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ONTARIO WEEKLY REPORTER

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DECEMBER 30TH, 1905.

C.A.

HENNING v. TORONTO R. W. CO.

Contract—Advertising Privileges—Renewal—Uncertainty—Invalidity—Construction of Contract.

The plaintiffs were entitled under agreement with the defendants the Toronto Railway Company to the exclusive privilege of advertising in the street cars for a term of three years, expiring on 31st August, 1904. By an agreement dated 30th April, 1904, the defendants the Toronto Railway Company granted to their co-defendants the exclusive privilege of advertising in the cars for a period extending (subject to prompt quarterly payments) to 1st September, 1907.

This action was begun on 18th May, 1904, seeking a declaration that plaintiffs were entitled to renewal of their agreement with defendants the Toronto Railway Company for a further period from 1st September, 1904, and that their rights were prior to those of defendants the Canadian Street Car Advertising Co.; an injunction restraining defendants the Toronto Railway Company from entering into a contract with any person other than plaintiffs; specific performance of an agreement for renewal; and in the alternative damages against the Toronto Railway Company.

TEETZEL, J., dismissed the action (5 O. W. R. 227), and plaintiffs appealed.

E. E. A. DuVernet, for plaintiffs.

D. L. McCarthy, for defendants the railway company.

S. B. Woods, for the other defendants.

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

MOSS, C. J. O.:—At the trial the claim for specific performance, though not abandoned, did not appear to be advanced with much confidence, and on the appeal there was scarcely an attempt to maintain it. Nothing was proved from which it could reasonably be held that defendants the Canadian Street Car Advertising Company had any notice or knowledge of any contract for renewal between plaintiffs and the Toronto Railway Company. The substantial question was whether the Toronto Railway Company were liable for breach of contract with the plaintiffs.

The words of the agreement on which the plaintiffs rely are as follows: "This agreement to be renewable at the end of three years at a price to be agreed upon, but not less than $5,000 per annum."

The plaintiffs contended, first, that there was an agreement as to price come to between them and the Toronto Railway Company, and secondly, that if no agreement as to price was reached, plaintiffs were entitled to require the Toronto Railway Company to renew under the terms of the agreement set forth above, and that the company had refused to do so.

With regard to the first contention, the evidence fails to establish it. There were negotiations beginning in February, 1904, but no agreement was reached. The plaintiff Henning testified that he and Mr. Keating, the then manager of the Toronto Railway Company, agreed upon $6,000 for the first year, $6,500 for the second year, and $7,000 for the third year. But it seems clear that these figures were only named for reference by Mr. Keating to the board of directors, and they were never accepted. That plaintiffs acquiesced in this was shewn by their afterwards continuing negotiations with Mr. Grace, the secretary, with whom plaintiff Henning endeavoured to come to an agreement, but without success.

As to the second contention plaintiffs argue that under the terms of the agreement, if no other price was agreed upon, they were entitled to a renewal at $5,000 per annum.

This is tantamount to giving plaintiffs the sole right to name the price, and, by refusing to name any beyond $5,000 or declining to accept any greater sum named by the Toronto Railway Company, secure the renewal at $5,000—a

construction which could not have been contemplated, and one not warranted by the language of the instrument. The more natural reading is, that, unless both parties agreed upon $5,000, which was to be the minimum, no price was fixed, and the only way of ascertaining one was by the parties agreeing. The whole matter was thus left at large, no method being provided short of an agreement between the parties. And there is no way provided for substituting any other mode than that to which the parties agreed to submit. The case is quite distinguishable from Manchester Ship Canal Co. v. Manchester Race Course Co., [1900] 2 Ch. 352, and [1901] 2 Ch. 37. It is true that no argument arises here on the ground that the agreement offends the law against perpetuity. On the other hand, the argument against uncertainty and vagueness derives no support from a legislative declaration of validity, as in the case cited, and the language must be read without any unusual expansion of its sense. . . . Here the case is different. The parties have to agree upon a price as preliminary to either being bound, and there is no provision for ascertaining the price in any other way. There is nothing to control the actions of either party, unless indeed it can be said that the Toronto Railway Company had the right, if they chose, to hold plaintiffs to the payment of $5,000 per annum for a further term, even though plaintiffs were unwilling to pay that sum. But it seems clear that there is no such reciprocal right on the part of plaintiffs, and it is fairer and more reasonable to read the words as conferring no such right on either party.

Plaintiffs further urged that they had until the day of the expiration of their former term within which to obtain a renewal if they could. Mr. Henning's testimony shews that it was essential to the proper carrying on of the business that it should be known and settled, a very considerable time before the day for a new contract to go into operation, with whom and upon what terms it was to be effected. And it was at his instance that steps were taken, as early as they were, to ascertain the price and terms of a renewal. He was aware that circulars were issued to other advertising firms and companies, and made no objection to that course, although he knew that such action would necessarily involve an early agreement with the party whose tender would be successful. But, irrespective of this conduct on plaintiffs' part, there seems to be nothing in the words of the agreement

to entitle plaintiffs to refuse to announce their intentions until the last day of the term. The Toronto Railway Company would be unduly prevented from entering into arrangements with others, who would of course only deal on the footing of being in a position some months before to make their sub-contracts and other preparations for carrying on the business.

The appeal fails and must be dismissed with costs.

DECEMBER 30TH, 1905.

C.A.

HIME v. LOVEGROVE.

Vendor and Purchaser—Covenant—Building Restriction—Deed of Land—Covenant Running with Land—Breach—Construction—"House."

Appeal by plaintiffs from judgment of STREET, J., 5 O. W. R. 706, 9 O. L. R. 607, dismissing action for damages and an injunction in respect of an alleged breach of covenant as to building contained in a deed of conveyance of land.

A Cassels, for plaintiffs.

J. Bicknell, K.C., and G. B. Strathy, for defendants.

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

OSLER, J. A.:—Assuming that, as the assignees thereof, plaintiffs are entitled to the benefit of the covenant entered into by the original purchaser Dick, defendants' predecessor in title, with their testator's grantor Evans, and assuming also that there has been no such change in the residential character of the neighbourhood as to affect the right of plaintiffs to enforce the covenant, the question remains whether any breach thereof has been proved, and the answer to this depends upon the true construction and extent of the covenant. It is a restrictive covenant, affecting the ordinary right of the land owner to use his property in the way which

he may deem most beneficial to himself, and it is therefore not to be pressed beyond the fair meaning of its terms, including "any term obviously intended by the parties which is necessary to make the contract effectual, if the contract as expressed in the writing would otherwise be futile."

What the covenantor says, speaking for himself and his representatives, is, "that he or they will not nor will they or any of them permit any person whomsoever to erect or build more than one house upon the property hereby conveyed, and that any house so erected shall be of brick or stone, or partly of brick and partly of stone, and shall cost not less than $5,000," and the situation of such house is then described by reference to that of the adjoining house of the covenantee.

Does this restrict the covenantor or his successors from building a stable as appurtenant to a house to be afterward erected of the character and in the situation described in the covenant? I agree with Street, J., that it does not. The object of the covenant is to maintain the high residential character of the neighbourhood. It is directed against the building of more houses, i.e., dwelling houses, than one upon the parcel conveyed, not against "the erection of any building whatever" except a dwelling house or private dwelling house: Smith v. Standing, 51 Sol. Jour. 734; nor of a building which is commonly or frequently appurtenant to a substantial or high class dwelling house, and is the more likely to be so the more costly and substantial the house. If the house had been built first, I think it would be impossible to say that the erection of a stable as appurtenant to it would be inconsistent with the covenant or prohibited by it.

The case of Bowes v. Law, 18 W. R. 102, referred to in the judgment, is a decision which really covers the case before us. It is true that it is a decision of a single Judge, but it does not seem to have been appealed from, though the circumstances were such as to have invited appeal had it been thought one could be prosecuted successfully.

I think that the defendants have not infringed the covenant, and therefore that the appeal should be dismissed with costs.

STREET, J. JANUARY 2ND, 1906.

TRIAL.

ELLICE (NO. 1) PUBLIC SCHOOL TRUSTEES v. TOWNSHIP OF ELLICE.

Schools—Protestant Separate School—Establishment—Failure to Bring into Operation—Municipal By-laws—Rates—Assessment — Inequality — Adjustment — Debentures—Collector's Roll—Action—Declaration — Parties—Trustees—Fraud—Costs.

Action by the trustees of school section 1 and by Theodore Parker against the township corporation and W. W. Shore, James Archer, and Louis Brunner, to set aside certain by-laws and for a declaration with regard to a Protestant separate school in the township.

R. S. Robertson, Stratford, and J. J. Coughlin, Stratford, for plaintiffs.

E. Sydney Smith, K.C., and J. Steele, Stratford, for defendants.

STREET, J.:—On 27th May, 1901, the municipal council of the township of Ellice passed a by-law, No. 425, under the provisions of sec. 2 of the Separate Schools Act, R. S. O. 1897 ch. 294, authorizing the establishment of a separate school for Protestants in that township. The by-law recited an application in writing by a large number of Protestant heads of families resident in school section No. 1 of the township, and also that the teacher in the public school for that section was a Roman Catholic. The limits of the Protestant separate school section intended to be created were set forth in the by-law, and included a number of lots which were not in school section No. 1 of Ellice, but in union school section No. 2 of Ellice and Downie. An election of school trustees was held, and trustees were appointed for the Protestant separate school, but no school has ever been erected or rented, no school teacher has ever been engaged, and no Protestant separate school has ever gone into operation. The

persons who made the application have not sent their children to the public school in the section, but have sent them into the adjoining city of Stratford, to the public school there. They have all been placed upon the assessment roll of the township in each year, but they have not been placed upon the collector's roll for public school rates, because the township clerk of Ellice has treated them as exempt from public school rates, notwithstanding the absence of any return by the public school inspector to the township clerk that the persons so exempted were contributing to the separate school or sending their children to it, as required by sec. 13 of ch. 294.

It is true that the school trustees of the Protestant separate school did, at irregular intervals, transmit to the public school inspector returns of the names of the persons who were sending their children to the Stratford city school, or were contributing towards the expense of doing so, and that copies of these returns were sent on to the clerk by the inspector; but none of these returns was a compliance with the only condition under which supporters of Protestant separate schools, who are on the assessment roll, are entitled to exemption from payment of public school rates. The result is, that for the years 1902, 1903, and 1904, most of these persons have escaped payment of public school rates. In 1905, upon an appeal by the plaintiff Theodore Parker to the Court of Revision, they were all placed upon the collector's roll as public school supporters, and were compelled to pay the public school rate for that year.

By sub-sec. 3 of sec. 71 of ch. 39, 1 Edw. VII. (O.), being the Public Schools Act of 1901, it is made the duty of every municipal council to correct any errors or omissions that may have been made, within the 3 years next preceding such correction, in the collection of any school rate duly imposed or intended so to be, to the end that no property shall escape from its proper proportion of the rate, and that no property shall be compelled to pay more than its proper proportion of such rate. The lapse of time prevents any correction under this section of the rates for 1902, but those for 1903 and 1904 are not barred. The school trustees have got all the money they were entitled to in those years, but it was levied upon some only of the persons who should have paid it, and it is now the duty of the council of Ellice so to ad-

just the rates upon the properties of the public school supporters in the coming year as that each shall have paid, when those rates are collected, the amount he would have paid in the 3 years, 1903, 1904, and 1906, had a proper proportion of the public school rates for 1903 and 1904 been collected from him; those who have paid more than their share should be credited with interest at 5 per cent. upon the overpayment; and those who have paid less than their share should be charged with interest at that rate.

On 28th July, 1902, the municipal council of Ellice passed by-law No. 447, in which they recite that certain lots in union school section No. 2 of Ellice and Downie had been by oversight included within the limits of the Protestant school section created by by-law No. 425, and that it was expedient to amend that by-law by striking out the lots so improperly included; and they then declare that by-law No. 425 is amended by striking them out; and that the by-law is to come in force immediately.

I think it is plain that by-law No. 425 was certainly bad for including the lots in the union school section within the limits of the Protestant separate school section. Section 7 of ch. 294, in prescribing that "no Protestant separate school shall be allowed in any school section except when the teacher of the public school in such school section is a Roman Catholic," seems to plainly intend that no Protestant separate school section shall extend beyond the limits of the particular public school section in which the religion of the teacher furnishes the reason for its creation. See Trustees of Roman Catholic Separate School Section 10, Arthur, v. Corporation of Arthur, 21 O. R. 60; Banks v. Anderdon, 20 O. R. 296.

Every by-law of this kind is required to go into operation on the 25th December following the application of the heads of families for it. Whether because the by-law was known to be bad, or for some other reason, it did not go into operation on 25th December following its passing, and nothing was done under it beyond the election of trustees until by-law No. 447 amending it was passed.

But because the by-law No. 425 was bad in not defining any lawful school section under sub-sec. 1 of sec. 2 of ch. 294, R. S. O., the school authorized by it could not go into

operation on 25th December following the date of the application, as required by the 4th section of the Act, and it was too late in July, 1902, to pass a by-law to amend it. A new application and a new by-law only could authorize a Protestant separate school, for it must be capable of going into operation on the 25th December after the application. I must hold, therefore, that no Protestant separate school has ever been validly authorized by either of the by-laws which have been given in evidence. See also Free v. McHugh, 24 C. P. 13.

The plaintiffs alleged in their statement of claim that the persons applying to the council for the establishment of a separate school had acted fraudulently in making the application, and that, although they represented themselves as being desirous of establishing a separate school, they at no time had any intention of doing so; and the by-law was attacked on this ground. This charge was not made out. The legality of their proceedings has been questioned from the beginning, and they had already been involved in one expensive law suit, before the present one, in which, although successful, they were unable to recover their costs from the plaintiff. I think their troubles arising from these causes have probably induced them to postpone the establishment of their school; and now the reason for its establishment is at an end, because the teacher at the public school in the section is a Protestant.

In addition to the relief claimed by the plaintiff Parker, as a co-plaintiff with the public school board, a cause of action has been joined in which he alone is plaintiff; it is shewn that a by-law, No. 449, was passed by the municipal council of Ellice on 24th November, 1902, for raising $800 by debentures to build a public school house in section No. 1 Ellice, and this school house was built. On 2nd January, 1903, a Roman Catholic separate school was established in section No. 1, and having been established after the building of the new public school house was undertaken, the Roman Catholic separate school supporters are not exempt from payment of the debenture rate. By an error of the township clerk, these supporters were, however, not placed on the collector's roll for this rate in 1903 and 1904; nor were the supporters of the so-called Protestant separate school assessed for it in those years; and, to add to the confusion, the township clerk did not even assess upon the remaining ratepayers

a sufficient rate to pay the instalment of the debenture debt payable in those years. Upon the matter being called to the attention of the council in October, 1905, they instructed the clerk to make a new calculation and to reduce the sum charged against the public school supporters in respect of the debenture rate by the amount they would have been called on to pay had the Roman Catholic separate school supporters been assessed for their share; this was done, but it still leaves the public school supporters and the Roman Catholic separate school supporters chargeable with the share of the debenture debt which the so-called Protestant separate school supporters should contribute. The defendants the corporation of Ellice must be restrained by injunction from collecting from the plaintiff Theodore Parker any greater sum in respect of this debenture debt than he would be required to pay if all the persons properly chargeable with a share of it had been made chargeable. He is the only person overcharged who has brought an action, and the only one to whom relief can be given in this action. If there are others who have not paid their taxes, no doubt the council will treat them in the same way without the necessity for a further action. As to those who have paid a larger share in this year and the previous 2 years, the duty of the council is to correct the matter under sec. 71 of the Public Schools Act of 1901, in the manner above indicated.

As the question of the proper amount payable in respect of the debenture debt by the plaintiff Parker is one of simple calculation, there should be no difficulty in arriving at it, and no necessity for a reference to a Master; but if the parties are unable to agree upon it the matter may be spoken to again.

The plaintiffs should have their costs against the defendants the municipal corporation of Ellice; the defendants the school trustees of the co-called Protestant school section were properly made defendants to the action, and their status has been successfully attacked, but the charges of fraud against them were made recklessly and unnecessarily, and have not been sustained; I therefore give no costs against them.

STREET, J. JANUARY 3RD, 1906.

TRIAL.

BEATTY v. McCONNELL.

Assessment and Taxes—Tax Sale—Deed—Time for Registration—R. S. O. 1887 ch. 193, sec. 184—Construction—Purchaser in Good Faith—Trustee—Promissory Note.

After the delivery of the judgment reported 6 O. W. R. 882, STREET, J., gave a supplementary judgment upon another branch of the case.

STREET, J.:—I find that in giving judgment in this case on 11th December, 1905, I omitted to deal with a branch of the plaintiffs' argument not governed by the point upon which my judgment turned, and the papers have been handed back to me in order that I may deal with it. The question arises under sec. 184 of ch. 193, R. S. O. 1887, made applicable to Algoma by sec. 31 of ch. 23, R. S. O. 1887, which provides that the deed (made under the sale for taxes) shall be registered "within 18 months after the sale, otherwise the parties claiming under the sale shall not be deemed to have preserved their priority as against a purchaser in good faith who has registered his deed prior to the registration of the deed from the warden and treasurer."

The lands in question were sold to Bull for taxes in 1887, and the deed from the Provincial Treasurer to Bull was not made until 14th December, 1903.

It is contended that the words "18 months after the sale" mean "18 months after the making of the tax deed," upon the authority of Donovan v. Hogan, 15 A. R. 432, and that therefore the section above quoted does not apply; and further that the plaintiff is not a purchaser of the land.

In my opinion, the words of sec. 184 should be construed in their ordinary and natural sense, and so construing them their meaning is plain. The section follows close upon other sections in which a sale and the deed given under it are plainly treated as two separate and distinct matters; in sec. 184 also they are treated as two separate and distinct matters, and there is no reason why it should be assumed that when the section speaks of a sale it means not a sale but the deed which is not to be given until a year after the sale.

If Donovan v. Hogan had been decided upon this section or upon a precisely similar form of words and of context, I should be bound to follow it; but that case was decided upon another and a different section, the context of which was supposed to justify the Court in disregarding its language.

The deed was not registered within two years after the sale, and was therefore not entitled to prevail against a purchaser who should have registered his deed prior to the registration of the deed from the Provincial Treasurer.

The conveyance from W. H. Beatty to the plaintiff Joseph W. Beatty was dated 29th October, 1903, and registered on 6th November, 1903; the tax deed from the Provincial Treasurer was registered on 18th December, 1903; and the former is entitled to prevail if Joseph W. Beatty was a "purchaser" within the meaning of the section.

At the time of the conveyance from W. H. Beatty to Joseph W. Beatty, an option given by the former to one Longworthy to purchase the property at $7,560 was in force. The conveyance purports to be made in consideration of $4 cash, and $7,560 remaining unpaid as a lien upon the property, and is subject to the option given to Longworthy. Contemporaneously with the making of the conveyance a note was made by J. W. Beatty for $7,560 payable six months after date to W. H. Beatty or order. W. H. Beatty stated that it was never intended that J. W. Beatty should pay this note; it was only intended that if Longworthy exercised his option to purchase, the purchase money should be applied in reduction of a debt of $50,000 due by W. H. Beatty to the late Mr. George Gooderham, which was guaranteed by Mrs. Beatty, and as part of the arrangement W. H. Beatty, on 25th November, 1903, handed J. W. Beatty's note for $7,560 to Mrs. Beatty, having indorsed it to her. At the time of handing her the note W. H. Beatty wrote a letter to her speaking of her guarantee and saying "as security therefor I hand you J. W. Beatty's note for $7,560 connected with a land deal in the township of McTavish, Thunder Bay." This is the only reference to the land in question in the letter, but other property is specifically mentioned as pledged to her by way of security.

The option to purchase was allowed to lapse by Longworthy, and the note was destroyed in accordance with the original understanding with regard to it, and no new arrangement of any kind was made between W. H. Beatty and J. W.

Beatty, the latter however retaining the legal title to the land. J. W. Beatty appears to have no recollection whatever as to the transaction or as to the reason why the property was conveyed to him. He never even had the deed in his possession, and, as he says, "left everything to his brother." There was never a lien for purchase money due from J. W. Beatty to W. H. Beatty, for there was no sale to J. W. Beatty. The conveyance was without consideration, for the note was not intended to be paid, and there was a resulting trust to W. H. Beatty, subject only to this, that, so long as the note remained outstanding, J. W. Beatty was entitled to retain the land for his protection against it; but the note was cancelled, and J. W. Beatty then held the land only for W. H. Beatty, for he had never agreed to hold it except for him. W. H. Beatty could have required a reconveyance at any time, for he never had directed J. W. Beatty to hold the land as trustee for Mrs. Beatty; and J. W. Beatty had never agreed to hold it for her. He was, therefore, not a purchaser but only a volunteer, and the section which has been invoked by him does not protect his title against the tax deed.

FALCONBRIDGE, C.J. JANUARY 3RD, 1906.

TRIAL.

COBEAN v. ELLIOTT.

Limitation of Actions—Real Property Limitation Act—Tenant at Will—Devise for Life to Tenant upon Condition—Presumption of Acceptance—Violation of Condition.

Ejectment for the east half of the west half of lot 15 in 6th concession east of Hurontario street in the township of Caledon.

W. T. J. Lee, for plaintiffs.

T. J. Blain, Brampton, for defendants.

FALCONBRIDGE, C.J.:—The plaintiffs claim title as executors of Joseph Elliott, whose title, if any, was derived through the will of John Elliott, who admittedly had a paper title.

The defendant Rachel Elliott claims title by length of possession, being the devisee of her husband Andrew Elliott.

John Elliott and Andrew Elliott were brothers. Andrew Elliott went into possession either under a contract of purchase or under other circumstances which constituted him tenant at will of his brother.

The first contention on behalf of defendants is that, at the time of the death of John Elliott, Andrew Elliott had acquired a good title by length of possession. John Elliott died on 17th July, 1873. His will bears date 28th May of the same year. I find that defendants' contention in this respect is well founded, and that the 20 years then necessary had elapsed, making allowance for the year which would determine the tenancy at will. Defendant Rachel Elliott came to this country in 1848, being then 12 years of age, and she swears that from the time of her arrival in this country she knew of Andrew Elliott, whom she married in 1860, being in possession of the land and living on it as a bachelor. It is proved that Andrew was assessed as owner of the lot since about 1857, and for 3 years before that in a capacity not exactly defined.

But let it be assumed for the sake of argument that defendants have not satisfactorily established the above proposition. The state of facts then is as follows. By his will John Elliott assumed to dispose of the lands as follows: "I also give and bequeath to my son Joseph Elliott the east half of the west half of lot number 15 in the 6th concession east of Hurontario street in the township of Caledon, in the county of Peel, at the death of my brother Andrew Elliott. I give and bequeath to my brother Andrew Elliott the use of the east half of the west half of lot number 15 in the 6th concession east of Hurontario street, in the township of Caledon and county of Peel, during the term of his natural life, on condition that he neither sells nor rents the same without consent in writing of my son Joseph Elliott."

It is admitted by defendant Rachel Elliott that her husband knew at any rate of the existence of the will, and that he was not quite satisfied with it; and plaintiffs present a strong argument, based on Re Dunham, 29 Gr. 258, and on Re Defoe, 2 O. R. 623, that, inasmuch as Andrew Elliott was aware of the devise to himself and neither accepted nor rejected the same, but remained passive, he ought to be pre-

sumed to have accepted the devise, and that therefore neither he nor his devisee could claim the fee by virtue of his possession. These cases are effectually distinguished from the one in hand by the fact that Andrew Elliott did not remain passive, but actively and openly violated the condition imposed by the will that he should neither sell nor rent the land. Twelve or thirteen years ago it was rented for two years to Thomas McCartney, who paid his rent to Andrew Elliott, and by written lease bearing date 1st April, 1895, Andrew Elliott demised and leased the land to William Dunn for one year from that date. The writ in this case was not issued until 29th May, 1905. So that Andrew Elliott, having thus openly set at naught the conditions of the will, the statute had run in his favour, even reckoning from the last mentioned date.

It is generally with regret that I find myself constrained to give effect to a claim of title by length of possession, but in this case I am pleased to see my way clear to confirm the title of this old woman, who has lived on the premises for nearly half a century. The action will be dismissed with costs.

CARTWRIGHT, MASTER. JANUARY 4TH, 1906.

CHAMBERS.

THOMSON v. MARYLAND CASUALTY CO.

Discovery—Production of Documents — Privilege — Letters Written by Agent to Principal—Reference to Legal Matters—Advice of Solicitor—Better Affidavit on Production.

On 11th March, 1905, a policy was issued by defendants to plaintiff, agreeing to indemnify her against injuries to her husband or death resulting therefrom.

Thomson was fatally injured on 7th August, 1905, and died 3 days later. In this action plaintiff sought to recover from defendants $10,000 by the terms of the policy.

The defendants' manager in Toronto made an affidavit on production, dated 4th November, 1905. This stated that

there were no material documents which defendants objected to produce.

He was afterwards examined for discovery, and a further affidavit on production was filed on 19th December, in the schedule to which it was stated that defendants objected to produce "sundry letters between Toronto and head office of a confidential nature, written and received after 7th August, 1905, the date of the alleged accident." In the 5th paragraph of this affidavit it was said that the ground of the objection was "that they were privileged, being of a confidential nature, and disclosing certain legal points in connection with the defence of this action."

Plaintiff moved for a further and better affidavit.

E. G. Long, for plaintiff.

E. Bayly, for defendants.

THE MASTER:—In the affidavit of the manager filed in answer to this motion he says of the letters in question: "It is my custom in the course of business frequently to write to the head office on matters involving points of law; the head office confer with their general solicitors, receive legal advice from them, and then communicate with me. The letters between the head office and the Toronto office above mentioned are of the same nature as those between solicitor and client, and are, as I am advised and believe, privileged for that reason."

With this I cannot agree. To establish such a claim the affidavit must conform to the rule laid down in Southwark v. Quick, 3 Q. B. D. 315, which is the leading case on the point, and one, as will be seen, of great authority.

It is said in Bray's Digest of Discovery (1904), pp. 13 and 34, that the affidavit must state that these letters "came into existence for the purpose of being communicated to the solicitor, with the object of obtaining his advice or enabling him to defend an action."

It was admitted on the argument that there was at least one other document which should be produced. A further affidavit will therefore be necessary; and in it the letters in question must be produced unless privilege is properly and distinctly claimed as above indicated.

A further affidavit must therefore be filed forthwith; and the costs of this motion will be to plaintiff in any event.

ANGLIN, J. JANUARY 4TH, 1906.

CHAMBERS.

NORTH PLANTAGANET HIGH SCHOOL BOARD v. TOWNSHIP OF NORTH PLANTAGANET.

High Schools—Constitution of High School District—Validity—By-Law of County Council—Assent of Lieutenant-Governor in Council—Appointment of Trustees—County and Township By-laws—Organization of Board—Term of Office of Trustees—Refusal to Fill Vacancies—High Schools Act—Construction—Demand of Trustees for Money to Carry on School—Mandamus.

Motion by plaintiffs for a mandamus to compel defendants to furnish the sum of $750 required for the maintenance of the high school in North Plantaganet for 1905. This sum, plaintiffs alleged, was duly demanded of defendants by them, as required by sub-sec. 5 of sec. 16 of the High Schools Act, 1 Edw. VII. ch. 40. Plaintiffs also asked for a mandatory order directing defendants to fill vacancies in the high school board arising from the annual retirement and from resignation of trustees.

T. McVeity, Ottawa, for plaintiffs.

E. Mahon, Ottawa, for defendants.

ANGLIN, J.:—A point was raised in argument as to the validity of the constitution of the high school district, counsel for defendants contending that, in the absence of evidence that the by-law setting apart and constituting the high school district of North Plantaganet had been approved by the Lieutenant-Governor in council, such district cannot be recognized as having a legal existence. . . .

It seems to me to be reasonably clear that the high school district of North Plantaganet has been validly constituted. The county council of the united counties of Prescott and Russell passed a by-law, on 6th November, 1872, setting apart the township of North Plantaganet as a high school district. That by-law has never been set aside, repealed, or quashed.

It was passed under sec. 40 of ch. 33 of 34 Vict., which authorized every county council to "form the whole or part of one or more townships, towns, or villages within its jurisdiction into a high school district." By sec. 35 of the same Act, the right to authorize the establishment of additional high schools is given to the Lieutenant-Governor in council. I do not read these provisions as requiring the assent of the Lieutenant-Governor in council to the setting apart and constitution of the high school district, though additional high schools could not be established without his authorization. Having regard to sec. 7 of 1 Edw. VII. ch. 40, there seems no reason to doubt that the township of North Plantaganet has been validly constituted a high school district. Moreover, defendants, in their by-law appointing high school trustees in 1904, recite as follows: "Whereas the township of North Plantaganet is a high school district."

No high school was established in this district, nor were any steps taken to constitute a high school board for it, until 1904. In that year the county council of Prescott and Russell passed a by-law purporting to appoint three high school trustees; and the township council also appointed three trustees. On 10th August, 1904, an order in council was passed, under sec. 9 of 1 Edw. VII. ch. 40, approving of the establishment of a high school in the village of Plantaganet. This order in council has been put in evidence since the argument of this motion. I think I should treat the by-law of the county council appointing three trustees as "a by-law for the establishment of a new high school," within the meaning of sec. 9 of 1 Edw. VII. ch. 40, which the Lieutenant-Governor has approved by the order in council of 10th August, 1904. It becomes necessary, therefore, to consider the other objections taken by defendants to the present motion.

By-law No. 555 of the united counties of Prescott and Russell is in part as follows: "By-law to appoint county officers for the year 1904 for the united counties of Prescott and Russell and fix their remuneration. Be it hereby enacted that the following gentlemen be appointed high school trustees for the high school to which their names are set opposite, viz.: Plantaganet—Dr. W. Gaboury, Alphonse Labelle and P. J. Potts."

By-law No. 446 of the township of North Plantaganet, passed on 6th February, 1904, enacted "that Dolphis McKay, Ferreol Prevost, and Denis Robinson be appointed high school

trustees of the high school district of the township of North Plantaganet for the following term: Dolphis McKay, for one year; Ferreol Prevost, for two years; Denis Robinson, for three years."

It is stated in an affidavit made by David M. Viau, who is styled "secretary of the North Plantaganet high school board," that this board met and was duly organized for 1904, and that they "acquired a building and premises for high school purposes and proceeded to exercise the functions of high school trustees as provided in the said High Schools Act."

By-law No. 563 of the county council, passed on 2nd February, 1905, is in part as follows: "By-law to appoint county officers for the united counties of Prescott and Russell for the year 1905 and fix their remuneration. . . . Be it hereby enacted that the following gentlemen be appointed high school trustees of the high school to which their names are set opposite, namely: Plantagenet—J. P. Potts and Jos. Charboneau in place of A. Labelle."

The council apparently treated Dr. Gaboury as being still in office—presumably regarding him as appointed for a term of either two or three years; Mr. Labelle having resigned, as was stated at bar, Mr. Charboneau was appointed to replace him: Mr. Potts was treated as having been appointed for one year, and, that term having expired, was reappointed.

The township council appointed no new trustees in the year 1905. Denis Robinson, appointed in 1904, for a three-year term, having resigned, this council refused to appoint a trustee to replace him. Dolphis McKay had been appointed for only one year, which expired on 6th February, 1905.

The statute 1 Edw. VII. ch. 40 contains the following material provisions:—

"Every high school corporation shall consist of at least six trustees:" sec. 13, sub-sec. 2.

"A majority of the board shall form a quorum:" sec. 15, sub-sec. 3.

"The trustees of every high school shall hold office until their successors are appointed and the new board is organized:" sec. 3, sub-sec. 2.

"In the case of high schools situated in any municipality within the jurisdiction of the county, three of such trustees

shall be appointed by the county council, and additional trustees shall be appointed by the municipalities composing the high school district, as follows, that is to say:—

"(a) Where a high school district is composed of one municipality, the municipal council thereof shall appoint three additional trustees; . . . In every case one of the trustees appointed by the county council and one trustee in each municipality composing the high school district shall retire each year:" sec. 13, sub-sec. 2.

" . . . The municipal council of every city and town shall by by-law provide for the annual retirement of so many of the trustees appointed by the council as shall secure a complete rotation every three years:" sec. 13, sub-sec. 4.

"Vacancies arising from the annual retirement of trustees shall be filled at the first meeting thereof after being duly organized in each year by the municipal councils . . . . and vacancies arising from death, resignation, or removal from the high school district, or county, or otherwise, shall be filled forthwith by the municipal council having the right of appointment:" sec. 14.

"The first annual meeting of every board of trustees shall be held . . . in the afternoon of the first Wednesday in February, or at an earlier date fixed by the board in case all appointments of trustees shall have been made:" sec. 15, sub-sec. 1.

The affidavit of David Viau states that the first annual meeting of trustees for the year 1905 was held on 29th April, 1905, and that the board was then duly organized by the election of Dr. Gaboury, as chairman, and of himself, as secretary-treasurer; and that, on 27th July, the board applied under sub-sec. 5 of sec. 16 of 1 Edw. VII. ch. 40, to the township council for the sum of $750—the amount which the board of trustees deemed it necessary to demand from the township for the maintenance of the high school for the year 1905.

The material does not shew which or how many members of the board attended its meetings on these occasions. The demands for payment of $750 sent to the defendants purport to be signed by Dr. Gaboury, as chairman of the board. Denis Robinson, who had resigned, and Dolphis McKay, who had been appointed for one year, were probably not present. At all events, their presence may not be assumed. Unless

Ferreol Prevost, the other trustee originally named by the township council, was present, there cannot have been a quorum of the board at these meetings: sec. 13, sub-sec. 3. Information upon this very material point is not vouchsafed. Without satisfactory evidence upon it, were there no other objections to the present motion, a sufficient case for the granting of the extraordinary remedy of mandamus is not, in my opinion, made out.

But I think it more than gravely doubtful whether Dr. Gaboury and his colleagues named by the county council in 1904 were validly appointed. An intention on the part of the legislature that, of the three trustees to be appointed by the county council upon the original constitution of a high school board, one should hold office for three years, one for two years, and one for one year, may be deduced from the several provisions of sec. 13 of the statute. How this is to be accomplished may, in the absence of any expressed direction, be subject to some doubt, the statute merely providing that one of such trustees shall retire in each year. But, after careful consideration, it would seem that the only way in which the section can be worked out is that the appointing body—in this case the county council—must determine which of its appointees shall enjoy a three-year term, which shall hold office for two years, and which shall retire at the end of the first year, and that the appointments shall be made for these respective terms.

This the county council failed to do. On the contrary, its by-law, No. 555 of 1904, purports to appoint Dr. Gaboury, Alphonse Labelle, and P. J. Potts, as "county officers for the year 1904."

If this heading of the by-law might be ignored, there is no reason why one rather than another of the three gentlemen named should be deemed the person who is to retire at the end of the first year under the provision of sec. 13, sub-sec. 2 (a), of the High Schools Act—no warrant for assuming, as the appointees appear to have done, that the trustee first named is to hold office for three years, the second for two years, and the third for one year. In point of fact, in the township by-law the one-year appointee is first named, and the three-year appointee last. Under the county council by-law of 1904, either the tenure of office of all three trustees was intended to be for one year only, or that of each trustee was left undefined and uncertain. In neither view can the

by-law be said to meet the intention of the legislature, if I have correctly apprehended its purpose, which is by no means clearly or satisfactorily expressed.

It seems quite probable, therefore, that the appointment of these three gentlemen by the county council of 1904 was invalid, because not made in conformity with what I think must be held to be the requirements of sec. 13 of the High Schools Act.

If this view be correct, even though the appointment of Potts and Charboneau in 1905 should be valid (and it seems open to similar objections), Dr. Gaboury would have no status as a trustee; the organization for 1905 would be defective; and, in the absence of Denis Robinson and Dolphis McKay, assuming the latter to have been still in office by virtue of sec. 3, sub-sec. 2, there probably was not a quorum at any meeting of the board in 1905. Indeed, it would appear not improbable that there never was any board validly constituted or organized for either 1904 or 1905.

In this state of affairs, and in the absence of evidence that a quorum of the board, constituted as it was, was present at the organization meeting of 1905, and at the meeting at which it was resolved to demand $750 from the township council, I certainly should not feel justified in granting a mandamus requiring the defendants to furnish to the plaintiffs that sum of money.

The action of the defendants, on the other hand, in refusing to fill the vacancies upon the board which they had power to fill, appears to have been wholly unjustifiable. Section 14 is imperative in its terms. The municipal council has no discretion to refuse to act under it. But, apart from other objections to it, the present application to compel the township council so to act has been so tardily made that it cannot succeed.

As a solution of the existing difficulty—fairly attributable to the obscurity and confusion of the provisions of the 13th section of the High Schools Act, which cannot be too soon recast or amended—I would suggest that the county council should at once obtain and accept the resignations of all its present appointees, and should then proceed to appoint three trustees, one for one year, a second for two years, and a third for three years; I would further suggest, to anticipate other possible objections under sec. 14, that the new appointments be, in form, of a trustee to replace Dr. Gaboury, for the term

of one year; of a trustee to replace Mr. Potts, for a term of two years; and of a trustee in succession to Mr. Charboneau, for a term of three years.

Upon this being done, the township council will probably, in view of the opinion of the Court in regard to the validity of the constitution of the high school district and the imperative character of the provisions of sec. 14, proceed to discharge its duty in the premises.

In the circumstances, the present motion will be refused without costs.

BOYD, C. JANUARY 4TH, 1906.

CHAMBERS.

RE STEWART v. EDWARDS.

Division Courts—Judgment Debtor—Married Woman—Refusal to Attend for Examination—Committal for Wilful Misconduct—Imprisonment for Debt—Prohibition.

Motion by defendant for prohibition to a Division Court.

W. H. Barry, Ottawa, for defendant.

A. C. Hill, Ottawa, for plaintiff.

BOYD, C.:—Judgment was obtained in a Division Court against a married woman, living apart from her husband, on a promissory note made by her after marriage. She was married in 1896, and judgment was signed in November, 1902, on the note made in September, 1902. No payment being made, plaintiff proceeded by way of judgment summons in October, 1905, for her examination as a judgment debtor. Her counsel attended and raised the objection that she was not examinable, and that the Division Court Judge had no jurisdiction to enforce the judgment by this method. After some enlargements, the Judge finally made the order now attacked—being an order to commit defendant for 5 days unless the debt and costs were sooner paid—he being of opinion that her non-attendance was wilful misconduct.

Various objections as to form and as to parties were raised, but I think it better to deal with the matter on its merits.

Apart from decisions, I should come to the conclusion that if a person who is a judgment debtor makes default in attendance to be examined for the purpose of discovery as to property available for execution, and the Judge finds that there is wilful default is not appearing upon its return, he would have the power to commit by way of punishment. Such is the law no doubt in the higher courts of record, where the failure to attend is regarded as a contempt of court.

But I am bound by a line of decisions applicable to the Division Courts to hold that the committal for wilful default in appearing to be examined is in the nature of process to coerce payment, rather than of a punitive character, as for contempt. The root of this line of decisions is found in Ex p. Dakins, 16 C. B. 77, which interpreted the effect of statutory law identical almost in form with the sections as to judgment summons in our Division Courts Act. That case was made to turn upon the provision of the law that a person imprisoned for an offence against the Act was entitled to his discharge on payment of the debt and costs at any time pending committal. That provision is contained in sec. 251 of the Division Courts Act, which provides for any person imprisoned under the Act, which has been construed as applying to all causes for committal which are recited in sec. 247. They are classed as in the same category as methods of enforcing payment.

Ex p. Dakins was discussed by Robinson, C.J., and its effect pointed out in Henderson v. Dickson, 19 U. C. R. 592. It was proceeded upon by a Divisional Court in Re McLeod v. Emigh, 12 P. R. 450. And still more pointedly, from the circumstances of the present case, by a Divisional Court in Re Reid v. Graham, 26 O. R. 126, where it was held that the committal of R. S. G. for non-appearance to be examined was not process of contempt, but in the nature of execution or qualified execution. These decisions apply specifically to Division Courts, and I am bound by them to decide that there is no jurisdiction to make this order against the married woman. Mr. Holmested, in his useful book on married women (The Married Women's Property Act of Ontario), refers to a case in 116 L. T. Jour. 469 (1904), where prohibition was issued against Judge Stonor from proceeding on a judgment summons against a married woman.

The cases referred to by Mr. Holmested as shewing a departure from the ruling in Re McLeod v. Emigh will be

found to be cases in the High Court or the County Court—both courts of record—which the Division Court is not: R. S. O. 1897 ch. 60, sec. 7; R. v. Lefroy, L. R. 4 Q. B. 134. The point is cautiously dealt with in Mr. Bicknell's book at pp. 420 and 502, who leaves it under a "perhaps" that there might be inherent power in the Court to enforce its own judgments. In this case the order is based upon the provisions of the statute and Rules of Court. The form of the warrant prescribed for cases of non-attendance is given in No. 162, which provides for so many days' committal or until the debt is discharged by due course of law. The warrant must be indorsed with the amount of the debt and costs, by Rule 203 of the Division Courts, which afford another evidence that the payment of the claim is the primary object of the whole proceeding. The Judge in this case, indeed, emphasizes this by limiting the committal to 5 days unless payment is sooner made. It is the statutory jurisdiction which is being exercised, and, for the reasons given, I think in the case of a married woman the statute does not apply. There is no doubt the English decision of Aylesford v. Great Western R. W. Co., [1892] 2 Q. B. 626, looks the other way, for it decides that in the lower Court a married woman is in some sort a judgment debtor for the purposes of discovery as to her separate estate. It goes no further, and does not say what shall happen if she does not attend. It may be explained by its having reference to the powers to commit a married woman under the Debtors Act, which is not in force here: Dillon v. Cunningham, L. R. 8 Ex. 23. After this decision, it was conclusively affirmed to be the law by the passage of a new Rule in 1903, declaring that the term "debtor" included a married woman against whom judgment had been recovered in respect of her separate estate. And still a further new Rule gives the specific remedy in case of non-attendance for examination amounting to wilful disobedience, which is declared to be contempt of Court and to be dealt with accordingly: County Court Practice, 1905, pp. 393-4. That Rule will, no doubt, overcome the ratio decidendi of Ex p. Dakins, but we have no like provision in Ontario as to the Division Courts. And in England the provision as to discharge from arrest after commitment is limited to cases of non-payment of money; Order XXV., Rule 48, Yearly County Court Practice, 1905, p. 465.

If the general enactment of our Act, sec. 251, were limited in the like manner so as to make it apply only to cases of

imprisonment under the Act "for non-payment of money," that would probably put the matter in a very different plane of decision.

I have looked at all the cases cited and many others, but none are in point except those I have dwelt upon. Thus Metropolitan Loan Co. v. Mara, 8 P. R. 355, was a case in the County Court. It was followed in Watson v. Ontario Supply Co., 14 P. R. 96, by Mr. Justice Rose, who delivered the judgment of the full Court in Re McLeod v. Emigh, and he points out how it is to be distinguished from that earlier case. Pearson v. Essery, 12 P. R. 466, was a case in the High Court. Re Teasdall v. Brady, 18 P. R. 104, was one in which the judgment was in respect of a debt incurred before marriage and in which the judgment was of personal incidence.

Ex p. Dakins has been affirmed and followed lately in Bailey v. Plant, [1901] 1 Q. B. 31, 33. Some of the formal objections taken as preliminary might have sufficed to turn round the application for a time, and have increased the expense; and, having regard to this, while I give judgment awarding prohibition, I do so without costs.

JANUARY 4TH, 1906.

DIVISIONAL COURT.

KENNEDY v. FOXWELL.

Mortgage—Foreclosure—Action — Parties—Final Order — Irregularity—Decease of Infant Defendant—Right of Representatives to Redeem—Order of Revivor—Practice—Account—New Day—Delay—Costs.

Plaintiff was the assignee of a mortgage dated 2nd July, 1897, from Albert Foxwell, now deceased, and Llewellyn Allan Foxwell, Aubrey Adolphus Foxwell, Gertrude Maude Foxwell, and Ernest Walter Foxwell, then all infants and only children of Walter Foxwell, then deceased, a brother of Albert Foxwell, to Robert Hamilton, on certain lands in the township of York.

Albert Foxwell died on 15th February, 1898, having made a will of which he appointed plaintiff and W. G. Hannah

executors, and by which he bequeathed to his brother Llewellyn $25,000, and to his sister Mary $25,000, and the residue of his estate to defendants Llewellyn Allan Foxwell, Aubrey Adolphus Foxwell, Ernest Walter Foxwell, and Gertrude Maude Foxwell.

The next of kin of Albert Foxwell were his brother Llewellyn and his sister Mary, and the four infant mortgagors.

The executors declined to act, and a temporary grant of letters of administration to the estate of Albert Foxwell was made by the Surrogate Court of the County of York on 16th July, 1898, to the Trusts Corporation of Ontario; the duration of the grant was limited to 3 months from its date.

Plaintiff became assignee of the mortgage on 19th March, 1898.

On 3rd October, 1898, with a view to bringing this action, an ex parte application was made by plaintiff to a Judge in Chambers, which resulted in an order being made on that day, the operative part of which was as follows:—"It is ordered that John Hoskin . . . be and he is hereby appointed to represent the estate of the late Albert Foxwell . . . for the purpose of this action, and that administration of the real and personal estate and effects, rights and credits, of the said Albert Foxwell be and the same is hereby granted to the said John Hoskin, limited for the purpose only of attending, supplying, substantiating, and confirming the proceedings already had, or which may hereafter be had, between the parties hereto, or any other parties, touching or concerning the subject matter of this action; and to obey and carry into execution all orders and directions of the Court relating to the said subject matter and to this action until judgment shall be entered herein and the execution thereof fully completed, but no further or otherwise, or in any other manner whatsoever."

On the 8th of the same month the writ of summons was issued, the defendants being the four infant mortgagors "and John Hoskin, administrator ad litem of the estate of Albert Foxwell, deceased."

The plaintiff claimed foreclosure, and the writ was indorsed in accordance with the practice in such actions.

Mr. Hoskin as administrator ad litem entered an appearance, and, a statement of claim having been delivered, he

delivered a statement of defence submitting his rights and interests to the protection of the Court.

The plaintiff thereupon moved for judgment, under Con. Rule 595, before the Master in Chambers, and on 30th January, 1899, the usual judgment for redemption and sale was pronounced, and the proceedings ultimately resulted in a final order for foreclosure being made on 2nd May, 1900, attempts to sell the mortgaged premises, which had in the meantime taken place, having been abortive.

Neither the judgment nor the final order of foreclosure reserved to the infant defendants a day to shew cause.

The defendant Llewellyn Allan Foxwell died on 20th June, 1899, an infant, unmarried and intestate, leaving him surviving his brothers, the defendants Aubrey Adolphus Foxwell and Ernest Walter Foxwell, his sister, the defendant Gertrude Maude Foxwell, and his mother, Marion Hill.

The last named applied to set aside and vacate the final order of foreclosure, the Master's report, and all other proceedings in the action taken subsequently to 20th June, 1899.

Neither Marion Hill nor the beneficiaries under the will of Albert Foxwell, nor his next of kin, nor the next of kin of Llewellyn Allan Foxwell (except such of them as were already parties) were made parties to the action or notified of the proceedings in it.

In addition to the motion made by Marion Hill, Llewellyn Foxwell and Mary Foxwell, the beneficiaries under the will of Albert Foxwell, moved to set aside and vacate the order of 3rd October, 1898, appointing the administrator ad litem, and all proceedings founded on it, and to set aside and vacate the judgment pronounced by the Master in Chambers, on the ground that the Court had no power to appoint an administrator ad litem in such an action as this, and if there was power to appoint, the appointment of such an administrator in this action was improper.

The defendant Ernest Walter Foxwell, who was still an infant, also made a similar motion to that made by Llewellyn Foxwell and Mary Foxwell, based on the same grounds as were taken in that motion, and the following additional ones: (1) that the appointment of an administrator ad litem should be made by the Court and not by a Judge in Chambers: (2) that there can be no foreclosure against an administrator ad litem: (3) that no estate or interest vests

in an administrator ad litem under the Devolution of Estates Act, and that this action was not properly constituted without the appointment of a general administrator to the estate: (4) that the Master in Chambers had no power under the Rules or practice of the High Court to pronounce the judgment which he did pronounce: (5) that if the Rules or any statute of Ontario purport to confer power upon the Master in Chambers to pronounce judgment in an action, they are ultra vires; that the power to try an action and to pronounce judgment is vested only in a Judge appointed by the Governor-General of Canada: (6) that the final order of foreclosure is bad because a day to shew cause was not reserved to the infant defendants.

The defendant Aubrey Adolphus Foxwell, who had attained his majority, also applied by petition to open the foreclosure and to be let in to redeem, upon special grounds not affecting the regularity of the proceedings, but which it was contended entitled him now to redeem.

The motion of Marion Hill was based on the fact that she was one of the persons interested in the estate of Llewellyn Allan Foxwell, who died on 20th June, 1899, and the contention that in order to bind her estate she should have been made a party to the action, and that the final order of foreclosure was therefore ineffectual to put an end to her right to redeem. She also relied on the same grounds as were taken by defendant Aubrey Adolphus Foxwell and by Llewellyn Foxwell and Mary Foxwell.

By consent of all parties, leave having been given to appeal from the order appointing the administrator ad litem, the appeal as well as the motions to set aside the various proceedings which were attacked, came on to be heard before a Divisional Court, and the hearing of the petition of Aubrey Adolphus Foxwell stood over until after the motions should have been finally disposed of.

W. Proudfoot, K.C., for petitioner Aubrey Adolphus Foxwell and for Marion Hill.

W. E. Middleton and C. E. Hollinrake, Milton, for Llewellyn, Gertrude, and Ernest Foxwell.

F. W. Harcourt, for the administrator ad litem and the infants.

J. B. Clarke, K.C., for the plaintiff.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

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

MEREDITH, C.J.:—It is clear, I think, that the final order for foreclosure is irregular and is not binding on the applicant Marion Hill, in whom the undivided interest in the estate of her deceased son, to which she became entitled as one of his heirs at law, vested at the expiration of a year from his death. No notice was taken of his death, but the action proceeded as if he were still living, and he and not his personal representatives or those claiming under him are declared to stand absolutely debarred and foreclosed. His personal representative, or at all events some one to represent his estate in the mortgaged lands, should have been made a defendant, and an order should have been obtained to continue the proceedings against the surviving defendants and the person or persons upon whom his estate in the mortgaged lands devolved upon his death.

Marion Hill is, therefore, entitled to redeem, and there is no reason why she should be left to bring a new action for that purpose, if relief properly may be given to her in this action. I think it may, and the course adopted in Campbell v. Holyland, 7 Ch. D. 166, be followed, the applicant being added as a defendant, and an order made that the action be carried on between the plaintiff and the continuing defendants and the new defendant, and that it stand in the same plight and condition in which it was at the time of the death of Llewellyn Allan Foxwell. See also Jacques v. Harrison, 12 Q. B. D. 165, and Meheffey v. Meheffey, [1905] 2 Ir. 292.

This will have the effect of requiring a new account to be taken and a new day fixed for redemption, of which all the defendants will be entitled to avail themselves, according to Faulds v. Harper, 11 S. C. R. 639, at p. 656.

Having come to this conclusion, I do not deal with the other objections taken to the proceedings, some of which, at least, are of a formidable character, and it may be well for plaintiff, in case the action is proceeded with, to consider whether, if he desires to obtain, in default of redemption, an effectual foreclosure, its constitution ought not to be changed so as to bring before the Court the persons who have become entitled to the interest of Albert Foxwell in the mortgaged premises.

Having regard to the delay of the applicants in taking proceedings to get rid of the final order for foreclosure, the ends of justice will be best served by awarding costs to none of the parties.

MEREDITH, C.J. JANUARY 5TH, 1906.

CHAMBERS.

ARTRESS v. THOMPSON.

Administration Order—Small Estate—Expensive Proceedings —Reasons for not Proceeding under Devolution of Estates Act—Order for Distribution.

Motion by plaintiff for distribution of moneys paid into Court in an administration proceeding, and by purchaser for a vesting order.

A. W. McDonald, for plaintiff and adult defendants and purchaser.

F. W. Harcourt, for infants.

MEREDITH, C.J.:—The whole estate administered consists of a village lot, which was sold for $250, and the amount allowed to the solicitors for commission and disbursements was $114.34, in addition to which $25 was allowed for the costs of obtaining letters of administration from the Surrogate Court, in all 56 per cent. of the value of the estate.

The Devolution of Estates Act was designed, in part at least, to prevent the necessity of such proceedings as were taken in this case, and if it had not appeared that there was a plausible reason for not adopting the inexpensive course of the administrator selling the estate, I should have refused to make the order for distribution, to mark my disapproval of proceedings being taken in the High Court.

The official guardian, however, has represented to me that there were conflicting claims to the estate and contentions that certain of the claimants were illegitimate children, and therefore not entitled to share in it, and that if the administrator had sold the land it would have been necessary for his

protection to pay the proceeds of the sale into Court, and that the costs of a sale out of Court, of payment of the purchase money into Court, and the proceedings necessary to determine who were entitled to it and of payment out, would have been not much, if any, less than the expense incurred by the proceedings taken.

Therefore, in the special circumstances of this case, the order asked for should be made. Vesting order also granted to purchaser.

FALCONBRIDGE, C.J. JANUARY 6TH, 1906.

TRIAL.

AMENDOLA v. DOHENY.

Master and Servant—Injury to Servant—Negligence—Railway—Unpacked Frog—Construction Work—Horse Tramway—Sub-contractors—Independent Contractor—Employment of Workmen—Liability of Principal Contractor—Damages—Workmen's Compensation Act.

Action by a boy of 14, alleging that he was a workman in the employment of defendants within the meaning of the Workmen's Compensation for Injuries Act, to recover damages for injuries received by him on 30th March, 1905, by reason of his right foot having been caught in the angle of certain rails which, it was alleged, constituted a railway frog, and was not filled with packing, wherein, as was alleged, defendants were guilty of negligence.

H. L. Dunn, for plaintiff.

C. A. Moss, for defendants.

FALCONBRIDGE, C. J.:—One A. R. MacDonald was the general contractor for the construction of the Temiskaming and Northern Ontario Railway, and defendants had a contract with him for grading 12 miles. Defendants entered into an agreement with two Italians, Biagio Cosco and A. Vetere. . . .

[The agreement on the part of Cosco and Vetere was "to take out the cut from station 148 n. to station 156 n." on the railway, "and to carry on the works according to the terms of the specification on which the railway is being built, and to accept the estimate of the engineer in charge of the

works as final," and to do the work at certain prices mentioned; and defendants agreed " to pay the above prices when the engineer in charge gives a certificate that the work is completed."]

Plaintiff was one of a gang of workmen under the direction and instructions of this Cosco, and the workmen were employed in removing earth and rock from the railway cut to the railway, by means of dump carts which were pulled by horses along tracks laid for that purpose, consisting of a single track with rails about 3 feet apart, the rails weighing about 33 lbs. to the yard (rails for permanent tracks weigh about 80 lbs. to the yard.) These rails were laid on ties, which were also about 3 feet apart, and ran for a certain distance as a single track, and at a certain point the single track connected with two diverging tracks, connection being made by means of a switch rail between the single track and either of the diverging tracks as occasion required.

I discredit the evidence of Cosco when he swears that there was frozen clay in that angle or switch so that it would be impossible for plaintiff to get his foot in it; and I find that the frog—if it is a frog—was not filled in with packing, and that there was negligence on the part of plaintiff's employer or of the person in the employer's service intrusted by him with the duty of seeing that such packing was done.

The two main questions for disposition are: (1) Who is the employer of plaintiff, defendants or Cosco and Vetere? (2) Is the construction described above a railway frog? . .

[Reference to Ruegg on Employers' Liability, 6th ed., p. 48.]

The test implied is, does the general contractor retain or assume direct and personal control over the workmen of the alleged sub-contractor? The leading case is Levering v. London and St. Katharines Docks Co., 3 Times L. R. 607. In the present case I think there is abundant evidence of personal control retained by the defendants, and that, notwithstanding the apparent contract, Cosco and Vetere were not independent contractors, but mere foremen or gangers. The arrangement is merely one by which men receive their usual wages with the exception of 4, whose remuneration was determined by the result of the work. It is quite different from the ordinary contract, where the contractor uses his own skill and knowledge, and carries out the work according to his own ideas. . . . The system may have suggested

itself, not by any particular desire to evade liability, but by its practical convenience in getting a gang of Italians, who probably work with best results under the eye of one of their fellow countrymen.

It is to be observed that defendants could not look to these men for breach of contract, except so far as they might happen to be of good financial standing. There is no security given and no time fixed for the completion of the work. Defendants paid frequent visits to the work, and the men, with the exception of 4, were paid according to their time cards by cheques of the chief contractor.

Mr. Ruegg cites at p. 52 an unreported case of Hunt v. Mowlen as shewing what very slight evidence of control is sufficient to sustain a verdict against the general contractor. I determine this branch of the case in favour of plaintiff.

The second question is, what is a frog and what is a railway? There is definition of a frog in Southern Pacific Co. v. Seley, 152 U. S. R. at p. 150, and this description seems to cover the appliance used here. Was this a railway? Doughty v. Firbank, 10 Q. B. D. 358, is in point and declares that a temporary railway such as this, laid down for the purposes of construction, is a railway, i.e., a way upon which trains pass by means of rails. Mr. Moss pointed out that a steam engine appears to have been used in the last cited case, but that does not seem to make any difference. See Cox v. Great North Western R. W. Co., 9 Q. B. D. 106, where motive power was supplied by a fixed hydraulic engine and communicated to two capstans.

I find all the facts which are in dispute and which are necessary to entitle plaintiff to recover, in his favour. . . .

I assess plaintiff's damages at $400, for which sum I direct judgment to be entered with full costs.

JANUARY 6TH, 1906.

DIVISIONAL COURT.

WALLACE v. TOWNSHIP OF TILBURY EAST.

Contract—Work and Labour—Terms and Conditions—Payment—Satisfaction of Engineer—Value of Work—Conflicting Evidence.

Appeal by defendants from judgment of junior Judge of County Court of Kent, in an action in that Court, in favour

of plaintiff for the recovery of $207.02 and the return of a promissory note for $100. The action was to recover payment for services rendered under a contract for the repair of a drain; and the questions involved in the appeal were: (1) What was the contract that the parties entered into? (2) Was the work completed according to the terms of that contract?

The appeal was heard by BOYD, C., MAGEE, J., MABEE, J.

M. Wilson, K. C., and J. G. Kerr, Chatham, for defendants.

O. L. Lewis, Chatham, for plaintiff.

BOYD, C.:—There is no sufficient evidence to shew that the contract was subject to a condition that final payment depended upon the production of a certificate that the work had been completed to the satisfaction of the township engineer. Even the witnesses for the defence do not go far enough to substantiate that contention. At the highest, it is said the work was to be paid for as it progressed, and that a percentage was to be retained till the work was finally passed by the engineer. This is what the witnesses "understood"—not that this was read out or announced or made part of the terms of the contract. This understanding, indeed, goes no further than this, that upon such final certificate the township would be justified in making full payment, but not that the satisfaction of the engineer was a sine qua non to plaintiff's right to recover by process of law. If the engineer certified satisfaction, well and good—payment would follow. But, if he was not satisfied, then plaintiff must recover by force of law and by making such proof as he could of substantial completion. That appears to me, on all the evidence, to be the legal position of plaintiff. He has therefore proceeded to call witnesses, experts and others, and has satisfied the Judge of the merits of his claim. The Judge made personal inspection and examination of the locus in quo, and, though he reports some shortages in depth, he is not satisfied that his examination was exhaustive or entirely to be relied upon. Indeed, upon the evidence I should say that the only test that would approximate to accuracy in gauging the depth of silt and sediment would be by process of digging in the bottom of the ditch with a spade, and that the probing with a staff or a trident would vary

with the weight of the instrument and the degree of pressure employed. At one of the points found defective by the observation of the Judge at station 10, there was a thorough examination made by a very competent engineer of great experience by means of a spade, and he found that the drain had been constructed to a depth of 6 feet, 4 inches—which was deeper than called for by the profile and plan of work furnished to the contractor by the township.

I find no reason for disagreeing with the result arrived at upon the very conflicting evidence as to the reasonable and proper completion of the drain according to contract, and would affirm the judgment with costs.

MABEE, J., gave reasons in writing for the same conclusion.

MAGEE, J., also concurred.

JANUARY 6TH, 1906.

DIVISIONAL COURT.

COOPER v. JACOBI.

Patent for Invention—Combination—Absence of Novelty—Device—Want of Inventive Merit.

Appeal by plaintiff from judgment of senior Judge of County Court of York dismissing action in that Court, brought to restrain defendant from infringing a patent for an invention in respect of soles of bedroom slippers. The County Court Judge held that the patent was void for want of novelty, and that it had no inventive merit.

W. E. Middleton, for plaintiff.

W. R. Smyth, for defendant.

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

BOYD, C.:—Plaintiff's patent is for a combination which, to give his own words, is "the sole, heel, and stiffening (or counter) with perforators around the base and around the top of the counter or the cord." As I understand him, this counter is furnished with a row of holes to sew through at the base, and at the top a row of holes (to sew through), and, as an alternative, a row of chain stitching, to which the upper may be attached by hand-sewing.

It is plainly proved that the combination of heel, sole, and stiffener, is as old as the hills, and that the application of chain stitching on the sole (whereto the upper may be attached) is also old.

It is also an old thing to find stitching on the counters and uppers at the top and bottom—so that the result of all the evidence is, that the sole feature of "novelty" in plaintiff's patent is that, by means of the row of chain stitching around the top of the counter, the upper can be sewn to this preliminary stitching without being sewn through the counter.

The Rhind patent is in this single point different; his upper is attached to the counter by stitching along the upper edge—it is stitched directly to the counter.

But this single point of distinction disappears when one looks to plaintiff's alternative method which he has patented; his claim substitutes at pleasure a row of small holes along the top of the counter, instead of chain stitching. When the seamstress then uses the holes for the purpose of her needle, the attachment thus made is directly with the counter, and not the superimposed chain stitches (according to the other alternative.) The patent therefore attributes no importance to the peculiar detached method of fastening the upper; for the method is claimed as the equivalent of attaching it directly through the material of the counter, which is the old and obvious method. There is here a distinction without a difference, so far as patentability is concerned; it is a point involving no inventive skill, and is merely a process by which, instead of one course of stitching uniting all the parts, there is a duplication of the sewing process based on the first chain stitching.

Appeal dismissed with costs.

CARTWRIGHT, MASTER. JANUARY 8TH, 1906.

CHAMBERS.

KING v. TORONTO R. W. CO.

Discovery—Examination of Officer of Defendant Street Railway Company—Motorman—Foreman of Repair Shop—Inspection of Car—Affidavit on Production—Particulars.

Motion by plaintiff for an order (1) to examine the superintendent of the defendant company for discovery; (2) to

allow inspection of car No. 748 by which plaintiff's husband was killed; (3) requiring defendants to file a further affidavit on production; and (4) to be allowed to serve further particulars.

A. J. Russell Snow, for plaintiff.

D. L. McCarthy, for defendants.

THE MASTER:—The motorman has already been examined. It appears that car No. 748 was not the regular one for his trip, but was being used by him for the first time after an interval of at least some months. He could say nothing as to the condition of the car except that it seemed to be running all right, but he made no examination of it before taking it out of the sheds.

It would clearly have been useless to ask him any further questions as to its previous history or condition at date of accident. Nor is the motorman in such a position that he may be expected to inform himself on matters of that kind, which do not fall within the line of his usual duties.

It may be that plaintiff will derive some assistance from examination of the condition of car 748 on the fatal day and its previous record in the repair shops. This is a sufficient ground for making an order as to this. (See Westmoreland Coal Co. v. Hamilton Gas Co., 6 O. W. R. 817).

I think the person to examine would be the foreman of the repair shop or whoever would know the history of this car. No doubt the defendants can say who would be the proper officer.

(2) As to this plaintiff should be allowed to take such measurements and particulars of the car as may be thought useful. If the car has been in any way altered since the accident, that can be pointed out by defendants' servants at the trial, or can be learned by plaintiff on the examination for discovery above directed.

(3) As to requiring defendants to file a further affidavit on production, there does not seem any reason for this. Mr. Gunn's affidavit is sufficient within the Rules. The motorman is clearly wrong in saying the report was made to Mr. Nix and not to the solicitor.

(4) As to particulars, they should be modified as suggested on the argument by defendants' counsel.

The costs of this will be in the cause, as success has been divided.

CARTWRIGHT, MASTER. JANUARY 8TH, 1906.

CHAMBERS.

STEPHENS v. TORONTO R. W. CO.

Pleading—Amendment—Damages—New Trial—Payment into Court.

By the judgment of the Court of Appeal, 6 O. W. R. 657, a new trial of this action was directed unless plaintiff was willing to accept and defendants to pay $500 as damages in lieu of $2,100 assessed by a jury. The action was for damages for the death of plaintiff's son by the negligence of defendants. The negligence was admitted, and the only question upon the appeal was as to the amount of damages.

Plaintiff was willing to accept the $500, but defendants declined to pay upon the terms suggested in the judgment, and moved for an order allowing them now to amend their statement of defence by pleading payment into Court of $500 as sufficient compensation to plaintiff for the admitted wrong.

J. Bicknell, K.C., for defendants.

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

THE MASTER:—I cannot accede to the view that defendants are attempting to do anything unfair. The action is now at large again, just as if it had never been tried: see Hunter v. Boyd, 6 O. L. R. 639, 2 O.W.R. 1055. . . Had such a motion been made before trial, it would have been granted almost as of course. Plaintiff, no doubt, fears that if at the second trial he recovers only $500 or any lesser sum, he will have nothing left after payment of his costs.

This, however, cannot prevail to prevent the order being made. Perhaps the result of a second trial will be that which happened in the similar case of Basso v. Grand Trunk R. W. Co., 6 O. W. R. 172, where the Court would not grant a new trial though the verdict was double of what they thought reasonable.

The order will go, with costs to plaintiff in any event, allowing defendants to amend and pay in such sum as they may be advised.

TEETZEL, J. JANUARY 8TH, 1906.

CHAMBERS.

RE REX v. SMITH.

Liquor License Act—Dismissal of Complaint against Licensee —Police Magistrate—Right of Appeal to County Court Judge—Prohibition.

Motion by defendant for an order directed to the Judge of the County Court of Simcoe prohibiting further proceedings on a conviction against defendant, James Smith, a licensed hotel keeper, on appeal by William Black, license inspector, from an order of John McCosh, police magistrate for the town of Orillia, dismissing a complaint preferred by Black against defendant for selling intoxicating liquor to a minor in violation of sec. 78 of the Liquor License Act.

J. Haverson, K.C., for defendant.

J. R. Cartwright, K.C., for the County Court Judge and for Black.

TEETZEL, J.:—The appeal was by direction of the Attorney-General under sub-sec. 6 of sec. 118 of the Liquor License Act . . .: "An appeal shall lie to the Judge of the County Court of the county in which an order for dismissal is made, sitting in Chambers without a jury, where the Attorney-General of the province so directs, in all cases in which an order has been made by a justice or justices dismissing an information or complaint laid by an inspector or any one on his behalf for contravention of any of the provisions of this Act, provided notice of such appeal is given to the defendant or his solicitor within 15 days after the date of such order of dismissal."

Sub-section 7 provides, inter alia, for the Judge granting a summons calling upon the "justice or justices" making the order, to shew cause why the order of dismissal should not be reversed and the case reheard.

These sub-sections were first introduced into the Act by the Liquor License Amendment Act of 1892, 55 Vict. ch. 51, sec. 9. Prior to this time, provision had been made under

sub-secs. 1, 2, 3, 4, and 5 of sec. 118 for an appeal by a convicted licensee from a conviction or order of "a justice, justices, or police magistrate." . . .

The offence in question could have been tried before one justice of the peace under sec. 97 of the Act. Under sec. 27 of the Act respecting Police Magistrates, R. S. O. 1897 ch. 87, a police magistrate is ex officio a justice of the peace; and sec. 7 of that Act provides that "no justice of the peace shall admit to bail or discharge a prisoner or adjudicate upon or otherwise act in any case for a town or city where there is a police magistrate, except at the Court of General Sessions of the Peace or in the case of the illness, absence, or at the request of the police magistrate."

In this case Mr. McCosh, in preparing the order of dismissal, used a printed form for use by a justice of the peace, and signed his name over the printed description, "J. P. Co. Simcoe." In the body of the order for dismissal, however, he struck out the printed description "a justice of the peace in and for the county of Simcoe," and wrote in the words "police magistrate for the town of Orillia." The information was sworn before him as police magistrate. The summons was issued and the minute of judgment at the end of the depositions was signed by him as police magistrate.

These circumstances, and the fact that the offence under adjudication was alleged to have been committed in the town of Orillia, I think conclusively shew that Mr. McCosh was acting throughout in his capacity as police magistrate, and not as an ex officio justice of the peace.

Then is there an appeal by the prosecutor from a dismissal by a police magistrate acting in that capacity?

In providing for appeals by the convicted licensee in the previous sub-sections of sec. 118, the legislature was careful to extend the right to all convictions whether by a justice, justices, or police magistrate.

It is to be observed that in the amending Act, 55 Vict., the right of appeal by a prosecutor was only given where the conviction was by "a justice," and the words "or justices" were added in the revision of 1897.

Notwithstanding considerable want of precision in many other sections of the Liquor License Act, when referring to proceedings before a justice, justices, or police magistrate, I am unable by any canon of construction to interpret the words "justice or justices" in this sub-section as including a police

magistrate. . . . I think it is clear that the words "or police magistrate" were intentionally omitted. It was probably considered by the legislature that there was much greater reason for finality as against the prosecutor in case of a dismissal by a police magistrate than by an ordinary justice of the peace.

The order will therefore issue as asked. No costs.

TEETZEL, J. JANUARY 8TH, 1906.

CHAMBERS.

COPELAND-CHATTERSON CO. v. BUSINESS SYSTEMS, LIMITED.

Pleading—Statement of Claim—Joinder of Causes of Action—Introductory Statements—Libel—Special Damage—Infringement of Several Patents for Invention—Company—Wrongs Before Incorporation—Trial—Separation of Issues.

Appeal by plaintiffs and cross-appeal by defendants from order of Master in Chambers (6 O. W. R. 555) striking out or requiring amendment of a part of the statement of claim.

W. E. Raney, for plaintiffs.

G. H. Kilmer, for defendants.

TEETZEL, J.:—As to plaintiffs' appeal, I think the judgment in O'Keefe v. Walsh, [1903] 2 Ir. 681, as applied to the allegations in the statement of claim, is conclusive in favour of the appeal. . . .

The order appealed from having directed that all claims against the individual defendants for anything done by them or any of them prior to incorporation of defendant company should be struck out, must therefore be reversed.

As to defendants' cross-appeal, I think all the causes of action set forth in the statement of claim cannot be conveniently disposed of in the one action.

Upon the argument Mr. Raney, for plaintiffs, disclaimed any intention of seeking damages in respect of the alleged

libel, and stated that an injunction restraining further publication thereof was all his clients were asking for in respect of that portion of the statement of claim.

I think there should be two separate issues prepared for trial. In the one issue may be contained all the causes of action except those in respect of the infringements of the 4 patents of invention, and a separate issue should be prepared containing the several causes of action in respect of the alleged infringements.

The order will contain a waiver of all claim for damages in respect of the alleged libel, and limit plaintiffs' claim to an injunction.

To this extent only defendants' cross-appeal will be allowed.

Costs of both appeals to be in the cause.

TEETZEL, J. JANUARY 8TH, 1906.

WEEKLY COURT.

HORLICK v. ESCHWEILER.

Evidence—Affidavit Verifying Account—Master's Office—Commission to Cross-Examine Deponent—Refusal—Discretion.

Appeal by defendants from report of Master at Kenora upon a reference to take accounts, based on the Master's refusal during the reference, upon defendants' application, to issue a commission to cross-examine plaintiffs upon their affidavits filed with him in proof of their accounts upon which he was adjudicating. In addition to these affidavits, which were filed by consent (plaintiffs residing out of the jurisdiction), there was filed with the Master evidence of plaintiffs taken on commission for the purposes of the trial. The Master refused the commission to cross-examine because he considered it unnecessary in view of the evidence already in, and was of opinion that the application was merely made for delay.

Casey Wood, for defendants.

W. M. Douglas, K.C., for plaintiffs.

TEETZEL, J., held, following Townsend v. Hunter, 3 C. L. T. 310, that the Master had no discretion to refuse a commission to cross-examine the deponent on his affidavit verifying the mortgage account. Plenderleith v. Parsons, 6 O. W. R. 145, distinguished. Upon a reference the subsequent proceedings are regulated by Rules 654 to 700; see particularly Rules 668, 669.

Appeal allowed. Costs in the cause.

JANUARY 8TH, 1906.

DIVISIONAL COURT.

McCARTHY v. KILGOUR.

Master and Servant—Injury to Servant—Negligence—Defect in Machine—Findings of Jury—Particulars—Damages.

Appeal by defendant from judgment of ANGLIN, J., upon the findings of a jury, in favour of plaintiff, in an action at common law and under the Workmen's Compensation Act, to recover damages for injuries sustained by plaintiff while employed by defendant in working at a die press or cutter called "Colt's Armoury Press."

Plaintiff had several of his fingers cut off, owing, as he alleged, to defects in the construction or condition of the machine.

The jury found, in answer to questions submitted to them, that the machine was defective "by reason of the imperfect working of the lever;" that the defect was known to defendant's foreman, and was the cause of the injury; that plaintiff was not guilty of contributing negligence; and they assessed the damages at $1,500.

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

E. E. A. DuVernet and R. H. Greer, for defendant.

L. V. McBrady, K.C., for plaintiff.

STREET, J.:—The jury, at the request of counsel for the defence, after the evidence was all in, were allowed to go to

defendant's works, where they saw the machine in question operated by an expert on each side for their information.

. . . .

The machine is set in motion and stopped by a lever with a horizontal play of 3 or 4 inches; when the lever is at the point half-way between the extremes called "neutral," the machine is at rest. If the lever is pushed away from the operator beyond "neutral," the machine is set in motion; if, when the machine is in motion, the lever is pulled towards the operator past "neutral," the machine stops; if the lever is then simply released, its normal and proper action is to move back to "neutral" and to remain there, the machine remaining at rest. Plaintiff says that he drew the lever towards him and stopped the machine; then gave it a slight touch to send it back to "neutral," and put his hand in to pick out a piece of cardboard which had got out of position, and that the lever slipped past "neutral" and set the machine going, and caught his hand.

A witness who had worked this identical machine stated that occasionally when he drew the lever towards him and then let it go, it did not stop at "neutral," but slipped past it and set the machine going.

The jury, after seeing the machine in operation and hearing this evidence, found that the accident was due to a defect in the machine, that defect being the imperect working of the lever.

Upon this evidence and under these circumstances, I am of opinion that we should not interfere with the finding of the jury.

I think that the defect to which I have referred is clearly included within the particulars delivered by plaintiff before the trial, and should be taken to be the defect which the jury intended to point out in their finding.

Nor do I think, bearing in mind the severe nature of the injuries received by plaintiff, that we could say that the damages assessed by the jury are excessive.

Appeal dismissed with costs.

FALCONBRIDGE, C.J., concurred.

BRITTON, J., dissented, being of opinion that there should be a new trial to get an express decision one way or the other as to the looseness of the lever being a defect, and as to its being the proximate cause of the injury.

CARTWRIGHT, MASTER. JANUARY 9TH, 1906.

CHAMBERS.

TORRANCE v. HAMILTON, GRIMSBY, AND BEAMSVILLE R. W. CO.

Discovery—Examination of Plaintiff—Scope of Inquiry—Relevancy of Questions.

Motion by defendants for an order requiring plaintiff to answer certain questions which she refused to answer upon her examination for discovery. The action was brought to recover damages for alleged injuries to plaintiff while a passenger on defendants' railway in November, 1905.

H. E. Rose, for defendants.

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

THE MASTER:—Before the examination commenced plaintiff's counsel objected to the presence of the manager of defendant company, on the ground that the examination was as to the nature of plaintiff's alleged injuries, which would be of a delicate nature, and that the manager was not needed to give any instructions on this point. The examiner ruled that the manager had a right to be present.

On this the examination proceeded until Q. 112, when plaintiff was asked why Dr. Carr, defendants' medical man, wished to examine her internally. Her counsel again requested the manager to withdraw, but defendants' counsel refused, although the examiner stated that he thought such a request very reasonable, but that he had a right to remain if he chose to insist upon it. Then, when the question was repeated, plaintiff declined to answer on advice of counsel. The next question was as to the conversation between Dr. Carr and plaintiff, which she again refused to answer. Afterwards, however, plaintiff did answer.

It was not stated whether Dr. Carr was acting under an order of the Court. If he was, he should not have asked any questions, and if he was not, he had no right there at all.

The next question (128) was: "Have you ever been examined internally?" This plaintiff refused to answer, but I

think wrongly, as it might be very important to defendants to know what was the state of health of plaintiff before the accident.

Q. 137 and 3 or 4 following, as to what Dr. Carr said when he made the internal examination, I do not think she was bound to answer. . . . I take the same view of similar questions later on (160, 162, 166), also as to Q. 79 et seq., as to what her own medical attendant said to her and she to him; but she should say what treatment he advised, as it would tend to shew what the trouble really was.

Q. 198, as to the effect of Dr. Carr's treatment, should be answered, also Q. 223 as to what her own medical man says is plaintiff's complaint.

Q. 244 seems quite irrelevant, but Q. 245 . . . should be answered.

Q. 248 does not seem material, but Q. 249 is proper . . .

Q. 265, as to treatment ordered by her doctor, plaintiff should answer, and also what his charges are to date.

My rulings are based on what I take to be the effect of . . . Frost v. Brook, 23 W. R. 260. . . .

No doubt, all this line of examination is most repulsive to a female plaintiff. . . .

An order must go as above, but the costs will be in the cause. . . .

MAGEE, J. JANUARY 9TH, 1906.

CHAMBERS.

ROBINSON v. ENGLAND.

Costs—Taxation—Appeal—Omission to File Written Objections before Certificate Signed—Slip of Solicitor—Relief—Setting aside Certificate—Extension of Time.

Motion by plaintiff for leave to appeal from the taxation by the senior taxing officer at Toronto of plaintiff's costs of the action and to review the taxation, or for such further order as might be just. The taxing officer refused to tax

to plaintiff the costs of a commission to California. The plaintiff objected, but did not file written objections, and the taxation was closed and the certificate of the officer issued without the filing of any objections.

J. C. Hamilton, for plaintiff.

Joseph Montgomery, for defendant.

MAGEE, J.:—Rule 774 makes the taxing officer's certificate final and conclusive in all matters which have not been objected to as provided in Rules 1182 and 1183, under which the objections are to be made in writing before the certificate is signed. Appeals in the nature of review of the taxation have repeatedly been disallowed because of the absence of written objections before the taxing officer, or have been limited to those which were in writing: see Snowden v. Huntington, 12 P. R. 248; Campbell v. Baker, 9 O. L. R. 291, 5 O. W. R. 372; Strousberg v. Sanders, 38 W. R. 117; Craske v. Wade, 80 L. T. R. 380. In Cousineau v. Park, 15 P. R. 37, where the appeal is said to have been allowed, it was on the ground that the certificate was signed too soon.

Here the taxing officer's course was quite regular, and the certificate was taken out by the appellant; but it is shewn that there was the intention to appeal, and that the slip which occurred was owing to oversight, at the moment, of the requirement of the Rules, and was made known within a few hours, and request made for its rectification.

In In re Furbèr, [1898] 2 Ch. 538, after a review of taxation had been refused on account of the absence of written objections, Kekewich, J., granted an order discharging the certificate of taxation, and directed it to be signed at a later date so as to enable the appellant to put his objections in writing, and this order was upheld on appeal, as there had been a slip or miscarriage of justice. The circumstances there do not materially differ from those in the present case, which, I think, call for the same relief.

The notice of motion is for leave to appeal and for an order varying the taxation, neither of which can be granted, but it also asks for such other order as may be just. That which I propose making is, I think, sufficiently cognate to the request for leave to appeal, to be granted on the present motion, without driving the appellant to make a special

application as in In re Furber, and counsel for defendant admits that all the facts are before me, and does not desire to file any further affidavits.

The order should go to set aside and discharge the certificate of taxation, and direct that a new certificate be not signed for 5 days. This delay, counsel agree, will be convenient for both sides to decide upon what course they will take. No costs.

JANUARY 9TH, 1906.

DIVISIONAL COURT.

PHILLIPS v. CITY OF BELLEVILLE.

Municipal Corporations—Acquisition of Lands at Tax Sale —Sale by Tender—Resolution of Council to Accept Lower Tender—Action by Higher Tenderer to Restrain Sale—Reasons for Accepting Lower Tender—Sufficiency—Good Faith—Threats of Litigation—Decision of Committee—Action—Parties—Costs.

Appeal by defendants the corporation of the city of Belleville from judgment of MAGEE, J. (6 O. W. R. 1), in favour of plaintiff upon the second trial of the action, as directed by a Divisional Court (9 O. L. R. 732, 5 O. W. R. 310.)

The action was first tried by STREET, J., who dismissed it. Plaintiff appealed to a Divisional Court, which held that plaintiff was entitled to succeed, unless defendant corporation could prove at a further trial good reasons which induced them to sell the lands in question to defendant Caldwell, the lower tenderer, plaintiff being the higher tenderer. Upon the further trial MAGEE, J., held that the reasons shewn were insufficient, and defendant corporation now appealed.

W. C. Mikel, Belleville, for defendant corporation.

E. D. Armour, K.C., for plaintiff.

E. G. Porter, Belleville, for defendant Caldwell.

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

STREET, J.: . . . We are, in considering this appeal, no doubt bound by the decision of the majority of a

Divisional Court, 9 O. L. R. 732, 5 O. W. R. 310. Shortly stated, that decision is, that the Courts are entitled to examine into and pronounce upon the sufficiency of the reasons which have actuated the minds of the members of a municipal council in selling real estate of the corporation to a person who was not actually the highest bidder; and, although the corporation, acting in good faith, has deemed its reasons sufficient, may restrain it from acting upon them if they happen to come to a different conclusion. This is the law laid down by the majority of the Divisional Court, and we must endeavour to follow it upon the present motion; but in doing so we should, if we find any reasonable grounds for the action of the corporation, at least give the members of the council credit for having acted upon them. . . .

[Reference to the reasons which led the corporation to accept Caldwell's offer, as set forth in the judgment of Magee, J., 6 O. W. R. 1.]

My brother Magee, it seems to me, has set himself an unnecessarily difficult task in seeking, as he has done, to investigate the workings of the minds of the aldermen with the object of determining the exact weight which they attributed to each of the reasons given. He passes over the first two reasons, upon the idea, an erroneous one, I think, that the Divisional Court had rejected them as insufficient; he thinks the third reason would have been a good and sufficient reason for their action had it stood alone; he thinks the fourth and fifth reasons were probably those which determined the action of the council; and because he thinks the council were under a mistaken view as to the facts upon which those two reasons were founded, he decides that they were not good reasons; and because these fourth and fifth reasons, and not the reasons which he finds to have been good, may have been those upon which the council acted, he finds that they had no good reason at all for acting.

In my opinion, we should not attempt to decide the question propounded by the Divisional Court upon so doubtful and elusive an inquiry as that of the respective weights that these different aldermen may have given to the various reasons on which they acted.

I think it should be sufficient for the decision of the question if we find, first, that the council acted in perfect good faith, and second, that they had reasons before them which they may reasonably have considered good and sufficient to justify their action.

In my opinion, the first of the reasons . . . viz., the desire to avoid the threatened litigation, either alone or coupled with the second reason, was an excelent and sufficient one for the action taken. They thought that by accepting Caldwell's $265 they would probably avoid an action, and that by accepting plaintiff's $326.50 they would probably subject themselves to one. This reason alone would properly appeal to business men who desired to avoid entangling the city in a law suit, and it was coupled with the other reason, viz., that their own committee having before them all the facts with regard to the action of the two men, had considered themselves bound in honesty to accept Caldwell's offer, although it was the smaller.

It was thought by my brother Magee that the Divisional Court had already passed upon these two reasons and held them insufficient. In this I think, with much respect, that he is mistaken. No member of the council was examined at the first trial, because I thought it unnecessary for them to give me their reasons, in the absence of any imputation of bad faith, for their actions. There was, therefore, no opportunity for any of them to give their reasons, and the reference back was to enable them to do so. It is true that the fact was before the Court, as it was before me at the first trial, that they had been threatened with litigation, but no one of them had said that that threat was one of the reasons which influenced him. Apart from these two reasons, there was the third reason which my brother Magee thought would, of itself, have been sufficient had it stood alone. Finding a sufficient reason for the action they took, I think it would be better to treat the council as having acted upon it, rather than to enter into a speculative inquiry as to what action they would have taken had other reasons not also been in their minds.

In my opinion, therefore, the judgment for plaintiff should be set aside with costs of the appeal, and judgment should be entered dismissing the action with costs of both trials and of the former as well as the present motion to the Divisional Court, to be paid by plaintiff to defendants the corporation of Belleville. Defendant Caldwell was brought in as a defendant upon an objection taken by the corporation that he was a necessary party; but for this he would not have been made a party. The evidence shews that he was not a necessary party, and he should have his costs

against the corporation of appearing at both trials, and upon the first argument before a Divisional Court, but no costs of any attempt to prove a contract with the corporation.

JANUARY 9TH, 1906.

DIVISIONAL COURT.

DRADER v. LANG.

Sale of Goods—Action for Price—Account—Delivery to Agents—Oral Agreement—Letters—Evidence—Findings of Jury.

Appeal by defendant from judgment of BRITTON, J., upon the findings of a jury, in favour of plaintiff for $1,640.97, and cross-appeal by plaintiff to increase the amount of plaintiff's recovery.

J. B. Clarke, K.C., for defendant.

M. Wilson, K.C., and Ward Stanworth, Chatham, for plaintiff.

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

MABEE, J.:—Plaintiff's claim is for a large quantity of apple barrels supplied upon defendant's account to alleged agents of his; and at the trial only one question was submitted to the jury, viz., whether the contents of a letter written by plaintiff to defendant on 8th September were as contended for by plaintiff, or whether defendant was right in his recollection of it, and, upon the jury finding that issue in plaintiff's favour, he had judgment for $1,640.79, upon the footing of the account standing as appears in the judgment of the trial Judge; the holding being that defendant's letter of 9th September, read with plaintiff's of 8th, in the terms found by the jury, made defendant liable for 8,000 barrels.

The whole contest at the trial seems to have been as to the contents of plaintiff's letter of 8th September, which was not produced by defendant, and of which plaintiff kept no copy, and it does not appear to have been argued on behalf of defendant that, even if the letter of the 8th was as contended for by plaintiff, still the letter in reply by defendant

of the 9th created no liability, but rather the contrary seems to have been assumed.

Plaintiff alleged he had a conversation with defendant on 12th September, in which he referred to the somewhat indefinite terms of defendant's letter of the 9th, and said he told defendant he would not let any more barrels go out unless defendant agreed to pay for them, and that defendant did so agree, and that, acting upon that agreement, he continued to deliver barrels upon defendant's account. Prior to 25th September plaintiff had delivered 4,250 barrels at 42 cents each, making $1,785, and he has received in all $1,700 upon account. Upon and subsequent to 12th September he delivered 4,170 barrels at 42 cents, making $1,751.40, and plaintiff contends he is entitled to recover the latter sum and the $85 owing upon the account incurred prior to the conversation of 12th September.

At the trial the conversation alleged by plaintiff to have taken place on 12th September was not denied by defendant; indeed, defendant's counsel admitted the contention of plaintiff as to that conversation having taken place, and so that issue was not left to the jury.

Upon this appeal it is for the first time contended that the letter of 8th September was not a guarantee, and created no liability, and perhaps that is the proper construction to be placed upon it; certainly plaintiff did not feel safe in letting the barrels leave his premises upon the strength of that letter, and was unwilling to accept it as the final terms upon which he would continue the delivery of the barrels, and so had the further interview of the 12th, and this arrangement made upon that day, I think, together with the conversation alleged by plaintiff of 27th September, avoids any trouble over the construction of defendant's letter of the 9th, and made defendant liable for the payment of all the barrels delivered upon and subsequent to 12th September.

Counsel for defendant contended that if defendant became liable by reason of the arrangement of the 12th he was entitled to have the $1,700 paid applied upon the barrels delivered subsequent to that date. I think not. Those moneys are said by defendant to have been paid only upon the authority and consent of Oakes and Welt (the alleged agents), and if that is so, defendant is not entitled to have them applied in reduction of his individual liability, which arose on 12th September, and he cannot contend that money paid

by him in reduction of the debt of Oakes and Welt to plaintiff should now be applied upon his personal liability for barrels delivered upon his account upon and after 12th September, and thereby deprive plaintiff of the benefit of the bargain made on that day and 27th September, and upon the strength of which plaintiff continued his dealings and delivered 4,170 barrels.

There was, however, $28 overpaid on Oakes's account, and defendant is entitled to have credit for that sum.

Plaintiff is entitled, I think, to have judgment in his favour for 4,170 barrels at 42 cents, making $1,751.40, less the $28, or $1,723.40.

I would not allow interest.

Plaintiff should have no costs of opposing defendant's appeal—costs of cross-appeal to plaintiff.

MABEE, J. JANUARY 10TH, 1906.

CHAMBERS.

MUIR v. GUINANE.

Pleading—Statement of Claim—Non-conformity with Writ of Summons—Statute of Limitations—Action Begun by Copartnership—Statement of Claim in Name of Incorporated Company.

Appeals by defendant from two orders of the Master in Chambers, one reported 6 O. W. R. 383, dismissing a motion by defendant to strike out of the original statement of claim all mention of bills of exchange as a cause of action, and the other order, 6 O. W. R. 844, dismissing a motion by defendant to set aside the amended statement of claim.

W. C. MacKay, for defendant.

A. R. Clute, for plaintiffs.

MABEE, J.:—Rule 244 is wide, and I think the extended claims set up in this statement of claim do not offend against that Rule. The acceptances were given for the goods for which the writ was indorsed, and plaintiff company is alleged

to have been incorporated to take over the business of Muir & Co., and thus, so far only of course as the pleadings are concerned, acquired the right of action for the goods sold, and became the holder of the acceptances.

Defendant, however, alleges that the acceptances are now all barred, the statutory period becoming complete as to each between the date of issue of writ and filing statement of claim. Notwithstanding that this may be correct, the extension of the claim by setting up liability upon the acceptances will do defendant no harm; he can so frame his defence with respect to pleading the Statute of Limitations as a bar to recovery upon the acceptances as to avoid the difficulty in which defendant in Bugbee v. Clergue, 27 A. R. 96, 717, found himself placed at the trial upon that branch of his defence. If I am correct in this, defendant is placed in no worse position by allowing the statement of claim to stand in its present form than he would be in if the alleged extended claims were struck out and plaintiffs left to issue a new writ upon the acceptances.

That defendant has this right may be made certain by varying the last order in appeal and providing that defendant shall be at liberty to plead the Statute of Limitations against plaintiffs' claim upon the acceptance as if the action had been commenced at the date of delivery of the statement of claim, viz., 7th September, 1905: Hogaboom v. MacCulloch, 17 P. R. 377.

Costs of both appeals in the cause.

JANUARY 10TH, 1906.

DIVISIONAL COURT.

FISHER v. PARRY SOUND LUMBER CO.

Assessment and Taxes—Tax Sale—Action to Set aside—Arrears—Notice — Assessment Roll — Distress—Evidence—Onus—Parties—Costs—Locatee—Status as Plaintiff.

Appeal by defendant Parton from judgment of BOYD, C., 6 O. W. R. 381, in favour of plaintiff in an action to set aside a tax sale and tax deed. The sale was had in June, 1903, for alleged arrears of taxes accruing as to lot 1 in the

10th concession of McDougall for the years 1895, 1896, 1897, and 1898, and as to lot 2 in the 10th for 1898 only. The Chancellor held that there was not sufficient evidence to support a legal tax sale and deed, and both must be vacated with costs of suit to plaintiff as against defendant Parton, who was a transferee from the defendant company, the original purchasers.

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

D. C. Ross, for plaintiff.

THE COURT (FALCONBRIDGE, C.J., STREET, J., CLUTE, J.), agreed with the Chancellor that plaintiff had a status to maintain the action, and that the failure to observe the requirements of secs. 153 and 154 of the Assessment Act was fatal to the validity of the tax sale.

Appeal dismissed with costs.

JANUARY 10TH, 1906.

DIVISIONAL COURT.

RE PLACE.

COPELAND-CHATTERSON CO v. BUSINESS SYSTEMS LIMITED.

Contempt of Court—Jurisdiction over Person Resident out of Province—Order Nisi for Committal—Discharge.

Motion by plaintiffs to make absolute an order nisi to commit Edson G. Place, a Montreal solicitor, for contempt of Court in conspiring in Ontario to procure the destruction of a certain letter in question in the action, which was pending in Ontario.

G. H. Kilmer, for Place, objected that the Court had no jurisdiction to issue process of this kind for service out of the jurisdiction, and that there was no proper evidence before the Court upon which to issue an order nisi, even if there was jurisdiction.

W. E. Raney, in answer to the objection, contended that the Judicature Act had no application, this being a criminal proceeding, as decided in Ellis v. The Queen, 22 S. C. R. 7.

THE COURT (FALCONBRIDGE, C.J., STREET, J., CLUTE, J.), held that it had no power to bring Place before it from outside the province; and discharged the order nisi with costs.

CARTWRIGHT, MASTER. JANUARY 11TH, 1906.

CHAMBERS.

SHARPIN v. NICHOLSON.

Venue—Change — Preponderance of Convenience— Expense— Cause of Action.

Motion by defendant to change venue from Owen Sound to Goderich.

W. E. Middleton, for defendant.

Shirley Denison, for plaintiff.

THE MASTER:—Defendant swears to 8 witnesses besides himself, and shews that the cost to him of a trial at Goderich would be about $16 for transportation of witnesses as against at most $50 for trial at Owen Sound.

Plaintiff swears to himself and two other witnesses who all reside at Owen Sound. If the trial is at Goderich, it would cost him $20, not allowing anything for expenses of his legal adviser.

The alleged causes of action, no doubt, arose in the county of Huron, of which Goderich is the county town.

Plaintiff makes an affidavit as to his poverty, and that if the venue is changed he will probably have to abandon his action.

This brings the case within McDonald v. Dawson, 8 O. L. R. 72, 3 O. W. R. 773, on that point. There, too, the Chancellor was of opinion that even $50 was not a difference of such a preponderance as to overcome plaintiff's rights, though the injury in that case occurred where defendants resided.

Here it will cost defendant only $34 more to have the trial at Owen Sound than if it takes place at Goderich. But it will cost plaintiff $20 at least to have the trial at Goderich more than to have it at Owen Sound. . . .

Motion dismissed; costs in the cause.

CARTWRIGHT, MASTER. JANUARY 11TH, 1906.

CHAMBERS.

ONTARIO LUMBER CO. v. COOK.

Particulars—Statement of Claim—Settlement of Accounts—Allegations of Error—Specifications of Error.

Motion by defendants for particulars of the 8th paragraph of the statement of claim.

Action for an account of dealings between plaintiffs and one G. J. Cook, who died on 19th August, 1902, defendants being his executors.

Certain financial dealings took place beginning in 1889, and, as set out in the statement of claim, the accounts were settled on 16th February, 1905, and plaintiffs paid to defendants the balance claimed.

The 8th paragraph of the statement of claim alleged that plaintiffs had since discovered errors such as, if proved, would entitle them to some relief. But no specific errors were alleged.

A. H. Marsh, K.C., for defendants.

A G. F. Lawrence, for plaintiffs.

THE MASTER:—For the motion reliance was placed on Chambers v. Goldwin, 9 Ves. 254 . . . and Blagrave v. Routh, 2 K. & J. 509.

From these authorities it seems clear that the motion must prevail. It would appear that the accounts may be divided into 3 periods, the first being during the life of G. J. Cook, the second from death of Cook to 8th July, 1904, and the last when the affairs of plaintiffs were in the hands of receivers, through whom defendants advanced moneys until the account was closed.

It seems, therefore, that plaintiffs should give specific items of what they propose to surcharge and falsify in the accounts of each of these periods so as to comply in substance with the terms of the notice of motion. Such facts must be stated as, if proved, will entitle plaintiffs to a judgment such as they ask. General allegations are not sufficient. "Pleadings must be precise as well as concise," as said by Kay, J., in Townsend v. Parton, 30 W. R. 289, 45 L. T. 750.

Costs of motion to defendants in any event.

MABEE, J. JANUARY 11TH, 1915.

CHAMBERS.

MASSEY-HARRIS CO v. DE LAVAL SEPARATOR CO

Discovery—Examination of Officer of Defendant Company—Libel—Privilege—Names of Persons to Whom Impeached Document Sent—Source of Information.

Motion by plaintiffs to compel defendants' manager to attend for re-examination for discovery and make disclosure of certain matters withheld by him.

Grayson Smith, for plaintiffs.

C. S. MacInnes, for defendants' manager.

MABEE, J.:—The action is for damages alleged to have been sustained by plaintiffs by reason of the publication of a circular by defendants, which is set out in full in the statement of claim. Defendants plead, among other things, that, if the circular was written or published by them, it was so written and published without malice and in the bona fide belief that it was true; that it was a privileged communication, made with an interest and under a duty to make the same, and sent in the ordinary course of business to the agents of the company in connection with the business of the company. I presume this is intended to mean to the agents of the defendant company, although it was stated at the argument that possibly some of these were agents of both plaintiff and defendant companies. One of the statements in the circular was: "We are advised that the Massey-Harris Co. have decided to discontinue their separator business."

Upon the examination of defendants' manager he was asked to state the names of the persons to whom the circular had been sent. It appeared that he had a list with these names all written down upon it. He was asked to produce and shew this to plaintiffs' counsel—he refused to do either. He was asked where the information came from upon the strength of which the circular was published—in other words, who "advised" that plaintiffs had decided to discontinue that branch of their business—this he also refused to disclose.

Many cases are cited . . . It is useless to try to reconcile the cases upon the point of practice.

Schmuck v. McIntosh, 2 O. W. R. 237, Marsh v. McKay, 3 O. W. R. 48, and Sangster v. Aikenhead, 5 O. W. R. 438, 495, all tend to support defendants' contention, and counsel for defendants alleged that he strongly relied upon Hennessy v. Wright, reported with Parnell v. Walter, 24 Q. B. D. at p. 448.

On the other hand, Parnell v. Walter, Elliott v. Garrett, [1902] 1 K. B. 870, Edmondson v. Birch, [1905] 2 K. B. 523, and White v. Credit Assn., [1905] 1 K. B. 613, support plaintiffs' view.

There is no reason to suppose that the inquiry is made for any improper purpose, nor does it appear that the information is being sought for purposes other than the present action. nor indeed will the giving of the information put defendants to any inconvenience or unnecessary trouble. Plaintiffs are entitled to explore all material facts involved or connected with the litigation that may tend to strengthen their own case to break down that of defendants. Defendants' good faith and honesty of purpose in sending out the circulars are in issue. It has, I think, been well said that "the paramount consideration must be the relevancy of the inquiry to the matter in issue, which is the state of the defendant's mind when he published the statements complained of."

In one aspect of plaintiffs' case, it may be essential to establish malice.

The name of defendants' informant, or access to the source of their information respecting plaintiffs' intention of abandoning the manufacture of separators, as well as inspection of the list of persons to whom the circulars were sent, might and probably would materially assist plaintiffs either in breaking down defendants' plea of bona fides and privilege and establishing mala fides, or of satisfying plaintiffs that defendants were acting honestly, although misled, and in either aspect, it would seem, the information should not be withheld unless offending against established practice. . . .

I think White v. Credit Assn., supra, ample authority to support the position that defendants must give the name of the person or persons from whom they allege they obtained the information that plaintiffs intended abandoning the main feature of separators. Nor do the reasons given in that case apply here in support of defendants' contention that they

need not furnish the list . . . This will entail no inconvenience or hardship upon them, and is in line with the reasons given in Parnell v. Walter for compelling defendants to give further information as to circulation of the papers and pamphlets in that case, and in harmony with other decisions upon this point. The withholding of the name under the rule of non-disclosure of a witness intended to be called, cannot avail defendants: Williamson v. Merrill, 4 O. W. R. 528.

Of course, discovery must be kept within reasonable bounds, and should not be permitted to be used for purposes other than appear to be proper, having regard to the facts and questions involved in each particular case and the issues presented by the pleadings.

The production of the list of persons to whom the circulars were sent by defendants and examination thereupon may be of material assistance to plaintiffs in shewing bad faith in the publication of the circular or in disproving the defence that the circulars in question were sent only to those "with an interest and under a duty to receive them." I think defendants should produce the list . . . and submit to examination upon it. For the reasons fully given in the Credit Assn. case, I think plaintiffs are entitled to have the name or names of the alleged informant or informants of defendants.

The order will go as asked upon both the points involved in the motion. In view of the state of the authorities, costs will be in the cause.

MABEE, J. JANUARY 12TH, 1905.

WEEKLY COURT.

WISE v. GAYMON.

Receiver—Equitable Execution—Ex Parte Order—Local Judge—Appeal—Forum—Extension of Time for Appeal—Previous Ex Parte Application—Direction to Serve Notice—Non-disclosure—Interest Under Will—Income——Married Woman—Restraint upon Anticipation.

Motion by defendant Alberta R. Gaymon for leave to appeal from and to set aside an order granted by the local Judge

at St. Catharines on 5th December, 1905, appointing plaintiff receiver by way of equitable execution of plaintiff's judgment against the applicant.

F. Ford, for applicant.

W. N. Tilley, for plaintiff.

MABEE, J.:—Rule 48, read with clause (B.) of Rule 47, provides that any appeal by any person affected by an order made by a local judge for the appointment of a receiver by way of equitable execution after judgment, shall be made to a Judge of the High Court in Court, so the objection to the regularity of defendant's notice of motion, it being contended that it should have been to a Judge in Chambers, is disposed of.

The order in question was obtained from the local Judge ex parte, and defendant now moves for leave to appeal against it.

Rule 353 provides that the Court may extend the time for appealing, and the first question therefore is, whether such extension should be made.

It appears that an application for a receiving order was first made on 30th November, 1905, to Meredith, C.J., and the following note appears in his book of that date: " . . I decline to make an ex parte order, leaving the applicant to move on notice." . . .

The affidavit of plaintiff's solicitor states that in making the application to the local Judge he explained to him that the application had been made in Toronto before the Chief Justice, . . . but the affidavit is silent upon the point of the Chief Justice having refused to grant an ex parte order and leaving the applicant to move on notice, and had this been communicated to the local Judge, of course no ex parte order would have been made, and all the subsequent trouble would probably have been avoided. The refusal of the Chief Justice to make the order ex parte, and his (in effect) directing notice to be given, may not have been fully communicated to the solicitor in St. Catharines, and he may have supposed himself quite right in renewing his application as he did, but the result is the same, viz., that an order has been obtained from the local Judge which the Chief Justice had refused to make, and which he had left to be applied for only upon the usual notice being given. . . .

This order was served in due course upon Mrs. Gaymon, but it is quite apparent that she had no intelligent understanding of its nature until it was seen by her solicitors, which was not until 26th December, and they on that day applied to plaintiff's solicitors for an extension of time to appeal from the order, and, this being refused, this motion was launched on 28th December. I think, in these circumstances, the leave to appeal should be granted.

It was contended for plaintiff that defendant must, under Rule 358, first apply to the local Judge to rescind the order. I do not think, however, that is her only remedy. The practice followed seems also to be open to her.

It remains then to be considered whether plaintiff would have been entitled to the order had the parties had an opportunity of being heard when application for it was made.

Plaintiff holds an unsatisfied judgment against defendants, and has execution in the hands of the sheriff of Lincoln.

Under the will of John F. Rittenhouse . . . certain provisions are made for the benefit of defendant Alberta Gaymon, his daughter, the following being the clauses material for consideration:

"I desire that my trustees shall retain in their possession the share of my daughter Alberta Gaymon . . . and invest the said share to the best advantage so as to pay her a fair income sufficient to maintain her, and free from any interference on the part of her husband. I direct my executors and trustees to set apart my stock in the Security Loan and Savings Co. as a part of the share of my said daughter . . . and if said stock does not pay a sufficient income to maintain my said daughter in comfortable circumstances, according to the discretion of my trustees, then I give them full power to sell my stock in the said company and invest the same as to them may seem proper. It is my express wish that in no way shall my said daughter be allowed to anticipate her income or deal in any way with the capital so invested. In the event of the death of her husband . . . the share of my said daughter Alberta may be handed over to her by my said executors to deal with as she may see fit, if they deem it wise."

The material before me does not shew that at the date of the order in question there were any arrears of income in

the hands of the trustees payable to Alberta Gaymon, or that at that date she had the right to require or call upon them to pay any part of the money, either principal or interest, then in their hands under the trusts of the will or otherwise. It was contended for plaintiff that the duty of shewing that there were no such arrears was upon defendant. I think not.

This lady is clearly restrained from anticipating her income, and can in no way deal with the principal. The judgment is said to have been recovered upon a joint note of defendants Alberta and Melvin Gaymon—husband and wife—and so the liability or contract upon which the judgment went was incurred during coverture.

Section 21 of R. S. O. 1897 ch. 163, the Married Women's Property Act, is the same as sec. 19 of 56 and 57 Vict. ch. 63 (Imp.), and the provision therein against restraint upon anticipation has been fully considered in England under the latter statute, and it is said that the Courts have always been careful to guard against any invasion upon a provision of that character, and the rule has been adopted that the power of the Court is to be measured by the married woman's own power, and that, as Alberta Gaymon could not anticipate this income by any engagement, assignment, or contract entered into by her, so under the above rule the Court cannot do so.

. . .

[Reference to Hood Barrs v. Cathcart, [1894] 2 Q. B. 559, and Hood Barrs v. Heriot, [1896] A. C. 174.]

I am compelled to hold that plaintiff is and was not entitled to the receiving order granted, and the appeal will therefore be allowed and the order in question vacated with costs to be paid by plaintiff to Alberta Gaymon.