the School Board and their architect, the contractor was precluded from completing his contract within the time stipulated; nor owing to the above circumstances could damages for the delay be recovered. *Brown* v. *Banantyne*, 21 W. L. R. 827, referred to. *Edwards* v. *Public School Board S. S. Oxford* (1913), 25 O. W. R. 437; 5 O. W. N. 537.

Construction of bridge for municipality—*Alleged delay of contractor—Attempted dismissal of—Validity of—Requirements—Time for exercising forfeiture clause — Strict construction of—Penalty clause — Time not essence — Breach of contract — Acquiescence — Quantum meruit—Accounts—Evidence.*]—Lennox, J., *held*, that a municipal corporation had no right to dismiss a contractor from work undertaken under a contract or because of alleged delay in proceeding when such delay was causesd by the default of the corporation.—*Lodder* v. *Slowey*, [1904] A. C. 442, and other cases referred to.—That time is not of the essence of the contract where the contract reserves a penalty.—*Lamprell* v. *Bellericay Union*, 3 Ex. 283, followed.—Time within which a clause of forfeiture can be exercised discussed.—*Smith* v. *Gordon*, 30 U. C. C. P. 553, referred to. *Beck* v. *York* (1913), 25 O. W. R. 730; 5 O. W. N. 836.

Exclusive agency for sale of cement for limited period—*Breach by defendant — Evidence — Damages—Profits—Reference.*]—Lennox, J., gave judgment for plaintiff for damages with a reference in an action for breach of contract under which he was to be employed as the sole selling agent of defendant company for a period of five years. *Rogers* v. *National Portland Cement Co.* (1913), 25 O. W. R. 298; 5 O. W. N. 349.

Exhibition "concession" — *Exclusive right to sell "ice cream cones"—Dispute as to — Decision of manager—Clause in contract making manager sole interpreter of same—Binding force of—Good faith—Domestic forum—Action for damages—Dismissal of.*]—Latchford, J., 25 O. W. R. 577; 5 O. W. N. 639, *held*, that where by a contract it is provided that all questions of interpretation shall be decided by A, and the latter in so deciding acts reasonably and in good faith, his interpretation will not be reviewed by the Courts.—*McRae* v. *Marshall*, 19 S. C. R. 10, approved. Sup.

Ct. Ont. (2nd App. Div.) affirmed above judgment. *Hopkins* v. *Canadian National Exh. Assoc.* (1914), 25 O. W. R. 942; 6 O. W. N. 71.

Guarantee — *Goods supplied railway company—Guarantee of two directors of company—Alleged variation in amount of contract — Knowledge of defendants — Variation contemplated by contract — Appeal.*]—Kelly, J., 24 O. W. R. 850, gave judgment for plaintiffs against defendant company for the price of certain material supplied for railway construction and against the two individual defendants, directors of defendant company, upon a guarantee executed by them, holding that the fact that the latter figures of the plaintiffs for a complete job exceeded their earlier figures when the data upon which they were estimating was admittedly incomplete and subject to revision, did not release the guarantors. —Sup. Ct. Ont. (1st App. Div.) dismissed appeal with costs. *Allen* v. *Grand Valley Rw. Co.* (1913), 25 O. W. R. 222; 5 O. W. N. 197, 239.

Opening of highway — *Agreement between adjoining owners — Refusal of municipality to accept—Agreement at end —No cloud on title.*] — Middleton, J., *held*, that where owners of adjoining lands agreed with each other to open up a street across the end of their lands and the municipal corporation in which the said lands were situate refused to accept the same, the agreement was at an end and constituted no cloud upon the title of either owner. *Pigott* v. *Bell* (1913), 25 O. W. R. 265; 5 O. W. N. 314.

Parol agreement between father and son—*Care of farm—Son to be conveyed same at death of survivor of parents—Evidence — Statute of Frauds — —Part performance—Acceptance and fulfilment of obligations under contract— Contemporaneous death of parents — Duty of personal representative.*]—Middleton, J., *held*, that there was sufficient part performance of a parol agreement between a father and a son by which the latter was to be conveyed a farm from the former in consideration of his living thereon and caring for the same properly and paying therefor an annual rental of $150 during the joint lives of his father and mother, where the son had returned from the city, taken up work on the farm and fulfilled the obligations of the agreement until the death of his parents. *Maddison* v. *Alderson*, 8 A. C. 467, distinguished. *Wilson* v. *Cameron* (1913), 25 O. W. R. 216; 5 O. W. N. 234.

Penalty—*Liquidated damages—Mortgage—Counterclaim — Costs—Set-off.*] — Falconbridge, C.J.K.B., allowed plaintiff $250 damages in an action upon a mortgage contract. *McLeod* v. *Rorey* (1913), 25 O. W. R. 701; 5 O. W. N. 784.

Principal and agent—*Moneys due by agent—Terms of contract—Evidence— Counterclaim—Statute of Frauds—Leave to amend by setting up on appeal—Discretion of Court—Memorandum in writing—Oral assent to alterations—Reference—Costs.*] — Falconbridge, C.J.K.B., (24 O. W. R. 149) gave plaintiffs judgment for $1,447.72 moneys had and received by defendants as agents for plaintiffs, but found in defendants' favour as to a counterclaim set up for damages on account of plaintiff's alleged wrongful acts and directed a reference to ascertain the amount of such damages.—Costs of action to plaintiffs, of counterclaim to defendants.—Sup. Ct. Ont. (1st App. Div.) refused plaintiffs leave to set up the Statute of Frauds on appeal as a defence to the counterclaim, holding that the allowance of the amendment was within the discretion of the Court.—*Sales* v. *Lake Erie & Detroit River Rw. Co.*, 17 P. R. 224, followed. — *Semble*, that a draft agreement sent by plaintiffs to defendants and altered by the latter, to which alterations plaintiffs gave their oral assent, was in any case a sufficient memorandum in writing to take the case out of the operation of the Statute of Frauds.—Appeal of plaintiffs from judgment at trial dismissed with costs. *Canadian Lake Transportation Co* v. *Browne* (1913), 25 O. W. R. 365; 5 O. W. N. 376.

Procuring breach of—*Action for— Police Magistrate acting as solicitor— Advice to landlord—Eviction of tenant— Letter to tenant—Dual capacity — Lack of malice—Findings of jury—Evidence— Improper conduct — Costs.*] — Action against defendant, police magistrate of Hamilton, who also practised as a solicitor, for wrongfully inducing or aiding in the plaintiff's eviction as tenant from premises demised to him. Defendant on being consulted by plaintiff's landlord as to the manner of evicting him for non-payment of rent, wrote plaintiff ordering him to leave and threatening to assist his landlord in forcibly ejecting him if such orders were not obeyed. As a matter of fact plaintiff was not legally in arrears but nevertheless his landlord attempted unsuccessfully to evict him. — Middleton, J., *held*, that defendant's act was not a procurement of breach of contract as it was disinterested advice and

not interested inducement.—Action dismissed without costs. *Fritz* v. *Jelfs*, (1913), 25 O. W. R. 344; 5 O. W. N. 416.

Purchase of hay—*Delivery—Purchaser's duty to notify vendor of his readiness to receive—Counterclaim—Account—Appeal—Costs.*]—Sup. Ct. Ont. (2nd App. Div.) varied judgment of Co. Ct. Welland by reducing the damage awarded defendant upon his counterclaim by $50, proven to have been paid by plaintiff and as to which he was not given credit at the trial. *Gordon* v. *Gowling* (1913), 25 O. W. R. 276; 5 O. W. N. 269.

Specific performance — *Exchange of shares of one company for another—Settlement of former action—Shares of both companies worthless—Nominal damages—Costs.*]—In an action for specific performance of an agreement to exchange the shares of one company for those of another to be formed, where the latter company had never been formed and the shares of the former company were worthless.—Middleton, J., refused specific performance as manifestly impossible and dismissed the action without costs, holding that the plaintiff had suffered no damage. *Tinsley* v. *Schacht Motor Car Co.* (1913), 25 O. W. R. 517; 5 O. W. N. 547.

Work and labour—*Manufacture of lumber—Quantity—Voluntary bonus—Novation—Evidence—Counterclaim—Trespass.*]—Lennox, J., in an action for a balance due for work alleged to have been done by plaintiffs for defendants under a lumbering contract, gave judgment for the plaintiffs for $1,426 55 with costs. *Orton* v. *Highland Lumber Co.* (1913), 25 O. W. R. 378; 5 O. W. N. 438.

CONVERSION.

Chattels — *Return or payment of value—Reference — Costs—Appeal.*] — Action to recover from defendants a possession of certain goods and chattels of which he had been wrongfully deprived, to recover $5,000 their value, or in the alternative, damages for conversion. — Britton, J., *held*, that plaintiff was entitled to return of certain goods and chattels or their value and directed a reference to the Local Master to enquire, ascertain, and report with respect to the same.—Sup. Ct. Ont. (1st App. Div.) varied above judgment holding that defendants were guilty of conversion and liable to pay plaintiff the value of the goods so converted. Reference to Master to ascertain amount due.—Sup. Ct. Can. refused leave to appeal, 25 O. W. R. 804. *Jewell* v. *Doran* (1913), 25 O. W. R. 945; 4 O. W. N. 518; 5 O. W. N. 303.

Finding of jewelry by mill-hand in rubbish—*Ownership of.*]—Sup. Ct. Ont. (2nd App. Div.) dismissed an action brought by plaintiff, a mill-hand, against defendant, another mill-hand, for conversion of certain jewelry found in old papers they were sorting, holding that plaintiff had no title either as owner or finder. *Buell* v. *Foley* (1913), 25 O. W. R. 177.

COSTS.

Conflict between Rules and Statute — *Supremacy of former—Witness fees—Surveyors—Rules of 1913—Taxation—Estoppel—Appeal.*] — Middleton, J., *held*, that where there was a conflict as to the quantum of witness fees between the Rules and a statute, the former governed.—That where a party submitted a bill of costs based on the new tariff and had the same taxed, he could not afterwards seek to have the taxation reopened and all the items prior to Sept. 1st, 1913, taxed upon the old scale. *Jolicour* v. *Cornwall* (1913), 25 O. W. R. 524; 5 O. W. N. 597.

Scale of — *Claim within supreme Court jurisdiction—Set-off not pleaded or admitted—Supreme Court scale proper scale.*] — Latchford, J., *held*, that where a set-off exists to a plaintiff's claim which would bring the same within the County Court jurisdiction and the same is not pleaded or admitted, the action is one within the competence of the Supreme Court.—*Caldwell* v. *Hughes*, 24 O. W. R. 498, referred to.—Judgment of Local Master at Chatham reversed. *Everly* v. *Dunkley* (1913), 25 O. W. R. 29; 5 O. W. N. 65.

Security for—*Defamation—9 Edw. VII. c. 40, s. 19—Con. Rule 373 (g)—Worthless plaintiff.*] — Cameron, Official Referee, ordered the plaintiff to give security for costs in an action for defamation under 9 Edw. VII. c. 40, s. 19, and Con. Rule 373 (g). *Cook* v. *Cook* (1913), 25 O. W. R. 25; 5 O. W. N. 52.

Security for — *Default in giving—Dismissal of action — Reinstatement — Discretion—Terms.*]—Lennox, J., ordered that an action dismissed for want of

compliance with an order for security for costs be reinstated upon security being given and the costs of the order and the present motion being paid. *Blanco* v. *McMillan* (1913), 25 O. W. R. 197; 5 O. W. N. 196.

Security for — *Ordered in habeas corpus proceedings — Order made after judgment where appeal brought — Past costs may be included — Dilatoriness of applicant — Discretion to refuse—Quantum of—Terms.*] — Magee, J.A., *held*, that security for costs can be ordered in habeas corpus proceedings.—*Re Giroux*, 2 O.W. R. 385, followed.—That where a defendant has been successful at the hearing security can be applied for after judgment. — *Hately* v. *Merchant's Despatch Co.*, 12 A. R. 640, referred to.—That security may cover past as well as future costs. — *Brocklebank* v. *King's Lynn S.S. Co.*, 3 C. P. D. 365, and *Massey* v. *Allen*, 12 Ch. D. 807, followed. —Security for past costs refused on account of dilatoriness in applying and plaintiff required to pay $60 into Court or give a bond for $120 as security for future costs. *Re Kenna* (1913), 25 O. W. R. 35; 5 O. W. N. 40.

COURTS.

County Court jurisdiction — *Amount claimed beyond ordinary jurisdiction — No dispute by defendant—10 Edw. VII., c. 30, s. 22, ss. 2—3 & 4 Geo. V. c. 18, s. 15 — Unlimited jurisdiction conferred upon County Court by operation of section — Action against municipal corporation—Ice and snow on sidewalk—Quantum of damages—Appeal —Increase of same by Appellate Court.*] —Sup. Ct. Ont. (1st App. Div.) *held*, that 10 Edw. VII., c. 30, s. 22, ss. 2, as amended by 3 and 4 Geo. V. c. 18, s. 15, confers upon County Courts jurisdiction to any amount named in the statement of claim, where the defendant does not dispute the jurisdiction either in his appearance or statement of defence. — Judgment of Winchester, Co.J., varied by increasing the damages awarded plaintiff from $500 to $750, with costs. *Pearce* v. *Toronto* (1913), 25 O. W. R. 321.

Division Court—*Jurisdiction—Division Courts Act, 10 Edw. VII. c. 32, s. 77—Action on drafts—Interest added by way of damages and not debt—Amount of claim—Place of payment — Place of acceptance — Prohibition — Costs.*] — Middleton, J., *held*, that sec. 7 of the Division Courts Act, 10 Edw. VII. c. 32, does not confer jurisdiction upon the Court of the place of payment where the principal amount does not exceed $100, merely because interest may be allowed by way of damages upon the overdue payment. — *Brazill* v. *Johns*, 24 O. R. 209, followed.—*Re McCallum* v. *Gracey*, 10 P. R. 514, distinguished. *Re American Standard Jewellery Co.* v. *Gorth* (1913), 25 O. W. R. 525; 5 O. W. N. 600.

Division Courts — *Motion for prohibition—Lack of jurisdiction — Motion premature — No motion for transfer made—Question not dealt with in Division Court — Mere irregularity—Dismissal of motion.*]—Middleton, J., *held*, that a motion to prohibit a Division Court upon the ground of absence of jurisdiction should not be made until a motion in the Division Court for a transfer has been made and refused or until the question of jurisdiction has been dealt with at the trial. — *Watson* v. *Wolverton*, 22 O. R. 586, and *Hill* v. *Hicks*, 28 O. R. 390, followed.— That prohibition will not lie for a mere irregularity in the proceedings in a Division Court. *Re Walker* v. *Wilson* (1913), 25 O. W. R. 696; 5 O. W. N. 802.

Division Courts—*Trial in county of plaintiffs' residence — Lack of jurisdiction—Notice disputing — Failure to appear at trial—Judgment and execution— Motion for prohibition — Good defence shewn by material—Order made—Costs.*] —Middleton, J., *held*, that where an action was brought in a Division Court which had not jurisdiction, and defendants, while filing a notice disputing the jurisdiction, did not attend the trial, a judgment being given against them, that an order for prohibition should be granted as the defendants had disclosed in their affidavits a good *primâ facie* defence to the action on the merits. *Canadian Oil Cos.* v. *McConnell*, 27 O. L. R. 549, distinguished. *Re Northern Hardwood Lumber Co. & Shields* (1913), 25 O. W. R. 694; 5 O. W. N. 757.

Jurisdiction—*Claim within Supreme Court jurisdiction — Set-off not pleaded or admitted — Costs — Supreme Court scale proper scale.*]—Latchford, J., *held*, that where a set-off exists to a plaintiff's claim which would bring the same within the County Court jurisdiction and the same is not pleaded or admitted, the action is one within the competence of the Supreme Court.—*Caldwell* v. *Hughes*, 24 O. W. R. 498, referred to.—Judgment of Local Master at Chatham reversed.

Everly v. *Dunkley* (1913), 25 O. W. R. 29; 5 O. W. N. 65.

CRIMINAL LAW.

Application for bail before committal for trial—*Jurisdiction of Judge of Supreme Court — Criminal Code, s. 698 — Remedy of accused on vagrancy charge.*]—Writ of habeas corpus granted and accused admitted to bail on return —Amount of bail fixed at $500 by Middleton, J. *R.* v. *Vincent & Fair* (1913), 25 O. W. R. 104; 5 O. W. N. 141.

Indeterminate sentence — *Industrial Farm — Municipal Act, 1903, sec. 549a—Prisoner confined in Central Prison upon warrant committing him to Industrial Farm — Habeas corpus—Discharge of prisoner ordered.*]—Upon return of a *habeas corpus* addressed to the warden and keeper of the Central Prison, defendant moved for his discharge.—Middleton, J.:—The only authority for the detention of the prisoner produced upon the return of the *habeas corpus*, is the warrant issued by Ellis, acting magistrate, committing this man to an industrial farm for two years' indeterminate sentence under 2 Geo. V. c. 17, s. 34.—In my view this does not authorise incarceration in the Central Prison. Nothing was produced shewing how the prisoner came to be in the custody of the warden.—I therefore order his discharge. *R.* v. *Gray* (1913), 25 O. W. R. 91; 5 O. W. N. 102.

Magistrate's absolute jurisdiction—*Keeping common gaming house.*]—Middleton, J., *held*, that *Rex.* v. *Honan*, 26 O. L. R. 484, is conclusive against the contention that a Magistrate may not proceed to try the accused without giving him an election to go before a jury. *R.* v. *Jung Lee* (1913), 25 O. W. R. 63; 5 O. W. N. 80.

Wilful obstruction of constable—*Keeping common gaming house.*]—Middleton, J., *held*, that the locking of a door does not intend to create a presumption of the intention to prevent or obstruct a constable from attempting to enter premises within sec. 986 Criminal Code. The presumption is created when something active is done, amounting to a wilful obstruction or prevention. *R.* v. *Jung Lee* (1913), 25 O. W. R. 63; 5 O. W. N. 80.

Nuisance—*Motion for leave to prefer an indictment against a municipal corporation — Application to Judge at Assizes — Jurisdiction of magistrate—Preliminary inquiry — Absence of objection to—Provisions of Criminal Code.*]—Meredith, C.J.C.P., *held*, that a Judge should not grant leave to a private prosecutor to prefer an indictment at the assizes against a corporation until the applicant has failed in his efforts to have a preliminary hearing before a magistrate. *Re Schofield & Toronto* (1913), 25 O. W. R. 331; 5 O. W. N. 109.

Procedure—*Conviction for receiving stolen goods — Summary conviction — Criminal Code, ss. 771, 781, 1035—Confusion with sections relative to summary trial of indictable offences—Quashing of conviction in part—Costs.*]—Middleton, J., *held*, that s. 781 of the Criminal Code does not apply to summary convictions but only to the summary trial of indictable offences. *Rex* v. *Frizell* (1913), 25 O. W. R. 697; 5 O. W. N. 801.

Procedure—*Motion to quash—Magistrate's return — Conclusiveness—Supplemental statement by magistrate — Inadmissibility of—Evidence—Judicature Act, 3 and 4 Geo. V. ch. 19, s. 63—Order of protection.*]—Lennox, J., *held*, that the magistrate's return on a motion to quash is conclusive for one party as well as the other and the magistrate cannot supplement it by voluntary statements as to what occurred.—*Regina* v. *Strachan*, 20 C. P. 182, approved. *Rex* v. *Davey* (1913), 25 O. W. R. 478; 5 O. W. N. 464.

DAMAGES.

Fraud and misrepresentation — *Rescission of sale of farm — Damages suffered by purchaser — Loss of income from investment — Allowance of—Quantum — Occupation rent—Appeal—Costs.*]—On a reference to the Local Master to assess the damages suffered by plaintiff by reason of misrepresentations leading to the rescission of a contract for the purchase of certain farm land, the Master found the damages at $9.041.38 and allowed defendant for plaintiff's use and occupation $1,425.—Middleton, J., 25 O. W. R. 93) varied above report, reducing damages to $458.05 and allowing for rent, use and occupation $2,000. Plaintiff to have right to further reference as to any increased value of land by reason of matters included under the head of outlays. —*Chaplin* v. *Hicks*, [1911] 2 K. B. 786 and *Goodall* v. *Clarke*, 44 S. C. R. 284, discussed.—*Held*, that an allowance for loss of interest upon capital withdrawn from a 10 per cent. investment to put

into the purchase of the land in question improper as being too remote a damage. —Sup. Ct. Ont. (1st App. Div.) *held*, that the Master was correct in principle and that the loss of interest as above could be recovered but reduced the amount of the damages from $9,041.38 to $3,541.38 and restored the Master's findings as to occupation rent.—Costs of appeal to plaintiff. *Stocks* v. *Boulter* (1913), 25 O. W. R. 839; 5 O. W. N. 863.

DEED.

Rectification of—*Action for possession—Surplusage — Possession — Agreement for definite quantity—Rectification refused—Appeal.*]—Sup. Ct. Ont. (2nd App. Div.) *held*, that in order that a deed may be reformed by the Court there must be at least two things established; namely, an agreement differing from the document, well proved by such evidence as leaves no reasonable doubt as to the existence and terms of such agreement; and a mutual mistake of the parties by reason of which such agreement was not properly expressed by the deed.—*McNeill* v. *Haines*, 17 O. R. 479, followed.—Judgment of Vance, Co.C.J., reversed. *Smith* v. *Raney* (1913), 25 O. W. R. 888; 6 O. W. N. 55.

Voluntary deed of trust — *Undue influence—Aged woman living alone with adopted daughter—Onus — Evidence—Intervention of solicitor—Duty of—Neglect to perform—Departure from instructions —Necessity for independent professional advice—Lack of understanding of grantor of nature of deed—Declaration setting deed aside—Trustees' remuneration—Reference—Costs.*]—Lennox, J., *held*, that where an aged woman living with her niece, who was also an adopted daughter, made a deed of trust in the niece's favour, the onus was upon the latter to prove that the grantor had had independent professional advice.—That it is not the presence of a solicitor but his advice, which the law requires, and he must give full advice and warning and retire if his advice is not followed.—*Powell* v. *Powell*, [1900] 1 Ch. 243, referred to. That the onus of proof as to capacity and undue influence is not on those attacking a will but on those upholding a voluntary deed. —*Parfit* v. *Lawless*, 2 P. & D. 462, referred to. That it is not enough to shew that the grantor knew what she was doing, it must be shewn that this intention was not produced by undue influence.—*Huguenin* v. *Beasley*, 14 Ves. 300, followed. That apart from the question of undue influence the defendants had not proven that the grantor understood the nature and quality of her act, and in the case of voluntary gifts the onus is on the grantees to do this. *Cooke* v. *Lamotte*, 15 Beav. 234, referred to. Declaration setting aside deed of trust with costs. *Houston* v. *London & Western Trust Co. Limited, and Cook* (1913), 25 O. W. R. 488; 5 O. W. N. 336.

DISCOVERY.

Examination of defendant — *Action to establish partnership—Refusal to answer—Motion to commit.*]—Postponement of discovery until right to participate in an undertaking established. — *Beddell* v. *Ryckman*, 5 O. L. R. 670, followed. *Haynes* v. *Vansickle* (1913), 25 O. W. R. 526; 5 O. W. N. 553.

Examination of officer of corporation — *Motion for leave to examine second officer—Full discovery already had—Discovery not to be had of material witnesses—Con. Rule 327.*]—Middleton, J., *held*, that an examination of a second officer of a corporation for discovery should not be permitted where the first officer examined has given adequate discovery of the case the examining party will have to meet. Judgment of Holmested, Senior Registrar, reversed. *Lange* v. *Toronto & York Radial Rw. Co.* (1913), 25 O. W. R. 27; 5 O. W. N. 64.

Further and better affidavit on production—*Motion for—Relevance—Evidence — Accidental — Inspection of privileged documents—Secondary Evidence of—Completion of schedules—Further discovery—Necessity of—Order for —Costs.*]—Middleton, J., *held*, that where one of the main questions in issue in an action was as to the existence or non-existence of an alleged parol agreement, correspondence between the plaintiff and his solicitor about the time of the alleged making of the same was material as supplying cogent evidence as to the existence of such agreement. That where by the inadvertence of the solicitor inspection was granted of certain correspondence for which privilege was claimed as being confidential communications between solicitor and client, and the inspecting party sought to establish by secondary evidence that privilege was improperly claimed, the Court on an interlocutory motion should not go behind the claim of privilege made in the affidavit. *Calcroft* v. *Guest*, [1898] 1 Q. B. 759, referred to. That where privilege is claimed the document for which it is

claimed should be fully scheduled. *Delap* v. *Can. Pac. Rw.* (1913), 25 O. W. R. 587; 5 O. W. N. 667.

Further and better affidavit on production — *Privilege—Grounds of—To be set out specifically—Dates and authors of reports — Not compulsory to give—Sufficient identification necessary—Appeal—Leave to granted.*]—Kelly, J., gave plaintiff leave to appeal from judgment of Falconbridge, C.J.K.B., 24 O. W. R. 981, 4 O. W. N. 1581, allowing appeal of defendants, "The Jack Canuck Publishing Company, Limited," from judgment of the Master-in-Chambers, 24 O. W. R. 707; 4 O. W. N. 1437, ordering the said defendant to file a further and better affidavit on production.—*Swaisland* v. *Grand Trunk Rw. Co.*, 3 O. W. N. 960, considered. *St. Clair* v. *Stair* (1913), 25 O. W. R. 40; 5 O. W. N. 28.

Privilege—*Solicitor and client—Attempt to destroy privilege—Allegation of fraudulent conspiracy between solicitor and client — Motion to amend statement of defence—Dismissal of.*]—Middleton, J., refused to allow a statement of defence to be amended by adding an allegation that the action was brought in pursuance of a fraudulent scheme between plaintiff and his solicitor, the purposse of such amendment being to obtain discovery of communications between solicitor and client otherwise privileged. *Delap* v. *Canadian Pacific Rw. Co.* (1913), 25 O. W. R. 741; 5 O. W. N. 850.

ELECTIONS.

Local Option by-law—*Action to restrain council from passing—Liquor License Act, s. 143a—Motion for interim injunction — Balance of convenience—Terms—Speedy trial.*] — Middleton, J., granted an interim injunction until the trial restraining a town council from passing a local option by-law where the refusal of the injunction and a consequent passing of such by-law would have prejudiced plaintiff in his action. *Hair* v. *Town of Meaford* (1913), 25 O. W. R. 689; 5 O. W. N. 783.

Local Option by-law — *Motion to quash — Passage within one month of publication — Deputy returning officer strong advocate of by-law — Illiterate voter—Blind voter — Omission to take declaration—Consolidated Municipal Act ss. 171, 204, 338 (2)—Voters' list—Certificate of County Judge as to—Refusal to go behind—Costs.*] — Kelly, J., *held* (24 O. W. R. 489) upon a motion to quash a local option by-law that where no one had been prejudiced thereby, the fact that the by-law had been passed within a month from the first publication thereof, by a few hours only, was not a fatal objection to the same. —*Re Duncan* v. *Midland*, 16 O. L. R. 132 followed, and the fact that one of the Deputy Returning Officer was a strong advocate of the passage of the by-law was not a disqualifying circumstance—That the omission of an illiterate person to take the declaration provided by section 171 of the Municipal Act is a mere irregularity in the mode of taking the vote and does not avoid the same. — *Re Ellis & Renfrew*, 23 O. L. R. 427, followed.—That the certificate of the County Judge as to the correctness of the revised voters' list should not be gone behind and the steps investigated by which he arrived at his conclusions.—*Ryan* v. *Alliston*, 18 O. W. R. 131, followed.—Sup. Ct. Ont. (2nd App. Div.) dismissed appeal with costs. *Re North Gower Local Option By-law* (1913), 25 O. W. R. 224; 5 O. W. N. 249.

Voters' list for Local Option By-law—*Municipal Act, 1913, ss. 265, 266, 267—Revision by County Judge—Scope of—Last revised voters' list—No power to add names of duly qualified persons—Prohibition.*]—Middleton, J., *held*, that under ss. 266 and 267 of the Municipal Act the Judge has no power to add to a voters' list persons qualified to vote whose names are not to be found on the last revised voters' list, his function being solely one of elimination. *Re Brampton Local Option By-law* (1913), 25 O. W. R. 585; 5 O. W. N. 644.

ESTATES.

Dower — *Ascertainment of value of dower rights—Alienation by husband subject to dower—9 Edw. VII. c. 39, s. 23—Subsequent permanent improvements—Rise in value—Income—Capitalization—Report of Local Master on reference—Appeal from—Variation.*]—Middleton, J., *held*, that in estimating the value of a widow's dower where lands have been alienated by her husband subject to her dower rights and subsequent permanent improvements to the lands have been made by the purchaser, the provisions of 9 Edw. VII. c. 39, s. 23, must be strictly followed, so that she is entitled to one-third of the income of the property in its state at the date of alienation, plus any increase in value since, if any, and any permanent improvements made by the

purchaser are therefore to be disregarded. Report of Local Master at St. Thomas varied. *McNally* v. *Anderson* (1913), 25 O. W. R. 661; 5 O. W. N. 751.

EVIDENCE.

Foreign commission—*Action to set aside contract as induced by fraud—Discretion as to granting a commission—Convenience.*]—Holmested, K.C., *held*, that in some few cases there was a discretion in the Court to refuse a foreign commission and that upon the circumstances of this case an application should be refused, upon the score of convenience. Falconbridge, C.J.K.B., dismissed appeal, costs to defendants in any event of the cause. *Stewart* v. *Battery Light Co.* (1913), 25 O. W. R. 189; 5 O. W. N. 195.

Privilege — *Solicitor and client — Discovery—Action to establish will of client—Solicitor named as executor—Representatives of testator—Waiver of privilege by—Costs.*] — Holmested, K.C., *held*, that the solicitor of a deceased testator whose will was being impeached could not refuse to answer questions upon the ground of professional privilege, where he as executor was seeking probate of such will.—*Russell* v. *Jackson*, 9 Hare 387, referred to. *Langworthy* v. *McVicar* (1913), 25 O. W. R. 297; 5 O. W. N. 345.

EXECUTIONS.

Seizure of goods—*Dispute as to ownership of—Purchase by partnership—Partner carrying on separate business under other name—Alleged transfer to—Evidence — Interpleader — Onus — Appeal—Costs.*]—Interpleader issue to determine the ownership of certain moneys, the proceeds of certain goods seized by the Sheriff. The goods in question were sold by plaintiffs to G. & H. carrying on business in partnership. H. also carried on business separately under another firm name and the goods in question were seized under an execution against this latter firm and were claimed by plaintiffs who had secured an execution against the partnership firm. Latchford, J., *held*, that the goods in question had been sold to the partnership firm but had been turned over by G. to H. and had become his property and subject to the executions of the defendants. Sup. Ct. Ont. (1st App. Div.) *held*, that defendants had not satisfied the onus upon them of shewing that the goods had ceased to be the property of the partnership and had become the property of H. Judgment of Latchford, J., reversed and judgment for plaintiffs with costs. *Maple Leaf Milling Co.* v. *Western Canada Flour Mills Co.* (1913), 25 O. W. R. 645; 5 O. W. N. 699.

EXECUTORS AND ADMINISTRATORS.

Action against—*Evidence to establish contract between plaintiff and testator — Corroboration — Laches — Acquiescence — Statute of Limitations — Trust — Company — Shares—Delivery of — Dividends — Appropriation — Waiver —Costs*]—Action against the executors of one Currie, deceased, to compel the transfer to the plaintiff of ten shares of capital stock of the Ford Motor Co., pursuant to an alleged contract between the plaintiff and the deceased, or for damages or other relief. Lennox, J., gave plaintiff judgment declaring him entitled to the 10 shares, holding that plaintiff had established a definite contract. That the Statute of Limitations had no application. That deceased was trustee for plaintiff of these ten shares, they being specific and ear-marked. *McGreggor* v. *Currie Estate* (1913), 25 O. W. R. 58; 5 O. W. N. 90.

Allowance to — *Commission — Reasonable amount—Appeal.*]—Latchford, J., *held*, that the compensation payable to administrators was not necessarily limited to a commission on the amounts received and distributed by them.—*Re McIntyre & London & Western Trusts Co.*, 7 O. W. R. 548, 556, and *Re Hughes*, 14 O. W. R. 630, considered. *Re Godchere Estate* (1913), 25 O. W. R. 570; 5 O. W. N. 625.

Deed—*Conveyance by husband as attorney of grantor—Alteration in power of attorney—Forgery—Authority—Presumption—Death of grantor—Presumption—Expiry of seven-year period—Date of death of wife—Interest of husband—Alleged murder of wife—Evidence—Will of grantor—Revocation by marriage—Alleged bigamous marriage—Evidence—Claim as heir-at-law—Administration not obtained—Outstanding interests—Settlement of action—Costs*]—Lennox, J., *held*, that those who allege death at a particular time must prove it.—*Re Lewes' Trusts*, L. R. 6 Ch. 356, referred to. That administration can be obtained by a party to an action before the case comes for trial, and when granted the administration relates back to the date of the

death.—*Dini* v. *Fauquier*, 8 O. L. R. 712, and *Re Pryse*, [1904] P. 301, followed. *Christina Catherine Hedge* v. *Charles Morrow* (1913), 25 O. W. R. 828; 5 O. W. N. 903.

Sale by estate — *Infants — Approval of official guardian not obtained—Possession by purchaser—Improvements—Sale bona fide and fair—Confirmation by Court — Terms.*] — Falconbridge, C.J.K.B., confirmed a sale made by an estate without the concurrence of the official guardian as required by the Devolution of Estates Act, where the sale was a fair one and the purchaser had entered and made improvements. *Re Ellen McDonald Estate* (1913), 25 O. W. R. 221; 5 O. W. N. 238.

EXPROPRIATION.

Arbitration and award—*Expropriation by municipal corporation—Practical obliteration of lucrative restaurant business—Mode of assessing compensation—Capitalization of net profits incorrect—Special adaptability—Allowance for—Potentiality—Realized possibility not to be allowed—Allowance for business disturbance—Quantum of.*]—Official Arbitrator *held*, that where a restaurant business was "practically obliterated" by expropriation proceedings, the claimant should be allowed full and fair compensation for all the assets of the business and a sum for business disturbance in addition. That as profits of a business are contingent on efficient management and other varying elements it is an incorrect mode of arriving at the compensation due the claimant to capitalize the net demonstrated profits. That the only practical and fair method of assessing compensation is to allow the full commercial value of the various assets of the business, taking fully into account the special adaptability and future potentialities of the land appurtenant thereto. That having regard to the nature of the business and the circumstances of the case three years' profits should be allowed for business disturbance. Appeal by claimants and cross-appeal by contestants from above award is pending.—Ed. *Meyer* v. *Toronto* (1913), 25 O. W. R. 1.

Crown — *Application for warrant of possession—R. S. C. c. 143, s. 21—Acceptance by Crown of rent under a lease—Absence of waiver—Warrant given—One month's respite—Terms.*]—Hodgins, J.A., *held*, that under the circumstances of this case, the acquirement of the fee in certain lands and the acceptance of rent under a lease thereof, after the expropriation of such lands by the Crown, did not constitute a waiver by the Crown of its right to proceed with the expropriation proceedings and to obtain immediate possession from the lessee of such lands.—*McMullen* v. *Vanatto*, 24 O. R. 625, and *Manning* v. *Dever*, 35 U. C. R. 294, referred to. *Re Minister of Public Works* v. *Billinghurst* (1913), 25 O. W. R. 28; 5 O. W. N. 49.

Municipal corporations—*Expropriation by city by-law of outside land for addition to Industrial Farm—"Acquire"—Municipal Act 1913, sec. 6—Special Act, 1 Geo. V. ch. 119, sec. 5—Bona fides—Statutory powers—Exhausting by original purchase—Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (33).*]—Motion by Boyle, owner of certain lands sought to be taken by the city of Toronto, by by-law No. 6353, intituled, "A By-law to Acquire Additional Lands for the Industrial Farm," to quash this by-law. Middleton, J., refused to quash the by-law on the ground that it was not intended that the power should be exhausted by a single exercise, holding that there was no reason to suppose that the by-law was not an absolutely *bona fide* exercise of the municipal powers.—*Re Inglis & Toronto*, 8 O. L. R. 570, distinguished. *Re Boyle and Toronto* (1913), 25 O. W. R. 67; 5 O. W. N. 97.

Railways—*Arbitration and Award—Appeal from award — Capitalization of annual loss incorrect method—Right of Appellate Court to examine evidence—Award sustained on other grounds—Interest—Arbitrators without jurisdiction as to.*]—Sup. Ct. Ont. (1st App. Div.) *held*, that in estimating the damage done a farm by the expropriation of a railway right of way through the same it was improper to arrive at the amount of the damage by capitalizing the estimated net annual loss suffered therefrom. That, however, the Court were entitled to disregard the method adopted by the arbitrators and to examine the evidence to see if the evidence would justify the award on other grounds. That arbitrators under the Railway Act, R S. C. c. 37, s. 192, 199; 8 and 9 Edw. VII. (Dom.) c. 32. s. 3, have no right to deal with the question of interest. Appeal from award dismissed with costs. *Re Ketcheson & Can. North. Ont. Rw. Co.* (1913), 25 O. W. R. 20; 5 O. W. N. 36.

FRAUD AND MISREPRESENTATION.

Action for damages—*Sale of bonds —Dismissal of action.*]—Kelly, J., dismissed actions brought in respect of alleged fraud and misrepresentation upon the sale of certain bonds to the plaintiff from or through the defendant, holding that no fraud or misrepresentation had been proven. *Stroh* v. *Ford*; *Duench* v. *Ford* (1913), 25 O. W. R. 672; 5 O. W. N. 786.

Contract for purchase of interest in invention—*Evidence—Rescission—Amendment of pleadings—Damages.*]—Lennox, J., set aside a contract entered into by plaintiff with defendants upon the ground that it had been induced by misrepresentation and fraud and gave judgment for the plaintiff for the loss sustained by him by reason of such misrepresentation. *Carrigue* v. *Catts and Hill* (1913), 25 O. W. R. 639; 5 O. W. N. 785.

Lennox, J., supplemented above judgment by fixing plaintiff's damage at $6,000 and allowing plaintiff full costs of suit. *Carigue* v. *Catts* (1913), 25 O. W. R. 802; 5 O. W. N. 886.

Purchase of shares in company—*Action to set aside—Necessity of clear proof of fraud—Evidence—Dismissal of action—Costs.*]—Falconbridge, C.J.K.B., *held*, that where fraud is alleged in a civil action the party alleging it must prove it clearly and distinctly, a slight preponderance of the evidence in his favour not being sufficient.—*Mowatt* v. *Blake*, 31 L. T. R. (O.S.) 387, referred to. *Smith* v. *Haines* (1913), 25 O. W. R. 797; 5 O. W. N. 866.

Sale of lands—*Action against agent —Evidence—Dismissal of action—Costs.*] —Lennox, J., dismissed an action brought for damages for fraud and misrepresentation upon the sale of certain lands, holding that it had not been proven that the representations were false to defendant's knowledge or that plaintiff had been induced to purchase by such representations. *Kenner* v. *Proctor* (1913), 25 O. W. R. 439; 5 O. W. N. 552.

HUSBAND AND WIFE.

Action to recover wife's separate estate—*Presumption as to corpus—Different presumption as to income—Evidence—Alleged gift—Mental condition of wife — Prior consent — Estoppel — Laches—Statute of Limitations—Express trust—Alimony—Quantum of—Refusal to re-open—Chattels—Judgment for delivery of—Costs.*]—Boyd, C., *held*, that as to the corpus of the wife's separate estate received by the husband during coverture the presumption is against a gift to him, but as to the income the presumption is that it was expended for their joint purposes and the husband therefore is not accountable for the same. —*Rice* v. *Rice*, 31 O. R. 59; 27 A. R. 121, followed. Sup. Ct. Ont. (2nd App. Div.) dismissed appeal and cross-appeal with costs.—*Alexander* v. *Barnhill*, 21 L. R. Irish, 515, approved. *Ellis* v. *Ellis* (1913), 25 O. W. R. 539; 5 O. W. N. 561.

Assignments and preferences—*Alleged conveyance to defraud creditors—Dismissal of action—Costs.*]—Kelly, J., dismissed an action brought by a judgment creditor for a declaration that the wife of the judgment debtor was trustee for him in respect of certain lands conveyed to her, holding that the allegation had not been sufficiently proven. *McDonell* v. *Thompson* (1913), 25 O. W. R. 566; 5 O. W. N. 654.

Separation agreement—*Release of dower — Resumption of cohabitation — Evidence — Declaration of cancellation made — Corroboration — Costs.*] — Falconbridge, C.J.K.B., cancelled a separation agreement and a release of dower where the parties had subsequently resumed cohabitation and the evidence went to shew that the two documents constituted in fact evidence of one transaction only. *Wardhaugh* v. *Wiseman* (1913), 25 O. W. R. 484; 5 O. W. N. 456.

Validity of alleged marriage in issue—*Collaterally in action—Right of Court to enquire into—Chamber order—Leave to appeal refused—Con. Rule 507.*] —Lennox, J., refused leave to appeal from an order refusing to strike out of certain defences herein an allegation that the applicant was not legally married to a testator, holding that the Court had power to enquire into the validity of alleged marriages when it incidentally or collaterally became necessary to do so. —*Re A. B.*, L. R. 1 P. & D. 559, and *Prowd* v. *Spence*, 10 D. L. R. 215, referred to. *Langworthy* v. *McVicar* (1913), 25 O. W. R. 699; 5 O. W. N. 767.

INFANT.

Custody of — *Application by half-brother — Habeas corpus—Religion of father to govern—Children's Protection*

Act, 8 Edw. VII., c. 59—3 & 4 Geo. V., c. 62—"Neglected children"—Meaning of—Strict construction of statute—Welfare of child—Family to be kept together—Compensation to foster-parents—Principles on which same granted.]—Lennox, J., *held*, that the provisions of the Children's Protection Act of Ontario, 8 Edw. VII. c. 59, or 3 & 4 Geo. V. c. 62, must be strictly followed before a child is committed thereunder.—That a child if committed must be placed in a home of the religion of its father.—*Re Newbury*, L. R. 1 Eq. 431, and *Hawkesworth* v. *Hawkesworth*, L. R. 6 Ch. 539, followed. —That in considering a child's welfare it is important that if possible the family be kept together.—*Re Foulds*, 12 O. L. R. 245, referred to. *Re Culin, Infants* (1913), 25 O. W. R. 604; 5 O. W. N. 663.

Custody—*Application of father—Custody of mother—Circumstances leading up to separation—Discretion—Welfare of infants — Dismissal of application.*] — Britton, J., refused the application of the father of certain infants for their custody as against the mother, having regard to the circumstances of the case and the welfare of the children. *Re Westacott Infants* (1913), 25 O. W. R. 845; 5 O. W. N. 924.

Illegitimate child — *Custody of — Right of mother—Character of—Welfare of child—Evidence.*] — Kelly, J., *held*, that in determining who is to have the custody and control of an illegitimate child the Court in exercising its jurisdiction with a view to the benefit of the child will primarily consider the interests of the mother. — *Barnardo* v. *McHugh*, [1891] A. C. 388, followed.—[See *Re C.*, 25 O. L. R. 218.—Ed.] *Re Spinlove* (1913), 25 O. W. R. 724; 5 O. W. N. 832

INJUNCTION.

Blocking of lane—*Nuisance—Reference as to damages—Stay of operation of order.*]—Kelly, J., granted plaintiff an injunction restraining defendants from using a lane so as to interfere with plaintiffs' rights therein, but suspended the operation of the order to give defendants an opportunity to abate the nuisance. *Fitzgerald* v. *Chapman* (1913), 25 O. W. R. 801; 5 O. W. N. 888.

Contract — *In restraint of trade—Limitation as to time, territory and business—Reasonableness — Consideration—Granting of employment—Breach by former servant of plaintiff—Injunction.*]—Britton, J., granted an injunction restraining defendant from engaging in the business of selling teas or coffees within the city of Toronto or within a radius of five miles adjacent thereto for three years from Dec. 27th, 1913, in breach of his contract in that behalf.—*Mills* v. *Durham*, [1891] 1 Ch. 576, and *Wicher* v. *Darling*, 9 O. R. 311, referred to. *Skeans* v. *Hampton* (1913), 25 O. W. R. 865; 5 O. W. N. 919.

Disobedience of order — *Motion to commit—Lack of proof of personal service of order—Enlargement of motion.*]—Lennox, J., *held*, that a defendant who had disobeyed an injunction order of the Court should not be committed until proof of personal service of the injunction order on him was made. *Toronto Developments Ltd.* v. *Kennedy* (1913), 25 O. W. R. 486; 5 O. W. N. 470.

Interference with neighbouring landowner's right of lateral support — *Tortious act admitted—Injunction oppressive to defendant — Award of damages—Quantum of.*] — Middleton, J., *held*, that where one landowner had admittedly interfered with the lateral support of an adjoining landowner by the digging of a gravel pit, and the damages were capable of estimation in terms of money, and an injunction or mandatory order would be oppressive to the defendants, that damages and not an injunction should be awarded.—*Shelfer* v. *London Electric Co.*, [1895] 1 Ch. 287, followed. *Ramsay* v. *Barnes* (1913), 25 O. W. R. 289; 5 O. W. N. 322.

INSURANCE.

1. Accident.
2. Benefit Society.
3. Fire Insurance.
4. Life Insurance.

1. Accident.

Death of insured—*Delay in making claim—Dispute cause of death—Defendants' tribunal not satisfied that death caused by accident — Evidence—Refusal to permit of autopsy — Non-compliance with by-laws of defendants—Dismissal of action.*]—Boyd, C., dismissed an action brought against the defendants upon a policy of accident insurance, holding that

the finding of the defendant's own tribunal that the plaintiff had not proven that the death of the insured was caused by an accident was warranted by the evidence. *Davis* v. *Locomotive Engineers* (1913) 25 O. W. R. 239; 5 O. W. N. 279.

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2. Benefit Society.

Amendment to constitution — *Institution of superior degree—Jurisdiction of Court—No property rights involved—Stated case—Dismissal of action—Costs.*] —Middleton, J., *held*, that the Court had no jurisdiction to enquire into the organization or management of a fraternal society as long as no property rights were affected.—*Rigby* v. *Connoll*, 14 Ch. D. 428, followed. *Whelan* v. *Knights of Columbus* (1913), 25 O. W. R. 450; 5 O. W. N. 432.

Claim that member not in good standing — *Alteration in rules—Non-retroactive effect—Construction of—Additional Fee—No Demand for—Insurance Corporations Act 1892, sec. 40 (1)—Insurance Act R. S. O. 1897, c. 203, sec. 165 — Recognition as member in good standing — Estoppel — Proof of loss—Waiver.*]—Sup. Ct. Ont. (2nd App. Div.) *held*, that the rules of a benefit society are not *prima facie* to be given a retroactive effect and that a member is not bound by such rules altering his contract of insurance with the society unless he received notice of the same. — That a benefit society having for years, and until the date of a member's death, received his dues and treated him as a member in good standing without notifying him of additional dues owing by him, were estopped from seeking to avoid the payment of the amount of his insurance policy after his death on the ground of non-payment of additional dues claimed to have been owing by him.—Judgment of Kelly, J., reversed. *Hewitt* v. *Grand Orange Lodge of British America* (1913), 25 O. W. R. 899; 6 O. W. N. 16.

3. Fire Insurance.

Action against alleged lunatic—*Incendiary—Evidence — Dismissal of action.*] — Kelly, J., *held*, in an action against a lunatic for indemnity against liability upon a fire insurance policy based upon the contention that the defendant was responsible for the fire in question, that the charge against the defendant had not been proven. *Otter Mutual Fire Insurance Co.* v. *Rand* (1913), 25 O. W. R. 568; 5 O. W. N. 653.

Policy—*Loss payable to mortgagee—Right of mortgagor to bring action—Payment of mortgage.*]—Kelly, J., *held*, that the fact that under a policy of fire insurance a portion of the proceeds were payable to a mortgagee did not disentitle the mortgagor to bring an action upon the policy.—*Prittie* v. *Connecticut Fire Insurance Co.*, 23 A. R. 449, followed. *Rand* v. *Otter Mutual Fire Insurance Co.* (1913), 25 O. W. R. 571; 5 O. W. N. 653.

4. Life Insurance.

Beneficiary—*Wife or surviving children—Mention of wife by name—Death of wife—Remarriage of insured—Rights of second wife surviving insured—Rights of surviving children—Ontario Insurance Act, 2 Geo. V. c. 33, ss. 178, 181—Trust—Executors.*]—Insured left an insurance policy payable B. K. wife of C. K. for her sole use if living, in conformity with the statute, and if not living to the surviving children of said C. K. The first wife B. K. died and C. K. married again. Second wife claimed the money.—Middleton, J., *held*, that the second wife was entitled, holding that the wife to be benefited was the wife at the time of death, even though the wife at the time of insurance was mentioned by name. *Re Kloepfer* (1913), 25 O. W. R. 101; 5 O. W. N. 133.

Designation of "wife" — *Second marriage of insured—Second wife to take—Costs.*] — Middleton, J., *held*, that "wife" in an insurance policy meant the last wife of the insured.—*Re Lloyd*, 5 O. W. N. 5, followed. *Re Bottomley & A. O. U. W.* (1913), 25 O. W. R. 26; 5 O. W. N. 83.

Lack of trace of insured — *Presumption of death—Diligent enquiry—No word for ten years—2 Geo. V. c. 33, s. 165, s.-s. 5, 6—Costs.*] — Latchford, J., *held*, that where the insured under a policy of life insurance had not been heard from for nearly ten years, in spite of diligent enquiry, and the circumstances were such that he might have been expected to communicate with his family if alive, there was strong enough presumption of death to warrant a declaration of the same by the Court. *Wright* v. *A. O. U. W.* (1913), 25 O. W. R. 469; 5 O. W. N. 445.

Wife made beneficiary and named —*Death of first wife and re-marriage of insured — Right of second wife to proceeds of policy—No further designation.*] —Britton, J., *held*, that where an insurance policy was made payable to the in-

sured's "wife Bridget Lambertus" and she predeceased him and he married again, that upon his death his second wife became entitled to the proceeds of the policy.—*Re Lloyd & A. O. U. W.*, 29 O. L. R. 312, and *Re Kloepfer*, 25 O. W. R. 101, followed. *Lambertus* v. *Lambertus et al.* (1913), 25 O. W. R. 350; 5 O. W. N. 420.

INTERNATIONAL LAW.

Private international law — *Ante-nuptial contract between resident of Quebec and resident of Ontario — Contract made in Quebec—Binding by Quebec law — Marital domicil of parties Ontario — Will — Declaration that same invalid as against contract—Costs.*] — Sutherland, J., *held*, that an ante-nuptial contract entered into in Quebec between a resident of Quebec and a resident of Ontario and valid by the law of Quebec is binding in Ontario, where the parties had their subsequent domicil, and takes precedence over the terms of a will.—*Tallifer* v. *Tallifer*, 21 O. R. 337, followed. *Goulet* v. *Vincent* (1913), 25 O. W. R. 750; 5 O. W. N. 839.

INTOXICATING LIQUORS.

Liquor License Act — *Conviction for selling without license—Evidence that defendant a mere messenger—Motion to quash—Existence of evidence to support conviction — Dismissal of motion.*] — Latchford, J., *held*, that in order to quash a conviction there must be no legal evidence of an offence, it is not sufficient that the weight of evidence is against the conviction. *Rex* v. *McElroy* (1913), 25 O. W. R. 279; 5 O. W. N. 284.

Motion to quash a conviction under Liquor License Act—*Dismissal of.*]—Kelly, J., dismissed a motion to quash a conviction for selling liquor without a license, holding that there was sufficient evidence to justify the same. *R.* v. *McLean* (1913), 25 O. W. R. 24; 5 O. W. N. 53.

JUDGMENT.

Default of statement of defence —*Misunderstanding of solicitors—Judgment set aside—Settlement of action—Enforcement of—Necessity of new action — Motion to strike out statement of claim.*] — Holmested, K.C., set aside a judgment signed in default of delivery of statement of defence upon the ground that the same was the result of a misunderstanding between the solicitors of the parties.—*Quære*, as to whether a settlement of an action can be enforced in the same action.—Reference to authorities. *Cairncross* v. *McLean* (1913), 25 O. W. R. 324; 5 O. W. N. 352.

Motion for summary judgment—*Action for freight rates—Bona fide dispute—Mismissal of motion.*]—Holmested, K.C., refused summary judgment in an action for freight rates when there was a bona fide dispute as to the classification of and charges for the freight so rated. *Canadian Pacific Rw. Co.* v. *Matthews* (1913), 25 O. W. R. 483; 5 O. W. N. 437.

Specially indorsed writ — *Con. Rules 50, 56, 57 — Defective affidavit—Credits claimed—Particulars not given—Leave to supplement ignored—Appeal.*]—Middleton, J., gave summary judgment for plaintiff upon a specially indorsed writ under Con. Rule 57 where defendant by his affidavit disputed the amount claimed and asserted credits due him but refused to give particulars of same.—Judgment of Master-in-Chambers affirmed. *Peck* v. *Lemaire* (1913), 25 O. W. R. 872; 5 O. W. N. 926.

LAND TITLES.

Appeal from decision of Master —*Sec. 140 of Act—Application to register objection to issuance of certificate of title — Applicants barred from bringing action for possession—"Action"—Meaning of.*]—Latchford, J., *held*, 24 O. W. R. 619; 4 O. W. N. 1265, that an order debarring the holders of the paper title to certain lands from bringing an action against the occupant for possession (see 23 O. W. R. 55) did not prevent them from filing an objection in the Land Titles Office to the said occupant being registered as owner of such lands.—Sup. Ct. Ont. (1st App. Div.) reversed above judgment with costs, formal order objected to vacated and set aside. *Re Woodhouse & Christie Brown & Co.* (1913), 25 O. W. R. 117; 5 O. W. N. 148.

LANDLORD AND TENANT.

Action to forfeit lease — *Alleged breach of covenant against waste—Alterations in premises for purpose of business —No notice given by lessor—Forfeiture*

— *Relief against — Buildings to be returned to former condition on expiry of lease—Payment into Court to ensure—Costs.*]—Middleton, J., *held*, in an action to forfeit a lease for breach of the covenant against waste, that mere alterations to make the building more suitable for the business carried on therein were not a breach of the covenant and that in any case relief against any such forfeiture would be granted upon payment into Court of such amount as would ensure a return of the premises to their old plight and condition at the expiration of the lease.—*Hyman* v. *Rose*, [1912] A. C. 623, followed.—*Holman* v. *Knox*, 25 O. L. R. 588, modified. *Sullivan* v. *Dore* (1913), 25 O. W. R. 31; 5 O. W. N. 70.

Lease — *Covenant not to assign or sub-let without leave — Arbitrary withholding of consent to assignment by lessor —Damages — Declaration — Reference.*] — Falconbridge, C.J.K.B., *held*, that where a lessor had unreasonably and arbitrarily withheld his assent to an assignment of lease that he was liable in damages for so doing. *Cornish* v. *Boles* (1913), 25 O. W. R. 677; 5 O. W. N. 799.

Lease—*Reformation of—Delimitation of "sand bank" — Reference to local master—Findings — Appeal from—Improper admission and rejection of evidence—Evidence as to boundaries—View by master.*]—Lennox, J. (24 O. W. R. 862) dismissed an appeal from a report of the local master at Welland defining the limits of certain properties to be included in certain instruments as rectified by judgment of the Court, holding that though the said local master throughout the hearing had on occasions improperly admitted and rejected evidence, the same had not affected the conclusions reached by him, which were not shewn to be erroneous.—Sup. Ct. Ont. (1st App. Div.) dismissed appeal with costs. *Empire Limestone Company* v. *Carroll* (1913), 25 O. W. R. 652; 5 O. W. N. 708.

LIMITATION OF ACTIONS.

Charge on land—*Power of attorney —Laches—Forty years' delay.*] — Lennox, J., 24 O. W. R. 967; 5 O. W. N. 19, dismissed an action brought upon a power of attorney alleged to form a charge on certain lands in favour of plaintiff's assignor, where no attempt had been made to enforce the alleged charge for over 40 years.—Sup. Ct. Ont. (2nd App. Div.) affirmed above judgment. *Brown* v. *Thompson* (1913), 25 O. W. R. 944; 5 O. W. N. 351.

Prescription — *Evidence of—Action to recover possession of lands — Agreement—Corroboration.*] — Middleton, J., *held*, that plaintiff was entitled to the ownership of certain lands in the possession of the defendant who was claiming under an alleged possessory title.—Judgment of Gunn, Co.C.J., affirmed. *Cowley* v. *Simpson* (1913), 25 O. W. R. 737; 5 O. W. N. 803.

Prescription—*Possession of lands—Boundaries—Buildings — Surveys—Encroachment — 33 Vict. c. 66 — Statute legalizing survey—Tax sale—Irregularity —Taxes not in arrear.*]—Sup. Ct. Ont. (2nd App. Div.) dismissed an appeal and cross-appeal from the judgment of the County Court of the county of Kent, declaring plaintiff entitled to possession of certain lands and that a tax title he possessed thereto was invalid. *Kovinski* v. *Cherry* (1913), 25 O. W. R. 143; 5 O. W. N. 167.

LOCAL MASTER.

Appeal from report of — *Vendor and purchaser — Partnership—Execution creditors—Value of property—Profits—Registration of deed—Costs — Reference remitted.*] — Lennox, J., in an appeal from the report of the Local Master at Ottawa in a vendor and purchaser matter, made certain findings of fact and remitted the matter to the Local Master for further report. *Smith* v. *Wilson* (1913), 25 O. W. R. 463; 5 O. W. N. 550.

LUNATIC.

Application for order superseding lunacy order—*Recovery of lunatic —Lunacy Act, 9 Edw. VII., c. 37, s. 10 —Evidence—Insufficiency of material—Right to renew motion—Reference—Notice to committee.*]—Meredith, C.J.C.P., refused to make an order under the Lunacy Act, 9 Edw. VII. c. 37, s. 10, superseding an order declaring the applicant a lunatic upon the ground of the insufficiency of the material filed, but gave leave to have the motion renewed upon proper material and proper notice to the committee.—9 Edw. VII. c. 37, s. 10, discussed. *Re Annett (a lunatic)* (1913), 25 O. W. R. 311; 5 O. W. N. 331.

Habeas corpus—*Detention in asylum for insane — Release on probation—Recommitment — Evidence—Reprehensible conduct of solicitor—Costs.*]—Middleton,

J., *held*, upon the return of a writ of *habeas corpus* that the applicant was rightfully detained in Brockville Asylum for the Insane and that there was no question of his lunacy. *Re Dack* (1913), 25 O. W. R. 633; 5 O. W. N. 774.

MALICIOUS PROSECUTION.

Municipal corporation — *Liability for acts of Mayor and Board of Control —Arrest of employee of power company —Charge of disorderly conduct—Scope of instructions—Appeal — Dismissal of.*]— Denton, Co.C.J., 24 O. W. R. 746, *held*, that neither the Mayor nor the Board of Control of a city have any authority to bind the city by their acts in procuring an illegal arrest, and the city is therefore not liable to the person so arrested in damages therefor.—*Kelly* v. *Barton*, 26 A. R. 608, followed.—Sup. Ct. Ont. (1st App. Div.) affirmed above judgment with costs. *Waters* v. *Toronto* (1913), 25 O. W. R. 173; 5 O. W. N. 210.

MASTER AND SERVANT.

Contract of hiring—*Employment of traveller on salary and commission basis —Alleged misrepresentations — Dismissal —Notice — Master not bound to provide work under contract — Exaggeration of damages—Dismissal of action brought by servant.*]—Britton, J., *held*, that where a traveller was employed upon a salary and commission basis his employers were not bound to provide work for him.—*Turner* v. *Sawdon & Co.*, [1909] 2 Q. B. 653, followed.—*Turner* v. *Goldsmith*, [1891] 1 Q. B. 54, distinguished. *Grocock* v. *Edgar Allen & Co., Limited* (1913), 25 O. W. R. 304; 5 O. W. N. 340.

Sharing of profits—*Action for declaration of partnership and accounting —Master and Servant Act—10 Edw. VII. c. 73, s. 3, s.s. 2—"Statement or return" Meaning of—Evidence — Fraud — Reference.*] — Lennox, J., gave judgment for plaintiff for an accounting in an action brought by the administratrix of the manager of a business against the proprietor under a contract whereby the profits were to be shared between them, holding that the facts did not bring a statement furnished by the defendant within the provisions of sec. 3, s.-s. 2 of the Master and Servant Act 1910, so as to protect it from attack and that in any case it was fraudulent within the meaning of that Act. *Washburn* v. *Wright* (1913), 25 O. W. R. 387; 5 O. W. N. 515.

MECHANICS' LIENS.

Claim of sub-contractor — *Abandonment by contractor — Owner not indebted to contractor — Mechanics' and Wage-Earners' Lien Act, 7 Edw. VII., c. 69, ss. 6, 10, 12—Retention by owner— Effect of non-retention — Neglect to file lien within 30 days of abandonment of contract—Dismissal of action—Appeal.*] —Sup. Ct. Act (1st App. Div.) *held*, if a sub-contractor did not file a mechanic's lien against the lands for goods supplied within thirty days of the abandonment of a contract by a contractor, his right was barred even though the owner had not complied with s. 12 of the Act and retained 20 per cent. of the value of the work and materials furnished upon such contract for the period of 30 days from such abandonment. — Judgment of Local Master at Ottawa reversed with costs. *Brooks* v. *Mundy* (1913), 25 O. W. R. 687; 5 O. W. N. 795.

MINES AND MINERALS.

Mining Location—*Exclusive license —Grant by four joint owners out of six —Rescission of agreement — Evidence— Counterclaim — Reference — Costs.*]— Kelly, J., (24 O. W. R. 462; 4 O. W. N. 1132, *held*, that where a mining property was owned by six owners jointly, four of them could not grant an exclusive license to work it, and that in any case the agreement granting such license had been subsequently terminated by the parties. —Sup. Ct. Ont. (1st App. Div.) affirmed above judgment. *United Nickel Copper Co.* v. *Dominion Nickel Copper Co.* (1913), 25 O. W. R. 948; 5 O. W. N. 301.

Supplementary Revenue Act — 7 *Edw. VII. c 9, as amended by 1 Geo. V., c. 17, s. 3—Summons under—Application to make absolute — Requirements of notice—Co-owners—Who are—Dismissal of application.*]—Middleton, J., *held*, that a summons issued under the Supplementary Revenue Act, 7 Edw. VII., c. 9, as amended by 1 Geo. V., c. 17, s. 3, should specify the amount of taxes due upon the locations and the exact amount payable by the addressee, should require payment within three months, and should name a day after such three months when cause could be shewn before a Judge why the summons should not be made absolute.—That the statute only applies to co-owners and this does not cover the case of mortgagor and mortgagee. *Re Mining Locations*, D. 199, etc. (1913), 25 O. W. R. 685; 5 O. W. N. 756.

MORTGAGES.

Assignment of as collateral security for loan of lesser amount—*Provision for re-assignment—Form of assignment otherwise absolute—Discharge of mortgage by assignee — Validity—Judicature Act — Assignments of choses in action—Vendor and purchaser application.*]—Boyd, C., *held*, that where a mortgage was assigned as collateral security for a loan of a lesser amount, the assignment containing a provision for re-assignment upon repayment of such loan that the assignee was the person entitled by law to receive the mortgage moneys from the mortgagor and to give a full discharge therefor.—*Mercantile Bank of London* v. *Evans*, [1899] 2 Q. B. 613, 617, referred to. *Re Bland and Mohun* (1913), 25 O. W. R. 419; 5 O. W. N. 522.

Company—*Mortgage made by mining company to promoters and owners of stock — Action by creditor to set aside mortgage—Advances made by promoters — Judgment in separate action for enforcement of mortgage—Absence of fraud —Assent of all shareholders.*]—Middleton, J., *held*, that the transaction was *intra vires* of the company and dismissed the action with costs. *Northern Electric & Mfg. Co.* v. *Cordova Mines Ltd.* (1913), 25 O. W. R. 105; 5 O. W. N. 156.

Deed absolute in form—*Claim that same by way of mortgage — Subsequent option to grantor to repurchase — Circumstances surrounding — Terms of — Default in exercising — Acquiescence in determination of option—Transaction not a mortgage — Evidence.*]—Middleton, J., dismissed an action brought to have it declared that a conveyance of certain property absolute in form was by way of mortgage only, holding that the terms of and circumstances surrounding a subsequent option given by the grantee to the grantor for three months to purchase the property, shewed that it was only intended that the grantor should have an option of repurchase for that period of time and that the original conveyance was not by way of mortgage only.—Sup. Ct. Ont. (2nd App. Div.) affirmed above judgment with costs.—*Samuel* v. *Jarrah Timber and Wood Paving Corp.*, [1904] A. C. 323, distinguished. *Roscoe* v. *McConnell* (1913), 25 O. W. R. 149; 5 O. W. N. 172.

Exercise of power of sale—*Irregularity—Notice of sale — Amount due not specified — Advertising within one month—Damages — Injunction—Costs.*]—Falconbridge, C.J.K.B., *held*, that a mortgagee's proceedings under his power of sale were irregular where the notice of sale did not state the exact amount due, and where the property was advertised for sale within one month of the giving of the notice. *Tucker* v. *Titus* (1913), 25 O. W. R. 574; 5 O. W. N. 651.

Foreclosure—*Parties to action — Action against executors—Beneficiaries not joined—Will—Power to sell land—Vendor and purchaser application.*]—Latchford, J., *held*, that in the case of executors or trustees the persons ultimately entitled need not be joined in foreclosure proceedings.—*Emerson* v. *Humphries*, 15 P. R. 84, followed. *Goldberg* v. *Grossberg* (1913), 25 O. W. R. 841; 5 O. W. N. 845.

Judgment for redemption of sale—*Appeal from Master's report — Subsequent encumbrancers—Who are — Necessity of adding—Mode of adding—Neglect to add fatal—Equity of redemption an entire whole—Con. Rules 16, 404, 433, 468, 469, 490—Report remitted to Master—Costs.*]—Britton, J., 24 O. W. R. 889, dismissed an appeal by certain defendants from the report of the Local Master at Ottawa in a mortgage action, holding that subsequent purchasers of portions of the mortgaged property who had given mortgages were not necessarily subsequent incumbrancers within the meaning of the Rules and need not be made parties to the action.—Sup. Ct. Ont. (1st App. Div.) *held*, that where the equity of redemption is severed, so that different persons are entitled to redeem in respect of different parcels, these different persons must be made parties, either by writ or in the Master's office, for the equity of redemption is an entire whole and so long as the right of redemption exists in any portion of the estate or in any of the persons entitled to it, it enures for the benefit of all.—*Jones* v. *Bank of U. C.*, 12 Gr. 429; *Faulds* v. *Harper*, 2 O R. 405, referred to. — Appeal allowed without costs and report set aside and reference remitted to the Local Master at Ottawa. *Home Building & Savings Association* v. *Pringle* (1913), 25 O. W. R. 191; 5 O. W. N. 226.

Sale of land subject to—*No covenant by purchaser — Assignment of supposed covenant—Assignment not to pass equitable rights of vendor—Lack of notice to purchaser—Effect of — Statement of claim—Striking out of — Non-disclosure of cause of action.*]—Middleton, J., *held*, that where a purchaser of lands subject to a mortgage did not covenant to pay off the mortgage an assignment from the vendor to another of the supposed coven-

ant of the purchaser is invalid to pass to the assignee whatever equitable rights the assignor possessed against the purchaser. —*Credit Foncier* v. *Lawrie*, 27 O. R. 498, followed. *Furness* v. *Todd* (1913), 25 O. W. R. 708; 5 O. W. N. 753.

Street railway—*Receiver under second mortgage—Rights of first mortgagee —Means of asserting—Motion to remove on ground of partiality—Leave to appeal —Postponement of motion.*]—Middleton, J., *held*, that a receiver in possession of a property under a second mortgage is responsible to the mortgagor and the second mortgagee, but not to the first mortgagee, and if the latter desires his removal some other steps than a motion for removal on the ground of lack of impartiality must be taken. *Trusts & Guarantee Co.* v. *Grand Valley Rw. Co.* (1913), 25 O. W. R. 795; 5 O. W. N. 848.

MUNICIPAL CORPORATIONS.

Action for damages by flooding—*Inadequate culvert—Act of third party—Obstruction of natural watercourse — Negligence—Continuing damage — Mandatory order to defendants to repair — Damages—Costs.*] —Middleton, J., gave plaintiff $100 damages against a municipal corporation for the flooding of her house by reason of the construction by the municipality of an inadequate culvert, and refused to award any damages on the basis of a continuing damage, but ordered the municipality to repair the culvert in question. *Ruddy* v. *Town of Milton* (1913), 25 O. W. R. 410; 5 O. W N. 525.

Bonus by-law — *Action to enforce mortgage given as security for an advance — Insolvency of company—Assignment of assets to another company — Right of municipality to refuse to recognize latter company as subrogated to former — Construction of mortgage deed —No express covenant — Obligation implied—Costs.*]—Middleton, J., *held*, that a municipality is not bound to accept as consideration for a bonus given by it the performances of an assignee of the bonused industry. — *Tolhurst* v. *Associated Portland Cement Mfrs.*, [1903] A. C. 414, followed.—That even where a mortgage does not contain an express covenant to repay the mortgage loan, yet nevertheless there is an implied covenant enforceable in a personal action. *City of Woodstock* v. *Woodstock Automobile Manufacturing Co. et al.* (1913), 25 O. W. R. 427; 5 O. W. N. 540.

Bonus by-law—*Industry established elsewhere in Ontario—Proposed branch—Municipal Act, 1913, sec. 396 (c) — Quashing of by-law.*] — Middleton, J., *held*, that sec. 396 (c) of the Municipal Act 1913 (3-4 Geo. V. c. 43) forbids a municipality to grant a bonus to an industry established elsewhere in Ontario proposing to establish a branch in the municipality in question. — *Markham* v. *Aurora*, 3 O. L. R. 609, referred to. *Re Wolfenden and Grimsby* (1913), 25 O. W. R. 847; 5 O. W. N. 901.

By-law—*Imposing rate for separate school purposes — Requisition of school board—Separate Schools Act, 3 & 4 Geo. V. c. 71, ss. 67, 70—Public Schools Act, 9 Edw. VII. c. 89, ss. 47, 72 (n)—Contrast in machinery of statutes—Powers of Council under former Act limited to collection of rate—By-law collecting larger sum than that requisitioned to provide for contingencies — Quashing of by-law — Costs.*]—Lennox, J. (24 O. W. R. 964), refused to quash by-law No. 81 of the town of Cochrane, imposing a rate on all property liable for Separate School purposes.—Sup. Ct. Ont. (1st App. Div.) *held*, that under s. 70 of the Separate Schools Act, 3 & 4 Geo. V. c. 71, the council of a corporation has no power to impose a rate for Separate School purposes, but that this action must be taken by the School Board, the duties of the Council being confined to collecting the rate so imposed.—*Semble*, that a body imposing a rate has implied power to impose a rate slightly in excess of that apparently necessary in order to provide for the contingencies of non-collection, etc. —Appeal allowed and by-law quashed in part without costs. *Therriault* v. *Cochrane* (1913), 25 O. W. R. 668; 5 O. W. N. 704.

By-law—*Motion to quash—Collection of garbage — Delegation of authority — Ministerial matters.*] — Falconbridge, C.J.K.B., refused to quash a municipal by-law dealing with the collection of garbage.—*Re Jones* v. *Ottawa*, 9 O. W. R. 323, 660, distinguished. *Re Knox & Belleville* (1913), 25 O. W. R. 201; 5 O. W. N. 237.

By-law authorising deed of lands to Library Board for site — *Special Act—58 Vict. c. 88 (O)—Public Libraries Act, 9 Edw. VII. c. 80, secs. 8, 12—Town authorised to sell but not to deed—Substantial compliance—Motion to quash —Dismissal of.*]—Britton, J., *held*, that where a municipality was authorised to sell certain lands and to devote the proceeds to public library purposes, it was justified in deeding the lands directly to

the Library Board, without any effort being made to sell such lands,—*Parsons* v. *London*, 25 O. L. R. 173, and *Phillips* v. *Belleville*, 11 O. L. R. 256, referred to.—*Ottawa Electric Light Co.* v. *Ottawa*, 12 O. L. R. 290, distinguished. *McKenzie* v. *Teeswater* (1913), 25 O. W. R. 892; 6 O. W. N. 32.

By-law establishing water works system—*Motion to quash—Special Act, 3 & 4 Geo. V., c. 109—Order of Provincial Board of Health—Public Health Act—Detailed plans not prepared—Statute to be strictly construed — Exceeding of powers—Necessity of submission to ratepayers — Works in Quebec Province — Provincial rights—Dominion legislation—Territorial jurisdiction—Former By-law quashed—Res judicata — Costs.*] — Lennox, J., *held*, that the city of Ottawa has no power, even with the sanction of legislation of the Province of Ontario, to pass a by-law providing for works to be carried out in the Province of Quebec without the consent of the legislature of the latter Province. — That the provisions of the Public Health Act providing that the Provincial Board of Health may order a municipality to establish waterworks must be strictly construed, and such order cannot be given until definite plans and specifications are submitted to it. *Clarey* v. *City of Ottawa* (1913), 25 O. W. R. 615; 5 O. W. N. 673.

By-law expropriating lands — *Power of corporation to repeal—No entry authorised—Trifling entry in fact made—Lesser quantity of land taken—Consolidated Municipal Act, 1903, s. 463.*] — Middleton, J., *held*, that where an expropriatory by-law of a municipality did not authorise or profess to authorise an entry to be made upon the lands expropriated that a trifling entry upon one corner of the said lands for the purpose of constructing a drain did not preclude the municipality from repealing the by-law. —*Grimshaw* v. *Toronto*, 28 O. L. R. 512 *discussed*. *Guest* v. *City of Hamilton* (1913), 25 O. W. R. 274; 5 O. W. N. 310.

By-law granting bonus—*Industry "already established" in another municipality—Meaning of—Ten months' location in rented factory—By-law quashed.*] —Middleton, J., *held*, that where a manufacturing company had carried on its operations for 10 months in one municipality in a rented factory pending the passing of a bonus by-law which was defeated by the ratepayers of such municipality, that such industry was "already established" in such municipality within the meaning of s. 591 (12) (e) of the Municipal Act, 1903, and a by-law of another municipality granting such industry a bonus was invalid. *Re Black & Orillia* (1913), 25 O. W. R. 17; 5 O. W. N. 67.

By-law to restrain location of garages—*"To be used for hire or gain"—Meaning of — Garage space to be let to tenants of apartment house.*]—Middleton, J., *held*, that where a proprietor of an apartment house erected a garage and let space therein to the tenants of the apartment house, it was not a garage "to be used for hire or gain" within the meaning of by-law 6061 of the City of Toronto. *Toronto* v. *Delaplante* (1913), 25 O. W. R. 16; 5 O. W. N. 69.

Contract — *Construction of sewer system in municipality—Action for bonus—Interpretation of contract — Cost of work — Extras — Finding of engineer—Reference.*]—Middleton, J., in an action by a contractor against a municipality for a bonus under a contract, which bonus depended upon the actual cost to the municipality of the work done, referred it to the Master to take an account of several items of such cost. *Armour* v. *Town of Oakville* (1913), 25 O. W. R. 875; 5 O. W. N. 980.

Contract by—*Drainage of landowner's lands—Lack of seal or by-law—Executed contract—Benefit received by corporation—Damages — Costs.*] — Middleton, J., *held*, that the absence of a seal or by-law was no defence to a municipality where a contract entered into it had been executed by the other party thereto, and he had changed his position as a consequence thereof. *McBain* v. *Municipal Corporation of the Township of Cavan* (1913), 25 O. W. R. 434; 5 O. W. N. 544.

County by-law regulating pedlars—*Offence on boundary road—No jurisdiction over—3 & 4 Geo. V. c. 43, s. 433—Conviction quashed.*]—Kelly, J., 25 O. W. R. 33; 5 O. W. N. 58, *held*, that a county by-law regulating the peddling of goods did not apply to a boundary road between one county and another and that 3 and 4 Geo. V. c. 43, s. 433, did not confer such jurisdiction.—Conviction quashed with costs, protection order to magistrate.

Sup. Ct. Ont. (2nd App. Div.) affirmed above judgment. *Rex* v. *Hamilton* (1913), 25 O. W. R. 947; 5 O. W. N. 265.

Electric light and power franchise—*Grant of permission to erect poles in lanes of town—Approval of council to be obtained to location — Unreasonable*

withholding of—Ulterior motives—Right to carry wires across streets implied — Interim injunction — Dissolution of.] — Latchford, J., *held*, that where a company were granted a franchise by a town for the distribution of light and power, and by the terms thereof were given power to erect poles in the lanes of the town, subject to the direction and approval of the council, that the council were not legally justified in delaying the granting of such approval for ulterior motives. *Town of Walkerville* v. *Walkerville Light & Power Co.* (1913), 25 O. W. R. 375; 5 O. W. N. 429.

Expropriation by city by-law of outside land for addition to industral farm — *"Acquire" — Municipal Act, 1913, sec. 6—Special Act, 1 Geo. V. ch. 119, sec. 5—Bona fides — Statutory powers—Exhausting by original purchase —Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (33).*]—Motion by Boyle, the owner of certain lands sought to be taken by the corporation of the city of Toronto, by by-law No. 6353, intituled, "A By-law to Acquire Additional Lands for the Industrial Farm," to quash this by-law.—Middleton, J., refused to quash the by-law on the ground that it was not intended that the power should be exhausted by a single exercise, *holding* that there was no reason to suppose that the by-law was not an absolutely *bona fide* exercise of the municipal powers.—*Re Inglis & Toronto*, 8 O. L. R. 570, distinguished. *Re Boyle & Toronto* (1913) 25 O. W. R. 67; 5 O. W. N. 97.

Judgment — *Contempt of Court — Motion to commit—Building restrictions —"One building"—Amendment of plans and structure—"Front" of building — Reference to architect appointed by Court —Undertaking to obey his report — Dismissal of motion—Terms.*] — Motion to commit defendant for breach of the injunction herein granted by Teetzel, J., (22 O. W. R. 767). Since that judgment defendant had altered her walls, and placed a permanent doorway in the vertical wall formerly dividing the building.—Britton, J., (23 O. W. R. 961) *held*, that the building was no longer two buildings, and that therefore the motion must be dismissed with costs.—*Ilford Park Estates* v. *Jacobs*, [1903] 2 Ch. 522, 526, referred to.—Sup. Ct. Ont. (2nd App. Div.) ordered that if defendant would file an undertaking in one week to follow the plans of an architect to whom the matter had been referred by the Court and pay the costs of the motion and appeal, including the architect's fees, the motion should be dismissed, otherwise it was allowed with costs. *Holden* v. *Ryan* (1913), 25 O. W. R. 874; 5 O. W. N. 890.

Police officer—*Liability for acts of—Statement of claim—Striking out as disclosing no cause of action.*]—Middleton, J., *held*, that a police officer is not *ipso facto* the servant of a municipality and any facts relied on to establish the liability of the municipality for his acts must be expressly pleaded. *McAvoy* v. *Rannie* (1913), 25 O. W. R. 667; 5 O. W. N. 688.

Waterworks by-law — *Motion to quash—City of Ottawa Special Act—3 & 4 Geo. V. c. 109—Sum fixed by Act as limit of expenditure—Projected scheme to exceed such sum—Debentures not sufficient to complete work — Discretion.*]—Lennox, J., *held*, that 3 & 4 Geo. V. c. 109, authorising the City of Ottawa to raise a sum not exceeding $5,000,000 for the construction of waterworks, did not authorize the city to pass a by-law providing for the issue of debentures for $5,000,000 to be applied on a waterworks scheme which would cost at the least estimate $8,000,000. — By-law quashed with costs. *Re Clarey* v. *City of Ottawa* (1913), 25 O. W. R. 340; 5 O. W. N. 370.

NEGLIGENCE.

Damages — *Death of superannuated minister—Estate passing to children — Expectation of life — Beyond normal — Evidence as to — Benefit from continuance of life—Probable savings from pension received by deceased—Computation of damages—Present worth of five years' pension — Appeal—Costs.*] — Boyd, C., awarded the children of a superannuated minister killed by the negligence of defendants and who was in receipt of a pension from the superannuation fund of his church, five times the amount of such annual pension as damages for his death, holding that his reasonable expectation of life was five years and the probability was from his financial position that the whole of such pension would have been saved by deceased.—Sup. Ct. Ont. (1st App. Div.) varied above judgment by awarding in place of the sum awarded the present worth of the five annual instalments of pension. — Judgment affirmed with above variation, no costs of appeal to either party. *Goodwin* v. *Michigan Central Rw. Co.* (1913), 25 O. W. R. 182; 5 O. W. N. 198.

Death by drowning—*Breaking of dam — Action against river company — Findings of jury—Negligence—Evidence —Contributory negligence — Voluntary assumption of risk—Dismissal of action.*] —Falconbridge, C.J.K.B., dismissed an

action brought against a river company for their alleged negligence causing the death of one George Hudson by drowning in a flood of water caused by the breaking of one of defendant's dams, holding that no negligence on the part of defendants had been established, and that in any case the primary cause of the accident was the contributory negligence of deceased in persisting after warning in endeavoring to cross the swollen stream. *Hudson* v. *Napanee River Improvement Co.* (1913), 25 O. W. R. 460; 5 O. W. N. 467.

Death of employee—*Caught in revolving shaft—Negligence of superintendent — Person to whose orders deceased bound to conform—Workmen's Compensation Act—Common law liability—Alleged defective system—Work and place where being carried on unusual—Appeal—Reduction of damages.*]—Latchford, J. (24 O. W. R. 556), *held*, that where a workman was killed by being caught in a revolving shaft when moving with other men a heavy fly-wheel through a door within a foot or so of the shaft in question, defendants were liable at common law for maintaining a dangerous and defective system, and also under the Workmen's Compensation for Injuries Act, inasmuch as the accident was attributable to the negligent orders of a superintendent to whose orders the deceased was bound to conform. — Judgment for plaintiff for $4,000 and costs; if only under the Workmen's Compensation Act, for $2,000 and costs.—Sup. Ct. Ont. (1st App. Div.), varied above judgment by reducing the damages to $2,000, holding that the defendants were not liable at common law as the work being done and the place where it was being done were unusual.—*Ainslie* v. *McDougall*, 42 S. C. R. 420, and *Brooks* v. *Fakkema*, 44 S. C. R. 412, distinguished.—No costs of appeal *Hicks* v *Smith's Falls Electric Power Co.* (1913), 25 O. W. R. 294; 5 O. W. N. 301.

Death of workman — *Breach of statutory duty — Contributory negligence —Finding of jury—Evidence—Dismissal of action.*]—Britton, J., *held*, that contributory negligence is a defence to an action for negligence, even where the accident was occasioned by the neglect of the employer to perform a statutory duty. *Linazuk* v. *Canadian Northern Coal & Ore Dock Co.* (1913), 25 O. W. R. 584, 5 O. W. N. 642.

Electric railway — *Opening in footboard on open car — Passenger falling through—Invitation to alight—Damages — Quantum of.*] — Middleton, J., *held*, that where the running-board of an open electric car was down and the side of the car was open and unbarred it was an invitation to alight, and where a passenger so alighting was injured by stepping into a hole in such running-board she was entitled to recover damages by reason of such injury fixed at $2,000. *Jones* v. *Hamilton Radial Electric Rw. Co.* (1913), 25 O. W. R. 267; 5 O. W. N. 282.

Highway—*Unsafe condition — Snowdrifts—Horse killed—Notice to municipal council.*]—Sup. Ct. Ont. (2nd App. Div.) dismissed appeal from judgment awarding plaintiff $125 damages for death of horse killed by reason of neglect of municipal council to make highway passable. Council had six months' previous notice to repair. *King* v. *Limerick Township* (1913), 25 O. W. R. 87.

Independent contractor—*Municipal corporation—Cement mixer on highway—Frightening of horse—Dangerouss object —Knowledge of corporation — Liability of.*]—Sup. Ct. Ont. (1st App. Div.) *held*, that "an employer cannot divest himself of liability in an action for negligence by reason of having employed an independent contractor, where the work contracted to be done is necessarily dangerous, or is, from its nature, likely to cause danger to others, unless precautions are taken to prevent such danger," and consequently a municipality was liable for damages caused by the frightening of a horse by the operation of a cement mixer being operated by an independent contractor.—*Halliday* v. *National Telephone Co.*, [1892) Q. B. D. 392, referred to. Judgment of Jun. J. Co. Simcoe, reversed. *McIntosh* v. *County of Simcoe* (1913), 25 O. W. R. 682, 5 O. W. N. 793.

Injury to person working on highway — *Negligence of driver of vehicle owned by defendant—Evidence—Finding of trial Judge—Appeal.*]—Sup. Ct. Ont. (1st App. Div.) *held*, that the evidence justified the finding of the trial Judge in favour of the plaintiff in an action for damages for the negligence of defendant's servant in causing a steel girder to fall upon the plaintiff. *Kettle* v. *Dempster* (1913), 25 O. W. R. 115; 5 O. W. N. 149.

Injury to workmen—*Air-drill falling on him—Alleged negligence of fellow-workmen—Findings of jury — Contributory negligence—Dismissal of action.*]—Falconbridge, C.J.K.B., dismissed an action brought by a workman for injuries sustained in defendants' employ caused by an air-drill falling on him, holding

that the accident was caused by the contributory negligence of plaintiff. *Phillips* v. *Canada Cement Co. Ltd.* (1913), 25 O. W. R. 426; 5 O. W. N. 549.

Injury to workman — *Fall from hoist — Negligence of foreman—Workmen's Compensation Act—Building Trades Protection Act, 1 Geo. V., c. 71, s. 6—Reasonable safety from accident — Evidence—Damages.*]—Actions for damages for personal injuries sustained by plaintiffs, employees of defendants, by reason of the fall of a hoist being used temporarily by them while bricking up openings in a wall of a building, the said accident occurring through the alleged negligence of defendants. The hoist was operated by a cable and drum driven by a stationary engine which also operated a fixed drum for other purposes.—Middleton, J., *held*, that the defendants were liable under the Workmen's Compensation Act in that plaintiffs were working as they were in obedience to the orders of their foreman, who was negligent in not forbidding the hoisting engine to be used for any other purposes while the plaintiffs were upon the hoist. — That they were also liable under the Building Trades Protection Act, 1 Geo. V., c. 71, s. 6, in that the hoist in question was not being operated so as to afford reasonable safety to those using it.—Judgment for plaintiffs for $3,500 and $2,500, respectively; if liability under Workmen's Compensation Act only, then for $2,700 and $1,500, respectively. *Schofield* v. *Blome, Johnston* v. *Blome* (1913), 25 O. W. R. 282; 5 O. W. N. 328.

Master and servants—*Death of employee — Defective floor of brick kiln—Findings of jury — Evidence—Common law liability—Knowledge of superintendent—Workmen's Compensation for Injuries Act—Damages.*] — Kelly, J., *held*, that where defendants, a brick company, permitted the floor of one of their kilns to fall into disrepair whereby an employee was killed, that they were liable at common law for such negligence. — *Smith* v. *Baker*, [1891] A. C. 325, referred to. *McNally* v. *Halton Brick Co. Ltd.* (1913), 25 O. W. R. 610; 5 O. W. N. 693.

Master and servant — *Death of superintendent of works — No defect in plant or system — Deceased responsible for same—Findings of jury—Motion for non-suit—Dismissal of action.*] — Kelly, J., dismissed an action brought for the death of defendants' superintendent smothered to death in a mixing hopper of defendants, holding that no defect in the plant or system had been shewn and that in any case deceased was responsible for the sufficiency of the same. *Lang* v. *John Mann Brick Co., Ltd.* (1913), 25 O. W. R. 659; 5 O. W. N. 765.

Master and servant — *Death of workman—Common law liability—Findings of jury—Non-user of alleged safety device—Denial of efficiency—Evidence—Appeal.*]—Sup. Ct. Ont. (2nd App. Div.) *held*, that whether or not a safety device for certain machinery was effective, the defendants denying the efficiency of the same, was a proper question for the jury and the latter having found that the non-user of such device by the defendants constituted negligence on their part, such finding could not be disturbed. —Judgment of Kelly, J., affirmed. *Paskwan* v. *Toronto Power Co. Limited* (1913), 25 O. W. R. 779; 5 O. W. N. 823.

Master and servant — *Driller in mine—Stone falling from above—Lack of proper "scaling"—Damages — Quantum of—Retardation of recovery by disobedience to physician's orders.* —Kelly, J., in an action for damages sustained to a workman while drilling in defendant's mine by reason of a stone falling from the roof and striking him, *held*, that the evidence established that the accident was due to the negligence of the defendants in not properly scaling the roof and awarded plaintiff $750 damages and costs. *Matson* v. *Mond Nickel Co. Ltd.* (1913), 25 O. W. R. 549; 5 O. W. N. 652.

Master and servant—*Employee injured by felled tree falling on him — Workmen's Compensation for Injuries Act—Lack of notice—Defective system—Common law liability—Damages.*]—Sutherland, J., *held*, that for a contractor to fell trees which might fall into the path of employees engaged in the carriage of logs, without proper superintendence of such operations, was a defective system for which defendants were liable at common law. — *Kreuszynicki* v. *Can. Pac. Rw. Co.*, 25 O. W. R. 262, and *Fairweather* v. *Owen Sound Stone Quarry Co.*, 26 O. R. 604, distinguished. *Kostenko* v. *O'Brien* (1913), 25 O. W. R. 663; 5 O. W. N. 689.

Master and servant — *Fatal Accidents Act—Fall down uncovered "winze" of mine—Statutory duty—Use of defective wrench—Liability for the supply of—Contributory negligence—Finding of jury —No evidence to support—Rejection of finding by trial Judge—Appeal.*]—Latchford, J. (24 O. W. R. 631) in an action for damages for the death of one of the

defendants' employees killed by a fall down a "winze" in defendants' mine through their alleged negligence, refused to accept a finding of contributory negligence, holding that there was no evidence to support it, but *held*, that a finding of negligence upon the part of the defendants was justified, and entered judgment for the plaintiff for $1,750 and costs.—Sup. Ct. Ont. (2nd App. Div.), Riddell and Leitch, JJ., *dissenting*, *held*, that there was a clear breach of statutory duty on the part of the defendants in neglecting to guard the "winze," but that in any case the finding of the jury as to contributory negligence was too vague to be understood and should be disregarded.—The Court being equally divided the appeal was dismissed with costs. *Pressick* v. *Cordova Mines* (1913), 25 O. W. R. 228; 5 O. W. N. 263.

Master and servant—*Injury by circular saw—Findings of jury—Contributory negligence — Damages—Quantum of —Costs.*]—Falconbridge, C.J.K.B., dismissed an action brought by a workman against his employer for damages sustained by reason of the operation of a circular saw, upon the findings of the jury that the plaintiff was guilty of contributory negligence.. *Livermore* v. *Gerry*, (1913), 25 O. W. R. 690; 5 O. W. N. 782.

Master and servant—*Miner injured by unexploded blast—Mining Act 1908, s. 164, Rules 10, 31—Duty of mine captain to inspect—Employment of inexperienced man in hazardous duty—Findings of jury —Evidence to warrant—Further finding by Appellate Court—Estimated earnings —Computation — Workmen's Compensation for Injuries Act.*]—Sup. Ct. Ont. (1st App. Div.) *held*, that it was the duty of a mine captain to whom it had been reported that certain blast holes had blasted badly to examine them before sending an inexperienced man to reblast other holes in the immediate vicinity.—Judgment of Latchford, J., at trial, affirmed. *Dementitch* v. *North Dome* (1913), 25 O. W. R. 927; 5 O. W. N. 932.

Master and servant—*Negligence of foreman—Fellow-servant — Common law liability—Dismissal of action.*]—Sup. Ct. Ont. (2nd App. Div.) *held*, that plaintiff, a workman in defendants' employ, could not recover at common law for injuries sustained by him through lifting a heavy plate under orders of a foreman, owing to the doctrine of common employment. *Young*, v. *Hoffman*, [1907] 2 K. B. 646, referred to. *Lear* v. *Canadian Westinghouse Co.* (1913), 25 O. W. R. 798; 5 O. W. N. 769.

Municipal corporation — *Automobile accident—Alleged defective guardrail—Contributory negligence—Recklessness on part of driver of car—Right of passenger to recover—Knowledge of passenger—Assumption of risk.*] — Middleton, J., *held*, that where the driver of an automobile was killed in attempting to descend a steep road with sharp turns at night and with an automobile whose head lights were injured so as to give little light, the accident was attributable to his own negligence and not to an insufficient guardrail upon the road. — That a passenger in the automobile, a brother of the driver, could not recover for injuries sustained in the accident, as the facts were all known to him and he, as much as his brother, voluntarily incurred the risk.—*Plant* v. *Normanby*, 10 O. L. R. 16, distinguished. *Miller* v. *County of Wentworth* (1913), 25 O. W. R. 270; 5 O. W. N. 317.

Municipal Corporations——*Delay on part of fire brigade in answering call —Duty merely permissive—Absence of liability.*]—Latchford, J., *held*, that a municipality is not liable in damages for the non-performance of purely permissive duties, so that they are not liable for the tardy manner in which their fire brigade answers an alarm of fire.—*Quesnel* v. *Emard*, 8 D. L. R. 537, followed. —*Hesketh* v. *Toronto*, 25 A. R. 449, distinguished. *Gagnon* v. *Haileybury* (1913), 25 O. W. R. 474; 5 O. W. N. 435.

Railway.]—Injury to and death of brakesman improperly going between cars while in motion to uncouple.—*Held*, accident direct result of deceased's misconduct. — Action dismissed. *Cook* v. *Grand Trunk Rw. Co.* (1913), 25 O. W. R. 253; 5 O. W. N. 347.

Railway—*Operation of cars on siding—Negligence of those in charge of cars — Damages — Quantum — Apportionment—Allowance for maintenance.*] —Middleton, J., 25 O. W. R. 272; 5 O. W. N. 307, in an action for damages for the death of a foreman employed by the defendant steel company by reason of the operation of cars upon a siding upon the property of such company, found the railway company guilty of negligence in connection with such operation and awarded the plaintiff $2,500 damages. Sup. Ct. Ont. (2nd App. Div.), affirmed above judgment. *Mercantile Trust* v *Steel Co. of Canada, Ltd., & Grand Trunk Rw. Co.* (1913), 25 O. W. R. 943: 6 O. W. N. 1.

Release—*Personal injuries—Release executed in hospital—Alleged fraud or*

undue influence—Mental condition of plaintiff—Evidence — Dismissal of action.]—Falconbridge, C.J.K.B., dismissed an action brought against defendant railway company for damages for alleged negligence upon the ground that plaintiff had released defendants from liability by instrument in writing, and there was no evidence to justify a finding that such release had been procured by fraud or undue influence.—*Gissing* v. *Eaton*, 25 O. L. R. 50, referred to. *Arkles* v. *Grand Trunk Rw. Co.* (1913), 25 O. W. R. 456; 5 O. W. N. 462.

Railway—*Yardman injured in shunting operations—Bar of action under Workmen's Compensation Act—Alleged defect in system—Pleading—Sufficiency of—Findings of jury—Piece of work temporary in character—Work in charge of foreman — Fellow servant — Defendants not liable at common law.*]—Middleton, J., 25 O. W. R. 262; 5 O. W. N. 312, *held*, that where no allegation was made against the defendants' general system of operating their railway, that where there was negligence in a purely subsidiary and accidental piece of work such as shunting placed by the defendants in charge of a foreman, the same must be attributed to the foreman, a fellow workman of the plaintiff, and not to the system employed by the defendants so as to make them liable at common law Sup. Ct. Ont. (2nd App. Div.), affirmed above judgment. *Kreuszynicki* v. *Canadian Pacific Rw. Co.* (1913), 25 O. W. R. 939; 6 O. W. N. 1.

Separate contractors on building—*Death of painter—Alleged negligence of servant of carpentering contractor—Temporary passageway—Breaking of—Right of deceased to be in interior of building—Licensee—Lack of interest of defendant in work of deceased—Knowledge of intended user by deceased—Findings of jury—Disagreement with—Evidence.*]—Action by widow of one Bilton, a painter, for damages by reason of his death through the alleged negligence of defendant, a carpentering contractor. Deceased was in the employ of a painting contractor who had contracted to paint a building upon which defendant had contracted to do the carpentering work. An employee of the defendant's, to reach a window where he was installing certain weights, placed some planks over the unfinished flooring of the second storey of the building and crossed on them to the window. The deceased being precluded by the weather from exterior work, attempted to cross such planks in order to paint the exterior of the building from such window, but the planks broke and he was thereby killed. The jury found the defendant's employee guilty of negligence and that he should have known that the planks in question would be used by other workmen.—Britton, J., *held*, that on the facts it was not to be expected by defendant or his workmen that the planks in question would be used by anyone than the carpenters, and the position of the deceased was no higher than that of a mere licensee, which precluded plaintiff from recovery.—*King* v. *Northern Navigation Co.*, 24 O. L. R. 643, approved, 27 O. L. R. 79, followed.—*Heaven* v. *Pender*, 11 Q. B. D. 503, distinguished upon the ground that the planks in question were not furnished by defendant for the work of deceased nor was he interested in any way in the same. *Bilton* v. *Mackenzie* (1913), 25 O. W. R. 714; 5 O. W. N. 818.

Street Railway—*Collision with cart—Contributory negligence — Ultimate gence—Findings of jury—Excessive speed—Insufficient warning — Infant suing without next friend—Amendment at trial—Practice—Mere irregularity.*]—Sup. Ct. Ont. (2nd App. Div.) *held*, that upon the findings of the jury plaintiff was entitled to recover in an action brought for damages for injuries sustained by being thrown from his cart owing to a collision with defendants' street car. *Durie* v. *Toronto Rw. Co.* (1913), 25 O. W. R. 789; 5 O. W. N. 829.

Street Railway — *Passengers — Alighting—Opening exit door.*]—Sup. Ct. Ont. (2nd App. Div.) *held*, that where a street car exit door is opened mechanically by the motorman it is an invitation to the passenger to alight. *Reeves* v. *Toronto Rw. Co.* (1913), 25 O. W. R. 91.

NUISANCE.

Blasting by quarry-owners—*Danger to public—Necessity of method used—Independent expert—Report of—Modified injunction—Liberty to apply—Costs.*]—Middleton, J., in an action to restrain the owners of a quarry from continuing a nuisance in the form of reckless blasting, granted an injunction restraining the use of the quarry in such a manner as would cause a nuisance, operation of the quarry, however, in the manner pointed out to the Court by an independent expert appointed by the Court, not to be considered a nuisance.—Leave reserved to either party to apply for further order. *Etobicoke* v. *Ontario Brick Paving Co.* (1913), 25 O. W. R. 327; 5 O. W. N. 356.

Smelter—*Noxious fumes and vapours —Special damage to plaintiff—Death of cow—Public nuisance—Attorney-General —Voluntary abatement of nuisance by defendants — Evidence — Damages—Refusal of injunction.*]—Boyd, C., refused to grant plaintiff, a resident near a smelter, alleged to be a nuisance, an injunction, as the nuisance had been abated by the defendants prior to the issuance of the writ and in any case the nuisance was a public one and the plaintiff suffered no special and peculiar inconvenience therefrom, but allowed plaintiff $80 damages in respect of the death of a cow occasioned through defendant's operations.—*Soltan* v. *De Held*, 2 Sim. N. S. 133, referred to. *Cairns* v. *Canada Refining & Smelting Co.* (1913), 25 O. W. R. 384; 5 O. W. N. 423.

PARTICULARS.

Statement of claim—*Action against trustee—Alleged breaches of trust—Facts not in knowledge of plaintiff—Necessity of discovery—Order for particulars vacated—Leave to renew after discovery reserved—Costs.*] — Middleton, J., *held*, that in an action by a bondholder against the trustee for bondholders of a company alleging breaches of trust on the part of defendant it was improper to force plaintiff to give minute particulars of the specific breaches of trust complained of, especially as such facts were not within his own knowledge and were within the knowledge of the defendant.—Order of Holmested, K.C., acting Master-in-Chambers, ordering particulars, vacated. Liberty reserved to defendants to renew motion after discovery had. *Dixon* v. *Trusts & Guarantee Co.* (1913), 25 O. W. R. 581; 5 O. W. N. 645.

Statement of claim — *Contract — Damages—Practice—Information obtainable by discovery—True function of particulars — Supplementary to pleadings.*] —Middleton, J., varied order of Master-in-Chambers, 25 O. W. R. 48, by ordering plaintiff to deliver particulars ordered with reference to the making of the contract and to require delivery of particulars of the damages claimed. *Owen Sound Lumber Co.* v. *Seaman Kent Co.* (1913), 25 O. W. R. 61; 5 O. W. N. 93.

Statement of claim—*Former order not complied with—Ability to furnish—Discovery not substitute—Discussion of function of particulars — Appeal—Vacation of order for particulars—Leave to apply after discovery.*]—Holmested, K.C., (25 O. W. R. 422; 5 O. W. N. 552) ordered particulars of certain paragraphs of the statement of claim as asked, stating that discovery is not a substitute for particulars. — Middleton, J., vacated above order, holding that under the circumstances of the case, plaintiffs were entitled to full discovery from defendants before formulating their claim. — Leave reserved to apply further after discovery had. *Mexican Northern Power Co. Ltd.* v. *S. Pearson & Son* (1913), 25 O. W. R. 593; 5 O. W. N. 648.

Statement of claim—*Items of damage—Right of defendants to.*] — Holmested, K.C., ordered particulars of damages alleged to have been suffered by the plaintiffs, lessees of certain premises, by reason of alleged breaches of covenant on the part of their lessors. *Columbia Graphophone Co.* v. *Real Estates Corp.* (1913), 25 O. W. R. 45; 5 O. W. N. 53.

Statement of claim — *Motion for particulars — Contract—Order granted.*] —Holmested, K.C., *held*, that plaintiffs should deliver particulars to defendants of the contract mentioned, stating whether or not it is in writing and the terms thereof. *Owen Sound Lumber Co.* v. *Seaman Kent Co.* (1913), 25 O. W. R. 48; 5 O. W. N. 55.

PARTIES.

Addition of unwilling plaintiff sought—*Contract by agent in his own name—Undisclosed principal — Right of agent to sue as real plaintiff—Counterclaim—Right to add principal in — Dismissal of motion.*]—Middleton, J., *held*, that a plaintiff cannot be added in an action against his will, and that an agent with whom a contract is made in his own name is entitled to sue upon it, and is a real not a nominal plaintiff. —*Murray* v. *Wurtele*, 19 P. R. 288, distinguished. — Judgment of Master-in-Chambers, confirmed. *Winnifrith* v. *Finkelman* (1913), 25 O. W. R. 692; 5 O. W. N. 781.

Joinder of defendants—*Fatal accident—Electrocution — Joinder of telephone company—Series of occurrences—Joint liability—Doubt in plaintiff's mind —Alternative claim permissible — Con. Rule 67.*]—Lennox, J., *held*, that where an action arises out of a series of occurrences for which one or both of two defendants are responsible and with which both are connected and the plaintiff is uncertain which defendant is liable, both may be sued. — *Compania*

Sansinena de Carnes Congeladas v. *Houlder Bros. & Co.*, [1910] 2 K. B. 354, referred to. — That therefore where a death is caused by a shock from wires supplying electric current to a house and it is alleged that the same was probably caused by the crossing of the electric wires with telephone wires, both the municipality supplying the electricity and the telephone company are properly made defendants. *Till* v. *Town of Oakville and Bell Telephone Co.* (1913), 25 O. W. R. 476; 5 O. W. N. 443.

Third parties — *Service of third party notice—Extension of time for—Irregularity—Rules 165, 176—Proper subject of third party notice — Claim for contribution.*]—Holmested dismissed motion by third party to set aside notice. *Dominion Bank* v. *Armstrong* (1913), 25 O. W. R. 97; 5 O. W. N. 105.

Third party notice—*Motion to set aside—Fatal accident—Electric shock—Alleged crossing of wires due to negligence of defendants' workmen — Action against municipality supplying light and power—Notice sustained.*]—Lennox, J., refused to strike out a third party notice in an action against a municipality supplying light and power for a fatal accident caused by electrocution where the defendants alleged that the third party, a telephone company, had caused the accident by their negligence in crossing their wires with those of defendant.—Order of acting Master-in-Chambers affirmed.—Review of authorities. *Harker* v. *Town of Oakville and Bell Telephone Co., third party* (1913), 25 O. W. R. 507; 5 O. W. N. 441.

PARTNERSHIP.

Mining claim — *Action to establish —Evidence—Findings of fact—Counterclaim — Promissory notes — Costs.*]—Latchford, J., dismissed plaintiffs' action for a declaration of partnership as to a mining claim, holding that the evidence did not support their claim, and gave judgment for the defendant upon his counterclaim for certain promissory notes given by plaintiffs to defendant. *Labine* v. *Labine* (1913), 25 O. W. R. 527; 5 O. W. N. 609.

Operation of theatres — *Pooling agreement — Construction — Death of partner—Continuance of partnership — Right of personal representative — Declaratory judgment—Account—Reference — Motion for judgment where defence struck out—Rule 354 — Practice.*] — A deceased partner entered into a partnership agreement with defendant to share the profits of theatrical enterprises.—Britton, J., *held*, that plaintiff was entitled to a declaration that the deceased partner had been in his lifetime, and his estate was, a partner with defendant. *Whitney* v. *Small* (1913), 25 O. W. R. 121; 5 O. W. N. 160.

PARTY WALL.

Evidence — *Openings for joists—No record of rights—Injunction—Easement —Damages.*] — Falconbridge, C.J.K.B., *held*, that the fact that where there were openings in a wall between two old buildings for the insertion of joists and timbers of the adjoining building, did not constitute such wall a party wall where all other evidence pointed to a different conclusion. *Home Bank of Canada* v. *Might Directories Ltd.* (1913), 25 O. W. R. 665; 5 O. W. N. 690.

PATENTS

Action for royalties—*Patented envelope—Non-compliance with postal regulations — Substitution of different envelope—Refusal of defendants to accept —Compliance with contract — Repudiation of, by defendants—Right of plaintiffs to treat as ended — Relicensing of others by—Damages — Reference—Appeal*]—Falconbridge, C.J.K.B., 24 O. W. R. 885, dismissed an action for royalties for the use by licensees of a patented envelope, holding that as the form of the envelope contracted for had been materially changed to comply with the postal regulations, the altered form was not the article contracted for and there was consequently a failure of consideration.—Sup. Ct. Ont. (1st App. Div.) *held*, that the amended envelope was within the scope of the patent and a compliance with the contract and defendants were liable in damages for their refusal to observe its terms.—Judgment of Falconbridge, C.J.K.B., reversed. *Neostyle Envelope Co.* v. *Barber-Ellis Ltd.*, 6 O. W. N. 43 (1913), 25 O. W. R. 920.

Constitutional law—*Execution Act, 9 Edw. VII. c. 47, s. 16—Constitutionality — Property and civil rights within province—Patents of invention—Assignment — Validity.*] — Falconbridge,

C.J.K.B., *held*, that sec. 16 of the Execution Act, 9 Edw. VII. c. 47 (Ont.) was constitutional and dismissed an action brought for a declaration that the assignments of certain patents of invention were of no effect. *Felt Gas Compressing Co.* v. *Felt* (1913), 25 O. W. R. 723; 5 O. W. N. 821.

PAYMENT.

Out of Court—*Money paid in by mortgagee — Surplus proceeds of mortgage sale—Notice — Personal service—Sevice by publication.*] — Britton, J., *held*, that where money had been paid into Court under an order of the Master, directing that notice be given to the execution creditors such money would be paid out upon the application of one of said creditors until the other had been notified. *Weber* v. *Morris* (1913), 25 O. W. R. 123; 5 O. W. N. 166.

PLEADING.

Defence to counterclaim—*Embarrassing paragraphs—Motion to strike out —Leave to amend.*] — Holmested, K.C., struck out certain paragraphs of a joinder of issue intended as a defence to a counterclaim which set up no real defence to the allegations therein contained. *Mitchener* v. *Sinclair* (1913), 25 O. W. R. 296; 5 O. W. N. 347.

Motion to strike out statement of claim — *Action for libel—Plaintiff member of class—Right to sue—Alleged misjoinder — Time to plead—Costs.*]—Kelly, J., refused to strike out a statement of claim in a libel action, holding that a member of a class can sue on behalf of the class, if defamed.—*Le Fanu* v. *Malcomson*, 1 H. L. C. 637, and *Albrecht* v. *Burkholder*, 18 O. R. 287, followed. *Cooper* v. *Jack Canuck Publishing Co.* (1913), 25 O. W. R. 47; 5 O. W. N. 66.

Particulars—*Alimony action—Party not obliged to get particulars from an examination for discovery.*]—Holmested, K.C., *held*, that it is no answer to a demand for particulars of a pleading to suggest that the other party can get the information desired from an examination for discovery. *Love* v. *Love* (1913), 25 O. W. R. 278; 5 O. W. N. 345.

Particulars — *Statement of claim—Fatal Accidents Act — Plaintiff's son killed by derailment of train—Residence of plaintiffs out of jurisdiction—Knowledge by defendants of facts—Res ipsa loquitur — Order for particulars oppressive—Particulars of damages impossible —Order set aside.*]—Middleton, J., set aside an order for particulars in an action for alleged negligence of defendants causing the death of plaintiff's son by reason of the derailment of defendants' train, holding that where the plaintiffs resided in Ireland and the facts were within the knowledge of the defendants an order for particulars of negligence was oppressive and an abuse of the practice and that particulars of damage under the Fatal Accidents Act were unheard of and impossible to give. *Mulvenna* v. *Canadian Pacific Rw. Co.* (1913), 25 O. W. R. 675; 5 O. W. N. 779.

Statement of claim—*Material variation from endorsement on writ of summons—Addition of foreign executors as defendants—Attornment to the jurisdiction—Judicature Act, 1913, s. 16 (h)—Rule 109.*]—Holmested, K.C., *held*, that where subsequent to the appearance to the writ of summons certain foreign executors had become parties to the action and attorned to the jurisdiction and the plaintiff had thereupon materially changed his claim in his statement of claim from that set out in the writ of summons, he was entitled under the Rules to do so. *Snider* v. *Snider* (1913), 25 O. W. R. 286; 5 O. W. N. 325.

Statement of claim — *Motion for particulars—Paragraph irrelevant—Particulars refused—Costs.*] — Holmested, K.C., *held*, that particulars should be refused of an irrelevant allegation in a pleading.—*Cave* v. *Torre*, 54 L. T. 515, followed. *McVeity* v. *Ottawa Citizen Co.* (1913), 25 O. W. R. 200; 5 O. W. N. 237.

Statement of claim—*Order striking out portions and for particulars of other portions — Appeal.*] — Britton, J., in Chambers, sustained an order of the Master in Chambers directing that certain words and passages in a statement of claim should be struck out, and ordering certain particulars to be given by plaintiff to defendant. *Scully* v. *Nelson* (1913), 25 O. W. R. 120; 5 O. W. N. 164.

Statement of defence—*Leave for amendment by defendant — Otherwise judgment for plaintiff.*] — *Steinberg* v. *Abramovitz* (1913), 25 O. W. R. 89; 5 O. W. N. 107.

Statement of defence — *Motion to strike out as irregular — Specially endorsed writ — Appearance entered and affidavit filed — No notice of trial by plaintiff — Defence delivered after lapse of ten days from appearance — Not irregular—Costs — Con. Rules 56, 112, 121k.*] — Holmested, K.C., *held*, that a statement of defence filed after the time limited by Con. Rule 112 is not only not a nullity but is not irregular.—*Smith* v. *Walker*, 5 O. W. N. 410, considered. *Munn* v. *Young* (1913), 25 O. W. R. 447; 5 O. W. N. 426.

Statement of defence — *Motion to strike out paragraphs — Libel action—Public comment — Not properly pleadable—Costs.*] — Holmested, K.C., struck out as irrelevant and embarrassing certain paragraphs in the statement of defence to a libel action alleging that certain alleged acts of the plaintiff had been the subject of public comment. *McVeity* v. *Ottawa Citizen* (1913), 25 O. W. R. 505; 5 O. W. N. 469.

Statement of defence — *Motion to strike out paragraphs as embarrassing—Title to land — Denial of title of registered owner—Res judicata—Importance of matters raised—Refusal to determine on interlocutory motion.*] — Britton, J., refused to strike out certain paragraphs of a statement of defence, which raised matters which were not properly triable upon an interlocutory motion. — Judgment of Master-in-Chambers reversed. *Toronto Developments Ltd.* v. *Kennedy* (1913), 25 O. W. R. 863; 5 O. W. N. 922.

Statement of defence — *Necessity for in addition to affidavit to specially endorsed writ—Time for delivery — Default — Right to move for judgment—Con. Rules 56, 112.*]—Kelly, J., *held*, that even after a defendant has filed an affidavit in answer to a specially endorsed writ under Con. Rule 56, if the plaintiff makes no election under such rule the defendant must deliver a defence under Con. Rule 112 within ten days after appearance, failing which plaintiff is at liberty to move for judgment as if no defence filed. *Smith* v. *Walker* (1913), 25 O. W. R. 481; 5 O. W. N. 410.

PRINCIPAL AND AGENT.

Accounting — *General insurance agency — Substitution of individual for company — Liability of individual thereafter—Assumption of outstanding liability—Evidence—Statute of Frauds—Appeal.*]—Sup. Ct. Ont. (1st App. Div.), *held*, that upon the evidence the appellant had been substituted as general agent for the respondent insurance company in 1907, in place of a company in which he was the largest stockholder, and as such was liable to account for the agency business transacted thereafter, but that the evidence did not establish that he assumed any prior liabilities of the company in connection with such agency, and the requirements of the Statute of Frauds with regard to the proof of such assumption had in any case not been met.—Judgment of Latchford, J., at trial, varied; no costs of appeal. *Lloyds Plate Glass Insurance Co.* v. *Eastmure* (1913), 25 O. W. R. 406; 5 O. W. N. 498.

Action for commission — *Sale of mining lands — Evidence—Findings of trial Judge — Dismissal of action.*] — Latchford, J., dismissed an action for commission upon the sale of certain mining lands, holding that plaintiff had already received all the commission to which he was entitled under the agreement between himself and the defendants. *Connell* v. *Bucknall* (1913), 25 O. W. R. 534; 5 O. W. N. 610.

Secret profit — *Purchase of lands —Evidence—Fraud — Account—Counterclaim—Costs.*]—Latchford, J., *held*, that an agent who purchased certain lands from a syndicate at $400 per acre and resold them to his principal at $450 per acre, representing to the latter that $450 per acre was the true purchase price, was liable to his principal for the secret profit so made by him. *Bell* v. *Coleridge* (1913), 25 O. W. R. 575; 5 O. W. N. 655.

PROCESS.

Service out of jurisdiction—*Action properly brought against one defendant in jurisdiction—Con. Rules 25, 48—Conditional appearance—Refusal to allow substitution of, for ordinary appearance entered through alleged inadvertence.*] — Latchford, J., refused to grant defendants, they being resident out of the jurisdiction, have to substitute conditional appearances under Rule 48 for the ordinary appearances entered by them to concurrent writs served out of the jurisdiction, where he was satisfied that the Courts had jurisdiction over such defendants. — *Standard Construction Co.* v. *Wallberg*, 20 O. L. R. 646, followed.—Judgment of Master-in-Cham-

bers reserved. *Bain* v. *University Estates and Farrow, Connor* v. *West Rydall Limited and Farrow* (1913), 25 O. W. R. 895; 6 O. W. N. 22.

Service out of jurisdiction — *Breach of contract — Non-payment for goods sold—Place of payment—Duty of debtor to seek out creditor—Con. Rule 25 (e)—Appeal.* — Lennox, J., 25 O. W. R. 471; 5 O. W. N. 453, *held*, that where certain goods were sold by an Ontario farm, delivery to be made at Edmonton and no provision was made as to the place of payment, that non-payment of the purchase-price was a breach of the contract occurring in Ontario, as it was the debtor's duty to seek out his creditor and make payment, and that therefore issuance of a writ for service out of the jurisdiction was proper.—*Comber* v. *Leyland*, [1898] A. C. 524, discussed. — Judgment of Holmested, Registrar, reversed. Sup. Ct. Ont. (1st App. Div.) affirmed above judgment. *Leonard* v. *Cushing* (1913), 25 O. W. R. 940; 5 O. W. N. 952.

Service out of jurisdiction—*Con. Rules 25 (e) (f) (g) — Motion to set aside — Irregularities — Not set out in notice of motion—Con. Rule 219—Conditional appearance — Reason for.*] — Holmested, K.C., refused to set aside the service of a concurrent writ of summons upon defendants holding them properly suable in Ontario on a tort committed here, and refused to allow the entry of a conditional appearance on the ground that the same were only necessary to allow of a motion against the writ, which motion in this case had already been made unsuccessfully. *Wood* v. *Worth* (1913), 25 O. W. R. 473; 5 O. W. N. 452.

Service out of jurisdiction—*Contract—Breaches—Assets in Jurisdiction —Con. Rule 25 (1) (e), (h).*]—Holmested refused motion by defendants to set aside an order allowing service of the writ in Ireland and also the writ and the copy and service thereof. *Auburn Nurseries* v. *McGredy* (1913), 25 O. W. R. 85; 5 O. W. N. 104. Britton, J., varied above order by permitting defendant to enter a conditional appearance. *Auburn Nurseries Ltd.* v. *McRedy* (1913), 25 O. W. R. 119; 5 O. W. N. 165.

Service out of jurisdiction—*Rule 25 (e)—Contract—Place of payment—Inference.*]—Kelly, J., *held*, that it is well established that leave to serve out of the jurisdiction a writ of summons or notice in lieu of a writ is properly granted where, either expressly or by implication, the contract or a part of it is to be performed within the jurisdiction, and there is a breach of it or of that part of it, within the jurisdiction. *Thompson* v. *Palmer*, [1893] 2 Q. B. 80, followed. *Wolseley Tool & Motor Car Co.* v. *Humpries* (1913), 25 O. W. R. 65; 5 O. W. N. 72.

Service out of jurisdiction on officers of company—*Company incorporated in Ontario—Not British subject —Con. Rules 26, 29—Insufficient affidavit —Leave to file sufficient material nunc pro tunc—Costs.*]—Lennox, J., *held*, that a company incorporated within Ontario is not "a British subject" within the meaning of Con. Rule 29, and where it must be served with process outside the jurisdiction notice of the writ of summons and not the writ must be served. *Gilpin* v. *Hazel Jules Cobalt Silver Mining Co.* (1913), 25 O. W. R. 417; 5 O. W. N. 518.

Special endorsement—*Statement of claim delivered as well—Irregularity—Setting aside — Form 5, Rules 56, 111, 112, 127 — Amendment — Affidavit filed with appearance — Statement of defence —Practice.*]—Master-in-Chambers struck out a second statement of claim filed, under Rule 111, holding that plaintiff must obtain leave before he can file a second statement of claim. *Dunn* v. *Dominion Bank* (1913), 25 O. W. R. 84; 5 O. W. N. 103.

Special endorsement—*What constitutes liquidated demand—Con. Rules 33, 37, 56—Appearance—Affidavit.*]—Holmested, K.C., *held*, that a special endorsement of a writ of summons was valid which stated the precise sum due making proper allowances for credits to be allowed defendant and that since Con. Rule 33 (1913), an interest claim, whether payable by way of damages or not, can be added to the main claim.—*McIntyre* v. *Munn*, 6 O. L. R. 290, distinguished. *Williamson* v. *Playfair* (1913), 25 O. W. R. 322; 5 O. W. N. 354.

PROHIBITION.

Division Court—*Motion for prohibition—Action for return of deposit on purchase of land—Rescission of contract —Title to land not in question—Dismissal of motion.*]—Britton, J., dismissed a motion for prohibition to the First Division Court of the County of York in an application for the return of moneys

paid as a deposit on the purchase of certain lands, holding that no question as to the title to land arose.—*Crawford* v. *Sevey*, 17 O. R. 74, referred to. *Barnett* v. *Montgomery* (1913), 25 O. W. R. 846; 5 O. W. N. 884.

Grounds for — *Questions passed on by Appellate Division — Late application —Costs.*]—Lennox, J., refused an order for prohibition where the application was made upon grounds which were practically by way of appeal from a decision of the Appellate Division and where in any case it was doubtful if there were anything left to prohibit. *Avery* v. *Cayuga* (1913), 25 O. W. R. 482; 5 O. W. N. 471.

RAILWAY.

Carriage of goods—*Contract for—Delivery to consignee without surrender of bill of lading—Damages caused by—Liability for.*] — Falconbridge, C.J.K.B., *held*, that where a railway company delivered merchandise to a consignee without obtaining surrender of the bill of lading therefor they were liable to the consignor for any damage occasioned him by such wrongful act.—*Tolmie* v. *Michigan Central Rw. Co.*, 19 O. L. R. 26, referred to. *Lemon* v. *Grand Trunk Rw. Co.* (1913), 25 O. W. R. 720; 5 O. W. N. 813.

Deviation of line — *Order of Ontario Railway and Municipal Board—Jurisdiction — Right of appeal—Preliminary opinion of Board not appealed from—No right to do so — Jurisdiction of municipalities over highways—Meaning of "Deviation"—Street railways—What constitute—Franchise—Necessary extension of—Statutory powers of company — Rights of one municipality as successor of another — Construction of statutes.*]—Court of Appeal, *held*, 28 O. L. R. 180, that under the various statutes relative to the Toronto and York Radial Railway Company and their predecessors in title, the Metropolitan Railway Company, and their agreements with the county of York, the said company had no right to deviate their line of railway from the west side of Yonge street where it had been constructed and to operate it along what was termed a private right-of-way parallel thereto, which right-of-way, however, crossed five highways within the municipal limits of the city of Toronto.—Privy Council affirmed above judgment with costs.—Order of Ontario Railway and Municipal Board set aside. *Toronto & York Radial Rw. Co.* v. *City of Toronto* (1913), 25 O. W. R. 315.

Expropriation of land—*Agreement to submit compensation to "valuers"—Appeal prohibited — Motion to set aside finding — Alleged misconduct—View of property in presence of claimant only—Valuers not as circumscribed as arbitrators—No injustice done—Failure of company to give item of evidence—Examination of valuer—Dismissal of motion.*]—Boyd, C., *held*, that where certain lands were being taken and injuriously affected by a railway and the parties had agreed that the sum to be paid should be left to three valuers and that there should be no appeal from their finding, the action of the valuers in proceeding to view the lands in question, the claimant but no representative of the railway being present, was not misconduct and was no ground for setting aside their finding.—That greater latitude is to be allowed valuers than arbitrators. *Re Laidlaw and Campbellford O. & W. Rw. Co.* (1913), 25 O. W. R. 431; 5 O. W. N. 534.

Horse killed on track—*No witness of accident — Finding of fact by trial Judge—Evidence—Reversal on appeal — Ry. Act. R. S. C. 1906 c. 37, ss. 254, 294 (4), 295—9 & 10 Edw. VII. c. 50, s. 8—Absence of fencing — Liability for —"At large"—Meaning of—Onus—Satisfaction of.*]—Action against a railway company for damages on account of the alleged killing of plaintiff's horse by a train of defendants. Plaintiff had let out the horse into his pasture which ran down to the railway track, the right of way being unfenced. The accident was not witnessed by anyone.—O'Leary, Dist. Ct.J., *held*, that there was no evidence to establish the fact that the horse was killed by the train and dismissed the action with costs.—Sup. Ct. Ont. (2nd App. Div.) *held*, that the evidence clearly shewed that the death of the horse must have been caused by a passenger train of defendants.—That Statute 9 & 10 Edw. VII. c. 50, s. 8, amending the Railway Act, shifts the onus and in effect provides that the railway company to escape liability must prove that the animal was "at large" and "at large" through the owner's negligence or wilful act or omission.—That "at large" in the above section means elsewhere than on the land of its owner. — *McLeod* v. *Can. North. Rw. Co.*, 12 O. W. R. 1279, followed. —Appeal allowed with costs and judgment entered for plaintiff for $275 and costs. *Palo* v. *Canadian Northern Rw. Co.* (1913), 25 O. W. R. 165; 5 O. W. N. 176; O. L. R.

Protection of highway crossing—*Horse running into engine on highway—Defendants not liable.*]—Sup. Ct. Ont. (2nd App. Div.) *held*, that defendants were not liable for damages where a horse ran into an engine of defendants upon the public highway where the same crossed the right-of-way.—Judgment of O'Leary, Dist. Ct. J., confirmed. *Prior* v. *Canadian Pacific Rw. Co.* (1913), 25 O. W. R. 163.

REFERENCE.

Accounts — *Appeal from master—Automobile company—Sale of assets—Mode of taking accounts—Appeal—Variation.*] — Latchford, J., (23 O. W. R. 780) on an appeal from the report of the Local Master at Sandwich upon the state of accounts between the parties reduced the amount found due plaintiff from $12,130.72 to $11,634.20, and gave judgment for plaintiff for latter amount with costs of action and reference.—Sup. Ct. Ont. (1st App. Div.) varied above judgment, holding that upon the facts as disclosed upon the reference the defendants did not owe plaintiff anything.—Judgment declaring that neither party is indebted to the other, no costs to either party. *Richards* v. *Lambert* (1913), 25 O. W. R. 352; 5 O. W. N. 388.

SALE OF GOODS.

Action for price—*Alleged error in bookkeeping—Appeal—Dismissal of.*]—Sup. Ct. Ont. (1st App. Div.) dismissed an appeal by defendants from the judgment of the County Court of the County of York in favour of the plaintiffs in an action to recover $213.22, the price of certain goods sold and delivered to defendants. *Moore* v. *Modern Skirt Co.* (1913), 25 O. W. R. 849.

Chattels in moving picture theatre — *Refusal of lessor to consent to assignment of lease to purchaser—Condition — Evidence — Refusal of lessor brought about by defendant—Waiver—Estoppel—Cheque—Action on—Appeal.*] —Action upon a cheque for $450 given as part payment upon the purchase of certain chattels appurtenant to a moving picture theatre by the defendant from the plaintiff. Defendant alleged the transaction had fallen through by reason of the refusal of the lessor of the theatre premises to consent to an assignment of the lease thereof to the defendant.—Bell Co.C.J., dismissed the action with costs.—Sup. Ct. Ont. (2nd App. Div.) *held*, that the defendant by his acts was estopped from denying the validity of the purchase.—Appeal allowed and judgment entered for plaintiff for $450 and costs. *Bates* v. *Little* (1913) 25 O. W. R. 156; 5 O. W. N. 180.

Consignment of goods for sale—*Evidence as to terms of contract — "Guaranteed advance" — Appeal — Costs.*]—Sup. Ct. Ont. (1st App. Div.) dismissed an appeal by defendants from the judgment of the Judge of the County Court of the United Counties of Durham and Northumberland, awarding plaintiff $488.58 for apples consigned by them to defendants. *Kelly* v. *Stevenson* (1913), 25 O. W. R. 37; 5 O. W. N. 10.

Default in delivery of goods purchased—*Cause of—Evidence—Dismissal of action — Contingent assessment of damages.*] — Middleton, J., *held*, in an action for damages for non-delivery of goods as ordered that the default was due solely to the actions of the plaintiffs and dismissed the action with costs, but fixed the damages in the event of a successful appeal at $1,000. *David Dick & Sons, Ltd.* v. *Standard Underground Cable Co. & Hamilton Bridge Works* (1913), 25 O. W. R. 53; 5 O. W. N. 82.

Possession in vendors till payment—*Rescission of contract—Consent to—Recovery of purchase price—Appeal—Variation in judgment—Costs.*]—Sup. Ct. Ont. (2nd App. Div.) varied a judgment of the County Court of the County of Carleton in favour of plaintiffs for $229.20, moneys paid for goods of which possession was resumed by defendants, holding that plaintiffs were entitled to possession and defendants to the balance of the unpaid purchase money as the contract had not been rescinded. *Blais* v. *Bigovaise* (1913), 25 O. W. R. 851.

Timber on land—*Unilateral contract—Lack of consideration—Removal and payment in reasonable time — Implied terms — Resale — Notice—Action for trover—Third party—Costs.*] — Britton, J., *held*, that a unilateral contract for the sale of certain piling upon vendor's land to be paid for before removal contemplated, removal and payment within a reasonable time, and where the purchaser made no effort to remove the piling within a reasonable time, the vendor had a right to treat the contract as at an end.—*Brown* v. *Dulmage*, 10 O. W. R. 451, referred to. *McGregor* v. *Whalen, et al.* (1913), 25 O. W. R. 626; 5 O. W. N. 680.

Traction engine—*Contract of sale—Warranties — Verbal representations not binding on vendors — Complaint to be made in five days — Non-fulfilment of warranties—Neglect to complain—Binding force of contract — Neglect to read same no excuse — Action for purchase price.*] — Falconbridge, C.J.K.B., *held*, that where a contract for the sale of a traction engine provided that any complaint was to be made to the vendors within five days from the operation thereof, failing which the warranties in the contract were to be considered as fulfilled, and the engine did not fulfil the warranties but no complaint was made, that the purchaser was estopped from complaint by his contract. *George White & Sons Co.* v. *Hobbs* (1913), 25 O. W. R. 597; 5 O. W. N. 659.

Wheat stored in elevator — *Loss by fire — Draft with delivery note attached unpaid—Specific goods not separated—Storage charges paid by purchaser —Delivery at his convenience — Insurance—Property held not to pass.*]—Middleton, J., *held*, that where certain wheat was sold to defendants but remained unseparated in an elevator in Meaford awaiting defendants' delivery orders, they paying storage charges, and a draft with delivery note attached had been sent to defendants but remained unpaid for their convenience, that plaintiffs must bear the loss by reason of the destruction of such wheat in its elevator.—*Graham* v. *Laird*, 20 O. L. R. 11, followed. — *Inglis* v. *Richardson*, 29 O. R. 292, distinguished. *Richardson* v. *Georgian Bay Milling and Power Co.* (1913), 25 O. W. R. 441; 5 O. W. N. 539.

SOLICITORS.

Action for bill of costs—*Services performed for wife of defendant—Guarantee not proven—Liability of husband—Dismissal of action.*.] — Middleton, J., dismissed an action brought by a solicitor upon a bill of costs as rendered, holding that the services were performed for the wife of the defendant and no guarantee by the defendant had been proven. *Beck* v. *Lang* (1913), 25 O. W. R. 843; 5 O. W. N. 900.

Application for accounting—*Retention of clients' moneys in satisfaction of costs—Non-delivery of bills of costs—Lapse of fifteen years — Alleged negligence — Statute of Limitations—Vexatious application.*] — Middleton, J., dismissed an application of a client for an accounting of moneys received by solicitors over fifteen years before, and for delivery of a bill of costs where it appeared that the applicant had been treated with generosity and the application was patently vexatious. *Re Solicitors* (1913), 25 O. W. R. 619; 5 O. W. N. 671.

STREET RAILWAY.

Breach of contract—*Notice—Forfeiture of franchise rights—Jurisdiction of Dominion Railway Board—Jurisdiction of Supreme Court of Ontario—Dominion Railway Act—R. S. C. 1906, c. 37, s. 26a—B. N. A. Act, s. 92 (13) (14); s. 101 — Appeal.*] — Meredith, C.J.C.P., *held*, in an action brought by the city of Brantford, that certain street railway companies operating therein had forfeited their franchises by reason of breaches of their agreement with the city and failure to remedy the same after due notice.—Sup. Ct. Ont. (2nd App. Div.) *held*, that the jurisdiction conferred upon the Dom. Rw. Board by R. S. C. (1906) c. 37, s. 26 (a) to interpret agreements did not oust the jurisdiction of the civil Courts. — Appeal dismissed with costs. *Brantford* v. *Grand Valley Rw. Co.* (1913), 25 O. W. R. 545; 5 O. W. N. 583.

TRESPASS TO LANDS.

Railway—*Injury to lands by blasting —Trespass — Personal loss and inconvenience—Quantum — Agreement as to damages — Admissions of counsel—Tenant—Costs—County Court—No set-off.*] —Falconbridge, C.J.K.B., awarded the plaintiffs $400 and $250 respectively in actions brought against a railway company for trespass and injury to lands and buildings by reason of blasting operations as well as personal loss and inconvenience suffered by reason of such blasting.—County Court costs—no set-off. *Thomas H. and Patrick Laveck* v. *Campbellford Lake Ontario and Western Rw. Co.* (1913), 25 O. W. R. 867; 5 O. W. N. 925.

Trifling claim — *Counterclaim — Fence — Right of way — Injunction—Damages.*] — Falconbridge, C.J.K.B., 25 O. W. R. 572; 5 O. W. N. 654, dismissed plaintiff's action for trespass to lands and gave judgment in favour of defendant on his counterclaim for an injunction and damages. Sup. Ct. Ont. (2nd App. Div.) varied the judgment below by striking out paragraphs 2, 3, and 4 thereof, and

by declaring that neither party shall build a fence on the centre line north and south of lot 180 further north than a point 11 ft. 2 in. north-westerly from the corner of the plaintiff's house; and also (by consent) declaring that no part of the plaintiff's house is on the defendant's land, and directing that the plaintiff shall, within one month, re-erect and maintain the fence that formerly extended from the north-west corner of her house. In other respects appeal dismissed. No costs of appeal. *Mulholland* v. *Barlow* (1914), 25 O. W. R. 938; 6 O. W. N. 72.

TIMBER.

Manufacture and sale of lumber —Refusal to accept—Defects—Evidence —Time of delivery—Damages—Resale of lumber by vendors — Mode of selling—Reference. *Owen Sound Lumber Co.* v. *Seaman, Kent Co. Limited* (1913), 25 O. W. R. 883; 5 O. W. N. 861.

Mining Act—*Grants of mining land —Reservation of pine timber—Right of grantee to cut for special purposes—Trespass — Cutting of pine—Right to bring action — Transfer by Crown to trespasser—Jus tertii—Possession—Independent contractor—Act of — Ratification—Essentials—Crown agent—Authority of—Evidence—Appeal—Costs.*]—Action by holders of mining locations for damages for trespass on their mining lands for cutting of pine and tamarack timber thereon. The Ontario Mining Act, R. S. O. (1897), c. 36, as amended by 62 Vict. c. 10, s. 10, provides in s. 39, s.-s. 1, that "the patents for all Crown lands sold or granted as mining lands shall contain a reservation of all pine trees standing or being on the lands which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or saw logs on such lands may at all times, during the continuance of the license, enter upon the lands and cut and remove such trees and make all necessary roads for that purpose." By the other provisions of the section the patentee may cut and use pine necessary for building, fencing and fuel, and remove and dispose of what is required to clear the land for cultivation and for any cut for other purposes he shall pay Crown dues. The trespass of defendants Dickson and Miller upon the lands of plaintiff was clearly proven but they claimed that subsequently the Crown conferred upon them the title to the timber so taken from plaintiffs' lands.—Clute, J., gave judgment for plaintiffs for $3,157 and $1,053 respectively with costs, finding that the timber upon the mining locations in question while not sufficient for mining needs was more valuable to plaintiffs for this purpose than for the purposes of railroad ties.—Ont. C. A., 19 O. W. R. 38, reversed above judgment and directed judgment to be entered for defendants.—Sup. Ct. Can., Idington and Duff, JJ., *dissenting* (46 S. C. R. 45) *held*, that a patentee of mining land has, notwithstanding the reservation of pine trees in the patent, such possession thereof or interest therein as would enable him to maintain an action against a trespasser cutting and removing them from the land.—Judgment of Court of Appeal for Ontario reversed and judgment of Clute, J., restored. — Privy Council, *held*, that the property in the pine timber remained in the Crown, and while plaintiffs as possessors or bailees for the Crown might possibly have brought an action for its value against defendants prior to the transfer of the ownership in the same from the Crown to the defendants, they could not do so thereafter.—*The Winkfield*, [1902] p. 42; *Greenwood Lumber Co.* v. *Phillips*, [1904] A. C. 405, referred to.—That it is essential to constitute an agency by ratification, that the agent in doing the act to be ratified shall not be acting for himself but should intend to bind a principal actually named or ascertainable.—*Keighley Maxted & Co.* v. *Durant*, 1901 A. C. 240, and *Wilson* v. *Barker*, 4 B. and Ad. 614, referred to. — Appeal allowed with costs and actions dismissed. *Eastern Construction Co.* v. *National Trust Co.* (1913), 25 O. W. R. 756.

Purchase of timber limits — *Action for purchase-price — Misrepresentations—Executed contract — Absence of fraud—Breach of warranty—Evidence—Res judicata — Estoppel — Findings of trial Judge confirmed.*] — Action to recover for purchase price of timber limits; defendants counterclaimed for damages for deceit or for breach of warranty arising on the contract.—Boyd, C., gave plaintiff judgment on his claim and dismissed defendants' counterclaim with costs.—Sup. Ct. Ont. (2nd App. Div.) affirmed above judgment, holding that defendants had not established the charge of fraudulent misrepresentation. *Vaughan-Rhys* v. *Clarry et al* (1913), 25 O. W. R. 885; 5 O. W. N. 929.

TRIAL.

Admission by counsel — *Mortgage action..Right to redeem—Settlement of*

judgment—Right to recede from admission — Costs.] — *Croft* v. *McKechnie* (1913), 25 O. W. R. 573; 5 O. W. N. 606.

Jury—*Motion for—Surrogate action —Enlargement of motion — Determination by trial Judge.*]—Meredith, C.J.C.P., enlarged a motion for an order for a trial by jury in an action transferred from a Surrogate Court to the Supreme Court of Ontario to be disposed of by the trial Judge. *Murphy* v. *Lamphier* (1913), 25 O. W. R. 848; 5 O. W. N. 924.

Notice of—*Time for—Computation—New Rule 248.* — Meredith, C.J.C.P., *held*, that Rule 248 means that no case shall be set down for trial until after a 10 days' notice of trial has been given; and then it shall be set down six days before the sittings of the Court. That there was no intention to extend the long standing 10 days' notice. *Healey-Page-Chaffons* v. *Bailey* (1913), 25 O. W. R. 75; 5 O. W. N. 113.

Postponement—*Action—Dismissal.*] —Sup. Ct. Ont. (2nd App. Div.) *held*, that plaintiff cannot choose his own Judge to hear his action, and if he refuses to proceed with his action when it comes on for trial it should be dismissed with costs. *Broom* v. *City of Toronto et al.* (1913), 25 O. W. R. 314.

Stated case—*Municipal corporations —Gas and electric company—Powers of —Street lighting — Facts inadequately stated—Refusal of Court to express an opinion.*]—Riddell, J., refused to give an opinion upon a stated case where the facts upon which the case was based were inadequately stated, and it would have been necessary for the Court to draw inferences which were little short of guesswork. — *Bulkeley* v. *Hope*, 8 D. M. & G. 36, followed. *Sarnia Gas & Electric Light Co.* v. *Town of Sarnia* (1913), 25 O. W. R. 415; 5 O. W. N. 532.

Unreadiness of party for —Order for payment of opponent's costs occasioned by default—Dismissal of action in default of payment—Costs. *Broom* v. *Royal Templars* (1913), 25 O. W. R. 250.

TRUSTS AND TRUSTEES.

Accounting — *New trustees — Improper intermingling of trust funds with personal assets or trustee — Death of trustee — Knowledge of representative.*] —Kelly, J., gave judgment for the appointment of new trustees and an accounting where it was shewn that the assets of a trust estate and those belonging to the trustee had been intermingled. *Godkin* v. *Watson* (1913), 25 O. W. R. 718; 5 O. W. N. 811.

Application for delivery of securities by trustees—*Trustee Act—Jurisdiction of Court.*] — Falconbridge, C.J.K.B., *held*, that the Court had no jurisdiction, under the Trustee Act, to order trustees to hand over certain securities and papers to a party to the trust deed. *Re Consolidated Gold Dredging & Power Co.* (1913), 25 O. W. R. 281; 5 O. W. N. 346.

Executors — *Action against—Evidence to establish contract between plaintiff and testator—Corroboration—Laches —Acquiescence — Statute of Limitations —Trust—Company—Shares—Delivery of —Dividends — Appropriation — Waiver —Costs.*]—Action against the executors of one Currie, deceased, to compel the transfer to the plaintiff of ten shares of capital stock of the Ford Motor Co., pursuant to an alleged contract between the plaintiff and the deceased, or for damages or other relief. — Lennox, J., gave plaintiff judgment declaring him entitled to the 10 shares, holding that plaintiff had established a definite contract. That the Statute of Limitations had no application. That deceased was trustee for plaintiff of these ten shares, they being specific and ear-marked. *McGreggor* v. *Currie Estate* (1913), 25 O. W. R. 58; 5 O. W. N. 90.

Investment of estate fund—*Proposed loan to beneficiary — Application for "opinion, advice or direction" under Trustee Act, 1 Geo. V. c. 26, s. 65— Scope of — Restraint on anticipation— Creation of lien breach of trust — Insufficient security—Costs.*]—Lennox, J., *held*, that an executor had no right to loan one of the beneficiaries of the estate the sum of $8,500 upon security worth $11,000 and a lien upon the said beneficiary's interest in the estate, as to which she was restrained from anticipation. *Re Hamilton Estate* (1913), 25 O. W. R. 198; 5 O. W. N. 230.

Lands purchased by mother—*Deed taken in daughter's name — Improvidence — Absence of independent advice—Declaration of trust.*]—Britton, J., gave judgment for the plaintiff in an action to have it declared that defendant was the trustee of certain lands for the plaintiff, holding that the plaintiff, a

simple elderly woman, had been defrauded out of such lands. *Limereaux* v. *Vaughan* (1913), 25 O. W. R. 880; 5 O. W. N. 978.

VENDOR AND PURCHASER.

Action for damages—*Purchase of interest in western lands — Evidence—Damages — Measure of.*] — Lennox, J., *held*, that the measure of damages in an action for damages for false and fraudulent representations by which the plaintiffs were induced to purchase an interest in certain lands was the difference between the price paid and the actual value of such interest.—*Stocks* v. *Boulter*, 47 S. C. R. 440, referred to. *McCallum* v. *Proctor*, *Armstrong* v. *Proctor* (1913), 25 O. W. R. 602; 5 O. W. N. 692.

Action for specific performance—*Dispute as to interpretation of agreement—Claim of purchaser for more land than vendor willing to give—Rescission by vendor—Evidence — Correspondence—Right of purchaser to claim in alternative—Return of deposit—Damages—Costs.*]—Britton, J., *held*, that where purchasers refused to complete a purchase of certain lands, claiming that they were entitled to more land under the agreement of purchase than the vendors were willing or able to give, and as a result thereof, the vendors rescinded the agreement, the purchasers were not entitled to ask the Court for specific performance of the agreement according to their interpretation and in the alternative for specific performance according to the vendor's interpretation, which in the opinion of the Court was the proper opinion. *Preston* v. *Luck*, 27 Ch. D. 497, distinguished. *Walker* v. *Skey* (1913), 25 O. W. R. 336; 5 O. W. N. 366.

Action for specific performance—*Incomplete agreement — Part payment by mortgage—No provision as to mode or terms of payment — No demurrer taken — Costs limited accordingly.*]—Meredith, C.J.C.P., *held*, that where a memorandum of agreement for the purchase of certain lands provided that part of the payment only was to be in cash, "the balance to be arranged by mortgage bearing 6 per cent. interest," the agreement was unenforceable as no provision was made for the mode or time of payment of such mortgage.—*Reynolds* v. *Foster*, 23 O. W. R. 933, followed. — That as this defence should have been raised as a question of law on the pleadings, the costs of such a proceeding only should be allowed to defendant. *Stevens* v. *Moritz* (1913), 25 O. W. R. 453; 5 O. W. N. 421.

Action for specific performance—*Objections to title — Clause allowing rescission in case of unwillingness or inability to remove—Tender of conveyance—Non-acceptance — Termination of agreement — Damages—Costs—Dismissal of action.*]—Kelly, J., *held*, that where a contract for the sale of certain lands provided that if the purchaser made objections to title which the vendor should be unwilling or unable to remove, the agreement should be null and void, and objections were made which the vendor was unable to remove, but where nevertheless he made a tender of a signed conveyance which was not accepted, that the agreement was at an end and the purchaser could not ask for specific performance. *Fine* v. *Creighton* (1913) 25 O. W. R. 656; 5 O. W. N. 677.

Action to rescind — *Agreement—Entry by purchaser — Acts of waste—Certificate by solicitor as to good title—Former vendor and purchaser application—Order not issued—New facts—Dismissal of action.*] — Falconbridge, C.J.K.B., *held*, that where purchasers of certain lands had entered immediately upon the execution of the purchase agreement, as agreed, and had committed acts of waste, and where their solicitors who also acted for the vendors had certified to a good title, they could not afterwards rescind the contract upon the ground that the title was defective. *McNiven* v. *Pigott* (1913), 25 O. W. R. 871; 5 O. W. N. 921.

Application by vendor for declaration that title satisfactory—*Further evidence — Discharge of mortgage—Costs.*]—Lennox, J., *held*, in an application under the Vendors and Purchasers Act that the vendor, subject to the obtaining of certain further documents and evidence, had made a good title. *Re Wilson and Holland* (1913), 25 O. W. R. 693; 5 O. W. N. 768.

Contract — *Sale of Alberta lands—Alleged misrepresentations of agent — Opportunity of inspection by purchaser—Value and quality of land—Evidence—Failure of action — Foreign commission—Costs of.*]—Britton, J., dismissed an action brought for damages for alleged untrue representations made by defendants to plaintiffs on a sale by the former to the latter of certain Alberta lands.—*Scobie* v. *Wallace*, 24 O. W. R. 641, distinguished.—*Wilson* v. *Suburban*

Estates Co., 24 O. W. R. 825, referred to. *Menary* v. *White* (1913), 25 O. W. R. 444; 5 O. W. N. 472.

Contract for sale of land—*Several "options" upon same parcel—Priority—Notice—Husband and wife—Misrepresentation—Expiry of time—Pleading—Statute of Frauds — Amendment—Trial in absence of defendants — Rescission—Waiver—Evidence — Breach of contract—Criminal proceedings—Costs.*] — First Neil gave an option for sale of land. Wife refused to join. Secondly Neil and wife gave another option on said land at an increased price acting on representation that first option was no good. Thirdly Neil and wife gave a third option on same land, but informed the parties of second option and agreed to notify them if the second option was not taken up. The third option was registered. Plaintiffs in first action procured an assignment of the first and second options and purchased the property from Neil and wife, then brought action to have third option removed from the register. — Meredith, C.J.C.P., *held*, that first option had priority over third option—That the second option had no effect for two reasons: (1) it was procured by misrepresentation and (2) it expired without being acted on. — The second action was by holders of third option for damages for breach of contract to sell, and was dismissed with costs. *Healey-Page-Chaffons Co., Ltd.* v. *Bailey & Hehl; Bailey & Hehl* v. *Neil* (1913), 25 O. W. R. 70; 5 O. W. N. 115.

Contract to purchase lands—*Action to set aside—Representation as to intention of railway company — Falsity not proven—Representation not inducing cause of purchase—Dismissal of action—Appeal—Costs.*] — Winchester, Co.C.J., dismissed an action brought for the cancellation of an agreement to purchase certain lands upon the ground of fraud and misrepresentation, holding that the representations made had not induced the contract.—Sup. Ct. Ont. (1st App. Div.) *held*, that the representations made had not been proven false and that therefore plaintiff could not recover.—*Per* Riddell, J.:—"A statement of the existing intention of a third party to do a certain act may well be a statement of fact:" Halsbury's Laws of England, p. 663, s. 1621: *Rex* v. *Gordon*, 23 Q. B. D. 354, at p. 360, referred to.—Appeal dismissed with costs as against defendant company, without costs as against defendant Newsom. *Medcalf* v. *Oshawa Lands & Investments Limited* (1913), 25 O. W. R. 702; 5 O. W. N. 797.

Damages—*Fraud and misrepresentation—Rescission of sale of farm—Damages suffered by purchaser—Shortage in acreage and in fruit trees—Loss of income from investment — Remoteness of damage — Improvements to property—Loss in operating—Expenses of moving—Expenses of searching title—Occupation—Rent—Quantum.*] — See reports of S. C. in 20 O. W. R. 421, 22 O. W. R. 464; 47 S. C. R. 440.—Reference was ordered to Local Master to assess damages suffered by reason of misrepresentations leading to the rescission of a contract to purchase land. Master reported damages at $9,041.38 and allowed for rent, use and occupation $1,425.—Middleton, J., varied above report, reducing damages to $458.05 and allowing for rent, use and occupation $2,000. Plaintiff to have right to further reference as to any increased value of land by reason of matters included under the head of outlays.—*Chaplin* v. *Hicks*, [1911] 2 K. B. 786, and *Goodall* v. *Clarke*, 44 S. C. R. 284, discussed. *Stocks* v. *Boulter* (1913), 25 O. W. R. 93; 5 O. W. N. 129.

Deed containing restraint on alienation—*Refusal to force on unwilling purchaser—Leave reserved to renew motion—Addition of all parties interested—Binding judgment—Costs.*]—Meredith, C.J.C.P., *held*, that in the present state of the authorities a title based upon a deed containing a restraint on alienation should not be forced upon an unwilling purchaser, but that vendor might have leave to renew his motion, bringing all persons interested before the court when a judgment in this matter binding on all parties could be made. *Re Godson & Casselman* (1913), 25 O. W. R. 722; 5 O. W. N. 814.

Exchange of property for western lands—*Misstatements as to character of—Reliance on — Acquiescence—Evidence—Damages.*] — Kelly, J., gave judgment for plaintiff for damages in an action for fraud and deceit in connection with the sale of certain western lands.—"A person by his conduct may forfeit his right to rescind and yet retain his right to sue for damages."—*Peek* v. *Derry*, 37 Ch. D. 576, referred to. *Heimbach* v. *Grauel et al.* (1913), 25 O. W. R. 783; 5 O. W. N. 859.

Fraud and misrepresentation—*Sale of farm—Fraud and conspiracy of purchasers—Void agreement — Cancellation—Refusal of specific performance—Forfeiture of deposit — Counterclaim—Damages.*]—Lennox, J., dismissed action for specific performance of an alleged

contract by the defendant to sell his farm to plaintiffs, or for damages, on the broad ground that the plaintiffs were not entitled to any assistance from the court, because the so-called contract was induced by fraudulent misrepresentations. *Page & Jaques* v. *Clark* (1913), 25 O. W. R. 82; 5 O. W. N. 143.

Objection to title—*Conveyance to trustees — Merger of beneficial interest and legal estate—Evidence of discharge of trust not required.*] — Middleton, J., *held*, that where lands were conveyed to trustees in trust for A. B. and later were conveyed by such trustees to A. B., that it was unnecessary for a subsequent vendor of such lands to prove upon what trusts the lands were held for A. B. and that such trusts had been discharged. *Scott* v. *White* (1913), 25 O. W. R. 666; 5 O. W. N. 766.

Objections to title — *Construction of will—Quit claim — Vendor instructed to procure — Terms of agreement—Refusal to permit purchaser to withdraw.*] —Kelly, J., refused to give effect to the purchaser's objections to the title of the vendor of certain property, but ordered a quit claim to be procured to clear up a possible cloud on the title. *Tozman* v. *Lax* (1913), 25 O. W. R. 49; 5 O. W. N. 51.

Reference—*Appeal from Local Master—Tenants in common—Joint owners —Executions—Enlargement of motion.*] —Lennox, J., varied the report of the Local Master at Ottawa on a vendor and purchaser application. *Smith* v. *Wilson* (1913), 25 O. W. R. 351; 5 O. W. N. 437.

Specific performance — *Agreement for sale and exchange of lands—Mortgage—Dispute as to terms of—Evidence —Part performance—Application to postpone trial—Absence of defendant—Costs.*] — Sutherland, J., gave judgment for plaintiffs for specific performance of an agreement for the sale of certain lands, where the only point in dispute was as to the terms of the mortgage to be given to secure part of the purchase-money. *Lafontaine* v. *Brisson* (1913), 25 O. W. R. 792; 5 O. W. N. 858.

Specific performance — *Attempt to rescind—Time of essence—Waiver—Account—Reference.*] — Lennox, J., 24 O. W. R. 705; 4 O. W. N. 1413, *held*, that where time is made of the essence of the contract, this provision is waived by recognition of the contract by the party entitled to insist on such provision after the expiry of the time provided for by such contract and thereafter in order to cancel the same reasonable notice must be given of a time within which the contract must be completed.—*Webb* v. *Hughes*, L. R. 10 Eq. 281, referred to. Sup. Ct. Ont. (1st App. Div.) affirmed above judgment. *Dahl* v. *St. Pierre* (1913), 25 O. W. R. 261; 5 O. W. N. 230.

Specific performance—*Conduct of purchaser—Title — Reference.*]—Middleton, J., gave judgment for plaintiff, a vendor in an action for specific performance of an alleged agreement for the purchase of certain lands, and directed a reference as to title. *Eisenstein* v. *Lichman* (1913), 25 O. W. R. 803; 5 O. W. N. 887.

Specific performance — *Default of solicitor—Liability of client for—Rescission—Notice of—Reasonableness — Conditional waiver—Condition not performed —Final cancellation — Personal liability of solicitor.*]—Middleton, J., *held*, that a vendor of lands who had given reasonable notice that the purchase must be closed on a stated day; but who agreed afterwards to close on a day shortly thereafter, had only waived his right to rescind conditionally and that where the purchaser failed to complete upon the day agreed upon, the vendor's right to rescind revived.—That a party to an agreement for the purchase of lands is bound by the conduct of his solicitor. *Marotta* v. *Reynolds* (1913), 25 O. W. R. 833; 5 O. W. N. 907.

Specific performance—*Parties not ad idem—First mortgage—Provision as to—Fault of estate agent—Costs.*]—Middleton, J., dismissed a vendor's application for specific performance of an alleged agreement to purchase certain lands, holding that the parties were never *ad idem* as to the terms of the agreement relative to the first mortgage. *Blackwell* v. *Scheinman* (1913), 25 O. W. R. 800; 5 O. W. N. 887.

Title to land—Sale under power in mortgage — Evidence of default—Short Forms of Mortgages Act, R. S. O. 1897 ch. 126, Schedule No. 14—Requisition on title—Vendors and Purchasers Act. *Re Georgian Land and Building Co.* (1913), 25 O. W. R. 883; 5 O. W. N. 859.

VENUE.

Change Berlin to Belleville — Motion for—Convenience — Undertaking of plaintiffs to pay additional costs of trial at place chosen by them. *Berlin*

Lion Brewery Co. v. *Mackie* (1913), 25 O. W. R. 90; 5 O. W. N. 107.

Change of—*County Court action—Transfer to District Court—Application of one defendant—Judgment in County Court against the other defendant — Effect of—Practice.*] — Middleton, J., *held*, that the fact that judgment has been signed against one defendant does not deprive the other defendants of the right to have the trial at the place which is most convenient. *Berthold* v. *Holton*, 23 O. W. R. 839, distinguished. *Martin* v. *McLeod* (1913), 25 O. W. R. 66; 5 O. W. N. 79.

VETERINARY SURGEON.

Counterclaim for malpractice—*Jury notice struck out.*]—Roger, Co.C.J., *held*, that in malpractice actions against surgeons it is now a well established practice to strike out the jury notice, and the same practice should apply to actions against veterinary surgeons, and that as the case was set down for trial before the Judge who heard the motion, it was better to dispose of the application in Chambers, rather than to wait for the trial. *Dickinson* v. *Austin* (1913), 25 O. W. R. 739.

WATER AND WATERCOURSES.

Drainage—*Improper construction of drainage works — Evidence—Continuing damage — Effect of statutory limitation on—Non-repair—Necessity of notice to municipality—Municipal Drainage Act, s. 80 (a)—Damages — Quantum of — Costs.*]—Henderson, K.C., Drainage Referee, *held*, that a municipality is not liable for damages caused by the non-repair of drainage works unless and until a notice specifying the non-repair is served upon it.—That an action can be brought upon a continuing damage, even though two years have elapsed from the inception thereof.—*Wigle* v. *Gosfield*, 7 O. L. R. 32, followed.—*Thackeray* v. *Raleigh*, 25 A. R. 226, distinguished. *Cullerton* v. *Township of Logan* (1913), 25 O. W. R. 254.

WAY.

Highway—*By-law closing same — Dedication—No acceptance by municipality—Surveys Act, 1 Geo. V. c. 42, s. 44—Registry Act, 10 Edw. VII. c. 60, s. 44, s.-s. 6—Quashing of by-law.*]—Middleton, J., 25 O. W. R. 680; 5 O. W. N. 750, *held*, that where a highway had been dedicated but never accepted by the municipality the latter could not by by-law assume to close the same and sell it. Sup. Ct. Ont. (2nd App. Div.) set aside the order quashing the by-law, and referred the matters in question upon the appeal and motion to quash to the Judge assigned for the trial of the action of *Jones* v. *Township of Tuckersmith*, and directed that the Judge should not be bound by the decision of Middleton, J., upon the motion to quash. Costs of the motion to quash and of this appeal to be in the discretion fo the trial Judge. *Re Jones & Tuckersmith* (1914), 25 O. W. R. 944; 6 O. W. N. 71.

Highway—*Claim of municipal corporation that certain lands were—Dedication—Evidence as to unsatisfactory—Statutory appropriation as harbour — Trespass—Damages — Costs.*] — Meredith, C.J.C.P., *held*, in an action for trespass upon lands claimed by defendants to be a public highway that there was no sufficient evidence of dedication as such and that in any case the lands in question had been appropriated for harbour purposes by statute. *Niagara Navigation Co.* v. *Niagara* (1913), 25 O. W. R. 42; 5 O. W. N. 46.

Highway—*County road in township —Judgment against county for non-repair of—Highway Improvement Act, 2 Geo. V. c. 11, s. 7, 13—Requisition under—Right of county to charge amount of judgment against township or "good roads fund"—Minister of public works —Jurisdiction of.*]—Kelly, J., *held*, that where a township council had made application to the county under 2 Geo. V. c. 11, s. 13, to levy a special rate upon the township for the construction, improvement and maintenance of county roads with the township and a by-law passed and moneys raised for such purposes, that the county could not divert any part of such moneys to the payment of a judgment against the county arising from the negligence of the county in allowing a county road in the said township to fall into disrepair. *Township of Toronto* v. *County of Peel* (1913), 25 O. W. R. 561; 5 O. W. N. 632.

Highway—*Non-repair—Liability of municipal corporation—Automobile upset—Death of occupant—Damages.*] — Lennox, J., in an action for damages for non-repair of a highway causing the death of plaintiff's husband, found want of repair as a fact and awarded plaintiff

$2,500 damages. *Connor* v. *Township of Brant* (1913), 25 O. W. R. 479; 5 O. W. N. 438.

Highway — *Original road allowance —Impossibility of ascertainment — By-law defining and accepting highway—12 Vict. c. 81, s. 31—18 Vict. c. 156— Subsequent declaratory by-law—Railway —Trespass — Injunction — Costs.*] — Kelly, J., *held*, that plaintiffs, a municipal corporation, were entitled to restrain the obstruction of a 50-foot strip of land accepted as a public highway by by-law of the corporation, but not a further 16 feet which had not become a public highway as aforesaid. *Township of Niagara* v. *Fisher* (1913), 25 O. W. R. 821; 5 O. W. N. 881.

Highway—*Tolls Road Expropriation Act, 1 Edw. VII. c. 33—Amendment 2 Edw. VII. c. 35—Expropriation of road — Award of arbitrators — Road not taken or paid for in year—Action for costs of arbitration—Parties to arbitration—Liability of county—Liability of township—Tolls Road Act, 2 Geo. V. c. 50, secs. 76, 80—Application of—Retroactivity — Construction of statutes.*] —Lennox, J., *held*, that under the former Tolls Road Expropriation Act, 1 Edw. VII. c. 33, as amended by 2 Edw. VII. c. 35, where a toll road is expropriated the county is a necessary party to the arbitration proceedings and is liable to the owners of the road for the costs thereof in case the road is not taken and paid for within one year.—*United Counties of Northumberland and Durham* v. *Township of Hamilton and Haldimand*, 10 O. L. R. 680, approved. *Brockville & Prescott Road Co.* v. *Counties of Leeds & Grenville* (1913), 25 O. W. R. 371; 5 O. W. N. 362.

Right of way — *Prescriptive right proven — Definite termini — No deviation from — Expropriation by railway company—Damages.*]—Britton, J., *held*, that the plaintiff had established a right of way by user over certain lands taken by a railway for the purposes of their line and that consequently plaintiffs were entitled to damages for their deprivation of such right of way. *Mothersill et al.* v. *Toronto Eastern Ry. Co.* (1913), 25 O. W. R. 553; 5 O. W. N. 635.

Right of way — *Reservation of — Specific purpose—No right to grant for extraneous purpose—Action of trespass —Ascertainment of boundary line—Evidence—Ancient surveys — Descriptions in deeds—Possession—Mortgage—Foreclosure—Damages.*] — Kelly, J., *held*, that the benefit of a right of way reserved by a grantor to be used by him as the owner of certain lands could not be granted by him to an owner of other adjoining lands.—*Purdon* v. *Robinson*, 30 S. C. R. 64, followed. *Epstein* v. *Lyons* (1913), 25 O. W. R. 807; 5 O. W. N. 875.

WILLS.

CONSTRUCTION OF.

Bequest in favour of possible future temperance hotel — *Charitable bequest—Conditions—Approval of bishop — Uncertainty of fulfilment — Vagueness — Invalidity.*] — Latchford, J., *held*, that a bequest to trustees to pay the income to any future hotel to be established in Guelph, where no intoxicating liquor should be sold, subject to the approval of a certain bishop, was too uncertain to be valid, as no such hotel might ever be established and in any case such approval might never be given.—*Re Swain* [1905] 1 Ch. 669, and *Re Jarman*, 8 Ch. D. 584, referred to.—That a trust for the promotion of temperance or abstinence from liquor might be considered charitable.—*Farewell* v. *Farewell*, 22 O. R. 573, referred to. *Re Doyle Estate* (1913), 25 O. W. R. 837; 5 O. W. N. 911.

Bequest of interest on specific sum for lives of three legatees— Interest after death of two falling into residue—Period of distribution of estate — Construction by Britton, J.] — *Re Campbell* (1913), 25 O. W. R. 110; 5 O. W. N. 154.

Codicils—*Gift of income to widow— Remainder to others—Trust for sale — Subsequent permission to encroach on capital for maintenance—Estate taken by widow not fee simple — No repugnance.*]—Lennox, J., *held*, that where a will and certain codicils had given the testator's widow the income of certain property during her widowhood with remainder to named persons, that a subsequent codicil reciting that whereas the widow has been up to that time restricted to the use of the income alone, but thereafter she shall have "the right in addition thereto to use the principal or so much thereof as she may require according to her own judgment, for her support and maintenance," did not confer upon the widow an estate in fee simple but only gave her a power of encroachment on the capital.—*Re Davey*, 17 O. W. R. 1034, followed.—*Re Jones, Richards* v. *Jones* [1898] 1 Ch. 438, dis-

tinguished. *Re Harrison* (1913), 25 O. W. R. 195; 5 O. W. N. 232.

Codicil—*Overriding of terms of will by—"Supersede" — Meaning of — Income—Share in corpus—Practical revocation of will—Inference against — Appeal.*]—Middleton, J., *held*, 24 O. W. R. 476, that a codicil giving a legatee a certain annuity superseded the provisions of the will giving her a share in the corpus of the estate.—Sup. Ct. Ont. (1st App. Div.) *held*, that the intention of the testator was that the gift of income should be in addition to and not in substitution of the gift of the corpus. —Appeal allowed. Costs of all parties out of estate. *Re Smith* (1913), 25 O. W. R. 393; 5 O. W. N. 501.

Condition of forfeiture—*"Instituting proceedings to set aside will"—Filing of caveat not such proceeding—Accounts—Reference.*]—Britton, J., *held*, that filing a caveat against the proof of a will is not "instituting proceedings to set it aside" so as to work a forfeiture of the caveator's interests under the will:—*Rhodes* v. *Mansell Hill Land Co.*, 29 Beav. 560, and *Williams* v. *Williams*, [1912] 1 Ch. 399, referred to. *Re McDevitt* (1913), 25 O. W. R. 309; 5 O. W. N. 333.

Devise to trustees on trusts — *Death of object of trusts in lifetime of testatrix—Sale of lands by testatrix—Conversion into cash and mortgage — Ademption—No earmarking — Proceeds of sale falling into residue—Intestacy.*] —Boyd, C., *held*, that a devise of lands to executors upon certain trusts was adeemed or revoked by the action of the testatrix, after the object of the trusts died, in selling such lands, and that the proceeds of such sale, although partially represented by a mortgage, were not earmarked but went into the residuary estate.—*Re Dods*, 1 O. L. R. 7, followed. *Re Tracy* (1913), 25 O. W. R. 413; 5 O. W. N. 530.

Election — *Legacy to niece—General devise—Lands of testator in which legatee had half interest—No election—Intention—Evidence—Foreign executor — Partition—Costs.*]—Middleton, J., *held*, that to raise a case of election under a will it must be clearly shewn that the testator has attempted to dispose of property over which he had no disposing power, and that such intention must appear from the will itself. *Snider* v. *Carlton; Central Trust & Safe Deposit Co.* v. *Snider* (1913), 25 O. W. R. 771; 5 O. W. N. 852.

Gift of property bequeathed by husband's alleged will — *Husband dying intestate — Failure of gift—Presumption against intestacy overborne.*]—Middleton, J., *held*, that the following paragraph in a will—"My husband made his will. Its contents I know not. What he gives me and for my disposal I wish to give to the family of J.," did not pass property acquired from the estate of the husband of the testatrix on an intestacy. —*Re Lenz & Bowstead*, 19 O. W. R. 769, referred to. *Re Palmer* (1913), 25 O. W. R. 869; 5 O. W. N. 917.

Gift to "brothers and sisters and their children"—*Right of children of deceased brother and sister to share—Use of plural term — Only one surviving sister—Context.*]—Middleton, J., *held*, that where one brother and one sister of a testator had died before the date of the will leaving children, and there were alive at the date of the will several brothers and one sister of the testator, that a gift to "Brothers and Sisters and their Children" did not include in the beneficiaries thereof children of the deceased brother and sister of the testator. *Re Acheson* (1913), 25 O. W. R. 329; 5 O. W. N. 361.

Gift to daughter—*Moneys in bank for household expenses — Large sum in bank at death—Trust — Surplus—Resulting trust—Sale of devised lands — Mortgages—Personalty—Claim of devisees disallowed—Mortgage on wife's property—Assumption of—Charge on real estate.*]—Middleton, J., *held*, that a gift to the daughter of a testator of "whatever sum or sums of money may be to my credit in any bank or upon my person or in my domicile at the time of my decease for the purpose of enabling my said daughter to meet the immediate current expenses in connection with housekeeping," where there was only a small sum in the bank at the date of the will but $17,200 at the time of the death of the testator, created a trust for the purpose expressed and all moneys not needed for that purpose belonged to the estate as a resulting trust. — *Re West*, [1901] 1 Ch. 84, referred to. — That where specific houses were afterwards sold and mortgages taken back, the devisees had no right or title to such mortgages.—*Re Dods*, 1 O. L. R. 7, followed. —See *Re Beckingham*, 25 O. W. R. 564.—Ed.] *Re Robert George Barrett* (1913), 25 O. W. R. 735; 5 O. W. N. 805.

Gift to daughters—*"Out of" rentals—Increased rentals—No increase in gift — "Issue"—Limitation to children*

—Estate tail negatived—Residuary estate—Tenancy in common.]—A testatrix provided *inter alia*, "I give—out of the rents—of land on King St. the annual sum of six hundred and fifty-four pounds. The six hundred pounds to be divided equally between my daughters, the fifty-four pounds to Edith Emily for life." This was followed by a proviso that upon the expiry of the present lease, if the rent is increased. Edith Emily's share is to be £600 per year for life.—Middleton, J., *held*, that this was a gift to the daughters of £600 and no more, and that they did not take any increased rental after deducting the allowance to Edith Emily.—*Re Morgan*, [1893] 3 Ch. 222, and other cases referred to. *Re Rebecca Barrett Estate* (1913), 25 O. W. R. 710; 5 O. W. N. 807.

Gift to executors in trust—*Life estate—Remainder—Condition — Birth of issue—Time of vesting.*]—Latchford, J., *held*, that where certain lands were given to A for life and after A's death to B if she should have lawful issue, but if she should die without lawful heirs to C, and where at A's death, B was living having lawful issue, she became entitled in fee simple to such lands. *Re Donald McDonald Estate* (1913), 25 O. W. R. 147; 5 O. W. N. 188.

Gift to trustee—*Fund "to be expended for the education and support of testator's niece"—Right of beneficiary to unexpended balance.*]—Hodgins, J.A., *held*, that where there is a gift to a trustee for the education and support of a named beneficiary, the latter is entitled to the fund absolutely upon coming of age.—*Hanson* v. *Graham*, 6 Ves. 249, referred to. *Re McKeon* (1913), 25 O. W. R. 146; 5 O. W. N. 190.

Inconsistency—*Bequest of all residue to amount of $800— Gift limited to that sum—Intestacy as to remainder of residue.*]—Latchford, J., *held*, that under a clause in a will providing "all the residue and remainder of my estate not hereinbefore disposed of I give, devise and bequeath unto my nephew to the amount of $800," the beneficiary only took the sum of $800, there being an intestacy as to the balance of the residue. *Re Nelson*, 14 Gr. 199, discussed. *Re Browne* (1913), 25 O. W. R. 467; 5 O. W. N. 466.

Legacies charged on land—*Devisee—Life estate—Remainder to children or issue—Tenants in common per stirpes—Rule in Shelley's Case—Settled Estates Act—Gift over — Costs.*]—Motion by Margaret Ames, a beneficiary under the will of Myron B. Ames, deceased, for an order determining a question arising upon the administration of the estate as to the construction of the will. The will was that upon the death of the widow (which had occurred) Thomas should take during the term of his natural life without impeachment of waste and that Thomas should pay thereout several legacies. — Middleton, *held*, that Thomas took only a life estate and that the legacies should be paid by mortgaging the estate under the Settled Estates Act. *Re Ames* (1913), 25 O. W. R. 80; 5 O. W. N. 95.

Life interest—*Gift of "residue" on death of life tenant—Power of encroachment by life tenant on corpus for maintenance — Amount of annual payment fixed by consent.*]—Middleton, J., *held*, that where a testator gives his property, mainly personal, to his wife for life, the "residue" to others after her death, that the widow has power to encroach upon the corpus for her maintenance. —*Re Storey*, 14 O. W. R. 904, and *Re Johnson*, 27 O. L. R. 472, followed. *Re Achterberg* (1913), 25 O. W. R. 700; 5 O. W. N. 755.

Payment to beneficiary on attaining age of 23—*Divesting clause —Direction for investment of corpus in interval — Costs.*]—Latchford, J., *held*, that where a testatrix made a gift to a beneficiary when he should attain the age of 23 and directed the corpus to be invested for him in the meantime, the executors should, not later than one year from the death of the testatrix, set aside and invest such sum. *Re Clooney* (1913), 25 O. W. R. 458; 5 O. W. N. 513.

Will—*Power of appointment—Exercise of—Validity—Subsequent attempted exercise of power—Revocation—Title to land — Action for possession.*]—Boyd, C., *held*, that an appointment made voluntarily and without the knowledge of the appointee was valid even against a subsequent appointee, although the appointment was made for valuable consideration.—*Sweet* v. *Platt* (1886), 12 O. R. 229, discussed. *Goldsmith* v. *Harnden* (1913), 25 O. W. R. 55; 5 O. W. N. 42.

Provision for daughter — *"To have a home with her mother"—Life estate of mother—Death of mother — Termination of daughter's rights.*] — Middleton, J., *held*, that where a testator by his will gave a life estate to his wife and provided that "my daughter Sarah shall have a home with her mother

so long as she does not marry again," that any rights of the daughter lapsed with the death of the mother. *Re Fairchild* (1913), 25 O. W. R. 897; 6 O. W. N. 35.

Provision for widow — *Claim of dower by—Presumption against — Election—Annuity to widow—Lien on whole estate for—Right to resort to corpus for arrears—Gift to infant beneficiary — Discretion of executors as to income.*]—Britton, J., *held*, that where there is such reasonable provision made by a testator for his widow as warrants a strong inference that such provision was intended to be in lieu of dower, the widow is put to her election.—*Re Hurst*, 11 O. L. R. 6, distinguished. *Re John Ouderkirk* (1913), 25 O. W. R. 185; 5 O. W. N. 191.

Residuary bequest to nephews and nieces—*Supplying word to render language of will intelligible—Proof of contents of will—Probate copy certified by Surrogate Court—Conclusiveness — Original will produced to aid interpretation.*]—Kelly, J., *held*, 24 O. W. R. 665; 4 O. W. N. 1360, that a gift by a testator to a legatee of "all my cash in bank" passed certain moneys on deposit in the Canada Permanent Mortgage Corporation as well as other moneys in deposit in two chartered banks.—That a gift to the three nieces and five nephews of B. S. C., the brother of the testator, where B. S. C. had three daughters and five sons and several nephews and nieces (but not eight precisely) was a gift to the latter class and not to the children of B. S. C., the wrongful enumeration being disregarded. — *Re Stephenson, Donaldson* v. *Bamber*, [1897] 1 Ch. 75, followed. — Sup. Ct. Ont. (1st App. Div.) supplied the word "children" in the following clause in testator's will. "my three nieces and five nephews, children of Barry S. Cooper," and held that these eight took to the exclusion of the other nieces and nephews of testator.—Judgment of Kelly, J., reversed. *Re Cooper* (1913), 25 O. W. R. 112; 5 O. W. N. 151.

Specific devise—*Subsequent agreement for sale—Conversion—Ademption —Non-payment under agreement—Discretion of executors — Ascertainment of next of kin—Reference.*] — Boyd, C., *held*, that where land specifically devised is afterwards sold by the testator under an agreement for sale, the devisee takes no interest even though default should be subsequently made by the purchaser. —*Farrar* v. *Winterton*, 5 Beav. 1, and *Re Dods*, 1 O. L. R. 7, followed.—See *Re Mackenzie Estate*, 24 O. W. R. 678, for converse of above case.—[Ed.] *Re Beckingham* (1913), 25 O. W. R. 564; 5 O. W. N. 607.

Vendor and purchaser application—*Gift to executors—Power to use corpus—Balance if any to go to nephew —Fee simple not devised—Implied power of sale—Form of deed.*] — Lennox, J., *held*, that where property was devised by a testatrix to two of her brothers, to be "left entirely in their hands," they to be permitted to "use the corpus for their own benefit, and the balance if any which is left" to go to her nephews, the two brothers did not take an absolute estate in fee in the property but could sell the same as executors, the above words conferring an implied power of sale. *Re Mair & Gough* (1913), 25 O. W. R. 217; 5 O. W. N. 277.