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COURT OF APPEAL.

MAY 15TH, 1912.

*PATTISON v. CANADIAN PACIFIC R.W. CO.

Railway—Crossing of one Railway by another—Leave of Board of Railway Commissioners—Terms of Order—Interlocking Plant—Signalman—Hiring by one Company and Payment Indirectly by the other—Negligence—Injury to and Death of Servant of one Company—Liability of Employing Company—Action against both Companies—Reversal of Judgment at Trial—Leave to Plaintiff to Appeal against Company Held not Liable by Trial Judge.

Appeal by the defendant the Canadian Pacific Railway Company from the judgment of BOYD, C., 24 O.L.R. 482, ante 45.

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

I. F. Hellmuth, K.C., and Angus MacMurchy, K.C., for the appellant.

Wallace Nesbitt, K.C., and Christopher C. Robinson, for the defendant the Canadian Northern Railway Company.

C. A. Moss, for the plaintiff.

MOSS, C.J.O.:—This appeal, though nominally and in form an appeal against the plaintiff, is in substance and reality an appeal against the defendant the Canadian Northern Railway Company. At the trial, and again on the argument of the appeal, it was admitted that the unfortunate accident which caused the death of the plaintiff's husband was due to the gross negligence of one Frank Leland, who was operating the points and signals in connection with the interlocking plant at Ward's crossing.

*To be reported in the Ontario Law Reports.

The amount of damages to be paid by the company ultimately held liable was agreed upon and fixed at $4,250.

The only question tried and debated was, which one of the defendants was answerable for the consequences of Leland's negligent act.

The solution of that question is to be found by ascertaining from the facts established in evidence whose servant Leland was in fact and law when he committed the negligent act. And, as has been many times observed, the answer depends upon the facts and the proper inferences to be drawn from them.

The recent case in the House of Lords of McCartan v. Belfast Harbour Commissioners, reported in 44 Irish Law Times 223, was one in which action was brought for personal injuries to the plaintiff, while engaged in helping to unload a ship. A crane, the property of the defendants, was hired to the master of the ship for unloading purposes. The crane was in charge of and worked by a servant employed by the defendants. The plaintiff was working under employment by the master of the ship, and was injured through the negligence of the craneman. There was judgment for the plaintiff, and ultimately an appeal to the House of Lords. It was contended for the defendants that quoad the work on which he was engaged at the time of the accident the craneman was the servant of the master of the ship, and not the defendants' servant. The Lord Chancellor said: "I regard this case as one purely of fact, in which no point of law is in dispute. The question on which the decision hinges is this—was the man whose negligence caused the accident, acting as servant of the defendants in doing what led to the mishap or as servant of the master of the vessel which was being unloaded?" And Lord Dunedin said (p. 226): "There is no principal involved in . . . this case except the principle which I have already mentioned, which is compendiously described by the brocard respondeat superior, and as to which no one entertains any doubt. The application of that particular principle depends upon facts and is a question of fact . . ."

The present case having been tried without a jury, and there being no substantial difference as to the facts, we are free of the difficulties which sometimes arise in dealing with findings upon disputed facts. It only remains to endeavour to make the proper application of the facts and the inferences to be drawn from them, in order to ascertain which of the two companies is liable.

The learned Chancellor has held the defendant the Canadian Pacific Railway Company liable, basing his conclusion,

as I read his opinion, upon three grounds: (a) that, Leland being the common signalman, the proper legal outcome as to liability in case of negligence is, that he was to be regarded as the person employed by the company for which he was adjusting the points and giving the signals; (b) if the order of the Board of Railway Commissioners, coupled with its directions, be regarded as a quasi contract or in the nature of a contract between the companies, the rules of common law would place liability on the company which was making use on its own line of the common servant for the sole prosecution of its sole work at the crossing; (c) or if, rejecting the theory of joint service and regarding Leland, appointed and paid in the manner in which he was, as the servant or agent sui generis of both companies, then fairness and good sense would support the proposition that the company for whom he was alone acting on the particular occasion was the principal against whom relief should be sought in case of misconduct on Leland's part occasioning injury to an employee of the last-mentioned company.

But, however, strongly these propositions may appear to be consistent with what should be fair as between the two companies, I am, with deference, unable to think that they can be considered as decisive of the question in issue here. In order to give effect to them, it must be first found that Leland was the common servant of the companies. He was, it is true, the common signalman, in the sense that he was the only one in charge; but it by no means follows that he was the servant of both companies. It must depend upon the circumstances of his engagement, the nature of the duties he owed to the respective companies, and the extent of the control over his conduct and actions vested in each of them.

The occasion for the employment of a person performing the duties which Leland was engaged in arose out of the application of the Canadian Pacific Railway Company to the Board of Railway Commissioners for leave to cross the track of the Canadian Northern Railway Company's spur line to their gravel pit at the point in question. The Board granted the leave, but directed that the Canadian Pacific Railway Company should, at his own expense, under the supervision of an engineer of the Canadian Northern Railway Company, insert a diamond in the track of the latter company at the point of crossing, and that the crossing be protected by an interlocking plant, derails to be placed on the line of both companies on both sides of the crossing, the derails to be interlocked with home and distant signals. Then followed directions bearing

directly on the question here, viz.: (4) that, during such period of the year as the line of the Canadian Northern Railway Company is not being operated, the signals and derails be set and placed so as to permit the crossing to be safely made by trains of the Canadian Pacific Railway Company without stopping, and that during such period it shall not be necessary to have a man in charge of such crossing; (5) that the Canadian Northern Railway Company be entitled to place a man in charge of such crossing whenever the said line is to be operated by that company, upon giving to the Canadian Pacific Railway Company at least 48 hours' previous notice in writing of its intention so to do.

Thus far it will be seen that, so long as the Canadian Northern Railway Company is not operating its line, no necessity for having a man in charge of the crossing exists, and it is only when the Canadian Northern Railway Company desires to operate its line that a man is to be placed in charge. Until the arrival of that time the Canadian Pacific Railway Company was free to use its line for all proper and legal purposes without any hindrance at the crossing. The next material directions are: (7) that the man in charge of the interlocking plant be appointed by the Canadian Northern Railway Company; and (8) that the Canadian Pacific Railway Company bear and pay the whole cost of providing, maintaining, and operating the interlocking plant, including the cost of keeping a man in charge of the crossing. With these should be read the stipulations of clause (6), that, in the movement of trains of the same or of a superior class over the crossing, the trains of the Canadian Northern Railway Company have priority.

So that, when the occasion for placing a man in charge arises, his appointment is to be made by the Canadian Northern Railway Company, and he is to be paid in the first instance by it. The Canadian Pacific Railway Company is to indemnify the Canadian Northern Railway Company for the cost of keeping him in charge, but otherwise there is nothing expressed, which would give the Canadian Pacific Railway Company any control over or power of interference with him in the performance of his duties. Complete control of the interlocking plant and of the man in charge is left to the Canadian Northern Railway Company, and in the movement of trains its are to have priority. The evidence shews that the two companies so interpreted the effect of the order. The men in charge were invariably appointed by the Canadian Northern Railway Company, without any previous communication with the Canadian Pacific

Railway Company, and it nowhere appears that it ever interfered with the man in the performance of his duties. It was, of course, open to the Canadian Pacific Railway Company to complain to the Canadian Northern Railway Company in case of neglect or failure of the man to attend to his duties, but it had no power to dismiss or even suspend him. It was, of course, part of his duty to pay attention to the signals from trains of the Canadian Pacific Railway Company approaching the crossing and to set and place the signals and derails so as to permit the crossing to be safely made as soon as the traffic on the Canadian Northern Railway Company's line permitted. But such acts as these cannot be so classed as to convert them into orders or directions given to him as a servant of the Canadian Pacific Railway Company. As the case appears to me, it is the simple case of a man employed and paid by the Canadian Northern Railway Company, subject only to its orders and subject only to dismissal by it, acting on its behalf as the company having sole control of the interlocking plant, but under obligation to permit the crossing to be safely made by the Canadian Pacific Railway Company's trains, but in subordination to the Canadian Northern Railway Company's trains.

And, in my opinion, no question of joint or common employment or agency arises. Leland was, at the time, engaged in permitting a Canadian Pacific Railway Company's train to make the crossing in response to its signal, and his negligent act was in displacing the points after he had permitted the train to proceed.

I think that negligent act was committed by Leland as the servant of the Canadian Northern Railway Company, and that it should be held liable for the damages.

This conclusion gives rise to another question, which was raised and partially discussed upon the argument of the appeal. The plaintiff has not appealed against the Canadian Northern Railway Company, nor asked that, if the judgment against the Canadian Pacific Railway Company be set aside, judgment for the damages should be entered against the Canadian Northern Railway Company. Upon the argument of the appeal, counsel for the plaintiff asked to be allowed to appeal so as to obtain judgment against the Canadian Northern Railway Company.

The case seems a proper one for giving this relief, and it should be granted. But the Canadian Northern Railway Company may be advised that, in order to render unnecessary any further argument, it would be proper to submit to judgment in the same way as if an appeal had been brought by the plaintiff in the first instance.

In that case, judgment may go setting aside the judgment against the Canadian Pacific Railway Company, and directing judgment to be entered against the Canadian Northern Railway Company, with costs throughout to the plaintiff and the Canadian Pacific Railway Company.

If, however, it is deemed necessary by any of the parties, the matter may be mentioned again.

MACLAREN, J.A., concurred.

MEREDITH and MAGEE, JJ.A., also concurred in the result, for reasons stated by each in writing.

GARROW, J.A., dissented, for reasons stated in writing.

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

MAY 15TH, 1912.

DANIEL v. BIRKBECK LOAN CO.

Trial—Action to Recover Moneys Paid on Shares of Company—Winding-up of Company—Leave to Bring Action—Proof of Order—Alleged Assignment of Shares—Absence of Proof—Points not Raised in Pleadings—Mistrial—New Trial.

Appeal by the plaintiff from the judgment of LATCHFORD, J., at the trial, without a jury, at London, dismissing the action, which was brought to recover moneys alleged to have been paid by the plaintiff to the defendants on shares of the defendants' capital stock.

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

The plaintiff appeared in person.

No one appeared for the defendants.

MOSS, C.J.O.:—No evidence was adduced, and no investigation of the merits, if any, of the plaintiff's claim was entered upon, but effect was given to a preliminary objection made by the defendants that the plaintiff had made assignments or an assignment of the shares on which the action was brought.

The defence was not set up in the pleadings, and apparently the learned Judge's attention was not directed to that fact, as doubtless it would have been if the plaintiff had been represented by counsel, and had not undertaken the conduct of her own cause.

The statement of claim, though discursive and not conforming to the ordinary rules of pleading, seems to disclose a case which, if established in evidence, would entitle the plaintiff to some measure of relief; but whether any, and if so to what extent, relief should be granted, can only be determined after the testimony on both sides has been adduced.

The defendants, besides disputing the plaintiff's claims and putting her to strict proof, set up that an order was made in liquidation proceedings pending against the defendants the Birkbeck Loan Company that no action should be commenced against the company or their liquidators, the defendants the London and Western Trust Company, without the permission of the Court, and that no consent had been given to the bringing of this action.

At the opening of the proceedings at the trial, the defendants' counsel raised the objection that no consent had been obtained. This was contested by the plaintiff, who stated that, if time was given, she could produce the order granting permission to bring the action; and, after some discussion, the learned Judge was prepared to grant an adjournment to enable that to be done. The defendants' counsel then raised the objection as to the assignments, and considerable discussion ensued, and it is said that, in the course of it, the plaintiff admitted the fact of an assignment. But this is scarcely correct. She stated that a paper had been executed to her brother, but never delivered, and that any other assignment was not absolute, but merely as security. In truth, there was no proof, by admission or otherwise, of the execution of any assignment.

So far as appeared also, any assignment was subsequent in date to the commencement of the action.

In any case, the utmost effect that should have been given to the assignments, supposing them to have been proved, would have been to direct the case to stand over to enable the plaintiff to procure the consent of the assignees to become co-plaintiffs, or, failing their consent, to make them defendants.

The plaintiff was placed at a disadvantage in meeting this objection, which, as already stated, was not set up in pleading; and, no doubt, if that fact had been pointed out to the learned Judge, he would not have given effect to the objection

without first giving the plaintiff an opportunity of meeting it in any manner which she might be advised was proper.

As it was, a mistake was made, for which, no doubt, the plaintiff was to some extent responsible, but the defendants were not wholly blameless. The result was, that the case was summarily disposed of without trial.

In view of all the circumstances, the judgment should not stand. But all that can be done is to direct a new trial. This will not stand in the way of the plaintiff taking such steps as she may be advised to make the record complete by the addition of proper parties in case it appears that any such proceeding is necessary.

There should be no costs of the appeal, but the costs of the former trial should be costs in the action.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

MEREDITH, J.A., agreed that there should be a new trial, giving reasons in writing.

Order for a new trial.

MAY 15TH, 1912.

GOODCHILD v. SANDWICH WINDSOR AND AMHERSTBURG R.W. CO.

Street Railways — Injury to Person Driving across Track — Negligence—Evidence—Findings of Jury—Appeal.

Appeal by the defendants from an order of a Divisional Court affirming a judgment entered at the trial by BOYD, C., in favour of the plaintiff, upon the answers of a jury to the questions submitted to them, in an action to recover damages for personal injuries to the plaintiff and the death of one horse and injuries to another and to the plaintiff's waggon, occasioned by the negligence of the defendants' servants in the operation of one of their street-cars.

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

D. L. McCarthy, K.C., and W. G. Bartlett, for the defendants.

J. H. Rodd, for the plaintiff.

MOSS, C.J.O.:—The plaintiff, while driving south on McDougall street, in the city of Windsor, and crossing the track of

the defendants' railway upon Wyandotte street, at the intersection of the two streets, was struck by a car proceeding east, with the result above stated.

The jury found that the injuries were caused by the defendants' negligence; that the negligence was in the motorman not having his car under control; that the plaintiff took reasonable care in approaching and endeavouring to cross the track; that the plaintiff took reasonable care to save himself from injury; that the motorman had time to avoid the collision after he became aware that the plaintiff intended to cross the track; that the plaintiff had not time to turn away from the track or to stop the team after he had an opportunity of seeing the coming car; and that the defendants were to blame for the accident; and they assessed the damages at $1,910. No complaint is made as to the amount of damages.

If the evidence warrants these findings, the judgment should stand, beyond question.

The case was submitted to the jury in a charge to which no exception was taken, directing the jury's attention specially, in a manner quite favourable to the defendants, to the plaintiff's conduct, as detailed in the testimony, in approaching the crossing and in looking out for cars coming either way upon the track and as to the duties and responsibility of the motorman in nearing a crossing.

There was a conflict of evidence as to whether the gong was sounded, but the jury have not found against the defendants in that respect.

There was also a conflict of testimony as to the speed at which the car was going when nearing the crossing. The motorman and conductor swore that it did not exceed 7 or 8 miles an hour, while others placed the speed at a much higher rate; one witness, Sloake, who said he had been a street-car man at one time, placing it as high as 20 miles an hour. The jury's finding that the motorman had not his car under control implies that they were of the opinion that the speed was greater than was proper when approaching a crossing.

The motorman admitted that the crossing is a dangerous one, "one of the worst" on the whole route. His answers on this point are as follows:—

"Q. This is a dangerous crossing? A. Yes.

"Q. And you know that you have to take extra precaution at this point? A. Yes.

"Q. Perhaps the most dangerous crossing on your whole route, is it not? A. It is one of the worst.

"Q. One of the most dangerous? A. Yes, that is, on that side—when you are going east.

"Q. And it is pretty dangerous when you are coming west? A. Yes—it is worst when you are going east.

Q. Because the other building is a little further back? A. Yes."

The building referred to is a barber's shop on the north-west corner of McDougall and Wyandotte streets, which obscures the view of any one going south on McDougall street, and prevents him seeing a car approaching from the west on Wyandotte street. In this instance the car was coming from the west, going east. The motorman, therefore, should have recognised what he well understood—the necessity of proceeding with great caution.

The plaintiff was seated in a waggon, with a long reach, and would not be able to get a clear view along Wyandotte street to the west until his body had cleared the barber's shop. There are obstructions to the vision in the shape of a telephone pole and some trees.

He said he looked to the west just as he was coming to the front of the barber's shop, but could not see very far, and he neither saw a car nor heard a gong. He then looked to the east, where he had a clear view, and, seeing nothing, drove on. When the horses were on the north rail of the track, he saw the car, and, before he could do anything, they were struck.

The motorman said that he saw the plaintiff when the car was about 70 or 80 feet from the centre of the crossing, and he thought that the plaintiff did not realise what was going on. The motorman did not then prepare to stop the car, but contented himself with taking up some of the slack of the brake, and it was not until he was within 10 feet of the horses that he reversed, too late to avert the collision.

There was a conflict as to the distance the plaintiff and his waggon were carried after the collision. The jury evidently credited the witnesses who swore that the car went across McDougall street and some distance beyond before it came to a stop, thus shewing that the speed must have been much greater than the motorman and the conductor put it at.

If the motorman had had the car under control, there is very little reason to doubt that, when he saw the plaintiff and became aware that he did not realise the situation, he could have stopped in time to avert the collision.

The jury might well have thought that the plaintiff should have exercised more caution when approaching this dangerous crossing; but there is evidence upon which they could reason-

ably find as they did, and it was for them to say. But, even if they had taken an adverse view to the plaintiff upon that question, they could well find as they did that the motorman had sufficient time to avoid the collision after he became aware of the plaintiff's intention to cross, and that he did not appear to realise the situation.

The appeal must be dismissed with costs.

The other members of the Court agreed; MEREDITH, J.A., giving reasons in writing.

MAY 15TH, 1912.

JACOB v. TORONTO R.W. CO.

Street Railways—Injury to Passenger Alighting from Car—Negligence—Evidence—Findings of Jury—Appeal.

Appeal by the defendants from the judgment of SUTHERLAND, J., upon the findings of a jury, in favour of the plaintiff, in an action for damages for injuries sustained in alighting from a car of the defendants. The plaintiff alleged and the jury found negligence of the defendants in starting the car with a jerk when he was in the act of alighting or about to alight. He was thrown under the car, and his foot was so crushed that it was necessary to amputate it. The jury awarded the plaintiff $2,000 damages.

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

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

J. E. Jones, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, J.A.:—This case was, I think, one for the jury: and whether they have well or ill done their duty in it is not for this Court to determine, there being evidence adduced in it upon which reasonable men might find as they have found.

The weight of the testimony favours the defendants' contention that the plaintiff did not attempt to get off the car until it was running at considerable speed, after leaving the place where his companions got off without injury.

But the plaintiff very positively testified that such was not the case; that the car was started again with a jerk just as he

was in the act of getting off; and there is other evidence that the car was started with a jerk before time had been given for passengers to alight.

Again, it seems to have been well proved that the plaintiff and one of his companions started at the same time with the purpose of alighting from the rear platform, but were directed by the conductor to go to the front platform and alight there, and that they thereupon proceeded to obey that direction, his companion alighting in that way before the car was put in motion. No reason is given, or reasonable suggestion made, which would account for the very considerable delay of the plaintiff in following his companion, if the defendants' contention be true that the plaintiff did not attempt to get off until after the car had started again and had gone some distance and acquired such speed that it would be very dangerous to attempt to alight from it then: the strong probability is, that he closely followed his companion; and, if so, his story of the occurrence is quite probable. All the incontrovertible circumstances are in accord with the plaintiff's story, though it may be that they are not inconsistent with the defendants' contention.

The testimony that some person pushed his way to the front of the car, as if with the intention of alighting, after the car was put in motion, is very strong; but there is, of course, the possibility—however slight or otherwise—that this person was not the plaintiff; possibly some one getting to the front of a crowded car so as to be able to alight quickly at the next stopping place; a possibility gaining weight from the fact that not one person, but two—the plaintiff and his companion—went to the front together, the companion alighting before the car was put in motion; and no attempt was made to identify this pushing person as the plaintiff.

I am unable to say that the verdict can in any way be disturbed here.

Appeal dismissed with costs.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. MAY 10TH, 1912.

*RE REX v. HAMLINK.

Prohibition—County Court Judge—Jurisdiction—Appeals from Convictions—Extension of Time for Hearing and Decision of Appeals—Costs—Taxation by Clerk of County Court—R.S.C. 1906 *ch.* 85, *sec.* 121—*Sessions Practice.*

*To be reported in the Ontario Law Reports.

Appeal by the defendant from the order of SUTHERLAND, J., 2 O.W.N. 186, dismissing the defendant's motion for an order prohibiting the Judge and clerk of the County Court of the County of Huron, and one Baker, the informant, from taking further proceedings upon certain orders made by the County Court Judge dismissing the defendant's appeals from three convictions made against him on the 11th January, 1910, by the Police Magistrate for the Town of Goderich, under the Act respecting Inspection and Sale of certain Staple Commodities, R.S.C. 1906 ch. 85, sec. 321, whereby the applicant was found guilty in each case of a violation of the Act, and sentenced to pay a fine and costs. The motion for prohibition was based upon the grounds that the County Court Judge was functus officio when he gave his decision; and that it was the duty of the Judge himself to fix the costs when disposing of the appeals, instead of delegating the taxation and allowance to the clerk, as he did.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

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

M. G. Cameron, K.C., for the informant.

RIDDELL, J. (after stating the facts):—The motion came before my brother Sutherland, who . . . made the following order:—

"1. It is ordered that this motion be enlarged for ten days, during which time the Judge of the County Court may be applied to, if the respondent desires, to amend the orders in question by himself fixing the amount of costs which he thinks should be allowed.

"2. It is further ordered that, if said course is taken, this motion be dismissed without costs, unless either party desires to speak to the question of costs, in which case they may have liberty to do so."

Apparently the County Court Judge was applied to, although with what result, or even that he was applied to at all, we are not informed. . .

While, at least in some cases, the appeal to the Sessions from convictions by persons having jurisdiction similar to that of Justices of the Peace, goes back to the time of the Restoration, 12 Car. II. ch. 2, and from convictions by Justices of the Peace to 22 Car. II., no power was given to award costs until 1697. The statute 8 & 9 Wm. III. ch. 30, by sec. 3, allows and directs the Justices in the Sessions, "at the same Quarter Sessions" to

"award and order the party . . . such costs and charges in the law as by the said Justices in their discretion shall be thought most reasonable and just. . . ." As this applied only to certain named appeals, a new provision was ultimately made in 1849, by 12 & 13 Vict. ch. 45, sec. 5 (Imp.), "that, upon any appeal to any Court of General or Quarter Sessions of the Peace, the Court before whom the same is brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such Court appear just and reasonable . . ." It was under this statute that most of the English cases were decided, and they laid down: (1) that the same Court which decided the case should fix the costs; as Lord Halsbury says in Midland R.W. Co. v. Guardians of Edmonton Union, [1895] 1 Q.B. 357, at p. 362, "The Legislature knew very well that whatever may be the identity of the Court as an abstraction, it occasionally consists of different persons, and they" (i.e., the Legislature) "have accordingly provided that the power to order costs shall be exercised by the Court before which the appeal is tried;" and (2) the Court must fix the costs, and not delegate this judicial duty to a clerk.

As is shewn in Re Bothwell v. Burnside, 31 O.R. 695, at p. 702, it soon became the practice for the clerk to tax the costs, and for the Court to adopt the amount taxed by him, and include it in their order, but this had to be done during the same Sessions. It then became the practice for parties to consent to the taxation out of Sessions and the insertion then in the order; in case of such consent, the Court would not permit the fact that the taxation was out of Sessions to be taken advantage of, and the slightest evidence of such consent was considered enough, since the practice was so very common. I do not follow out the Imperial legislation: the practice is substantially founded on Barrie's Act, 12 & 13 Vict. ch. 45, already referred to: and the curious may find all the legislation mentioned in Paley on Summary Convictions and Scholefield & Hill's Appeals from Justices.

In Upper Canada, the first Act of any significance is (1850) 13 & 14 Vict. ch. 54, which, by sec. 1, gave an appeal to the "next Court of General Quarter Sessions of the Peace . . . and the Court *at such Sessions* shall hear and determine the matter of such appeal and shall make such order therein with or without costs to either party as to the Court shall seem meet . . :" the appeal was tried by a jury: sec. 2. A change was made in 1859, at the consolidation, but merely verbal—the appeal is to the "first Quarter Sessions of the Peace"—the rest is

as before: C.S.U.C. 1859 ch. 114, sec. 1: the trial still is by jury if either party desires. It was under this legislation, i.e., where the Court must proceed "at such Sessions," that some of our cases were decided: In re McCumber and Doyle, 26 U.C.R. 516; Regina v. Murray, 27 U.C.R. 134. Then came the Act to assimilate the practice of the Provinces of Canada (1869), 32 & 33 Vict. ch. 31 (D.)—this, by sec. 65, provided for an appeal to the "next Court of General or Quarter Sessions," and provided that "the said Court shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the Court seems meet . . ." The trial continues to be by jury if either party so desires: sec. 66. In re Rush and Corporation of Bobcaygeon, 44 U.C.R. 199, was decided under this statute by Cameron, J. . . .

Then came, after certain legislation, the Code of 1892, 55 & 56 Vict. ch. 29, consolidating 51 Vict. ch. 45, sec. 8, and 53 Vict. ch. 37, sec. 24. This provides for an appeal, in sec. 880, in practically the same words as are found in the present Code, secs. 750, 751.

It was under the Code of 1892 that Re Bothwell v. Burnside, 31 O.R. 695, came on for decision. . . .

It will be seen that the decision of Mr. Justice Rose in Regina v. McIntosh, 28 O.R. 603, is upon the same statute. . .

Giving these decisions their full force, and assuming that they apply to the present, what is the result?

The appeal is to the County Court under sec. 335 of R.S.C. ch. 85. This section provides: "2. The trial of any such appeal shall be heard, had, adjudicated upon, and decided, without the intervention of a jury, at such time and place as the Court or Judge hearing the trial appoints, and within 30 days from the date of the conviction, unless the said Court or Judge extends the time for hearing and decision beyond such thirty days."

The perfectly general "time" for trial is not limited at all, if the Judge does extend the time beyond "such 30 days."

Even supposing the very stringent rule laid down in Power v. Griffin, 33 S.C.R. 39, to apply, and the power to extend exercisable only once: and supposing that the large powers given in the Code, sec. 751(3), cannot be exercised by the Judge here, I am of opinion that the order extending the time to 10 days after the 7th February, that is, to the 17th February, more than thirty days after the conviction, made the time wholly at large and wholly in the discretion of the Judge. The extension of the time for hearing the appeal necessary was an extension of the time

for decision as well—and consequently his order of the 7th February was an order "extending the time for hearing and decision," under sec. 755(2).

He could sit at any time to hear, adjudicate upon, and decide anything and everything the law called upon him to hear, adjudicate upon, and decide.

That he had the right to have the clerk tax the costs for his own information is undoubted. If the clerk taxed when the Court was not sitting, this was at most an irregularity (if even that). The Court could sit again, if necessary, and have the form of taxation gone through and insert the amount in the order. The Court is not functus officio until everything is done which should be done—as there is no time-limit or limit to any particular sittings. The very most that can be said is, that the Judge has not stamped with his approval the amount, and caused that amount to be inserted in the order.

Prohibition is not ex debite justitiae—it is an extreme measure: In re Birch, 15 C.B. 743; Re Cummings and County of Carleton, 25 O.R. 607, 26 O.R. 1; and is not granted in case of a mere illegality or irregularity not going to the jurisdiction: Regina v. Mayor of London, 69 L.T.R. 721; or where the judicial officer having jurisdiction goes about it in an irregular manner: Regina v. Justices of Kent, 24 Q.B.D. 181.

It would, in my view, be absurd to direct prohibition to the County Court Judge forbidding him to act upon an order which he can make right by a few strokes of his pen.

This consideration is, I think, sufficient to dispose of the appeal. My brother Sutherland's order was practically: "Get the Judge to put his order right; if you do, the motion will be dismissed." This is substantially what the Divisional Court did in the case in 31 O.R. . .

If it were considered that the decisions in cases from the Sessions compelled us to grant prohibition contrary to the opinion just expressed, further considerations would arise. . .

Suppose the Act giving an appeal to the County Court had said, "The Court to which such an appeal is made shall hear and determine the matter of appeal and make such order therein, with or without costs to either party, including costs of the Court below, as seems meet to the Court . . ," would there have been any doubt as to the meaning? Would it not mean that the Court should make such order as seems meet, and that this order should be "with or without costs" as seems meet? Would it be construed as meaning "with or without costs as seems meet, and if with costs, costs to such an amount as seems meet?" The

Court having a legal tariff, could the Court give any other than the tariff costs, if any? Making an order "with costs" means with the costs taxable between party and party in the Court making the order, if nothing more be said. It could not be successfully argued, I think, under such legislation, that the Court could give solicitor and client costs or on the High Court scale: O'Farrell v. Limerick, etc., R.W. Co., 13 Ir. L.R. 365; Re Bronson and Canada Atlantic R.W. Co., 13 P.R. 440; or any more at all events than the taxable party and party costs in the County Court.

It may well be that a choice was given in this Act of going to the County Court rather than to the Sessions from just such considerations—the appellant would know pretty well the worst that could happen to him, and I see no impropriety in making the orders complained of—if it were not for the practice in the other Court, due, as I venture to think, to historical and other considerations, wholly wanting in the case of the County Court, no one would have thought the language of the statute had any other meaning than that I am now suggesting.

At all events there is such "doubt in fact (and) law whether the inferior Court is exceeding its jurisdiction or is acting without jurisdiction" that we should exercise the discretion we have "to refuse a prohibition." Brett, J., in Worthington v. Jeffries, L.R. 10 C.P. 379, at pp. 383, 384, says: "If the Court doubt as to what is the true state of the facts or as to the law applicable to recognised facts, it is indisputable that the Court may decline to proceed further." See also Foster v. Berridge, 4 B. & S. 187, cited in the case in L.R. 10 C.P.; Ex p. Smyth, 3 A. & E. 719, per Littledale, J., at p. 724; Martin v. Mackonochie, 4 Q.B.D. 734, per Thesiger, L.J.; Carslake v. Mapledoram, 2 T.R. 473, per Buller, J.; Bassano v. Bradley, [1896] 1 Q.B. 645, per Russell, L.C.J.; Ricardo v. Maidenhead, 2 H. & N. 257, per Pollock C.B.; In re Birch, 15 C.B. 743, per Jervis, C.J.

This consideration also enters into the case upon the earlier branch.

I am of opinion that the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—I agree in the result.

BRITTON, J., also agreed, for reasons stated in writing.

BRITTON, J. MAY 11TH, 1912.

ROBINSON v. REYNOLDS.

Principal and Agent—Employment of Agent to Sell Land—Purchaser Procured by Agent Refusing to Carry out Purchase—Right to Commission—Finding as to Scope of Commission Contract — Commission Payable out of Purchase-money — Absence of Fraud or Collusion—Unenforceable Agreement of Sale and Purchase—Statute of Frauds.

Action by real estate agents for 2½ per cent. commission upon the selling price of the defendant's property, viz., King George Apartments, in the city of Toronto.

G. H. Watson, K.C., for the plaintiffs.

C. A. Moss, for the defendant.

BRITTON, J.:—The plaintiffs procured an offer in writing from one John G. Foster, addressed to the defendant, offering to purchase this property for $60,000, which offer the defendant accepted; but subsequently Foster refused to carry out the purchase, and he did not in fact purchase, and the defendant did not receive any purchase-money from Foster.

The plaintiffs' contention is, that immediately upon a contract of purchase and sale being made—through the intervention and agency of the plaintiffs, acting for the defendant—they, the plaintiffs, became entitled to their commission, no matter whether the actual purchase and sale was carried out or not.

There was an employment by the defendant of the plaintiffs as the defendant's agents to make a sale of the property mentioned. The particulars and real nature of the agreement between the plaintiffs and defendant are found in the offer drawn up by the plaintiffs and signed by Foster, which offer the defendant accepted. In the offer it is stipulated as follows: "The agents' commission to be paid out of and from part of the purchase-money, at 2½ per cent." There was nothing in writing between the plaintiffs and defendant, and the defendant contends that the agreement between him and the plaintiffs is evidenced in the offer written out as above-mentioned.

It may be that this special clause was inserted in the offer to prevent any possibility of Foster being liable for commission, and also to permit Foster's paying it out of the purchase-money, and so prevent the money, to the extent of the commission, going

into the hands of the defendant. This offer permitted Foster to pay the commission and keep the amount so paid out of the purchase-money. I find that the agreement between the plaintiffs and the defendant was that, in the event of a sale—not merely an agreement for sale—the commission was to be paid out of the purchase-money.

This is what the plaintiffs said. If the commission was to form part of the purchase-money—as between Foster and the defendant—it can come only out of the purchase-money as between the plaintiffs and defendant. If Foster paid it, he would be protected. If the defendant got the purchase-money, or if the sale was carried out so that he would be responsible for not getting it, the defendant would be liable to the plaintiffs. In the acceptance of the offer by the defendant, he acknowledges receipt of $500 as a deposit. This cheque of Foster's was payable to the order of the defendant, but it was not received by him, nor was it offered to him, nor was he asked to indorse it. It was retained by Mr. Bethune, one of the plaintiffs, for some time, and when presented payment had been stopped, as Foster repudiated and refused to go on with his proposed purchase. The holding of the cheque, and all the dealing between the plaintiffs and Foster, convince me that the real agreement between the plaintiffs and the defendant was as the defendant contends, viz., that the commission was to be paid out of the purchase-money. The defendant has acted in perfect good faith throughout. He did his utmost to get Foster to complete the purchase.

The fair inference upon all the evidence is, that the defendant never agreed to pay and the plaintiffs did not intend to charge so large a commission for procuring a person to sign an agreement to purchase, for an amount which the defendant would accept.

No fraud or collusion in this transaction can be imputed to the plaintiffs; but to accept their contention would offer a temptation to any real estate agent, upon a general retainer or employment, who would be guilty of collusion to procure an offer at a price that the vendor would gladly accept, and then have the proposed purchaser retreat or simply decline to carry out the purchase, allowing the agents to collect their commission from the responsible owner. My decision, however, is based upon my view of the evidence in this case, and not because of what might happen in some other case.

Then I am of opinion that the defendant is entitled to succeed upon the ground taken in the amended statement of defence.

The plaintiffs did so draw this agreement as to give to the purchaser Foster an opportunity to resist the defendant's claim to have Foster's purchase carried out. It seems to me that the Statute of Frauds affords a good defence to Foster. If the defendant in good faith desired to have the purchase carried out, and if the plaintiffs are in any way responsible for that, so that no purchase-money was received or can be received by the defendant out of the alleged sale by the plaintiffs, the defendant is not called upon to pay.

The action will be dismissed with costs; and the counterclaim also will be dismissed with costs.

DIVISIONAL COURT. MAY 11TH, 1912.

*RE AUGER.

Dower—Mortgaged Land—Mortgage Given to Secure Purchase-money—Wife Joining to Bar Dower—Sale of Land by Administrators of Estate of Deceased Mortgagor with Concurence of Widow—Extent of Widow's Claim on Purchase-money—42 Vict. ch. 22, secs. 1, 2—58 Vict. ch. 25, sec. 3.

Appeal by certain of the next of kin of Michael Auger, the husband of the respondent, from the order of MIDDLETON, J., ante 377, declaring the respondent to be "entitled to dower in the full value of the lands of which he was seized at the time of his decease, payable out of the proceeds of the sale thereof now in the hands of the administrator, in priority to all other claims against the estate of the said Michael Auger."

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and KELLY, JJ.

D. Urquhart, for the appellants.

J. J. Maclennan, for Sarah Auger, the respondent.

MEREDITH, C.J.:—Auger owned at the time of his death the equity of redemption in the land as to which the question arises. The land was purchased by him from Henry Gooderham, and the conveyance to Auger bears date the 1st November, 1898. The purchase-price is stated to be $3,000, and one of the recitals in the conveyance is that it had been agreed that $2,800 of this sum should remain a lien upon the land, to be collaterally secured by a mortgage of it.

*To be reported in the Ontario Law Reports.

The release clause according to the statutory form is altered to read as follows: "And the said grantor releases to the said grantee all his claims upon the said lands, excepting the said lien for unpaid purchase-money and mortgage to be given therefor."

The mortgage bears the same date, and the respondent joined in it to bar her dower.

The mortgage-money was reduced by payment to $1,700 in the lifetime of the mortgagor, and he died intestate on the 12th May, 1909. The land has been sold by his administrators for $5,250; and the question for decision is, whether the respondent's dower is to be calculated on the proceeds of the sale of the land or only upon the proceeds after deducting the amount remaining due upon the mortgage at the time of the death of her husband.

Before any legislation on the subject, it had been held, in Campbell v. Royal Canadian Bank (1872), 19 Gr. 334, that where a wife joins with her husband to bar dower in a mortgage to secure the purchase-money of the mortgaged lands, and the husband dies, and the mortgaged land is sold to satisfy the mortgage, she is entitled to dower in the proceeds after satisfying the mortgage-debt, but no more. . . .

In the subsequent case of Doan v. Davis (1876), 23 Gr. 207, where the mortgage was not given to secure unpaid purchase-money, the same learned Judge held that the widow was entitled to dower out of the whole value of the mortgaged premises, and not only out of their value beyond the mortgage-debt.

Doan v. Davis was approved and followed by Proudfoot, V.-C., in Lindsay v. Lindsay (1876), 23 Gr. 210.

[Reference also to In re Robertson (1877-78), 24 Gr. 442, 25 Gr. 486; Sheppard v. Sheppard (1867), 14 Gr. 174; Thorpe v. Richards (1872), 15 Gr. 493; White v. Bastedo (1869), 15 Gr. 546; Baker v. Dawbarn (1872), 19 Gr. 113; In re Croskery (1888), 16 O.R. 207; In re Williams (1903), 7 O.L.R. 157; and to the provisions of 42 Vict. ch. 22, secs. 1, 2.]

It has been generally understood, I think, that what led to this legislation was the uncertainty as to the law as evidenced by the conflicting decisions, to some of which I have referred, and that the purpose of sec. 1 was to declare the law as it had been held to be in Campbell v. Royal Canadian Bank and In re Robertson. Section 2 was intended, as was said by Patterson, J.A., in Martindale v. Clarkson (1880), 6 A.R. 1, 6, to give the wife a new right in cases where she had joined in the mortgage, her husband having at the time the legal estate, and

the land was subsequently sold under a power of sale in the mortgage or under legal process. The nature of this new right was considered and explained by Ferguson, J., in In re Luckhardt (1898), 29 O.R. 111, the present Chancellor agreeing with the opinion he then expressed.

The principle upon which the Court of Chancery proceeded in holding, before this statute, that the wife, although she had joined in the mortgage for the purpose of barring and had barred her dower in the mortgaged lands, was yet entitled to dower, was, that she had barred it only for the purpose of the security given to the mortgagee, and that is what in substance sub-sec. 1 provides; and it follows, I think, that the widow's rights under sub-sec. 1 are no greater than they had been decided to be in the view of the Court of Chancery as to the effect of the bar of dower before the statute; and that was, to have dower in the surplus calculated on the full value of the land, where the mortgagee was to secure a debt of the husband, except where the debt was for unpaid purchase-money of the mortgaged land, and in that case calculated on the value in excess of the incumbrance. . . .

[Reference to 58 Vict. ch. 25, sec. 3.]

Except for the provision as to the basis for calculating the amount to which the wife is to be entitled for her dower, this section does not differ in substance from sec. 2 of the Act of 1879.

While sec. 3 applies only to cases in which the mortgaged land has been sold under a power of sale in the mortgage or under legal process, it, like sec. 2 of the earlier Act, provides that the wife is to be entitled to dower in the surplus to the same extent as she would have been entitled to dower in the land had it not been sold; and, in the provision as to the basis for calculating the amount to which the wife is to be entitled, the Legislature indicates, I think, that the draughtsman was under the impression that that would have been the measure of the wife's rights if the land had not been sold.

If the order appealed from is right, as sec. 3 is confined to cases in which the land is sold under power of sale in the mortgage or under legal process, it would follow that, in other cases, a different rule would be applicable, and in them the widow's dower would be calculated on the basis of the value of the land irrespective of whether or not the mortgage was given to secure purchase-money. I can see no reason for such a distinction, and this affords, I think, an additional reason for construing sec. 1 of the Act of 1879 as I have construed it.

I am, for these reasons, unable to agree with the opinion of my brother Middleton, and am of opinion that the appeal should

be allowed, and that there should be substituted for the declaration which he made a declaration that the respondent is entitled to dower in the purchase-money of the mortgaged land, after deducting from it the amount which remained owing on the mortgage at the time of her husband's death; and there should be no order as to the costs of the appeal or the costs of the proceedings before my brother Middleton.

TEETZEL, J., agreed.

KELLY, J., agreed in the result.

RIDDELL, J. MAY 14TH, 1912.

TOAL v. RYAN.

Will—Validity—Absence of Undue Influence—Testamentary Capacity—Proof of Due Execution—Evidence—Statements of Testatrix.

Action for a declaration that a will made by Susan Ryan, deceased, was invalid and for revocation of the letters probate thereof.

T. G. Meredith, K.C., for the plaintiffs.

E. Meredith, K.C., and W. R. Meredith, for the defendant Ryan.

N. P. Graydon, for the defendants D. J. Toal and Mrs. Fisher.

F. P. Betts, K.C., for the infants.

RIDDELL, J.:—Susan Toal had married one McC., and he had left her a farm, etc., when he died in 1885. She married the defendant Ryan in 1889. In 1910, being then a woman of 58 or 59, and suffering from arterial sclerosis, she was, in September or November, taken violently ill with convulsions. She recovered, but not completely or lastingly; and, in July, 1911, took to her bed. The disease, sclerosis, was, of course, quite incurable, as she knew. In September, 1911, her father thought and said that she should make a will; and Richard Code, an unlicensed conveyancer (the best friend of the solicitor), was sent for. He drew up a will, which was signed by Susan Ryan, and was admitted to probate by the Surrogate Court of the County of Middlesex on the 17th October, 1911.

The father and one of the nephews of the testatrix bring this action, alleging want of testamentary capacity, undue and improper influence by William Ryan, the husband, and non-execution in the manner prescribed by law—and they ask that the will be declared of none effect and probate revoked.

The defendants are the husband, against whom the attack is made, and the next of kin, etc., who submit their rights to the Court (in form), but who really take part with the plaintiff.

The will leaves everything to the husband except small legacies to certain relatives.

No evidence was given of anything approaching undue influence, and that was not pressed in argument. The two matters are, (1) capacity, and (2) execution.

Much evidence was given of statements made by the deceased. These were objected to, but I admitted them (subject to the objection), as they bore or might bear upon the question of capacity and the factum of the will: Sutton v. Saddler, 3 C.B.N.S. 87, 99.

Whether these statements be admitted or not is, in the present case, immaterial. I am perfectly satisfied that the testatrix was competent to make a will, and so find.

And while, on the evidence of Code, it might be doubtful how far it was established that all due formality was observed in the making of the will, that doubt is removed by the evidence of the nurse, Miss Hoy—whose evidence at the trial is to be fully credited. I do not find that any of the witnesses was not trying to tell the truth: Code was confused and "mixed" upon cross-examination; and the plaintiff's witnesses were anxious and rather extreme. But Miss Hoy's evidence at the trial was most satisfactory, notwithstanding the document she gave Mrs. Fisher previously.

I find that the deceased knew that she was making a will, knew its effect, and knew what property she had, and how she was disposing of it, knew those who had claims on her, and appreciated all these. The will was drawn according to her instructions and as she wished it; it was signed by her in the presence of the two witnesses as her will, and by them in her presence and in the presence of each other at the same time, etc.; also that there was no undue influence.

All due formalities being observed, the testatrix being competent, and no undue influence being used, the will is valid.

The action will be dismissed with costs payable by the plaintiff to the defendant Ryan and the Official Guardian. The costs

of the other defendants I do not order to be paid by the plaintiffs—they are in common case. If the Official Guardian cannot make his costs out of the plaintiffs, he may receive them from the legacy to the mother of the infants.

MIDDLETON, J., IN CHAMBERS. MAY 15TH, 1912.

RE POLSON IRON WORKS LIMITED.

Company—Shares—Transfer by Holder to Trustees—Refusal of Company to Register—Indebtedness of Transferor to Company Arising since Transfer—Companies Act, R.S.C. 1906 *ch.* 79, *secs.* 64, 67—*Construction—Concurrent Ownership and Indebtedness—Agreement with Vendors of Shares—Notice to Trustees—Remedy—Mandamus.*

Motion by McWhinney and Brown, trustees of the marriage settlement of John James Main and LaDelle McCahon, for a mandamus directing the Polson Iron Works Limited, an incorporated company, to register a transfer of 500 fully paid-up non-assessable shares of the capital stock of the company from John James Main to the applicants.

R. McKay, K.C., for the applicants.
C. A. Moss, for the company.

MIDDLETON, J.:—The 500 shares in question were acquired by Mr. Main under and pursuant to the terms of an agreement of the 27th June, 1906, between Mr. Main and Messrs. Polson and Miller, by which Mr. Main undertook to transfer to the company all the assets of the Canadian Heine Safety Boiler Company, in consideration of the issue of these 500 shares. As part of the same agreement, Mr. Main agreed to subscribe for $25,000 capital stock of the Polson company, for which he was to pay when calls were made by the board of that company.

By this agreement certain rights are given to Messrs. Polson and Miller, enabling them to acquire the $75,000 of stock upon payment to Main of the value of the stock as shewn by the books of the company, in the event of Main ceasing to be in the service of the company, or upon Main desiring to sell the stock. This agreement, made originally with Messrs. Polson and Miller, was adopted by the directors and shareholders of the company, by appropriate by-laws.

The 500 paid-up shares were duly issued, and the 250 other shares were duly subscribed for. The stock is subscribed for as follows: "500 shares to be issued as fully paid-up and non-assessable, pursuant to by-law No. 40, and to be held subject to the terms of agreement referred to in said by-law;" the agreement and by-law being those above-mentioned.

On the 15th September, 1911, by his marriage settlement, Mr. Main transferred the 500 paid-up shares to the applicants. This instrument was duly executed on the 16th. At this time, no calls had been made upon the 250 shares; but subsequently, on the 28th December, 1911, a call of $20 per share upon all unpaid stock of the company was made by the directors. This call was payable on the 4th January, 1912, and notice was duly given to Mr. Main on the 28th December.

Mr. Main, for reasons which, he thinks, justify him in doing so, refuses to pay the call; and his counsel states that, if any attempt is made to collect payment, Mr. Main is advised that he has a good defence to any action that may be brought.

For some reason, the trustees omitted to apply for registration of the transfer until the 5th January, when the company declined to record the transfer. The secretary of the company, on the 11th January, in reply to the formal demand for registration, writes that the matter has been considered by the directors, and that "I have been directed to inform you that the directors decline to register the transfer of the shares in question belonging to the said John J. Main, owing to his being indebted to the company."

Upon the argument of the motion, it was admitted that the only indebtedness is the indebtedness in respect to the calls made upon the 250 shares.

The company is incorporated under Dominion legislation, and the sections of the statute which require to be considered are R.S.C. 1906 ch. 79, secs. 64, 67.

By sec. 64, "except for the purpose of exhibiting the rights of the parties to any transfer of shares towards each other . . . no transfer of shares . . . shall be valid for any purpose whatever until entry of such transfer is duly made in the register of transfer." By sec. 67, it is provided that the directors may decline to register any transfer of shares belonging to any shareholder who is indebted to the company.

I have read the numerous cases cited upon the argument, but have come to the conclusion that none of them throws much light upon the problem before me, which must be determined upon the wording of these two sections.

Primâ facie, a share—or at any rate a paid-up share—of the capital stock of a company is personal property, and may be disposed of by the shareholder freely. Any provisions which cut down this right must be construed strictly. Section 67 gives the right to the directors to decline to register any transfer of shares "belonging to any shareholder who is indebted to the company."

I do not think that the shares in question ever belonged to a shareholder who was indebted. Upon the execution of the transfer on the 15th September, these shares ceased to belong to Main. They then became the property of the trustees. Section 64 does not invalidate the transfer by reason of the failure to register, for it expressly preserves to the transfer validity "for the purpose of exhibiting the rights of the parties . . . towards each other."

The indebtedness did not arise until the making of the call on the 28th December. Main then became indebted to the company, within the meaning of sec. 67; but he had ceased to own the shares. As I read the statute, the ownership and the indebtedness must be concurrent; and the section cannot be read as if it gave authority to the directors to refuse to register when the transferee is at the date of the application indebted. The section itself seems to be carefully worded so as to require indebtedness at the time of the ownership; and the ownership is, by sec. 64, made independent of registration.

It was argued that the transfer ought not to be permitted, because of the terms of the agreement. In the first place, the transfer is not a sale, which is the only transaction that gives to Polson and Miller any right to purchase under the agreement. In the second place, the agreement in question is an agreement with Polson and Miller, not with the company; and the trustees, taking with full notice of the agreement, will hold subject to its terms; and any rights that Polson and Miller may have can be exercised against the trustees.

Objection was taken to the remedy sought. It was said that a mandamus would not lie. I think this is determined in favour of the application by Crawford v. Provincial Insurance Co., 8 C.P. 263. See also the recent decision in Rich v. Melancthon Board of Health, ante 826.

The order for mandamus will go as sought, with costs.

MIDDLETON, J., IN CHAMBERS. MAY 15TH, 1912.

RICKART v. BRITTON MANUFACTURING CO.

Evidence—Examination of Witness upon Pending Motion for Injunction—Trade Union—Union Label—Trade Mark—Unincorporated Association—Inquiry into Organisation of Union—Oppressive Inquiry—Fishing Expedition—Refusal to Order Witness to Answer Questions.

Motion by the plaintiffs for an order directing Cecil A. Burgess to attend and answer certain questions upon his examination as a witness on a pending motion for an injunction, and to produce the minute books, cash books, rule books and all other books and records of the United Garment Workers of Canada, and to submit to examination as to the organisation and conduct of such union and all other matters relating thereto, and in default thereof to be committed to the common gaol.

J. G. O'Donoghue, for the plaintiffs.
C. G. Jarvis, for Burgess and the defendants.

MIDDLETON, J.:—The action is brought by certain members of the United Garment Workers of America, on behalf of themselves and other members of that body, and by the United Garment Workers of America, for an injunction restraining the use of what is said to be an imitation of the plaintiffs' union label; and a motion was made on the 30th March for an order for an interim injunction restraining the use of any such imitation, more particularly a certain label containing the words, "Issued by authority of United Garment Workers of Canada, general executive board, registered."

The defendants are a manufacturing company carrying on business at London, Ontario. There is a Canadian trade union, to which certain garment workers belong; and there is an agreement between the defendants and that union under which the defendants are compelled to employ only members of the Canadian union and to affix to the garments manufactured the label of that union.

There appears to be some conflict between the Canadian and American unions; and at one time there was an agreement between the defendants and the American union. This agreement was dated the 1st April, 1911, and terminated in one year from that date; so that the defendants' obligation towards the

American union had ceased at the time this action was brought.

The notice of motion for the interim injunction was based upon an affidavit made by one Carroll, in which he says that the label which the defendants are using, and will continue to use, is a fraudulent imitation of the plaintiffs' union label. But, not content with this, it is sought to supplement the material by the depositions of the defendants "and such other persons as the plaintiff may be advised;" and, in pursuance of this, the evidence has been taken of some eight persons, from which it abundantly appears that the plaintiffs' design is to embark, under the colour of this motion for an interim injunction, upon a preliminary cross-examination of those who, they may anticipate, would be hostile witnesses at a trial, or upon a fishing excursion, in which they will obtain discovery greater than that permitted by our practice, and which they may hereafter use, not merely in a contest with the defendants, but in a contest with the Canadian union.

In the course of this examination the plaintiffs desire to inquire fully into the organisation, constitution, membership, financial position, and domestic concerns of the rival union. Burgess has declined to produce this information and to permit the plaintiffs' counsel free access to the documents. And I think that he is within his rights.

Upon the argument it was stated that the Canadian union have registered a label under the statute, and that this alone would indicate that there is such an issue to be tried as to render it unreasonable to suppose that any interim injunction will be granted. Besides this, a very serious legal question arises at the threshold of the plaintiffs' case. There is a wide divergence of view in American cases as to the status of a union label.

In many States the view entertained by Mr. Justice Thayer in Carson v. Ury, 39 Fed. Repr. 777, is accepted. He says: "It is, no doubt, true that the union label does not answer to the definition ordinarily given of a technical trade mark, because it does not indicate with any degree of certainty by what particular person or persons or firm the cigars to which it may be affixed were manufactured, or serve to distinguish the goods of one cigar manufacturer from the goods of another manufacturer, and because the plaintiff appears to have no vendible interest in the label but only a right to use it on cigars of his own make, so long, and only so long, as he remains a member of the union. In each of these respects the label lacks the characteristics of a valid trade mark."

There is also another difficulty. The American trade union does not appear to be an incorporated body, and it is hard to

see how any property right in a trade label could be vested in such a loose aggregation. On the other hand, the principles upon which equitable relief is granted to prevent unfair competition may be found to reach far enough to afford the plaintiffs some redress, if the label adopted by the Canadian union is an unfair imitation of the American label. No Canadian case has yet determined a question of this kind; and, according to established principles, a novel and difficult legal question ought not to be dealt with upon a motion for an interim injunction.

All these considerations point to the impracticability of success upon the motion, and emphasise the vexatious nature of the course adopted by the plaintiffs.

Since the argument, the learned counsel for the plaintiffs has, I think, justified the suspicion that the plaintiffs' course is oppressive, by a memorandum which he has handed in, as follow: "In the case of Canada Foundry Co. v. Emmett, 5 or 6 years ago, the company got an interim injunction, and then was permitted by one Judge after another, during a period of five or six months, to examine witnesses to the extent of eight or nine thousand questions, before the motion to continue the injunction was heard."

I do not know the circumstances of that case, and probably the circumstances justify the course taken; but this naked statement is apparently relied upon as authority for the proposition that in all trades union cases there ought to be prolonged examination. At any rate there is nothing in this statement to justify the making of the order now sought.

The motion is dismissed, with costs to be paid by the plaintiffs to the defendants and to Burgess forthwith after taxation.

MIDDLETON, J. MAY 15TH, 1912.

RE SOLICITOR.

Solicitor—"Retainer"—Agreement—Law Reform Act, 9 Edw. VII. ch. 28, secs. 22 et seq.—Payment for Services of Solicitor — Obligation of Solicitor to Account — Delivery and Taxation of Bill of Costs.

Motion by Canale Demetrio, the client, for an order requiring the solicitor to deliver a bill and to account for certain moneys received by him from the client; and, in the alternative, if it should be held that the solicitor made an agreement respect-

ing payment for his services, for an order reopening the agreement and directing the delivery of a bill and for taxation.

J. D. Falconbridge, for the client.
F. Arnoldi, K.C., for the solicitor.

MIDDLETON, J.:—The motion was originally made before the Master in Chambers, and was enlarged by him before a Judge in Chambers (see ante 1132); and upon the return of the motion before me it was agreed by counsel that the motion should be dealt with by me either as a motion in Court or Chambers, if this makes any difference.

This case, as far as I know, is the first application in which the provisions of the statute 9 Edw. VII. ch. 28, secs. 22 et seq., are invoked.

Before this statute, known as the Law Reform Act, 1909, it was incompetent for a solicitor to make a bargain with his client for remuneration upon any other or higher scale than that allowed by law. Charges made by solicitors for services rendered by them were subject to review by the Court; and any attempt to obtain more than the law permitted was most sternly dealt with. See, for example, Re Solicitor, 14 O.L.R. 464.

This statute has introduced a new era. It permits an agreement in writing between the solicitor and the client respecting the amount and the manner of payment for either past or future services; and this agreement may be either for the payment of a salary, a lump sum, or a percentage; but the agreement as to percentage is permitted only in non-contentious and conveyancing business, so that champertous bargains are not yet sanctioned.

In this case, Canale Demetrio, who describes himself euphemistically as a labourer and as having a very imperfect knowledge of the English language, had apparently likewise a very imperfect knowledge of Canadian law; as on the 7th October, 1911, the Police Magistrate at Porcupine found, upon evidence, that the Nugett Saloon—of which Demetrio was then the proprietor—was a disorderly house, a bawdy house, and a house for the resort of prostitutes; and sentenced Demetrio to six months' imprisonment with hard labour in the Central Prison; a fact which probably justifies the description Demetrio now assumes.

At this time Demetrio had $500 in the bank; and, not relishing the proposed change of occupation, he procured the gaoler at North Bay, where he then was, to send for a lawyer. The gaoler

thereupon selected the respondent solicitor, who waited upon Demetrio, and the subject of remuneration appears to have been immediately discussed. The solicitor says: "In all my criminal practice I exact a retaining fee before undertaking a case; my experience having been that, if I did not so protect myself, in many instances, and after heavy disbursements, I would never receive any remuneration."

In pursuance of this, he informed Demetrio that he would undertake an application for the latter's release, but that he would require "a retaining fee of $300;" and, this being agreed to, he "wrote out an agreement calling for a retainer of $300, and at the request of Demetrio made out a cheque for $300, both of which were signed by the said Demetrio."

It is said that this agreement and cheque were read and explained to Demetrio, and he appeared to understand the same. The solicitor is corroborated by a series of three affidavits made by the gaoler, in which he confirms the solicitor's affidavit by instalments.

In launching this application, Demetrio says that he is not aware that he made any agreement with the solicitor in regard to remuneration, or, if he did sign any document purporting to be an agreement, he did so without independent advice, and that he has no recollection of any such document being signed. He also says that he signed a blank cheque, which he gave to the solicitor, and which he now finds is filled in for $300. The cheque is not produced, but the agreement is. It is in the words following: "North Bay, October 20th, 1911. I hereby retain (the solicitor) to make application for my release from gaol; and herewith deliver to him cheque for $300 as retainer. C. Demetrio."

The motion for discharge was then made, and heard by my brother Sutherland. He refused to make the order sought. See ante 313. An application for leave to appeal was heard by myself and dismissed. Mr. Arnoldi appeared for Demetrio on these two applications. What he charged is not stated.

Upon the material, I would find against Demetrio's statement as to the filling in of the cheque. I must also find that he understood the document which he signed. But this does not conclude the matter. I must, in the first place, find that this document is an agreement in writing with the client respecting the "amount and manner of payment for the services of the solicitor in respect of the business done or to be done by him." On the solicitor's own statement, it is not. The payment made was not to be remuneration for the services, but was to be a

retaining fee; and, as put in Mr. Arnoldi's affidavit, "the payment of a substantial retainer enables the professional man to exercise an option whether he will charge for his services or not;" and Mr. Arnoldi's first contention on behalf of the solicitor is, that this money was received, as it is said, "as a retaining fee;" and the solicitor now elects to render his services gratuitously, and has, therefore, no bill to deliver—an attitude which is quite consistent with the wording of the document, and justifies the holding that it cannot be relied upon as an agreement under the statute.

Nor can the solicitor retain this $300 without accounting for it, under the guise of a retaining fee. It has more than once been stated that a retainer is a gift by the client to the solicitor. It is something outside of and apart from his remuneration, and something which he is not bound to bring into account. Its true nature must be known to and understood by the client.

That is not the situation here. The solicitor's own account of the transaction justifies me in taking the view that the real situation was, that he declined undertaking these proceedings unless and until his client placed him in funds to the extent of $300, and that, when the client paid this $300, it was not with the intention of its being regarded as a gift, but rather either as a security to the solicitor for his remuneration or as a payment of the remuneration. In either case the solicitor is bound to deliver to the client a bill of his actual charges and to account for the $300, if I am right in thinking that the memorandum signed does not constitute a sufficient agreement under the statute.

Two affidavits have been filed by counsel, expressing opinions with regard to the propriety of Mr. Bull's conduct. I think that these affidavits are most improper.

I direct the delivery of a bill, and that it be referred for taxation, and reserve the question of costs until after the taxation.

DIVISIONAL COURT. MAY 15TH, 1912.

COOPER v. LONDON STREET R.W. CO.

Street Railways—Injury to Person Crossing Track—Negligence—Contributory Negligence—Evidence—Expert Testimony—Findings of Jury—Appeal.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., upon the findings of a jury, in favour of the plaintiff, in an action for damages for injuries sustained by being struck by a car of the defendants, after she had alighted from another car, and was attempting to cross the track.

The appeal was heard by BOYD, C., TEETZEL and KELLY, JJ.

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

Sir George Gibbons, K.C., for the plaintiff.

The judgment of the Court was delivered by BOYD, C.:—I think this case could not properly have been withdrawn from the jury, and I am not prepared to dissent from the conclusion reached by the jury and favourably viewed and acted upon by the Chief Justice. The situation of the plaintiff at the rear of the car from which she had got out, with a car approaching her on the same track, coupled with the warning given by one on the car she had left to look out for the car, may well have flurried and perturbed her, as the witnesses say, and have led her, in the face of a strong wind, to lower her head and hurry across the track to her place of destination, not observing the coming upon her on the track she was crossing of the other car which was passing the stationary car. Upon this state of facts, the jury may have rightly absolved from contributory negligence: see Wright v. Grand Trunk R.W. Co., 12 O.L.R. 114.

On the question of negligence by the company there was also evidence which ought not to have been withdrawn from the jury. The reception of this evidence by an expert from Hamilton was not objected to, and the effect of it was to indicate that sufficient caution was not observed in approaching this place of crossing the street, at which the car carrying the plaintiff stopped regularly for the discharge and reception of passengers. There was proved to be a habit or custom of those leaving the cars to cross the tracks at that point to get to Albert street, and this practice was well known to the company. If the view was obscured by the stationary car to the conductor of the oncoming car, that was a strong reason for slackening the speed and exercising conformable caution in the view of probable danger at that crossing. And the jury have found negligence in running the south-bound car at too high a rate of speed, when the north-bound car was standing and passengers getting off.

Brill v. Toronto R.W. Co., 13 O.W.R. 114, is distinguishable from this, in that a duty was cast on the car approaching the

place of crossing taken by the passengers for Albert street to go slow while the passengers were being discharged.

I would affirm the judgment with costs.

MASTER IN CHAMBERS. MAY 16TH, 1912.

CARTWRIGHT v. PRATT.

Security for Costs—Defendant out of Jurisdiction—Counterclaim—Want of Connection with Plaintiff's Cause of Action—Property in Jurisdiction—Evidence of Value.

Motion by the plaintiff for an order requiring the defendant to give security for the costs of his counterclaim.

Both parties were residents of Buffalo, in the State of New York.

The plaintiff, who had given security for costs, claimed from the defendant in all something over $9,000, with interest, in respect of three different joint adventures.

The defendant denied all the plaintiff's allegations, and counterclaimed in respect of an alleged agreement by the plaintiff to deliver to him 10,000 shares of stock in the Pan Silver Mining Company, and also for payment of one-half of a sum of $1,100 paid by the defendant on a joint venture of the defendant and the plaintiff, which was forfeited with the plaintiff's consent.

G. H. Sedgwick, for the plaintiff.

M. H. Ludwig, K.C., for the defendant.

THE MASTER:—This question was considered in two cases in the Court of Appeal, at the hearing of both of which Lord Esher, then Master of the Rolls, presided.

In Sykes v. Sacerdoti (1885), 15 Q.B.D. 423, security was ordered. In Neck v. Taylor, [1893] 1 Q.B. 560, it was refused. In this latter case Lord Esher said (p. 562): "The rule laid down by the cases seems to be as follows. Where the counterclaim is put forward in respect of a matter wholly distinct from the claim, and the person putting it forward is a foreigner resident out of the jurisdiction, the case may be treated as if that person were a plaintiff and only a plaintiff, and an order for security for costs may be made accordingly, in the absence of anything to the contrary. Where, however, the counter-

claim . . . arises in respect of the same matter or transaction upon which the claim is founded . . . the Court . . . will in that case consider whether the counterclaim is not in substance put forward as a defence to the claim, whatever form in point of strict law and of pleading it may take. . . . The Court in that case will have a discretion."

Under which class the counterclaim in question comes does not seem doubtful on the material. The various transactions between the parties are dealt with in their respective pleadings as having been separate, and not items of a continuous course of dealing in the nature of a partnership. Had that been the fact, it would, no doubt, have been so alleged in the counterclaim, as it would have brought the case within the principle of Neck v. Taylor, supra.

In view of the contradictory affidavits as to the value of the mining claim in which the defendant has a half interest, it does not seem a ground for refusing security, in the absence of the evidence of at least one qualified and disinterested person to support the estimate of the defendant.

An order will go for security to be given in the usual form —costs of this motion will be in the counterclaim to the successful party.

RIDDELL, J., IN CHAMBERS. MAY 16TH, 1912.

BISSETT v. KNIGHTS OF THE MACCABEES.

Jury Notice—Motion to Strike out—Judge in Chambers—Discretion—Con. Rule 1322*—Change in Practice—Proper Case for Trial without a Jury.*

Motion by the defendants to strike out a jury notice filed and served by the plaintiff.

J. A. Paterson, K.C., for the defendants.
W. D. McPherson, K.C., for the plaintiff.

RIDDELL, J.:—In this case the plaintiff alleged: (1) that C. B. was insured in the defendant society; (2) that he paid all assessments, etc.; (3) that he died; (4) that the plaintiff became administratrix by letters of administration from the Surrogate Court of the County of Lambton, August, 1910; (5) that she furnished the defendants in January, 1911, satisfactory and sufficient proof of the death of C. B.; (6) that the defendants

refuse to pay. The defendants do not admit any of the above, and plead specially: (1) no sufficient proof of death; (2) if C. B. be dead, the action is barred; (3) if C. B. be dead, the proofs should have been furnished within 12 months, and were not; (4) that C. B. did not pay dues up to time of his death (if he is dead), but omitted so to do for several months, and the insurance is, therefore, void; (5) that C. B. removed from his usual home in July, 1897, remaining away one year, and did not report to the secretary of his "Tent" his location, and the insurance is, therefore, void; (6) that until conclusive proof of death is furnished no benefits are payable, and none such has been given. The plaintiff replies: (1) that, if default was made in furnishing proofs of death, this was waived; (2) that, if the dues were not paid, this was assented to by the defendants, and, therefore, the defendants are estopped; (3) that, if the condition that the insured must report to the secretary of his "Tent" applies to this insurance, it is unreasonable and not binding; and (4) that, if conclusive evidence of death be required under the contract, that provision is unreasonable.

A motion is made to strike out the jury notice. If the jury notice stand, the case cannot come on for trial until the autumn (the venue being at Sarnia, and the jury sittings being now over at that town); but, if the jury notice be struck out, the case can come on before vacation.

Much difference of opinion was expressed in reference to striking out jury notices, by various Judges. The cases may be seen collected and referred to in Stavert v. McNaught (1909), 18 O.L.R. 370. In that case, if I understand it, the principle laid down by the Divisional Court was to let the jury notice stand unless it was a clear case of the jury notice being improper. The Chancellor says: "The direction in actions merely of a common law character, and in which a jury would be the recognised forum, if sought by either party, as to the method of trial, should not be taken out of the hands of the trial Judge." Con. Rule 1322, passed 23rd December, 1911, and promulgated 6th January, 1912, has, in my view, changed the practice. This provides that, when an application is made to a Judge in Chambers under sec. 110, if "it appears to him that the action is one which ought to be tried without a jury he *shall* direct that the issues be tried . . . without a jury." Con. Rule 1322(2) provides that such an order shall not "interfere with the right of the Judge presiding at the trial to direct a trial by jury."

The law, therefore, is now changed—the Judge in Chambers

is called upon to exercise his judgment as to how the case ought to be tried; he cannot pass that responsibility over to any one else—and, if it appears to him that the case should be tried without a jury, he must—"he shall"—direct accordingly.

I have no kind of doubt that this action should be tried without a jury. I think, moreover, that no Judge would try the issues upon the record with a jury (though that does not seem to be important)—and I must, therefore, direct the action to be tried without a jury.

This disposition of the motion will not interfere with the discretion of the trial Judge: Con. Rule 1322(2). Nor in this particular instance will it change the sittings at which the case may be tried (but that fact does not enter into my reasons for allowing the motion).

Costs will be in the cause unless otherwise ordered by the trial Judge.

DE LA RONDE v. OTTAWA POLICE BENEFIT FUND ASSOCIATION—RIDDELL, J.—MAY 13.

Benevolent Society—Police Benefit Fund—Right to Retiring Allowance—By-laws of Society—Trustees—Parties—Order for Payment by Treasurer.]—After the judgment delivered by RIDDELL, J., on the 29th April, 1912 (ante 1188), the parties did not agree, as it was suggested they should; and the learned Judge proceeded to dispose of the case as follows:—It would at first sight appear that clause 10 was adverse to the plaintiff's claim; but a careful examination of that clause shews that such is not the case. That provides for a report being made by the trustees to the Board of Police Commissioners, and for what is to be done in case the trustees and the Board disagree. Nothing of that kind took place here; and, consequently, clause 10 does not apply. Clauses 18 and 19 are specific that certain sums "shall be paid;" and these must be given effect to. Clause 14 provides that no money is to be paid out by the treasurer unless ordered by the board of trustees; but that difficulty may be got over by making the trustees parties and directing them to give such an order. No doubt, the Board of Commissioners will sanction the same. Judgment directing the pleadings to be amended by making the trustees defendants; declaring the plaintiff entitled to $1,000 from the fund; and directing the trustees (as a board) to give an order to the treasurer for payment of $1,000 and interest from the date of the writ of sum-

mons. The defendants to pay the costs. A. E. Fripp, K.C., for the plaintiff. M. J. Gorman, K.C., for the defendants.

CAMPBELL v. SOVEREIGN BANK OF CANADA—MASTER IN CHAMBERS —MAY 14.

Trial—Motion to Expedite—Jurisdiction of Master in Chambers—Plaintiffs not in Default.]—In four actions, which were proceeding together, the defendants moved for an order directing the plaintiffs to set the actions down for trial and proceed to trial at the current Toronto non-jury sittings, and for an order fixing the date of trial, and dispensing with the three weeks' notice required under the Rules before a case can be put on the peremptory list. The notice of motion was served on the 8th May. It appeared that the actions were begun in August, 1911; that the statements of claim were delivered in December, and statements of defence and counterclaims on the 19th or 20th March. The Master said that, assuming that the cases were at issue, there was nothing to prevent the defendants from setting them down if they wished to be in a position to speed the trial. This, however, they did not see fit to do. The defendants had not up to the present time been much in haste to have the matter disposed of. It was well known that these same parties were all concerned in a test case now pending before the Judicial Committee and to be argued in July. It also appeared that negotiations for a settlement of all matters in controversy between the parties had been in progress and were only finally terminated unsuccessfully on the 11th May. One result of this had been that the plaintiffs had not made the necessary preparations to go to trial. For these reasons, the motion should be dismissed—with costs to the plaintiffs in the cause. The Master added that, had he arrived at a different conclusion, it would have been necessary to consider if he had any power to make such an order as was asked for. If the plaintiffs were in default under Con. Rule 434, they, no doubt, could be put on terms to expedite the trial. But was not the notice served too soon, as the counterclaim was delivered only on the 20th March? W. J. Boland, for the defendants. F. Arnoldi, K.C., and F. McCarthy, for the plaintiffs.

ONTARIO AND MINNESOTA POWER CO. v. RAT PORTAGE LUMBER CO.—MASTER IN CHAMBERS—MAY 14.

Discovery—Examination of Officers of Plaintiff Company—Unexecuted Order for Examination of President—Con. Rule 439(a)—Production of Documents—Better Affidavit—Premature Application.] —Motion by the defendants for an order for a further affidavit on production from the plaintiffs, to include all the books of account and other records of the plaintiffs, and for the examination of three persons alleged to be in some way, either as directors or otherwise, connected with the plaintiffs, as well as of an officer or officers of the company, at Toronto, where the plaintiffs' head office was situated. As to the examination of an officer of the company, the Master said that a reference to Hees Co. v. Ontario Wind Engine Co., 12 O.W.R. 774, shewed that no such order could now be made, because, on the 3rd April, an order was obtained by the defendants for the examination of the president of the plaintiffs; and this examination had not yet taken place. No order could be made for the examination of another officer as long as that order was in force. As the three persons referred to as directors or in some way connected with the company could not be examined otherwise than under the same Rule, Con. Rule 439(a), clause 2, it followed that that part of the motion must also be refused—at least for the present. If any occasion should arise for a renewal of this branch of the motion, it could then be dealt with on its merits. The other branch of the motion was supported only by affidavits, and argument that the books, etc., of the plaintiff company should be produced, because they *must* be relevant, as they must shew the plaintiffs' dealings with the Minnesota company, and other facts alleged in the statement of defence (see ante 1078, 1182). All this, however, was at present only a matter of surmise and conjecture, so far as appeared on the material; and it was stated on the argument that there were no such dealings as alleged. The affidavit already made was sufficient on its face. It might be that, on examination for discovery, some ground would be shewn to justify an order for a further affidavit. But until this had been done in some of the ways pointed out in Swaisland v. Grand Trunk R.W. Co., ante 960, no further affidavit was required. The conclusion of the whole matter was, that the motion was wholly premature and should be dismissed, but without prejudice to its being renewed, in whole or in part, as the defendants might be advised. The costs of the motion to be to the plaintiffs in the cause. N. Sinclair, for the defendants. Glyn Osler, for the plaintiffs.

RE KRUEGER—MEREDITH, C.J.C.P.—MAY 14.

Will—Construction—Sale of Land—Order Authorising—Terms—Disposition of Purchase-money—Payment into Court—Maintenance of Beneficiary.]—Motion by Mary Krueger, a beneficiary under the will of Christian Krueger, for an order declaring the true construction of the will, and authorising a proposed sale of the lands of the testator. At the hearing of the motion, the Chief Justice decided and declared that the whole of the land of the testator passed under the will, and that the sale should be authorised. He reserved judgment as to the disposition of the purchase-money; and, after consideration, made the following memorandum: An order may go authorising the proposed sale to Benjamin Rody and Ephraim Rody for $6,150. Of the purchase-money, $1,000 must be paid into Court, to be applied for the maintenance of Annie Krueger during her life, and any surplus of the fund remaining at her death will be paid to John C. Krueger, if living at her death, and in the event of her surviving him to his executors, administrators, or assigns at her death. The residue of the purchase-money will be paid to the widow and John C. Krueger; and a discharge for it signed by them and by the executors must be filed in Court. Costs of the application out of the estate. C. J. Holman, K.C., for the applicant. E. C. Cattanach, for the Official Guardian. T. H. Peine, for the executors.

CAMPBELL v. SOVEREIGN BANK OF CANADA—MASTER IN CHAMBERS—MAY 15.

Evidence—Foreign Commission—Order for—Terms—Prior Examination of Officers of Defendant Bank.]—Motion by the defendants for a commission to examine one D. M. Stewart as a witness on their behalf at New York. It was stated in the affidavit in support of the motion that Stewart had agreed to be examined at New York, but that he expected to leave that city for the interior of Alaska early in June. The Master said that it could not be argued that Stewart was not a material witness; but it was said that the plaintiffs were not prepared to cross-examine him effectively; that they wished to examine two of the defendants' officers, Jarvis and Jemmett, for discovery before the examination of Stewart, on the principle of the exclusion of

witnesses at a trial. The defendants were willing that the two officers should be examined this week, and offered to produce them. The Master said that if the two officers were examined early next week, and Stewart the week following, each side would have all they could reasonably ask. On this understanding, an order was made for the issue of a commission to examine Stewart. Costs of the motion and of the commission to be left to the Taxing Officer unless disposed of by the trial Judge. W. J. Boland, for the defendants. F. Arnoldi, K.C., and F. McCarthy, for the plaintiffs.

BROOM v. TOWN OF TORONTO JUNCTION—DIVISIONAL COURT—MAY 14 AND 15.

Parties—Addition of Defendant—Terms—Statute of Limitations—Motion to Reopen Appeal.]—On the 10th May, 1912, BRITTON, J., upon the application of the plaintiff for leave to appeal from the order of MIDDLETON, J., ante 1228, affirming the order of the Master in Chambers, ante 1158, refusing the plaintiff's application to add A. J. Anderson as a party defendant, made an order in the following terms: "Leave granted to the plaintiff to appeal from the order of Mr. Justice Middleton, dated the 7th May, 1912; the plaintiff consenting that, if the appeal be allowed, and if A. J. Anderson be added as a party defendant, and if he pleads any statute of limitations as a bar to the plaintiff's recovery, such statute shall be a complete bar as against Anderson, if such statute would have been a bar in case an action against him had been commenced by writ of this date. Let the case be set down for Tuesday the 14th May, 1912." On the 14th May, 1912, the appeal came before a Divisional Court composed of BOYD, C., TEETZEL and KELLY, JJ. The plaintiff appeared in person. No one appeared for the defendant. The Court pronounced an order adding Anderson as a defendant, upon the terms contained in the order of BRITTON, J.; costs in the cause.—On the 15th May, 1912, W. A. McMaster appeared for Anderson, and asked the same Court to reopen the appeal, stating that he had made a mistake as to the day. The Court refused to reopen the appeal, saying that Anderson was protected by the terms of the order, and that, if he wished to move against the order pronounced yesterday, he must launch a substantive application.