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COURT OF APPEAL.

JUNE 17TH, 1911.

GOWGANDA-QUEEN MINES v. BOECKH.

Company—Calls upon Shares—Action to Recover—Alleged Misrepresentation by Agent—Delay in Repudiation—Agreement by Counsel to Abandon Contentions on Law—Questions for Jury—General Verdict—Issue of Shares at a Discount—Proof of By-law not Made at Trial—Plaintiffs Permitted to Put in Copy—Statutory Meeting—Evidence of Holding—Allotment—Delay in Proceeding to Avoid—Ontario Companies Act, secs. 106, 107, 108.

Appeal by the defendant from the judgment of BOYD, C., in favour of the plaintiffs, after trial before him with a jury, in an action to recover calls upon shares of the capital stock of the Gowganda-Queen Mines, Limited, alleged to be subscribed for by the defendant.

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

J. W. McCullough, and S. W. McKeown, for the defendant.

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

MOSS, C.J.O.: . . . The chief defence set up in the pleadings was that the defendant was induced to subscribe by false and fraudulent representations, upon discovering which the defendant had repudiated his subscription, and upon these issues of fact the parties went to trial by jury. The learned Chancellor submitted to the jury the questions and received the answers following:—

"(1) Was the defendant, Boeckh, misled by any statement of Greig? A. No.

"(2) If so, what was the statement or statements? (No answer.)

"(3) Did the defendant delay unreasonably to repudiate after he became dissatisfied with the terms? A. Yes.

"(4) Do you find in favour of the plaintiff or the defendant? A. The plaintiff.

"This is the unanimous verdict of the jury."

The learned Chancellor thereupon entered judgment for the plaintiffs for $2,000 and costs.

Upon the argument of the appeal many grounds of objection were taken to the judgment, which were not set up by the defendant's pleadings, nor raised at the trial, nor even hinted at in the reasons for appeal. If the last was the only objection to now entertaining these grounds, it might not be found insuperable; but at this stage of the case the other objections to entering upon new grounds are very weighty.

It is said that at the opening of the case at the trial application was made on behalf of the plaintiffs to dispense with the jury, on the ground that there were mixed questions of law and fact involved rendering the case one more suitable to be tried by a Judge without a jury, but that in order to retain the jury the defendant's counsel abandoned all contentions on the law and stated his willingness to abide by the result on the facts.

Although this does not appear upon the record, the course the case took at the trial seems to indicate the likelihood of something of the kind having taken place.

After the jury rendered their findings no argument on the law was addressed to the learned Chancellor, nor was he asked by the defendant's counsel to hear any. We are thus left without the benefit of knowing his views upon the questions of law raised by the pleadings. In argument the defendant now complains that the questions of law were not dealt with, and also that (*a*) there was misdirection in the charge, (*b*) other questions than those submitted should have been submitted to the jury, (*c*) question No. 4 should not have been submitted to the jury, (*d*) there was no proof of a by-law of the plaintiffs, the Gowganda-Queen Mines, Limited, permitting the sale of shares at a discount, (*e*) that evidence to shew that no statutory meeting of the company under section 111 of the Ontario Companies Act was held, was rejected, and (*f*) that other evidence tendered on the defendant's behalf was improperly rejected.

As to (*a*), the misdirection now claimed to have been given was in stating to the jury that a statement by a person soliciting subscriptions for shares that according to the engineer's report the outlook was good, and that it was a promising outlook, that being the substance of the engineer's report, was not a mis-

representation, but simple commendation. No objection was taken to the charge in this respect, and a perusal of the portion of his charge relating to this shews that the learned Chancellor fairly stated the law on the subject, leaving the jury to deal with the question of fact as to what actually occurred. He had previously pointed out to them that it was for them to find from the conflicting statements of the defendant and Greig what had really taken place between them.

As to (*b*): no request was made to the learned Chancellor to submit any other questions, and those submitted seem to cover all the issues of fact involved.

As to (*c*): no objection was made when the learned Chancellor proposed to submit question No. 4, but even if it had been objected to, it was not wrong to put the question.

In discussing in his charge the questions bearing on the issues relating to the alleged misrepresentation the learned Chancellor had necessarily to deal, and as a matter of fact did deal, with every matter proper to be considered by the jury if they were disposed to render a general verdict. The point seems to be disposed of by Furlong v. Carroll, 7 A.R. 145.

Section 264 of the Common Law Procedure Act, R.S.O. (1877), ch. 50, the enactment then in force, was in terms about precisely the same as section 112 of the Judicature Act. And as appears from that case, the enactment is intended to govern the action of the jury, rather than that of the Judge. If the Judge directs the jury to answer questions only, they must obey. They cannot decline or neglect to answer, and instead thereof give a verdict. But the Judge is not prevented from asking the general question if he thinks fit, provided he takes care to see that his charge is sufficiently comprehensive to enable the jury to deal with the issues by a general verdict. And it was because of failure in this regard that in Reid v. Barnes, 25 O.R. 223, a Divisional Court thought that there should be a new trial. In that case the jury did not answer the specific questions. In the present case they did, and the answer to the 4th question harmonizes with the answers to the previous questions. So that from which ever point of view the matter is regarded, the judgment was entered in accordance with the findings of the jury.

As to the want of proof of a by-law providing for the sale of shares at a discount, the point was not taken at the trial. If it had been, there would have been no difficulty in supplying the proof if it was incumbent upon the plaintiffs to produce it, or a verdict could have been taken subject to this proof—Con. Rule 549. The defendant's agreement was to take the number of

shares set opposite his name at 20 cents per share. It is not disputed that under the Companies Act the company has power to issue shares at a discount, and there is in fact no question as to the existence of a by-law. And all parties seemed to take for granted that such was the case, and raised no question about it. It would be unfortunate if the case should now go off upon a mere technical objection. If necessary to supply the proof, it is a proper case under the circumstances for allowing a copy to be put in even at this stage. See Cooke v. McMillan, 5 O.W.R. 507; Hargreaves v. Hilliam, 58 J.P. 655.

Then, as to the rejection of evidence that what is termed the statutory meeting was not held, that defence was not raised by the defendant's pleading, and no application to amend was made. The learned Chancellor declined to receive the evidence as not relevant to the issues, and it is not a case for interfering with his ruling.

The defendant's object was to endeavour to avail himself of the provision of section 107 of the Act by shewing that he was not precluded by lapse of time from seeking to avoid the allotment of shares to him on the ground that the prerequisites to allotment required by section 106 had not been complied with. The latter enquiry would have opened up an entirely new case, and called for an investigation of matters in regard to which no question had been raised at any time previous to the trial. The allotment to the defendant had been made on the 29th December, 1908, and on the following day he had been notified of the fact, and that the first call of 5 cents per share was payable within 30 days. He made no objection until the 5th March, 1909, when he wrote stating that he was induced to subscribe through representations with which he was not satisfied. This letter was not followed up by any proceedings to avoid the allotment. Section 107 enacts that an allotment made to an applicant in contravention to section 106 is voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later.

The letter of the 5th March, 1909, was of course not an avoidance of the allotment, though it was a sufficient notice of avoidance if followed up with reasonable promptitude by proceedings to avoid: In re National Motor Mail Coach Company, [1908] 2 Ch. 228.

Section 108(1) enacts that a company shall not commence business or exercise any borrowing powers unless, (*a*) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less on the whole than the mini-

mum subscription, (*b*) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription, and (*c*) there has been filed with the Provincial Secretary a statutory declaration by the secretary or one of the directors in the prescribed form, that the foregoing conditions have been complied with. Subsection (2) enacts that the Provincial Secretary may on the filing of the certificate certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled; provided, however, that upon its being shewn that any such certificate was made upon any false statement, or upon the withholding of any material statement, the Provincial Secretary may cancel and annul such certificate.

The plaintiffs produced and put in at the trial a certificate of the Provincial Secretary dated the 15th March, 1909, that the company was entitled to commence business, and this has not been impeached before the Provincial Secretary. It is, therefore, final and conclusive as to compliance with all the requirements of sub-section (1) of section 108, and this involves substantially compliance with the conditions of section 106.

The action was commenced on the 6th April, 1909, and was tried on the 29th September, 1910.

Now, if after all that had transpired prior to the commencement of the action, the defendant desired to shew that he was entitled to avoid the allotment, and that notwithstanding his delay he could still do so in these proceedings, it was incumbent upon him to set up distinctly the grounds on which he impeached it, so as to give the plaintiffs a reasonable opportunity of meeting the case made.

No explanation of the neglect to set it up at the proper time was tendered, and no application for leave to amend was made. Under the circumstances the learned Chancellor could do nothing but reject the evidence offered, and it would not now be a proper exercise of discretion to permit the defendant to set up a defence which in any case appears to be beset with difficulties in establishing.

The other evidence rejected was offered for the purpose of shewing non-compliance with the requirements of section 106 as regards payment before the allotment.

All the foregoing considerations are applicable to it, and the learned Chancellor properly declined to permit it to be intro-

duced or laid before the jury upon the record and issues before them.

An allotment without compliance with the requirements of section 106 is not a void, but a voidable allotment, per Buckley, J., in Finance and Issue, Limited v. Canadian Produce Corporation, [1905] 1 Ch., at p. 43, and if it is to be avoided it can only be upon a record properly framed for that purpose.

The defendant's real and substantial defence was the alleged misrepresentations, and upon that the jury's findings were against him.

Thre is no ground for disturbing the findings and so the judgment should stand.

The appeal must be dismissed. The plaintiffs to be at liberty to put in and file as an exhibit a copy of the by-law for issuing shares at a discount, filed in the office of the Provincial Secretary.

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

JUNE 17TH, 1911.

*WARREN, GZOWSKI & CO. v. FORST & CO.

Evidence—Telephone Conversation between Parties—Testimony of Person Hearing Words of one Party—Admissibility—New Trial.

Appeal by the plaintiffs from the judgment of a Divisional Court, 22 O.L.R. 441, ordering a new trial on account of the rejection by the trial Judge of certain evidence tendered by the defendants.

The judgment of the trial Judge, SUTHERLAND, J., is noted ante 222.

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

F. Arnoldi, K.C., and D. D. Grierson, for the plaintiffs.

A. McLean Macdonell, K.C., for the defendants.

The judgment of the Court was delivered by MACLAREN, J.A:— . . . The parties are brokers in Toronto and the dispute is over a stock transaction. Both plaintiffs and defendants admit that there were telephone conversations between them on

*To be reported in the Ontario Law Reports.

the 28th and 29th of June, it being a matter of dispute whether a call for certain shares by the defendants was made on the 28th or 29th. The defendant Forst claims that it was first made on the 28th and repeated on the 29th; the plaintiff Gzowski says that it was not made until the 29th.

The defendants proposed to have their stenographer, Annie Slough, who claimed to have been in the same room as her employer during the conversation of the 28th, testify as to what he said through the telephone on that occasion. The trial Judge refused to allow her to do so, on the ground that she could not swear that it was the plaintiff Gzowski that was at the other end of the line, or that he had heard what the defendant Forst had spoken into the telephone. The Divisional Court overruled the trial Judge and ordered a new trial, from which the defendants appeal.

No English or Canadian authority was cited to us on the point. A number of American cases were referred to, the weight of authority there being in favour of the reception of such evidence. Among the cases that may be mentioned are Miles v. Andrews, 103 Ill. 262; McCarthy v. Peach, 186 Mass. 67; Dannemiller v. Leonard, 8 Ohio Circ. 735; People v. McKane, 143 N.Y. 455; Shawyer v. Chamberlain, 113 Iowa 742.

On principle I do not see how such evidence can be excluded. It is simply an application of the old recognized rules of evidence to modern methods and conditions. After a witness has sworn that he recognized by his voice the person to whom he was speaking, and who was answering him from the other end of the line, it is quite competent to produce in corroboration one who heard what he spoke into the telephone, in so far as it is relevant to the matter in question. In case of an oral contract it is not necessary that each witness should have heard the whole contract. The witness may testify as to what he heard, and it is for the Judge or the jury, as the case may be, to determine what weight is to be attached to it. If, for instance, two persons of different languages, but each understanding the language of the other, were to make a contract, each using his own language, a bystander, knowing only one of these languages, might testify as to what was said in the tongue he understood. Or a witness might testify as to what was said by one person on an occasion, although he might not be able to identify, or even see or hear the other party to the conversation, provided the latter were identified *aliunde* as the other party. The fragmentary nature of the testimony, the possibility of a dishonest party talking into a telephone in the hearing of his witnesses without having any con-

nection with the person to whom he was purporting to talk, and giving answers to questions that were never asked, are all circumstances that should be taken into account in determining what weight is to be attached to the evidence, but are not valid grounds for refusing to hear it at all. Such testimony is not in any way objectionable as being hearsay.

In my opinion the appeal should be dismissed and the judgment ordering a new trial affirmed.

JUNE 17TH, 1911.

RE RAVEN LAKE PORTLAND CEMENT CO.

NATIONAL TRUST CO. v. TRUSTS AND GUARANTEE CO.

Company—Winding-up—Realisation of Assets—Claim by Mortgagee to Proceeds—Contestation by Liquidators—Leave to Bring Action against Liquidators—Powers of Referee—Dominion Winding-up Act, secs. 22, 110, 133—*Discretion—Appeal—Frame of Action—Liquidators Representing Creditors.*

Appeal by the defendants from the judgment of SUTHERLAND, J., ante 761 (where the facts are stated), affirming a decision of the Official Referee to whom the powers of the Court were referred and delegated in the winding-up of the Raven Lake Portland Cement Company.

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

W. Laidlaw, K.C., for the defendants, the Trusts and Guarantee Co., the liquidators.

Glyn Osler, and R. C. H. Cassels, for the plaintiffs, the National Trust Co.

The judgment of the Court was delivered by MACLAREN, J.A.:— . . . The Trusts and Guarantee Co. was appointed the liquidator of the insolvent company and sold as the property of that company certain goods and chattels and book debts and choses in action, which the National Trust Co. claimed were mortgaged to it in trust to secure an issue of bonds by the Raven Lake Portland Cement Co. The liquidator claimed that this mortgage was void under the Bills of Sale and Chattel Mortgage

Act for want of registration and renewal, and also for want of an affidavit of *bona fides*.

The National Trust Co. applied to the Official Referee and obtained leave to issue a writ and prosecute an action against the Trusts and Guarantee Co., in respect to the assets sold as above, claiming the proceeds of said assets and, in the alternative, damages for the conversion of the same. The appellants applied to the Official Referee to set aside the order granting leave which was refused, and on appeal to Sutherland, J., the order was affirmed.

The appellants' claim is founded upon sec. 133 of the Winding-up Act, R.S.C. ch. 144, which reads as follows: "All remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands, possession or custody of a liquidator, may be obtained by an order of the Court on summary petition, and not by any action, suit, attachment, seizure or proceeding of any kind whatsoever."

If this section stood alone it would no doubt be conclusive as to such remedies as are mentioned in it. But it must be read in connection with sec. 22 of the Act which is as follows: "After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court imposes." The powers of the Court were in this instance delegated to the Official Referee under sec. 110 of the Act.

Section 133 lays down the rule, sec. 22 gives the exception, and a very important exception. The latter is to be followed only where there are such exceptional circumstances as justify its application. In the first place sec. 133 applies only to cases that reasonably come within its language, that is, to "remedies sought or demanded for enforcing any claim for a debt, privilege, lien or right of property upon, in, or to any effects or property in the hands, possession or custody of a liquidator."

It may be a doubtful point whether this language is applicable to the first part of the claim of the National Trust Co. endorsed on the writ issued by them; but it is clearly not applicable to the alternative claim for damages for the conversion of the goods and chattels, book debts, and choses in action claimed to have been covered by the chattel mortgage. It has been decided that rescission is beyond the jurisdiction of the Master (or Referee) in a winding-up proceeding under the Dominion Act, and that he cannot make a vendor account for any profit that may have accrued to him: In re Hess Manufacturing Co., 23 S.C.R., at

pp. 665-6. Also that he is not a "Court of competent jurisdiction" within the meaning of sec. 71 (now 98) to try the question of a transfer alleged to be an unjust preference: Harte v. Ontario Express and Transportation Co., 25 O.R. 247.

But even if the Referee had jurisdiction in the matter, it would be a mere matter of discretion whether he should try it himself or give leave to have an action brought. From what appears it would seem to be a proper case to be tried in the ordinary way. The Referee in the exercise of his discretion was of the opinion that it was not a suitable case for him to try; and an appeal from his decision was approved by a Judge of the Court in which the proposed action will be tried.

I am unable to see any reason that would justify this Court in coming to the conclusion that their discretion was improperly exercised.

The appeal should be dismissed with costs.

HIGH COURT OF JUSTICE.

CLUTE, J. JUNE 14TH, 1911.

LESLIE v. PERE MARQUETTE R.W. CO.

Railway—Farm Severed by—Agreement with Land-Owner—Undergrade Crossing—Filled in by Railway after 20 Years' User—Easement—Prescription—Presumption of Lost Grant—Application to Board of Railway Commissioners—Assessment of Damages.

The plaintiffs alleged that in the year 1885 one George Leslie, then owner of the north half of lot 6 in the front concession of the township of Moore, entered into an agreement with the Erie and Huron R.W. Co., the predecessors in title of the defendants, whereby he agreed to convey to said company a strip of land as a right of way, and the said company agreed to construct and maintain for the owners of the said lot an undergrade crossing; that in accordance with said agreement the said George Leslie did convey to the said railway company that portion of the said lot No. 6 which now comprises the right of way of the defendant company over said lot, and the said Erie and Huron Railway Company did build and construct an undergrade crossing with

the proper fences and gates for the use of the said George Leslie, all of which was done in the year 1885.

It was further alleged that the said Erie and Huron Railway Co. and its successors and assigns have from time to time repaired and maintained the said undergrade crossing, and the plaintiffs and their predecessors in title did for upwards of 20 years from the time of the construction of the said undergrade crossing use the same as a means of access and communication from the east part to the west part of the said farm and as a farm crossing, but in the year 1906 the defendant company without leave from the plaintiffs or their predecessors in title filled in the said undergrade crossing and deprived the plaintiffs of the same, whereby the plaintiffs have been unable to obtain access to the eastern portion of their farm or to use the said undergrade crossing, to their great damage and inconvenience.

The plaintiffs brought this action for specific performance of the said agreement, and a mandatory order compelling the defendants to restore and rebuild the said undergrade crossing, an injunction restraining the defendants from interfering with the said undergrade crossing when re-constructed, and a declaration that the plaintiffs are entitled to have the said undergrade crossing maintained and repaired by the defendant company as a good and safe farm crossing, and damages and other relief.

W. J. Hanna, K.C., and R. V. Le Sueur, for the plaintiffs.
R. J. Towers, for the defendants.

CLUTE, J. (after stating the facts and the nature of the action as above) :—The defendants claim that the right of way as now used by them was conveyed by the said George Leslie to the Erie & Huron R.W. Co., and that the whole agreement was contained in said instrument. They deny that any agreement was entered into between the said George Leslie and the Erie & Huron R.W. Co. to construct and maintain said undergrade crossing, and further allege that if the same was built, which they deny, that it was so built and maintained not as a matter of right, but as a matter of convenience and accommodation, and that the plaintiffs did not thereby acquire any right or title thereto. They further deny any right by prescription, and allege that the defendant company at the time of their purchase had no notice or knowledge of such undergrade crossing on the lands in question, or of the claim of the plaintiffs to be entitled to the same, and claim that they purchased in good faith without notice of the right of way in question and are not affected by any rights that

the plaintiffs might have against the Erie & Huron R.W. Co. The defendants further say that if the plaintiffs are entitled to an undergrade crossing as alleged, which they deny, the plaintiffs have been guilty of laches in making their claim.

The following admission was put in by counsel: "It is admitted for the purposes of this action that the plaintiffs and defendants herein respectively stand in the place and stead of George Leslie and the Erie & Huron Railway Co., with all the rights and subject to all the duties and obligations, and entitled to assert the same claims and plead the same defences as the said original parties could do as if there had been no change of interests, and subject to proof to satisfaction of plaintiffs' solicitors that the Erie & Huron Railway Company, before the construction of its portion of the line referred to herein, complied with the provisions of 42 Vict. ch. 9, sec. 8, and 46 Vict. ch. 24, sec. 2 (D.)." The plaintiffs' counsel stated that he was satisfied that the Erie & Huron Railway Co. had complied with the provisions of these statutes. These sections have relation to the filing of maps and plans.

The conveyance of George Leslie to the Erie & Huron Railway purports to be made in consideration of $40 in fee simple, without reference to any crossing whatever.

The land in question fronts on the river, and the right of way cuts the land in two parts with about one-third on the riverside. The railway crosses the lands in question at a considerable grade above the level of the land, and at a ravine near the centre of the said lands there were bents 14 feet apart and about 28 feet in height through the centre of which in times of freshet there was a water-way. This structure was in course of erection at the time the agent of the railway company applied to purchase the right of way. From the evidence of George B. Douglas, now Judge of the County Court of Haldimand, it appears that he was acting for the railway company and applied to George Leslie for the purchase of the right of way. He has no very distinct recollection of what took place, and does not seem to be able to distinguish this particular case from any other purchase for right of way of the railway.

Having regard to the surrounding circumstances and the evidence, I have no doubt whatever that it was a part of the agreement and arrangement made at the time of the purchase of the right of way, that the said George Leslie should have an under-pass for the use of his farm for wagons and cattle to pass thereunder. This pass was in fact established, the railway fence was turned in to the two posts on each side of the centre opening

and gates were put upon both sides of this opening, and I find as a fact that the pass was used in connection with and for the purposes of the farm for over 20 years. After a time the trellis work was filled in up to the pass and this was planked up to prevent the earth from falling into the pass, and so it continued down to the year 1906. It would appear that in the first instance two gates were placed, one on each side of the pass, and that after it was planked up only one gate appears to have been in use. I do not accept the evidence of the defendants' witnesses that the fence along the railway ever extended across the opening so as to close the pass. Having regard to the location of the farm, and the necessity for having a pass for the cattle to go down to drink, the evidence of the defendants' witnesses upon that point, contradicted as it is by the plaintiffs' witnesses, to me is incredible. I think they are mistaken.

At the time of the purchase of the right of way George Leslie owned the land in question, being the north half of the lot. The south half was owned by his sisters, Anne Leslie and Ellen Leslie. The family were living together, the house being upon the south half and the barn upon the north half, and it was worked at that time as one farm. The land north and south of the pass had been a pasture field and in dry weather there was no water in the west part of the farm. The cattle went to the river to drink. The pass was and is a necessity to the farm. At the time it was granted it was clearly in the interests of the railway to give it. It would have been and will be now an expensive matter to make a level crossing, inasmuch as the railway track is elevated to a considerable extent above the level of the land across the entire lot. The railway company adopted the cheapest method of procuring the right of way, and I have no doubt whatever that the granting of the pass was a part of the consideration for that right of way. In 1906 the defendants filled up the opening and closed the pass and prevented the plaintiffs from passing from the north to the south part of the farm as theretofore.

I think the case falls within McKenzie v. Grand Trunk R.W. Co. and Dickie v. Grand Trunk R.W. Co., 14 O.L.R. 671.

[References to the facts in these cases and quotations from the judgments of Meredith, C.J., at p. 676; Moss, C.J.O., at p. 679; and Meredith, J.A., at p. 681.]

Mr. Towers urged that the present case was governed by Oatman v. Grand Trunk R.W. Co., 2 O.W.N. 21, and not by the McKenzie case. I do not think so. Meredith, C.J., points out the distinction between the cases. [Quotations from his judgment at pp. 21, 22.]

While I desire my judgment to proceed mainly upon the principle laid down in the McKenzie case, I am also of opinion that the plaintiff has established an easement by continuous user as of right for over 20 years. An agreement such as was here made was expressly held in the McKenzie case not to be *ultra vires*, inasmuch as it was for the right of way, and presumed therefore to be in the interest and for the benefit of the railway, and is, therefore, distinguishable from Canadian Pacific R.W. Co. v. Guthrie, 13 S.C.R. 155, and the Grand Trunk R.W. Co. v. Valliear, 7 O.L.R. 364.

There is also strong ground for arguing that in the present case the doctrine of presumption of a lost grant can be applied: see Angus v. Dalton, 3 Q.B.D. 85, 4 Q.B.D. 162, 6 App. Cas. 740; Re Cockburn, 27 O.R. 450; Leconfield v. Lonsdale, L.R. 5 C.P. 657; Rangeley v. Midland R.W. Co., L.R. 3 Ch. 310; Birmingham v. Ross, 38 Ch. D. 295.

The plaintiffs made application to the Railway Board, but the Board held that, inasmuch as the plaintiffs claim under an arrangement at the time the right of way was purchased, they had no jurisdiction to deal with the case—that if any alteration was sought by the railway contrary to the arrangement made at the time of the purchase the application should be by the railway company. The plaintiffs were, therefore, forced to seek their remedy in this Court. Although the defendants by their pleadings deny all rights of the plaintiffs to a crossing of any kind, Mr. Towers, their counsel at the trial, conceded that they were entitled to a level crossing, and both counsel desired that I should assess the damages by reason of the depreciation to the land by changing from an under-pass to a level crossing, and of the damages on account of the under-pass having been closed since 1906.

The plaintiffs were willing to accept my assessment for such damages together with the over-head crossing, in lieu of their right to an under-pass. The evidence shewed that it would cost the defendants about $1,000 for a wooden structure creating an under-pass, and something over $2,000 for cement structure. Finding, as I do, that the agreement for the under-pass was a part of the arrangement and consideration for the right of way, the plaintiffs are entitled to a mandatory order directing the defendants to provide and maintain such pass, and to an injunction from interfering with the same when so made, and for damages for its obstruction from 1906 to the present time, which I fix at $200. But as the plaintiffs are willing to accept a sum by way of compensation in lieu of the under-pass for a level cross-

ing, I assess the damages for such depreciation at the sum of $500.

The defendants are given one month to make this election to pay the damages and provide and maintain a suitable level crossing in lieu of the under-pass. If they do so elect, judgment will be for the plaintiffs for $700, together with a declaration that the plaintiff is entitled to a level crossing. In default of such election, judgment as above indicated for the construction of an under-pass and $200 damages. In either case the plaintiffs are entitled to the costs of the action. Thirty days' stay.

DIVISIONAL COURT. JUNE 15TH, 1911.

*RE FRASER.

FRASER v. ROBERTSON.

McCORMICK v. FRASER.

Lunatic—Issue as to Lunacy—Inquiry as to Mental Condition—Further Evidence Directed to be Taken by Court—Improvident Alienation of Property—Failure of Memory as to Important Transactions and Recent Occurrences—Lack of Capacity to Understand or Manage Business—Delusions—Senile Deterioration—Evidence of Medical Experts—Appointment of Separate Committees of Person and Estate—Jurisdiction of Appellate Court—Lunacy Act, sec. 7 (7)—Con. Rule 498—Costs.

Appeal by Catherine McCormick from the judgment of BRITTON, J., ante 241, 597, upon an issue directed by SUTHERLAND, J., 1 O.W.N. 1105, as to the sanity of Michael Fraser.

The appeal was heard by MULOCK, C.J.Ex.D., TEETZEL and MIDDLETON, JJ.

A. E. H. Creswicke, K.C., and A. McLean Macdonell, K.C., for the appellant, Catherine McCormick.

J. King, K.C., and F. W. Grant, for the respondent, Michael Fraser.

MULOCK, C.J.:—In this matter the petitioner seeks to have it declared that Michael Fraser is a person of unsound mind and incapable of managing himself or his affairs, and by order

*To be reported in the Ontario Law Reports.

dated the 23rd July, 1910 (1 O.W.N. 1105, affirmed by a Divisional Court, ante 26), it was referred to BRITTON, J., to try and determine whether Michael Fraser was at the time of the enquiry of "unsound mind and incapable of managing himself or his affairs," and this appeal is from his decision.

Michael Fraser, a man of some 82 years of age, was possessed of property estimated to be worth between eighty and ninety thousand dollars, some forty-six thousand of which he acquired by will from his brother John, who died in the month of August, 1909. John's estate is still unadministered, being in the hands of the executors, namely, the said Michael Fraser and one Irwin.

On the 13th January, 1910, Fraser went through the form of marriage with one Margaret Robertson, and shortly thereafter transferred to her all his moneys, securities for money, and real estate, except such as came to him under his brother's will.

An examination of the evidence at the trial failed to furnish to the Court any detailed information regarding such alienation of property or the circumstances attending the same, or regarding the management of the trust estate of John Fraser, and such information appearing to us to be material, we directed the taking of further evidence. Obviously a reasonable knowledge by witnesses of definite acts of an alleged lunatic in regard to the management of his affairs gives value to their testimony as to his mental capacity, while an almost total absence of such knowledge deprives it of much weight. Exception was taken to the admission of further evidence. It is true that Con. Rule 498 gives the Court discretionary power to receive further evidence, but such power must be wisely exercised. As said by Spragge, C.J.O., in Murray v. Canada Central R.W. Co., 7 A.R. 655, such evidence must as a rule be "of some facts or documents essential to the case, of the existence or authenticity of which there is no reasonable doubt, or no room for serious dispute." The additional evidence taken in this case discloses facts beyond dispute as to Fraser's dealings with his property, a knowledge of which by the Court is, in my opinion, essential in order to a right conclusion being reached.

If Fraser is of unsound mind it is to his interest that that fact be so found, and he should not be prejudiced because of the petitioner having omitted to put the trial Judge in possession of all material evidence. Having regard to the object of this inquiry I am unable to discover any good reason why the Court should not at this stage exercise its discretionary power as to receiving new evidence in regard to incontrovertible facts shewing Fraser's conduct touching his affairs or his capacity to manage his property.

It is the duty of the Court to throw its protection over the persons and property of those of unsound mind, and to that end in such cases the rule giving discretionary power to an Appellate Court to admit further evidence should, in my opinion, be liberally interpreted. For these reasons I think it was the duty of the Court to learn, if possible, how in fact Fraser had been managing his property. Such evidence is most helpful in determining the question in issue.

Referring then to certain of the additional evidence adduced in this case, the following facts were brought out:

On the 28th September, 1909, Michael Fraser drew two cheques on the Bank of British North America in favour of W. Finlayson, or bearer, one for $1,000 for the benefit of Catherine McCormick, and the other for $3,000 for the benefit of Richard McCormick. On or about the 5th February, 1910, he executed a conveyance to his wife of his residence in Midland. On or about the 7th February, 1910, he conveyed to her his homestead farm. On the 14th February, 1910, he signed a cheque in her favour for $2,998,41, being his balance in the Bank of Hamilton. On the 14th February, 1910, he drew a cheque in favour of his wife on the Standard Bank for the balance to his credit there, namely, the sum of $4,393.33. On the 15th February, 1910, he drew a cheque for the sum of $2,536.05, being his balance in the Bank of British North America, and signed a direction to the bank to place the amount to his wife's credit. In March, 1910, he executed his will, giving his whole estate to his wife.

Michael Fraser had originally owned 10 debentures of $1,300 each, issued by the city of Midland. They were held by his solicitor Mr. Finlayson for him. In or about July, 1910, seven or eight of these debentures were unpaid and at that time Mr. Fraser signed an order directing Mr. Finlayson to hand over the debentures to Mr. Grant for Mrs. Fraser. This was done, and she claims to be now the owner of these debentures.

Thus between the date of the marriage on the 13th January, 1910, and July, 1910, Mrs. Fraser had succeeded in obtaining transfers to herself for her own benefit from Michael Fraser of all his moneys, securities for money, and lands and real estate, except his interest in the estate of his brother John.

The Court desired to obtain Mr. Fraser's explanation of these transactions, but it being shewn that his attendance in Court might endanger his life, we decided to examine him in his own home, a course which appeared to offer conditions most favourable to himself. Accordingly on the 12th May the members of this Court visited and examined Mr. Fraser at his own house.

He impressed me as perfectly truthful and honest. Before the impairment of his faculties he had evidently been a man of more than ordinary ability, who had read a good deal.

Our examination of him occupied a couple of hours and was conducted in a manner to accord to him the least possible fatigue or excitement, and I am satisfied that the examination as taken down by the Court reporter correctly discloses his knowledge in regard to the matters that formed the subject of our conversation with him.

He realized that the object of our visit was to ascertain the facts and he spoke to us with the utmost frankness.

From his examination the following facts appear: As to the cheque for $1,000 to Miss McCormick signed by him on the 28th September, 1909, he had no knowledge of it whatever, and his feelings towards Miss McCormick were unfriendly and it is clear that he would not knowingly have given it to her.

The same observations apply to the case of the $3,000 cheque for Richard McCormick. He evidently dislikes both of the McCormicks, and such dislike is not of recent origin, and it was with some indignation that he contemplated any of his money being given to them.

It is clear that he did not appreciate the nature of his action in signing these two cheques. With reference to the deed of his residence to his wife Margaret Fraser, he has no knowledge of its existence, and is firmly of opinion that he still owns the property. His attitude to her in connection with that property is that he never intended to give it to her in his lifetime, but would probably do so by will. [Reference to his examination on this point.]

As to the gifts of money to his wife his mind is a complete blank. He was aware that at one time he had ten or twelve thousand dollars in certain banks in Midland, and thinks the money is still there, and is wholly unaware of having given it to his wife. In ignorance of its withdrawal in favour of Mrs. Fraser he has offered her small sums from time to time, and he seemed touched by her disinterestedness in not accepting them. [Reference to extracts from his evidence on this point.]

Fraser's attention was then called to the debenture transaction, but on this subject his mind was also a complete blank. He had no knowledge of having ever had any dealings with debentures or bonds, in fact seemed unable to comprehend the meaning of such securities. As a matter of fact, he at one time owned in his own right ten debentures of $1,300 each against the town of Midland. They were payable in annual instalments, one debenture a year, and in July, 1910, he owned seven or eight,

thus he had been owner of those debentures for two or three years at least, but their existence had passed entirely out of his mind.

Shortly after the judgment given in July, 1910, by Mr. Justice Britton, an order signed by Fraser for the handing over of these debentures to Mr. Grant for Mrs. Fraser was presented to Mr. Finlayson and acted upon, yet Mr. Fraser has no recollection whatever of the transaction. He was pointedly asked whether he had given an order to have the debentures handed over to his wife, to which he answered, "No, never.

Q. Or to Mr. Grant? A. No."

One of the solicitors acting for Mr. Fraser in this matter is Mr. Grant, a resident of Midland, but though Mr. Grant has had frequent occasion to see Mr. Fraser, the latter scarcely knows him and has no clear idea in what interest Mr. Grant is acting. This matter has been pending for a considerable time, and Mr. Fraser has been examined on several occasions by medical men and others, including the learned trial Judge, but practically understands nothing of the nature of the present proceedings or their object, but with the suspicion characteristic of persons of impaired intellect, fears in some vague way . . . that the object is to "pluck him." [Reference to his examination as to this point.]

Thus it would seem that in July, 1910, Fraser parted with the whole balance of his own personal estate by directing to be handed over for his wife to a gentleman whom he scarcely knew, debentures worth some $7,000 or $8,000.

As to the cheque for $2,536.45 given to his wife, Fraser has no recollection whatever of the transaction.

Before the death of his brother John, Fraser made a will. Then he made another will after John's death, and then in March, 1910, he made another whereby he gave his whole estate to his wife, but he has no recollection of any of these transactions, and is firmly of opinion that at no time in his life has he ever made a will. [Extract from his examination on this point.]

With reference to the estate of his brother John, Michael Fraser and one Irwin were appointed executors of John's will, and filed with the Surrogate Court an inventory which shewed the estate to consist of real estate valued at $11,300, and personalty valued at $34,872, making together $46,177.42, of which $19,976 consisted of money on deposit in the bank at the time of John's death.

Although Fraser was a party to the making of the inventory he is unaware of the existence of the deposit of $19,976, and thinks there was no money on deposit.

As to the existence of the inventory his mind is quite confused. When reminded of it he remembered the making of the inventory, but when questioned as to its contents said, "I never saw it to know anything about it."

As to the value of John's estate, worth some $46,000, the whole of which goes to Michael, the clearest idea he has of it is that it is worth "ten or fifteen thousand dollars for all I know. That is only a rough guess, it may be more for all I know," and he is taking no steps towards its administration. John died in August, 1909, and no reason growing out of the conditions of the estate existed for its being left unadministered, practically in the hands of Robert Irwin, the only executor who seemed to be giving it any care. Nevertheless Fraser seemed wholly unconcerned in regard to its management, holds no communication on the subject with his co-executor, and is wholly unaware in what condition it is, or what is being done with regard to it.

He has some idea that he is the beneficiary of the estate, and therefore every good reason exists for its due administration in order that he may come into his own, but he manifests not the slightest interest in it.

Such indifference in regard to a matter of such great pecuniary importance indicates that, left unprotected, he might readily fall a prey to any designing person who might fraudulently seek to strip him of his property.

Although our questions to Michael Fraser were calculated to awaken in the mind of a person of ordinary intelligence the idea that it was a matter of common prudence that he should concern himself in regard to a matter in which he was so deeply interested as he was in his brother's estate, still it had no such effect on him, and his mind seemed to pass away from the subject at the conclusion of each answer.

To each question in regard to the estate he seemed to give an impatient and weary thought for a moment only. It was evident that he felt no interest whatever in regard to any matters connected with the estate of his brother John, and had no intelligent appreciation of his interest in it, nor sufficient mental energy to direct, or to take part directly, or indirectly through others, in its management. Mentally, he was utterly incapable of realizing the position or nature of the estate, or of managing or giving any reasonable directions as to its affairs. [Reference to extracts from his examination on this subject.]

It was shewn at the trial that on the 28th September, 1909, Michael Fraser signed a paper, directed to his co-executor, Robert Irwin, to take such steps by the employment of con-

stables or otherwise as might be necessary to protect his house and grounds from trespass by one Robertson or others. When shewn this paper which is signed by him, he failed to recognize it or remember any of the attendant circumstances. The evidence at the trial shews that the attempts of the Robertsons to obtain access to Fraser, and of Miss Robertson to marry him, had been the subject of consideration by Fraser, Mr. Finlayson, his solicitor, and others of Fraser's acquaintance. It was not a trifling matter of mere momentary importance, but one which seriously concerned Fraser, and if at the time of this occurrence Fraser was, and thereafter continued, in the enjoyment of his reason, it was, I think, impossible for him to have forgotten his uneasiness as to his overtures to Miss Robertson, his wish to be extricated from the legal consequences therefrom, and his desire to prevent the Robertsons having access to his premises, yet the various incidents have passed away from his mind. Evidently at the time of their occurrence his mind was incapable of receiving and retaining impressions of matters of such great concern to himself.

It was shewn at the trial that John Fraser in his lifetime held a mortgage for about $2,500 against Mrs. Weston, a neighbour of Michael Fraser's, and that on the 8th September, 1909, being only a few days after John's death, Michael Fraser gave Mrs. Weston an order to Mr. Finlayson, his solicitor, to prepare a release of the Weston mortgage. Thereupon Mr. Finlayson called upon Mr. Fraser with reference to the order, when Fraser stated that Mrs. Weston had called upon him for some pecuniary assistance and that he had promised to help her, but that he understood that it was a note and not a mortgage that was held against her. On Mr. Finlayson informing Fraser that the mortgage was for $2,500, Fraser said he never intended to give her that amount. Our examination of Fraser shews that he has no recollection of signing the order, or of having ever had any business conversation with Mrs. Weston, or that any reason existed for her having her mortgage gratuitously discharged, and that he is unaware of the amount of the mortgage. Nevertheless in his own hand-writing he directed his solicitor to prepare a release of the Weston mortgage, which the evidence shews was to be given without consideration, and at the instance and for the benefit of a woman to whom he says he had never spoken, and who had no claim upon him. With regard to this transaction Fraser denied ever having given the order in question, or having had any businesss conversation with Mrs. Weston about the mortgage. . . .

[Reference to a transaction of Fraser with Dr. McGill of Midland who had been John Fraser's physician in his last illness, being a frequent attendant at the house before John's death, and afterwards Michael's physician, but Michael has quite forgotten that Dr. McGill attended him, though shortly after John's death Michael sold and conveyed to Dr. McGill a piece of land in Midland, a fact which he has entirely forgotten.]

The evidence in this case assumed a wide range, and much of it deals with the circumstances connected with Fraser's marriage, but the validity of that marriage is not in question here, and that class of evidence is material only in so far as it bears upon the question now under judicial investigation, namely, whether Michael Fraser was of unsound mind and incapable of managing himself and his affairs.

The question is one of fact. Fraser may have been competent to marry, and not competent to manage himself and his affairs.

[Reference to the law as stated in Wood Renton on Lunacy, p. 7.]

It was argued in this case that there was an entire absence of delusions, and that therefore Fraser was of sound mind. . . .

I do not agree with the contention that in this matter there is an entire absence of delusions, nor with the broad proposition that the existence of delusions establishes in all cases insanity with the legal consequence of irresponsibility for acts . . . But unsoundness of mind may arise from many other causes than mere delusions, for example, by reason of want of intelligence because of mental decay, which is in fact this case, although Fraser is also the subject of delusions. He is under the delusion that his wife is without means, and so he offers her trifling sums. He thinks he still owns the moneys which he once had in the banks and that they are still there, also that he is still the owner of the house in which he resides and also his homestead farm, and he imagines that the object of these proceedings is to "pluck" him.

If Fraser is of so sound mind as to be capable of managing his affairs, how can the existence of these notions be accounted for? I fail to find any reasonable explanation except the one, namely, the decay of his mental faculties.

Medical experts testified to Fraser's capacity to manage his affairs, but they do not appear to have had the data necessary in order to enable them to form a sound opinion.

A man may be able to do rationally a great many things, and at the same time be incapable of sane actions in regard to others. He may be competent to marry, but incompetent to man-

age business affairs. He may be competent to make a simple will, but incompetent to make a more complicated one.

An intelligent explanation by Fraser of matters connected with the life history of himself and other members of his family, the manifestation by him in conversation of some more or less familiarity with literature, history, and public matters, are not evidence as to his mental capacity to manage his affairs.

None of the medical experts who testified as to Fraser's sanity know how he had in fact dealt with any of his affairs since John's death, and therefore their evidence as to his capacity to properly look after himself and his affairs is to me unconvincing.

Mr. Irving Cameron thought it strong evidence of Fraser's sanity that he knew the derivation of the word "Plantagenet." To me that circumstance seems to prove merely that Fraser's recollection of past events is not wholly gone. Memory alone is not synonymous with soundness of mind.

If these experts had been advised as to Fraser's actual doings in regard to his affairs, it is, I think, fair to them to assume that they would not have reached the conclusion arrived at in the absence of such material information.

Dealing with certain of the controversial facts established by the additional evidence taken under direction of this Court and more fully set forth above, they may be summarized as follows: Commencing with the cheque of $1,000 to Catherine McCormick on the 28th September, 1909, Fraser's conduct is a succession of acts shewing the absence of any controlling will-power in the management of his affairs, and total failure to realize or appreciate what he has done.

Shortly before that date, namely, on the 8th September, 1909, at the request of Mrs. Weston, a woman having no claim upon him and almost a stranger to him, he agreed to forgive her a mortgage debt of $2,500, and so instructed his solicitor in writing. When his solicitor informed him as to the nature of the debt he said he thought it was only a note involving a few dollars, but his previous instructions to his solicitor described it as a mortgage.

He never intended to give to his wife all his own cash in the banks, his residence, his farm property, or his municipal debentures, yet she succeeded in obtaining a transfer to herself of all these moneys, lands, and debentures.

He never decided to actually make a will in his wife's favour, but it is in evidence that he has executed such a will.

He owns his deceased brother John's estate worth some $46.000, but his idea of its value is that it is worth ten or fifteen

thousand dollars although one item alone consists of some $19,000 in cash in the bank. He leaves the management of this estate with his co-executor Irwin, taking no directing part in it, and manifesting no interest whatever in it.

He was a party to the inventory of the estate made shortly after John's death, but has no sensible idea as to its value.

For some reason he avoids giving attention to his affairs, and his mind is a complete blank as to the numerous transactions that have occurred since August, 1909. Although, except as to John's estate, Fraser does not now own a dollar, he fails to appreciate the importance of the estate to himself.

Reverting briefly to other of the facts above fully set forth going to shew Fraser's mental condition, it appears that Fraser has wholly forgotten a recent transaction whereby he became the possessor of $13,000 debentures of the city of Midland. He has forgotten having authorized his debentures to be handed over to a gentleman who was almost a total stranger to him, and he has no intelligent idea of the nature of these proceedings.

He has wholly forgotten the attempts of the Robertsons to obtain access to him, also his alleged proposal at that time to Miss Robertson, and his consultation with his solicitor Mr. Finlayson as to resisting further attempts. He has forgotten the Weston mortgage incident.

He disclaims any acquaintance with, and thinks he has never seen Mr. Finlayson, although that gentleman had been his solicitor, and in that capacity frequently attended at Fraser's house.

He has forgotten ever having seen Dr. McGill, or having deeded a piece of property to him, although Dr. McGill had attended Fraser professionally and had frequently been at his house.

He knows nothing as to what is being done in regard to John's estate and appears as indifferent to its management as if he were in no way interested in it. No rational person would, I think, conduct his affairs as Fraser has done.

The inference which I draw from the evidence is that in August, 1909, Fraser was suffering from senile deterioration, and that he was then, and has ever since continued to be, and now is, of unsound mind and incapable of managing himself or his affairs, and a committee of his person and estate should be appointed.

As regards possessing will-power to resist his wife's mercenary and covetous conduct, he is mere clay in the potter's hand. Her marriage with Fraser was simply a device on her part to acquire his property, and for no other purpose. Within a couple of hours after the marriage she commenced her efforts to that

end, and unless protected by the Court, there is in my opinion no doubt that she will at the earliest moment obtain a transfer from Fraser of his interest in John's estate, being his only remaining property, the nature and extent of which he is incapable of understanding.

Then having been stripped of everything Fraser will be entirely at her mercy, and if she chooses to desert him he will be a pauper, dependent on charity for the necessaries of life.

For the time being she might be appointed committee of his person, but the Toronto General Trusts Corporation should be appointed committee of the estate, and should institute proceedings to recover all properties of which Mrs. Fraser may have fraudulently possessed herself.

The costs of the matter, including costs of the appeal, to be paid out of the estate.

TEETZEL, J., gave reasons in writing, in which he agreed "that the proper conclusion upon all the evidence is that Michael Fraser at the beginning of the proceedings herein, and at the present time, although not a lunatic in the popular acceptation of that term, was and is a person of unsound mind and incapable of managing himself or his affairs, within the meaning of the Lunacy Act; and that The Toronto General Trusts Corporation should be appointed committee of his estate, and that Margaret Fraser should, until further order, be appointed committee of his person. . . . The costs should be disposed of as indicated by my brother Middleton."

MIDDLETON, J., gave reasons in writing, in which he dealt in the first place with the jurisdiction of the Court in cases of this kind, referring to and quoting from the following cases, statutes, and authorities: Chancellor Kent in Re James Barker, 2 John Ch. 232; Gibson v. Jeyes, 6 Ves. 267; Re Cranmer, 12 Ves. 445; Sherwood v. Sanderson, 19 Ves. 280, 286; 9 Edw. VII. ch. 37, sec. 2; 1 Geo. V. ch. 20; Snyder v. Snyder, 142 Ill. at p. 67; Pope's Law of Lunacy, ed. of 1890, p. 20; Re J. B., 1 My. & Cr. 538; Re Clare, 3 Jones & Latouche, 571.

The learned Judge then referred to the evidence adduced on the trial before BRITTON, J., and the reasons for which the Divisional Court considered it proper that additional evidence should be secured, his conclusion being stated in the following terms: "Had the litigation been between the McCormicks and Mr. Fraser, they would have had the right to present the case as they chose, and the Court would have been bound to deal with the matter as best it could upon the evidence adduced. But the

inquiry before the Court was not a piece of litigation between adverse parties, but a solemn inquiry by the Court for the purpose of ascertaining if the old man is at the time of the inquiry capable of managing his affairs, or is, as suggested, in the feebleness of his old age, the victim of a designing woman and her family who are attempting to deprive him of his property—her marriage being a mere incident to the larger scheme.

Upon such an inquiry the Court is not shut up to the evidence which the parties chose to tender, but has the right to demand the fullest information. The suggestion that it is the duty of the Court in a case of this kind to grope blindly in the dark, when light may be had for the asking, belongs to the days of long ago, and meets no response in my mind.

We felt that any inquiry could be better conducted before us than upon a new trial, because much evidence had been taken and much argument had been heard, and this would be thrown away by directing a new trial, but far more important than this was the question of delay.

Counsel representing before us Mr. Fraser represented the wife in other litigation, and stated before us that they were acting on instructions from the wife as well as the husband. From the inception of the whole matter their policy has been delay, and delay is obviously to the advantage of the wife if the charges made against her are well founded. No new trial could take place till the fall sittings, even if no appeal was had from our order directing a new trial.

Under the Lunacy Act, sec. 7, sub-sec. 7, it is expressly provided that the Court hearing an appeal under the Lunacy Act shall have the same powers as upon a motion against a judgment at a trial. Among these powers is that given by rule 498: "In all appeals . . . the Court appealed to shall have . . , full discretionary powers to receive further evidence upon questions of fact; such evidence to be either by oral examination before the Court appealed to, or as may be directed."

In the exercise of this power, and in the discharge of this duty which we felt devolved upon us, to ascertain the facts which appeared to us to be important, we thought it proper to have further evidence taken. The appellants at once accepted this suggestion and expressed the desire to have this evidence given, and if any formal application was necessary, asked that this evidence might be taken. Upon this direction being given we, sitting as a Divisional Court, became the Court before which the inquiry was being conducted touching Fraser's capacity, and the question now is Fraser's capacity at this date.

Originally an appeal, the hearing was re-opened, and the

matter fell to be dealt with by us upon the original evidence and the new evidence, and upon this we are called upon to pronounce, not as upon an appeal, but as in the first instance, and if in the result we differ from the learned trial Judge, we are not reviewing him but are arriving at a different conclusion upon widely different evidence." [Reference to the evidence at the original hearing and before the Divisional Court, the conclusion arrived at being stated in the following terms: "the one thing that is certain is that Fraser is utterly unfit to have the management of his own affairs, and that some independent person should be appointed to take charge of them."]

The learned Judge concludes his judgment as follows:—

"It then becomes our duty under the statute to make an order for the appointment of committees of his person and estate. Without in any way prejudicing the issue as to the marriage, if that is to be tried, I think Mrs. Fraser should be appointed committee of the person. There is no doubt that she has treated Fraser with the greatest kindness, and has succeeded in keeping him clean and sober.

A Trust Company should be appointed committee of his estate, and should at once obtain possession of his real and personal property, including his interest in the assets of his deceased brother.

If Mrs. Fraser at once hand over to the committee of the estate, the lands and balance of money remaining in her hands, and the debentures, a fair allowance should be made for the maintenance of the house as a home for the old gentleman.

The costs of the applicants, including the cost of this appeal, and of the various interlocutory motions, should be paid out of the estate.

The costs of the solicitor and counsel assuming to represent Mr. Fraser should also be allowed out of the estate. These costs will cover the costs of the petition, hearing, and appeal, and the costs of such interlocutory proceedings as the taxing officer may find were taken in good faith, and with the reasonable prospect of substantially advancing Mr. Fraser's interests.

Upon these costs, credit must be given for all sums paid to the solicitor and counsel by either Mr. Fraser or his wife or anyone else out of money which was originally Mr. Fraser's.

In the taxation of all these costs proper allowances should be made for the medical examinations."

TEETZEL J. JUNE 15TH, 1911.

REX EX REL. SLATER v. HOMAN.

Municipal Elections—Proceeding to Set Aside Election of Alderman—Contract for Supply of Goods to Contractor—Irregularities in Notice of Motion—Amendment—Municipal Act, sec. 80.

Appeal by the respondent Homan from the judgment of the Master in Chambers, ante 1221, setting aside his election as alderman of the city of Niagara Falls.

F. W. Griffiths, for the appellant Homan.
A. C. Kingstone, for the relator.

TEETZEL, J.: . . . The cause of disqualification, as stated in the formal judgment, is that since his election Homan "supplied goods and materials to a contractor erecting a public building for the municipal corporation for the said city of Niagara Falls." This was the only ground for disqualification set forth in the relator's notice of motion.

The proceedings are based upon the provisions of sec. 80 of the Consolidated Municipal Act, 1903, which provides *inter alia* . . . that "no person having by himself or his partner an interest in any contract with or on behalf of the corporation, or having a contract for the supply of goods or materials to a contractor for work for which the corporation pays or is liable directly or indirectly to pay, or which is subject to the control or supervision of the council or of an officer thereof on behalf of the council, or has an unsatisfied claim for such goods or materials . . . shall be qualified to be a member of the council of any municipal corporation."

Mr. Griffiths, for the appellant, submitted, firstly, that the notice of motion under which the learned Master proceeded was defective and did not justify the proceedings taken, and, secondly, that the evidence did not disclose any contract for the supply of goods, etc., within the prohibition of sec. 80.

The notice of motion is very unskilfully framed, in that while the real object of the motion, to be gathered from reading it in the light of the affidavit of the relator filed upon his application for the fiat, was to have it declared that Homan had forfeited his seat, the primary purpose of the motion, to be gathered from the language of the notice read by itself, was for an order setting

aside and declaring invalid and void the election held on the second January, 1911. If the motion had to be so confined it must have failed, because it was not launched until the 5th May, 1911, so that it was clearly too late, as such a motion would have to be within six weeks of the election or one month after acceptance of office, under sec. 220.

It is also manifest that as the relator did not vote or tender his vote, he would not be qualified to act as relator in a proceeding to declare the election void under sec. 219.

I agree, however, with the learned Master that reading the notice with the affidavit, and having regard to the words "still does usurp" and "still is disqualified" in the notice of motion, and in view of the fact that the proceeding is one in which the public has an interest, and of the fact that it does not appear that Homan has been misled, the objection to the notice should not prevail at this stage.

I also agree with the learned Master that the relator's affidavit sufficiently establishes his qualification to be a relator for the purpose of a motion to declare the seat forfeited.

The most serious objection to the language of the notice is that it does not aptly express any of the causes of disqualification set forth in sec. 80, which does not enact that "to supply goods and materials to a contractor," etc., "shall disqualify," but enacts that "having a contract for the supply of goods or materials," etc., does disqualify.

Why the draftsman neglected to describe the disqualifying condition in the language of the statute, which he must have had before him, it is difficult to understand. It does not upon the notes of evidence taken *viva voce* by the learned Master in support of the motion, appear that any specific objection was taken to the proceedings on the ground that no offence against the statute was contained in the notice of motion.

Under sec. 232, the Master is required in a summary manner, without formal pleadings, to hear and determine the right of any person to sit; and if objection had been taken that the language describing the grounds of disqualification was not literally in the terms of the statute, the Master might, I think, in the exercise of his discretion, have allowed the relator to amend such language, and to prove the existence of a contract, express or implied, under which the goods were supplied, because to state that a person is supplying another with goods or materials may fairly imply the existence of a contract between them in that behalf.

In the absence of any such objection, the learned Master heard the evidence, and if it is sufficient to establish the existence

of any such contract the Court may under Con. Rule 498 exercise the same powers of amendment as the Master might have exercised, and direct such judgment to be entered as the evidence warrants.

That Homan purchased or ordered in his own name, practically all the goods and materials which until the beginning of these proceedings went into the building, and became personally liable for the cost of same, that his teams delivered quantities of the material upon the ground, and that money for wages of workmen employed upon the building was paid from his office by his stenographer, were facts not seriously contested upon the hearing.

Men do not ordinarily supply hundreds of dollars worth of material and cash for wages without having some contractual rights against the person to whom the same are furnished, and in the absence of any satisfactory evidence to the contrary, or of any explanation by Homan, who abstained from giving evidence, I think the conclusion is irresistible that Homan had a contract for the supply of goods or materials to a contractor, etc., and did supply them within the meaning of sec. 80.

The object of this legislation clearly was to prevent any one being elected to, or holding a seat in a municipal council, whose personal interests might clash with those of the municipality; and in this case if Homan is allowed to retain his seat, and any question should arise between the corporation and the contractor for whose benefit Homan had furnished the material, etc., such as a question, whether the contract had been duly and properly completed entitling the contractor to be paid, thereby possibly embarrassing Homan's ability to realise the amount he had advanced, for material and money, he might be tempted to vote or use his influence as a member of the council in favour of the contractor and against the interests of the corporation.

It is of the utmost importance that members of a municipal council should have no interests to bias their judgment in deciding what is for the public good, and they should strive to keep themselves absolutely free from the possibility of any imputation in this respect.

In recent years there have been most regrettably many instances where members of governing bodies have incidentally to their positions succeeded in promoting their own material interests at the public expense.

The first essential of good local government being the purity of administration, the tendency of the Courts, both here and in England, is to give full effect to statutory provisions like sec. 80.

As remarked by Lord Esher, in Nutton v. Wilson, 22 Q.B.D. 744, at p. 747, in discussing similar enactments: "They are intended to prevent the members of Local Boards which may have occasion to enter into contracts from being exposed to temptation or even the semblance of temptation."

See also Arnold's Municipal Corporations, 4th ed., 27; and Biggar's Municipal Manual, p. 109, and cases there cited.

In this case, it is right to say, there is no evidence to shew that in doing what he did Homan had any corrupt intention. He made a mistake in law and must suffer accordingly.

The appeal must be dismissed, but the formal judgment should be varied by properly describing the cause for declaring the seat forfeited to be that Homan had a contract for the supply of goods or materials, etc.

In view of the irregularities in the form of the notice of motion and in the formal judgment, which I think invited the appeal, there will be no costs of the appeal.

LATCHFORD, J. JUNE 15TH, 1911.

TOWNSHIP OF WELLESLEY v. McFADDIN.

Banks and Banking—Cheque—Marking "Good" by Bank—Effect of, when Payment not Demanded—Discharge of Drawer—Payment by Cheque Coupled with Receipt—Bills of Exchange Act, sec. 166.

Action by the plaintiffs against Johnstone J. McFaddin, formerly their collector of taxes, and Robert Foster, his fellow-bondsman, for the recovery of $2,370.14, alleged to be due the plaintiffs for moneys collected by the said McFaddin.

A. B. McBride, for the plaintiffs.

A. Spotton, for the defendants.

LATCHFORD, J.:—This action arises out of the suspension of payment by the Farmers' Bank on the 19th December, 1910. It is brought by the township of Wellesley against Johnstone J. McFaddin, the collector of taxes for part of the township, duly appointed by by-law on the 1st August, 1910, at a salary of $32, and against one Foster, who on the 3rd October, jointly with McFaddin, executed a bond to the township conditioned that

McFaddin should duly collect the taxes and "pay over or cause to be paid over all moneys he may so collect to the treasurer of the said township on or before the 14th December, 1910, or sooner if required by the treasurer to meet the obligations of the municipality." The statement of claim sets forth the delivery to McFaddin of the collector's roll for the south-western portion of the township on the 3rd October—in fact he received it on the 6th—that he subsequently collected all the taxes levied except $2.11 which he returned as uncollectable, and that he did not pay the sums so collected to the plaintiffs before the 14th December as required by the terms of the bond. The action is not otherwise based upon the bond. It is not brought for the penalty, nor, except as stated, does it assign any breach of the condition. As to the proper course in an action upon a bond, see Star Life Society v. Southgate, 18 P.R. 151. The defendant admittedly paid over all the taxes he collected, except $2,368.03 represented by a cheque upon his special account as collector in the agency of the Farmers' Bank at Millbank, where he resided. This cheque, with other cheques and some cash, he handed to Herie, the township treasurer, at Crosshill, on the 15th December at the statutory meeting of the township council for that month, and was given the following receipt:—

$5,088.51. Crosshill, 15th Dec., 1910.

Received from J. J. McFaddin five thousand and eighty-eight 51/100 dollars taxes.

(Sgd.) V. HERIE.

The statement of claim sets forth that this cheque was deposited by the treasurer "in the Standard Bank of Canada, St. Clements Branch, but the said Standard Bank of Canada subsequently charged the account of the corporation of Wellesley with $2,368.03, alleging that the cheque . . . had not been paid;" and the plaintiffs claim they have not yet received the $2,368.03. A claim for the $2.11 returned as uncollectable, was also made, but it was abandoned at the trial.

The defence is that the cheque was accepted by the plaintiffs in payment of part of the taxes collected, and was in fact payment *pro tanto* of such taxes.

There is no material dispute as to the facts. McFaddin could not have collected and paid over the moneys on the 14th, as the plaintiffs had by resolution extended to the 15th the time for payment of the taxes by the ratepayers. Nothing, therefore, turns on the fact that the amount covered by the receipt was not handed over until the 15th. Herie, after the meeting of the

council, returned to his home near St. Clements, and the same evening between 9 and 10 deposited to the credit of the township with the Standard Bank, St. Clements, the money and cheques which he had received from McFaddin and the other collectors of taxes. The cheque in question, and no doubt the other cheques deposited—he endorsed "Victor Herie, Treasurer." The acting manager entered in the township's bank pass-book the amounts stated to him by the treasurer to have been received from each collector, and delivered the pass-book the same evening to Herie. The entry covering what was received by the treasurer from McFaddin is as follows: "1910. Dec. 15th. J. J. McFaddin, $5,088.51." Credit for the deposit was duly given next morning in the township's account in the bank ledger. In what is known as the Sundry Banks Cash Remittance Ledger entries were made which, so far as material, are as follows:—

No. 102. When cashed—Dec. 16th: For whom cashed—V. Herie, Treasurer: Where payable—Millbank: Drawer—J. J. McFaddin, collector. On the same day (Dec. 16th) the acting manager wrote to the Farmers' Bank at Millbank enclosing the cheque for $2,368.03, having first endorsed it: "Pay to the order of any bank or banker. The Standard Bank of Canada, St. Clements, Ontario." The letter covering the cheque sets forth that the cheque is enclosed "for collection and remittance," and proceeds: "Kindly remit at par. We cashed (scil. "it") without charge on that understanding." St. Clements is west of Crosshill about four miles, and Crosshill is five or six miles west of Millbank. There is but one mail out of St. Clements daily, leaving at 6 a.m., and letters for Millbank do not go directly from one village to the other. The letter from the Standard Bank posted on the 16th left St. Clements on the morning of the 17th, and was received by the manager of the Farmers' Bank at Millbank between 8 and 9 o'clock in the evening of the same day. The 18th fell on Sunday. When the bank opened on Monday morning the cheque was charged against McFaddin's account as collector—he had two other accounts with the bank—and stamped "Paid. Dec. 19, 1910. Farmers' Bank of Canada, Millbank, Ont." Although the Farmers' Bank was unable, at noon of the same day, to meet its obligations in the clearing house, Toronto, the evidence is undisputed that at any hour up to 3 p.m. of the 19th the branch at Millbank would, if the cheque had been there presented, have paid it in cash, or if so desired, would have forwarded the cash by mail or express to the Standard Bank at St. Clements. But the Millbank agency of the Farmers' Bank followed in remitting, as the bank at St. Clements intended it

should, the ordinary mode of settling clearances between branch banks, and issued the following draft:—

Bank Settlement Draft.

The Farmers' Bank of Canada—No. 54627.

Millbank, Ont., Dec. 19, 1910.

Pay to the order of the Standard Bank of Canada, St. Clements, $2,368.03. Twenty-three hundred and sixty-eight 03/100 dollars.

(Sgd.) D. E. MILLIE,
Manager.

(Sgd.) J. F. MACKAY,
Accountant.

The Farmers' Bank of Canada,
Toronto, Ont.

The draft is endorsed "In payment of your S. B. (Sundry Banks) No. 102" A letter covering was posted about 3 p.m. addressed to the Standard Bank, St. Clements, where it was received on the evening of the 20th, more than twenty-four hours after the Farmers' Bank had suspended payment. It was never presented for payment, and if presented it would not have been honoured. Until made an exhibit in this action, it was held by the Standard Bank and is still the property of that bank. No claim appears by the evidence to have been made upon the draft by the holders against the liquidator of the Farmers' Bank. But the draft upon its face represents an indebtedness of the one bank to the other arising when the draft was issued as endorsed "In payment of your S. B. 102." The obligation under it is manifestly not affected by the fact that on Dec. 23rd the Standard Bank assumed to debit the plaintiffs' account with the amount of the settlement draft.

The case is not one in which a cheque was received that was afterwards dishonoured, and in which accordingly the amount for which the cheque was drawn could be recovered as upon a consideration which has wholly failed. There had been many dealings between the township and McFaddin, and the latter's cheque was treated by Herie as cash and receipted for as cash. Payment by cheque coupled with a receipt has been held to be evidence of payment without proof that the cheque was honoured: Carmarthen and Cardigan R.W. Co. v. Manchester and Milford R.W. Co., L.R. 8 C.P. 685. But McFaddin's cheque was in fact honoured. It was paid in the way the Standard Bank desired, and this bank was either the purchaser of the

cheque—in which case the plaintiffs are out of Court—or, to put the matter on the highest ground on which it can be put in the plaintiffs' interest, the Standard Bank was the agent of the plaintiffs to collect the amount of the cheque by presenting it for payment. Whether as holder for value or agent, the duty of the bank was to present the cheque for payment within a reasonable time of its issue. Otherwise the drawer is discharged: Bills of Exchange Act, R.S.C. ch. 119, sec. 166. The cheque was presented within a reasonable time, but not for payment—except in so far as the defendant McFaddin was concerned—and the payment contemplated by the statute is clearly payment to the cheque's lawful holder. If the holder chooses instead of currency to take a more convenient medium of exchange—in this case a bank settlement draft—he does so with the same risk that a holder takes who, instead of presenting a cheque for payment, presents it to be marked "good" or "accepted." In Boyd v. Nasmith, 17 O.R. 40, the payees of a cheque in due time presented it to the bank on which it was drawn, and asked to have it marked "good." They might, if they desired, have had it paid. The cheque was marked good, and charged against the drawer's account. On the evening of the same day the bank suspended payment. The holders of the cheque then brought suit against the drawer. In delivering a considered judgment, Street, J., who tried the action, says (p. 41): "The payee had no right as between himself and the drawer, to present the cheque for any other purpose than payment. . . He chose . . . instead of payment to take the banker's undertaking to pay upon a further presentation." The action was dismissed. On appeal Galt, C.J., stated that if a holder instead of demanding payment obtains a certificate, he elects to give credit to the bank and not to the drawer.

The words of MacMahon, J., (at p. 49), are very much in point: "When a cheque is presented at the bank upon which it is drawn, it is presented for payment; but if the holder accepts something else from the bank in substitution for payment, he does so at his peril, for he discharges the drawer."

The recent judgment of my brother Clute in Johns v. Standard Bank of Canada, ante 910, is to the same effect.

As the Standard Bank at St. Clements presented McFaddin's cheque for "collection and remittance," not for payment, and it was in fact collected from McFaddin when charged to his account, and remitted in the way usual in such cases, the drawer of the cheque was thereby discharged.

The action fails and is dismissed with costs.

REX v. BARBER ASPHALT PAVING CO.—DIVISIONAL COURT—MAY 1.

Public Health Act—Construction of sec. 72—Ejusdem Generis Rule—Noxious or Offensive Trade—"Such as may Become Offensive"—Conviction—Jurisdiction of Magistrate—Evidence.]—Appeal by the defendants from the order of TEETZEL, J., ante 819. The appeal was heard by a Divisional Court, composed of MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ. THE COURT dismissed the appeal with costs. D. C. Ross, for the defendants. C. J. Holman, K.C., for the prosecutor.

RE ALICE KERR—MIDDLETON, J., IN CHAMBERS—JUNE 8.

Will—Trust for Payment of Husband's Creditors—Statute of Limitations—Statute-barred Creditors Entitled.]—Motion by the executors of the will of Alice Kerr under Con. Rule 1269. Alice Kerr, the wife of James Kerr, by her will, devised and bequeathed her real and personal property to her executor upon trust to apply the proceeds in the payment of such sums to her husband as the executor should see fit, and after the death of her husband to pay and apply the balance of her estate towards his funeral and testamentary expenses, "and any just debts that he may owe, a list of which I hope my said husband will make out and leave shewing those he desires to be paid." It was held by a Divisional Court that a surplus in the hands of the executor should be distributed pro rata amongst the creditors of James Kerr, who should prove their claims to the satisfaction of the executor, who now asks the direction of the Court as to whether in paying the creditors' claims, he should have regard to the Statute of Limitations. MIDDLETON, J.:—The Statute of Limitations can only apply as between the debtor and the creditor. Here the wife, being in no way a debtor, gave certain property to her executor to be divided among the creditors of her husband. This was a trust she voluntarily created, and the only function of the Court is to ascertain the persons who come within the class. The creditors of the husband are none the less his creditors because their claims are statute-barred. The statute gives the debtor the right to assert it as a bar to an action against him if he so desires, but it is quite beside the mark when a third person volunteers to create a trust fund for payment of his creditors.

The volunteer has placed no limit upon the class entitled to share in her bounty, and the Court cannot do so. Costs of all parties out of the estate. A. E. H. Creswicke, K.C., for the executor. J. J. Maclennan, for the creditors. J. J. Coughlin, for Alice O'Connor, one of the next of kin. J. R. Meredith, for the other next of kin.

Ross v. St. Lawrence Brewery Co.—Britton, J.—June 15.

Sale of Brewery Property to Trustees—Condition as to Payment by Parties Interested—Receipt—Estoppel.]—Action to recover $750, and for a declaration that the defendants hold the property in question in trust and that the plaintiffs are entitled to be paid the $750 thereout. Prior to the 17th March, 1907, the plaintiffs subscribed for 10 shares of the capital stock in the Nutter Brewery Co., against which a winding-up order was made on the 6th August, 1908. The real estate of said company was advertised to be sold on the 14th October, 1908. When the sale was imminent a plan was devised for saving something to such of the shareholders of the Nutter Co. as would join in providing a fund for the purchase of its plant and property. An agreement in writing was entered into, by which certain shareholders in the Nutter Co. should each contribute and deposit with persons named as trustees, an amount, equal, at least, to 50% of his then present registered stock holdings in the Nutter Co., the said sums to be deposited with the trustees on or before the 10th October, 1908, to be used solely in the purchase of the real property of that company on the 14th October, 1908. Any one of these stock-holders failing to deposit his money was "not to participate in the agreement." Trustees were appointed, two of whom, the defendant Schnaufer and one Pitts, purchased the property, which they were to transfer to a new company to be formed for carrying on the business, when the other parties to the agreement complied with its provisions. A new company was formed, namely, the Cornwall Brewery Co., but the parties of the second part to that agreement failed to place the new company in such a financial position as they had agreed to do. The new Cornwall Co. had a very short career, and was disposed of in winding-up proceedings. Neither bonds nor stock were available for those who had put up the money to buy the property. The two trustees, however, still held the property purchased by them. Then the defendant Schnaufer interested himself in the formation of a new company and succeeded in forming

the defendant company, of which he is the principal and largest shareholder. Pitts and Schnaufer recognised their liability as trustees under the agreement of October, 1908, and have settled with all the parties to it except the plaintiffs. Pitts has been paid, and he has released to his co-trustee Schnaufer. Schnaufer refuses to pay the plaintiffs anything on account of the Nutter Brewery stock, which is the main question at issue in this action. The learned Judge finds, as a fact, that the plaintiffs did not pay the promised sum of $500, or any sum, to the purchase fund. The only matter now in dispute is as to the liability of the defendants to pay the 75% of the par value of the Nutter stock, as to which the judgment declares that the plaintiffs are exactly in the same position as they were before the agreement of October, 1908. The only liability of the defendants is that created by the last mentioned agreement, a condition precedent to which was the payment of at least $500 to the purchase fund, which has not been paid. The receipt given by Hartman, long after the purchase by the trustees, cannot create a liability on the part of the trustees, nor can the trustees be estopped by it from setting up the non-payment in fact of the money. Action dismissed with costs. R. A. Pringle, K.C., for the plaintiffs. G. A. Stiles, for the defendants.

BANFIELD v. TORONTO RAILWAY CO.—TEETZEL, J.—JUNE 16.

Sale of Goods—Fare Boxes Supplied by Plaintiffs—Alleged Faulty Construction—Repairs—Extras—Conflicting Evidence.] —Motion by way of appeal by the defendants from the report of the Master in Ordinary, and also motion by the plaintiffs for judgment in terms of the report. The action was brought to recover balance alleged to be due on pay-as-you-enter cabinets and cash-boxes supplied to the defendants, and was referred by Falconbridge, C.J.K.B., to the Master, who found the sum of $1,432 due to the plaintiffs, together with costs. TEETZEL, J., said that while it was possible that if he had heard the witnesses he might have taken a different view in some of the matters reported upon, he was not able to say that the learned Master was clearly wrong in any of his holdings. The evidence is upon many of the matters conflicting, and the case is peculiarly one in which the findings of the Master, who saw all the witnesses, should not be disturbed in the absence of convincing proof that he has drawn wrong inferences from the evidence, or has not given proper consideration to undisputed facts, or has made a mistake in law.

Appeal dismissed with costs, and judgment to be entered in favour of the plaintiffs in accordance with the report, together with the costs of the action and reference and of this motion. Britton Osler, for the defendants. Gideon Grant, for the plaintiffs.

HOWELL v. IRONSIDE—DIVISIONAL COURT—JUNE 17.

Sale of Livery Business—False Representations—Subsequent Dealing with Property.]—Appeal by the defendant from the judgment of the County Court of Wentworth of April 5, 1911, in an action on a promissory note given in part payment for a livery business. The defendant counterclaimed for damages, alleging false and fraudulent representations by the plaintiff on the sale of the business. At the trial, after deducting for damages and insurance, judgment was given for the plaintiff for $170.61, each party to pay his own costs. The appeal was heard by RIDDELL, LATCHFORD, and SUTHERLAND, JJ., and the judgment of the Court was delivered by RIDDELL, J., who said that upon the findings of fact at the trial, which he thought could not be set aside, the whole case was one of amount of damages. The learned trial Judge had correctly apprehended the facts and the law, and the appeal should be dismissed with costs. J. W. Lawrason, for the defendant. W. E. S. Knowles, for the plaintiff.

HAWES, GIBSON & CO. v. HAWES—MASTER IN CHAMBERS—JUNE 19.

Examination for Discovery—"Party Adverse in Interest"—Con. Rule 439*—Practice under Corresponding English Rule.*]—Motion by the plaintiffs for an order setting aside application for examination for discovery by the defendant of James Hawes, a member of the firm of Hawes, Gibson & Co., in an action brought by the receiver of the partnership of Hawes, Gibson & Co. which is being wound up under order of the Court. James Hawes was admittedly a member of the firm, and it was also admitted that he is not in favour of the action and has joined in an agreement made since the order for winding up the partnership, which if enforceable would be destructive of the present action wholly or in part. On these grounds it was contended that James Hawes is not examinable under Con. Rule 439, because he is not adverse

to the defendant. The corresponding English Rule is differently worded and speaks of "the opposite parties." Judgment: There do not seem to be any decisions in our own Courts on the point now under consideration. Under the English Rule there has not come to my notice anything except the judgment of the Court of Appeal in Wilson v. Raffalovich, 7 Q.B.D. 553, 560, where it was held, reversing the decision of the Court below, that the nominal "plaintiffs on the record must be taken to be the parties conducting the litigation." If this applies to our procedure it would seem to be decisive, unless the words "adverse in interest" in Con. Rule 439 are to be held to limit its operation—as at present advised I do not think this is so. They seem rather intended to amplify it, as was held to be the case in Bradley v. Clarke, 9 P.R. 410. What weight is to be given to the examination, or how far it will avail the defendant, is not at present to be dealt with. The Wilson case, supra, shews that the Court will not allow the technical form of the action to be used to work injustice—see per Cotton, L.J., at p. 561. According to the best opinion I can form, the motion must be dismissed, but with costs in the cause, as the point is new and by no means self-evident. H. D. Gamble, K.C., for the plaintiffs. F. R. Mackelcan, for the defendant.

BOYLE v. MCCABE—DIVISIONAL COURT—JUNE 20.

Security for Costs—Defendant out of Jurisdiction—Real Actor—Onus.]—Appeal by the plaintiff from the order of RIDDELL, J., in Chambers of June 12th, ante 1293, allowing the defendant's appeal from an order of the Master in Chambers, ante 1248. The appeal was heard by MEREDITH, C.J., TEETZEL and LATCHFORD, JJ., and dismissed with costs. C. Kappele, for the plaintiff. R. G. Smyth, for the defendant.

HOLDAWAY v. PERRIN—DIVISIONAL COURT—JUNE 20.

Negligence—Defective System—Answers of Jury—Common Law and Statute.]—Appeal by the defendants from the judgment of Falconbridge, C.J.K.B., ante 1055. The appeal was heard before MEREDITH, C.J., TEETZEL and LATCHFORD, JJ., and dismissed with costs. T. G. Meredith, K.C., for the defendants. J. M. McEvoy, for the plaintiff.