THE

ONTARIO WEEKLY REPORTER

VOL. 25 TORONTO, JANUARY 15, 1914. NO. 9

HON MR. JUSTICE BRITTON. DECEMBER 9TH, 1913.

McARTHUR v. McLEAN.

5 O. W. N. 447.

Contract—Agreement to Leave Property by Will—Enforcement by Beneficiaries not Parties to Agreement—Death of Promisor Intestate—Evidence — Corroboration — Interest—Costs—Infants.

BRITTON, J., *held*, that an agreement for valuable consideration with A to leave A's children certain property by will was capable of enforcement by the said children against the estate of the promisor.

Action brought on behalf of infants by their next friend to recover the sum of $4,500 in the circumstances mentioned in the judgment, tried at Walkerton without a jury.

D. Robertson, K.C., for plaintiffs.

C. J. Mickle, for defendant, McLean.

Arthur Collins, for defendant McArthur.

HON. MR. JUSTICE BRITTON:—The plaintiffs are the infant children of John Alexander McArthur, and Christina McArthur, and Christina McArthur was the daughter of the late Alexander McLean who died on March 15th, 1911. Christina was the only surviving child of Alexander McLean, and letters of administration to his estate were granted to her on April 26th, 1911. Alexander McLean left him surviving (besides his daughter) one sister, viz., Sarah McLean, and two brothers John and Neil. Sarah died suddenly, intestate, and the defendant John McLean took out letters of administration to her estate. She was about 60 years of age at the time of her death. The wife of Alexander McLean died in 1876, or 1877, and at his request his sister Sarah went to his home and continued there as his housekeeper until his death. She was not well

off financially. She was disappointed and so expressed her feelings, that her brother had not provided for her by will. She stood in the place of mother to the then child Christina, and there was love by each for the other.

Christina McArthur says that desiring to make her Aunt Sarah feel at ease in regard to her maintenance and support during her life, on or about June 8th, 1911, made the arrangement with her aunt that she, Christina, would give to the Aunt Sarah $2,500 in money and would assign to her a mortgage, viz., a mortgage made by Wm. Sparrow to the late Alexander McLean, upon which for principal and interest there was about the sum of $2,000 unpaid, upon the condition that Sarah McLean would by will give and bequeath the sum of $4,500 to the children of her—Christina McArthur. This Sarah McLean did not do, but died intestate. It was made perfectly clear by the evidence that the money was paid over, and the mortgage was transferred. No other consideration for payment of money or transfer of the mortgage was proved. The evidence of Christina McArthur was corroborated, and I find the agreement set up proved. If a gift of the money and mortgage is suggested, the onus would be upon the defendant McLean, to establish it. It was not established, but negatived. The money and mortgage were not, in my opinion, payment or settlement of any claim by Sarah against the estate of her brother. The only intimation of any such claim, by Sarah, was that she felt sure a will would be found and if found, it would contain a bequest to her of $2,000. In conversation with her Aunt Christina, Sarah spoke of being entitled to a wife's share, as she had in place of a wife kept the home and cared for the child—and she apparently thought her brother worth about $6,000, one-third of which would be the $2,000 that her brother had, in her opinion, named in a will.

That Sarah would be willing to bequeath all she got from Christina, to Christina's children, is extremely probable, for the only others were her brothers, both elderly men of large means, and unmarried. The plaintiffs are entitled in my opinion to maintain this action. The mother, however, is a party defendant and will be bound by the judgment in this action. She consents to be made a party plaintiff if necessary.

The judgment will be for the plaintiffs for $4,500 with costs payable out of the estate.

The defendant McLean, without delay, gave the statutory notice requiring the plaintiffs to establish their claim, so I think no interest should be allowed.

The amount of $4,500, less solicitor's and client's costs, if any, to be paid into Court for the plaintiffs (infants) to be invested as Court moneys and paid out to them as they respectively attain the age of 21 years.

Twenty days' stay.

HON. MR. JUSTICE LATCHFORD. DECEMBER 13TH, 1913.

RE BROWNE.

5 O. W. N. 466.

Will—Construction—Inconsistency—Bequest of all Residue to amount of $800—Gift Limited to that Sum—Intestacy as to Remainder of Residue.

LATCHFORD, J., *held*, that under a clause in a will providing "all the residue and remainder of my estate not hereinbefore disposed of I give, devise and bequeath unto my nephew to the amount of $800" the beneficiary only took the sum of $800, there being an intestacy as to the balance of the residue.

Re Nelson, 14 Gr. 199, discussed.

Application by the executors for the construction of a provision in the will of the testatrix, an unmarried woman, the residue of whose estate amounted to nearly $4,000.

The clause regarding which the advice of the Court was sought is as follows: "All the rest, residue and remainder of my estate not hereinbefore disposed of I give, devise and bequeath unto my nephew Travers Gough Browne of Brockville, to the amount of $800."

If the bequest was limited to the $800, there would be an intestacy as to upwards of $3,000.

J. A. Hutcheson, K.C., for executors.

G. H. Kilmer, K.C., for Caroline Bolton, one of next of kin.

HON. MR. JUSTICE LATCHFORD:—It is a well established rule that the Courts do not favour an intestacy. But it is also the law that effect must be given to the intention of a testator as expressed.

No case parallel to this was cited upon the argument, nor have I been able to find any. *In re Nelson* (1868), 14 Grant 199, has some little relevancy. There the testator

left two unsigned and undated scraps of paper, on one of which he had written "I leave the whof (whole) of my property to William Brown, Townhead, Arbuthnot by Fordoun, Scotland, $2,000;" and on the other scrap of paper he had written "I give Peter Crann $500 for himself."

Probate of these unsigned scraps had—wonderful to relate—been granted by a Surrogate Court as the last will of the deceased. The matter came before Chancellor Van Koughnet upon the contention made by the next of kin that the whole of the estate did not pass to William Brown and Peter Crann; but that there was an intestacy as to the residue in excess of the $2,500. The question was not whether the two pieces of paper constituted the will; that had been settled—rightly or wrongly it mattered not—by the Surrogate Court; but whether, assuming them to be the will of the deceased, they disposed of all his property.

The learned Chancellor asks: "Can I reject the figures $2,000?" and proceeds: "The testator must have meant something by them. They have no meaning, no use, are insensible, unless read as designating the amount of the bequest to Brown."

The line "I leave the whof of my property to William Brown" was regarded as a declaration by the testator that he was going to dispose of the whole of his property, but the figures were held to indicate that the testator never executed the intention he had formed.

An additional ground upon which the declaration of intestacy, as to the residue was based was that, in the order in which the scraps were granted probate, they were so arranged that the bequest to Crann followed that to Brown. This ground does not exist in the present case. Had the bequest made by Miss Browne to her nephew been followed by any other bequest, it is manifest that the subsequent legacy would have to be given effect to, and to that extent at least the whole of the residue would not pass to the prior legatee.

In the present case I cannot reject the words and figures "to the amount of $800." They are meaningless, useless, senseless, when not regarded as limiting the general residuary bequest to Travers Gough Browne. I think they express the limitation to $800 quite clearly. There is an intestacy as to the excess. There will be judgment accordingly. Costs of parties represented out of the estate—those of the executors as between solicitor and client.

HON. MR. JUSTICE LATCHFORD. DECEMBER 9TH, 1913.

WRIGHT v. A. O. U. W.

5 O. W. N. 445.

Insurance—Life Insurance—Lack of Trace of Insured—Presumption of Death—Diligent Enquiry—No Word for Ten Years—2 Geo. V. c. 33 s. 165 s.-s. 5, 6—Costs.

LATCHFORD, J., *held*, that where the insured under a policy of life insurance had not been heard from for nearly ten years, in spite of diligent enquiry, and the circumstances were such that he might have been expected to communicate with his family if alive, there was strong enough presumption of death to warrant a declaration of the same by the Court.

Action to recover the amount of an insurance on the life of Judson A. Wright, who had disappeared and had not been heard of since 1904.

A. R. Bartlett, for plaintiff.

A. G. F. Lawrence, for defendants.

HON. MR. JUSTICE LATCHFORD:—Judson A. Wright, a carpenter, the husband of the plaintiff, became, in 1886, a member of the fraternal society known as the Ancient Order of United Workmen. In 1897, being then 43 years of age, he left the county of Essex and went first to Manitoba, then to other western provinces of Canada, and thence to various places in the United States. He was in the city of Chicago in February, 1904. During his wanderings he wrote from time to time to his wife and the eldest of the five young children he had left in Canada, manifesting in such of the letters as have been preserved a warm and constant affection. His last letters indicate that he was broken in health, and incapable of earning even a precarious living. He had spent three nights in the municipal lodging house at 12 and 14 South Jefferson street. Only for one more night would even that shelter be afforded him. He was poorly clad, hungry and weak, he says, but sober and promised to be sober to the end that he doubtless felt to be not far off. His son, who had at an early age taken the absent one's place as head of the family, had on previous occasions responded to appeals from his father for relief; and would have done so again when the last call was made had he not been himself on the point of moving the family from Windsor to Chicago,

whither his employers had transferred him from Cleveland. As soon as the family reached Chicago, they sought out the father at the addresses he had given. The only information they obtained was that he had hired with a lumber company to work in "the South." The assistance of the detective department of the city was secured, and many but unavailing efforts were made to find some trace of Wright. A suggestion that possibly he might have worked on the World's Fair buildings at St. Louis in 1905 was followed by enquiries there, but again without result. Knowing of his father's preference for the West, the son had advertisements published in many of the newspapers of western Canada and the United States, but failed to obtain any information whatever.

The assured has not been heard of for a period of nearly 10 years. The plaintiff, by paying all the dues and assessments which her husband would have been liable for if living has kept him in good standing in the defendant order, and on proof of his death is entitled to the $2,000 for which his life was insured.

From the letters before me intended but for his wife and children, it is manifest that, whatever his weakness may have been, he was of a very affectionate disposition. He says that he loved them with heart and soul, and no one can read his words without being impressed by his sincerity. Having regard to fondness for his wife and children, the advantages he had obtained from his communications with his eldest son, his physical condition when he wrote his last letter on February 1st, 1904, and the fact established in evidence that he has not since been heard of, I am satisfied that the presumption of his death has been established, and direct that judgment be entered in favour of plaintiff for $2,000. The defendants have acted throughout in a spirit of fairness and the plaintiff might have moved under 2 Geo. V. ch. 33, sec. 165, sub-secs. 5 and 6, for a declaration which would have the same effect if made as this judgment. I therefore think it is not a case for costs.

HON. MR. JUSTICE LENNOX. DECEMBER 10TH, 1913.

LEONARD v. CUSHING.

5 O. W. N. 453.

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

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

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

Judgment of HOLMESTED, Registrar, reversed.

Appeal by plaintiffs from an order of Holmested, Senior Registrar, in Chambers, setting aside an order of a local Judge allowing the plaintiffs to issue a writ of summons for service out of the jurisdiction and setting aside the writ and service thereof.

F. Aylesworth, for plaintiff, appellant.

G. Osler, for defendant, respondent.

HON. MR. JUSTICE LENNOX:—Consolidated Rule 25 provides: "(1) Service out of Ontario of a writ of summons . . . may be allowed wherever (e) The action is founded . . . on a breach within Ontario of a contract, wherever made, which is to be performed within Ontario."

There is a contract in writing, and under its express terms the goods were shipped to the defendants at Edmonton, Alberta, the plaintiffs being at the expense of carriage to that point. Certain payments were made and the plaintiffs claiming to recover the balance were allowed to proceed under the rule quoted by order of the local Judge of this Court at London. This order and the writ issued and the service effected were set aside by the order of the Registrar of this Court, sitting as Master-in-Chambers. From this order the plaintiffs appeal.

With great respect I am of opinion that the learned Registrar erred in setting aside the order of the local Judge. The "breach" upon which the action is founded is non-payment. If the contract provides either in terms or by impli-

cation for payment outside Ontario then the order appealed from is right. The contract is not explicit, but it is argued that as delivery was to be made at Edmonton and part of the money was to be paid upon delivery of machinery and "the balance in 2 equal payments in 30 and 60 days from the delivery of the machinery," that this means that the plaintiffs have to accept payment at Edmonton. I do not think so. I cannot think that either of these "upon delivery" or "from the delivery" perform any office beyond simply defining the time at which payment is to be made. Upon the reading of the contract the place of payment is left absolutely at large. The result of the contract being silent the debtor must seek out his creditor. The defendants must get the money into the hands of the plaintiffs in London—no posting or depositing or other act falling short of this will discharge them. The converse was the case in *Comber* v. *Leyland*, [1898] A. C. 524. There all that the debtor was to do was by the contract to be done outside the jurisdiction of the Court in England and hence as Lord Halsbury pointed out the debtor there had not to seek out his creditor in England, he had to do just what the contract provided, but he also enunciated the principle which is to govern here, namely, "that where the parties have agreed that something is to be done in this country, some part of the subject-matter of the contract is to be executed within this country, it is a sort of consent of the parties that wherever they may be living, or wherever the contract may have been made, that question may be litigated in this country;" and Lord Herschell at p. 529, points out that the place of performance may be expressly or impliedly provided for by the contract. The importance of this case, however, is that it expressly recognises and reinstates the decision of the English Court of Appeal in *Bell & Co.* v. *Antwerp, London and Brazil Line*, [1891] 1 Q. B. 103, and *The Eider* (1893), P. 119, both of which go to shew that when a plaintiff is entitled to require payment to be made in this province, and if not made, he is entitled to sue out a writ and serve it under the provisions of Rule 25.

The order appealed from will be set aside, with costs. The defendants will have 10 days to appeal.

MASTER-IN-CHAMBERS. DECEMBER 10TH, 1913.

WOOD v. WORTH.

5 O. W. N. 452.

Writ of Summons—Service out of Jurisdiction—Con. Rules 25 (e) (f) (g)—Motion to Set Aside—Irregularities—Not Set Out in Notice of Motion—Con. Rule 219 — Conditional Appearance—Reason for.

HOLMESTED, K.C., refused to set aside the service of a concurrent writ of summons upon defendants holding them properly suable in Ontario on a tort committed here, and refused to allow the entry of a conditional appearance on the ground that the same were only necessary to allow of a motion against the writ, which motion in this case had already been made unsuccessfully.

Application on behalf of defendants Hortwitz and Zoller, to set aside an order allowing the issue of a concurrent writ for service out of the jurisdiction, the notice of the writ, the copy and service thereof, on them.

F. Aylesworth, for applicants.

H. E. Rose, K.C., for plaintiffs.

HOLMESTED, K.C.:—On the argument of the motion several alleged irregularities to the proceedings were pointed out, but it is a standing rule that he who would object to proceedings on the ground of irregularity must himself be regular. Rule 219 expressly requires that a notice of motion to set aside proceedings for irregularity must specify the irregularity complained of and the objections intended to be insisted on. This the notice of the present motion fails to do, and therefore the defendants do not appear to be in a position to rely on mere irregularities.

Then as regards the merit of the motion.

It appears that Mr. Pickup's affidavit, on which the order for service out of the jurisdiction was based, by some mistake omitted in par. 3 to include the name of the defendant Zoller; but it appears from the statement of claim and the endorsement on the writ, that Zoller equally with the other defendants, is a necessary party to the action against the company and Wagner who are within the jurisdiction.

The action is to restrain the present applicants from parting with certain shares they are alleged to hold in the defendant company; to restrain the defendant company from paying them any dividends on such shares; and to have it declared that these applicants are not the rightful holders

of such shares, and therefore, they are proper and necessary parties to the action under Rule 25 (f) and (g). But they are also proper and necessary parties and entitled to be sued out of the jurisdiction on the ground that the action is founded on a tort committed in Ontario and the case therefore is within Rule 25 (e).

It appears to me therefore that the defendants are properly suable in this province and that (apart from the irregularities which were referred to) the order was properly made.

The motion is therefore refused. The costs to be in the cause to the plaintiffs, who appear to have rather invited the motion by the way they conducted their proceedings.

The applicants in the alternative applied for leave to enter a conditional appearance. According to the English practice appearance is merely allowed for the purpose of enabling the defendant to apply to set aside the writ, because if he entered an absolute appearance he would waive the right to object to the jurisdiction. If within a limited time the motion to set aside the writ is not successfully made the appearance automatically becomes an absolute appearance. There is nothing in the Rules to indicate that the practice thereunder is to be otherwise. Here the applicants have moved to set aside the writ and failed and there appears therefore to be no reason for allowing them to enter a conditional appearance.

HON. MR. JUSTICE LATCHFORD. DECEMBER 5TH, 1913.

GAGNON v. HAILEYBURY.

5 O. W. N. 435.

Municipal Corporations—Negligence—Delay on Part of Fire Brigade in Answering Call—Duty merely Permissive—Absence of Liability.

LATCHFORD, J., *held*, that a municipality is not liable in damages for the non-performance or inefficient performance of purely permissive duties, so that they are not liable for the tardy manner in which their fire brigade answers an alarm of fire.

Quesnel v. *Emard*, 8 D. L. R. 537, followed.

Hesketh v. *Toronto*, 25 A. R. 449, distinguished.

J. Lorn McDougall, for plaintiff.

F. A. Day, for defendants.

Action by plaintiff alleging that the defendants negligently allowed grass, weeds, logs and other combustible materials to accumulate during the dry season of 1913 on the streets of the municipality near the plaintiff's property; and that they were further negligent in unduly delaying to respond to an alarm of fire sent in by the plaintiff, which if promptly responded to would have averted the destruction of his house and stables, whereby he sustained a loss of $700.

HON. MR. JUSTICE LATCHFORD:—At the close of the evidence, I expressed opinion that upon the facts, as I found them, as well as upon the law, as I understood it, the plaintiff had failed to make out a case. However, I deferred giving judgment, so that the plaintiff's counsel might have an opportunity of submitting authority to support the contention he so vigorously advanced at the time. He now informs me that no such authority can be found. Even had a clear case of neglect of duty by the fire chief been made out, and not merely as established, a slight error in judgment as to the imminence of the danger, and some delay on the part of the fire department in arriving on the scene, the plaintiff would still be without redress. The municipality had power to clean the streets of grass, weeds and other materials, but it was not obliged to exercise that power. It had and exercised the right to establish a fire brigade, but here again the statute is merely permissive. No legal obligation rested on the town to have its fire department vigilant in protecting the property of the ratepayers from fire. Indeed, had the firemen refused, instead of delayed, to respond to the plaintiff's call for their aid, the town would not be responsible for the damages which he sustained. It is not a case where a direct tort was occasioned by the firemen acting as servants of the municipality. If the firemen had caused damage to the plaintiff while employed in the performance of their duties, the defendants might be liable, as was held in *Hesketh* v. *Toronto* (1898), 25 A. R. 449. In that case the plaintiff's son was killed while standing in a public street by the runaway horses of a steam fire engine of the defendants. The jury found that the horses had not been kept under proper control. The *maxim respondeat superior* was held applicable; but it was at the same time pointed out—Burton, C.J. O., at p. 451—that no private action would lie against a

municipal corporation for damages sustained by reason of its neglect to perform a public duty while exercising merely permissive powers.

The question in issue here was recently given careful consideration in the Quebec Court of Review: *Quesnel* v. *Emard* (1912), 8 Dom. L. R. 537. In Quebec, as in Ontario, the power given to municipalities in regard to the organisation of fire companies, is enabling and not obligatory. Mr. Justice De Lorimier, in delivering the judgment of the Court (p. 543), expressed the law in a few words: "Municipal corporations are not obliged to protect property against fire. They have in this regard merely a faculative power which does not create an obligation, the inexecution of which would entail liability in damages for fire losses."

This action is accordingly dismissed with costs.

HON. MR. JUSTICE LENNOX. DECEMBER 9TH, 1913.

TILL v. TOWN OF OAKVILLE AND BELL TELEPHONE CO.

5 O. W. N. 443.

Parties—Joinder of Defendants — Fatal Accident—Electrocution—Joinder of Telephone Company — Series of Occurrences—Joint Liability—Doubt in Plaintiff's Mind—Alternative Claim Permissible—Con. Rule 67.

LENNOX, J., *held*, that where an action arises out of a series of occurrences for which one or both of two defendants are responsible and with which both are connected and the plaintiff is uncertain which defendant is liable, both may be sued.

Compania Sansinena de Carnes Congeladas v. *Houlder Bros. & Co.*, [1910] 2 K. B. 354, referred to.

That therefore where a death is caused by a shock from wires supplying electric current to a house and it is alleged that the same was probably caused by the crossing of the electric wires with telephone wires, both the municipality supplying the electricity and the telephone company are properly made defendants.

Appeal by defendants, the Bell Telephone Company of Canada, from an order made by the Master-in-Ordinary sitting for the Master-in-Chambers, on October 21st, 1913, dismissing appellants' motion for an order striking them out as defendants on the ground of improper joinder or for an order compelling plaintiff to elect which defendant she would proceed against and for other relief.

The action was brought against both defendants to recover damages for the death of the plaintiff's husband by an electric shock from the wires by which a current for the supply of electric light was conducted by the defendant municipal corporation into the houses of its customers, but said to have been caused by the wires of the defendant company crossing the electric light wires.

H. A. Burbridge, for the appellants, the Bell Telephone Company.

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

D. I. Grant, for defendants.

HON. MR. JUSTICE LENNOX:—It cannot prejudice the defendant company that there will be a chance at the trial of throwing the liability upon the defendant corporation and the converse may be said of the corporation. A plaintiff who has a *bona fide* claim against somebody should not be forced into experimental actions to discover where the liability rests unless the joinder of parties is clearly unauthorized. The statement of claim here is not all that could be desired, but it is more specific than the points of claim held to be sufficient, in the *Houlder Case,* hereafter referred to. It is quite clearly to be gathered from the plaintiff's statement that she claims to have a cause of action, (a) arising out of a series of occurrences with which both defendants are alleged to be connected, (b) for which one or other of these defendants are responsible, (c) or for which they are jointly liable, and that (d) she is in doubt as to who is responsible for the damage.

The last point is perhaps the clearest because from the very nature of the circumstance shewn, it must remain uncertain until the trial, who put in action the destructive agency which killed the plaintiff's husband; and this point is conclusive of the plaintiff's right to join the defendants upon the express authority of Con. Rule 192, now Rule 67, See also *Symon* v. *Guelph & Goderich Rw. Co.,* 13 O. L. R. 47. If there is a joint cause of action of course the plaintiff has a right to join the wrongdoers: *Hind* v. *Barrie,* 6 O. L. R. 656, and the *Symon Case,* which shews too that the right against one may be founded upon contract and the other be independent of it. And upon the prominent question, namely: As a series of connected transactions for which one or other of the defendants are liable the law seems to be now clearly

established that the plaintiff has a right to prosecute a joint action. See *Compania Sansinena De Carnes Congeladas* v. *Houlder Bros. and Co.*, [1910] 2 K. B. 354; following *Frankenburg* v. *Great Horseless Carriage Co.*, [1900] 1 Q. B. 504; and *Buller* v. *London General Omnibus Co.*, [1907] 1 K. B. 264, and expressly recognizing *Child* v. *Stenning*, 5 Ch. D. 695.

It was understood upon the argument that I need not deal with the question of particulars, and the motion is disposed of without prejudice to a motion later on. The defendant the Bell Telephone Company will have eight days for delivery of a statement of defence.

The motion is dismissed with costs.

HON. MR. JUSTICE LENNOX. DECEMBER 13TH, 1913.

REX v. DAVEY.

5 O. W. N. 464.

Criminal Law—Procedure—Motion to Quash—Magistrate's Return—Conclusiveness—Supplemental Statement by Magistrate—Inadmissibility of—Evidence—Judicature Act, 3 and 4 Geo. V. ch. 19, sec. 63—Order of Protection.

LENNOX, J., *held*, that the Magistrate's return on a motion to quash is conclusive for one party as well as the other and the magistrate cannot supplement it by voluntary statements as to what occurred.

Regina v. *Strachan*, 20 C. P. 182, approved.

Motion by defendant for an order quashing his conviction by the Police Magistrate of the town of Amherstburg for the offence of being found on the enclosed land of another with a sporting implement after notice not to hunt or shoot thereon.

D. C. Ross, in support of motion to quash.

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

HON. MR. JUSTICE LENNOX:—It is contended by the defendant Davey that the only evidence against him is the deposition of James Moore. It is not and could not be denied that this evidence alone will not support a conviction. The prosecution contends that by agreement at the trial the evidence in a previous case was to apply in this case. The evidence was taken in shorthand, has been extended and is returned by the Magistrate as the evidence

in the case. There is nothing in the evidence to shew that any arrangement was made that the evidence in the earlier case would be accepted in this.

Mr. Ross proposed to fortify his position by filing an affidavit shewing that counsel for Davey refused to accept the earlier evidence as applying in the *Davey Case*. This was strenuously opposed by Mr. Rose, who referred me to *Regina* v. *Strachan*, 20 U. C. C. P. 182, as shewing that the magistrate's return is conclusive and that I have no right to go behind it; and subject to this Mr. Rose produced a counter affidavit. The doctrine of this case is beyond dispute, I think. The proper application of it to this case is not without difficulty. In the *Strachan Case* the rule was invoked to confine the evidence in the case to the evidence recorded by the magistrate at the trial. Mr. Rose pressed this rule of law, but desires me to accept not only the recorded evidence but to supplement it by a voluntary statement made by the magistrate. I do not think I can do this. If this may be done, where is the matter to end? Accept affidavits to contradict the magistrate, surely not, and if not then in some cases conclusions notoriously unjust might result.

Sec. 63 of 3 & 4 Geo. V. ch. 19 is explicit as to what return the magistrate shall make upon a motion to quash a conviction. Within these lines his return cannot be questioned, outside these limits his statements are extra judicial and irrelevant. The conviction will be quashed with costs. Order protecting magistrate if necessary.

HON MR. JUSTICE LENNOX. DECEMBER 5TH, 1913.

CONNOR v. TOWNSHIP OF BRANT.

5 O. W. N. 438.

Way—Highway—Non-Repair — Liability of Municipal Corporation—Automobile Upset—Death of Occupant—Damages.

LENNOX, J., in an action for damages for non-repair of a highway causing the death of plaintiff's husband found want of repair as a fact and awarded plaintiff $2,500 damages.

Action for damages for the death of plaintiff's husband by reason of being thrown from an automobile in which he was being driven along defendants' highway, caused by the alleged want of repair of the same.

D. Robertson, K.C., for plaintiff.

O. E. Klein, for defendants.

HON. MR. JUSTICE LENNOX:—At the trial yesterday I found that the highway at the point in question was not in such a state of repair as to be reasonably safe and fit for the requirements of that locality: I also found that it had been out of repair for such a length of time that knowledge by the municipality must be implied and in addition to this that the municipal corporation through their pathmaster had actual knowledge of the condition of the road for a sufficient length of time before the accident to enable them to put it in proper repair.

I find that at the time the automobile in which the deceased was travelling reached the defective part of the highway it was travelling at a rate not exceeding twelve miles an hour and was being properly driven and under the control of Robert Hunter; and that he had made all proper adjustments having regard to the general condition of the road, and the fact that he was descending a grade; and that the driver was a competent man, and was at the time exercising reasonable care.

The evidence of Robert Hunter was given in a frank, unhesitating way; he is a clear-headed, intelligent man, and I accept his evidence as generally reliable and accurate.

A careful perusal of his evidence satisfies me that from the time the car jolted over the cut, until it upset and pinned the driver and the deceased Connor under it, Robert Hunter was not mentally fit or physically in a position to control the car, and did not in fact control it, and that this condition was solely due to the shock or jar occasioned by the condition of the highway and the almost overturned condition of the car as it descended from the highway. The condition of the highway occasioned the driver of the car, and therefore the deceased, to be in a position in which he could not help himself. I find therefore that the want of repair was the cause of the casualty.

There will be judgment for the plaintiff for $2,500, with costs.

HON. MR. JUSTICE KELLY. DECEMBER 2ND, 1913.

SMITH v. WALKER.

5 O. W. N. 410.

Pleadings—Statement of Defence—Necessity for in Addition to Affidavit to Specially Endorsed Writ—Time for Delivery—Default—Right to Move for Judgment—Con. Rules 56, 112.

KELLY, J., *held*, that even after a defendant has filed an affidavit in answer to a specially endorsed writ under Con. Rule 56, if the plaintiff makes no election under such rule the defendant must deliver a defence under Con. Rule 112 within ten days after appearance, failing which plaintiff is at liberty to move for judgment as if no defence filed.

Plaintiff issued against defendant a specially endorsed writ to which defendant Walker entered an appearance; and he filed the affidavit as to defence required by Rule 56. Plaintiff did not make the election provided for by sec. 2 of that Rule, nor did the defendant deliver a defence within ten days after appearance. (Rule 112). After the expiration of the ten days, plaintiff served a joinder of issue and notice of trial, following which a statement of defence was delivered.

An application by defendant Walker to Mr. Holmested, acting as Master in Chambers, for an order to strike out the joinder of issue and notice of trial, was refused on the ground that after the filing of the affidavit required by Rule 56, a defendant cannot, even though he file no further statement of defence, be treated as in default of defence, and that the defence is practically, in the eyes of the Court, in the form of an affidavit like an answer under the old Chancery Practice.

The present motion is by way of appeal from that order.

M. Grant, for the appellant.

J. E. Jones, for respondent.

HON. MR. JUSTICE KELLY:—I think the view taken by the acting Master is not correct. The effect of the rules in question is that the defendant, under the circumstances here, had the right within the time specified in Rule 112 to deliver a defence, and, in failing to do so, plaintiff's right was to treat him as being in default and to move for judgment accordingly. The rules referred to do not

contemplate or authorise the course adopted by the plaintiff. The defendant's appeal is, therefore, allowed. If necessary, I validate the delivery of the statement of defence (see C. R. 121), but as a condition thereof, and to obviate delay in bringing the matters in issue to trial, it will be referred to the Junior Judge at Goderich to dispose of the whole matter. The pleadings shew that the matters involved are largely an accounting, and can be readily disposed of in that manner.

Under the circumstances there will be no costs.

HON. MR. JUSTICE LENNOX. DECEMBER 11TH, 1913.

AVERY v. CAYUGA.

5 O. W. N. 471.

Prohibition—Grounds for—Questions Passed on by Appellate Division—Late Application—Costs.

LENNOX, J., refused an order for prohibition where the application was made upon grounds which were practically by way of appeal from a decision of the Appellate Division and where in any case it was doubtful if there were anything left to prohibit.

Motion by the primary debtor for prohibition to the First Division Court in the county of Halidimand to prohibit proceedings upon the judgment of that Court, which was affirmed by the Appellate Division of the Supreme Court of Ontario on April 21st, 1913, *vide Avery* v. *Cayuga*, 28 O. L. R. 517.

J. B. Mackenzie, for the defendant.

HON. MR. JUSTICE LENNOX:—The plaintiff was not represented when the motion for prohibition was made.

The fact that there has been a trial and lengthy argument and that there has been an appeal to the Appellate Division touching the questions now raised does not of itself negative prohibition. But I have only power to prohibit subordinate tribunals and persons—I have no power to prohibit the Appellate Division. I would be doing this in effect if I granted the order asked for. It is idle to argue that there was only one point before the Appellate Division and that it was only decided that the money in the bank might be taxed—the point there was the point again raised here,

namely, whether the money in the bank, situate outside the reserve, was money available for payment of the defendant's debts, he being an unfranchised Indian. See the reasons of appeal filed. The Appellate Division held that the money was garnishable. I am asked to hold that it was not and to prohibit the payment. This goes to the root of the whole matter and I am of course bound by the decisions.

There is a point taken too about a counsel fee allowed by the trial Judge. This should have been made the ground of appeal if objected to. I have not at all events felt called upon to consider this fine point in view of the fact that the defendant himself on the 23rd of May gave his cheque in settlement of the suit. There is no prohibition of course if nothing remains to be prohibited. I am not quite sure as to the facts upon this point, but the cheque was accepted on the day it was issued and is stamped as paid by the Dominion Bank on the 4th of June last. I think I must refuse to make an order.

The motion will be dismissed with costs, other than the $5 already ordered.

MASTER IN CHAMBERS. DECEMBER 2ND, 1913.

CANADIAN PACIFIC Rw. CO. v. MATHEWS.

5 O. W. N. 437.

Judgment—Motion for Summary Judgment—Action for Freight Rates —Bona Fide Dispute—Dismissal of Motion.

HOLMESTED, K.C., refused summary judgment in an action for freight rates when there was a *bona fide* dispute as to the classification of and charges for the freight so rated.

Motion for judgment under Rule 57. The action was to recover charges for handling freight at the rate of 40 cents per ton. The defence set up in the affidavit filed on behalf of the defendants was, that the charge was excessive.

G. W. Walrond, for plaintiff.

J. F. Boland, for defendant.

HOLMESTED, K.C.:—From the examination of the deponent on his affidavit it appears that the defendants claim that the vessel in respect of which the plaintiffs'

claim arises is of a special character and in a class by itself—that it is not a bulk freight vessel, but a package vessel and that for such a vessel and for cement carried by it, the proper charge is 21 cents per ton and not 40 cents as claimed.

It appears to me that there is shewn to be a *bona fide* dispute proper to be tried as to whether the plaintiffs are entitled to 40 cents per ton as claimed and that it cannot possibly be determined on a summary application.

I may add that according to the defendants' contention the plaintiffs have been overpaid, so that no part of the plaintiffs' claim is admitted.

The motion is therefore refused with costs to the defendants in any event.

HON. SIR G. FALCONBRIDGE, C.J.K.B. DEC. 10TH, 1913.

WARDHAUGH v. WISEMAN.

5 O. W. N. 456.

Husband and Wife — Separation Agreement — Release of Dower— Resumption of Cohabitation — Evidence—Declaration of Cancellation Made—Corroboration—Costs.

FALCONBRIDGE, C.J.K.B., cancelled a separation agreement and a release of dower where the parties had subsequently resumed cohabitation and the evidence went to shew that the two documents constituted in fact evidence of one transaction only.

Action for cancellation of certain agreements of separation and a release of dower and for a declaration as to plaintiff's rights as the widow of Alexander Wardhaugh, deceased, tried at Belleville.

E. D. O'Flynn, for plaintiff.

E. G. Porter, K.C., for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The plaintiff is the widow of Alexander Wardhaugh and the defendant is the administratrix of his estate and effects. The plaintiff was married to the said Alexander Wardhaugh in 1887. They lived in Belleville as husband and wife for about five years, when the said Alexander Wardhaugh became addicted to the use of intoxicating liquor, and the

plaintiff and the said Alexander Wardhaugh executed a deed of separation bearing date the 26th day of May, 1892.

About two years afterwards the said Alexander Wardhaugh, having promised to abstain from the use of intoxicants and to lead a better life, induced the plaintiff to live with him again. The plaintiff gave up a business she was carrying on for herself and joined Alexander Wardhaugh and his business, which was carried on successfully by both of them.

About the year 1900 Alexander Wardhaugh again commenced the drinking habit and treated the plaintiff with cruelty so that she took proceedings for her own protection in the Police Court. She also brought an action for alimony. Her statement of claim was delivered on the 17th day of November, 1902. That action was settled and a new deed of separation was executed by the husband and wife which bore date of 22nd November, 1902, in which the agreement of the settlement of the action is set out in extenso. The sum of $600 was paid to the plaintiff in pursuance of the terms of the settlement. She also contemporaneously executed a release of dower which release was registered in the Registry Office on the 15th December, 1902.

After all these events and agreements he again sobered up and lived properly and induced her to return and live with him, agreeing to burn all the papers and take care of her. He joined the Baptist Church; taught a Sunday school class; became a member of the Y. M. C. A. and for some years led an exemplary life and the two lived together until the time of his death, which took place suddenly on the 8th day of March, 1912.

For some time before his death the said Alexander Wardhaugh had again relapsed into dissipation, but the plaintiff remained with him and assisted him in his business and was living with him as his wife at the time of his death, aforesaid. She now asks for a declaration that the said agreements of separation, and the release of dower, be cancelled and null and void, and that she be entitled to rank against the estate of the said Alexander Wardhaugh as his widow.

Mr. Porter does not controvert the proposition that a separation deed is, *ipso facto,* put an end to for all further purposes if the parties subsequently become reconciled and return to cohabitation (Lush on Husband and Wife, 3rd

ed., p. 463 *et seq.*), but he relies on the release of dower which he claims is on a different footing, being under seal and for good consideration.

I am of opinion that the second agreement and the release of dower should be read together and treated as one transaction. The husband promised her to burn all the papers and she thought he had done so. She is an illiterate woman and signs with her mark. She is corroborated sufficiently by Mr. F. E. O'Flynn and Mrs. Pope. The former gentleman, a practising solicitor, narrates a curious incident, characteristic of a certain class of client. He says that the husband and wife did not remain apart a month after the agreements of November, 1902. O'Flynn had acted for Alexander Wardhaugh and had drawn the release of dower. O'Flynn saw them together and Wardhaugh wanted O'Flynn to throw off his costs, as he, Wardhaugh, had "taken his wife back and the papers were of no use." O'Flynn refused to forego his costs, whereupon Wardhaugh became quite angry.

I think, therefore, she is entitled to the declarations she asks for, but in the winding-up of the estate she must be charged with the $600 which she received in November, 1902, without interest. I have not overlooked the fact that she says she put $700 of her own money into the building which forms part of his estate, during the years "he was good." That was of course in their minds when the settlement of November, 1902, was made.

Costs to both parties out of the estate, those of the defendant as between solicitor and client. Thirty days' stay.

HON. MR. JUSTICE LENNOX. DECEMBER 10TH, 1913.

TORONTO DEVELOPMENTS LTD. v. KENNEDY.

5 O. W. N. 470.

Injunction—Disobedience of Order — Motion to Commit—Lack of Proof of Personal Service of Order—Enlargement of Motion.

LENNOX J., *held*, that a defendant who had disobeyed an injunction order of the Court should not be committed until proof of personal service of the injunction order on him was made.

Motion to commit defendant for contempt of Court for disobedience of an injunction order.

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

HON. MR. JUSTICE LENNOX:—The defendant was not represented upon the argument. He files an affidavit which he should never have made. If prepared by a solicitor, his action was highly improper. A litigant should not be allowed to swear to legal propositions which he knows to be false, or which he could not be supposed to understand.

I am not able to accept the defendant's statement, if that is what he means when he says that he did not intend to disobey the order of the Court. The previous paragraphs of his affidavit lead me to a different conclusion. The defendant is not entitled to much consideration. I think in a sense he intended to disregard the Court and play the roll of a quasi-civilized outlaw. Technically, however, I would not be justified in making an immediate order committing him to the common gaol for contempt. He was not served with the injunction order made by Mr. Justice Kelly on the 28th of November, 1912, and the solicitors who accepted service for the defendant only advised him that he was enjoined from cutting or selling sod upon the property. He should not be deprived of his liberty until the case is made clear against him to all intents.

The motion will stand enlarged until Friday, 26th December, inst. when I will be sitting as a vacation Judge, and if the plaintiffs desire it, will then be further enlarged. In the meantime the plaintiffs, if so advised, can have the injunction order personally served and evidence of any subsequent interference with the property can be given upon this application.

If the plaintiffs prefer it the motion will be dismissed without costs.

HON. MR. JUSTICE LENNOX. NOVEMBER 21ST, 1913.

HOUSTON v. LONDON & WESTERN TRUST CO. LIMITED, AND COOK.

5 O. W. N. 336.

Deed—Voluntary Deed of Trust—Undue Influence — Aged Woman Living Alone with Adopted Daughter—Onus—Evidence—Intervention of Solicitor—Duty of—Neglect to Perform—Departure from Instructions—Necessity for Independent Professional Advice — Lack of Understanding of Grantor of Nature of Deed—Declaration Setting Deed Aside—Trustees' Remuneration—Reference—Costs.

LENNOX, J., *held*, that where an aged woman living with her niece, who was also an adopted daughter made a deed of trust in the niece's favour the onus was upon the latter to prove that the grantor had had independent professional advice.

That it is not the presence of a solicitor but his advice which the law requires and he must give full advice and warning and retire if his advice is not followed.

Powell v. *Powell*, [1900] 1 Ch. 243, referred to. That the onus of proof as to capacity and undue influence is not on those attacking a will but on those upholding a voluntary deed.

Parfitt v. *Lawless*, 2 P. & D. 462, referred to.

That it is not enough to shew that the grantor knew what she was doing, it must be shewn that this intention was not produced by undue influence.

Huguenin v. *Beasley*, 14 Ves. 300, followed.

That apart from the question of undue influence the defendants had not proven that the grantor understood the nature and quality of her act and in the case of voluntary gifts the onus is on the grantees to do this.

Cooke v. *Lamotte*, 15 Beav. 234, referred to.

Declaration setting aside deed of trust with costs.

Action to set aside a voluntary deed of trust of her property and a general power of attorney given by plaintiff, an aged woman, upon the ground of undue influence and temporary mental incapacity.

F. W. Pardee, K.C., for plaintiff.

Fraser, for the defendant company.

W. N. Tilley, K.C., for the defendant Cook.

HON. MR. JUSTICE LENNOX:—It is reasonably clear that until about the beginning of April, 1912, the plaintiff was competent to look after her business and determine as to the disposal of her property if aided by honest and competent professional advice, and if, in other respects, left to the free exercise of her own will and judgment. There is no reason to believe that up to this time anybody had attempted to warp her judgment or poison her mind as to

any of the objects of her bounty, and up to this time she had a well thought out, settled, and clearly defined method for the disposal of her property to which she not only frequently referred but had embodied in several wills; and her purpose as declared and shewn was to dispose of her property by will, and by her will so to divide it that the family of Martha Manley, on the one hand, and the defendant Annie Cook on the other, would receive about equal benefits.

Annie Cook is a niece of the plaintiff, and lived with her until she was married—an adopted daughter in fact. Martha Manley was a niece of the plaintiff and of the plaintiff's husband as well, and was reared by the plaintiff. Thomas Manley is a son of Martha Manley, and lived with the plaintiff until he was thirteen, and then went with his parents to the West. He was regarded with great affection by the plaintiff and her husband, and they went to the West to get him to come back and live with them. He subsequently went to Texas; and the plaintiff went out to Texas and remained there five or six months and induced him to return to Canada and make his home with her. This he did, even for a time after he was married. Then he had a house of his own for a time; and some years ago at the instance of plaintiff he and his wife again moved into plaintiff's house and they all lived together until the date I have referred to, the end of March, 1912.

Mrs. Cook received more under the will of the plaintiff's husband, than was given to the Martha Manley branch of the family; but whether the plaintiff intended to make up the deficiency to the Manleys out of her own estate or not, is not quite clear. It matters not, however, which was the plaintiff's method and purpose in detail, the point is that down to the early part of April, 1912, the capacity and free will of the plaintiff is recognized on all hands and down to that time the plaintiff was outspoken as to her purpose to divide her means between the two branches of the family upon a basis of substantial equality; whereas under the settlement complained of Annie Cook takes all.

The plaintiff was only a few days keeping house until she became a poor, frightened, dejected woman in a state of mental and physical collapse, and imagined herself beset by spirits who took up their quarters in the cellar, in the pantries, and even in the key holes, and locked her in and locked her out, and tormented her and prevented her from

getting food or sleep; but these hallucinations had not yet, nor up to the time that Annie Cook took charge of the plaintiff, assumed a form necessarily calculated to prevent the plaintiff from properly disposing of her property; for the spirits were not then associated in her mind with the act or conduct of anybody.

On the 2nd April Thomas Manley wrote, advising Mrs. Cook of the plaintiff's ill health and hallucinations. On the 3rd he telephoned for Mrs. Cook, who arrived on the 4th and took up her home with the plaintiff. The 5th was Good Friday. On that day the plaintiff was thought to be dying, and she thought so herself. Dr. Bell and Dr. Logie attended her. Dr. Bell is an intimate friend, and had been the plaintiff's physician for many years, and he continued to visit her until the 15th of April.

Neither of the doctors considered the plaintiff in a condition to make a will or transact business at this time, and so reported to Mr. Gurd. Mr. Gurd waited on the plaintiff and talked to her on the 15th April and again on the 16th, 17th and 18th; and refused to draw a will on account of incapacity. He is emphatic in saying that she was not fit to transact business at all on any of these occasions.

At about this time it was in the plaintiff's mind, occasionally, that there had been men in the house instead of spirits, and that Thomas Manley was in some way responsible for what happened—that he wanted to frighten her. The evidence is not very clear or connected as to this, but the plaintiff had it clearly and persistently in her mind at about this time and afterwards that Manley wanted to put her in a lunatic asylum. This, she says, made her very sad.

I understood Mrs. Cook to say that she did not say Manley was going to lock the old lady up as a lunatic; but she admits that she told the plaintiff he was going to have a committee or guardian appointed, and he got him to stay away from the house, saying that Mrs. Houston did not want to see him or had taken a dislike to him. She does not pretend to say that she tried to disabuse the plaintiff's mind of this false impression; and she certainly did not apprise Manley of what the plaintiff had in her mind against him, or give him a chance to vindicate himself. During all this time Mrs. Cook was evidently determined to have a will made; and, whether of her own motion or otherwise, the plaintiff also appeared to desire to make a will; and during this time

—say along about the middle of April—the opinion of Mrs. Cook, and perhaps the opinion of the plaintiff too, was fluctuating as to the advisability of having two other doctors examine the plaintiff with a view to establishing her capability to do business.

Dr. Hayes was called in, but when he came to the house, was told by Mrs. Cook that he was not wanted. In the meantime, on the 15th April, Mrs. Cook had practically turned Dr. Bell out of the house after charging him with doping the plaintiff and endeavouring to keep her ill. Neither Dr. Bell nor Thomas Manley had access to the plaintiff again while Mrs. Cook remained in the house, a period of more than a year. Nor did Mr. Gurd see her. However, a decision was come to, and Dr. Hayes and Dr. McDonald were called in, and interviewed and questioned the plaintiff on the 20th April. It is not stated whether they were informed of the opinion of Dr. Bell, Dr. Logie or the solicitor, Mr. Gurd, and it is not in evidence whether these doctors at the time expressed a favourable or unfavourable opinion. Dr. McDonald said in Court of the plaintiff: "I thought her mind was normal for a person of that age."

Dr. Hayes saw the plaintiff only on one occasion when he and Dr. McDonald met on the 20th April—a most important date, as it was the day Mr. Weir took his instructions for the will; and from that day until all was in the hands of Mrs. Cook, there is no medical testimony; and no testimony at all except that of the actors in the transaction attacked—Mrs. Houston, who swears she never knew she was disposing of her property, and Mr. Moore and Mrs. Cook; and the gentlemen whom Mr. Moore engaged to carry through the transaction.

It is, therefore, very important to know what Dr. McDonald and Dr. Hayes had to say. Dr. McDonald's evidence does not help me, "Normal for a woman of 84." Under normal conditions a woman born 84 years ago is not alive, it is an exceptional condition if she is alive and a phenomenal condition if she is alive and mentally sound.

Then I have Dr. Hayes. He says he was not able to make out clearly from Mrs. Houston what she wanted him for. He gathered it was to judge of her sanity. He says her memory was good as to remote events, and not good as to recent events; and her capacity was such as "you would expect in a woman of her age." . . . "I thought she was in a condition

that she could be easily influenced." This is from his evidence in chief, and it is not strong testimony. On cross-examination he adds: "For large transactions, I don't think she could grasp the situation; I don't think she could grasp the significance of it."

This is the day Mr. Weir took Mrs. Houston's instructions for a will, and found her perfectly bright, capable and alert. He had never met the plaintiff before, and he decided to get the opinion of Dr. McDonald and Dr. Hayes before actually drawing up the will. He knew that Mrs. Houston's regular solicitor had refused to act, alleging incapacity; and he knew that Dr. Bell, the regular physician, and Dr. Logie, had both pronounced against capacity. Mr. Weir does not mention why he did not think it advisable to discuss the situation with these doctors as well.

For reasons which will appear it is my duty to scrutinize every act and statement of Mr. Weir with the greatest care. This, however, is not to be read as implying that I question Mr. Weir's honesty in what he did or in giving evidence.

Well, Mr. Weir obtained the report of Dr. McDonald and Dr. Hayes; but he did not draw the will. Why? Was it that he was too busy, as he thinks now, or was there a better reason that he has forgotten? I understand Mr. Weir to be a capable reputable solicitor, and, as I have said, I do not propose to question the honesty of his testimony, but, with it all, the circumstances force me back again to the inquiry: Has Mr. Weir sounded the real cause of his extraordinary delay, and practical refusal, to execute his instructions, or was it a haunting, persistent doubt of the plaintiff's capacity that stayed his hand? He knew of the opinion of Dr. Bell, Dr. Logie and Mr. Gurd; and he had the report of Doctors McDonald and Hayes, and yet he thinks he retained his opinion of the plaintiff's capacity right along; but how could he retain it if these doctors reported to him as they testified in Court, and it is inconceivable that they did otherwise? In a matter so peculiarly urgent, Mr. Weir, as an experienced solicitor, would unquestionably realize how imperatively he was called upon to promptly execute or promptly surrender the trust reposed in him, and it is because of this, among other things, that I find it so difficult to believe that in looking backward Mr. Weir has discovered the real cause of his long delay. With a client just rallied from an alarming illness, eighty-four years of age, her capacity called in

question, and her mind, upon the most favourable hypothesis, admittedly close upon the border line between capacity and incapacity; appreciating too, as we would, that the medical examination, to have meaning or cogency must coincide, or nearly coincide, with the actual execution of the will, I find it easier to believe that Mr. Weir was halted and prevented, as other solicitors had been, by the belief that no will ought to be drawn, than to believe that any experienced and conscientious solicitor would callously and negligently dally and drift for days and weeks, "taking all chances," but taking no steps whatever for the protection of his client; and I do not believe it, Mr. Weir's testimony to the contrary notwithstanding.

Just when Mrs. Cook called on Mr. Weir, paid his account and took away the papers, does not appear; but it was before the advent of Mr. Moore, the manager of the defendant company, on the 22nd of May, 1912. With this act the relation of solicitor and client between Mr. Weir and the plaintiff terminated. Between these two events other unsuccessful efforts were made to have a will drawn up, and in particular, Mrs. Cook, accompanied by the plaintiff, went to John Cowan, K.C., who had been the plaintiff's solicitor, and had drawn several wills for her. He hesitated or declined at first and then saw the plaintiff at her house and positively declined to draw a will.

The Cooks were the only people about the plaintiff when the transaction attacked was initiated. John Cook, husband of Annie Cook, drew up a memorandum of the manner in which all the plaintiff's property was to be disposed of sometime before Mr. Moore came. Mr. Cook says he wrote out this memorandum just as the plaintiff stated it. Mrs. Cook was "in and out," if not present all the time, and she took charge of the memorandum. John Cook instructed his brother, Thomas H. Cook, to telephone for Mr. Moore, and when Moore came to Sarnia, Thomas H. Cook accompanied him to the house and introduced him to the plaintiff. John Cook says he did this on the plaintiff's instructions, and leaving out for the moment the question of how the purpose was produced, I think it probable that, finding it impossible to get anyone in Sarnia to draw a will, the plaintiff in some way got the idea of having a trust company look after her business. She had this thought in her mind when Mr. Moore came, and talked to him along this line; but I am far

from believing that the thought originated with her, or that left to herself he would have altered the provisions of the will of 1907, and the codicil to this will.

Mr. Moore says he formed the opinion that the plaintiff understood what she was saying and doing. It may be that he honestly entertained this opinion, but to come to it was all in the line of his own interests, and in his zeal for his company he probably silenced a good many doubts before reaching it; but in any case it was all in the presence of the beneficiary, and knowing, as I understand he did know, of the formidable array of opposing opinion by persons far more competent to judge of the plaintiff's condition of mind that he could be, he had no right to act upon his own judgment, unless confirmed by an almost overwhelming preponderance of unassailable expert opinion, nor even then until the plaintiff was actually protected by competent, and entirely independent professional assistance and advice.

I am satisfied that Mr. Moore had no intention of entrapping or wronging the plaintiff, but he certainly arrogated to himself most extraordinary powers in the settlement and management of the plaintiff's property, forgetting or not appreciating that in a case of this kind the exercise of the profoundest wisdom of the agent cannot be substituted for the instruction or lack of instructions or authority of the principal.

The plaintiff, Mr. Moore says, attempted to give him instructions verbally, but was unable to go on, and thereupon Mrs. Cook produced the memorandum already referred to. Mr. Moore made this the basis of all he did then and afterwards; and it is not an unimportant circumstance that until the trial he thought it had been written by the plaintiff herself. In this memorandum he interlined some alterations and added particulars at the foot of it. Leaving out these particulars, this document, as amended, is as follows:—

"Eliza Houston, widow:

"I give Point au Tremble schools of the Presbyterian Church..... $1,000

"I give St. Andrew's Presbyterian Church, Sarnia..... 500

"I give St. Paul's Presbyterian Church, Sarnia..... 500

> "I give Annie H. Cook now a deed of my house and all the contents, and a thousand dollars at once, and the residue of my estate.
>
> "I give Thomas H. Manley my piano at my death, otherwise I cut Thomas H. Manley out of my will, as he has got more than his share. He has had more than $6,000 now."

This document shews that as written by John Cook the benefit to Mrs. Cook included the piano. This piano belonged to Thomas Manley. There was satisfactory evidence of this, aside from the plaintiff's statement. Mr. Moore says that he persuaded the plaintiff to leave Manley something. She said she would leave him the piano at her death, "as it is his anyway."

Having taken his instructions in writing in this way, Mr. Moore says he informed the plaintiff that her wishes might be effected in any one of three ways, namely, by power of attorney, by will, or by a deed of trust; but he says he advised the plaintiff to have a deed of trust, as this was the only means by which Mrs. Cook could be guaranteed. Mrs Cook was there, and it is said the plaintiff assented to Mr. Moore's proposal. There is no suggestion as to why Mrs. Cook should be guaranteed, or that the plaintiff had expressed a wish or purpose in that direction. It is not pretended that there was any explanation as to the meaning or effect of a trust deed, then or afterwards. Mr. Moore took the written instructions and the deeds and papers of the plaintiff away with him. The plaintiff told him, he says, that Mr. Weir was her solicitor; but he does not explain why he did not telephone and have him present, or why he passed Mr. Weir's office and carried the instructions and papers on to London. I think I know. I feel satisfied that it was simply because Mr. Moore wholly misconceived what was proper in such a case, and intended to be guided, as he certainly was to a great extent, by what he might think expedient in the premises.

When he got back to London Mr. Moore endorsed the instructions as follows:—

"Memo. of disposition of assets handed me by Mrs. Houston 22nd May, 1912, and amendments made by her at the interview." This, then, is the only basis upon which all

that was done on the 31st of May can rest; and, leaving out for the moment every other question arising on this action, he would be a bold man indeed who would argue that these instructions have been even approximately embodied in the several instruments procured to be executed by the plaintiff. It is not enough, of course, to say that the changes work a benefit to the plaintiff or that she is better protected or that it is a more provident arrangement or that Mr. Moore acted in good faith, as he probably did. The answer to it all is: Mr. Moore had not the right to settle the plaintiff's property or substitute his judgment for that of the plaintiff. There was no explanation of the changes. She did not ratify them. This is not her act or deed.

I have not overlooked that when the matter came on for trial Mr. Moore's verbal account in Court was not nearly so far out of harmony with what was done as are the written instructions, but he retained the instructions in his own written; but, even then, Mr. Moore did not for a moment pretend that when he left the plaintiff on the 22nd of May there was a word or syllable of instruction to justify him in drawing up a will and power of attorney in addition to the deed; and in a case of this kind neither Mr. Moore nor the defendants have ground for complaint if the documentary evidence of what was done is regarded as a safer guide than verbal statements in contradiction or qualification of it, and particularly in the face of the endorsement above quoted.

On the 23rd of May Mr. Moore wrote Mr. Weir enclosing the deeds and papers, giving his own interpretation of the instructions, but he retained the instructions in his own hand; and they were never produced to Mr. Weir unless they were produced to him when he took up the defence of this action as solicitor for the defendant company.

Acting upon what was contained in this letter, and on this alone, Mr. Weir prepared the trust deed in question and a will; and these instruments and a general power of attorney were executed by the plaintiff, by her mark, on the 31st of May, 1912, in the presence of Mr. Moore, Mr. Weir, Mr. Logan and Mrs. Cook.

I have not come to the conclusion that either Mr. Moore or Mr. Weir acted in bad faith; but from first to last the methods pursued were unusual and undesirable, from the standpoint of protecting the plaintiff. A great deal of care was taken to make the transaction fast and sure, to shut out

any possible future claimant, but no care was taken either in the framing of the deed or in the circumstances surrounding its execution to safeguard the plaintiff, by enquiry, warning, advice, or otherwise; and I regret to say that the numerous rehearsals, upon which the defendants so confidently relied, considered as a test of the unfettered exercise of the deliberate intention of a capable donor executing an irrevocable deed of all her property, with a full appreciation of the nature and consequences of her act, are simply farcical.

Mr. Weir had seen the plaintiff in the presence of Mrs. Cook on the 20th of April, and Mr. Moore, under the same condition, had an interview on the 22nd of May. Mr. Logan, who was sought out as a specially qualified witness, had met the plaintiff on one occasion ten or twenty years ago. Not a very strong trio, this, I would think. The only person present who could compare the Eliza Houston of that day with the Eliza Houston of a year or a few months before, was Annie Cook; and it might not be safe to accept Mrs. Cook as the final judge of the capacity and intention of the plaintiff, or to disclose to me "how this intention was produced."

Even if I accept the evidence that the plaintiff was able to repeat and did repeat all the provisions of the deed and will without faltering, this, with Annie Cook always in the room, always listening, and always the beneficiary, is, to say the least of it, as likely to be the mere echo of another mind as the spontaneous well-understood act of a capable woman. If anything, it was too well done.

It does relieve the situation a little that the plaintiff's memory was not absolutely perfect. She forgot to mention the piano, but this painful incident was so adroitly dealt with by Mr. Weir that in the end it went to prove even more conclusively than before the keen intellectuality of the plaintiff. Confronted with this serious crisis, I understood Mr. Weir to say that he did not think it expedient or proper to put the bold, bald question: "What are you going to do with the piano?" Why not? It could hardly disturb the robust intellect of the Eliza Houston put in evidence at the trial of this action on behalf of the defendants. Mr. Weir's method, however, afforded another intellectual test, and he inquired of the plaintiff: "Have you a fiddle?" The result was entirely satisfactory. "By the association of ideas,"

as Mr. Weir explained, the subject-matter was recalled to the plaintiff's mind, and she at once recollected that she owned a piano, or, to be more accurate, that Thomas Manley owned a piano, which happened to be in her house at the time; and she thereupon proceeded to make a gift of this piano to the owner, but not to take effect until after her death.

And in all seriousness, if "the association of ideas" has power to carry the memory back and rivet it upon conversations or, it may be, arguments or accusations or entreaties or promises, recent or remote—and it has—and if the disposal of the plaintiff's property and questions affecting its disposal were almost daily, or at all events, frequently, discussed between the plaintiff and Annie Cook—and they were—then what would be, what must be, the effect of having that lady always at the plaintiff's elbow, always upon the watch-tower, and always upon watch when the plaintiff's property was being discussed or dealt with. The "association of ideas" is difficult to eliminate under these conditions. Careful and troubled they were, about many things—little things—but not about the things which would guarantee the unfettered action of the plaintiff's mind. To what purpose is the gnat rejected, if the camel is to take its place? No one had the thought, or the courage it may be, to ask Mrs. Cook to retire, and no one was sufficiently self-denying to point out to the plaintiff that even her money on deposit (after payment of the charitable donations) would become a mere interest-bearing fund; or to warn her that, whatever might come upon her, or however dire her need might be, once the papers were signed she could never touch one dollar of the capital.

It is to be noticed, incidentally, that it was also arranged on the 31st of May that the income should be paid to Mrs. Cook, and a paper to this effect was sent on and signed within a few days, presumably in presence of Mrs. Cook. Mrs. Cook thereafter for so long as she lived with the plaintiff received this money, and used it as she liked, without keeping any account. The plaintiff complains that she was left absolutely without money. During the year, or better, that Mrs. Cook was in the house she also received gifts amounting to $750.

The transaction attacked cannot be allowed to stand. The deed is a purely voluntary one. Confidential relations of

an exceptionally intimate character existed between the plaintiff and the defendant Annie Cook. It is not alone that this defendant is an adopted daughter and was reared by the plaintiff and was married from her house. The most cordial relations were maintained afterwards. The plaintiff educated, or contributed very largely to the education of, Mrs. Cook's daughters, and the girls made their home with the plaintiff in their holidays. The question of influence is not here a mere implication arising from a fiduciary relation between the parties; it is shewn as a fact that the plaintiff placed great dependence in her (Mrs. Cook), had her in her home from time to time, sent for her in her illness, and consulted with her. Mrs. Cook herself emphasized this phase of the case in giving evidence. Mrs. Cook was the only relative in communication with the plaintiff at the time the deed was executed, and for weeks before. In such a case the defendant must shew that the plaintiff had the advantage of competent independent professional assistance: *Rhodes* v. *Bate* (1866), 1 Ch. App. 252, at p. 257. It was argued that Mr. Weir stood in the relation of solicitor to the plaintiff in this transaction. The terms of the letter of instructions, and the attitude of Mr. Moore and Mr. Wier, are in my judgment, only consistent with the idea that Mr. Weir acted throughout as the company's solicitor. Whatever the plaintiff may have said to Mr. Moore, Mr. Weir was never told that he was to act for the plaintiff; and in view of the obligations which such a position imposes—none of which could be said to be discharged—it is only fair to Mr. Weir to say that I do not think he understood he was drawing up the papers or attending their execution as the plaintiff's solicitor.

Practically speaking, the point is of no importance, as it is not a question of the presence of the solicitor, but the actual protection of the client that the law requires. A dormant solicitor is no more potent than a bottle of medicine with an immovable cork. The solicitor must fully acquaint himself with all the circumstances affecting the proposed disposition, must see that all the avenues by which improper influences might come in are closed, that the client's will is unfettered; he must protect the client against her own inclinations by advice and warning, point out the consequences of the contemplated act, and he must retire from the transaction if his advice is not followed: *Powell* v. *Powell,* [1900]

1 Ch. 243. In the circumstances of this case he could never justify the absence of a power of revocation.

The plaintiff executed the deed and will without advice, warning, or explanation. The will is not moved against, as it is unnecessary to do so; but in determining the plaintiff's rights, and the situation created by the parties who were present, the deed, will and power of attorney are to be regarded as one transaction.

And the introduction of a will is not by any means to be regarded as a mere formal departure from the instructions. On the contrary, it is a very drastic change, as, had the plaintiff died in the meantime, the burden of proof as to volition, understanding, capacity and undue influence would have been shifted from the beneficiary to the parties attacking the transaction, that is, the will; "natural influence" arising from the relation of the parties, and even persuasion or entreaty being legitimate in the case of a will, but not so in the case of a deed: *Parfitt* v. *Lawless* (1872), L. R. 2 P. & D. 462; *McDougall* v. *Paille*, 24 O. W. R. 912. And where the relations between the parties are of the nature here shewn, undue influence will be presumed and the transaction set aside, unless the party benefited by it can shew affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment: *Parfitt* v. *Lawless*, at p. 469 and *Archer* v. *Hudson*, 7 Beav. 551.

The defendants have not only failed to discharge this onus, but on the contrary the evidence satisfies me that defendant Annie Cook was the means of separating the plaintiff from Thomas H. Manley, Dr. Bell, and Mr. Gurd, three of her most intimate and trusted friends, that by coloured and false statements she influenced the plaintiff against Mr. Manley, and induced her to doubt his sincerity and good will, that plaintiff's desire, if any she had, to alter the disposition of her property was brought about by Annie Cook or by Annie Cook and her husband, and that Mrs. Cook acted in bad faith and for the purpose of acquiring for herself as large a share as possible of the plaintiff's property.

Again, it is not enough, in the circumstances of this case, to shew that the plaintiff knew what she was doing and intended to do it. As was said by Lord Eldon, in *Huguenin* v. *Baseley*, 14 Ves. 300, the question is not "whether the donor knew what he was doing, but how the intention was

produced; and though the donor was well aware of what he did, yet if his disposition to do it was produced by undue influence, the transaction will be set aside." See also *Hoghton* v. *Hoghton* (1852), 15 Beav. 278.

I am of opinion that, so far as the plaintiff had any intention or disposition at all in this transaction, it originated with and was kept alive by Annie Cook. The old plan of dividing the property was satisfactory until Mrs. Cook assumed charge of the plaintiff's home. Equality of division was still the plaintiff's purpose, and indeed, as Mrs. Cook shews, that the first act of the plaintiff when Mrs. Cook came over was to give her $100, so as to keep her upon an equality with Thomas Manley, who had been recently given this amount. There was no thought then of cutting Manley off, or that he had already got more than his share, as John Cook stated in the memorandum a little later on. As soon as Mrs. Cook returned to Michigan in the spring of the present year, the plaintiff sought out her old friends and took steps to have the deed set aside.

But even aside from the confidential relations between the parties the transaction cannot stand. In every transaction in which a person obtains by voluntary donation a benefit from another, it is necessary that he should be able to establish that the person giving him that benefit did so voluntarily and deliberately, knowing what he was doing; and if this be not done the transaction cannot stand. . . . If the Court should be unable to arrive at a satisfactory conclusion the transaction cannot stand." The Master of the Rolls, in *Cooke* v. *Lamotte* (1852), 15 Beav. 234, at p. 240. See also the judgment of the Chief Justice of Exchequer Division in *Johnstone* v. *Johnstone*, 4 O. W. N. 915, and *Kinsella* v. *Pask*, 4. O. W. N. 964. The evidence leads me to the opposite conclusion.

To my mind, there was no one in that room who understood the matter fully, with the possible exception of Mrs. Cook; I doubt if either Mr. Weir or Mr. Moore realised the effect of the deed as to the cash on hand, in excess of the $2,000, and I am sure that neither they nor this strict-living honest old Welsh lady would knowingly include stock belonging to the estate of the plaintiff's husband; and this was in fact done.

However, I am clearly of opinion that the deed attacked was not the voluntary, deliberate or conscious act of the

plaintiff; that, as a matter of fact, she never intended to dispose of her property in the manner in the deed provided for, or, except as to the charitable gifts, to put her property out of her control in her lifetime; and that she did not know the nature, effect or consequences of the trust deed when she executed it.

I am also convinced that, on the 20th of April, 1912, the plaintiff was not under any circumstances mentally capable of making a deed or will or transacting important business of any kind, and there is no evidence to indicate that she improved, either mentally or physically, between that date and the date of the execution of the deed. I am strongly inclined to believe, too, that if competent independent advice had been procured for the plaintiff the true condition of the case would have been revealed, and the deed would not have been executed.

Two questions remain: remuneration to the trustees, and the costs of the action.

The first of these has given me a great deal of anxious thought. There should be no encouragement given to the method pursued in this case; but as I am satisfied that Mr. Moore did not intend to wrong the plaintiff, and the property has been preserved in the meantime, I have decided to allow remuneration.

The other question stands upon a different footing. It is not heirs or next of kin bringing action upon a mere surmise; it is the very person whom the company primarily represent. I have, therefore, decided not to deprive the company of remuneration as trustees.

And as to the costs. The company having made common cause with the defendant Annie Cook in actively opposing the plaintiff's claim, instead of submitting their rights to the protection of the Court—as in fact they declared they proposed to do in their statement of defence—ought not now, I think, to be separated from their co-defendant in liability to the plaintiff for costs.

There will be judgment (a) for the plaintiff against the defendant company for such sum as is found to be in their hands upon the taking of the accounts under the reference hereinafter directed, and against both defendants for the costs of the action and reference; (b) judgment declaring that the trust deed in the pleadings mentioned, except as to moneys collected or received by the defendant company and

moneys properly paid out by the defendant company under the terms of the said deed, including $2,000 paid to Point Aux Trembles School, St. Andrew's Presbyterian Church, Sarnia, and St. Paul's Presbyterian Church, Sarnia, before the commencement of this action, is null and void, and directing that it be delivered up to be cancelled, and that the registration of this deed in the Registry office for the county Lambton be vacated; (c) directing the defendant company to deliver to the plaintiff all deeds, bonds, stock certificates, promissory notes, vouchers for money, bank books or other writings or papers belonging to the plaintiff, or to the estate of her husband, in their possession or control; (d) directing a reference to the local Master at Sarnia to take an account of the moneys received and paid out by the defendant company and of the amount in their hands and payable to the plaintiff, after deducting these payments and allowing to the defendant a fair and reasonable remuneration for their services as trustees.

Stay of execution for thirty days.

SUPREME COURT OF ONTARIO

FIRST APPELLATE DIVISION. DECEMBER 15TH, 1913.

CROFT v. MITCHELL.

5 O. W. N. 481.

Broker—Purchase on Margin—Refusal to Deliver on Tender of Sum Due—Liability of Broker—Attempt to Shew Correspondents of Broker as Liable—Failure of Correspondent Firm—Bought Note—Lack of Conclusiveness—Measure of Damages—Value of Shares at Time of Demand—Rate of Commission—Appeal.

LENNOX, J., *held* (24 O. W. R. 393), that in a purchase of stock upon margin, the broker is under obligation to deliver the stock purchased at any time, upon being tendered the amount due thereon, and in case of neglect or refusal to deliver on demand the purchaser is entitled to the market value of the stock at the date of demand, less any proper charge to be made against the same.

Clark v. *Baillie*, 45 S. C. R. 50, referred to.

SUP. CT. ONT. (1st App. Div.), *held*, that a bought note is not in itself conclusive.

Aston v. *Kelsey*, [1913] 3 K. B. 314, followed.

That a condition printed on the bought note after the order is executed and not assented to by the principal ought not to be binding unless it is beyond question clear and couched in such terms as to cast on the principal the duty of immediate dissent.

Price v. *Union Lighterage Co.*, [1903] 1 K. B. 750, followed.

Appeal dismissed with costs.

Appeal by defendants from judgment of HON. MR. JUSTICE LENNOX (24 O. W. R. 393), in favour of plaintiffs in an

action to compel defendants to deliver to plaintiff 40 shares in the Rock Island Railroad Company or for repayment of a sum alleged to have been paid on account of the purchase of the shares and for damages for non-delivery.

R. S. Cassels, K.C., for defendants, appellants.

G. H. Watson, K.C., for plaintiff, respondent.

HON. MR. JUSTICE HODGINS:—A perusal of the evidence satisfies me that the learned trial Judge is correct in his finding as to the effect of the agreement made between the appellants and respondent on the first occasion. It was argued, however, that after the apparent execution of the order to purchase, the appellants had by virtue of the conditions upon their bought note in some way altered the relative positions, and had become intermediate agents.

The measure of damage fixed by the learned trial Judge is correct, for there is nothing to indicate that actual delivery was not contemplated. The appellants' bought note begins with a statement to that effect, and the appellants' evidence at the trial establishes that as the legal result of their contract.

I do not read the bought note as indicating any change of position from that stated by Lamont (p. 68): "Q. You got an order to purchase the shares? A. Yes, sir. Q. You accepted that? A. Yes."

From the bought note of Lyman & Company, put in at the trial, it would appear that they bought at one-quarter per cent. less than the amount represented to the respondent by the appellants in the bought notes of the latter.

I do not think it can be said that the bought notes are in themselves conclusive. *Aston* v. *Kelsey*, [1913] 3 K. B. 314. Yet they illustrate how the various parties treated the actual purchase, and from them it is clear that Lyman & Company bought for and on account of the appellants, and that the appellants bought for and on account of the respondent. Mitchell says Lyman charged them one-sixteenth per cent. on the purchase (p. 112); so that the statement in the original note of 57¼, on a purchase by Lyman at 57, shews that the appellants included Lyman's commission as part of their own, and did not disclose it to the respondent (pp. 65, 67), and included also one-eighth for prospective sale, (p. 111). This does not effect a change in relationship as was the case in *Johnson* v. *Kearley*, [1908] 1 K. B. 514, because there was

no concealed and arbitrary addition, but only the usual broker's commission, which in *Aston* v. *Kelsey* (*ante*), is treated as proper. But the non-disclosure, or rather the want of statement that a commission charge was being made by Lyman & Co., is of importance as shewing that the latter were treated by the appellants as their agents and not as the broker of the respondent.

If this be correct, the importance of the notice said to be given by the printed matter on the bought note disappears. But there is really nothing on the bought note to indicate that Lyman & Co. were other than the agents of the appellants. Their case is based upon the fact that Lyman & Co. bought these shares; and a condition printed upon the note of that purchase after the order is executed, and not assented to by the principal, ought not to be binding unless it is beyond question clear, and couched in such terms as to cast upon the principal the duty of immediate dissent. *Price* v. *Union Lighterage Co.*, [1903] 1 K. B. 750, 20 T. L. R. 177. There is not between a broker who knows all the facts and does not disclose them, and a customer, any duty similar to that stated in *Ewing* v. *Dominion Bank* (1904), 35 S. C. R. 133; nor after a contract is made and executed or partly executed can its effect be impaired by any such notice as is expressed on these bought notes.

The words "any kind of failure or default on the part of our correspondents" can hardly be said to include insolvency, and its consequences, but rather point to neglect in executing the order.

I think the appeal should be dismissed with costs.

MASTER IN CHAMBERS. DECEMBER 10TH, 1913.

McVEITY v. OTTAWA CITIZEN.

5 O. W. N. 469.

Statement of Defence—Motion to Strike out Paragraphs—Libel Action—Public Comment—Not Properly Pleadable—Costs.

HOLMESTED, K.C., struck out as irrelevant and embarrassing certain paragraphs in the statement of defence to a libel action alleging that certain alleged acts of the plaintiff had been the subject of public comment.

Motion by the plaintiff to strike out paragraph 5 of the defence as irrelevant and embarrassing.

J. T. White, for plaintiff.

R. C. H. Cassels, for defendant.

HOLMESTED, K.C.:—After a careful perusal of the pleadings I am of opinion that the objections are well taken.

One way of testing the matter would be to assume that all the allegations in paragraph 5 were admitted to be true —would they constitute any defence or justification of the libel?—and applying that test to this paragraph, can it be said that the facts alleged offer any defence or justification? I think clearly not. For admitting that the plaintiff's method of conducting his office was a matter of comment—that furnishes no defence. The comment may have been mere idle gossip without a pretence of justification, and even if it were well founded, his method of conducting his office, though bad, would not justify the particular charge complained of by the plaintiff. Then would the fact that the matter of his employment of experts without providing for their pay was discussed by newspapers be any justification? For aught that is alleged, all such comments may not have had a particle of foundation in fact. The plaintiff may never have had anything to do with experts or their remuneration, but the fact might be true as alleged in paragraph 5 that the matter had been "discussed in the newspapers on the assumption that it was all true." The paragraph 5 therefore seems at present a wholly immaterial issue, viz., whether public comments and public interest as to the matters referred to in the alleged libel.

The gravamen of the plaintiff's claim is that the alleged libel charges him with malfeasance in his office as City Solicitor. How does the fact that other newspapers have discussed the matter and that public interest had been aroused in the charge in any possible way justify, excuse, or extenuate the publication of the libel complained of? I am unable to see that it can—even if such comments had any foundation in fact, and still less if founded on fiction. I therefore think paragraph 5 should be struck out with costs to plaintiff in any event.

HON. MR. JUSTICE LENNOX. DECEMBER 6TH, 1913.

HARKER v. TOWN OF OAKVILLE AND BELL TELEPHONE CO., THIRD PARTY.

5 O. W. N. 441.

Third Party Notice—Motion to Set Aside—Fatal Accident—Electric Shock—Alleged Crossing of Wires Due to Negligence of Defendants' Workmen—Action against Municipality Supplying Light and Power—Notice Sustained.

LENNOX, J., refused to strike out a third party notice in an action against a municipality supplying light and power for a fatal accident caused by electrocution where the defendants alleged that the third party, a telephone company, had caused the accident by their negligence in crossing their wires with those of defendant.

Order of acting Master-in-Chambers affirmed.

Review of authorities.

Appeal by the third party from an order of the acting Master-in-Chambers dated October 21st, 1913, refusing to set aside the third party notice herein.

H. A. Burbidge, for third party, appellants.

D. I. Grant, for defendants, respondents.

HON. MR. JUSTICE LENNOX:—I think the judgment of the learned Master in Ordinary is right.

I cannot see that the very strenuous argument of counsel for the appellants that the Telephone Company cannot be brought in because there is no right of contribution between joint tort feasors has any application. The defendants and the company did not act in concert, there was no intentional wrongdoing by anybody, and the act complained of at worst resulted from involuntary negligence.

The defendants in effect say to the company: "If we are liable it is because you, by crossing your wires with ours, forced us to become your agents in carrying the high voltage current complained of into the premises of our customer; the act complained of, as between us, is your act, not ours, and we are entitled to relief over against you." This is a case of two or more persons alleged to be subject to a common liability other than for fraud or other wilful tort, *Johnston* v. *Wild*, 44 Ch. D. 146. Unlike the cases of *Wade* v. *Pakenham* (1903), 2 O. W. R. 1183; *Miller* v. *Sarnia Gas Co.* (1900), 2 O. L. R. 546; *Parent* v. *Cook*, 2 O. L. R. 709 and 3 O. L. R. 350; and *Wilson* v. *Boulter* (1898), 18 P. R. 107, where the claims were divergent, or the measure of damages or the principles governing the

assessment varied, here, if anything, it is one culminating wrong, the third parties alleged to be the most important link in the chain of liability, the same inevitable measure of damages (although if assessed by different tribunals they may not measure the same) and to be assessed upon the same principles.

I have used the word alleged advisedly because the defendant, no more than a plaintiff is, is not called upon to prove his claim in Chambers, *Pettigrew* v. *Grand Trunk Rw. Co.*, 22 O. L. R. 23. Consolidated Rule 165 says: "Where a defendant claims to be entitled" etc. The rule provides substitute for an action and is intended to prevent multiplicity of actions, and the scandal arising from contradictory results based upon the same facts. If the defendant apparently has a *bona fide* claim, of a character covered by the rule, there is no right to try this claim either as to fact or law in Chambers. He proceeds, as a plaintiff does, at the peril of costs. Other considerations arise of course if it is clear beyond argument that the defendant cannot have a legal claim. The rule is remedial and should receive a liberal interpretation. In construing it, sec. 57 of the Judicature Act and particularly sub-sec. 7 of this section, should be kept in mind, and as far as possible made effective.

I entirely agree with Mr. Justice Riddell when he says in *Swale* v. *Canadian Pacific Rw. Co.*, 25 O. L. R. at p. 500: "I am convinced that the Consolidated Rule has been given quite too narrow an application and I hope that the matter may receive full consideration in an appellate Court." In the same case, Mr. Justice Middleton, sitting in the Divisional Court, said: "The right to invoke the third party procedure exists whenever the plaintiff's claim against the defendant, if successful, will result in the defendant having a claim against the third party to recover from him the damages which he has been compelled to pay to the plaintiff."

The defendants appear to be acting in good faith, they set up a claim which may prove to be valid, they ask to have it tried now, it is a convenient time, the plaintiff does not object and the rule in my opinion is intended to cover such a claim.

The third party will have 8 days to enter an appearance.

The motion will be dismissed with costs to the plaintiff and defendant in the cause.