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APPELLATE DIVISION.

FEBRUARY 20TH, 1914.

VAUGHAN-RHYS v. CLARRY.

Contract—Purchase and Sale of Timber Limits—Executed Contract—Misrepresentations not Amounting to Fraud—Breach of Warranty — Judgment in Former Action between the same Parties—Res Judicata—Estoppel—Evidence — Credibility of Witnesses—Acceptance of Testimony of those who Remember against those who do not — Findings of Trial Judge—Appeal.

Appeal by the defendants from the judgment of BOYD, C., at the trial, in favour of the plaintiff.

The action was for a money demand; and the defendants counterclaimed for damages for deceit or for breach of warranty arising upon a contract for the sale and purchase of timber limits. The judgment appealed from was in favour of the plaintiff upon his claim, and dismissing the counterclaim. The appeal was confined to the counterclaim.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. Bicknell, K.C., and N. Phillips, for the appellants.

Shirley Denison, K.C., for the plaintiff, the respondent.

The judgment of the Court was delivered by MULOCK, C.J. Ex.:—In this action the defendants endeavour to succeed on one of two grounds: (1) deceit; (2) breach of warranty.

The first question to determine is, what was the contract between the parties?

It appears that the defendant Clarry, who lives in the Province of Ontario, was on the 1st November, 1907, in the city of Vancouver; and, observing a notice in the window of one Gallagher, a real estate agent, to the effect that he had certain timber limits in British Columbia for sale, entered Gallagher's office,

and then came into touch with the plaintiff, Vaughan-Rhys, the ostensible owner of these limits. The notice which had attracted Clarry's attention was discussed. It contained a statement as to the quantity and quality of the timber on the limits, and their accessibility. At this stage it doubtless played an important part in the mind of Clarry, for he asked the plaintiff to sign it, which the plaintiff did.

On this occasion the plaintiff made a written offer to the defendant for the sale of the limits. That offer contains a number of terms, amongst others this term: "As soon as the stock is issued, if this is satisfactory to you, a proper agreement will be drawn embodying the above conditions; or, if you give me your cheque for the $500, dated ten days from now, that is the 11th November, I will accept the same."

The defendant did not accept the offer unconditionally; his acceptance, which is in writing, at the foot of the offer, being in the following words: "I accept the above, subject to report of P. Meyers being satisfactory; and subject to title being clear."

That qualified acceptance did not constitute a contract.

Clarry left British Columbia about this time, leaving Gallagher to look after his interests, including the securing of the completed documents referred to in the plaintiff's offer.

On the 9th November, the plaintiff delivered to Gallagher a document under seal, signed by the plaintiff, wherein he offered and agreed to sell the limits to Clarry on the terms therein set forth. That agreement was left with Gallagher. Clarry says that he did not receive it from Gallagher, but, Gallagher being Clarry's agent to secure the document, delivery to him was delivery to Clarry.

Subsequently Clarry completed the purchase, and the limits were transferred to him; and the only contract of which we have any evidence is the one resulting from the agreement on the 9th November, 1907, and the defendants' conduct in completing the purchase.

Thereafter certain litigation in the Courts of British Columbia arose between the parties in respect of the dealings between them, one of such actions being a suit by the plaintiff against the defendants for a vendor's lien on the limits in respect of the unpaid portion of the purchase-money.

In that suit the plaintiff alleged the sale of the limits to the defendant under the contract of the 9th November, 1907; and the defendants, in their statement of defence, admitted the correctness of that allegation, as to the agreement of the 9th November, and the Court took the defendants at their word, and found that the contract was that of the 9th November, 1907.

We are not only bound by that judgment, which is an estoppel, but we would reach that same conclusion if the question was yet at large. Thus it is judicially declared that the rights of the parties grow out of the agreement of the 9th November, 1907. And, with that agreement as a starting-point, the questions of fact to be here determined are whether the plaintiff was guilty of deceit and whether there was a breach of warranty.

The learned Chancellor was not able to accept Clarry's version of the occurrences. He did, however, accept, apparently, the version of the plaintiff's witnesses.

Clarry forgets, or does not remember, where other witnesses remember distinctly. Where one witness testifies to a certain fact, and the opposing witness does not remember, credence can be given to the honesty of both sides by accepting the evidence of the one who does remember, and which stands uncontradicted by the other.

That is the charitable view which the Chancellor has taken of the evidence, and, sitting in appeal, we do not take exception to such finding.

The evidence, if we felt at liberty to review it, would not warrant us in disturbing such finding; and, unless we were to reverse it, the appeal must fail.

The transaction, as it stands, is an executed contract, and, therefore, nothing short of actual fraud would be sufficient to render it void. Misrepresentation, not fraudulent, would not help the defendants. If it was competent to us to review the learned Chancellor's findings, we would, as a jury, looking at all the circumstances, reach the conclusion that there was no actual fraud.

As to the other question of fact, namely, whether there was a breach of warranty, it is to be observed that the representations made on the 1st November might have been material if the case were still executory; and if the contract had been completed on the 1st November.

But no contract was then made, and those representations were not made part of the contract of the 9th November, 1907.

In the contract of the 9th November, an opportunity was given the defendant Clarry to verify or falsify the allegations contained in the schedule, as it is called. He could then have gone, or have caused his agents to go, to the limits and have them examined for his own information.

When the agreement of the 9th November, 1907, was prepared, the schedule was not made a part of it so as to become a warranty. It is referred to, but only in the sense that the de-

fendants are given an opportunity to send their agents to examine the limits; and, if the agents' report shews the quantity of timber mentioned in the schedule, then the defendants are to increase their purchase-money by delivering over certain shares, otherwise not.

Thus the schedule is referred to merely by way of description; but, it not being made a part of the contract, the statements contained in it do not amount to a warranty.

That being the case, the defendants cannot recover for breach of warranty; and, as they fail on both grounds, the appeal must be dismissed with costs.

FEBRUARY 23RD, 1913.

DEMENTITCH v. NORTH DOME MINING CO.

Master and Servant—Injury to Servant Working in Mine—Negligence—Mining Act of Ontario, 1908, *sec.* 164, *Rules* 10, 31—*Failure to Observe—Negligence of Captain of Mine—Failure to Inspect—Findings of Jury—Evidence to Warrant—Supplementary Finding by Appellate Court—Damages—Workmen's Compensation for Injuries Act—Estimated Earnings—Computation.*

Appeal by the defendant company from the judgment of LATCHFORD, J., upon the findings of the jury, at the trial at Haileybury, in favour of the plaintiff.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

H. E. Rose, K.C., and J.W. Pickup, for the appellant company.

Frank Denton, K.C., for the plaintiff, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The respondent is a miner, and was employed by the appellant to operate a drilling-machine in the appellant's mine, and, while engaged in that work on the morning of the 21st March, 1913, the respondent was seriously injured owing to an explosion which took place; and his action is brought to recover damages for his injuries, and is based on the allegation that they were due to the negligence of the appellant.

According to the evidence, the operation which was going on in the mine at the time of the accident was for the purpose of blasting in a new draft at the 250-foot level. The respondent was in charge of a drilling-machine, which was used for perforating holes in the face of the rock, and was assisted by a helper named Mecca, who was killed by the explosion, and a man named Cassidy was in charge of a similar machine in another drift about 50 feet away from that in which the respondent was working, and Cassidy was assisted by a helper named Orak. Cassidy and his helper had assisted the respondent in drilling 13 holes in the latter's drift, and, after the holes had been "blown out," they were loaded with powder, and the respondent cut the fuse and lit it; the party then ascended to the surface and waited for the reports of the explosions and counted them as they occurred. There were 13 explosions counted, which indicated that there had been an explosion in every one of the holes. This occurred between 3 and 4 o'clock in the morning, and the men then went to bed. They returned to work about noon of the same day, when they were requested by the captain of the mine (Grierson) to do some "timbering" in the mine, which had become necessary owing to the timbers having been displaced by the explosions. When they got down to the mine, the respondent and Cassidy examined the holes and found that in some cases the rock had not been broken away to the full depth of the holes, which was about 5 feet, but only to the depth of about 2 feet; they then ascended to the surface and informed Grierson that some of the holes had broken badly; there is a conflict of testimony as to what next occurred and as to the instructions that were given to the respondent. According to the testimony of Cassidy, Grierson said to "fire" the holes over again, and asked how many there were to "fire out," to which the respondent replied that he thought there were eleven.

Grierson testified that they reported that "it did not break good;" that he asked the respondent "How many will you have to shoot over again? that the respondent's reply was "eleven holes;" and that he then told the respondent "to shoot them or as many as he thought ought to be shot before they started drilling again;" that he went down into the mine and assisted in timbering until about 5 o'clock, when they went "off shift" and did not come back until seven o'clock; that he then met them at the collar of the shaft, as they were going down into the mine, and said, "Be sure to shoot those eleven holes, or as many as you think should be shot again." Although this report had been made to him, no steps were taken by Grierson to find

out which of the holes ought to be shot again or the condition in which the holes had been left by the explosions; and, though he was in the mine and but a few feet away from where the holes were, he does not appear to have even taken the trouble to look at them. . . .

According to the testimony of the respondent, he told Grierson that he wanted the holes shot again, and was told by Grierson to drill again, and that Grierson told him not to shoot again holes two or three feet, that is, as I understand, when the rock had broken away to that depth; that, having examined the holes and taken out the loose rock from them, and having found no trace of powder in any of them, he proceeded to drill other holes, keeping six inches away from any of the existing holes; that he had drilled one to the full depth and had partly drilled another, when the explosion occurred in an old hole next to it. Different theories are suggested as to the cause of the explosion: one of them that the hole the respondent was drilling was not being truly bored, with the result that the drill went in at an angle and came in contact with the powder that remained in the adjoining hole; and another, that the jarring caused by the drilling had caused the powder to explode.

The jury, in answer to questions put to them by the learned trial Judge, found that the accident was caused by the negligence of the appellant, and that the negligence consisted "in the captain failing to inspect after report made to him of incomplete shots before resuming operations:" acquitted the respondent of contributory negligence; and assessed the damages at $3,250; and judgment was thereupon entered for the respondent for that sum, with costs.

There was, in my opinion, evidence to warrant the findings of the jury.

Among the rules which, by the provisions of sec. 164 of the Mining Act of Ontario, 1908, are required, "so far as may be reasonably practicable," to be observed in every mine, are the following:—

10. A charge which has missed fire shall not be withdrawn, but shall be blasted; and, in case the missed hole has not been blasted at the end of a shift, that fact shall be reported by the foreman or shift-boss to the mine captain or shift-boss in charge of the next relay of miners before work is commenced by them.

31. The manager or captain or other competent officer of every mine shall examine, at least once every day, all working shafts, levels, stopes, tunnels, drifts, cross-cuts, raises, signal apparatus,

pulleys, and timbering, in order to ascertain that they are in a safe and efficient working condition. . . .

There was no shift-boss employed on the mine at the time of the accident and no foreman in charge of or having oversight over the workmen; and no inspection for the purpose mentioned in rule 31 was made by any one after the report to Grierson that the holes had broken badly, although he was, as I have said, in the mine and near the place in which the holes had been drilled.

The jury were, I think, warranted in coming to the conclusion that Grierson was negligent in not having made an examination of the mine after it had been reported to him that the holes had broken badly, and that it would again be necessary to "shoot" some of them, and in leaving the respondent to be guided by his own judgment as to which of them he should "shoot" and which of them he need not "shoot," instead of himself directing on the ground what was to be done. . . .

There would perhaps have been more difficulty in the respondent retaining his verdict if it had been established that he was directed to blast out any of the holes in which the rock had not broken away to the bottom of the hole, before drilling any new holes; but, as has been seen, no such direction was given to him, and he was left to use his own discretion as to what holes should be blasted out and what holes he need not blast out. The former direction would have been one that might have been safely carried out by a miner having as little experience as the respondent is shewn to have had, but the direction that was given involved the casting upon a comparatively inexperienced man the delicate duty of deciding what holes should be and what holes should not be blasted out, and running the risk that might result from an error of judgment in carrying out his instructions. The jury, no doubt, thought that, had Grierson inspected the mine after it was reported to him that the holes had broken badly, he should and would himself have determined and pointed out which of the holes should be blasted out, instead of leaving that to be determined by the respondent.

It may be that, as it stands, the answer to the second question does not cover this view of the case; but it is certainly not inconsistent with it; and, having before us all the materials necessary for finally determining the matter in question, we should exercise the power conferred upon the Court by the Judicature Act and make this supplementary finding, which there is ample

evidence to support; and, having made it, affirm the judgment of my brother Latchford.

It was argued by Mr. Rose that there was not sufficient evidence to warrant the jury assessing the damages at $3,250; that, if the respondent is entitled to recover at all, he can recover only under the Workmen's Compensation for Injuries Act; and that there was no evidence as to what was the equivalent of "the estimated earnings during the three years preceding the injury of a person in the same grade employed during those years in the like employment within this Province;" and that the damages should, therefore, have been assessed at $1,500.

I am unable to agree with this contention. According to the testimony of the respondent, he was earning $3.50 a day at the time he was injured, and that appears to have been treated by everybody at the trial as a sufficient basis for determining the alternative amount to which the compensation is limited by the Act; and rightly so, I think, because, in the absence of evidence pointing to a different conclusion, the jury might properly draw the inference from the fact that the respondent was being paid that wage, that the estimated earnings during the three years of a person in the same grade employed during those years in the like employment within this Province, would be a sum represented by $3.50 multiplied by the number of working days in the three years.

I would dismiss the appeal with costs.

FEBRUARY 23RD, 1914.

*REX v. HELLIWELL.

Criminal Law—Betting and Pool-selling—Criminal Code, sec. 235—Jurisdiction of Police Magistrate—Summary Trial without Consent of Accused—Criminal Code, secs. 773, 778 (2)—"Absolute"—Stated Case—New Trial.

Case stated by R. E. Kingsford, Esquire, one of the Police Magistrates for the City of Toronto, under sec. 1014 of the Criminal Code, R.S.C. 1906 ch. 146.

The accused was charged before the Police Magistrate with a contravention of sec. 235 of the Criminal Code (betting and pool-selling), and asked leave to elect to be tried by a jury, which was refused because, in the magistrate's opinion, his jur-

*To be reported in the Ontario Law Reports.

isdiction to try the accused was absolute without the consent of the accused. The accused was tried and convicted by the Magistrate.

The first question reserved for the opinion of the Court was, whether the magistrate had the right to refuse to allow the accused to elect to be tried by a jury and to try him summarily without his consent.

The case was heard by MEREDITH, C.J.O. MACLAREN, MAGEE, and HODGINS, JJ.A., and LENNOX, J.

H. E. Rose, K.C., for the accused.

E. Bayly, K.C., for the Attorney-General.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . The jurisdiction to try summarily conferred by sec. 773 of the Criminal Code is, by the terms of the section, "subject to the subsequent provisions of this Part," one of which (sec. 778(2)) is: "If the charge is not one that can be tried summarily without the consent of the accused, the magistrate shall state to the accused . . . that he has the option to be forthwith tried by the magistrate . . . or to remain in custody or on bail . . . to be tried in the ordinary way . . ."

The ruling of the Police Magistrate was erroneous unless the charge against the accused is "one that can be tried summarily without the consent of the accused," within the meaning of subsec. 2 of sec. 778. . . .

The word "absolute," in sec. 773, is used, I think, in the sense of "unconditional," that is to say, not dependent upon the conditions precedent to the right to exercise the jurisdiction which are prescribed by the Act having been complied with; and the words referring to the consent of the accused were added ex abundanti cautela. . . .

In my opinion, the jurisdiction of the Magistrate to try summarily, so far as it depends upon any of the provisions of Part 16, depends upon the consent of the accused as to all of the offences mentioned in sec. 773, except those as to which, and the cases in which, it is expressly provided that jurisdiction does not depend upon the consent of the person charged.

Having come to the conclusion that the first question should be answered in the negative, it is unnecessary to answer the second and third questions.

The result is, that a new trial must be granted in order that the case may be dealt with as provided by sec. 778 and in accordance with the answer to the first question.

FEBRUARY 23RD, 1914.

*REX v. FRASER.

Criminal Law—Lottery Scheme—Criminal Code, sec. 236—Acquittal of Accused—Prosecution Conducted by Crown Attorney—Status of Informant Bound over to Prosecute—Right to Apply to Trial Judge to Reserve Case—Right to Move for Leave to Appeal to Court of Appeal—Criminal Code, secs. 871, 872, 944, 1014, 1015—Crown Attorneys Act, 9 Edw. VII. ch. 55, sec. 8, cls. (b) and (c)—"Prosecutor" "Private Prosecutor."

Application by John Scully, the informant, under sec. 1015 of the Criminal Code, R.S.C. 1906, ch. 146, for leave to appeal to a Divisional Court of the Appellate Division from the refusal of MORGAN, Jun. Co.C.J., at the York General Sessions, to state a case for the opinion of the Court, he having ruled that the Crown had not made out a case, and the jury, under his direction, having found the defendants "not guilty" of the offence charged.

The application was heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., and LENNOX and LEITCH, JJ.

Gordon Waldron, for the applicant.

C. H. Ritchie, K.C., for the defendants, the respondents.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—An information was laid by the applicant before the Police Magistrate for the City of Toronto against the respondents, charging them with a contravention of sec. 236 of the Criminal Code, and the respondents were committed for trial, and the applicant was bound over to prosecute.

An indictment was preferred at the General Sessions of the Peace for the County of York against the respondents for the offence charged in the information, and it was preferred by the Crown Attorney. A true bill having been found, the trial proceeded before His Honour Judge Morgan, presiding at the General Sessions, on the 7th October, 1913, and the Crown Attorney conducted the prosecution at the trial.

At the close of the case for the prosecution, the presiding Judge ruled that no case had been made, and directed the jury to acquit, whereupon a verdict of "not guilty" was rendered.

*To be reported in the Ontario Law Reports.

After this ruling, the Crown Attorney applied for a reserved case, which was refused, whereupon Mr. Waldron intervened on behalf of the present applicant, and submitted that the reserved case should be granted, but without success.

Upon the opening of the motion, a question was raised as to the right of the applicant to apply, and after argument judgment was reserved upon this preliminary question.

No case was cited by either counsel bearing upon the question to be determined, and the only case which bears upon it that I have been able to find is Rex v. Gilmore (1903), 6 O.L.R. 286. . . .

[Reference to the Criminal Code, sec. 1014, sub-sec. 2; sec. 1015, sub-secs. 1 and 2.]

It is clear that the applicant, having been bound over to prosecute, was entitled to prefer a bill of indictment for the charge on which the responents had been committed or in respect of which he was so bound over, or for any charge founded on the facts or evidence disclosed in the depositions taken before the Police Magistrate: sec. 871.

By the Crown Attorneys Act, 9 Edw. VII. ch. 55, sec. 8, clause (b), it is made the duty of the Crown Attorney to "institute and conduct on the part of the Crown prosecutions for crimes and misdemeanours at the Court of General Sessions of the Peace . . ."

That, at all events after a true bill has been found, unless the case is one to which clause (c), to which I shall afterwards refer, applies, the person by whom the information was laid, or who, where he may do so, has preferred the bill of indictment, has no right to take part in the proceedings at the trial, seems reasonably clear; for, if it were not so, the duty imposed upon the Crown Attorney of conducting, on the part of the Crown, the prosecution, could not be discharged.

This is made more clear by the provisions of clause (c), which require the Crown Attorney to "watch over the conduct at the . . . General Sessions of the Peace of cases wherein it is questionable whether the conduct complained of is punishable by law, or where the particular act or omission presents more of the features of a private injury than of a public offence; and, without unnecessarily interfering with private individuals who wish in such cases to prosecute, assume wholly the conduct of the case where justice towards the accused seems to demand his interposition."

The prosecution of the respondents does not come within the exception mentioned in clause (c); and, therefore, the conduct

of it on the part of the Crown devolved upon the Crown Attorney, by whom it was in fact conducted for the Crown.

If the contention of counsel for the applicant were well-founded, it would have been the right of the applicant or his counsel, as was contended in Rex v. Gilmore, to intervene at any stage of the proceedings at the trial; and that cannot be, because the exercise of the right to do so would render it impossible for the Crown Attorney to discharge the duty imposed upon him by the statute of conducting the prosecution for the Crown; and, if the applicant's counsel is right in his contention, what would happen if counsel representing the Crown acquiesced in the ruling of the Court and consented to the acquittal of the accused, and counsel for the private prosecutor took the opposite view?

The application of Mr. Waldron at the Sessions was made before the jury were directed to render a verdict of "not guilty;" and, in my opinion, the applicant had no locus standi to make the application, which was a part of the proceedings in the prosecution, the conduct of which was committed to the Crown Attorney.

The practice of allowing an appeal where the accused has been acquitted is a novel one, and the right to appeal should, in my opinion, be strictly limited to cases coming plainly within the provisions of the statute. It cannot, I think, have been intended that where the Crown, representing the people of the Province, does not deem the case one in which the right of appeal should be invoked, the person by whom the charge was originally laid should have the right to invoke it. What was intended by the legislation in question was, I think, to confer that right upon the Crown where there has been an acquittal, at all events where the prosecution has been conducted on the part of the Crown by its law officers or by the Crown Attorney, and upon the accused where he has been convicted.

The Crown, and not the person by whom the proceedings were instituted, is, I think, the prosecutor in all cases of prosecutions for indictable offences, at all events after a bill has been found, unless the case comes within clause (c). The person who institutes the proceedings is called in sec. 1045, which deals with the costs of a prosecution for the publication of a defamatory libel, where judgment is given for the defendant, "the private prosecutor" not "the prosecutor."

None of the sections referred to by Mr. Waldron as shewing that the word "prosecutor," as used in secs. 1014 and 1015, has

a wider meaning than I would give to it, applies to proceedings upon an indictment, except sec. 871, to which I have already referred, and secs. 872 and 944. They all relate to proceedings before a bill is found, and it may well be that as to such proceedings the complainant is the prosecutor.

If by "prosecutor," as used in sub-sec. 3, the person who instituted the proceedings is meant, there would be no right in the Crown to apply, because, ex hypothesi, the Crown is not the prosecutor.

Section 872 does not affect the question, as it deals only with the preferring of a bill of indictment by the counsel acting on behalf of the Crown, nor does sec. 944 help the applicant. The expression there used is "counsel for the prosecution," and it is not open to question that in this case the counsel for the prosecution was the Crown Attorney. If it were otherwise, and the person who laid the complaint were the prosecutor, his counsel, not the counsel for the Crown, would have the right of addressing the jury, as the section provides, even in such a case as this, in which the prosecution was required by law to be and was conducted by the Crown Attorney; which is reductio ad absurdum.

It was argued that, if it had been intended that only the Crown should have the right to apply, different language would have been used; but there are, I think, two answers to the argument: (1) there are, as has been seen, cases in which in this Province the private prosecutor may prosecute at the trial; and (2) the Act applies to the whole of Canada, and no doubt in some of the Provinces, as is the case in England, a private prosecutor may prosecute at the trial for an indictable offence, and the wide term "prosecutor" was used so as to meet whatever might be the conditions in this respect in any part of Canada.

In short, I am of opinion that, as applied to this Province, the expression "prosecutor" means the Crown where the prosecution is conducted at the trial by the law officers of the Crown or by the Crown Attorney, and means private prosecutor where the prosecution is conducted by or on his behalf.

For these reasons I am of opinion that the preliminary objection was well taken, and that the motion must be dismissed; and, as the point is a new one, it is proper, I think, that the dismissal should be without costs. . . .

[Reference to Regina v. Patteson (1875), 36 U.C.R. 129.]

FEBRUARY 23RD, 1914.

*KILGOUR v. LONDON STREET R.W. CO.

Statutes—Interpretation—Railway—"Actions for Indemnity"—Time-limit—Special Act Incorporating Street Railway Company, 36 Vict. ch. 99 (O.)—Incorporation of Provisions of General Railway Act, C.S.C. ch. 66—Six Months' Limitation by sec. 83—Effect of Incorporation—Repeal of General Act—Effect of—One Year's Limitation by 6 Edw. VII. ch. 30, sec. 223—Repeal of R.S.O. 1897 ch. 207, sec. 42 (1)—Interpretation Act, 60 Vict. ch. 2, sec. 6—"Special Act."

Appeal by the plaintiffs from the judgment of LATCHFORD, J., at the trial at London, dismissing the action.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

R. U. McPherson, for the appellants.

W. N. Tilley, for the defendant company, the respondent.

MEREDITH, C.J.O.:— . . . The action is brought to recover damages for injuries sustained by the appellants owing to the alleged negligence of the respondent; and the trial Judge held that the action, not having been brought within six months after the happening of the injury of which they complain, was barred by the provisions of the respondent's special Act, 36 Vict. ch. 99 (Ontario, 1873).

By sec. 16 of the special Act, among other clauses of the Act of the Legislature of the Province of Canada known as "The Railway Act," that with respect to "actions for indemnity" was incorporated with the special Act. The Railway Act referred to is C.S.C. ch. 66; and the clause with respect to actions for indemnity is sec. 83, which provides that "all suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months next after the time of such supposed damage sustained, or, if there be continuation of damage, then within six months next after the doing or committing such damage ceases, and not afterwards . . ."

The effect of incorporating this section in the special Act is the same as if the provisions of it had formed a part of the special Act. . . .

*To be reported in the Ontario Law Reports.

[Reference to In re Woods Estate (1886), 31 Ch.D. 607, 615.]

See also as to this, and as to the effect of the repeal of an enactment which has been incorporated in a subsequent Act, Regina v. Stock (1838), 8 A. & E. 405; Regina v. Inhabitants of Merionethshire (1844), 6 Q.B. 343; and Regina v. Smith (1873), L.R. 8 Q.B. 146.

Chapter 66, C.S.C., except sec. 155 and secs. 158 to 161 inclusive, was repealed in the revision of 1877; but, apart from the effect of the Acts respecting the Revised Statutes of Ontario and of the Interpretation Act of 1897, to which I shall afterwards refer, its repeal had no effect on the respondent's special Act—the rule of construction being that "where a statute is incorporated by reference into a second statute the repeal of the first statute by a third does not affect the second:" per Brett, L.J., in Clark v. Bradlaugh (1881), 8 Q.B.D. 63, 69.

Unless, therefore, the provisions of the special Act as to actions for indemnity have been repealed or so amended as to extend the period of limitation to one year, the ruling of the trial Judge was right, and the action was properly dismissed.

It was argued by counsel for the appellants that the provision of the respondent's special Act which is in question was superseded by sec. 223 of the Ontario Railway Act, 1906, the provisions of which are that "all actions or suits for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or, if there is continuation of damage, within one year next after the doing or committing of such damage ceases, and not afterwards."

It was answered by the respondent's counsel that not only does the rule of construction that a special Act is not repealed by a subsequent general Act dealing with the same subject-matter, unless by express reference or necessary implication (Beal's Cardinal Rules of Legal Interpretation, 2nd ed., pp. 460-470, and cases there cited), prevent the repeal of ch. 66 and the enactment of sec. 223 from operating so as to repeal the limitation provision of the respondent's special Act, but the Act itself expressly provides that where the provisions of the special Act and its provisions are inconsistent the special Act shall be taken to override the provisions of the Act of 1906, and in support of that contention secs. 3 and 5 are relied upon.

That the limitation provision of the special Act is inconsistent with sec. 223 of the Act of 1906 is not open to question, the

provision of the one being that actions shall be brought within six months and not afterwards, and of the other that they shall be brought within one year and not afterwards.

In order to arrive at a proper understanding of the provisions of the Act of 1906 which affect the question at issue, the meaning of which is by no means clear, and to determine which of these contentions is entitled to prevail, it will be necessary, or at all events desirable, to trace the history of railway legislation from the consolidation of the statutes of Canada in 1859 down to and inclusive of the enactment of the Act of 1906, and to consider how far, if at all, the respondent's special Act is affected by the provisions of the subsequent legislation, including the amendment to the Interpretation Act made in 1897 by 60 Vict. ch. 2. . . .

[Reference to R.S.O. 1877 ch. 165, sec. 34 (1); 40 Vict. ch. 6, secs. 6, 11; R.S.O. 1887 ch. 170, sec. 41(1); 50 Vict ch. 2, secs. 5, 10; R.S.O. 1897 ch. 207, sec. 42(1); 60 Vict. ch. 3, secs. 5, 10.]

The effect of this legislation was, that, after the coming into force of the Revised Statutes of 1897, the reference in the respondent's special Act to sec. 83 of the Consolidated Statutes of Canada, as regards any subsequent transaction, matter, or thing, was to be taken to be a reference to sub-sec. 1 of sec. 42 of ch. 207, R.S.O. 1897.

In 1897, an amendment to the Interpretation Act was passed (60 Vict. ch. 2), by sec. 6 of which (now clause 6 of par. 48 of sec. 7 of the Interpretation Act, 7 Edw. VII. ch. 2) it is provided: "Whenever any Act or part of an Act is repealed, and other provisions are substituted by way of amendment, revision, or consolidation, any reference in any unrepealed Act, or in any rule, order, or regulation made thereunder, to such repealed Act or enactment, shall, as regards any subsequent transaction, matter, or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject-matter as such repealed Act or enactment. . . ."

This section and the other provisions of the Act are made applicable to every Act subsequently passed, except in so far as they are inconsistent with the intent and object of the Act, or the interpretation which they would give to any word, expression, or clause is inconsistent with the context, and except in so far as they are declared by the subsequent Act not applicable to it (sec. 1).

The first change made after the passing of this Act in the indemnity section (sec. 83 of the C.S.C.; sec. 34 of the R.S.O. 1877; sec. 41 of the R.S.O. 1887; sec. 42 of the R.S.O. 1897) was made by the Ontario Railway Act, 1906 (6 Edw. VII. ch. 30), which repealed among other Acts ch. 207, R.S.O. 1897, and substituted for its sec. 42(1) the following as sec. 223:—

"223—(1) All actions or suits for any damages or injury by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or, if there is continuation of damage, within one year next after the doing or committing such damage ceases, and not afterwards. . . .

"(3) This section shall apply to street railway companies."

The effect of this legislation, unless the application of sec. 6 of the Interpretation Act, which I have quoted, is excluded by reason of the provisions of sec. 1 of that Act, was to substitute for the reference in the respondent's special Act to sec. 83 of ch. 66 of the Consolidated Statutes of Canada, and to the corresponding section in R.S.O. 1897, which had taken the place of it, a reference to sec. 223 of the Act of 1906, and in effect to amend the special Act by making the provisions of it as to "actions for indemnity" those contained in sec. 223, instead of those contained in sec. 83 of ch. 66, C.S.C.

The next step in the inquiry is to ascertain if there is anything in the Act of 1906 to exclude the application of sec. 6 of the Interpretation Act of 1897. . . .

[Reference to the Ontario Railway Act, 1906, secs. 2 (1), 3, 4, 5; the Dominion Railway Act, 1903, secs. 3, 4, 5; the Dominion Railway Act, R.S.C. 1906 ch. 37, secs. 3, 4, 5; R.S.O. 1897 ch. 207, secs. 4, 5(1), 45; C.S.C. ch. 66, secs. 2, 3, 127.]

The difficulty which I have pointed out, owing to the interpretation of the expression "the special Act," occurs in all the Acts, that interpretation being applied to all of them, although it has been got rid of in the Dominion legislation subsequent to the Railway Act of 1868, by omitting the words "with which this Act is incorporated."

The general Railway Acts are all, I think, in substance what the Act of 1851 was called, Railway Clauses Consolidation Acts. . . .

[Reference to Metropolitan District R.W. Co. v. Sharpe (1880), 5 App. Cas. 425, 430.]

Upon the whole, I am of opinion that, as the result of the subsequent legislation to which I have referred, the provisions of sec. 223 of the Act of 1906 have been written into and in-

corporated with the special Act in substitution for the provisions of sec. 83 of ch. 66 of the Consolidated Statutes of Canada, and that the ruling of the learned Judge was erroneous; and it follows that the appeal must be allowed, and the judgment which has been entered set aside and a new trial ordered.

The costs of the last trial and of the appeal should be paid by the respondent.

MACLAREN and MAGEE, JJ.A., concurred.

HODGINS, J.A. (dissenting):—I am unable, with great respect, to agree with the conclusion that the effect of the Interpretation Act is to replace sec. 42 of R.S.O. 1897 ch. 207 (which, by force of the former, was substituted for the indemnity section incorporated in the original Act) by sec. 223 of the Railway Act of 1906.

The repeal of ch. 207, R.S.O. 1897, was the occasion which brought into play the provision of the Interpretation Act, as applied to this case.

But in the same Act which effected the repeal there is a distinct provision as to a possible clash between the special Act and in the general Act; and this specific reference should, I think, govern.

Under sec. 3, the Railway Act is "incorporated and construed as one Act with the special Act," and the special Act is defined in sec. 2, sub-sec. 1, as any Act authorising the construction of a railway or street railway, and with which the Railway Act is incorporated.

I take it that the effect of these two provisions is to amalgamate each special Act and the Railway Act into one Act, and that every part of each of them must be construed as if it had been contained in one Act: per Lord Selborne, L.C., in Canada Southern R.W. Co. v. International Bridge Co. (1883), 8 App. Cas. 723. Very properly, therefore, sec. 5 provides that where the provisions of the special Act and the provisions of the Railway Act are inconsistent, the special Act prevails. In this view, as the indemnity sections are inconsistent, that one which is part of the special Act overrides the other.

If the Interpretation Act applies at all, then the "substituted Act," referred to in it, is the product of the amalgamation of both Acts; and as, under it, the provision in the special Act governs, the result is the same.

I think the appeal should be dismissed.

Appeal allowed; HODGINS, J.A., *dissenting.*

FEBRUARY 23RD, 1914.

*TOWN OF ARNPRIOR v. UNITED STATES FIDELITY AND GUARANTEE CO.

Insurance—Bond Guaranteeing Honesty of Tax Collector—Embezzlement—Conditions—Breaches — Written Statement of Mayor — Expiry of First Bond — Execution of New Bond without Fresh Application or Statement—Inclusion of Original Application and Statement—Embodiment in Bond—Insurance Act, R.S.O. 1897 *ch.* 203, *sec.* 144—*Duties of Collector—Failure of Municipal Corporation to Audit Collector's Accounts and Examine Rolls—Appointment of Auditors—Municipal Act,* 1903, *sec.* 299—*Untrue Representations —Materiality.*

Appeal by the defendants from the judgment of BRITTON, J., 4 O.W.N. 1426, in favour of the plaintiffs for the recovery of $5,000 upon a bond for that amount by which the defendants agreed to guarantee the plaintiff corporation against loss through the fraud or dishonesty of one Mattson, the chief constable and tax collector of the Town of Arnprior.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. H. Watson, K.C., and R. J. Slattery, for the appellants.

W. M. Douglas, K.C., and J. E. Thompson, for the respondents, the plaintiffs.

MACLAREN, J.A.:—The bond sued upon was dated the 30th May, 1905, and covered the period from the 10th June, 1905, to the 10th June, 1906, subject to continuance or renewal. It was renewed by annual continuation certificates up to the 10th June, 1911.

There had been a similar previous bond, dated the 16th June, 1904, covering the period from the 10th June, 1904, to the 10th June, 1905, issued upon the application of Mattson, and the answers by the then Mayor or Arnprior to certain questions; the said answers being stated to be taken as the basis of the bond applied for by Mattson, and being dated the 10th June, 1904. No new application was made by either Mattson or the town corporation for the new bond of the 30th May, 1905; but, on account of the renewal or continuation certificate not having been re-

*To be reported in the Ontario Law Reports.

ceived from the head office at Baltimore, the general agent at Toronto issued, instead, the new bond, in the same terms as those of the expiring one.

It was contended on behalf of the plaintiffs, both at the trial and before us, that the defendants could not invoke for any purpose the answers given in 1904, on which the first bond purported to be based.

This position, however, I consider to be untenable. The bond on which the plaintiffs bring their action and on which they base their claim, contains a recital that they have delivered to the defendants "a statement in writing setting forth the nature and character of the office or position to which the employee has been elected or appointed, the nature and character of his duties and responsibilities, and the safeguards and checks to be used upon the employee in the duties of his said office or position, and other matters, which statement is made a part hereof." It is also therein stated that "it is hereby agreed and declared" that the bond is given "upon the faith of the said statement as aforesaid by the employer, which the employer warrants to be true." The only statement which the town corporation had given to the company was that of the 10th June, 1904, and the plaintiffs having accepted and retained in their possession the second bond containing the statements above quoted, and having paid the premium therefor and the subsequent annual premiums, and having accepted and retained the bond and the annual continuation certificates, which are expressly declared to be "subject to all the covenants and conditions of the said original bond heretofore issued," and having brought their present action upon the bond of 1905 and the annual continuation certificates, they cannot now be heard to dispute the facts so plainly stated in the bond; and they are, in my opinion, clearly estopped from now setting up such an objection.

In submitting to the plaintiff corporation the questions regarding Mattson and his position and duties, the defendant company expressly stated that the answers would be taken as the basis of the bond, and at the foot of the answers the Mayor, in his "official capacity," declared that it was agreed that the answers were to be taken "as conditions precedent and as the basis of the bond."

Assuming that the answers and statement of the Mayor of the 10th June, 1904, are the statements referred to in the bond sued upon, it remains to be seen whether the plaintiffs, under the terms of the bond and the facts disclosed by the documents and the testimony, are entitled to recover. . . .

The main point relied upon and the one most strongly urged before us by counsel for the defendants was the failure of the plaintiffs to audit or examine the collector's rolls of the town. . .

Counsel for the respondents argued that the answers of the Mayor were not embodied in the bond in question sufficiently to comply with the provisions of the Insurance Act, R.S.O. 1897 ch. 203, sec. 144, and cited Village of London West v. London Guarantee and Accident Co., 26 O.R. 520, in support of this proposition. We are, however, precluded from giving effect to this argument by the decision of this Court in Hay v. Employers' Liability Assurance Corporation, 6 O.W.R. 459, by which it was held, under the authority of Venner v. Sun Life Insurance Co., 17 S.C.R. 394, and Jordan v. Provincial Provident Institution, 28 S.C.R. 554, "that the plaintiff's proposal and the statements therein contained are, by reference thereto in the policy, sufficiently incorporated therewith and set out in full therein, within the meaning and requirements of the above section (144), and, therefore, form the basis of and are part of the contract between the parties."

It is true that in the Venner case the statements relied upon were contained in the answers of the applicant for the insurance. Here they are not in the answers of Mattson, who was the applicant, but in those of the Mayor, who answered on behalf of the town corporation the questions put by the company on which the bond was to be based. This brings the case within another decision of this Court, in which the answers were given by the party in whose favour the policy was to be issued, as in the present case, viz., Elgin Loan and Savings Co. v. London Guarantee and Accident Co., 11 O.L.R. 330, in which Hay v. Employers' Liability Assurance Corporation, above cited, was expressly followed.

It was further argued on behalf of the town that, the corporation having passed a by-law two auditors under sec. 299 of the Municipal Act of 1903, their full duty was performed, and they were not responsible for the acts or omissions of the auditors, who were statutory officers.

It is not necessary now to inquire how far the responsibility of the corporation may possibly extend under the statute; but we have to consider what obligation, if any, arises from the contract based upon the answers given by the Mayor, and how far the corporation may be affected by the information conveyed to the council by the reports made to them by their auditors. . .

Whatever might have been the duties of the auditors and the corporation with respect to the collector's rolls in case there

had been no undertaking regarding them, or no duty as between the corporation and the company, I am of opinion that, as a consequence of the promise of the corporation, in the answers to the questions put to them, that the auditors would examine the rolls yearly, and of the annual statements of the corporation that the books and accounts of Mattson for each year were examined by them from time to time in the regular course of business and found to be correct in every respect, they were in duty bound to do so. It is proved and not denied that these promises and statements were material to the risk. . . .

The auditors themselves declare they did not examine the collector's rolls, and never even saw them; so that there is no pretence that the promised annual examination of the rolls by the auditors was ever made. As to the annual certificate of the collector's books and accounts having been examined from time to time in the regular course of business, it is true to this extent: when the collector handed in his roll at the end of the year, the collections recorded were added up by the town clerk, when he was adding five per cent. to the amounts unpaid, and he compared this with the receipts given by the treasurer to the collector, and he found that they substantially agreed.

The roll was then handed back to the collector for the purpose of his collecting these arrears, and he was never subsequently asked for any statement, nor did any person on behalf of the corporation ever examine these rolls or inquire as to the collection of these arrears. It is in evidence that about two-thirds of the taxes were usually collected during the first year. As to the remaining one-third collected subsequently, no examination was made by any one as to whether the collector had handed over to the treasurer the whole of these collections. His defalcations arose from his not handing over the full amount of these subsequent payments.

The fact that neither the auditors nor any other person on behalf of the corporation checked over these subsequent collections no doubt tempted and led the collector to retain and use these moneys. This neglect was a violation of the promise in the statement on behalf of the corporation that the auditors would examine the rolls yearly. In order to render this examination of any use it was necessary that the old rolls as well as the new one should be examined and checked. The examination of the new roll by the town clerk might possibly have served as a substitute for the examination by the auditors, but he never saw or examined the old rolls.

The same may be said as to the statement upon which the annual renewal certificates were issued. That statement was untrue. The "books and accounts" of the collector were not examined each year by them as stated. A single book, the collector's roll for the current year, was all that was examined. It was equally important that the old ones in his possession should be also examined each year; and the fact that this was never done gave him the opportunity of concealing his defalcation for two successive years and a portion of the third, until the special audit brought them to light. . . .

I am of opinion . . . that the learned trial Judge erred with respect to the failure of the plaintiffs to keep the promise made on their behalf by the Mayor in answer to questions 12 (a) and (b), that the auditors would examine the collector's rolls yearly. It does not even appear that they informed the auditors that such a promise had been given, although it is surprising that the auditors should have thought that they had properly performed the duties of their office and complied with the requirements of the by-law appointing them, without examining the collector's rolls, which, it appears, were properly kept, and all payments entered; and a simple comparison of these entries with his receipts from the treasurer would at once have disclosed any deficiency. Under the facts proved in this case, the examination of the rolls in his possession at the time of the audit in January, 1909, would at once have disclosed a defalcation of $3,941.28 for 1908, and the defalcation of 1909, amounting to the further sum of $7,521.61, would never have occurred. There can be no question that the promise and representations were most material to the risk.

But there is more. The report of the auditors dated the 3rd March, 1909, which was read to the town council and confirmed, clearly shewed that the auditors did not claim to have examined any other books than those of the treasurer; and it was the duty of the council, under sec. 10 of the Municipal Act, to have seen that these officers duly performed the duties of the office to which they had been appointed. In my opinion, they had by no means, as argued before us, fulfilled their duty by simply passing the statutory by-law naming the officers.

By acquiescing in and confirming the report of the auditors, which shewed that they had not examined the collector's rolls, they violated the promises given by the Mayor on behalf of the corporation, in the answers that preceded and formed the basis of the bond; and the representations subsequently made by the Mayor and Clerk in the certificate upon which the annual re-

newal of continuation certificates was made, were untrue. These, as shewn above, were all material to the risk, and, in addition, directly contributed to the defalcation in question.

In my opinion, the appeal should be allowed and the action dismissed with costs.

MEREDITH, C.J.O., and HODGINS, J.A., agreed with the judgment of MACLAREN, J.A., each giving reasons in writing.

MAGEE, J.A., also concurred.

Appeal allowed.

FEBRUARY 25TH, 1914.

LEONARD v. CUSHING.

Writ of Summons—Service out of the Jurisdiction—Contract—Sale of Goods—Place of Payment—Rule 25(e).

Appeal by the defendants from the order of LENNOX, J., ante 453.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

Glyn Osler, for the appellants.

Featherston Aylesworth, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs in the cause to the plaintiffs.

HIGH COURT DIVISION.

MEREDITH, C.J.C.P., IN CHAMBERS. FEBRUARY 21ST, 1914.

*RE ELLIOTT.

Liquor License Act—Magistrates' Conviction—Motion to Quash—Necessity for Service of Notice of Motion on Magistrates—Time for Service—9 Edw. VII. ch. 82, sec. 25 (O.)—Application where Conviction not Authorised by Act—Proof of Service in Time—Onus—Failure to Meet—Preliminary Objection to Motion—Waiver—Enlargements of Motion—Demanding Copies of Affidavits.

Motion by Joseph Elliott to quash his conviction by two magistrates for an offence against the Liquor License Act, on the prosecution of Robert Morrison.

*To be reported in the Ontario Law Reports.

The motion came on for hearing in Chambers at Toronto.

M. H. Roach, for the prosecutor, took the preliminary objection that the motion was out of time.

J. B. Mackenzie, for the applicant.

MEREDITH, C.J.C.P.:— . . . In sec. 25, ch. 82, 9 Edw. VII. (Ontario), "An Act to amend the Liquor License Act," a special limitation was put upon the time within which a motion to quash a conviction made under the Liquor License Act could be heard: the section is in these words: "No motion to quash a conviction or order made under this Act shall be heard by the Court or Judge to which such application is made unless notice of such motion has been served within twenty days from the date of the conviction or order."

It was admitted, on all hands, that service of the notice of this motion upon each of the two magistrates who made the conviction, as well as upon the prosecutor, was necessary; and that the 24th July was the last of the twenty days "from the date of the conviction."

But it was contended for the applicant that there was no power to make such conviction under the Liquor License Act; and, therefore, the case could not come within the meaning of the legislation I have read. But why not? Good, or bad, it is a conviction expressly made under the Act. The information was laid, and the whole prosecution carried on under and in accordance with its provisions, for an offence throughout expressly stated to have been committed in contravention of the provisions of the Act; and now the whole proceedings taken on this motion have been taken expressly to quash a conviction for an offence committed "contrary to the provisions of the Liquor License Act." I am unable to find anything substantial in this point, and so must deal with the case as one within the meaning of such legislation: see People ex rel. Springsted v. Board of Trustees of Village of Cobleskill (1892), 20 N.Y. Supp. 920; and People ex rel. Cook v. Hildreth (1891), 126 N.Y. 360.

The onus of proof of service of the notice of motion is upon the applicant, but he has failed to give any direct evidence of service upon any one but the prosecutor.

His story is, that the notices reached him on the morning of the 24th July, and that he then served one copy upon the prosecutor; gave another copy to a girl in Beaverton to give to one of the magistrates, near whom she lived, a long way from Beaverton; and the third to another girl, in Beaverton, to give to the other magistrate, with whom she lived, and for whom

she was working, also some considerable distance from Beaverton. He also asserts something as to what was told to him afterwards by these girls; but that is not evidence.

To ask a finding of due service upon any such evidence is extremely unreasonable. According to the applicant's assertions, in the several affidavits made by him, he knew that the 24th July was the last day for service of the notices, and yet, although he seems to have had time enough, if his story be credited, to shew the notices to his son and to the two men engaged in digging a ditch, he was content to take his chances that each of these girls would effect service for him, and also prove the service.

It was the applicant's duty to have proved due service, if it were really effected, by these girls. If an affidavit could not be obtained, they might have been examined in the usual way. But no proof of that character has been made on this motion. The applicant seems rather to rely upon the result of his own carelessness as excusing him; when in fairness it ought rather to condemn him.

The magistrate McRae was examined by the applicant as a witness; and the girl to whom the notice was given to give to him, after that examination, made an affidavit at the applicant's instance, which, instead of relating what she did with the notice, and when, is confined to a circumstantial assertion that it was not on the 25th, but was on the 24th, that she got the paper.

It might, perhaps, upon the whole evidence, be found that this notice came to the hands of this magistrate on the evening of the 24th July; but that would not end the matter; for I am quite unable to find that service was effected on the other magistrate in time.

The magistrate McLennan, in his affidavit, asserts that the notice reached him on the 25th July; and his wife, in her affidavit, circumstantially corroborates him. . . .

So that I must find that the provisions of the enactment limiting the time within which such a motion as this may be made have not been observed.

But it is contended that there has been a waiver of the objection: (1) in asking an enlargement of the motion; and (2) in demanding copies of the affidavits filed in support of it.

In regard to the delay, the entries in the official book shew that the adjournments were by consent; and it is admitted that, except in the first instance, they were almost, if not quite, all for the convenience of the applicant's solicitor, who went to England while the motion was pending.

But why should a mere enlargement of the motion indicate an intention to waive an objection of this character? It would generally be necessary. The respondent would need to find out what evidence there was of service, and then to meet it; and I may add that it was not until the month of January, 1914, that all the affidavits on behalf of the applicant, on this question of service of the notice of motion, were made. . . .

[Reference to Regina v. How, 11 A. & E. 150.]

That which I have said covers also the point regarding the demand of copies of the affidavits in support of the motion. The respondent might have demanded copies of the affidavits affecting the question of service only; but, if he had done so, he might afterwards have been told that he was unduly increasing the costs. In a majority of cases, perhaps, the preliminary objections and the merits are argued at the one time. So that, all things considered, there is no substantial ground upon which any waiver in this respect can be based. . . .

Nor can I think that this is a case in which there could be any such waiver.

Any one may, of course, waiver a statutory benefit in his favour. But the enactment in question is not one passed for the benefit or relief of prosecutor or magistrate—and very certainly not for that purpose only. It is one of those changes, made from time to time, in the Liquor License Laws of this Province, to make them more stringent, and harder to evade. . . .

[Regina v. Whitaker, 24 O.R. 437, referred to and distinguished.]

Whether it is right to do so in all cases, I need not consider: see secs. 129 and 134 of the Liquor License Act; for, right or wrong, the fact is that prosecutions under the Liquor License enactments of this Province are commonly styled and treated as if Crown cases; a Crown officer, or counsel for the Provincial Attorney-General generally opposing such motions as this: a manner of proceeding which the applicant in this case has stamped with his concurrence in the style of the cause in all his proceedings—though there is no evidence before me of the interposition of any Crown officer in this case—The King v. Elliott. If really a Crown case, the question of waiver may assume a very different character from that arising in the case of entirely a private prosecution.

The motion must be dismissed, because out of time, with costs of success upon that ground only. The conviction and papers brought up with it will be dealt with in the usual way, so that the conviction may be enforced.

BRITTON, J., IN CHAMBERS. FEBRUARY 23RD, 1914.

SNIDER v. SNIDER.

Pleading—Reply—Setting up Facts Alleged in Statement of Claim and Struck out as Irrelevant at that Stage—Relevancy in Reply to Allegations of Defence—Substance of Reply well Pleaded—Superfluous Language.

Appeal by the plaintiff from an order of the Master in Chambers striking out paragraphs 2, 3, 4, 5, 6, and 7 of the reply.

G. H. Watson, K.C., and H. E. Irwin, K.C., for the plaintiff.

W. J. Elliott, for the defendants the foreign executors of T. A. Snider.

F. C. Snider, for the defendant the Canadian executor.

BRITTON, J.:—The action was commenced on the 1st February, 1913, by a specially endorsed writ. The endorsement was for two promissory notes of $5,000 each, dated the 1st February, 1909.

Upon the application of the defendants, the plaintiff delivered a statement of claim, in which the facts and circumstances in regard to the making of the notes sued upon were set out. The defendants moved before the Senior Registrar, in Chambers, to set aside this statement of claim. This motion was dismissed. Upon appeal the learned Chancellor reversed the Registrar's order and set the statement of claim aside: ante 325, 528.

The defendants put in their statement of defence. The plaintiff replied, and in his reply set out, in the paragraphs now objected to, practically the same facts as had been struck from the statement of claim. The defendants then moved before the Master to have these paragraphs struck from the reply.

The statement of defence is: (1) a denial that the deceased T. A. Snider made the notes; (2) an allegation that, if the deceased made the notes, there was no consideration for the same, and if the notes came into the possession of the plaintiff, the estate of the deceased is not liable for the same or any part thereof.

To this the plaintiff replies, and the learned Master has struck out all of the reply except the joinder of issue.

I see no objection to the material facts on which the plaintiff relies to shew that he is entitled to recover upon the notes and to shew how the notes came into his possession being pleaded in reply.

Upon the argument there was no attempt made to set aside the reply because of the "superfluous" language. Parts of some of the paragraphs considered objectionable do offend against the Rule that pleadings should be limited to a concise statement of the material facts, but that in no way tends to embarrass the defendants. The defendants object to the substance, and rely upon the Chancellor's judgment as affording a conclusive reason for dismissing this appeal. I do not so read the reason for that judgment.

One of the main objections was, that putting these alleged facts in a statement of claim was pleading in anticipation of the statement of defence. It was "leaping before coming to the stile." "The proper course of pleading is to wait until the defendants make their defence and then let the plaintiff meet it by appropriate pleading."

Again the Chancellor says: "If the questions raised by the second statement of claim, which I now set aside, are to come up by reason of the defence made, well and good, so long as they are properly pleaded; but at present they are an excrescence on the record and should be removed." If objection were raised to particular parts of each paragraph as pleading what is evidence and stating what is irrelevant or superfluous, the plaintiff would be compelled to state more concisely what is the substance of the reply; but, as I said, the objection is not to form but substance, and that is not entitled to prevail.

The appeal will be allowed and the reply restored. Costs to be costs in the cause.

LENNOX, J. FEBRUARY 23RD, 1914.

CAMPBELL v. IRWIN.

Landlord and Tenant—Termination of Lease—Buildings of Lessee — Payment for, by Lessor — Submission to three Persons to Fix Amount to be Paid—Arbitration or Valuation — Conduct of Valuator — Bias — Disqualification — Functions of Valuators — Method of Valuation — Entire Building—Estoppel—Sufficiency of Valuation—Joint Act of Valuators—Evidence—Enforcement of Valuation.

Action to recover $35,300, being the amount awarded by three arbitrators or valuators to be paid by the defendant

(lessor) to the plaintiff (lessee) for the buildings erected by the lessee on the demised land, upon termination of the leases by the lessor.

N. W. Rowell, K.C., and George Kerr, for the plaintiff.
W. N. Ferguson, K.C., and W. N. Tilley, for the defendant.

LENNOX, J.:—Whether the proceeding under the leases was an arbitration or a valuation, and whether the valuators were bound to act judicially or not, the document sought to be enforced in this action, or the plaintiff's right to recover, is not in any way affected by anything done by Mr. Garland (one of the arbitrators or valuators) or the plaintiff in connection with North Toronto lots. Yet the suspicion engendered by Mr. Garland's endorsement of the plaintiff's promissory note (for the accommodation of Mr. Dinnick) has been a potent factor in this litigation . . .

Suspicion of course is not enough: Crossley v. Clay (1848), 5 C.B. 581; and, "whenever the conduct of arbitrators is sought to be impeached, the Court will look with a jealous and scrutinising eye through the evidence advanced for that purpose:" Brown v. Brown (1683), 1 Vern. 157, 23 Eng. Rep. 384, editorial foot-note at p. 385. This domestic tribunal is the direct outcome of the specific terms of the defendant's own leases, and "we must not," says Chief Justice Cockburn, in In re Hopper (1867), L.R. 2 Q.B. 367, "be over ready to set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something wrong or vicious in the proceedings."

For the present I am not distinguishing between an arbitration and a valuation, although of course arbitrators are bound to observe rules and principles of judicial procedure never enacted or in fact looked for in the case of valuators.

Speaking then of arbitrators, corruption, fraud, impartiality, or wrong-doing, if alleged, must be distinctly established: Goodman v. Sayers (1820), 22 R.R. 12, 2 J. & W. 249. And it must be shewn that the parties were actuated by corrupt motives, and that the arbitrator was influenced by what is complained of: Mosley v. Simpson (1873), L.R. 16 Eq. 226; In re Hopper, supra; Doberer v. Megaw (1903), 34 S.C.R. 125. And the Court favours awards: Morgan v. Mather (1792), 2 Ves. Jr. 15.

The defendant says: "The arbitrator Nicholas Garland

. . . was an interested person . . . and, unknown to the defendant, he was illegally biassed for and interested in the plaintiff, whereby he was disqualified from acting in the capacity he filled."

The attempt was to shew that Garland was a mortgagee of land belonging to the British Land Company Limited, and that, if the company sold some of their lots to the plaintiff, they would be in a better position to meet their obligations to this valuator. . . .

[Reference to Drew v. Drew (1855), 2 Macq. H.L. 1; Halliday v. Duke of Hamilton's Trustees (1903), 5 F. (Ct. of Sess.) 800.]

But, if all that is suggested were true, another difficulty confronts the defendant. The valuation and all questions referred to Mr. Garland and his associates had been determined upon, the result had become known, and the preparation and signing of the valuation paper had been arranged for before the land transaction was initiated or even spoken of. . . .

[Reference to In re Underwood and Bedford and Cambridge R.W. Co. (1861), 11 C.B.N.S. 442; In re Hopper, supra; and Goodman v. Sayers, supra.]

But it is not true—as I find—that these parties were actuated by improper motives, or were acting in collusion or bad faith. . . .

So far I have dealt with this action without reference to whether the plaintiff's rights are dependent upon an arbitration or valuation; but I am not at liberty to consider the question as an open one.

Upon an appeal from an order of Mr. Justice Middleton dismissing the defendant's motion to set aside the valution or award now in question, the Court of Appeal declared that the leases set out in the statement of claim provide for "a valuation and not an arbitration:" Re Irwin and Campbell (1913), 4 O.W.N. 1562, 5 O.W.N. 229. . . .

It is argued for the defendant that:—

1. The leases provide for an arbitration, though not for an arbitration within the provisions of the Arbitration Act.

I am at a loss to see how I can give effect to this contention, and to the judgment referred to; and counsel for the defendant has not pointed the way. The judgment of the Court is not that the leases do not provide for an arbitration under the statute, but that they provide "for a valuation and not for an arbitration" at all; and I am not only bound by this declar-

ation, but, if I may say so, with the very greatest respect, it is the conclusion I should have reached in any case.

2. Even if a valuation was the proceeding provided for by the leases the proceedings taken were in fact arbitration proceedings, nevertheless; and in consequence, I presume, to be governed by the rules and principles of procedure in such cases.

I have not been directed to evidence supporting this proposition, and I have not found any. . . .

3. The leases provided for proceedings of a judicial character, or the valuators, although valuators only, were bound to exercise their functions judicially.

That "a valuation and not an arbitration" is provided for is a settled point. A starting-point for this argument would be gained were it shewn that a valuation "of a judicial character" is distinguishable from an arbitration. I know of no case in which such a contention was established. . . .

[Reference to In re Hopper, L.R. 2 Q.B. at p. 372; Turner v. Goulden (1873), L.R. 9 C.P. 57, at pp. 59, 60; Wadsworth v. Smith (1871), L.R. 6 Q.B. 332; In re Enoch and Zaretzky Bock & Co.'s Arbitration, [1910] 1 K.B. 327 (C.A.); Walker v. Frobisher (1801), 6 Ves. 70; In re Brien and Brien Arbitration, [1910] 2 I.R. 84 (K.B.D.); Re Plews and Middleton (1845), 6 Q.B. 845; and Dobson v. Groves (1844), 6 Q.B. 637.]

I have examined all the cases and authorities referred to by counsel on both sides, and scores of others, and the cases all go to shew that it is invariably arbitration, on the one hand, with its judicial functions, or valuation in its primary ordinary meaning on the other—the arbitration for the most part, but not quite invariably, being based uopn an actual dispute or difference existing at the time of the agreement or submission: Re Laidlaw and Campbellford Lake Ontario and Western R.W. Co. (1913), 5 O.W.N. 534; Bottomley v. Ambler (1878), 38 L.T.N.S. 545; Re Hammond and Waterton (1890), 62 L.T.N.S. 808; Hudson on Building Contracts, 3rd ed., p. 713; Collins v. Collins (1858), 26 Beav. 306; Re Dawdy (1885), 15 Q.B.D. 426; Leeds v. Burrows (1810), 12 East 1; Fletcher on Arbitration, 3rd ed., p. 4; Slater on Arbitration and Awards, 5th ed., p. 4, and "Valuation" at p. 205; Hickman v. Roberts, [1913] A.C. 229; Bristol v. Aird, [1913] A.C. 241; Chambers v. Goldthorpe, [1901] 1 K.B. 264; and Re Carus-Wilson and Greene (1886), 18 Q.B.D. 7; and this last case, contrary to a suggestion thrown out by Lord Esher in the Dawdy case and by Mr. Justice Brett in Turner v. Goulden, shews that the character of

the proceeding is finally determined by the terms of submission, and a proceeding which opens as a valuation is not converted into an arbitration by the introduction or action of a third valuer or even an umpire.

But, even if Mr. Tilley is right that there is an intermediate domestic tribunal "of a judicial character" somewhere in between an arbitration and a valuation, the defendant is not in a position to complain of what was done.

It was Mr. Hunter and Mr. Millar (solicitors for the defendant) who prevented a quasi-judicial inquiry and insisted upon a valuation merely, and on just the character of investigation that obtained. "There is a good old fashioned rule" (says Bowen, L.J., in Ex p. Pratt (1884), 12 Q.B.D. 334, at p. 341) "that no one has a right so to conduct himself before a tribunal as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him, to turn round and say, 'You have no jurisdiction'."

[Reference also to Drew v. Drew, supra; Re Zuber and Hollinger (1912), 25 O.L.R. 252.

4. The east and west ends of the building on King street should have been valued separately.

I am disposed to think that the plaintiff had a right to insist upon a valuation as upon one entire building. . . . There is a strong preponderance of testimony to the effect that it was distinctly understood and agreed by all parties that this building should be valued as one building—"as a whole," as it is expressed. The defendant must abide by this. The authorities quoted as to estoppel apply here again.

5. The valuation is avoided by the valuators' interview with the plaintiff in the absence of the other parties.

In the case of an arbitration I think this would be ground for setting aside or refusing to enforce the award. . . . In a valuation case it is different. Even then a triangular tribunal of judicial impartiality is a thing to be desired, but it is rarely desired by the parties. When Nicholas Garland was appointed it was expected of him that he would be earnest, vigilant, and loyal in looking after the defendant's interest, and he was . . . No objection is open to the defendant upon this head. The defendant is not in a very good position to complain. The party complaining ought to be free from blame: Lord Eldon in Fetherstone v. Cook (1803), 9 Ves. 67. . . .

6. The valuation is avoided by including in it $300 for Judge Barron's costs. . . .

There is no ground for saying that this was done. I am quite satisfied that it was not done. . . .

7. The valuation is not in the terms of the leases, and is ineffectual for leaving undecided "the amount proper to be paid" for the buildings.

The award is clearly sufficient. . . . The valuation makes it quite clear that "the amount proper to be paid" is the sum of $35,300, and directs payment of this sum. This is not the only expression used in the leases. They are to "make a valuation" of the buildings, and, before entering on their duties, they are to be "sworn to make a proper valuation."

8. This was not the joint act of the valuators.

There is nothing to support this argument. The contrary is to be presumed from the document itself. It is manifestly not necessary that the valuators should at the beginning be of one mind. Two of them were inclined to put the valuation higher, but finally came to look at it as Garland did. This is not a ground of objection. Chichester v. McIntire (1830), 4 Bli. N.R. 78, has no application. . . .

I have considered the evidence as to the value of the buildings only in so far as it throws light upon the conduct of the valuators: Morgan v. Mather, 2 Ves. Jr. 15; Goodman v. Sayers, 2 J. & W. 249.

There will be judgment for the plaintiff against the defendant, in the character in which she is sued, for $35,300, with interest from the 1st July, 1913, and costs of action. There will be a reference to adjust the rents, if the parties cannot agree.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 24TH, 1914.

PIERCE v. GRAND TRUNK R.W. CO.

Particulars—Statement of Claim—Action under Fatal Accidents Act—Death of Railway Servant—Negligence — Workmen's Compensation for Injuries Act, sec. 15—Names of Employees Guilty of Negligence—Res Ipsa Loquitur—Rules and Regulations of Railway Company.

Appeal by the defendants from an order of Master in Chambers refusing to direct particulars of the names of the employees of the defendants whose negligence, it was alleged, caused the death of the plaintiffs' father; and cross-appeal by

the plaintiffs from the same order in so far as it directed particulars of the rules and regulations of the railway company imposing upon the train crew in charge of the way freight train in the pleadings mentioned the duty to close the main line switch and set the distant semaphore, and of the rule or regulation imposing upon the defendants' servants the duty to furnish to the conductor of the said train a copy of the train order in question, and of the rule or regulation imposing upon the defendants' servants in charge of the train the duty of stationing a flagman to warn approaching trains, and lastly of any rule or regulation in contravention of which the railway company authorised and sanctioned a defective and improper system in allowing the switch to remain open and unprotected for long intervals while way freight trains switched back and forth over different siding tracks.

Frank McCarthy, for the defendants.
T. N. Phelan, for the plaintiffs.

MIDDLETON, J.:—In so far as particulars are said to be for pleading, particulars are not required here, for the defendants have the privilege accorded to them by statute of pleading "not guilty by statute."

By sec. 15 of the Workmen's Compensation for Injuries Act, R.S.O. 1897 ch. 160, it is provided that, in an action brought under that Act, where the injury of which the plaintiff complains shall have arisen by reason of the negligence of any person in the service of the defendant, the particulars shall give the name and description of such person. The defendants contend that this gives them the statutory right to have the name of every employee against whom negligence is to be charged, and that the Court has no discretion in the matter.

The statement of claim here sets forth circumstantially what took place. At St. Catharines the station-house is so situated as to prevent any extended view along the tracks. There are, in addition to the main track a passing track and two other sidings. A train had been given through orders, not calling for any stop at St. Catharines. For some time before it reached the station, a way freight train had been shunting upon the sidings. The switch had been left open from the main track, and the distant semaphore had not been set to warn any train running on the main track, nor had there been any man stationed to flag an approaching train. By reason of this, the oncoming train ran into the siding, and the engine-driver of that train was

killed. His infant children now sue, alleging negligence in the matters above set out, and, in the alternative, that, if this condition of affairs was in conformity with the system by which the railway was operated, the system was itself negligent.

The defendants now seek to impose upon these infant plaintiffs the obligation of fixing the blame on some particular individual and of pointing out the specific rules of the railway company which had been disobeyed by the servants of the company in bringing about this dangerous and disastrous result, as a condition of being allowed to prosecute the action. The contention needs only to be stated to shew its fallacy. Our law places no such obligation upon a plaintiff.

Section 15, if it has any application, applies only where the claim of the plaintiff is based upon some specific act of misconduct on the part of a fellow-servant; and I do not think that it ought to be extended to the class of cases in which the plaintiff will have proved his case as soon as the facts in relation to the accident are shewn. Where the rule *res ipsa loquitur* applies, the statute does not intend to shift the onus and call upon the plaintiff to locate the fault.

Nor do I think the Master should have ordered particulars of the rules. The defendants, it may be presumed, know their own rules and regulations. They have the means of knowing exactly what happened, for they are called upon to investigate every accident, and nothing could seem more oppressive than the order sought in this case, nor could anything be devised more likely to occasion a miscarriage at the trial.

In the result, the plaintiffs appeal succeeds and the defendants' appeal fails. The plaintiffs should have the costs throughout in any event.

LATCHFORD, J. FEBRUARY 24TH, 1914.

REID v. AULL.

Trial—Matrimonial Cause—Action for Declaration of Nullity of Pretended Marriage—Application for Hearing in Camera—Illness of Plaintiff—Refusal—Necessity for Openness and Publicity.

Motion by the plaintiff, upon notice to the defendant, for a direction for trial of this action in camera.

G. H. Watson, K.C., for the plaintiff.
The defendant was not represented.

LATCHFORD, J.:—The action is brought on behalf of Doris Reid, an infant under the age of twenty-one years, by her father as next friend, for a declaration that an alleged marriage between the plaintiff and one Robert Aull, solemnised at Cobourg on the 25th July, 1913, but not consummated, is null and void, on the ground that the plaintiff, who was at the time under eighteen, did not consent to the marriage and was not sensibly and willingly a party to the ceremony, but was induced to take part therein by fraud, deceit, and misconduct of the defendant.

In support of the application, Mr. Watson files an affidavit made by the plaintiff's father, verifying a certificate by Dr. J. F. Fotheringham, and stating that his daughter is ill, and that her examination and cross-examination in open Court would, in his opinion, be attended by serious and possibly fatal consequences.

Dr. Fotheringham, as the result of an examination into the state of the plaintiff's nervous equilibrium, considers that her evidence could be much more fully and accurately obtained if she is not called upon to give it in open Court, and that, if she testified in public, there would, in his opinion, be great danger of a nervous collapse, which might be attended with serious consequences.

It is to be remembered that here, as in England, the law is administered publicly and openly, and its administration is at once subject to, and protected by, the full and searching light of public opinion and public criticism. The openness and publicity of our Courts forms one of the excellences of our practice of the law, and, in the words of Lord Fitzgerald, in Macdougall v. Knight (1889), 14 App. Cas. 194, at p. 206, admits of exception only in the rare cases of such a character that public morality requires that the proceedings should be in camera in whole or in part.

In criminal trials in Canada, the right to exclude the public conferred upon the trial Judge by sec. 645 of the Code is restricted to cases in which the Court considers the exclusion to be in the interest of public morals.

Other exceptions occur in the case of wards of Court, in lunacy proceedings, and in actions regarding secret processes, where the paramount object of securing that justice be done would be doubtful if not impossible of attainment if the hearing were not in camera.

The recent case of Scott v. Scott, [1913] A.C. 417, in the

House of Lords, reversing the judgment of the Court of Appeal, [1912] P. 241, is remarkable not only for the strength of the Court, composed of Lord Haldane, L.C., and Lords Halsbury, Loreburn, Atkinson, and Shaw of Dunfermline, each of whom delivered a considered judgment, but for the wide field covered by their Lordships, and especially for the numerous and far-reaching propositions declared to be the law of England regarding the necessity (with the exceptions mentioned) of having all trials open and public. The neat point for decision appeared to be unimportant. It was merely whether an order to commit for contempt of Court, made because of the publication of proceedings held in camera, in a case in the Court of Divorce and Matrimonial Causes, was a judgment in a "criminal cause or matter," within the meaning of sec. 47 of the Judicature Act, 1873—in which case no appeal lay.

The disposition of what seemed an ordinary matter of practice involved several questions of the utmost public importance. In construing certain sections of the Matrimonial Causes Act, 1857, 20 & 21 Vict. ch. 85, especially secs. 22 and 46, and the practice that had arisen in the Court thereby constituted, it was pointed out that the modern practice of hearing suits for nullity in private arose out of a misconception of what was the actual practice in the Ecclesiastical Courts. Under sec. 22 of the Act of 1857, the new Court was to proceed and act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts had previously acted and given relief. Undoubtedly the earlier stages of the proceedings in the Ecclesiastical Courts for annulment occasionally took place in camera. But, when the Commissioners had taken the evidence, both parties had access to it. This was called "publication" (Lord Haldane at p. 433); but, with a few exceptions, all the subsequent proceedings were public.

Commenting on sec. 22 and on sec. 46, which provides that, subject to such rules as the Court might establish under sec. 22, the witnesses in all proceedings before the Court where their attendance can be had shall be sworn and examined orally in open Court, Lord Shaw of Dunfermline says (p. 475): "In my humble opinion these sections of the Act of 1857 were declaratory in another sense" (i.e., in addition to declaring that the proceedings were to be in open Court throughout). "They brought the matrimonial and divorce procedure exactly up to the level of the common law of England. I cannot bring myself to believe that they prescribed a standard of open justice for

these cases either higher or lower than for all other causes whatsoever. And it is to this point accordingly that the discussion must come. The historical examination clears the ground, so that the tests of whether we are in the region of constitutional right or of judicial discretion—of openness or of optional secrecy in justice—are general tests."

Most apt to the case made by Mr. Watson is the language of Lord Shaw when he asks (p. 484): "May not the fear of giving evidence in public on questions of status like the present deter witnesses of delicate feeling from giving testimony and rather induce the abandonment of their just right by sensitive suitors? And may not that be a sound reason for administering justice in such cases with closed doors? For otherwise justice, it is argued, would thus in some cases be defeated. My Lords, this is very dangerous ground. One's experience shews that reluctance to intrude one's private affairs upon public notice induces many citizens to forgo their just claims. It is no doubt true that many of such cases might have been brought before tribunals if only the tribunals were secret. But the concession to these feelings would in my opinion tend to bring about those very dangers to liberty in general, and to society at large, against which publicity tends to keep us secure, and it must further be remembered that in questions of status, society as such—of which marriage is one of the primary institutions—has also a real and grave interest as well as have the parties to the individual cause."

Throughout each of the judgments delivered similar expressions of opinion may be found.

The Law Quarterly Review for January, 1913, p. 9, calls attention to a common law decision on the publicity of judicial proceedings which was not referred to in Scott v. Scott. It is Daubney v. Cooper (1829), 4 B. & C. 237. There the plaintiff sued a Justice of the Peace for throwing him out of the room where he claimed to appear as attorney for an absent defendant on a summons for having a sporting gun without a license. The Court of King's Bench upheld his right on the higher ground that in any case he was entitled to be present as one of the public. Bayley, J., in delivering the judgment of the Court, said (p. 240): "We are all of opinion that it is one of the essential qualities of a Court of Justice that its proceedings should be public."

In view of the authorities cited, the direction applied for cannot be given.

LATCHFORD, J., IN CHAMBERS. FEBRUARY 25TH, 1914.

RE BLACK v. JOHNSTON.

Division Courts—Territorial Jurisdiction—Debt Sued for Exceeding $100—Division Courts Act, R.S.O. 1914 ch. 63, sec. 77—Action Brought in Court of Place of Payment—Application for Transfer—Refusal—Discretion—Motion for Prohibition—Dismissal.

Motion by the defendants for prohibition to the Fifth Division Court in the County of Ontario, on the ground that the promissory note sued on, which was for $114.46, though dated and made payable at Cannington, within the jurisdiction of the said Court, was in fact made outside such jurisdiction, in the city of Toronto, where both the defendants resided. The defendants disputed the jurisdiction of the Court and applied to the Judge therein to have the place of trial changed to Toronto. Their application was refused, and they now sought to prohibit further proceedings, for want of jurisdiction.

J. R. Roaf, for the defendants.
Martin H. Roach, for the plaintiff.

LATCHFORD, J.:—The facts are not in dispute. The only question is, whether the note can be sued on in a division in which the whole cause of action did not arise, and in which neither of the defendants resides.

If the debt or money payable did not exceed $100, as was the case in In re Brazill v. Johns (1893), 24 O.R. 209, prohibition would be granted.

But, as the debt does exceed $100, sec. 77 of the Division Courts Act, R.S.O. 1914 ch. 63, applies. That section differs materially from sec. 86 of R.S.O. 1887 ch. 51, and sec. 90 of R.S.O. 1897 ch. 60, but follows almost verbatim sec. 77 of the Division Courts Act of 1910.

It provides that "where the debt . . . exceeds $100, and is made payable by the contract of the parties at a place named therein, the action may be brought thereon in the Court of the division in which the place of payment is situate, subject, however, to the action being transferred to the Court of any division in which but for this section it might have been brought."

This action was, therefore, properly brought in the Fifth Division Court in the County of Ontario, but was subject to be transferred to Toronto.

Sub-section 2 of sec. 1 provides that the Judge of the Court in which the action is brought may, upon application of the defendant, made within the time limited for disputing the plaintiff's claim, make an order transferring the action accordingly.

By the Interpretation Act, R.S.O. 1914 ch. 1, sec. 29, the word "may" shall be construed as permissive.

The Judge could grant or refuse the application which the defendants made. He chose to refuse it, and was entirely within his rights in doing so.

That he might have been compelled to transfer the case under sec. 90 of the Act of 1897 is not a matter for decision. It is sufficient to say that he cannot be compelled to do so under the law as it exists to-day. Section 77 gives a jurisdiction until changed. The Judge, in the exercise of his discretion, has refused to change it. The jurisdiction continues. Prohibition does not lie, and the motion must be refused with costs.

LATCHFORD, J. FEBRUARY 25TH, 1914.

FITZ BRIDGES v. CITY OF WINDSOR.

Injunction—Municipal Corporation—Bonus By-law—Submission to Ratepayers—Motion to Restrain—7 Edw. VII. ch. 97—10 Edw. VII. ch. 136—Industry of Similar Nature to one already Established—Remedy by Motion to Quash if By-law Approved and Passed.

Motion by the plaintiff for an interim injunction restraining the defendants, the Corporation of the City of Windsor, from submitting to the ratepayers, on the 3rd March, 1914, a by-law granting a bonus to one Klingensmith, who proposed to establish in Windsor an industry for producing and selling distilled water and artificial ice.

S. Cuddy, for the plaintiff.
Frank McCarthy, for the defendants.

LATCHFORD, J.:—The plaintiff is engaged in the business of harvesting, storing, and selling natural ice cut in the Detroit river, and stored as cut outside the defendant municipality, but with subsidiary storage premises in Windsor; and stables, with accommodation for some of the vehicles used by the plaintiff in delivering the ice, are said to be maintained in Windsor.

The statute empowering the defendant municipality to grant aid by way of bonus for the promotion of manufactures is 7 Edw. VII. ch. 97, as amended by 10 Edw. VII. ch. 136. Subject only to the assent of two-thirds of the duly qualified ratepayers, and to the provision that no bonus shall be granted to a manufacturer who proposes establishing an industry of a similar nature to one already established, unless the owners of such established industry or industries shall first have given their consent in writing to the granting of such aid, the Council of the City of Windsor may, by a three-fourths vote of all the members thereof, pass by-laws for granting aid by way of bonus for the promotion of manufactures within the limits of the city, to such persons or body corporate and in respect of such branch of industry as the council may determine upon.

The application is made within eight days of the date of the submission of the by-law to the ratepayers, and the material upon which it is based is unsatisfactory. It is important to know to what extent the business of the plaintiff is carried on within the municipality of Windsor. The plaintiff's affidavit does not shew this. To prevent the ratepayers from voting on the 3rd proximo, after considerable money has been expended in the necessary advertising, might work a serious wrong to the defendants, if it should ultimately appear from additional material that the by-law is not within the prohibitory clause of the statute. On the other hand, the voting upon the by-law by the ratepayers will, even in the event of a sufficient assent being secured, work no injury, so far as appears, to the plaintiff; and, should the necessary assent not be secured, the proposed by-law will be a nullity. I think no adequate case is made out for the granting of such an extraordinary remedy as an injunction.

If the by-law should be assented to by two-thirds of all the ratepayers, the plaintiff may be able to satisfy the Court that the by-law should be quashed, as granting a bonus for the establishment of an industry similar to that which the plaintiff may shew is now carried on by him within the municipality.

The circumstances are exceptional which will justify the granting of an injunction to restrain the passing of a by-law: City of London v. Town of Newmarket (1912), 3 O.W.N. 565, and the cases there cited.

BOYD, C. FEBRUARY 27TH, 1914.

ASPDEN v. MOORE.

Vendor and Purchaser—Sale and Conveyance of Land—Rescission—False Representations by Vendor Inducing Purchase—Materiality — Parties Relegated to Former Positions—Damages—Occupation Rent—Set-off—Costs.

Action against two defendants, husband and wife, for rescission of a sale and conveyance of land by the defendants to the plaintiff, for the return of the portion of the purchase-money paid, cancellation of the mortgage given by the plaintiff for the balance, and for damages, by reason of false representations alleged to have been made by the defendants, which induced the plaintiff to purchase.

F. D. Moore, K.C., for the plaintiff.
T. Stewart, for the defendants.

BOYD, C.:—. . . The plaintiff is . . . badly crippled with sciatica, yet able, aided by a stick, to move about slowly. He was advised by a doctor to move from Toronto and find a house where he would be near the water and where he might amuse himself in a canoe. His physical condition was such that he required in any such house the convenient use of a bath-room and water-closet. Not being able to go personally, he employed a land agent, whom he knew, to look out a suitable place, and this man, Probert, visited Lindsay for that purpose. He found two houses, Workman's and Moore's, that answered the local requirement; but, as the owner was temporarily absent from Moore's, he could not and did not inspect it. Having reported progress to the plaintiff, he returned next day with Mrs. Aspden, the wife of the plaintiff, in order to be satisfied as to suitability. They found Mrs. Moore, the owner of the house, at home, and went all through it, and were satisfied with it, after conversation about bath and sewer with the owner. They visited the other house, which had bath-room and conveniences installed, and for this reason the plaintiff's wife liked it better; but the price was higher and it was further from the river than Moore's. She preferred to take the defendant's house because it was closer to the water, and, from what she was told by Mrs. Moore, she believed that the necessary conveniences could be installed there in connection with the sewer, and that the whole outlay would be less than the price asked for the Workman house.

The evidence of the defendants is of a negative character; according to them, no questions were asked and no conversation was had about closet or bath-room or sewer, and these strangers bought the house as it was. One reason why the defendant sold the house was that from the condition of the sewer she could not have proper conveniences there; so Mrs. Porter reports.

It appeared that the owner of the whole area had put down a private main sewer through this part of it, draining a row of three detached houses by lateral connection to the river. Moore's house was, of the three, farthest from the water, and Mrs. Porter's nearest to it. The Moores had lived there nine years, and knew that the sewer could not be used for bath purposes. It was, at the first, poorly and cheaply built of field tiles, and had become blocked from various causes, so that it did not discharge into the river, nor was there any through-flow. About two years before this sale, Mrs. Porter had called in a plumber, Hungerford, to have a bath put in her house: he tested the place and reported against its being done, and this result was known to all the neighbours, including the defendant. Upon the evidence, I find that it was a well-known fact that the sewer was not and could not be used for bath-room and water-closet purposes. It had become clogged up, and was nothing more than a long underground hole or tunnel—a subterranean cul de sac—which was being gradually filled up to the ground level, on which the surface closets of the three houses were placed.

This was the plight of the private "sewer" (so-called) at the time of the sale, and when the agent and the plaintiff's wife visited the place. I see no reason to doubt the account given by the agent and the wife as to what occurred during their visit. The witnesses were excluded, and slight variations occur in what they recollected, but the general tenour may be well accepted. Probert, on their arrival, told Mrs. Moore that they wanted a house near the river, one with conveniences or in which conveniences could be put; he asked the defendant if a sewer was on the street; she said, "We have a private sewer," and he said that would answer the purpose. She said they had intended to put in a bath-room themselves, but they were going to move to Toronto. She said that they had lots of water: three sources—pump water, rain (cistern) water, and water from the town. He pointed to a little place (closet), and she said, "That is where the sewer is." They then went upstairs, and Mrs. Moore said that they were going to put the bath-room in a small room upstairs; then the agent pointed out what he said was a better place in the hall or landing where the pipes could be better con-

nected with the sewer below, and the owner agreed with that suggestion. No examination of the sewer was made.

Mrs. Aspden gives some other details of what was said. Mrs. Moore shewed her where the convenience was—the private sewer —and said it was in good working order; that she had had the inspector in, and he found everything all right. When the defendant said that the sewer was in good working order, Probert said, "That would suit us, so that all the conveniences could be put in and no bother." She gives the same account of what was said upstairs about the best place to put the bath-room. She says that she would not have taken the house if it lacked such a sewer as was needed for her husband's requirements.

The transaction was closed by the husband when the report of the agent and his wife was made known to him; he was told, in brief, that he could have the conveniences in "right away," as there was a good private sewer in connection with the house.

I think, on this state of facts, of what was said and what was suggested and what was left unsaid by the defendant, that the right conclusion is, that the plaintiff was misled into the belief that the sewer was sufficient and in order so that a bath-room and closet could be put into the house for his use at a little further expenditure; there was wilful misrepresentation; and, substantially, the misrepresentation was as set forth in the 5th paragraph of the statement of claim, namely, that the dwelling-house was supplied with a sewer drain fully sufficient to permit of a bath-room being placed by the plaintiff in the said residence.

To the knowledge of the defendants, this was not the case, and the conduct and words of the owner, Mrs. Moore, led the agents of the plaintiff to believe what was contrary to the fact.

The falsity of the representation was found out by the plaintiff and his wife, and verified by testing soon after their occupation of the premises in August, and at the end of the same month they complained, and offered the property back, but the defendants refused to hear any complaint, and threatened action upon the mortgage; $900 had been paid when the deed was given, and a mortgage given back for the balance, $900.

No repairs are possible to reinstate the sewer and make it efficient to a proper outlet; for the town authorities have forbidden it. The only way of drainage is upon the public street near-by, and this is contingent on the frontagers agreeing to call upon the council for such relief—and it would cost a good sum.

As to the law, I may adapt to this case the language of Lord

Campbell, L.C.: "Simple reticence does not amount to fraud, however it may be used by the moralists. But a single word or a nod or a wink, or a shake of the head, or a smile, from the vendor, intended to induce the purchaser to believe the existence of a non-existing fact, which might influence the price or induce the sale, would be sufficient ground for Equity to refuse specific performance:" Walters v. Morgan (1861), 3 De G. F. & J. 718, 723, 724.

If the word and the conduct be such as to involve an intention to deceive; if, in other words, the vendor so speaks and acts with knowledge of the real fact as to mislead the other in regard to any material circumstances; and if, under that misapprehension of fact, induced by that misrepresentation, the contract is completed—in such case the Court will undo and set aside the whole transaction if the parties can be replaced in statu quo.

The question as to damages quoad the defendants (husband and wife) was not discussed, nor was evidence given thereon, though interesting questions may be involved therein: see Traviss v. Hales (1903), 6 O.L.R. 574, and Earle v. Kingscote, [1900] 2 Ch. 585.

In the circumstances, the whole transaction should be vacated —the mortgage cancelled, the deed set aside, and the land vested again in the defendant, subject to a charge for $900 cash paid.

It is better, all things considered, not to give damages, but to set off claims for occupation rent against these; so that, upon payment of $900, the possession is to be given up by the plaintiff; and, subject to what may be said, I would fix the 1st April as the date for this payment and delivery of possession.

The plaintiff is also entitled to costs of action.

LATCHFORD, J. FEBRUARY 28TH, 1914.

RE LLOYD.

Infants—Moneys of, in Hands of Administrator of Estate of Deceased Person—Application by Mother for Payment to her as Guardian Appointed by Foreign Court—Refusal—Past Maintenance of Infants—Future Maintenance.

Application by Hattie E. Lloyd, of Norton, Runnels County, Texas, widow, the guardian of her four infant children, aged respectively 11, 15, 17, and 19, appointed by the County Court

of Runnels County, for an order that the London and Western Trusts Company, the administrators with the will annexed of the estate of one Robert E. Lloyd, deceased, should pay over to the applicant, as such guardian, all moneys in the hands of the said company, to which such infant children were entitled under the will of Robert E. Lloyd; or for an allowance for maintenance.

E. W. Scatcherd, for the applicant.
T. Coleridge, for the Official Guardian.
C. G. Jarvis, for the London and Western Trusts Company.

LATCHFORD, J.:—Robert E. Lloyd was an uncle of the infants. He was a resident of and domiciled in Ontario and at the time of his death, and all his estate administered by the trusts company was derived from property situate in this Province. The amount to which the applicant's children are entitled is about $5,500. The money is invested on mortgage, and realises, it is said, five and a half per cent. per annum.

Mrs. Lloyd deposes that, since the death of her husband, William Lloyd, in 1904, leaving property not worth more than $350, she has supported her children by her own labour. There were five children, but one died in May, 1910. The mother estimates that it cost her $10 a month for each of the five children up to the time of the death mentioned, and a like amount monthly since for each of the four children. She thus builds up a claim for past maintenance amounting to $6,400.

Her affidavit is unsupported, except by copies of the proceedings in the County Court of Runnels County connected with the appointment of the applicant as guardian. For the effect of such appointment and as to the right of the guardian to receive the moneys of her wards, I am referred to the statutes of Texas.

In Hanrahan v. Hanrahan (1890), 19 O.R. 396, Mr. Justice Rose, in a considered judgment, in which many cases were reviewed, held that the duly appointed tutors in the Province of Quebec of an infant domiciled and residing there—Quebec having also been the domicile of the infant's father at his death—were entitled to have paid over to them by the administrators in Ontario of the father's estate moneys coming to the infant from such estate collected in this Province.

A guardian appointed under the laws of Texas has, doubtless, the same powers as a tuteur under the laws of the Province of Quebec. The material filed on the point is defective, but I

should allow it to be properly supplemented if I were satisfied the claim of the guardian was made for the benefit of her wards. But it is quite clear that the claim is not for their benefit, but for her own. It exceeds for past maintenance—by $900—the whole fund in the hands of the trusts company. If the fund were transferred to her upon this application, and the children afterwards claimed an account, they would undoubtedly be met by the contention that this Court had recognised that she was entitled to their shares for past maintenance. Her good faith is open to question by reason of the exaggerated amount of her claim. The security which she is said to have given may, for anything that appears, be worthless. Her sureties made no affidavits of justification. In the words of Kekewich, J., in In re Chatard's Settlement, [1899] 1 Ch. 712, 717, "I ought to consider whether when the fund is handed over to the guardian it will be properly applied for the benefit of the infants, and whether it is not better that it should remain here and be paid to them when they attain their majorities."

I am asked to direct the payment over as a matter of right to a foreign guardian of moneys derived from the estate of a person not domiciled in the foreign state, but domiciled here. No such case is made as in Hanrahan v. Hanrahan. The ordinary rule and practice of the Court is, that the Court will not direct the payment over of the moneys of infants unless satisfied that it will be applied for the benefit of the infants. Their welfare and interests are the paramount consideration.

In the circumstances, the order must be refused. Costs of the trusts company and Official Guardian out of the fund.

On a proper case made, it will, of course, be open to Mrs. Lloyd to apply for an order for future maintenance.

LENNOX, J. FEBRUARY 28TH, 1914.

HALLMAN v. HALLMAN.

Marriage—Action for Declaration of Nullity—Fraud—Insanity—Evidence—Consent—Declaration of Right or Status—Judicature Act, sec. 16(*b*)*—Special Forum for Relief—Parliament—Costs.*

Action for a declaration of the annulment of the marriage of Jonathan G. Hallman, the plaintiff, to Catherine Hallman,

the defendant, represented by the Official Guardian as her guardian ad litem.

E. P. Clement, K.C., for the plaintiff.
J. R. Meredith, for the Official Guardian.

LENNOX, J.:—Except that this action also fails upon the merits, it is not distinguishable from A. v. B., 23 O.L.R. 261. The ground set up for annulling the marriage in that case, too, was insanity; and, although Mr. Justice Clute found that the plaintiff was in fact insane at the time of the marriage, he refused to give relief of any kind.

Upon the question of jurisdiction, I am bound by the judgment in that case and by my own judgments in Prowd v. Spence (1913), 10 D.L.R. 215, 4 O.W.N. 998; Malot v. Malot (1913), 4 O.W.N. 1405, 1577; and Longworthy v. McVicar (1914), 5 O.W.N. 767. See also Leakim v. Leakim (1912), 3 O.W.N. 994, and 4 O.W.N. 214.

Mr. Clement urged me, if possible, at least to make a declaration that the marriage was invalidated by the fraud practised upon the plaintiff, in that the defendant failed to disclose to the plaintiff that she had previously been confined in a lunatic asylum in Chicago. I regret to say that I am not able to assist the plaintiff in any way.

Counsel for the plaintiff admits that the defendant was sane, or at all events in a mental condition to understand and appreciate what she was doing and the duties and obligations she was undertaking, at the time of the marriage. In this respect this case differs from any insanity case which has come to my notice; and the claim set up is, that the omission to mention the circumstances referred to was a fraudulent concealment sufficient to avoid the marriage. There is not, to my mind, sufficient evidence here to avoid an ordinary commercial contract. Marriage is a contract in a sense, but it is something more; and, leaving out of sight even the moral and religious obligations which it creates, it creates a status from which the parties cannot voluntarily recede.

But fraud of the most outrageous and iniquitous character does not prevent the marriage being absolutely legal and binding, so long as there is actual consent: Moss v. Moss, [1897] P. 263; Harrod v. Harrod (1854), 1 K. & J. 4.

It is argued that I should not feel bound by English cases. I think otherwise; but at all events, I am bound by the judg-

ment of the Judicial Committee of the Privy Council in Swift v. Kelly, 3 Knapp 257, at p. 293, where it is declared that "no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances, consent never would have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of deception which will avail to set aside a contract of marriage knowingly made."

Neither can I make a declaration of right or status under sec. 16, sub-sec. (b), of the Judicature Act. That section does not enlarge or affect the jurisdiction of the Ontario Courts so far as the class of subjects which they can deal with is concerned. It does not make any radical change in the Rules or practice: Bunnell v. Gordon (1890), 20 O.R. 281; and there was no right to make a declaration as to a claim which might or might not arise, and which was not incidental to any present relief, under a similar provision of the old Act: *ib.* The only forum for relief is the Senate. And where there is a special forum the parties must go to it: Attorney-General v. Cameron (1899), 26 A.R. 103; and Barraclough v. Brown, [1897] A.C. 615.

Counsel representing the guardian ad litem does not ask for costs. Following the course I took in other cases, I make no order of any kind.

LIMEREAUX v. VAUGHAN—BRITTON, J.—FEB. 26.

Trusts and Trustees—Conveyance to Daughter of Land Purchased by Mother—Improvidence—Absence of Independent Advice—Declaration of Trust—Charge for Advances—Land to be Conveyed upon Payment of Amount Charged.]—An action to have it declared that two lots of land in the city of Toronto were the property of the plaintiff, and that the defendant was a trustee thereof for the plaintiff. The plaintiff was eighty-five years of age, and the defendant was her daughter. The plaintiff had agreed to purchase the lots for $100, and had paid $35 on account, but found it impossible to make further payments, and the defendant's husband provided $70, which was accepted by the vendor in full; and the vendor, with the consent of the plaintiff, made a conveyance to the defendant. The learned Judge found that the plaintiff did not understand the transaction; that her consent to the conveyance was improvident;

that she acted without advice, and was not a match in business matters for the defendant; that the arrangement had not been carried out by the defendant, even according to her own version of it, no provision having been made for the plaintiff's maintenance or her residence on the land. Judgment for the plaintiff declaring that the defendant holds the lots as trustee for the plaintiff, subject to a charge in favour of the defendant for the $70 and for amounts paid for taxes and insurance premiums, with interest. Upon payment being made, the defendant will execute a conveyance of the lots to the plaintiff, free of all incumbrances created by the defendant. No costs. S. H. Bradford, K.C., for the plaintiff. J. C. McRuer, for the defendant.

WOLFE v. EASTERN RUBBER CO. LIMITED—MIDDLETON, J.—FEB. 26.

Contract—Architect—Preparation of Plans—Risk of Architect—Evidence of Employment—Action for Remuneration—Testimony of Discharged Servants—Suspicion.] — Action by an architect to recover $2,000 remuneration for the preparation of plans in connection with a proposed factory of the defendants. The learned Judge was of opinion, upon the evidence, that the plaintiff had failed to substantiate his claim. All the probabilities surrounding the case supported the evidence of the defendants' general manager. The plaintiff was told by the manager that he might prepare plans, but at his own risk. The actual cost of the preparation of the plans would not be large, and there was nothing unreasonable in the supposition that the plaintiff, an outsider, anxious to obtain an opportunity of shewing his skill, would risk that much for what appeared to be a favourable opportunity; and all that followed was quite consistent with this theory. When the plans came, the defendants had the right to employ the plaintiff or to refuse to do so; and, on the evidence, there never was an employment.—The plaintiff sought to strengthen his position by calling as witnesses some ex-employees of the defendants. The learned Judge said that evidence of this class never appealed strongly to him—he always viewed the testimony of discharged employees, especially when given with animus, with the greatest suspicion. There was nothing in this evidence that helped, and a good deal that hurt, the plaintiff's case.—Action dismissed with costs. F. Arnoldi, K.C., for the plaintiff. N. W. Rowell, K.C., for the defendants.

ARMOUR v. TOWN OF OAKVILLE—MIDDLETON, J.—FEB. 26.

Contract—Work and Labour—Construction of Sewer System—Interpretation of Contract—Bonus—Cost of Work—Extras.] —The Corporation of the Town of Oakville, the defendants, desiring to construct a system of sewers, entered into a contract with one Lorenzo on the 15th April, 1912, which called for the construction of the drains and disposal works for a total price of $81,418. Lorenzo had scarcely started on the work when he failed, and abandoned the contract. A new contract was made with the plaintiff in July, 1912, by which the plaintiff undertook to do the work at actual cost, plus a salary of $30 a week and plus a certain bonus if the cost was kept below a named figure. The work having been completed by the plaintiff, he sued for the bonus, alleging that the work had been kept within the stipulated price, which the defendants denied. The dispute was as to the proper construction of the contract. The learned Judge finds that what the plaintiff undertook was to construct the entire sewage system as shewn by the Lorenzo contract, upon terms which did not entitle him to a bonus unless the actual cost of the sewers, including all allowances for extras with respect to them, came to less than $100,000. The total cost of the work to the defendants, it was agreed, was $115,922.08. From this must be deducted the cost of the disposal works, $12,190.79, and also the cost of the laterals, placed by the plaintiff at $10,629.70. Deducting these two sums, the balance would be $93,101.59; to which must be added three undisputed items, $11,374.74, $2,826.18, and $224, making a total of $107,526.51. A further deduction would then have to be made as representing the excess of the extended work over diminished work—placed by the plaintiff at $17,220.36—leaving, according to his contention, the total cost, for the purpose of ascertaining his right to a bonus, $90,306.15; so that he would be entitled to 20 per cent. on $9,693.85, or $1,938.77. In making the computations necessary to bring about this result, the plaintiff assumed that the cost of the construction of the laterals was to be determined by applying the schedule price found in the Lorenzo contract. The defendants, on the other hand, contended that this price did not control, that the cost of the laterals must be found as a fact, and that from the actual cost of the entire work the amount to be deducted on this head was the actual cost of the lateral drains. In regard to the extra work, the respective contentions were similar. The learned Judge agrees with the contentions of the defendants. Judgment directing a reference to take an

account on the footing of the learned Judge's findings and declarations, reserving the costs of the action and reference; but, for the purpose of affording some criterion hereafter, the plaintiff and defendants should name a sum which he is or they are willing to give and receive. In arriving at the amount to be deducted, the amount allowed by the engineer as just and equitable in respect of diminutions, $6,796.23, is to be regarded as conclusively determined. The two factors to be determined by the Master are the actual cost of the laterals and the actual cost of the additional work given by the engineer on the basis of the Lorenzo contract as $10,629.70 and $22,130.22 respectively. T. N. Phelan, for the plaintiff. M. K. Cowan, K.C., for the defendants.

MEMORANDUM.

Re Barnett v. Montgomery, ante 884. In the last paragraph of the judgment of BRITTON, J., it is stated that "counsel for the defendant produced a decision of the learned County Court Judge at variance with his decision in the present case." It afterwards appeared that the decision referred to was in a Division Court plaint in which the title to land did in fact come into question.

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1. *Contract Made by Individual—Evidence to Establish Agency for Company—Failure to Shew Ratification—Authority of Director—Absence of Holding out—Apparent Authority—Liability of Individual—Novation.*]—In an action to make the defendant company liable for the purchase-money of a lot of land and a business sold by the plaintiff to the defendant F., upon the ground of F.'s agency for the company:—*Held,* upon the evidence, that F. had not bought the property with the authority of the company, and that they had not adopted or ratified the purchase.—The purchase, however, was made by F. upon the authority of one of the directors of the company:—*Held,* that the plaintiff was not entitled to assume that F. was clothed with the authority of the company: there was no holding out, and no room for the application of the principle relating to apparent authority, for the plaintiff's contract was with F., and the plaintiff had failed to establish F.'s agency in fact.—F. remained liable upon the agreement; he could be relieved only by something amounting to a novation, which was not established.—*National Malleable Castings Co.* v. *Smiths' Falls Malleable Castings Co.,* 14 O.L.R. 22, 28, distinguished.—*Cartmell's Case,* L.R. 9 Ch. 691, followed. *Bird* v. *Hussey-Ferrier Meat Co.,* 5 O.W.N. 60.—MIDDLETON, J.

2. Director—Managing Director—Transactions with — Claims and Cross-claims—Account — Mortgage — Indebtedness of Managing Director to Company—Credits Given in Books of Company at Instance of Managing Director—Commission—By-laws of Company—Salary—Transfer of Assets—Powers of Board of Directors—Delegation to Committee—Moneys Owing by Allottees of Land—Cancellation of Transfers—Interest—Statute of Limitations — Trustee — Trust Property—Recovery of—Sales of Land—Commission on—Compensation for Endorsing Commercial Paper—Directors' Fees—Special Services—Particulars. *Saskatchewan Land and Homestead Co.* v. *Moore,* 5 O.W.N. 183.—KELLY, J.

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11. Winding-up — Petition under Dominion Act, by Creditor Unwilling to Accept Compromise of Claim—Right of Petitioning Creditor—Discretion of Court. *Re Tudhope Motor Co.*, 5 O.W.N. 865.—MIDDLETON, J. (Chrs.)

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2. Disobedience of Judgment—Injunction—Manner of Erecting Buildings—Structural Alterations — Building Restrictions—Plans—Undertaking—Costs. *Holden* v. *Ryan*, 5 O.W.N. 890.—APP. DIV.

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1. Architect — Preparation of Plans—Risk of Architect—Evidence of Employment—Action for Remuneration—Testimony of Discharged Servants—Suspicion. *Wolfe* v. *Eastern Rubber Co. Limited,* 5 O.W.N. 979.—MIDDLETON, J.

2. Author—Preparation of Biography—Access to and Use of Private Documents—Express or Implied Agreement as to Use to be Made of Documents—Breach—Injunction—Delivery up of Copies and Extracts—Jurisdiction. *Lindsey* v. *Le Sueur,* 5 O.W.N. 407, 29 O.L.R. 648.—APP. DIV.

3. Breach — Delay — Damages — Counterclaim — Interest — Costs—Third Parties. *David Dick & Sons Limited* v. *Standard Underground Cable Co.,* 5 O.W.N. 82, 889.—MIDDLETON, J.—APP. DIV.

4. Company-shares — Settlement of Former Action — Specific Performance — Nominal Damages — Costs. *Tinsley* v. *Schacht Motor Car Co. of Canada,* 5 O.W.N. 547.—MIDDLETON, J.

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8. Exhibition "Concession" — Exclusion of Right to Sell "Ice-cream Cones"—Sale of Fruit Ices in Cones—Sale Stopped by Manager of Exhibition—Clause in Agreement Making Manager Sole Judge of Conduct of Concessionaire and of Facts and Interpreter of Contract—Manager Acting in Good Faith and Reasonably—Domestic Forum—Action

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9. Manufacture and Sale of Lumber—Quantity and Price—Extra Payment or Bonus—Counterclaim—Trespass—Payments—Set-off—Findings of Fact of Trial Judge. *Orton* v. *Highland Lumber Co.*, 5 O.W.N. 438.—LENNOX, J.

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12. Parent and Child—Oral Agreement to Convey Land—Ascertainment of Terms by Reference to Document Signed by Parties — Action for Specific Performance — Statute of Frauds—Part Performance—Conduct of Parties—Enforcement of Agreement by Son after Death of Father. **Wilson* v. *Cameron*, 5 O.W.N. 234, 787.—MIDDLETON, J.—APP. DIV.

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14. Principal and Agent—Agent's Commission—Breach of Contract—Damages—Report of Referee—Appeal—Judgment—Costs. *Gibson* v. *Carter*, 5 O.W.N. 145.—APP. DIV.

15. Purchase of Stock of Goods—Failure of Purchaser to Pay—Damages—Loss on Resale. *Hutchinson Co.* v. *McGowan*, 5 O.W.N. 27.—LENNOX, J.

16. Sale and Delivery of Hay—Breach of Contract—Damages—Reduction by Payment—Appeal—Costs—Counterclaim—Scale of Costs. *Gordon* v. *Gowling*, 5 O.W.N. 269.—APP. DIV.

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26. Work and Labour—Construction of Sewer System—Interpretation of Contract—Bonus—Cost of Work—Extras. *Armour* v. *Town of Oakville*, 5 O.W.N. 980.—MIDDLETON, J.

27. Work and Labour — Extras — Evidence — Specifications — Knowledge of—Sums Due under Contract—Payment—condition Precedent — Architect's Certificate — Premature Action—Costs. *Italian Mosaic and Marble Co.* v. *Vokes*, 5 O. W.N. 15.—KELLY, J.

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1. Application for Bail before Committal for Trial—Jurisdiction *of Judge of Supreme Court of Ontario—Criminal Code, sec.* 698—*Remedy of Accused—Writ of Habeas Corpus—Habeas Corpus Act, 9 Edw. VII. ch.* 51, *sec.* 7—*Admission to Bail on Return—Amount of Bail — Vagrancy.*] — Under the Criminal Code, a Judge of the Supreme Court of Ontario has no jurisdiction to grant bail until the accused has been committed for trial: see sec. 698. But, under the Ontario Habeas Corpus Act, 9 Edw. VII. ch. 51, sec. 7, upon the return of a writ, the Court may "determine touching

7. Magistrate's Conviction — Motion to Quash — Evidence — Magistrate's Return—Conclusiveness—Supplemental Statement—Inadmissibility—Judicature Act, 3 & 4 Geo. V. ch. 19, sec. 63. *Rex* v. *Davey*, 5 O.W.N. 464, 666.—LENNOX, J. (Chrs.)—MIDDLETON, J. (Chrs.)

8. *Nuisance—Motion for Leave to Prefer an Indictment against a Municipal Corporation—Application to Judge at Assizes—Jurisdiction of Magistrate—Preliminary Inquiry—Absence of Objection to—Provisions of Criminal Code.*]—An application made to the Judge presiding at a sittings for the trial of criminal causes for leave to prefer an indictment for a nuisance against a city corporation, there having been no previous inquiry by a magistrate, was refused.—Since the enactment of sec. 2 (13) of the Criminal Code, R.S.C. 1906 ch. 146, there is no reason why a corporation may not be duly summoned to and appear at a preliminary investigation of a criminal charge against it taken under the provisions of the Criminal Code.—*Re Chapman and City of London*, 19 O.R. 33, considered; and *Regina* v. *Birmingham and Gloucester R.W. Co.*, 9 C. & P. 469, and *Pharmaceutical Society* v. *London and Provincial Supply Association Limited*, 5 App. Cas. 857, referred to. *Re Schofield and City of Toronto*, 5 O.W.N. 109.—MEREDITH, C.J.C.P.

9. Offence against Inland Revenue Act, sec, 372—Selling Wood Alcohol without "Poison" Label—Act of Servant—Conviction of Master—Mens Rea — Exceptions to General Rule. **Rex* v. *Russill*, 5 O.W.N. 86, 29 O.L.R. 367.—APP. DIV.

10. Receiving Stolen Goods—Magistrate's Conviction—Application of sec. 781 of Criminal Code—Secs. 401, 705-770, 771, 1035—Amendment of Conviction—Striking out Fine. *Rex* v. *Frizell*, 5 O.W.N. 801.—MIDDLETON, J. (Chrs.)

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2. Grant of Island in Navigable River—Construction of Patent—Description—Absence of Ambiguity—Reference to Plan—Evidence to Identify Subject-matter of Grant—"Channel"—"Side of the Channel"—"Windings"—Boundaries—Bearings in Relation to Mainland—Bed of Navigable Waters Act, 1 Geo. V. ch. 6 (O.)—Claim for Possession and Mesne Profits—Counterclaim—Specific Performance of Contracts—Dismissal, without Prejudice to Subsequent Action—Ownership of Shore—Practice of Department of Crown Lands—License of Occupation Granted by Crown—Claim for Cancellation—Pleading—Parties—Attorney-General—Absence of Proof of Fraud. *Bartlet* v. *Delaney*, 5 O.W.N. 200, 29 O.L.R. 426.—APP. DIV.

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2. Injury to Adjoining Land by Excavation—Deprivation of Lateral Support—Great Expense of Restoration—Damages in Lieu of Mandatory Injunction—Full Compensation—Costs. *Ramsay* v. *Barnes*, 5 O.W.N. 322.—MIDDLETON, J.

3. Railway—Injury to Property by Blasting—Agreement as to Compensation—Admission of Liability at Trial—Quantum of Damages—Item for Disturbance by Fear of Injury—Costs—Countl Court Scale—Certificate to Prevent Set-off. *Laveck* v. *Campbellford Lake Ontario and Western R.W. Co.*, 5 O.W.N. 925.—FALCONBRIDGE, C.J.K.B.

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1. Examination of Defendant—Action to Establish Partnership—Postponement of Discovery until Right to Participate Established. *Haynes* v. *VanSickle*, 5 O.W.N. 553.—MIDDLETON, J. (Chrs.)

2. Examination of Plaintiff—Privilege—Solicitor—Will—Representatives of Testator — Waiver. *Langworthy* v. *McVicar*, 5 O.W.N. 345. — HOLMESTED, SENIOR REGISTRAR (Chrs.)

3. *Examination of Servant of Defendant Railway Company—Rule* 327—*Injury to Passenger on Street-car—Examination of Conductor—Adequate Discovery—Application for Examination of another Servant of Company—Grounds for.*] —Rule 327 (Rules of 1913) precludes the examination for discovery of a second officer or servant of a corporation-party, unless by leave; and leave for a second examination should not be granted unless for some reason the examination already had has failed to give to the party seeking it the discovery to which he is entitled. It is not enough to establish that the person whose examination is sought may be a most important witness at the trial.—In this case, where the plaintiff sued a street railway company for damages for injuries sustained by the premature starting of a street-car, as she alleged, she had examined the conductor of the car for discovery, and he had given a clear account of it:—*Held*, that she was not entitled to examine, in addition, another servant of the company, who also saw

what happened, but was not in charge of the car nor concerned in its operation. *Lange* v. *Toronto and York Radial R.W. Co.*, 5 O.W.N. 64.—MIDDLETON, J. (Chrs.)

4. Production of Documents—Affidavit on Production — Claim of Privilege for Reports—Identification—Sufficiency—Documents Obtained for Information of Solicitor—"Solely." *St. Clair* v. *Stair*, 5 O.W.N. 269.—APP. DIV.

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5. *Life Insurance—Beneficiary—Wife or Surviving Children—Mention of Wife by Name—Death of Wife—Remarriage of Insured—Rights of Second Wife Surviving Insured—Rights of Surviving Children—Ontario Insurance Act, 2 Geo. V. ch. 33, secs. 178, 181—Trust—Executors.*]—By the terms of a policy of insurance, the insurance money was payable to Bessie K., wife of the assured, for her sole use, if living, in conformity with the statute, and, if not living, to the surviving children of the assured. The policy was issued on the 25th May, 1885. Bessie K. died, and on the 10th June, 1910, the assured directed that the amount secured by the policy should be paid to his executors. On the 1st June, 1904, the assured married again; he died on the 9th February, 1913, leaving his second wife and children surviving:—*Held*, that the executors could not take; and the latter part of clause 4 of sec. 178 of the Ontario Insurance Act, 2 Geo. V. ch. 33, did not aid the executors, as the children were preferred beneficiaries.—And *held*, that the benefit of the policy was for the testator's wife and children, and it made no difference that the wife, if she lived, took absolutely, and, if she was dead, the children took absolutely; it was still a policy for the benefit of the wife and children; and in such cases the Legislature has given to the policy a statutory construction; the wife to be benefited is the wife at the time of death, even though the wife at the time of insurance is mentioned by name. In no other way can effect be given to the awkward words of sec. 181. The money should, therefore, go to the wife. *Re Lloyd and Ancient Order of United Workmen*, 5 O.W.N. 5, 29 O.L.R. 312, followed. *Re Kloepfer*, 5 O.W.N. 133.—MIDDLETON, J.

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8. Life Insurance—Moneys Payable by Benevolent Society to Wife of Assured—Death of Wife before Assured—Rights of Children of Assured—Guardian Appointed by Surrogate Court—Application to be Appointed Trustee to Receive Infants' Shares—Ontario Insurance Act, 2 Geo. V. ch. 33, secs. 171-178—Ontario Insurance Amendment Act, 3 & 4 Geo. V. ch. 35, secs. 10, 12—Effect of—Payment to be to Trustee or into Court—Safety of Money—Saving of Expense—Interests of Infants—Security to be Given by Trustee—Consent of Infants—Notice to Official Guardian. *Re Rennie Infants,* 5 O.W.N. 459, 30 O.L.R. 6.—MEREDITH, C.J.C.P.

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10. Life Insurance—Proof of Death of Assured—Disappearance—Efforts to Trace—Lack of Tidings for Nine Years—Presumption of Death—Action—Application under 2 Geo. V. ch. 33, sec. 165, sub-secs. 5, 6—Costs of Action. *Wright* v. *Ancient Order of United Workmen,* 5 O.W.N. 445.—LATCHFORD, J.

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1. *Alterations in Demised Premises Made by Tenant—Waste—Breach of Covenant—Forfeiture—Absence of Proper Notice—Action—Failure of—Relief against Forfeiture—Terms—Restoration of Premises—Costs.*]—The plaintiffs' testator made a lease of business premises to the defendant, for five years, dated the 15th January, 1913. The lease contained the statutory covenants to repair, reasonable wear and tear and damage by lightning, fire, and tempest only excepted, and that the lessor might enter and view the state of repair, and that the lessee would repair according to notice in writing, reasonable wear and tear, etc., only excepted.—The building being old and in bad repair, the defendant made alterations in it, without leave of the lessor or the

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1. Detention in Asylum for the Insane—Release on Probation —Re-commitment—Habeas Corpus—Application for Discharge—Evidence. *Re Dack*, 5 O.W.N. 774.—MIDDLETON, J. (Chrs.)

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4. Death of Servant—Dangerous Machinery — Negligence — Defect in Condition of Premises—Common Law Liability—Efficient Cause of Injury—Place where Deceased at Work —Negligence of Superintendent—Workman Bound to Conform to Orders and Conforming—Liability under Workmen's Compensation for Injuries Act. *Hicks* v. *Smith's Falls Electric Power Co.*, 5 O.W.N. 301.—App. Div.

5. Death of Servant—Defective Condition of Plant of Brickworks—Negligence—Common Law Liability — Knowledge of Superintendent — Omission of Precaution — Liability under Workmen's Compensation for Injuries Act—Findings of Jury—Damages. *McNally* v. *Halton Brick Co.*, 5 O.W.N. 693.—Kelly, J.

6. Death of Servant—Negligence—Failure of Fellow-servant to Perform Statutory Duty of Master—Contributory negligence—Evidence—Findings of Jury. *Linazuk* v. *Canadian Northern Coal and Ore Dock Co.*, 5 O.W.N. 642.—Britton, J.

7. Death of Servant—Superintendent of Factory—Negligence—Defective System — Evidence — Workmen's Compensation for Injuries Act—Findings of Jury—Nonsuit. *Lang* v. *John Mann Brick Co. Limited*, 5 O.W.N. 765.—Kelly, J.

8. Death of Servant in Mine—Action by Widow for Damages—Negligence—Statutory Duty—Absence of Guard—Breach —Mining Act of Ontario, 1908, sec. 164, sub-secs. 24, 25—Defective Condition of Tool—Contributory Negligence—Finding of Jury—Absence of Evidence to Support—Rejection of Finding by Trial Judge—Equal Division of Appellate Court—Dismissal of Appeal—Costs. *Pressick* v. *Cordova Mines Limited*, 5 O.W.N. 263.—App. Div.

9. Injury to Servant—Action for Negligence—Findings of Jury — Contributory Negligence — Nonsuit. *Phillips* v. *Canada Cement Co.*, 5 O.W.N. 549.—Falconbridge, C.J. K.B.

10. Injury to Servant—Dangerous Machinery—Want of Guard —Negligence—Contributory Negligence—Findings of Jury —Division of Liability—Damages. *Livermore* v. *Gerry*, 5 O.W.N. 782.—Falconbridge, C.J.K.B.

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1. Action to Enforce by Foreclosure — Claim upon Covenant for Payment—Part of Mortgage-moneys not Payable till Majority of Person Interested in Land—Effect as to Remedies of Mortgagee — Parties — Infant. **Willson* v. *Thomson,* 5 O.W.N. 815.—MEREDITH, C.J.C.P.

2. Assignment of, as Collateral Security for Promissory Note of Lesser Amount—Right of Assignor to Redeem—Discharge of Mortgage by Assignee—Validity—Registry Act, 10 Edw. VII. ch. 60, secs. 62, 66a, and Form 10—Judicature Act—Title to Land—Vendor and Purchaser. *Re Bland and Mohun,* 5 O.W.N. 522, 30 O.L.R. 100.—BOYD, C.

3. Contract—Indemnity—Parent and Child—Will—Devise of Mortgaged Land—Exoneration— Surety — Subrogation — Wills Act, R.S.O. 1897 ch. 128, secs. 37, 38—Volunteer—Charge on Land. *Bancroft* v. *Milligan,* 5 O.W.N. 506, 30 O.L.R. 113.—APP. DIV.

4. Exercise of Power of Sale—Notice of Sale—Failure to State Amount Claimed as Due—Advertising before Expiry of Period Named in Notice—Mortgages Act, 10 Edw. VII. ch. 51, secs. 27, 28—Damages—Injunction—Costs. *Tucker* v. *Titus,* 5 O.W.N. 651.—FALCONBRIDGE, C.J.K.B.

5. Foreclosure—Parties to Action—Executors of Deceased Mortgagor—Will—Power to Sell Land—Beneficiaries not Joined—Rule 74—Title to Land—Application under Vendors and Purchasers Act—Validity of Title Derived through Foreclosure. *Re Goldberg and Grossberg,* 5 O.W.N. 885.—BRITTON, J.

6. Foreclosure—Reference—Report of Master—Subsequent Incumbrancers — Priority — Dates of Mortgages — Dates of Registration—Notice — Registry Act, 1910, secs. 70, 71—

"Party"—"Person"—Costs—Stay of Proceedings after Judgment—Payment by Mortgagor of Principal, Interest, and Costs—Tender — Sufficiency — Rule 485. **Heney* v. *Kerr*, 5 O.W.N. 842.—BOYD, C.

7. *Judgment for Redemption or Sale — Reference — Parties—Assignees of Parts of the Equity of Redemption—Subsequent Incumbrancers — Addition of Parties in Master's Office—Rules* 16, 404, 433, 468, 469, 490—*Practice—Substituted Service—Representation of Classes.*]—Mortgagees began an action for sale of the whole of the lands comprised in the mortgage, except three parcels which had been released. There were 33 original debts, but the plaintiffs discontinued against 22:—*Held*, that the action did not become fatally defective upon the discontinuance; for, although all parties interested in the equity of redemption must be parties, they may be made parties either by the original writ or in the Master's office; and, when the equity of redemption is severed, different persons entitled to redeem in respect of different parcels must be made parties.—*Jones* v. *Bank of Upper Canada*, 12 Gr. 429, and *Buckley* v. *Wilson*, 8 Gr. 566, followed.—The proper practice after judgment is for the Master to add as parties in his office all persons interested in the equity of redemption not already parties: Rule 490 (Rules of 1913); *Portman* v. *Paul*, 10 Gr. 458.—In this case, a reference back to the Master was directed, in order that he might add all those interested in the equity of redemption, not already parties, as parties, although they were numerous.—The Master must make a formal order adding parties, and they must be advised: Rule 404 (Rules of 1913).—There should be added, as well, all those having any lien, charge, or incumbrance upon the mortgaged premises or any part thereof subsequent to the plaintiffs' mortgage.—Rule 77 (Rules of 1913), as to representation of classes of defendants, does not apply where the parties have all separate and distinct interests in land, and rights to exoneration and contribution which differ according to their titles and the dates of acquisition thereof. But the Master has power to order substituted service under Rules 16 and 433 (1913). *Home Building and Savings Association* v. *Pringle*, 5 O.W.N. 226.—APP. DIV.

8. Sale of Land Subject to—Equitable Obligation of Vendee to Pay—Conveyance not Executed by Vendee—Agreement

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MOTOR VEHICLES ACT.

2. Injury to Person by Motor Vehicle on Highway—Violation of 2 Geo. V. ch. 48, secs. 6(1), 15—Liability of "Owner" under sec. 19—Purchaser of Vehicle in Possession and Control — Unpaid Vendor Retaining Legal Title or Ownership. *Wynne* v. *Dalby*, 5 O.W.N. 487, 30 O.L.R. 67. —App. Div.

MUNICIPAL CORPORATIONS.

1. Alteration in Grade of Highway—Necessity for By-law—Agreement between Members of Council and Private Individual—Sale of Gravel—Consolidated Municipal Act, 1903, sec. 647—Work of Repair—Duty to Keep in Repair—Unopened Road Allowance—Injury to Land Abutting on Road Allowance by Removal of Gravel—Action against Individual Doing Work—Injunction—Damages. *Taylor* v. *Gage*, 5 O.W.N. 489, 30 O.L.R. 75.—App. Div.

2. *Bonus for Promotion of Manufactures—Municipal Act*, 1903, *sec.* 591 (12) (*e*)—"*Industry already Established elsewhere in the Province*"—*Meaning of* "*Established*"—*Business Carried on for Ten Months in Rented Premises.*]—A by-law of the town of Orillia provided for the raising by the sale of debentures of $25,000 to be lent to a shoe company as a bonus to assist them in establishing a boot and shoe factory at Orillia. A motion was made to quash the by-law, on the ground that it violated sec. 591 (12) (*e*) of the Municipal Act, 1903, because it granted a bonus to an "industry already established" in London. The company asserted that its business was not "established" in London within the meaning of the statute, because, although the business was carried on there, it was carried on in rented premises in a way that indicated that its location in London was of a temporary character, pending completion of the contemplated arrangement for a bonus from that municipality, and that, no arrangement having been made, the company ought to be at liberty to move its business to any municipality ready to grant the desired bonus:—*Held*, that "established" should be read as "carried on," not as "set upon a secured and permanent basis." The intention was to prohibit one municipality from offering a bonus to an industry which was being carried on in another. The by-law was quashed. *Re Black and Town of Orillia*, 5 O.W.N. 67. —Middleton, J.

sec. 463—Right to Repeal By-law—Absence of Authority to Enter before Award—Municipal Act, 1913, sec. 347—Damages by Reason of Passing of By-law. *Guest* v. *City of Hamilton*, 5 O.W.N. 310, 899.—MIDDLETON, J.—APP. DIV.

10. Expropriation of Land—Compensation—Award—Value of Land and Buildings—Stock in Trade—Business Disturbance—Capitalization of Net Annual Revenue with Addition of Potential Value—Business Profits—Personal Element—Contingencies—Compensation for Disturbance Based on Three Years' Profits—Adequacy—Goodwill. **Re Meyers and City of Toronto*, 5 O.W.N. 733.—APP. DIV.

11. *Expropriation of Land—Industrial Farm—Addition to—Land outside City—By-law—Municipal Act*, 1903, *sec.* 576 (3)—*Municipal Act*, 1913, *sec.* 6—"*Acquire*"—*Purchase or Expropriation—Special Act*, 1 *Geo. V. ch.* 119, *sec.* 5—*Bona Fides—Necessity and Desirability of Addition to Farm—Statutory Powers—Non-exhaustion by Original Purchase—Interpretation Act*, 7 *Edw. VII. ch.* 2, *sec.* 7 (33).]—By sec. 576 (3) of the Municipal Act, 1903, the council of a city may pass a by-law "for acquiring any estate in landed property, within or without the city, for an industrial farm." By sec. 6 of the Municipal Act, 1913, the power to acquire includes the power to acquire by purchase or expropriation; the former provision being limited to purchase. By a special Act, 1 Geo. V. ch. 119, sec. 5, the Corporation of the City of Toronto were given power to expropriate lands within a certain radius outside the city, and to establish an industrial farm thereon. Subsequently the city corporation acquired lands for the purpose of an industrial farm, by purchase, sanctioned by resolution of the city council, but not by by-law. On the 10th February, 1913, a by-law was passed, reciting the special Act, but not mentioning the general Act of 1903—the Act of 1913 had not yet been passed—and reciting that lands had been acquired and a farm established, "and that, in the opinion of the council, it had become necessary to acquire additional lands for the purpose of the farm;" then enacting that certain lands were "expropriated and taken for the purpose of an addition to the said farm:"—*Held*, upon the evidence, that the by-law was passed in the *bonâ fide* exercise by the municipality of powers believed to be possessed by it.—The necessity and desirability of the acquisition were questions

entirely for the council, and could not, in the absence of *mala fides*, be reviewed by the Court.—*Held*, also, that the powers conferred by the statute were not exhausted by the original purchase.—*Re Inglis and City of Toronto*, 8 O.L. R. 570, explained and distinguished.—By the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (33), if a power is conferred, it may be exercised from time to time as occasion requires. *Re Boyle and City of Toronto*, 5 O.W.N. 97.—MIDDLETON, J.

12. Expropriation of Works and Property of Gas and Electric Light Company—Municipal Act, 1903, sec. 566, sub-sec. 4 —Street Lighting—Stated Case — Inferences of Fact — Powers of Corporation. *Sarnia Gas and Electric Light Co.* v. *Town of Sarnia*, 5 O.W.N. 532.—RIDDELL, J.

13. *Local Option By-law—Voting on—List of Persons Entitled to Vote—Revision by County Court Judge—Scope of—Last Revised Voters' List—Addition of Names—Municipal Act*, 1913, *secs.* 265, 266, 267.]—Upon a motion to prohibit a County Court Judge from entertaining an application to add certain names to the list of the names of persons entitled to vote upon the submission of a proposed local option by-law:—*Held*, that under the new provisions of the Municipal Act, 1913, the intention is to give finality to the voters' lists, and at the same time to allow the necessary amendments to be made up to the last possible moment, so that an exact list of those entitled to vote may be made before the voting takes place.—The list to be certified is to be based upon the last revised voters' list, omitting persons whose names are entered thereon but are not entitled as appears by such list to vote on the by-law: sec. 266 (2).—Sections 265, 266, and 267 considered.—The Judge was prohibited from including the names of any who did not appear by the last revised voters' list to be entitled.—When the list is being prepared for a local option by-law, and tenants and nominees of corporations have no right to vote, the provisions of sec. 265 have no application. *Re Brampton Local Option By-law*, 5 O.W.N. 644.—MIDDLETON, J. (Chrs.)

14. Local Option By-law—Voting on—Qualifications of Voters—Scrutiny by County Court Judge—Deduction of Votes from Total and from Majority—Premature Final Passing of By-law by Council—Absence of Prejudice—Deputy Returning Officer—Interest—Bias—Ballots Marked for Incapacitated Voters—Neglect to Require Declarations—Municipal Act,

1903, sec. 171—Irregularity Cured by sec. 204—Names Added to Voters' List by County Court Judge—Voters' List Act, secs. 21, 24—Irregularities in Procedure—Certificate of Judge—Finality. *Re North Gower Local Option By-law*, 5 O.W.N. 249.—APP. DIV.

15. Local Option By-law—Action to Restrain Town Council from Submitting to Electors—Interim Injunction—Balance of Convenience—Speedy Trial—Rule 221—Liquor License Act, sec. 143*a*. *Hair* v. *Town of Meaford*, 5 O.W.N. 783.—MIDDLETON, J.

16. Local Option By-law—Action to Restrain Town Council from Submitting to Electors—Liquor License Act, sec. 141, sub-secs. 1, 5, sec. 143*a*—By-law Submitted in Previous Year and Defeated—Judgment Declaring Submission Illegal—Consent Judgment—Compromise — Inconclusive Judgment —Ineffectiveness—Validity of Previous Submission — Absence of Evidence—Necessity for Proof—Rights of Electors —Refusal of Injunction—Constitution of Action—Status of Plaintiff—Costs. **Hair* v. *Town of Meaford*, 5 O.W.N. 868. —HODGINS, J.A.

17. *Pedlars—County By-law Regulating — Peddling without License on Boundary-line between Counties—Magistrate's Conviction—Jurisdiction—Municipal Act*, 1913, *secs.* 433, 436, 439, 446.]—The defendant was convicted by a Justice of the Peace for the county of Huron, for peddling and selling goods in the county of Huron, without a license, contrary to a by-law of that county, passed under the authority of sec. 583, sub-sec. 14, of the Consolidated Municipal Act, 1903. The evidence taken before the Justice shewed that the offence was committed on the boundary-road between the township of Tuckersmith, in the county of Huron, and the township of Hibbart, in the county of Perth:—*Held*, that the boundary-road was not part of the county of Huron; and there was nothing in the Municipal Act, as it stood before the passing of the Act of 1913, nor in that Act (3 & 4 Geo. V. ch. 43), making a boundary-road part of county.—Sections 433, 436, 439, and 446, considered.—And, therefore, the magistrate had no jurisdiction; and the conviction must be quashed. *Rex* v. *Hamilton*, 5 O.W.N. 58, 265.—KELLY, J. (Chrs.).—APP. DIV.

18. Regulation of Buildings—"Garages to be used for Hire or Gain"—Garage to be Used by Tenants of Apartment House

MURDER.

NAVIGABLE WATERS.

NEGLIGENCE.

2. Death by Drowning of Seaman Employed on Ship—Action for Damages Arising from—Falling Overboard Caused by Deceased's Own Negligence—Legal Duty of Employers as to Rescue—Evidence — Contract of Hiring — Master and Servant. **Vanvalkenburg* v. *Northern Navigation Co.*, 5 O.W.N. 564.—APP. DIV.

3. Death of Workman on Building—Action by Widow under Fatal Accidents Act—Negligence of Servant of Contractor —Defective Plank—Absence of Knowledge of Intention of Deceased to Use Plank—Absence of Contractual Relations —Licensee—Findings of Jury—Evidence. *Bilton* v. *Mackenzie*, 5 O.W.N. 818.—BRITTON, J.

4. Destruction of Fishing-nets in Waters of Stream by Tug and Boom of Logs—Side Channel—Lawful Setting of Nets—Fisheries Act, R.S.C. 1906 ch. 45, sec. 47, sub-secs. 2 and 4—Duty to Use Care where Nets Unlawfully Set—Acts Amounting to Negligence—Findings of Jury—Absence of Finding that Negligence Found was Cause of Destruction—Finding by Appellate Court—Judicature Act, 1913, sec. 27, sub-sec. 2. **Smith* v. *Northern Construction Co.*, 5 O. W.N. 789.—APP. DIV.

5. Excavation in Public Lane—Absence of Guard—Loss of Horse Falling into Hole—Findings of Jury—Use of Lane for Unhitching Horse—Reasonable Use—Excavation Made by Independent Contractor—Danger to Persons Using Lane —Liability of Person for whom Work Done—Contributory Negligence—Relief over against Contractor—Maintenance of Barricade—Contract—Time—Oral Evidence — Admissibility—Questions Submitted to Jury. *McLean* v. *Crown Tailoring Co.*, 5 O.W.N. 217, 29 O.L.R. 455.—APP. DIV.

6. Highway—Construction of Sidewalk — Use of "Mixer"—Frightening Horse—Loss of Horse—Liability of Municipal Corporation—Object Likely to Cause Danger—Knowledge of Corporation—Independent Contractor. *McIntosh* v. *County of Simcoe and Township of Sunnidale*, 5 O.W. N. 793.—APP. DIV.

7. Injury to Person Working on Highway—Negligence of Driver of Vehicle Owned by Defendant—Evidence—Finding of Trial Judge—Appeal. *Kettle* v. *Dempster*, 5 O.W. N. 149.—APP. DIV.

NUISANCE.

1. Blasting in Quarry—Reckless Use of Explosives—Limited Injunction—Acts of Servants — Leave to Apply — Costs. *Township of Etobicoke* v. *Ontario Brick Paving Co.*, 5 O. W.N. 356.—MIDDLETON, J.

2. Floatable and Navigable Stream—Lumbering Operations—Riparian Owner—Injury to Lands—Chain Reserve—High Water Mark—Access to Water—Saw Logs Driving Act, R.S.O. 1897 ch. 143—Unreasonable Obstruction to Stream—Statutory Rights of Timber Licensees—Status of Plaintiff—Special Damage—Encroachment on Plaintiff's Land—Extent of—Damages—Injunction — Removal of Logs — Counterclaim—Damages by Reason of Interim Injunction. **Ireson* v. *Holt Timber Co.*, 5 O.W.N. 577.—APP. DIV.

3. Obstruction of Lane—Injunction—Stay of Operation to Enable Defendants to Abate Nuisance — Damages — Costs. *Fitzgerald* v. *Chapman*, 5 O.W.N. 888.—KELLY, J.

4. *Vapour and Dust from Smelter—Special Injury to Plaintiff—Loss of Animal—Damages—Costs—Injury to Public Generally—Attorney-General — Injunction — Evidence.*]—A public nuisance is distinguished from a private nuisance only in this, that the latter is an injury to the property of an individual, while a public nuisance is an injury to the property of all persons who come within the sphere of its operation; though it may be injurious to a greater or lesser degree as to different people within the area affected.—*Soltau* v. *De Held*, 2 Sim. N.S. 133, 142, followed.—And *held*, in this case, that the operation of the defendants' smelter for silver ore in the town of Orillia, causing the emission of smoking vapour or fumes, was liable to affect, more or less prejudicially, all persons living or owning property in the neighbourhood.—It was a case of alleged public nuisance, in regard to which the plaintiff took individual action, on the ground of particular damage; and he must prove some grievance of his own other and beyond that suffered by the general community in the vicinity.—Having regard to the constitution of the action and to the failure of the plaintiff to prove any special damage except the loss of a cow, and having regard to the evidence of the defendants that no appreciable damage could or would result from the operation of the smelter, as recently equipped

gulations of Railway Company. *Pierce* v. *Grand Trunk R.W. Co.*, 5 O.W.N. 962.—MIDDLETON, J. (Chrs.)

2. Statement of Claim—Action under Fatal Accidents Act—Death of Plaintiffs' Son in Railway Accident—Negligence—Cause of Accident—Res Ipsa Loquitur—Oppressive Order for Particulars—Pleading — Damages. *Mulvenna* v. *Canadian Pacific R.W. Co.*, 5 O.W.N. 779.—MIDDLETON, J. (Chrs.)

3. Statement of Claim—Alimony—Accusations against Husband — Discovery — Costs. *Love* v. *Love*, 5 O.W.N. 345.—HOLMESTED, SENIOR REGISTRAR (Chrs.)

4. Statement of Claim—Contract—Damages—Practice—Information Obtainable by Discovery—True Function of Particulars—Supplementary to Pleadings. *Owen Sound Lumber Co.* v. *Seaman Kent Co.*, 5 O.W.N. 55, 93.—HOLMESTED, SENIOR REGISTRAR.—MIDDLETON, J. (Chrs.)

5. Statement of Claim—Damages—Breaches of Contract. *Columbia Graphophone Co.* v. *Real Estates Corporation Limited*, 5 O.W.N. 53.—HOLMESTED, SENIOR REGISTRAR (Chrs.)

6. Statement of Claim—Former Order not Complied with—Inability to Furnish Particulars—True Function of Particulars—Leave to Apply after Discovery. *Mexican Northern Power Co.* v. *S. Pearson & Son Limited*, 5 O.W.N. 552, 648.—HOLMESTED, SENIOR REGISTRAR.—MIDDLETON, J. (Chrs.)

7. Statement of Claim—Libel—Immaterial Allegation. *McVeity* v. *Ottawa Citizen Co.*, 5 O.W.N. 237, 288.—HOLMESTED, SENIOR REGISTRAR—LATCHFORD, J. (Chrs.)

8. Statement of Claim—Paragraphs of, Ordered to be Struck out in Default of Particulars—Breach of Trust—Order Set aside—Leave to Apply after Discovery—Examinations—Costs. *Dixon* v. *Trusts and Guarantee Co.*, 5 O.W.N. 645.—MIDDLETON, J. (Chrs.)

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1. Joinder of City Corporation as Defendant—Liability for Acts of Police Constable—Pleading. *McAvoy* v. *Rannie*, 5 O.W.N. 688.—MIDDLETON, J. (Chrs.)

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Failure to Establish—Evidence—Easement—Injunction—Damages. *Home Bank of Canada* v. *Might Directories Limited*, 5 O.W.N. 690.—FALCONBRIDGE, C.J.K.B.

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Assignment — Validity — Execution Act, 9 Edw. VII. ch. 47, sec. 16 (O.)—Intra Vires—Property and Civil Rights. *Felt Gas Compressing Co.* v. *Felt*, 5 O.W.N. 821.—FALCONBRIDGE, C.J.K.B.

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See Municipal Corporations, 17.

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See Contract, 13—Liquor License Act, 4.

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See Banks and Banking, 3—Fatal Accidents Act, 1.

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1. Reply—Setting up Facts Alleged in Statement of Claim and Struck out as Irrelevant at that Stage—Relevancy in Reply to Allegations of Defence—Substance of Reply well Pleaded —Superfluous Language. *Snider* v. *Snider*, 5 O.W.N. 956. —BRITTON, J. (Chrs.)

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3 Edw. VII. ch. 19, sec. 556, sub-sec. 4 (O.)—See MUNICIPAL CORPORATIONS, 12.

3 Edw. VII. ch. 19, sec. 576 (3) (O.)—See MUNICIPAL CORPORATIONS, 11.

3 Edw. VII. ch. 19, sec. 591 (12) (*e*) (O.)—See MUNICIPAL CORPORATIONS, 2.

3 Edw. VII. ch. 19, sec. 606 (O.)—See HIGHWAY, 3.

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4 Edw. VII. ch. 10, sec. 68 (O.) (Amending Toll Roads Expropriation Act)—See HIGHWAY, 11.

4 Edw. VII. ch. 23, secs. 2(7), 5, 43(1), 58, 65 (O.)—See ASSESSMENT AND TAXES, 8.

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