THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING SEPTEMBER 17TH, 1904.)

VOL. IV. TORONTO, SEPTEMBER 22, 1904. NO. 4

MAGEE, J. SEPTEMBER 12TH, 1904.

CHAMBERS.

RE EWART CARRIAGE WORKS LIMITED.

Company—Winding-up — Petition for — Insufficient Allegations—Evidence—Affidavits—Amendment—Terms.

Petition by the Dunlop Tire Co. for an order for the winding-up of the Ewart Co. under the Dominion statute.

C. S. MacInnes, for petitioners.

S. B. Woods, for company.

MAGEE, J.—The company is a trading company, incorporated under the Ontario Joint Stock Companies Act on 19th February, 1903, among the objects of that company being to acquire the business of James Ewart. The nominal capital was $100,000 in 1,000 shares, of which 294 were subscribed and 133 paid up. Of the $16,100 owing upon subscribed shares a sum of $500 is said to be owing by one director and $400 by another; $15,000 by Mr. James Ewart, described as manager, who holds 250 shares; and it is alleged by the petitioners that another shareholder, Mr. Boules, described as secretary, really subscribed for $3,000 of stock, although only appearing as holder of $1,000 fully paid. . .

The petitioners are judgment creditors for $205.84, made up of $193.97 debt and $11.87 costs, their judgment being recovered on 9th July, 1904.

The petitioners allege that a writ of fi. fa. was issued on 9th July, 1904, under their judgment, and that the Ewart Co. permitted the execution so issued against them, and under which their goods, chattels, lands, and property were seized, to remain unsatisfied for more than 15 days after the

seizure of such goods by the sheriff, and that the judgment and execution are wholly unsatisfied; that the Ewart Co. are unable to pay their debts as they become due.

The petitioners also allege that they are not aware of the facts relating to the subscription and payment of the stock, and are desirous that the affairs and business of the company and the subscription and payment of the stock should be investigated upon oath, and that it should be made to appear, etc.

In support of the petition is filed an affidavit by the petitioners' solicitor that their judgment was recovered on 9th July, and execution placed in the sheriff's office on 11th July, and that the deponent is informed by the sheriff that in accordance with the execution he proceeded to make a seizure of the goods, chattels, and property of the company, but found that they were claimed under a chattel mortgage to the Metropolitan Bank, and the said judgment still remains unsatisfied in the hands of the said sheriff, and he states that his return to such execution must be nulla bona.

An affidavit by petitioners' secretary, verifying the petition in general terms, states, on information received from petitioners' solicitors, that on 11th August, 1904, Mr. Reinhardt, the president of the company, was represented by counsel on the application of the petitioners to wind up the company, and that counsel for Reinhardt read an affidavit made by Reinhardt . . that the company were not doing any business for the reason that their assets other than the unpaid subscriptions had been sold and disposed of by the mortgagees, and the company owed him, Reinhardt, over $800, besides the company's indebtedness to him as accommodation indorser, and he had paid $1,000 already on behalf of the company as accommodation indorser. . . .

The affidavit of Mr. Bullock states that he is a creditor for $100 on the company's promissory note for $100 due 18th July, and he believes there are other creditors; . . that a chattel mortgage on the property of the company purports to have been given on 22nd December, 1903, to the Metropolitan Bank, and he was informed by the secretary of the company and believes that it was made without due authority from the shareholders, no meeting of shareholders having been called for passing the by-law under which the chattel mortgage was alleged to have been made. . . .

On the facts set out in the affidavits I would consider it desirable in the interests of the outside creditors that a winding-up order should issue. The amounts owing from

two or three directors, the claim of another, the mortgage without authority from shareholders, and the absence of available assets so soon after the company's organization, are circumstances which render it reasonable for creditors to ask that the control of the company's affairs be not left with the directors. . . .

Counsel for the petitioners contended that they were entitled to an order under clauses a, d, g, and h of sec. 5 of the Act.

As regards clauses d and g, even if there were proof of facts to bring the company within either, there is no allegation of such facts in the petition, nor even a general allegation of insolvency of the company, but only of particular facts not coming under either of these two clauses. In In re Wear Engine Works Co., L. R. 10 Ch. 188, an order was refused on that ground; and see also In re Briton Medical and General Life Assn., 11 O. R. 478; Re Grundy Stove Co., 7 O. L. R. 252, 3 O. W. R. 175.

As to clause h, there is here no evidence of a seizure. The petition alleges a seizure, but the solicitor's affidavit only states that the sheriff informed him he proceeded to made a seizure but found that all the goods, etc., were claimed under a mortgage, and his return must be nulla bona. This would imply that no seizure was in fact made. Even if this proceeding to make a seizure could be interpreted as the making of one, there is nothing to shew where it took place or that 15 days had elapsed. The secretary's affidavit verifying the petition in general terms, on information and belief, cannot be taken as sufficient, especially as the sources of the information are given, and manifestly do not relate to that fact.

As to clause a, the petition makes a direct allegation under that clause of the company's inability to pay their debts as they become due, but no evidence is given of a demand in writing and neglect by the company to pay within 60 days thereafter, as required by sec. 6, which specifies when the inability to pay debts shall be deemed to exist. In In re Qu'Appelle Valley Co., 5 Man. L. R. 160, and In re Rapid City Farmers' Elevator Co., 9 Man. L. R. 574, it was held by Taylor, C.J., that sec. 6 specifies the only way of bringing the case under clause a of sec. 5—a view apparently taken also by Proudfoot, J., in In re Briton Medical and General Life Assn., 11 O. R. 478, and in which I concur. In England other proof is sufficient, as sec. 80 of the Companies Act only requires it to be to the satisfaction of the Court.

On the petition as it at present stands and with the present proof, I do not see my way to grant an order, but, as it appears to be a case in which the company should be wound up, the petitioners may, if they so desire, amend the present petition and offer such additional evidence as they may be advised and again present it within 14 days. In such case the costs of the present application and of the application to Idington, J., are reserved to be disposed of on that application. Failing that, the present application is dismissed with costs, the costs of the company in opposing the petition as at first presented being fixed at $5.

CARTWRIGHT, MASTER. SEPTEMBER 13TH, 1904.

CHAMBERS.

GEIGER v. GRAND TRUNK R. W. CO.

Parties—Joinder of Defendants—Separate Causes of Action—Personal Injuries—Negligence—Breach of Contract to Carry Safely—Railway Company—Breach of Statutory Duty.

Motion by defendants the Canadian Transfer Co. for an order requiring plaintiffs to elect against which of the two defendants they would proceed in this action.

The statement of claim alleged (3) that on 21st July, 1904, plaintiffs were being carried for reward by defendants the transfer company, in their omnibus, from the Yonge street wharf to the King Edward hotel, in the city of Toronto; but that (4) the said company so negligently and unskilfully conducted themselves in the management of their omnibus that it came into violent collision with two cars of defendants the railway company, where their railway crosses Yonge street, and the omnibus was caught between the cars and wrecked; (5) that defendants the transfer company were negligent in attempting to cross the railway track while the servants of the railway company were shunting and coupling cars, and also in not crossing at a greater speed; (6, 7, 8) that the crossing was dangerous in the highest degree to the thousands who have to cross Yonge street at that point, and that the railway company gave no warning in any way nor took any precaution, by reason whereof the collision occurred; (9) that the acts of the transfer company and the acts of the railway company were negligent and unskilful and occasioned the collision, whereby plaintiffs sustained serious injuries and damage.

B. N. Davis, for defendants the transfer company, relied on Hinds v. Town of Barrie, 6 O. L. R. 656, 2 O. W. R. 995, where all the cases are cited and discussed.

D. L. McCarthy, for defendants the railway company, submitted to any order that might be made.

W. M. Boultbee, for plaintiffs, contended that paragraph 9 of the statement of claim took the case out of the principle of Hinds v. Town of Barrie.

THE MASTER.—I am of opinion that the motion must succeed and an order be made as in Andrews v. Forsythe, 7 O. L. R. 188, 3 O. W. R. 307. It seems reasonably clear that plaintiffs in their statement of claim set up two separate causes of action against separate parties. They first charge breach of contract by the transfer company and then breach of statutory duty by the railway company.

It is true that in paragraph 9 they attempt to set up a joint cause of action against both defendants, but not more successfully than in Hinds v. Town of Barrie. . . .

Either the transfer company were right in trying to cross the track when they did, or they were wrong. If the latter, plaintiffs should proceed against them; if the former, then against the railway company. As said by the Chancellor in Quigley v. Waterloo Mfg. Co., 1 O. L. R. 613, 614, plaintiffs must make up their mind whose neglect was the causa causans of the serious injuries they undoubtedly suffered. . . .

Scott v. London, etc., Docks Co., 3 H. & C. 596, would seem to shew that plaintiffs would prima facie have a good cause of action against the transfer company, and that they can safely leave it to that company to exculpate themselves if they can do so. If the railway company were in fault, the transfer company would clearly have a remedy over against them. . . .

CARTWRIGHT, MASTER. SEPTEMBER 14TH, 1904.

CHAMBERS.

BLACKLEY v. ROUGIER.

Particulars—Statement of Claim—Action for Commission on Sales of Goods—Information in Possession of Defendants.

Motion by defendants for particulars of the statement of claim. The action was to recover $8,472 as the balance due

to plaintiff for commissions earned by him as traveller for defendants in 1900 and three following years.

The writ of summons was indorsed as follows:

Jan. 1, 1904.	Total gross accepted orders.....		$213,225
	Less cancelled orders	$13,500	
	Less returned goods	16,500	
	Less cash discounts	9,000	
			39,000
			$174,225
10 per cent. commission on $145,000=		$14,500	
5 per cent. commission on $29,000=		1,450	
		$15,950	
Cr. By cash received at various dates net.		7,478	
Balance due			$8,472

And interest till judgment.

The result was similarly set out in the statement of claim.

Plaintiff stated on affidavit that in the course of his service with defendants he gave them a voucher in writing for every item of his claim in this action, and that he believed these vouchers were still in defendants' possession or power.

The defendants stated on affidavit that any particulars obtained from plaintiff while acting as defendants' agent were not sufficient to enable defendants to understand how plaintiff's claim was made up.

A. R. Clute, for defendants.

F. J. Roche, for plaintiff.

THE MASTER referred to Tawse v. Seguin, 1 O. W. R. 14, 56, and proceeded:

In the present case plaintiff does not allege any difficulty in furnishing the particulars asked for. It is clear he must give them at some stage if he is to succeed in his action. On the other side, defendants do not deny that all necessary information can be found in their own books. . . .

It might be thought that defendants could satisfy themselves whether to defend the action or not, without further particulars. But they say they cannot. And perhaps they are entitled to see a full statement of account, which might lead them to pay into Court such a sum as plaintiff would be willing to accept, and so the litigation would be at an end.

I therefore, though not wholly free from doubt, think it best to make as full an order for particulars as was made in Tawse v. Seguin. Such particulars would be the same as the accounts which plaintiff on a reference would bring into the Master's office.

Plaintiff must have full access to defendants' books for this purpose, if necessary, though I infer he has sufficient memoranda in his possession.

Costs will be in the cause.

ANGLIN, J. SEPTEMBER 14TH, 1904.

CHAMBERS.

BLEASDELL v. BOISSEAU.

Judgment—Set-off of Judgment Purchased by Defendants—Equitable Right—Discretion—Attachment of Debts.

The plaintiff, on 29th January, 1904, recovered judgment for $450 and costs against the defendants; on 1st February he assigned that judgment for value to one Dickson. Dickson's purchase was made bona fide and without notice of any outstanding judgment against his assignor. The accountant of the Supreme Court, in June, 1895, had recovered judgment upon a mortgage covenant against plaintiff and one Lester for $4,393.06, which remained unsatisfied. On 29th January, on behalf of the accountant, an attaching order was obtained and served upon defendants. By indenture bearing the same date the accountant purported to assign to defendants "the said judgment and all moneys due or to grow due by virtue thereof against the said William H. Bleasdell." Notice of this assignment was given to plaintiff and to his solicitors on 3rd February, but plaintiff was not notified of the garnishee proceedings. The garnishee order fixed 3rd February for the hearing of the judgment creditor's application for payment by the garnishee, but no such motion was made on that or any subsequent day. Defendants, having taken the assignment above mentioned, appeared thereafter to have relied entirely on whatever rights they had thus acquired. On 20th February they moved before the Master in Chambers for an order that plaintiff's judgment against them be set off pro tanto against the judgment of which they had become assignees, and also for an order "disposing of the garnishee order served upon them." On 23rd April the Master made the order for set-off, subject to the lien for costs of plaintiff's solicitors, and discharged the garnishee summons, which, he said, "was practically merged in the

assignment." From this order the assignee, Dickson, appealed. In the event of his appeal succeeding defendants claimed the benefit of the garnishee process, which their solicitor swore "was never in any sense abandoned, but was expressly preserved by arrangement with the solicitors for the accountant."

C. A. Moss, for appellant.

W. E. Middleton, for defendants.

ANGLIN, J.—The right of set-off, under such circumstances as exist in this case, is purely equitable: Lynch v. Wilson, 3 P. R. 173; Booth v. Walton, 44 U. C. R. 500. Defendants, who, "instead of paying to the plaintiff what he had recovered, expended money which might have been so employed in buying up a judgment" against him, are not entitled to ask the Court to exercise its equitable powers to assist them in this attempt to defeat plaintiff's recovery: Elliott v. Crocker, 1 P. R. 13.

Neither do I think I should assist defendants by reinstating the garnishee summons, which the Master has discharged. A hardship, if not an injustice, to Dickson would certainly follow, and unless bound to do so, and I think I am not so bound, I am not disposed, with such consequences to an innocent party, to help defendants, who have voluntarily put themselves in their present position, to virtually defeat a meritorious claim, payment of which the learned Chief Justice of the Common Pleas, who tried this action, thought should never have been resisted.

I assume, as did both counsel on the argument, that the document of 29th January did not operate to transfer the liability of Lester under the judgment in "Accountant v. Plummer."

If the liability of Bleasdell has been effectively assigned to defendants—and before so holding I should be obliged to consider with great care Mr. Moss's able argument to the contrary—attempting to enforce, as assignee, by garnishee proceedings, the judgment establishing that liability, whether in his own name or in that of his assignor, the defendants in reality seek to attach moneys in their own hands to satisfy their own claim. This in itself seems anomalous. Moreover they would thus, indirectly, but most effectively, accomplish the set-off, which, in my opinion, any discretionary powers which the Court possesses should be employed to prevent. If the liability of Bleasdell under the judgment in favour of the accountant has not been effectively transferred, the accountant alone can properly proceed to enforce that

judgment by attachment, and he is not a party to this application.

The appeal of plaintiff will be allowed with costs.

ANGLIN, J. SEPTEMBER 14TH, 1904.

WEEKLY COURT.

RE KINCARDINE SCHOOL SECTIONS.

Public Schools — Boundaries of School Sections — By-law — Petition—Award — Powers of Arbitrators — Finality of Award—Order Setting aside Award as to one School Section —Effect on Others.

Motion by the trustees of school section 5 of the township of Kincardine to set aside the award of arbitrators appointed by the county council of Bruce under sec. 42 of the Public Schools Act, 1 Edw. VII. ch. 39, determining the boundaries of certain sections.

W. H. Blake, K.C., for the applicants.

C. A. Moss, for the trustees of sections 6 and 12.

No one appeared for the trustees of section 15, who were notified.

ANGLIN, J.—School section 8, upon notice to section 5, which however did not appear, but without notice to sections 6 and 12, obtained on 28th April, 1904, an order setting aside the award in question "so far as it purports to affect section 8, or the boundaries thereof, or the lands therein contained." The net result of this order is, that a large tract of land, taken by the award from section 8 and added to section 5, is restored to section 8. The award had deprived section 5 of other lots given to it by the by-law of the township council, and had annexed these lots to sections 6 and 12, with which they remain, leaving section 5 too small, the trustees allege, to be a workable school section. They now ask an order declaring that the order of 28th April operates to set aside the award so far as it affects section 5. The respondents contend that the order of 28th April, because made without notice to them, cannot thus affect their position under the arbitrators' award.

This award was duly published on 18th January, 1904. By sec. 55 of the Public Schools Act, no notice to set it aside having been filed in the office of the township clerk within one month of its publication, notwithstanding any defect in

substance or form, or in the manner or time of making the same, the award is made valid and binding for a period of at least 5 years. This statutory provision excludes all objections save such as are based upon lack of jurisdiction in the arbitrators.

If wholly untrammelled by authority, I should be disposed to construe liberally and broadly the provisions of sec. 42, in order to enable the arbitrators appointed by the county council finally to settle the matters complained of in whatever manner seemed to them fair and equitable. But these provisions have already received judicial consideration, and I am bound to regard the limitations within which the powers of such arbitrators have been held to be restricted. . . .

[Re Southwold School Sections, 3 O. L. R. 81, 1 O. W. R. 32, and In re Sydenham School Sections, 6 O. L. R. 417, 7 O. L. R. 49, 2 O. W. R. 830, 3 O. W. R. 227, referred to.]

In each of these cases the appeal referred for hearing to the arbitrators was from the refusal of the township council to grant the prayer of a single petition. In the present case the township council had before it several petitions. Some requested that there be no change in boundaries; others asked the formation of sections which would permit of the establishment of line schools; others prayed for certain defined sections. The township council having passed by-law 162, determining certain boundaries, four appeals were taken to the county council "against by-law 162 of the township of Kincardine in regard to the boundaries of our school section." Each of these appeals was by 5 ratepayers from one of the following sections, 5, 6, 7, 12.

The arbitrators do not appear to have travelled outside the subject matter of appeals couched in such general terms against a by-law passed after the presentation of such varied petitions. The facts of the present case are, I think, clearly distinguishable from those before the Court in each of the two earlier cases cited above. I do not regard the award in the present instance as a mere promulgation of the views of the arbitrators outside of the scope of the reference to them, but rather as a settlement of the matters complained of upon the appeals to the county council, within the spirit and letter of sec. 42 (3) of the Act.

The difficulty in which section 5 now finds itself is the result of its own neglect or indifference.The trustees of that section were notified of the application made by section 8. They saw fit not to attend upon the motion . . and allowed the order, of the consequences of which they now

complain, to go by default. Had they taken the trouble to attend and shew cause, that order might not have been made. Had they then called the attention of the Court to the effect of the order sought upon their own position, and to the facts that the scheme of the award is such that it should stand as a whole or not at all, and that if the application of section 8 were granted it should only be upon a corresponding measure of relief being afforded to section 5, which would involve interference with the rights of sections 6 and 12, I cannot conceive that any disposition would have been made of that application without notice to all the other school sections interested in or affected by the award.

Section 7, an appellant to the county council, has apparently not been notified of this motion.

Being of the opinion that the arbitrators have not exceeded their statutory powers, I must dismiss this application, and the applicants must pay the costs of the respondents.

SEPTEMBER 17TH, 1904.

C.A.

RE TOWNSHIP OF ALDBOROUGH AND TOWNSHIP OF DUNWICH.

Municipal Corporations—Drainage—Report of Engineer—Appeal to Drainage Referee—Appeal to Court of Appeal—Status of Appellant—Landowner—Township Corporation—Right of Appeal — Amount of Assessment — Scope of Report—Petition — Extent of Drainage Area — Enlargement — Multiplication of Drains — Injury to Lands—Absence of Benefit—Unjust Assessment—Outlet.

Appeal by the corporation of Aldborough and Alexander Sellars from the order or judgment of the Drainage Referee dismissing their appeals from the report, plans, etc., of James A. Bell, C.E., relating to what is called the McAllister drain in the townships of Dunwich and Aldborough.

M. Wilson, K.C., and A. Grant, St. Thomas, for appellants.

C. St. Clair Leitch, Dutton, for the corporation of Dunwich, respondents.

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

GARROW, J.A.—I do not understand why it was considered necessary for Mr. Sellars to appeal, nor, as the proceeding is purely statutory, where he finds authority for appealing. Section 63 of the Municipal Drainage Act authorizes an appeal by the municipality served, as provided by sec. 61, but does not, I think, authorize or contemplate any other appeal. The matter is not of moment, perhaps, because the appeal of the township, if successful, will enure to the benefit of Mr. Sellars as one of the resident ratepayers assessed for the proposed drainage work.

Objection was taken by respondents that the appeal was not in time or in proper form, but I agree with the learned Referee that this objection is not well founded.

It was also objected that, the assessment being under $1,000, there was no right of appeal. Section 63 contains the provision respecting the right of appeal. The argument of the respondents' counsel would require us to carry forward into clause (b) the words found in clause (a), "where the assessment against the appealing municipality exceeds $1,000." But such a construction would, I think, be against the plain intention to provide specifically, as is done in clause (a), for the case of assessments exceeding $1,000, and generally for all other cases, including assessments below $1,000, as is done in clause (b). Any other construction would take away altogether all right of appeal where the assessment is under $1,000.

As applied to the facts, the appeal in the present case is to be treated as falling within sub-clauses 3 and 4 of clause (b), that is, (3) that the initiating municipality should not be permitted to do the work within the limits of the appealing municipality, and (4) that the assessment is illegal, unjust, or excessive.

The appellants contend that the petition did not authorize the report; that in fact the engineer had provided for a much more extensive work than the petition contemplated. If this point was open to the appellants at all, and it probably was, I should be against giving effect to it on the facts.

The appellants also contend that the drainage area was too extensive, that lands in Dunwich were included which had not the right in nature to drain towards the drain in question, but I am also against this objection on the facts. It may be that upon a strict levelling of the surface some

water will come to the proposed works which without aid would not reach them. But the territory is evidently not one in which the watersheds are well defined, and absolute exactness is not, therefore, to be expected, and cannot, in my opinion, under such circumstances, be demanded under the statute. . . .

The McAllister drain was originally constructed under the Ditches and Watercourses Act. It began in the township of Dunwich, and crossing the town line passed into the township of Aldborough, with an outlet in the latter township into what is called the government drain in lot 24 in the 4th concession, in its course through the latter township passing through the farm of the appellant Alexander Sellars. Before its construction Mr. Sellars had constructed a private main drain practically along the same course, into which he had carried a large number of lateral drains, all of tile, as is also his main drain. The evidence, in my opinion, shews that this system of drainage was sufficient for the purpose of draining his own land. He was, however, assessed for a portion of the cost of the McAllister drain, and did not appeal. The municipal council of the township of Dunwich afterwards, upon petition under sec. 84 of the Municipal Drainage Act, assumed the McAllister drain, and in the proceedings now in question proposed very considerably to enlarge the drainage area entitled to use the original drain. The proposal included using the original award drain through the Sellars lot as it stands, with the addition of an open or flood drain over practically the same course, so that, if carried out, the lands of Mr. Sellars would be burdened, first, with his own main drain, second, with the McAllister or award drain, and third, with a wide, open, shallow drain upon the surface, all proceeding within a few yards of each other, the last two almost, if not entirely, for the benefit of the lands in the township of Dunwich. He constructed his own drains at his own expense, of course; he was assessed for the construction of the award drain in labour and material; and now he is again assessed, although not for a large sum, for the proposed flood drain. And it is proposed in the report that he shall also remain liable to repair in proportion to his assessment. He says, and the evidence, I think, bears him out, that the award drain, instead of being of benefit, has injured his lands; that it has brought water upon rather than carried water away from him; and that the proposed open drain will be a serious injury to his lands and of no benefit; and that there is great danger that his whole drainage system will be imperilled, if not destroyed,

by placing the open ditch across or over his tile drains below. I am of the opinion, on the evidence, that his apprehension is well founded—that his assessment is, if not illegal, at least unjust, a characterization which, in my opinion, applies to all the assessments in the township of Aldborough; and for these reasons that the work as projected through that township should not be allowed to proceed. . . .

The township of Dunwich have, of course, the right by proper proceedings to obtain access to the outlet in the township of Aldborough for their drainage, but they have no right to burden the lands in the latter township with an unnecessary number of drains, or to put the latter township or its inhabitants to any expense or loss in the course of so doing either for construction or maintenance. . . .

As it appears to me, the proper course would be to provide one tile drain of sufficient size to carry off all the water required, into which Mr. Sellars's laterals could also empty, and to abandon altogether the proposed surface drain, which, as I read the evidence, is only intended to carry the surface water before the frost leaves the ground, when in fact it can do little or no harm.

As matters stand, I think the appeal must be allowed with costs.

CARTWRIGHT, MASTER. SEPTEMBER 19TH, 1904.

CHAMBERS.

CANTIN v. NEWS PUBLISHING CO. OF TORONTO.

Discovery—Examination of Past Officer of Company—Rule 439 (a)—Rule 485.

Motion by plaintiff for an order for the examination for discovery in an action for libel of a newspaper reporter formerly in the employment of defendant company as an officer of the company. The reporter wrote the article for defendants' newspaper which plaintiff complained of, and was still in their employment when the action was brought, but had left the defendants nearly a year before the motion.

W. N. Ferguson, for plaintiff.

T. Reid, for defendants.

THE MASTER.—The language of Rule 439 (*a*), as amended by Rule 1250, does not provide for the present case. Whether the words allowing examination of a past officer were omitted intentionally or not, it is clear they have gone. If this was in any way a mistake, no doubt it will be remedied on attention being called to it in the proper quarter.

Mr. Ferguson submitted that there was power to order this examination under Rule 485. He sought to distinguish Beaton v. Globe Printing Co., 16 P. R. 281, on two grounds: first, that the argument of Mr. Justice Osler (at p. 283) overlooked the language of Rule 7; and second, that all that had been decided was that Rule 485 did not allow the examination for discovery of a party before the usual time. But, looking at the whole judgment, I do not think it is to be limited in that way. The whole question is gone into both as to parties and witnesses, and it is laid down that the Rule gives no power to make such an order as was there in question (pp. 286 and 285, last paragraph). . . .

The motion fails and must be dismissed. The costs will be in the cause, as the point arises now for the first time.

SEPTEMBER 19TH, 1904.

DIVISIONAL COURT.

HEMPHILL v. TOWNSHIP OF HALDIMAND.

Way—Non-repair—Objects Placed on Highway—Neglect of Municipality to Remove—Frightening Horse—Liability—Character of Horse—Contributory Negligence.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., 3 O. W. R. 605, dismissing action.

W. J. Tremeear, for plaintiff.

E. C. S. Huycke, K.C., for defendants the Gaffields.

THE COURT (MEREDITH, C.J., IDINGTON, J., MAGEE, J.), dismissed the appeal with costs, agreeing with the judgment of FALCONBRIDGE, C.J.

SEPTEMBER 19TH, 1904.

DIVISIONAL COURT.

LAWS v. TORONTO GENERAL TRUSTS CORPORATION.

Mortgage—Account—Payments Made by Mortgagees—Money Paid for Improvements—Commission to Solicitor on Sale of Mortgaged Premises.

Appeal by plaintiffs from order of STREET, J., 3 O. W. R. 634, on appeal from Master's report.

E. E. A. DuVernet, for plaintiffs.

G. F. Shepley, K.C., for defendants.

THE COURT (MEREDITH, C.J., IDINGTON, J., MAGEE, J.), dismissed the appeal with costs, for the reasons given by STREET, J.