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RIDDELL, J. MAY 1ST, 1909.

TRIAL.

D'AOUST v. BISSETT.

Master and Servant—Injury to Servant—Negligence of Master—Disobedience of Orders—Dangerous Machine—Trial—Findings of Jury—Questions left Unanswered—Effect of—Proper Judgment to be Entered.

Action by a girl of about 18 years of age, employed in a steam laundry in Sudbury, against her employer, for damages for injuries sustained owing to the negligence of the defendant, as alleged; tried with a jury at Sudbury.

C. McCrea, Sudbury, for plaintiff.

J. Wood, Sudbury, for defendant.

RIDDELL, J.:—The contention of the plaintiff was that she had been set to work at a mangle which was not securely guarded, as it might and should have been, and that, consequently, her hand was caught by the roller and severely injured.

The defendant alleged that the plaintiff had been employed to work at the safe, the delivery, side of the machine; that upon the evening of the day before the accident, he had seen her working at the feeding side; that he knew that her hand was smaller than usual; that he rebuked her for attempting to feed the mangle, shewed her the danger of working at that side, having a hand so small that it would pass under the guard (which was 5/8 of an inch above the feeding table), sent her away, forbidding her to work on the feeding

side, and himself fed the machine until the hour for shutting down. He contended also that the guard was perfect.

The plaintiff, on the morning of the accident, again went to the dangerous side, and in a short time her hand did get caught, with the result already stated.

The plaintiff gave evidence herself, denied the story of the defendant, and swore that she was working at the work she had been employed to do.

The story of the defendant was corroborated by two young women, fellow-employees of the plaintiff.

There was the usual contradictory evidence as to the danger, and as to the existence of defect; and the hand of the plaintiff was shewn to the jury. At the request of both counsel, I allowed the jury to inspect the machine.

I submitted questions to the jury along the usual lines, and, in view of the contentions of the defendant, I submitted the following, specifically:—

"2. Was the plaintiff, at the time of the casualty, working where she should have been working?

"3. Had she been told not to be at that particular place?"

The jury remained out some hours, and, coming into Court, reported that they could not agree upon all the questions. Upon my inquiry, they said they could agree upon some of the questions, and I directed them to answer all the questions upon which they could agree. Thereupon they again retired, and shortly after came into Court with questions 2 and 3 answered, and reported that they could not agree upon any others. I excused them from answering any others, and discharged the jury.

The answers to questions 2 and 3 respectively were "No" and "Yes."

I have withheld judgment in order to look into the case of Findlay v. Hamilton Electric Light and Cataract Power Co., 9 O. W. R. 434, 773, in which the jury, being able to answer and answering certain questions, found themselves unable to agree as to others. I thought that the answers given were sufficient to dispose of the case; and gave judgment for the defendants. A Divisional Court granted a new trial. No written judgment was given by the Divisional Court, and I am unable to find that any reason was given for the course pursued. The Judge by the reasons against appeal

in the Court of Appeal and the grounds set up in the notice of motion to the Divisional Court (Appeal Cases, Judges' Library, vol. 167), the plaintiff relied upon the fact that questions had been left unanswered by the jury, and argued that these must all be presumed in favour of the plaintiff. Whatever may have been the reason for the decision of the Divisional Court, the Court of Appeal makes it clear that the course taken at the trial in directing judgment for the defendants was right. Mr. Justice Osler, 11 O. W. R. at p. 48, says: "A plaintiff cannot recover if his injury is the direct result partly of his adversary's negligence, and partly of his own, which has been found to be the case, and this made it quite unnecessary for the jury to deal with the other questions submitted, which, looking at the evidence and charge, are covered by the findings which proved fatal."

So in the present case, if it can be considered that the plaintiff cannot recover if she was working where she should not have been and at a point at which the master had expressly forbidden her to be, it is "quite unnecessary for the jury to deal with the other questions submitted."

In view of such cases as Deyo v. Kingston and Pembroke R. W. Co., 8 O. L. R. 588, 4 O. W. R. 182, Grand Trunk R. W. Co. v. Birkett, 35 S. C. R. 296, Best v. London and South Western R. W. Co., [1907] A. C. 209, Markle v. Simpson, 9 O. W. R. 436, 10 O. W. R. 9, and the like, it is impossible that the plaintiff can recover, being as she was at the time of the accident at a place at which she had been forbidden by her master to be—an accident which could not possibly have happened had she been where she should have been, if she had been doing her duty.

The action must be dismissed with costs.

MAY 1ST, 1909.

DIVISIONAL COURT.

TOWNSHIP OF BARTON v. CITY OF HAMILTON.

Municipal Corporations—Sewers—Water Supply—Contract between City Corporation and Owners of Land in Adjacent Township for Use of City Sewer—Ultra Vires—Contract between City Corporation and Township Corporation—Annexation of Part of Township to City—Proclamation of Lieutenant-Governor—Confirmation of Contract—Specific Performance—Contract ultra Vires qua Contract—Operation of Proclamation—Validity—Same Effect as a Statute—Powers of Provincial Legislature—Delegation of Statutory Rights—Enforcement—Action—Parties—Amendment—Class Action—Plaintiff Suing in Representative Capacity—Connections with City Sewer—Construction of Proclamation—Conditions—Declarations—Costs.

Appeal by defendants from judgment of ANGLIN, J., in favour of plaintiffs, the township corporation, one Barnes, and two other persons, in an action for a declaration of the rights of the plaintiffs in respect of water supply and sewers, and for specific performance and other relief.

The judgment of ANGLIN, J., declared that the agreement of 6th March, 1903, between the municipalities, was intra vires, and valid and binding upon all parties, on the terms and conditions expressed in the proclamation of 13th March, 1903, that the city water supply was inadequate for fire purposes, and that defendants could not add to the demands upon it without danger, and could not be compelled to supply residents of Barton with water; that the agreements of 6th and 27th October, 1902, were ultra vires of defendants; that defendants were not entitled to require residents of Barton, as a condition of furnishing them with water under the agreement of 6th March, 1902, and the proclamation, to execute agreements containing provisions as to not opposing annexation of territory with defendants, and as to relinquishing pipes, etc., laid and paid for by them, and so as to sewer accommodation; and declaring that plaintiff Barnes was entitled to sewer connection, etc. The

defendants thus succeeded at the trial with regard to water supply, and the plaintiffs as to sewers.

J. W. Nesbitt, K.C., and F. R. Waddell, Hamilton, for defendants, contended that the plaintiffs were not entitled to judgment as to sewers, and that, at all events, the defendants should not have been ordered to pay all the costs of the action.

W. A. H. Duff, K.C., and John Harrison, Hamilton, for the plaintiffs, contra.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

RIDDELL, J.—In October, 1902, the defendants entered into an agreement with certain persons in the township of Barton (not parties to this action), whereby, as the defendants were about to construct a common sewer on Sherman avenue, between Wilson and Main streets, the persons jointly and severally agreed to pay to the city half the cost and one cent annually per foot frontage of their lands which might be connected with or drained into the sewer, and an additional one cent per foot of every building, and the city agreed that these parties should be allowed to drain into the sewer their lands east not more than 703 feet from the middle line of Sherman avenue, "under and subject to the provisions of sec. 1 of by-law No. 30 and sec. 40 of by-law No. 40. . . or such other by-laws as may from time to time be in force relative to the construction of private drains . . . ."

Shortly thereafter a document under seal is signed by the plaintiff Barnes and others, wherein, after reciting the fact that the defendants are constructing a sewer as aforesaid, and that the residents and property owners had agreed to a division of the amount to be paid by each of the one-half of the cost, the division to be made by certain persons named, and that these persons had divided the amount accordingly, Barnes and the others covenanted and agreed to pay to the defendants the sums set opposite their names, Barnes's amount being $100.

The judgment appealed from holds that these two documents must be read together; but that they are and were ultra vires of the defendants; this part of the judgment is not appealed from, and consequently it stands.

Barnes paid his amount, $100, April, 1903, to the defendants. In the meantime, however, the defendants and the township of Barton had entered into an agreement under seal, 6th March, 1903. This agreement was made in view of a proposed application of the defendants to annex part of the township, and it provided, amongst other things:—

"3. For a period of 10 years from the date of such annexation, the lands annexed and the buildings now erected thereon shall not be assessed for any greater amount than they were assessed at by the township assessor for the year 1903, except that the city corporation shall be at liberty, in their discretion, to add to such assessment the value of any of the buildings or improvements afterwards erected upon the said lands, or any of them, and the rate upon the assessment so made shall not be higher during said period of 10 years than the total rates to be struck by the township of Barton for the year 1903.

"4. The city of Hamilton shall supply the residents of the township of Barton, along the lines of the mains and pipes of their waterworks, or within a reasonable distance therefrom, with water, when required, at a reasonable rate not to exceed 50 per cent. more than the city rates which would be chargeable in respect of such property, the applicants for such water supply to pay the cost of the service pipes and of the introduction of the water; but the city shall not be bound to supply such water if they have not more than sufficient water to supply their own citizens, nor shall the city be obliged to increase their waterworks plant in order to furnish water to the residents of Barton.

"5. Residents of the township of Barton shall have the right to make connection with city sewers on lands heretofore annexed to the city, or which are to be annexed in pursuance of this agreement; such connections to be made under city supervision, and on payment of a reasonable rate for sewer connection to be fixed by the city council, subject to appeal to the County Court Judge as sole arbitrator, it being understood that no sewer already built within the city limits shall have its capacity overtaxed by such connection."

The Lieutenant-Governor issued his proclamation 13th March, 1903, annexing to Hamilton the portion of the township agreed upon, "under and subject to the following

terms and conditions, that is to say:" (setting out the above with others, following the wording of the agreement).

On 21st August, 1907, Barnes, a resident of Barton, and not within the annexed territory, applied for leave to put in a 2-inch service pipe to supply water to residents on Barnesdale place; the city engineer reported against a 2-inch pipe, and advised that nothing less than a 6-inch pipe should be put in; and the sub-committee reported that Barnes should have the connection upon executing an agreement approved by the fire and water committee and the city solicitor. This agreement contained clauses which it is clear, and indeed it is admitted, the defendonts had no right to exact. Barnes did not sign the agreement, and, as he says, "the water has been refused."

Barnes, at what precise time does not clearly appear, made an application orally at a meeting of a committee of the council for leave to put in a sewer. On 11th November, 1907, the sewers committee reported that no lands or premises outside the city limits should be allowed to be connected with any city sewer until an agreement approved by the city solicitor should have been duly executed and registered by the owner, and that, except where agreements already made otherwise provided, the agreement should contain terms, unnecessary here to set out, as it is perfectly plain that no such terms could be exacted of any one entitled to water under the proclamation of His Honour.

The solicitor for the township (also Barnes's solicitor and solicitor for the other plaintiffs) wrote to the city, drawing their attention to the agreement of March, 1903, and the proclamation of His Honour, and pointing out that the residents of Barton had the right to make connection with the city sewers. He pointed out that the report of the sewers committee was inconsistent with the agreement and proclamation, and threatened action by the township "to enforce the agreement above referred to between the city and township in all its terms and to restrain the city from imposing any other conditions." The defendants did not recede from the position taken; they required Barnes to sign the obnoxious agreement before obtaining leave to connect his sewer; Barnes did not sign the agreement, but, without notice to the defendants, himself made the connection, and then, through his solicitor, notified the defendants that he had made connection, and invited inspection

and the fixing of a rate. (The dates are a little confused, but the facts are apparent).

The city wrote Barnes, notifying him that unless a proper agreement, approved of by the city solicitor, were executed forthwith, the defendants would be obliged to cut off the connection. Subsequently he was notified that the council had adopted a report of the committee that the connection should be cut off, and shortly thereafter the connection was cut off.

The plaintiff Cowell applied for water in August, and was notified that she might have it upon signing the same objectionable agreement asked of Barnes. The plaintiff Somerville applied for water in September, and was met with the same answer. Neither signed and neither got water accordingly.

This action is by the township of Barton, Barnes, Somerville, and Cowell, against the city of Hamilton. The statement of claim sets out the legislation respecting waterworks in Hamilton, the agreement of March, 1903, and that "the terms and conditions of said agreement of 6th March, 1903, were ratified and confirmed by a proclamation issued by the Lieutenant-Governor of the province of Ontario in council, bearing date the 13th day of March, 1903," the action of the water committee in requiring certain agreements, etc., the fact that Cowell and Somerville did not sign, that the city placed an arbitrary value on the property, that Barnes was a resident of Barton between Main and King streets, and the action of the committee and council as to his application for water and sewer connection. The statement of claim then sets out the agreements of 1902, that Barnes paid his $100, that he, "acting under his rights under the said agreement, put down a sewer from his property, and had the same connected with said sewer on Sherman avenue, and on the 11th day of May, 1908," notified the city; that the city on 20th May, 1908, filled up the connection; and he claims, in the alternative, that he had the right to connect the sewer under the agreement and proclamation of 1903. Cowell, "on behalf of herself and all other residents of the township of Barton, along the lines and pipes of the defendants' waterworks in the township of Barton, alleges that she is a resident of the township of Barton. . . . and is entitled to water under the agreement" of 6th March, 1903.

The prayer is:—

1. That the city of Hamilton be ordered and compelled to specifically perform the said agreement of 6th March, 1903, with the township of Barton, and the proclamation of 13th March, 1903, in respect of water and sewers as hereinbefore set forth.

2. That it may be declared that the agreements required by the city of Hamilton to be signed as set forth in the 7th and 17th paragraphs of the above statement of claim are unauthorised and unwarranted under the terms of said agreement of 6th March, 1903, and 13th March, 1903, and the agreement set forth in paragraph 19 hereof, and that the resolutions of the city of Hamilton requiring the same to be executed by residents of Barton applying for water or sewer connections are null and void.

3. That it may be declared what is a reasonable distance from the mains and pipes of the waterworks of the city of Hamilton as referred to in said agreement of 6th March and proclamation of 13th March, 1903.

4. That it may be declared that, in ascertaining the water rates payable by residents of Barton to the city of Hamilton under said agreement of 6th March, 1903, and proclamation of 13th March, 1903, the value of the property shall be deemed to be that at which it is entered on the last revised assessment roll of the township of Barton, and not an arbitrary amount fixed by an official of the city of Hamilton.

5. That it may be declared that a resident of Barton making a connection with a city sewer under said agreement of 6th March, 1903, and proclamation of 13th March, 1903, is only liable for payment of the actual cost of construction and inspection in making such connection at the time thereof.

6. And the plaintiff Thomas Barnes further claims that the city of Hamilton be ordered and compelled to specifically perform the said agreement set forth in paragraph number 19 of above statement of claim, and that it be declared that the plaintiff Thomas Barnes is one of the parties entitled to the benefit of said agreement. And that the said city of Hamilton be ordered at once, at their own expense, to replace his sewer and connection thereof with the city sewer on Sherman avenue in as good a state of repair as it was at the time of the city of Hamilton committing the wrongful acts set forth in paragraph No. 21 hereof.

6a. For construction of the several agreements above set forth and for damages.

7. For such further and other relief as the nature of the case may require.

The defendants, after denying everything and saying that no cause of action is disclosed, plead that all duties and obligations placed upon the city have been performed; that the agreement of 1902 is ultra vires; that the facilities for water and sewer accommodation are overtaxed; and that, if Barnes were allowed to make the sewer connection, the sewer would be overtaxed.

The action was tried by Mr. Justice Anglin at Hamilton, and the formal judgment was carefully settled by the learned Judge himself. It is as follows:—

2. This Court doth declare that the agreement bearing date the 6th day of March, 1903, made between the corporation of the city of Hamilton and the corporation of the township of Barton, referred to in the 5th paragraph of the statement of claim herein, and proclaimed by the Lieutenant-Governor of the province of Ontario in council by proclamation bearing date the 13th day of March, 1903, and referred to in the 6th paragraph of the statement of claim herein, is intra vires and valid and binding on all parties, on the terms and conditions as expressed in said proclamation, and those residents of Barton who are within the terms of the said agreement of the 6th March, 1903, although not parties to this action, have enforceable rights thereunder.

3. This Court doth further declare that at the present time the water supply of the city of Hamilton is inadequate for fire purposes, and that it cannot add to the present demands upon its present service without incurring serious danger, and would now be compelled to supply residents of Barton aforesaid with water.

4. This Court doth further declare that the agreement of 6th October and 27th October, 1902, referred to in the 19th paragraph of the statement of claim herein, should be read and construed as one agreement, but this Court doth further declare that said agreement were ultra vires of the city of Hamilton.

5. This Court doth further declare that the defendants are not entitled to require residents of Barton, as a condition of furnishing them with water under the agreement of 6th March, 1903, and proclamation of 13th March, 1903,

to execute agreements containing provisions as to not opposing annexation of territory with the city of Hamilton, as to relinquishing pipes and other appliances laid and paid for by them.

6. This Court doth further declare that the defendants are not entitled to require the plaintiffs and other signatories and subscribers to the agreements of the 6th and 27th October, 1902, in the pleadings mentioned, and other residents of Barton, as a condition of giving sewer accommodation under the agreement of 6th March, 1903, and proclamation of 13th March, 1903, to execute agreements containing provisions as to not opposing annexation of territory with city of Hamilton and as to relinquishing ownership of pipes, &c., laid and paid for by them.

7. This Court doth further declare that the plaintiff Thomas Barnes is entitled to have the houses erected on his property in Barton connected with the sewers of the city of Hamilton, as claimed in the statement of claim in this action, under and upon the terms of said agreement of 6th March, 1903, and said proclamation of 13th March, 1903, and this Court doth order and direct the defendants to afford to the plaintiff Thomas Barnes such sewer connection accordingly, and that the defendants do within a reasonable time restore the connection of the said Barnes which they cut off.

8. And this Court doth further declare that the sewer on Sherman avenue in the city of Hamilton is not overcharged, and that the sewer into which the Sherman avenue sewer debouches is capable of carrying off any sewage and water which can be carried down by the Sherman avenue sewer.

9. And this Court doth further order and adjudge that the defendants do pay to the plaintiffs their costs of this action forthwith after taxation.

Upon the appeal before us by the defendants much of the complaint was against some of the statements of the learned Judge at the close of the case. With these we have nothing to do, except as shewing the grounds upon which he based his judgment. An appeal is from the judgment, not the reasons given.

And more was against the interpretation which the other inhabitants of the township of Barton would or might put upon the judgment. But with that, again, we have nothing to do. Nor are we called upon to, nor should we, make broad declarations as to the law or the rights of others

than the plaintiffs or those they represent. We are to deal with the issues raised in this action, and those alone.

The appeal (confining it to the issues and the judgment) first attacks the right of the township to bring an action at all; and so attacks clause 2 of the judgment.

If the contract of 6th March, 1903, is within the powers of the city of Hamilton and the township of Barton, then the township is a proper party to this action, even though the township could not prove that the township had suffered damage from the breach of the contract. Village of Brighton v. Auston, 19 A. R. 355, was such a case.

But I am of opinion that the agreement was not intra vires, that is, as an agreement.

The legislation in force in March, 1903, was R. S. O. 1897 ch. 223, sec. 24, as amended by 2 Edw. VII. ch. 29, sec. 3, and reads thus: "In case two-thirds of the members of the council of a city or town do in council . . . pass a resolution affirming the expediency of any addition being made to the limits of a city or town, the Lieutenant-Governor may by proclamation to take effect on some day to be named therein . . . and on such terms and conditions as to taxation, assessment, improvements, or otherwise as the Lieutenant-Governor in council sees fit, and the council of the city or town may consent to, add to the city or town any part of the adjacent township or townships which the Lieutenant-Governor in council, on the grounds aforesaid, considers it desirable to add thereto . . ." There is no provision for the consent of the township being a prerequisite, and there is no power given to any municipality to enter into a contract with another looking to annexation. It is a matter wholly for the council of the city or town in the first instance, and then for the Lieutenant-Governor in council. No doubt, it is wise for the council of the city to see that there will be no opposition from the council of the township; and in that view such an agreement as that of 6th March, 1903, is valuable as shewing the position of the township council or the majority thereof. The agreement, however, has no validity as an agreement: and there would be nothing to prevent the councils (or either of them) changing their minds, and, before the issue of the proclamation, opposing the proclamation, or the council of the city or town refusing to consent to the proposed terms. No rights, therefore, can arise under the agreement. But this is not the

whole case. The proclamation was issued and its terms consented to by the city.

I entirely agree that neither the Lieutenant-Governor nor his Royal Master can as such validate an agreement which is ultra vires of any municipal corporation. The legislature can, however, give to the Lieutenant-Governor powers which otherwise he would not have. It is too late in the day to contend that the legislature of Ontario has only a delegated power, and, as delegatus non potest delegare, their powers cannot be delegated. Such cases as The Queen v. Burah, 3 App. Cas. 889, Powell v. Apollo Candle Co., 10 App. Cas. 290, and Hodge v. The Queen, 9 App. Cas. 132, make it beyond any question that our legislature is in no sense a delegate of or acting under any mandate from the Imperial Parliament. It is beyond any question that, within the limits of its jurisdiction, its authority is as plenary and ample as that of the Imperial Parliament, and may be as freely and effectively delegated.

The power of the legislature is validly given if the legislature had the power itself which the statute confers upon him, and it cannot be argued that, had the legislature passed an Act in the terms of the proclamation, such an Act would be valid. This being so, the proclamation is effectual, and, whatever may be the terms and conditions of the proclamation, these terms and conditions have the same effect although they were contained in a statute. But it is because they are in the proclamation, not because they are in the agreement, that they are effective; and the rights thereunder are statutory and not contractual. The township has no more interest in enforcing the rights, if any, of the inhabitants of the township under this proclamation than those under any statute; the township then should not have been a party to the action.

There being no one before the Court entitled to such a broad declaration as is contained in clause 2 of the judgment, that clause should be struck out.

Against clauses 3 and 4 there is no appeal. As to the latter, however, something may be said. The defendants complain that the learned trial Judge animadverted against the defence in a manner not justified by the facts. I find that he did say that the city had been absolutely dishonest in its defence. No doubt, this remark was called forth by the fact that the city, after entering into an agreement in 1902, and receiving money from the plaintiff Barnes, as they did,

and keeping it, as they also did, then, when sued upon this contract by Barnes, set up that they had no power to make it, but did not pay back the money or offer to do so. This can scarcely be considered in accord with a high ethical standard, and in this particular instance it cannot be said that the remark of the trial Judge is wholly without justification. Whether the sum paid by Barnes may be recovered back by him we need not here consider; no claim is made and no amendment asked.

As to clause 5, this is, with a trifling amendment, unexceptionable, if the proper parties are before the Court to enable such a declaration to be made. The township is not such a party; and in the style of cause no plaintiff is set out as suing in a representative capacity. It is true that the plaintiff Cowell, "on behalf of herself and all other residents of the township of Barton along the lines and pipes of the defendants' waterworks in the township of Barton, alleges that she is a resident of the township of Barton residing on Ottawa street . . . and is entitled to water under the agreement" of 6th March, 1903, &c. But she claims no rights for any other than herself. "A statement buried somewhere in the statement of claim that the plaintiff is suing on behalf of all the creditors of the testatrix would be of no use. The statement ought to appear in the title of the action . . . :" per North, J., in In re Tottenham, [1896] 1 Ch. 628, at p. 629. This is the practice that has been, I believe, uniformly followed in Ontario, and in one of the Bedell actions it was held by Mr. Winchester, when Master in Chambers, that the practice is compulsory. I agree with that conclusion, and hold that a class action should so appear on the style of cause. This, however, is a mere matter of amendment; and the proceedings may be amended accordingly, in the style of cause, and by setting out that Cowell claims for the residents of Barton along the mains and pipes of the waterworks of the city of Hamilton, or within a reasonable distance thereof, the rights she claims for herself. The amendment being made, the clause under consideration should be amended by striking out all reference to the agreement of 6th March, 1903, for the reason already given, namely, that this document has no validity as an agreement, and restricting the residents as above set out.

Upon the substantial matter in controversy, the proclamation having the effect of a statute, it is of no importance

that those claiming do not reside within the city of Hamilton. The residents of the township of Barton, in the locality mentioned, are given certain rights, and the city can have no power in any way to diminish these rights or make their enjoyment subject to a term imposed by the city, not justified by the proclamation. There can be no objection to a declaration of this kind being made, though at present no effect can be given to it, owing to the scanty water supply: O. J. A., sec. 57 (5). See the cases cited in the notes to this subsection in Holmested & Langton, pp. 49-51.

As to clause 6, the same objection as to the form of the action as a class action applies. But an amendment may be made as in respect of the claim for water supply. Then the rights may be declared.

The agreement of 1902 having been declared ultra vires of the city, the city can claim nothing under them, and they may be entirely ignored. The rights of the signatories to these agreements depend not upon these agreements at all, but upon the proclamation, and that alone can be looked at to determine their position. No power exists in the city, in this any more than in the former case, to impose conditions not justified by the proclamation. All reference to the agreement of 6th March, 1903, will be expunged, but otherwise this clause should stand.

As to clause 7 (except as to the last sentence thereof) the chief complaint is not to the judgment as worded, but that other residents of Barton may put a wrong construction upon it and act accordingly, to the detriment of the city. It will be well to indicate what should be the extent of this declaration, and to amend the present judgment, if necessary, to avoid future litigation.

Barnes, it seems, laid out a suburb, calling it "Barnesdale place," and divided this into building lots. This lies to the east of Sherman avenue and immediately adjoining thereto. On King street, one of the boundary streets of Barnesdale place, and running practically at right angles to Sherman avenue, Barnes built about 275 feet of a sewer, and ran another sewer connecting with this for a distance of 600 ft. through the suburb. The sewer of the plaintiff Barnes was drained into from a number of houses built on the land, and it is expected and intended that a number of other houses shall be connected with this sewer. This sewer on King street it was which Barnes did in fact connect with the Sherman avenue sewer.

The objections of the city are manifold. That as to the effect of the proclamation need not further be considered. But it is claimed that such a trunk sewer could not be permitted, even if the connection of a separate house from time to time must be. I can find no such limitation in the proclamation. It probably would not be contended that a drain or sewer, not being a drain or sewer of an inhabitant of the township, could be connected with the city sewer; but where a drain or sewer is built by a resident of the township, in good faith, for the benefit of his own property, whether to make it more saleable or otherwise, it seems to me the right exists to connect such a drain. It can, I think, make no difference that the sewage comes first into a large drain before it empties into the city sewer, or not. I think the judgment sufficiently expresses this; but, if not, it may be amended.

Then the defendants say that the sewer in Sherman avenue was built for the part of the city in the immediate neighbourhood; and that, if the plaintiff and others be allowed to connect their drains with this sewer, there will not be sufficient capacity left for the drainage of that part of the city intended to be provided for. Again, the proclamation must be looked at. I can find no such consideration in that document. "The residents of Barton . . . have the right to make connection with city sewers" at this point, "it being understood that no sewer already built within the city limits shall have its capacity overtaxed by such connection." "Shall have" contemplates something in the future; and the clear meaning is that connections are to be permitted unless and until a connection sought would, if allowed, overtax the drain. If this term did not recommend itself to the city council, they should not have agreed to it, and then the power of the Lieutenant-Governor could not have forced the obnoxious term upon them. As the term stands, would it not be absurd to say that the Barton people must wait to see if the Hamilton precinct will not be built up so as to require all the sewer? There may be a very great increase in population at that point, but in the meantime what are the residents of Barton to do? The sewer not now being so much used that the sewer built by Barnes would cause it to be overtaxed, Barnes has a clear right to have it connected. If the growing population of the city necessitates a larger sewer, a new sewer may have to be built, but that is so with the other parts of the city.

The sentence in this clause ordering the city to afford such sewer connection is also right. Under that order the city will do all the proclamation calls upon them to do—supply supervision and fix the rate.

The last sentence requires more consideration. Had the rights of the plaintiff Barnes arisen under a contract to which he was a party, the case would have been fairly clear. "As a general rule . . . where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing:" Lord Blackburn in MacKay v. Dick, 4 App. Cas. 251, at p. 263. And the same case decides that one party to the contract cannot rely upon a condition in the contract which has not been performed owing to his fault.

In the present case, under a contract, there would be a metaphysical but not a practical difference between saying, "Barnes was entitled to connect with the sewer on condition that this was done under the supervision of the city and upon condition that he paid the rate fixed by the city," and "Barnes was entitled to connect with the sewer, such connection to be made under city supervision and on payment of a reasonable rate . . . to be fixed by the city." And, had the right arisen under a contract, the refusal of the city to allow any connection, except upon a condition which was not justified, would have been a waiver of the condition the city had a right to exact, and Barnes would have been justified in acting without such supervision or payment. But this is not a contract; the rights arise under a statute; the rights are extraordinary rights, and must be exercised in precisely the way the statute prescribes. It is not a mere contracting party enforcing his rights against another. All the inhabitants of that part of Hamilton are to be protected, and there is no power existing anywhere to waive the statutory conditions.

Barnes, then, was not within his rights in connecting the private sewer as he did. It would appear that he believed he had rights under the invalid agreement of 1902; even at the trial (p. 11) his counsel admits that he must come within the 703 ft. mentioned in that agreement. However that may

be, he had no right to act as he did; his connecting his sewer with that of the city was an unauthorised trespass, and the city should not be ordered to restore the connection.

No objection is made to clause 8, except such as has been already met.

Certain omissions may be supplied which are complained of. The most important matter is the claim in paragraph 4 of the prayer. This was disposed of adversely to the plaintiffs orally at the trial, and, no doubt, had it been brought to the attention of the learned Judge, he would have inserted a clause so disposing of it.

The claims for specific performance of the agreements of 6th March, 1903, and October, 1902, should be dismissed, as also that for the declaration sought in paragraph 5 of the prayer.

As to costs, success both at the trial and before us is divided, and a proper disposition to make is that there should be no costs here or below, unless the plaintiff Barnes should release any right to recover back the amount paid by him, in which case the defendants will pay the sum of $100 costs.

CARTWRIGHT, MASTER. MAY 3RD, 1909.

CHAMBERS.

WADE v. TELLIER.

Discovery—Production of Documents—Examination of Parties—Order and Appointment Issued after Trial Begun—Mechanics' Lien Action—Motion to Set aside Order and Appointment—Forum—Official Referee Seised of Trial.

Motion by defendants the Frankels, in an action to enforce a mechanic's lien, to set aside an order for production by the applicants and an appointment for their examination for discovery, issued by the plaintiff, after the trial before an official referee had begun, pending an adjournment of the trial, and without the leave of the referee.

Casey Wood, for the applicants.

R. G. Smythe, for the plaintiff.

THE MASTER:—As the object of production is to enable the moving party to prepare for trial, it seems self-evident

that in an ordinary case it is too late to ask for production or discovery when the trial has begun.

Rule 439 speaks of examination "before the trial," and Rule 464 directs a procedure which would seem to contemplate production as soon as the cause is at issue.

In Clarke v. Rutherford, 1 O. L. R. 275, it seems to have been assumed that an examination for discovery must precede the trial.

By sec. 34 of the Act R. S. O. 1897 ch. 153, sec. 34, it may be that the officer by whom an action is being tried has control of the whole procedure once he is seised of the case. In my opinion, he certainly has that power. This seems to be borne out by sec. 43, which seeks to keep down costs. This is one object of the procedure in these cases, as pointed out in Cobban v. Lake Simcoe Hotel Co., 5 O. L. R. 447, at p. 448, 2 O. W. R. 310, where it is also said that "it is competent to have examination (for discovery) in proper cases."

Under the special facts of this case, it may well be that the plaintiff should have full discovery even now. An application for that purpose to the official referee will, no doubt, be duly considered. But it is to him the application should be made, conformably to secs. 34 and 43 of the Mechanics' Lien Act.

The motion is entitled to prevail; but the order will be without prejudice to an application to the referee, by whom the costs of the motion can also be best disposed of, as he will have the whole facts before him, and the case is one of some difficulty for the plaintiff to handle.

RIDDELL, J. MAY 3RD, 1909.

CHAMBERS.

REX v. GRAF.

Criminal Law—Selling Obscene Books and Pictures—Magistrate's Conviction upon Summary Trial—Power to Amend—Criminal Code, Part XVI.—Habeas Corpus—Certiorari in Aid—Defective Warrant of Commitment—Substitution of Proper Warrant—Costs of Attorney-General—Punishment for Offence.

After the delivery of the opinion of RIDDELL, J., in this case, ante 943, a proper warrant was lodged with the warden

of the central prison, and further argument of the motion for the discharge of the prisoner was heard by the learned Judge.

Eric N. Armour, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

RIDDELL, J.:—Mr. Armour argues that no power exists in the police magistrate to amend a conviction, reasoning from the analogy of convictions made by the Sessions. He points to the various provisions of Part XVI. of the Criminal Code as shewing the analogy. No doubt, such analogy does exist to a certain extent, and there is a clear line of demarcation, historically and otherwise, between summary convictions under Part XV. and convictions after summary trial under Part XVI. But, though there is an analogy between convictions of this kind and those before the Sessions, the analogy is not perfect—otherwise a writ of habeas corpus would not issue. The statute 29 & 30 Vict. ch. 45, sec. 1 (C.), expressly excludes the case of a prisoner imprisoned under conviction of the Court of General Quarter Sessions.

If, then, this conviction is on all fours with that of the Sessions, the present application must fail. I think it is not: Rex v. Morgan, 5 Can. Crim. Cas. 63, 272.

In respect of the original warrant, I hold that it is bad: ante at p. 949. Had the writ of certiorari in aid not issued, I should on the previous occasion have discharged the prisoner: Re Timson, L. R. 5 Ex. 257; Regina v. Chaney, 6 Dowl. 281. But a certiorari has issued, and under that I find returned a conviction which is perfectly good upon its face and wholly supported by the evidence. The argument that there was an original conviction, and this an amended conviction, and that, being a conviction under Part XVI., it could not legally be amended, has, in my opinion, nothing to support it. It is a conviction not by the Sessions but by a magistrate; and I can find no authority for the proposition that the general rule as to amending before return to a certiorari is not applicable to a case of this kind.

As to the power to permit an amendment of the warrant after the return to the writ of habeas corpus has been made, my doubt that this did not exist independently of the statute (ante 949) has not been removed. The cases cited in Regina v. Lavin, 12 P. R. 642, do not seem wholly to support the proposition. Those cited in Paley on Convictions, 8th ed.,

p. 359, for the proposition—"It (a warrant of commitment) cannot be amended like the information, but, if there is any error in it, a fresh commitment may be lodged with the governor of the prison"—are all cases in which the new warrant was so lodged before the return.

In Ex p. Cross, 26 L. J. M. C. 201, there had been a bad warrant, but, before the rule for the writ had been obtained, a good warrant was lodged. In Ex p. Smith, 27 L. J. M. C. 186, the commitment was (see p. 187) 30th March, the new warrant 12th April, the return 14th April, setting forth, as in the Cross case, both warrants. So also in Regina v. Richards, 5 Q. B. 926. The remark in Regina v. Shuttleworth, 9 Q. B. 651, at p. 658, of Coleridge, J., "The case is somewhat analogous to that of an insufficient commitment, where, if we are satisfied that the party ought to be committed, we recommit," does not carry the case much further, referring, as it does, to such cases as Regina v. Marks, 3 East 157. And Channell, B., in Re Timson, L. R. 5 Ex. at p. 261, points out the distinction between such cases as Re Timson and Regina v. Chaney, on the one hand, and Rex v. Taylor, 7 D. & R. 622, on the other, and the non-applicability of the last-named case to facts like the present. The remark of Mr. Justice Osler in Regina v Whitesides, 8 O. L. R. 622, at p. 628, 4 O. W. R. 237, 238, is obiter and not necessary for the decision.

I see no reason, however, to change the opinion I had formed when I considered the case previously, ante at p. 949. That has been strengthened by the case of Rex v. Morgan (1901), 5 Can. Crim. Cas. 63, 272, not cited upon the argument. In that case the prisoner was charged for that he did "pick the pocket" of a person named, and was brought before the police magistrate at Barrie. Electing to be tried summarily under what is now Part XVI., he was convicted of having "attempted to pick the pocket" of a person named, and sentenced to the central prison for 6 months. No warrant of commitment was made out, but the conviction was lodged with the gaoler at the central prison as the warrant for his detention there. Writs of habeas corpus and certiorari were issued, and his discharge asked for. Mr. Justice Street says (p. 65): "I think there should have been a warrant of commitment, although the Code is silent upon the point, and no form is given. The conviction in the gaoler's hands is an extremely informal

warrant; but, there being an offence proved, and a proper conviction for the offence, and absolutely no merits in the application, I exercise the power conferred on me by sec. 752 (now sec. 1120) of the Code, and direct that the prisoner be further detained under the present proceedings, and that the police magistrate before whom he was convicted do issue a proper warrant of commitment and lodge it with the gaoler of the central prison on or before the 1st day of November, 1901. . . ." An appeal was taken to the Court of Appeal, apparently without objection—Armour, C.J.O., Maclennan, Moss (now C.J.O.), and Lister, JJ.A. The appeal was dismissed. The only Judge in that Court who mentions the matter now under consideration is Armour, C.J.O., who (p. 276) says: "If a formal commitment were necessary, the learned Judge did right, there being a valid conviction, in allowing a formal commitment to be lodged."

While I may not be technically bound by these judgments (upon questions of habeas corpus, it is a well known rule that each Court is accustomed, and indeed considers itself bound, to exercise jurisdiction according to its own view of the law:" per Channell, B., in Re Timson, L. R. 5 Ex. 256, at p. 261), I accept them as setting out the law accurately, expressing, as they do, my own opinion.

There are two matters upon which, in refusing the application, I would express my regret. The first is that apparently there is no provision for the costs of the Attorney-General or his representative. I have already in Rex v. Leach, 17 O. L. R. 643, at p. 672 (see ante 86), given my views as to this—views to which I adhere.

The second is that only two years' imprisonment can be inflicted for this heinous offence. One who administers physical poison so as to inflict upon another grievous bodily harm is liable to 14 years' imprisonment; one who administers mental and moral poison, and thereby inflicts grievous harm upon the mind and soul, even if this is not possibly, indeed probably, accompanied by bodily harm as well, is let off with two years—rather a reversal of the injunction not to fear them that kill the body and after that have no more that they can do.

MAY 3RD, 1909.

DIVISIONAL COURT.

MILNE v. ONTARIO MARBLE QUARRIES LIMITED.

Company—Employment of Workman—Liability for Wages —Absence of Contract—Hiring by Acting Manager—Knowledge of Majority of Directors—Evidence.

Appeal by defendants from judgment of TEETZEL, J., of 3rd March, 1909.

The plaintiff, a quarry operator, sued the defendants for $483 for wages. The defendants denied the employment of the plaintiff. At the trial judgment was given for plaintiff for $483 and costs.

T. P. Galt, K.C., for defendants.

W. Mulock, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

FALCONBRIDGE, C.J.:—There is no rule of law which stands in the way of plaintiff's recovery. The work which he did was within the purposes for which the defendant company was created, and the company received the benefit of it. There was no contract for his employment under the corporate seal of the company. He had been in the service of Riddell and Morrison, partners or co-owners of the property prior to the incorporation, and he remained on the work under the direction of Morrison, who was acting manager. Morrison himself had no appointment under seal as manager, but he was so acting, and plaintiff was working under him, with the full knowledge of Riddell and Gilfillan. Riddell, Morrison, and Gilfillan were 3 of the 5 directors, the other two being students-at-law, who were negligible quantities.

The whole case comes down to a question of evidence. Riddell's letter and notice of 6th May (exhibit 3) are nothing but a disclaimer of personal responsibility. The company were not then incorporated, but became so a few days later, on 18th May.

There seems to be no ground on which we can reasonably interfere with the conclusions of the trial Judge.

The appeal will be, therefore, dismissed with costs.

MAY 3RD, 1909.

DIVISIONAL COURT.

RE CRYSLER.

Will—Construction—Direction to Set apart Fixed Sum to be Realised out of Lands—Sale of Lands in Lifetime—Direction in Respect of that Event—Direction as to Balance of Proceeds of Sale—Sum Realised Less than Sum Fixed.

Appeal by Mable Smith Lockhart from order of LATCHFORD, J., ante 613.

D. G. M. Galbraith, for the appellant.

M. C. Cameron, for the infant children of Anna F. Seeley.

H. A. Ward, Port Hope, for W. A. Bletcher and other legatees.

W. E. Middleton, K.C., for the executors.

THE COURT (MULOCK, C.J., MAGEE, J., CLUTE, J.), dismissed the appeal.

MAY 3RD, 1909.

DIVISIONAL COURT.

KINNEAR v. CLYNE.

Receiver—Equitable Execution—Judgment more than Twenty Years Old—Statute of Limitations—Effect on Receiving Order of Expiry of Judgment—Operation of Order—Injunction.

Appeal by defendant, judgment debtor, from order of TEETZEL, J., ante 776.

F. Arnoldi, K.C., for defendant.

W. E. Middleton, K.C., and N. Sommerville, for plaintiff.

C. A. Moss, for J. J. Travers.

The judgment of the Court (BOYD, C., MAGEE, J., LATCHFORD, J.), was delivered by

BOYD, C.:—This appears to be the first time in which the question of the Statute of Limitations as affecting "equitable execution" has been brought before the Court. "Equitable execution" is a short way of saying that the Court has appointed a receiver by way of equitable relief in aid of a judgment at law. Before the Judicature Act this relief was obtained through an independent suit in Chancery; since then it may be summarily obtained by application in the original action wherein judgment has been given. The object of the plenary suit of old and the present order for a receiver is to give the creditor, if there be a legal impediment to his process of legal execution, the same benefit by equitable process which he would have had at law had no impediment intervened: Lord Cottenham in Neate v. Duke of Marlborough (1838), 3 My. & Cr. 407, 417.

The order for receiver was rightly made in this case when the debtor had no property available for the ordinary writs of execution. He had only a reversionary interest in property, subject to his surviving his mother. She having died some months ago, he for the first time has an estate that can be laid hold of by the receiver and applied for the satisfaction of the judgment. Pending the receivership, the debtor's interest was in the custody of the Court, in the sense that the order operates as an injunction against his dealing with the property to the prejudice of the judgment creditor, and the property remains "in medio" till it becomes, by satisfaction of the testamentary conditions, available in execution as the property of the judgment debtor. See, in addition to the cases cited by my brother Teetzel: Re Harrison v. Bottomley, [1899] 1 Ch. 465; Re Pitts, [1893] 1 Q. B. 652; and Ideal Co. v. Holland, [1907] 2 Ch. 157; Thompson v. Gill, [1903] 1 K. B. 760.

In this case the order for receiver was validly made in December, 1892, and that was in effect equivalent to a judgment for equitable relief, the same as if a suit in equity had been brought to a hearing without result. That of itself gave a new point of departure for the Statute of Limitations, and 20 years has not since elapsed, assuming that that lapse of time is a material factor. But I do not think it is, because the order for and the appointing of a receiver was the inception of equitable execution; it was doing all that was

practicable to be done in the way of enforcing the fruits of the judgment; due diligence was exercised on the part of the creditor, and he is not to blame or to suffer if delay has unavoidably arisen before the debtor's interest in the property has come into possession.

The Statute of Limitations, in my opinion, has no application to this condition of affairs. The process of execution has been current in respect of the debtor's possible assets, and nothing more could be done than to let the receivership remain in statu quo till the death of the life-tenant and the survival of the reversioner made it possible for the machinery of the Court to become again active. I can see no propriety in law or in reason in asking the Court to discharge the receiver. He should be allowed to exercise the functions of his office, and collect the debtor's property, now first available for the satisfaction of the judgment debt and costs.

The judgment in appeal should stand affirmed with costs.

MULOCK, C.J. MAY 4TH, 1908.

WEEKLY COURT.

RE PERTH FLAX AND CORDAGE CO.

Company—Mortgage of Real and Personal Property—Future-acquired Property—Book Debts, whether Included—Power of Trading Company to Mortgage—Power of Mortgage Company to Accept Mortgage—Winding-up of Trading Company—Book Debts Collected by Liquidator—Claim of Assignee of Mortgage to Moneys Collected—Assignment of Future Choses in Action—Vesting of Beneficial Ownership—Absence of Notice of Assignment—Effect of Ultra Vires Mortgage—Executed Contract at most only Voidable—Equitable Relief—Terms—Redemption.

Appeal by the liquidator of the company from the order of the local Master at Stratford in winding-up proceedings, directing the liquidator to pay to one Holliday the sum of $4,835.91.

Glyn Osler, for the appellant.

R. S. Robertson, Stratford, for Holliday.

MULOCK, C.J.:—The following are the facts material to the appeal. The company borrowed from the British Mortgage Loan Co. the sum of $20,000, upon the security of a mortgage made by the flax company to the mortgage company, whereby the mortgagors granted and mortgaged to the mortgagees the lands and premises therein described "and all other assets, real and personal, of the company . . . and all property, real and personal, that shall hereafter be acquired and owned by the company."

The mortgage company assigned their mortgage to Holliday in trust for certain persons, who had become liable to the mortgage company for payment of the mortgage debt. The money ordered by the Master to be paid to Holliday was money collected by the liquidator from persons indebted to the flax company, and is claimed by Holliday on the ground that it was realised out of the book debts forming part of the mortgage security.

The liquidator resists Holliday's claim on the following grounds:—

(1) That these debts were not charged or assigned by the mortgage, and that the flax company had no power to mortgage personal property not in existence at the time of the mortgage.

(2) That the mortgage company had no power to lend upon a mortgage of personalty.

(3) That the moneys in question were realised partly from sales of goods of the flax company and partly from sales of goods of the Stratford Cordage Company, but that, owing to confusion of accounts, it was impossible to ascertain how much was realised from sale of the flax company's goods.

No evidence was given before the Master in support of this last contention, and it was practically abandoned before the Master.

During the argument it was also contended that the language of the mortgage—"all property, real and personal, that shall hereafter be acquired and owned by the company"—did not include books debts not at the time in existence, but which thereafter came into existence; but I then expressed the view that those words were amply sufficient to include future book debts, and I see no reason to change the opinion then expressed. There thus remain to be dealt with the first two objections above mentioned.

As to the first objection, the company is incorporated under the Ontario Companies Act, and, by sec. 49, sub-sec. a, is authorised "to borrow money upon the credit of the company."

There being nothing in the Act prohibiting the company from mortgaging its property to secure moneys so borrowed, it is entitled to do so: Re Patent File Co., Ex p. Birmingham Banking Co., L. R. 6 Ch. 83; and to so mortgage not only property real or personal then owned by the company, but property thereafter acquired: Holroyd v. Marshall, 10 H. L. C. 191.

Where, as here, it is sought to mortgage future choses in action, if the words of description contained in the mortgage are sufficiently explicit and distinct to make possible the identification without doubt of the choses in action (provided the transaction was intra vires of the two companies), the beneficial interest in them vests in the mortgage company at once upon their coming into existence.

As stated by Lord Watson in Tailby v. Official Receiver, 13 App. Cas. at p. 533: "The rule of equity which applies to the assignment of future choses in action, is, as I understand it, a very simple one. Choses in action do not come within the scope of the Bills of Sale Act, and, though not yet existing, may, nevertheless, be the subject of present assignment. As soon as they come into existence, assignees, who have given valuable consideration, will, if the new chose in action is in the disposal of their assignor, take precisely the same right and interest as if it had actually belonged to him or had been within his disposition and control at the time when the assignment was made. There is but one condition which must be fulfilled in order to make the assignees' right attach to a future chose in action, which is that, on its coming into existence, it shall answer the description in the assignment, or, in other words, that it shall be capable of being identified as the thing or as one of the very things assigned. When there is no uncertainty as to its identification, the beneficial interest will at once vest in the assignee."

The mortgage being for valuable consideration, if it was not ultra vires of either company, had the effect, on their coming into existence, of vesting in the mortgagees the beneficial ownership of the book debts in question. From the fact that the liquidator collected these book debts, I assume that the mortgagees omitted to give to the

debtors notice of the assignment. But that omission would not, as against the liquidator, a mere volunteer, defeat any rights of the mortgagees. The rule is well established that an assignee for the benefit of creditors takes the assets of the debtor subject to all the equities affecting them. Towards a mortgagee for value of a chose in action, the assignee for the benefit of creditors stands in the same position as his assignor, and, as the latter could not undo his assignment, for value, of a chose in action so as to revest the beneficial interest therein in himself, neither could his assignee for the benefit of creditors, nor, here, the liquidator: Thibaudeau v. Paul, 26 O. R. 388. If, then, this mortgage was intra vires, the moneys in question, having been realised from debts beneficially owing to the mortgagees, would belong to them, and the liquidator would have no right to withhold them.

As to the second ground of appeal—that the company had no power to lend upon personal security—it was assumed by appellant's counsel during the argument that, in the absence of such power, the assignment was void. Such an unqualified result would not, I think, be the true position of the parties.

As stated by Brice on Ultra Vires, 3rd ed., p. 63: "Suppose that a corporation has no power to acquire property or particular property, and a transaction takes place purporting to be a transfer to the corporation of any such property, e.g., the transfer to a railway company of a hotel, what is the result? Is the transaction simply void, or inoperative? The answer seems to be that (apart from the express prohibition contained in a statute) the transfer, as a matter of title and ownership, is good and complete, and that the property so purporting to be transferred is really and effectively vested in the corporation. The proceeding may be improper on the part of the officials concerned; the corporation or the opposite party may be able by legal proceedings to rescind the transaction. Probably the corporation will be under no liability for payment of the purchase money, but, till rescission, the property has passed."

In Ayers v. South Australian Banking Co., L. R. 3 P. C. 559, it was held that, though it was unlawful for the bank to make advances on merchandise, still, having done so, the effect of violating such prohibition was not to prevent the property in the goods passing, and that the bank

was entitled to maintain trover against a person guilty of wrongful conversion. Applying here the principle of that case, and assuming, as in the absence of evidence I must, that the mortgagees did not notify the debtors of the assignment of their debts, nevertheless it would follow that, at least in equity, the right to receive payment of these book debts passed by the mortgage to the mortgagees, and that, had they received payment, they could have given to the debtors effectual discharges. The liquidator, in intervening and possessing himself of these debts, became at law a wrong-doer, and as such liable in damages to the respondent to the extent of the moneys improperly received, or where, as here, the actual fund collected is in the hands of the liquidator, an officer of this Court, it may be treated as a trust fund in the custody of the Court itself, and transferred to the person rightly entitled to possession thereof. Therefore, in approaching the question of determining the rights of the parties to the beneficial ownership of this fund, it must now be regarded as legally in the possession of the mortgagees. In such circumstances, are the mortgagors or their liquidator (who occupies no higher position than do the mortgagors) entitled, and, if so, upon what terms, to the moneys in question?

The assignment to the mortgage company of the right to these moneys was for valuable consideration and not void, but at most only voidable: Ayers v. South Australian Banking Co., supra; and, before the liquidator can establish any beneficial title thereto, he must set aside the mortgage. As a condition of his obtaining equitable relief, the liquidator must do equity.

This matter does not come before the Court at the instance of the respondent on an executory contract. The mortgage was the final instrument contemplated between the parties for determining their rights, and as such constitutes an executed contract. Their remedy is not by way of action for specific performance, in which case the Court might exercise its discretion, and withhold equitable relief, but by action for specific relief on an executed contract, and they are entitled to the relief appropriate to a claim arising out of an executed contract: Wolverhampton and Walshall R. W. Co. v. London and North Western R. W. Co., L. R. 16 Eq. 439. To the mortgagees' demand the liquidator in substance objects, on equitable grounds, to

be bound by the mortgage, but he is bound by it, unless he can succeed in setting it aside. His position here is that of a plaintiff asking for the rescission of a contract.

It would be manifestly unjust to permit the estate of the flax company to retain the money which it borrowed on the security of the mortgage, and at the same time to recover from the mortgagees the proceeds of any of their securities for the loan. If the contract is to be undone at the instance of the borrower, it should be undone wholly, each party being restored to his former position. The ordinary illustration of a borrower under a usurious contract seeking to set aside the usurious contract is applicable here. The Court will not grant its aid to relieve him from the contract, except upon his paying what is bona fide owing to the defendant.

For these reasons, I am of opinion that the rights of the liquidator in this matter are limited to those of a mortgagor in a redemption suit; and that this appeal should be dismissed with costs.

RIDDELL, J. MAY 4TH, 1909.

TRIAL.

REX v. LABRIE.

Criminal Law—Reserved Case—Application by Prisoner to Trial Judge after Verdict—Criminal Code, secs. 1014, 1021—Appeal.

The defendant was convicted at the Sudbury assizes of manslaughter and sentenced to imprisonment.

A. H. Marsh, K.C., afterwards applied on behalf of the prisoner to the trial Judge to reserve and state a case for the Court of Appeal upon a question of the admissibility of certain evidence excluded by the Judge.

Marsh was heard as amicus curiæ.

RIDDELL, J.:—The Supreme Court of Canada in Ead v. The King, 40 S. C. R. 272, have held that the provisions of sec. 1014 (3) of the Criminal Code apply only to an application made before verdict.

An application may indeed be made under sec. 1021 for leave to appeal for a new trial, on the ground that the verdict was against the weight of evidence; but that is not the present application; and no such application in this case could possibly be granted.

Apparently the only provision now applicable is sec. 1014 (2). That seems to be directed to the case of a Judge reserving a case mero motu. In such cases counsel cannot be heard except as amici curiæ. No appeal lies, as the Supreme Court have decided in the Ead case; Rex v. Swyryda, 9th February, 1909, in Court of Appeal, not reported; but see ante p. 469.

I have heard Mr. Marsh as amicus curiæ, have read the authorities he has referred to and others, and see no reason to change my mind.

As my view would not be binding on another Judge, I see no good object to be attained by stating or discussing the point raised.

LAZIER, LOCAL MASTER. MAY 4TH, 1909.

CHAMBERS.

POSTLETHWAITE v. VERMILYEA.

Security for Costs—Plaintiff out of the Jurisdiction—Præcipe Order—Setting aside—Property in Jurisdiction—Money Paid into Court by Defendants for Plaintiff—Refusal to Accept in Satisfaction of Claim—Other Moneys in Hands of Defendants.

Motion by plaintiff before the local Master at Belleville to set aside a præcipe order for security for costs.

W. N. Ponton, K.C., for plaintiff.

W. Carnew, Belleville, for defendants.

THE LOCAL MASTER:—The plaintiff moves to set aside a præcipe order for security for costs, on the grounds: first, that there has been upwards of $1,000 paid into Court in this action by the defendants, which is still there, the plaintiff having refused to accept it in satisfaction of her claim; and, second, that there is a further amount in the defendants'

hands payable to her out of the residuary estate. While this latter amount has not been ascertained definitely, it would appear pretty clear that it will amount to a substantial sum.

As to the first amount paid into Court, while admitted by the defendants to be due to the plaintiff, it is still under the defendants' control as much as it is the plaintiff's. It cannot be obtained out of Court while the action is pending, nor even without notice to the defendants, and the Court, if the defendants are successful, would not allow it to be paid out without making provision for the defendants' costs, and an assignee, in case it should be assigned, would take it subject to all the equities and to the order of the Court.

I think, then, it is clear that the plaintiff, in the two different amounts referred to, has property and means within the jurisdiction of the Court sufficient to justify me in setting aside the præcipe order, which I consequently do.

As to the question of costs, I think they should be costs in the cause to the plaintiff in any event. Whatever the final disposition of the case may be, I do not think the plaintiff should be hampered, or that there should be any risk of her having to pay the costs of this motion, in the existing state of facts. In the cases cited by Mr. Ponton: Ganson v. Finch, 3 Ch. Ch. 296; Duffy v. Donovan, 14 P. R. 159; American Street Lamp Co. v. Ontario Pipe Line Co., 11 O. W. R. 734; and McConkie v. Fawcett, ib. 170: the Court has, in very similar states of circumstances, disposed of the costs in this way.

The defendants' solicitors, no doubt, thought that it was necessary to protect their clients' interests by issuing the præcipe order, and it will certainly have the effect of preventing any possibility of their being held personally responsible, no matter how the action may be ultimately determined.

RIDDELL, J. MAY 4TH, 1909.

TRIAL.

SMITH v. CITY OF LONDON.

Constitutional Law—Ontario Act, 9 Edw. VII. ch. 19, sec. 8—Stay of Actions Attacking Validity of Contracts between Municipal Corporations and Hydro-Electric Power Commission—Intra Vires—British North America Act, sec. 92—Property and Civil Rights in the Province—Magna Carta—Action Brought before Statute Coming on for Trial—Disposition of—Declaration of Stay—Retention, but no Proceedings to be Taken—No Judgment to be Entered—No Costs—Power of Legislature to Vary Contract of Municipal Corporation.

Action for a declaration that a certain contract was not valid, and for consequent relief.

E. F. B. Johnston, K.C., and J. M. McEvoy, London, for plaintiff.

E. E. A. DuVernet, K.C., and A. H. F. Lefroy, K.C., for defendants the Corporation of the City of London.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

RIDDELL, J.:—In this case, tried before me without a jury, at London and Toronto, it was not from any real doubt as to what my conclusions should be that I reserved judgment; I did so only out of deference to the arguments so strenuously urged by counsel for the plaintiff, and in view of the very great importance of the questions to be determined.

When it is said that in this action the question is squarely raised, "Has the legislature of the province of Ontario the power to stay the hand of His Majesty's Courts in this province, and to say to them, 'You shall not decide the rights of litigants in certain actions now pending,' and to the litigants, 'You shall not further litigate your alleged rights?'" it will be apparent that the matter for consideration is of the most momentous character.

The facts are simple and not in dispute.

By the Ontario Act of 1906, 6 Edw. VII. ch. 15, power is given to the Lieutenant-Governor in council to appoint 3 persons to form a commission, which commission shall be a body corporate under the name of "The Hydro-Electric Power Commission of Ontario." By sec. 6 of the Act, any municipal corporation is authorised to apply to the Commission for the transmission of electricity "for the uses of the corporation and the inhabitants thereof." Section 7 authorises the submission to the electors of a by-law authorising the corporation to enter into a contract in the form supplied by the Commissioners; in case the by-law is passed, the Commission and the corporation may execute the contract.

In pursuance of the powers given by this Act, the municipal corporation of the city of London, on 3rd December, 1906, read a by-law, No. 2920; then submitted the by-law to a vote of the electors; and, after the vote, finally passed it on 14th January, 1907. This by-law recites the Act of 6 Edw. VII. ch. 15, in part, and enacts that "it shall be lawful for the mayor and clerk . . . to execute a contract with the Hydro-Electric Power Commission of Ontario for the supply to the said corporation of electrical power or energy for the uses of the corporation and the inhabitants thereof, for lighting, heating, and power purposes at . . ." It is plain and not disputed that the object of the corpration was to procure this electrical power to sell it again. A contract was entered into with the Commission, which is set out verbatim et literatim in schedule A. to the Act 9 Edw. VII. ch. 19.

This action was begun 16th June, 1908, by the plaintiff, a ratepayer and freeholder of London, against the municipality, for a declaration that the contract is not valid, and asking for consequent relief. The defendants assert the validity of the contract, and, in addition, say that the action ought not to proceed without the Commission a party. There have been certain interlocutory proceedings, which, in the view I take of the case, need not be detailed.

The action came down for trial before me at the London assizes; I was informed that legislation in reference to the contract was pending as a "government measure." I accordingly heard all the evidence adduced, and postponed the argument until it should be seen what course the legislature would take.

The Act 9 Edw. VII. ch. 19 was assented to 29th March, 1909. By sec. 2 of this Act it is enacted that certain changes shall be made in the contract, and by sec. 3 that, with these changes, the contract sball be valid and binding according to the terms thereof upon the corporation of the city of London and other corporations named. By sec. 4, it is "declared and enacted that the validity of the said contract as so varied as aforesaid shall not be open to question on any ground whatever in any Court, but shall be held and adjudged to be valid and binding on all the corporations mentioned in sec. 3." Section 8 says: "Every action which has been heretofore brought and is now pending wherein the validity of the said contract or any by-law passed or purporting to have been passed authorising the execution thereof by any of the corporations . . . is attacked or called in question, or calling in question the jurisdiction, power, or authority of the Commission or of any municipal corporation or of the councils thereof, or of any or either of them, to exercise any power or to do any of the acts which the said recited Acts authorise to be exercised or done by the Commission, or by a municipal corporation or by the council thereof, by whomsoever such action is brought, shall be and the same is hereby forever stayed."

This is a very stringent section; and, if the legislation is not ultra vires, it would seem impossible for the plaintiff to continue this action.

Notwithstanding the recrudescence in some quarters of the old political heresy as to the constitutional position of the provincial legislature—the heresy which considered the legislature as a "big county council"—there can be no doubt of the extent of its powers. Our legislature is a Parliament, not a municipal council. Counsel for the plaintiff expressly stated that they did not contend that the legislature exercised its powers by delegation from the Imperial Parliament; but most of their argument logically rested in substance upon some such proposition.

The extent of the powers of the legislature has never been in the least doubtful in law. "The legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can of course do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it . . . has and was intended to have plenary powers of legislation as large and

of the same nature as those of Parliament itself." So said the Judicial Committee of the Privy Council, of an Indian legislature, in The Queen v. Burah, 3 App. Cas. 889; and of the legislature of our own province their Lordships said: "When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to matters enumerated in sec. 92, it conferred . . . authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its powers possessed and could bestow. Within the limits of subjects and area, the local legislature is supreme and has the same authority as the Imperial Parliament . . . :" Hodge v. The Queen, 9 App. Cas. 117. It is needless to multiply citations; whenever the matter has come up for decision in the Court of final resort, the result has been the same.

The powers of the legislature of the province are the same in intention, though not in extension, as those of the Imperial Parliament. The legislature is limited in the territory in which it may legislate, and in the subjects; the Imperial Parliament is not—that is the whole difference.

The extent of the powers of the Imperial Parliament is not doubtful. "The power and jurisdiction of Parliament . . . is so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds . . . It can, in short, do anything that is not naturally impossible:" Blackstone Comm., vol. 1, pp. 160, 161. "It is a fundamental principle with English lawyers that Parliament can do everything but make a woman a man, and a man a woman," says DeLorme. "An Act of Parliament can do no wrong, though it may do several things that look pretty odd:" Sir John Holt, C.J., in City of London v. Wood (1700), 12 Mod. 669, at pp. 687, 688.

Sir Edward Coke, who advanced the proposition in Bonham's Case, 8 Co. 118 (a), that "the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void," was properly rebuked by Lord Ellesmere (see note to the case in Thomas & Fraser's edition of Co. Rep., vol. 4, pp. 376, 377). As is pointed out by Dicey, Law of the Constitution, 7th ed., p. 59, note (1), "This dictum once had a real meaning . . . but it has never received systematic judicial sanction, and is now

obsolete." "A modern Judge would never listen to a barrister who argued that an Act of Parliament was invalid because it was immoral or because it went beyond the limits of Parliamentary authority:" Dicey, pp. 60, 61. "There is no legal basis for the theory that Judges, as exponents of morality, may overrule Acts of Parliament:" ib., p. 66.

There is consequently nothing more than the veriest legal commonplace in the description given of the powers of the legislature in the case of Florence Mining Co. v. Cobalt Lake Mining Co., 12 O. W. R. 297, at p. 301: "In short, the legislature, within its jurisdiction, can do everything that is not naturally impossible and is restrained by no rule, human or divine."

A writer in the Canada Law Journal, vol. 44, at p. 554, says: "The Imperial Parliament is bound by rules both human and divine, but they are rules of its own making, or arising naturally from its constitution and environments." No example is cited—and it must be obvious that a sovereign body cannot be said to be bound, i.e., legally bound, by any rules of its own making. No sovereign body continuing sovereign can devolve its sovereignty so as to prevent itself taking up the sovereignty again. And any rules arising from the constitution and environments, if the body is sovereign, may at any time be abrogated (if that be naturally possible) by the sovereign body; while, as has been pointed out above, a Britsh Judge could not listen to an argument that a statute of the Imperial Parliament was invalid because it went beyond the limits of parliamentary authority, the position of a Judge in respect of a Canadian statute, Dominion or provincial, is quite different. "In Canada, as in the United States, the Courts inevitably become the interpreters of the constitution:" Dicey, p. 164. The powers of the legislatures being confined to certain specified subjects, the Courts must necessarily determine in each particular case whether the subject of the legislation is within the specified classes.

The question to be determined is: Does the right (of course, when I speak of right, I mean legal right—power) to say to the Court, "You shall not decide this case," exist in the provincial legislature? And that, again, simply involves the question, Does the asserted right come within any of the classes mentioned in sec. 92 of the British North America Act?

Section 92 of the British North America Act gives the province the exclusive right to "make laws in relation to matters coming within 'certain' classes of subjects," amongst them "Property and Civil Rights in the Province." Now "the right to bring an action is a civil right:" Moss, C.J.O., giving the judgment of the Court of Appeal in Florence Mining Co. v. Cobalt Lake Mining Co., ante 837, at p. 848. This right has been taken from numberless persons by statutes of limitation, and similar legislation of undoubted validity.

An enactment of the Imperial Parliament preventing certain wrongs being actionable was under consideration by the Court of Appeal in England in Conway v. Wade, [1908] 2 K. B. 844. Farwell, L.J., says, p. 856: "It was possible for the Courts in former years to defend individual liberty against the aggression of kings and barons, because the defence rested on the law which they administered; it is not possible for the Courts to do so when the legislature alters the laws so as to destroy liberty, for they can only administer the law. The legislature cannot make evil good, but it can make it not actionable." In that case the learned Lord Justice says, p. 857: "I regret the conclusion, because I think it inflicts a cruel hardship on the plaintiff . . .; the conduct of the defendant is morally 'an . . . improper and inexcusable interference with the man's ordinary rights of citizenship;' but these rights have been cut away and the remedy for them destroyed by the legislature."

Many Acts of indemnity have been passed by legislatures—these Acts prevent the bringing or carrying on of actions—"prohibiting civil suits and criminal prosecutions in respect of acts done." A partial list will be found in the great judgment of one of the greatest of English Judges, Willes, J., in the celebrated case of Phillips v. Eyre, L. R. 6 Q. B. 1, at pp. 17, 18: statutes of England beginning with 1 Edw. III. stat. 1, down to 19 Geo. II. chs. 30, 39; of Ireland; the Cape; Canada in 1838; Ceylon; St. Vincent; New Zealand: and this case of Phillips v. Eyre upheld the validity of such a statute passed by the legislature of Jamaica. This statute prevented the well-known Governor Eyre suffering the consequences of his acts. The fact that the Court of Queen's Bench in this case refers, without any doubt as to its validity, to a statute of this kind passed in Canada, indicates their view that it was perfectly valid—

and the judgment is conclusive as to the powers, in that regard, of a colonial legislature.

In Delamatter v. Brown, ante 58, at p. 63, it is said: "If the legislature has in fact said that the true boundary between two adjoining lots is to be determined by 3 farmers or by a land surveyor, it is my duty loyally to obey the order of the legislature and stay my hand: the legislature has the legal power—and that is all I may concern myself about—to say that His Majesty's Court shall not determine the property rights of His Majesty's subjects in respect of the extent of their land. . . ." The Divisional Court in the same case, ante 862, does not question this statement of law (vide, p. 867).

The power of the legislature of Ontario and that of the Imperial Parliament being in this regard the same, the judgment of Farwell, L.J., in the case cited, shews that, even if I had come to the conclusion—which I have not—that the plaintiff was grievously wronged, my power would not be increased. "Where there is jurisdiction over the subject matter, arguments founded on alleged hardship or injustice can have no weight:" Moss, C.J.O., ante at p. 848.

It is contended that to deny the right of this plaintiff to have his claims passed upon by the King's Court is in breach of Magna Carta. Whatever Magna Carta may be in law, whether a treaty between King and subjects, charter or grant by the King, declaration of rights, constitution, statute, or what not, "it is also a long and miscellaneous code of laws:" Pollock & Maitland, vol. 1, p. 658. "The first great public Act of the nation after it had realised its identity:" Stubbs Const. History, vol. 1, p. 571.

But it is equally true that much of Magna Carta is obsolete, and that the Imperial Parliament has not hesitated, whenever occasion called for it, to legislate away its provisions, e.g., ch. 11: "If any one die indebted to the Jews . . . if any children of the deceased are left under age, necessaries shall be provided for them in keeping with the holding of the deceased, and out of the residue the debt shall be paid. . . ." No one supposes this law now exists. By ch. 18 "Justices in Eyre" are provided for, but they disappeared by 1400. By ch. 27, "If any freeman shall die intestate, his chattels shall be distributed by the hands of his nearest kinsfolk and friends under the supervision of the Church. . ." The Church

has long disappeared from the administration of estates. By ch. 42, "reserving always the allegiance due to us," on the principle "Nemo potest exuere patriam." This was wholly done away with. "A series of statutes culminating in the Naturalisation Act of 1870 have entirely abrogated this ancient doctrine and substituted one of perfect liberty:" McKechnie, Magna Carta, p. 477. I hesitate to speak of ch. 45, "We will appoint as justices, constables, sheriffs, or bailiffs, only such as know the law of the realm and mean to observe it well." The celebrated chapter 40, "Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam—to none will we sell, to none will we deny or delay right or justice"—much misunderstood as it has been, beyond any question contains the cardinal principle that all are entitled to the enforcement and the prompt enforcement of their legal rights. Any interference with the full performance of the promises of this chapter will be jealously guarded by the Courts; but even this is subject to the will of the legislature in the mother country and here.

It is needless to give further instances of the power of the Imperial Parliament to nullify provisions of Magna Carta. I shall mention cases in Canada. In Ex p. Gould, 2 Matthieu Rep. 378, Mr. Justice Day says: "Almost every statute interferes . . . with public rights . . . The powers of legislation of the Provincial Parliament are as extensive as those of the Imperial Parliament, while they keep within the limits fixed by that statute, even if they were to interfere with Magna Carta." These words are cited with approval by the Chancellor, who adds: "Such also is the position of the province under Confederation:" Re McDowell and Town of Palmerston, 22 O. R. 563, at p. 565. Girouard, J., in the Supreme Court of Canada, in the case of In re Provincial Fisheries, 26 S. C. R. at pp. 554, 555, points out that the restrictions of Magna Carta in respect of navigable waters "have been removed by colonial legislation, before Confederation, in most if not all of the provinces," and he considers that, therefore, "they are not of importance for the determination of the questions submitted to the Supreme Court."

It is sometimes said that the British Parliament could not, in passing the British North America Act, have intended to confer on a local legislature such unlimited powers. The best way of determining what a parliament

intends is to find out the meaning of what it says. The meaning of the language is perfectly plain, and does not admit of question. Those who assert that the British North America Act does not express the real meaning and intent of Parliament, it seems to me, forget that practically all the power Ontario has, she had from the time of the Act of 1791, 31 Geo. III. ch. 31. It was not just the other day that our province "came of age." She is over 100 years old. All the powers we have been considering in this action and those considered in the Cobalt action, were undoubtedly hers since 1791. And I much mistake the temper of my countrymen if they in 1867 would have been or would now be content to accept any legislation which cut down in any wise their power of governing themselves. All these powers are possessed in fact by our kinsmen across the seas, and for myself I can see no reason why our rights in Ontario in local matters should be any less than the rights of those in the British Isles—why Britons on this side of the Atlantic should any less govern themselves than those on the other.

Nor were those who drew up the British North America Act ignorant men. The Colonial statesmen were men of great ability, who knew what they wanted and knew how to put in plain language what they did want—they had the assistance of the ablest lawyers in England—they were experienced legislators themselves—and it is idle to speak of the result of their labours as being other than what was intended. That is, however, quite aside from the matters to be here decided.

Courts by whose judgments I am bound have decided in unmistakable language the meaning of the Act, and the result is inevitable. The legislature had undoubtedly the power to pass sec. 8 of the Act of 9 Edw. VII.

This action, it is plain, comes within the letter, as well as the spirit, of this sec. 8. The legislature has said that this action shall be stayed. My duty is "loyally to obey the order of the legislature"—the action is accordingly stayed.

While the wording of the statute is that the action shall be "forever stayed," the legislature has no power to control by anticipation the actions of any future legislature or of itself: it may be that this legislation may be repealed, or it may be that the legislation may be disallowed —the result is that the stay ordered by the statute has the

effect of causing the Court to retain the action, with no proceedings to be taken unless and until the legislation is in some way got rid of.

On the question of costs, my own decision in the Cobalt case is cited. In my humble judgment, when the legislature takes within its own cognisance and decides the private rights of individuals, it must be considered as intending to deal exhaustively with such rights, and also with the actions then pending in respect of such rights—and in all respects: and if there be no provision made in the legislation for the costs of the actions, it must be considered that the legislature did not intend that costs should be paid by either party. Upon the enactment taking effect, any party proceeds at his own peril—and if it be found that the legislation makes his contention untenable, he should pay the costs occasioned after he should have stayed his hand. Thus in the Cobalt case, all rights of the plaintiffs, if they had any, were taken away by the Act of 1907; they should not have proceeded with the action after the passing of that Act; their action was not stayed by the legislature, and they, therefore, had the legal right to proceed; but, failing, they were ordered to pay the costs after the time at which they should have stopped. As to the costs before the passing of that Act, the legislature had before its mind the fact that the litigation was going on, and made no provision for the costs; I thought I should not award costs. Had the legislature intended the Court to have any control over the costs, it would have said so. This was the principle of the award of costs in that case, and it had no other significance.

In the present case, however, the legislature has not simply determined rights by legislation, leaving it open to the litigants to ask the Courts to declare the rights; the legislature has, on the contrary, stayed the action itself—making no provision for costs. I can give no costs. Such an award of costs would itself be a proceeding with the action.

I can only declare that this action is stayed by legislation—and retain the action till further order.

Had I thought that sec. 8 was inoperative, I should have required to consider the effect of the Act of 9 Edw. VII. in validating the agreement, or rather making a new agreement between the Commission and the city of London. It is not necessary that I should go into that question, but

there can, in my view, be no doubt of the power of the legislature to authorise a municipality to make any bargain, or to make any bargain for any municipality, thought advisable. The municipality in Ontario is wholly a creature of the legislature—it has no abstract rights—it "derives all its powers from statute, and the same hand which gave may take away:" Re Hassard and City of Toronto, 16 O. L. R. 500, at p. 511, 12 O. W. R. at p. 50. Further rights may be given by the legislature to municipalities because that is legislation in respect to municipal institutions, and also it is a matter "of a merely local nature in the province." The legislature might give a municipality any powers of dealing in any substance, even though or if it were expressly created for another purpose. Municipalities supply water—in London, England, for generations a private commercial enterprise; gas, still with us in most cases a private commercial enterprise; electric light, to which the same remark applies; buy Crown or other wet lands, drain and sell them, making money if they can (3 Edw. VII. ch. 19., sec. 556); buy land for parks or exhibition purposes and lease them (ib., sec. 576); form cemeteries and sell lots therein (ib., sec. 577); construct and own telephones (ib., sec. 570). And many other things they may undoubtedly do which are or may be matters of commercial enterprise. Why not, then, electricity for power or light? All that is for the legislature to say. And, if the legislature can legally say in general terms that a contract in the form like that set out in schedule A. of the Act of 1909, as amended by the statute, should be valid if executed by any municipality, I fail to understand why the legislature cannot say that this particular contract as so amended (even though the original was executed before the Act and even if it were originally invalid) is binding.

There can be no good end achieved by pursuing this subject.

No judgment can, properly, be entered: the action is stayed. If either party so desire, the record may be indorsed with a declaration that the action is stayed by the legislation referred to.

MACMAHON, J. MAY 4TH, 1909.

TRIAL.

ROYCE & HENDERSON v. NATIONAL TRUST CO.

Solicitor — Bill of Costs — Services—Retainer—Cesser on Death of Client—Evidence as to Further Retainer by Executors—Reference to Taxation.

Action to recover the amount of a bill of costs.

I. F. Hellmuth, K.C., J. A. McAndrew, and Shirley Denison, for plaintiffs.

G. F. Shepley, K.C., and H. S. White, for defendants.

MACMAHON, J.:—The plaintiffs are barristers and solicitors in the city of Toronto, and the defendants are the executors of the last will and testament of Ernest A. Bremner, deceased.

Bremner in his lifetime had large interests in various companies in Sturgeon Falls and its vicinity, and had as his solicitor Henry L. McKee, of Sturgeon Falls, who was retained to look after Bremner's interests there, and on Bremner's death was appointed by the National Trust Co. solicitor for the executors. Bremner was interested in some undertakings in other parts of the province, and in Nicaragua, and had in 1900 retained Mr. Allan W. Royce, of Toronto, one of the plaintiffs, as his solicitor in connection therewith.

Bremner died on 23rd June, 1903, and prior thereto had obtained, from the syndicate interested in the then projected Temagami Railway Co., an assignment of their respective interests therein, except from Henry L. McKee, who had a one-ninth interest, and who was supposed to be a nominee of Bremner.

The Temagami Railway Co., while it was chartered by the Dominion government, was never organised, and none of its stock was ever issued.

Bremner, some time during 1902, instructed Royce to apply to both the Dominion and Ontario governments for a subsidy for the railway, and promised to pay him 10 per cent. of the amount of the subsidy or subsidies so obtained. In this Royce is corroborated by Henry L. McKee.

Bremner died before application was made for the subsidy, and, after his death, Henry L. McKee, who was called as a witness, said that he went over all the matters connected with the Bremner estate with Mr. Smith, the estates manager of the defendants, the National Trust Co., and explained to him the position of the Temagami Railway charter and the making of the application for a subsidy to the Dominion government, and stated that Royce had been solicitor for Mr. Bremner, and was told by Smith that the application for the subsidy might as well be proceeded with until the trust company looked into the matter. In consequence of this he (McKee) said he had instructed Royce to push the application for the subsidy to the Dominion government.

Smith denies that he gave any such instructions to McKee, and states that he was not aware that Royce claimed that he was the solicitor for Bremner in the Temagami Railway matter until a bill of Mr. Royce was received in December, 1908.

Royce went to Ottawa in connection with the application for the subsidy, and on 23rd October, 1903, a subsidy of $3,200 a mile for 50 miles of the Temagami Railway was granted, and in his bill presented to the National Trust Co., as executors of Bremner's estate, is included a charge of $16,000, being 10 per cent. commission on the subsidy granted by the Dominion government.

The bill of costs sued on commences with an item dated 21st November, 1900, as to a timber concession obtained by Mr. Chapin from the government of Nicaragua in connection with the Nicaragua Railway, and there are over 200 items in the bill for services in the matters of the Nicaragua and Temiskaming Railways, up to 23rd June, 1903, the date of Bremner's death. And there are about 50 charges in the bill between 23rd June and 28th December, 1903, when the last charge is made—almost all of which are in connection with the Temagami Railway.

Although the Nicaraguan and the Temagami Railways were not contentious matters, they can safely be classed, I think, as business of a continuous character from the time of the retainer of Mr. Royce as solicitor in 1900, down to Bremner's death on 23rd June, 1903, when his retainer would end: Whitehead v. Lord, 7 Ex. 629.

There must be judgment for the plaintiffs, referring the items of their bill from 21st November, 1900, down to and

inclusive of the item in the bill of 23rd June, 1903, to the senior taxing officer at Toronto to tax the same.

As regards the items of the bill subsequent to 23rd June, although Mr. McKee stated that, on the strength of the alleged directions of Mr. Smith, he had instructed Mr. Royce to proceed with the application for the subsidy to the Dominion government, Mr. Royce did not act as if he was the solicitor for the National Trust Company, the executors of the Bremner estate.

The Honourable Charles Russell, solicitor, of London, was asked by the National Trust Co. to apply in his own name for ancillary letters of administration to the estate of Bremner in England, which letters of administration were duly granted to Mr. Russell.

Mr. Russell came to Canada in August, 1903, and Mr. Royce saw him at Ottawa early in September, where Mr. Russell was apparently using his influence with members of the government to obtain a subsidy for the Temagami Railway; and he states in a letter from London, England, to McCarthy, Osler, & Co., dated 14th October, that, owing to the influence of two members of the government, whom he names, the subsidy was granted.

Although Mr. Royce says he knew that the National Trust Co. were the executors of Bremner's estate, he did not communicate to the company personally or otherwise anything in relation to the Temagami Railway, and in fact did not notify the trust company what he had done or was doing regarding the subsidy, while on 7th October, 1903, he wrote to Mr. Russell, saying: "I cabled you this morning that the Temagami subsidy had been granted. Enclosed herewith you will find the general conditions under which subsidies are granted. . . . I have not had any reply from you to my cable for funds to complete the re-organisation of the company. I should like to have instructions regarding this at as early a date as possible, as it will be necessary to commence negotiations with the Ontario government for a subsidy from them."

The amount of the subsidy to be given was not voted until 23rd October.

On 14th October Mr. Russell replied: "I have your telegram, but I did not answer it, because I could not give you the answer you wanted, namely, 'cash.' Owing to the death of Mr. Bremner, there has been a certain amount of conflict of interests, and certain members of the Occidental

Syndicate desired to have the matter supervised on their behalf by Messrs. McCarthy, Osler, & Co. We told them it would be quite unnecessary, but, at the same time, knowing that you were acquainted with Messrs. McCarthy & Co., and that you would not have any difficulty in working in co-operation with them, we did not pursue the matter further, but consented to do as proposed by them. We, therefore, enclose a copy of a letter which we have addressed to Messrs. McCarthy, Osler, & Co., and we shall be glad if you will see them and push on with the matter as speedily as possible."

The letter Mr. Russell referred to as having written to Messrs. McCarthy, Osler, & Co. states that Mr. Royce telegraphs it is necessary to proceed with the constitution of the company and to pay in 10 per cent. of the capital, and proceeds: "Shortly after the receipt by you of this letter, the Occidental Syndicate cabled you £1,000 to enable this to be done. We would have written to him and left the matter entirely in his hands, were it not, as you are aware, that there is a certain conflict of interests by reason of the death of Mr. Bremner. It is desired, therefore, by the parties having other interests, that they should be separately advised. Of course the Occidental Syndicate do not desire to be out of the money which they will pay as ten per cent. of the capital, for any longer period than may be necessary, As soon, therefore, as the new board is elected, and the company is in a position to deal, we shall be glad if the company will pay the amount or such portion of it as their funds will admit. We shall be glad, therefore, if you will co-operate with Mr. Royce in the re-organisation, which should be done as speedily as possible."

On 23rd October, 1903, Royce wrote McKee saying: "As you and Mr. Bremner are the parties from whom I have received my instructions in regard to the Temagami Railway, I beg to enclose a copy of a letter written by the Hon. Chas. Russell to Messrs. McCarthy, Osler, & Co. . . . as there appeared to be several interests in this company, and, as I understand you are solicitor for the Bremner estate and also for said interests, I am waiting your instructions in the matter."

On 24th October Royce wrote McKee again, stating: "Mr. McCool telephoned me this morning to know if you were in Toronto. I told him that I had seen you yesterday, and that you, as representing the Bremner estate and a

New York interest, in addition to your own, had instructed me to do nothing until further instructions from you, and that until I received those instructions I could not do anything, and there was no necessity for him to have a conference with me until then. I also advised him that you expected to be in Toronto again in a few days."

On 24th October Royce wrote the Hon. Charles Russell as follows: "Re Temagami Railway: Your favour of the 14th inst. is received. I have advised Mr. McKee, as representing the Bremner estate and a New York interest, of my instructions on behalf of the Occidental Syndicate, and am awaiting his concurrence and his instructions."

No doubt, McKee was desirous that the subsidies should be obtained, and it was evident that the railway could not be built without their being granted. And he may have told Royce to proceed with the applications therefor. But with the denial of Mr. Smith, of the trust company, that he gave McKee authority to instruct Royce to proceed, and from the conduct of both McKee and Royce, and from the latter's letters, I find that no such instructions were given by Smith. As if Royce was not fully aware that McKee was the solicitor for the National Trust Co., the executors of the Bremner estate, he writes to McKee as late as 23rd October, 1903, "as I understand that you are the solicitor for the Bremner estate," &c., and awaits his instructions.

Although Mr. Russell was the administrator of the Bremner estate, in England, it was not in that character that Mr. Royce was communicating with him. Royce was cabling Mr. Russell as representing the Occidental Syndicate, of London, England, which was to have, when the Temagami Railway Company was organised, a considerable number of the shares allotted to it, "for the funds necessary to complete the re-organisation of the company," and the Occidental Company desired their interests supervised by Messrs. McCarthy, Osler, & Co., to whom the £1,000 sterling was sent. And Mr. Royce says to Mr. McKee, "I understand that you are solicitor for the Bremner estate, and am awaiting your instructions in the matter," and he tells McKee that his own instructions are on behalf of the Occidental Syndicate.

As Mr. Royce's retainer terminated with Mr. Bremner's death, and as he was, I find, not retained by the

National Trust Co. as solicitor after Bremner's death, he cannot recover in respect of any items in the bill subsequent to 23rd June, 1903.

I reserve further directions and the question of costs until the taxation is concluded.

MAY 4TH, 1909.

DIVISIONAL COURT.

FREEL v. ROBINSON.

Will — Express Revocation by Subsequent Testamentary Document—Validity of Subsequent Document as Revocation — Invalidity of Bequests Made by Subsequent Document—Dependent Relative Revocation—Oral Testimony—Inadmissibility—Costs of Contestation.

Appeal by one of the next of kin of Ada Freel, deceased, from the judgment of WINCHESTER, Judge of the Surrogate Court of York, directing the admission to probate of a certain document as the last will of the deceased.

J. R. Meredith, for the appellant.

J. W. McCullough, for the defendant.

James McCullough, Stouffville, for the executors.

The judgment of the Court (FALCONBRIDGE, C.J., TEETZEL, J., RIDDELL, J.), was delivered by

RIDDELL, J.:—Ada Freel by a holograph will, made in 1904, gave to her executors all her estate in trust to pay debts and then to pay to Elizabeth A. Robinson, her sister, $1,000, to her brother Byron $700, to her nephew E. B. F. Robinson $100, and the residue to her sister Elizabeth A. Robinson, with a provision for payment to her niece Ada C. Robinson and her nephew E. B. F. Robinson of any part of Mrs. Robinson's legacy unpaid at her death, and making a like provision for the amount left to Byron Freel.

On 27th March, 1907, she, upon the same paper, made the following, also holograph, as her will: "I hereby revoke the above and give to my sister Elizabeth A. Robinson all the money I possess save the legacy named above to my

nephew E. B. F. Robinson. Made this 27th day of August, A.D. 1907." This was executed by her as her will, and was witnessed by Wesley Robinson and Marion Robinson. Unfortunately for the effect of this will, Wesley Robinson is the husband of the legatee Elizabeth A. Robinson, and Marion Robinson the wife of E. B. F. Robinson.

Judge Winchester took evidence, and, coming to the conclusion that the whole object of the last will was to benefit Elizabeth A. Robinson, and, as this could not be effective by reason of her husband acting as a witness, the doctrine of dependent relative revocation applied, and the former will remained wholly valid and unrevoked. He accordingly decreed the admission to probate of the former will, and refused probate of the later will.

One of the next of kin not named in the wills now appeals.

The learned Surrogate Judge followed a previous decision of his own, Re Tuckett, 9 O. W. R. 979; and it must be conceded that, if the decision in the Tuckett case is sound, the appeal must fail. I am of opinion that the Tuckett case is not well decided and should be overruled.

The doctrine of dependent relative revocation, in strictness, is applicable only to a case of physical interference with a testamentary document with the intention of revoking it. Of the 3 methods by which a will may be revoked—(1) marriage; (2) will, codicil, or paper; (3) burning, tearing, or otherwise destroying (R. S. O. 1897 ch. 128, secs. 21, 22)—the first does not depend upon intent; the second only in certain circumstances will justify parol evidence as to intent; the third depends wholly upon intent, and parol evidence may always be given of the intent.

Sir J. P. Wilde, in Powell v. Powell, L. R. 1 P. & D. at p. 212, speaking of the doctrine of dependent relative revocation, says: "This doctrine is based on the principle that all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary, in each case, to study the act done in the light of the circumstances under which it occurred, and the declaration of the testator with which it may have been accompanied. For, unless it be done animo revocandi, it is no revocation."

And, consequently, from an early period it has been held that if a testamentary document be physically destroyed or

mutilated because the testator believes that he has made an effective disposition of his estate by a subsequent document, if such document turns out to be wholly ineffective, the former document is held not to have been revoked.

Since the case In Bonis Applebee, 1 Hagg. 144, the doctrine has been extended to the case of a document having been destroyed, etc., as a preliminary to the making of a new one: In re Mitcheson, 32 L. J. P. M. & A. 202.

Many cases have been cited under the same head in which the testator destroyed the will, etc., under the belief that it was invalid; e.g., Giles v. Warner, L. R. 2 P. & D. 401; In Bonis Thornton, 14 P. D. 82; and others. No advantage is to be derived from a too nice distinction between the two classes of cases, the legal result being the same. Strahan's Law of Wills, p. 57, may be referred to on the whole question.

In cases, however, in which the revocation is by a subsequent document, and not some physical act, the rule is different. If there be, by a subsequent document, an express revocation, the intent of such revocation can only be found by an examination of the words of the subsequent document itself.

In Thorne v. Rooke, 2 Curt. 799, at pp. 811, 812, is considered the principle on which the Court proceeds with respect to such papers, having no express revocation. At p. 811 Sir Herbert Jenner says: "I apprehend that, in all these cases, the Court in the first instance must look to the papers themselves in order to discover whether there is anything in the nature of ambiguity or any absurdity arising out of insertion or omission—which you please; and, if it should find that the papers themselves, by necessary implication or from an ambiguity raised on the contents of the instruments, shew that it was not the intention of the deceased that they were to operate, then the Court may admit parol evidence to remove that difficulty. . . . It is not without there is some doubt, some ambiguity, or some absurdity arising from an insertion or omission, that the Court interferes to pronounce that the declaration of the one is revocatory of the other, or holds that it is a substitution for the other."

Such a case is Methuen v. Methuen, 2 Phill. 416. At p. 426: "It is admitted that if there is doubt on the face of the instrument, the Court may admit parol evidence."

The decision in Thorne v. Rooke is approved by Sir James Hannen in Jenner v. Flinch, 5 P. D. 106, 111.

So that, even if there had been no express revocation, as there is, the parol evidence would not have been admissible. See also In Bonis Gentry, L. R. 3 P. &. D. 80.

Then it is simply the case of interpreting the documents by their contents, and there can be no doubt that the later document effectually revokes the former. The new disposition would, were it not for the one witness being the husband of Elizabeth A. Robinson, and the other the wife of E. B. F. Robinson, be to give E. B. F. Robinson the sum of $100, and the remainder to Elizabeth A. Robinson. The will as it stands must be interpreted as though it were wholly effective, and then the legacies declared void: Aplin v. Stone, [1904] 1 Ch. 543; In re Maybee, 8 O. L. R. 601, 4 O. W. R. 421.

The will in itself is perfectly valid; the only difference between its present effect and the effect it would have had, had it not been witnessed by the husband, is that the bequest to Elizabeth A. Robinson is utterly null and void, as is that to E. B. F. Robinson.

Even though the later document had contained a declaration of the reason of the revocation, the result would, I think, be the same—where the substituted legatee fails to take by reason of incapacity in himself to take, the revocation is still wholly effective: Tupper v. Tupper, 1 K. &. J. 665; Quinn v. Buller, L. R. 6 Eq. 325.

Here the only thing which prevents Elizabeth A. Robinson and E. B. F. Robinson from taking is their relationship to one or other of the witnesses. If there were some "clerical rule," as it is called in Perrott v. Perrott (1811), 14 East at p. 440, which prevented the document being effective to deal with the particular property, the case might be different. See Bean v. Bean, 17 Atk. 72.

I have not thought it necessary to say anything of the jurisdiction of a Court to declare the cancellation of a will under an erroneous assumption of facts to be invalid—an entirely different head. See Williams on Executors, 9th ed., pp. 146 et seq.

The revocation is also a revocation of the appointment of executors: Henfrey v. Henfrey, 2 Curt. 468, 4 Moo. P. C. 29; Cottrell v. Cottrell, L. R. 2 P. & D. 397.

The appeal should be allowed. Letters of administration may be granted with the wills annexed; the estate

should be divided as upon an intestacy. We are told that the executors are desirous of the attempted disposition being carried out—nothing will stand in the way of their donating their shares to the disappointed legatee.

All the trouble has been caused by the act of the testatrix herself, and costs of all parties should come out of the estate, as between solicitor and client.

MACMAHON, J. MAY 5TH, 1909.

TRIAL.

MCGIBBON v. J. P. LAWRASON CO.

Pharmacist—Sale of Poison—Prescription for Horse—Addition of Poison to Prescription—Pharmacy Act, R. S. O. 1897 ch. 179, sec. 26—Amending Act 6 Edw. VII. ch. 25—Incorporated Company of Pharmacists—Shop not Managed by Director Qualified as Pharmacist—Damages for Loss of Horse.

The plaintiff, a farmer residing in the township of Esquesing, in the county of Halton, claimed from the defendants, an incorporated company carrying on the business of druggists in the town of Milton, damages for the death of a horse called "Jack," owned by him, which, it was alleged, died from the wrongful administration of a quantity of croton oil prescribed for the horse by a clerk in the drug store of the defendants.

W. N. Tilley and W. I. Dick, Milton, for plaintiff.

L. F. Heyd, K. C., for defendants.

MACMAHON, J.:—The plaintiff owned a pair of horses that he worked on his farm, the one that died and another he called "Dick." Both horses shewed signs of illness on Friday 15th November, which the plaintiff attributed to their having been out at pasture for some time before, and, being brought into the stable, the change from grass to hay and oats caused them to become stockey in the legs; and Archibald McGibbon, the plaintiff's son, who worked the horses and had charge of them, was told by a veterinary surgeon to give them some medicine to overcome their

stockey condition. He, on the 15th, ordered 12 drachms of aloes from a clerk named John McKenzie, in the defendants' shop, and McKenzie, who is a licensed pharmacist, had weighed it out preparatory to forming it into two balls, when Robert J. McKenney, the manager of the defendants' drug store, came in and asked Archibald McGibbon what he wanted the aloes for, was told as balls for the horses that were ill, and McKenney then said he would make up the balls, and took the aloes from McKenzie's hands and prepared two balls, with which he mixed, he said, 18 drachms of croton oil with the aloes, and handed them to Archibald McGibbon, who paid him.

Although McKenney had been for some years employed in a drug store and had passed his primary examination, he was not a licensed chemist and druggist. McKenney admitted in his evidence that he told the plaintiff and his son Archie that he had not given Archie the medicine he asked for, which was bitter aloes. And Mr. McKenzie said that, if McKenney had not interfered, Archie McGibbon would have received the aloes he ordered, and there would have been no croton oil with them.

By sec. 26 of the Pharmacy Act, R. S. O. 1897 ch. 179, "No person shall sell or keep for retailing, dispensing, or compounding, poisons, or sell, or attempt to sell any of the articles mentioned in schedule A. to this Act, or assume to use the title of 'chemist and druggist' . . . in any part of the province of Ontario, unless such person has taken out a certificate under sec. 18 of this Act during the time he is selling or keeping open shop for retailing, dispensing, or compounding poisons, or assuming to use such title."

Amongst the poisons mentioned in schedule A. is "croton oil and seeds."

Section 26 of the Pharmacy Act, as amended by 6 Edw. VII. ch. 25, is: "And no company incorporated under any of the Acts in force regulating joint stock companies shall sell or keep open shop for retailing, dispensing, or compounding poisons, drugs or medicines, as aforesaid, or sell or attempt to sell any of the articles mentioned in schedule A. to this Act, unless a majority of the directors thereof are duly registered as pharmaceutical chemists or chemists and druggists under this Act, and unless one of such directors shall personally manage and conduct such shop, and shall have his name and certificate posted up in a conspicuous

position in the shop, and no person not so registered as a pharmaceutical chemist or chemist and druggist shall in any way interfere with or take part in the management and conduct of such shop, and anything which would be an offence under this Act, if committed by an individual, shall be an offence by each of such registered directors, and by such company, and the prosecution of either of them shall not be a bar to the prosecution of the other."

There were 4 directors of the defendant company, and two of them, James H. Fleming and J. P. Lawrance, were licensed chemists and druggists, living in Toronto. Fleming said that in 1906 he was in Milton 2 or 3 times a month, and during the early part of 1907, and stayed about 3 hours each time he was there. Fleming said that Lawrance came to Milton oftener than he did, as he came 3 or 4 times in each month, ariving in the morning and remaining until the evening.

A director of the company who was a chemist was not "personally managing and conducting such shop," as during the greater part of the time, and on the day in question, it was managed by McKenney, who was not a certified chemist or druggist.

One ball was given to each of the horses "Jack" and "Dick" on Sunday morning the 17th November, and they were attended from the 17th until Saturday the 22nd, by Thomas Telfer, a veterinary surgeon, who said from the "awful purging" caused by the medicine to the horse "Jack" he concluded that croton oil had been mixed with the aloes.

Archie McGibbon said that 4 or 5 days after receiving the balls from McKenney, he asked him what he had put in them, and his reply was "one ounce of croton oil." There must have been some mistake as to this, as, if one ounce of croton oil had been mixed in the two balls, both horses would have died within 6 hours of the administration of the medicine.

Thomas Telfer said he would not expect a horse to die from 12 drachms of aloes and 10 drops of croton oil. He, however, attributed the death of the horse "Jack" to an overdose of croton oil.

After the death of the horse "Jack," a post mortem was held by Thomas Telfer and his brother Joseph, also a veterinary surgeon, and they same to the conclusion that death was caused by an overdose of croton oil mixed with

the aloes. They thought that death caused in that way was not much different from death caused by peritonitis. But in the latter case there would not be found extravasation of blood—the blood oozing out of the blood vessels: nor would the lungs be congested as found in the dead horse.

Mr. Faskin, the veterinary, an expert called by the defendants, impressed me most favourably by the clearness with which his evidence was given. In his opinion, the death was caused by inflammation of the bowels. But, as he did not see the horse, I accept the evidence of those who performed the post mortem.

The defendants are liable for having, through an assistant, compounded croton oil, one of the poisons named in schedule A. to the Act, when a director who was a chemist was not personally managing such shop. See the judgment of Hawkins, J., in Pharmaceutical Society v. Wheeldon, 24 Q. B. D. at p. 689.

I assess the damages at $215, being $200, the value of the horse, and $15, paid the veterinary.

There will be judgment for the above amount, with High Court costs.

MAY 5TH, 1909.

C.A.

STANFORD v. IMPERIAL GUARANTEE AND ACCIDENT INSURANCE CO. OF CANADA.

Accident Insurance—Policy Issued to "Traveller"—Accidental Death of Assured while Acting as Brakesman—Occupation or Exposure to Danger Classed as More Hazardous—Provisions of Policy—"Temporarily or Permanently Engaged."

Appeal by defendants from the judgment of CLUTE, J., at the trial in favour of the plaintiff.

The action was brought to secure $2,000 secured by an acident insurance policy for that sum, issued by the defendants upon the plaintiff's late husband, one Charles Finger Stanford, who was killed at Bowmanville by a train of the Grand Trunk Railway Co. And the plaintiff claimed under a special term of the policy an additional sum of

$2,000, because, as was alleged, the deceased was killed while riding as a passenger on the train, which latter claim however, was not allowed, and judgment was given for the first mentioned sum and interest.

E. B. Ryckman, K.C., and C. W. Kerr, for defendants.

C. Elliott, for plaintiff.

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

GARROW, J.A.:—When the insurance was effected, the deceased was described as a commercial traveller, but he ceased to be a commercial traveller in the month of May next before his death, and was out of employment until the day of the accident. A day or two before, he applied for employment as brakesman on the railway, and was making his first trip in that capacity when he was killed. The company's practice is to permit applicants for such employment to make one or more trial trips before actual employment takes place. There are different classifications of risks in use by the defendants in their business: commercial travellers are in a class called "select," and pay at a rate of $4 per thousand of insurance, while brakesmen are in a class called "special contract," and pay at a rate of $27 per thousand, and will only be insured up to $500.

The defendants do not contend that the plaintiff's whole claim should be defeated, but contend that it should be reduced to such sum as would have been paid to a brakesman for the premium which was paid, for which contention they rely on the 5th condition, which reads as follows: "That if the insured meet with an accident while temporarily or permanently engaged in any occupation or exposure to danger classed by the company as more hazardous than that in which he is insured, or approximating thereto, if not mentioned in the company's schedule of risks, the sums payable under this policy shall be such proportion of the sums herein named as the premiums paid by the insured would entitle him to be insured for under such more dangerous classification." And, in my opinion, this contention, which is apparently fair and just, and in accordance with the proper construction of the contract, ought to prevail.

Clute, J., was evidently of the opinion that the case fell within the authority of McNevin v. Canadian Railway Accident Insurance Co., 2 O. L. R. 531, and 32 S. C. R. 194, where the corresponding condition was as follows: "If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard."

But there is, I think, an apparent, and, indeed, vital, difference between the language of the two conditions by the insertion in the former of the words "temporarily or permanently," for no one can read the judgments in the McNevin case without seeeing that the result really rested upon this, that the "occupation" in the condition in that case was held to mean an occupation of a more or less permanent character, and that the mere doing of an isolated act properly belonging to another and more hazardous occupation would not prevent recovery.

Clute, J., upon this distinction being pointed out, held that the mere use of the word "temporarily" did not affect the matter, that the use of that word only enlarged the scope of the clause in so far as to cover the case of a person in fact having an engagement in a more hazardous business, although such employment was only temporary, but did not cover the case of a person who, although not engaged, was in fact discharging the duties of the more hazardous employment. This seems to make the result depend upon the meaning of the word "engaged," which Clute, J., evidently treated as the equivalent of "hired," or "employed."

The important words are "temporarily or permanently engaged in any occupation or exposure to danger."

We were told upon the argument that the word "temporarily" was inserted expressly to meet the McNevin case, the form having been prepared after that decision, which seems probable, although unimportant; but words have an unfortunate habit of sometimes miscarrying the intended meaning. The object of the conditions is, I think, plain, namely, to provide against a liability not contracted for and not paid for, a perfectly proper object. And, if the language of the document will reasonably permit the accomplishment of that object, there ought to be no objections to its success.

The contract was, of course, prepared by the defendants. Its language is their language, and if it is ambiguous, or

if there is a real doubt about what its true meaning is, the doubt should be resolved favourably to the other party to the contract. But we are not justified in "creating a doubt or magnifying an ambiguity when the circumstances of the case raise no real difficulty:" per Lindley, L.J., in Cornish v. Accident Insurance Co., 23 Q. B. D. 453, at p. 456.

"Engage" is a word of various meaning, depending on the circumstances in which it is found, and, therefore, to that extent, ambiguous. But it does not necessarily mean a hiring or contract of any kind. One of its meanings, given in the Century Dictionary, is: "to occupy one's self; be busied; take part, as to engage in conversation; he is zealously engaged in the cause;" and this, in my opinion, is the more reasonable and proper meaning to ascribe to it in this contract. The thing intended to be provided against was not contracting to do—there being no danger in a mere contract—but actually doing the dangerous thing. The condition would certainly not have been broken by merely entering into a contract to become a brakesman, unless that was followed by the assured actually doing the work of a brakesman. And, if he was actually doing the work of a brakesman when injured, it is, in my opinion, a matter of no moment whether he had or had not at the time a permanent or even a temporary contract with the railway company.

I am further of the opinion that the deceased was at least temporarily "engaged," within the meaning of the term, even as understood by Clute, J. He had applied to become a brakesman, and he was spending his first day in that employment, in, as the evidence, shews, the usual course of practice with a beginner. He was there by the consent of the railway company to learn how to become a brakesman, and the evidence shews that he was actually discharging the duties of a brakesman upon the trip.

Thomas T. Smith, a brakesman on the same train, said of the deceased, in his evidence:—

"Q. What was he doing on the train? A. He tried to follow up the ordinary work we done.

"Q. Did you see him handling freight? A. Yes.

"Q. Where? A. Pickering and Oshawa.

"Q. That is loading and unloading? A. Yes."

Henry Doyle, the conductor on the trip, said that when the deceased came to the train he asked how long the trip would be, and, on being told 2 days, said he was provided

with food in his lunch basket for that period. He also shewed Doyle his order from the yard-master allowing him to go on a trial trip as a brakesman, which order said "to take Mr. Stanford out on trial trip as brakesman, at his own risk and expense, and report to me on arrival as to his capability as brakesman.'

The evidence further shews that it is usual for a beginner to make two trips by way of trial, and, as each trip apparently occupied 2 days, this would mean 4 days' apprenticeship, after which, if found satisfactory, the apprentice would be hired as a brakesman. And, while making the trial trips, the apprentice, although paid no wages, was, as the evidence shews, under the orders of the conductor, just as were the other brakesmen.

Upon the whole, I entertain no doubt that the McNevin case, so much relied on, does not apply, and that upon the proper construction of the contract the plaintiff is only entitled to recover such sum as what was paid by way of premium would have secured as indemnity to one following the occupation for the time being of brakesman, which sum appears to be fully covered by the sum of $337.35, paid into Court; and that to that extent the appeal should be allowed with costs. And the plaintiff must pay the costs of the action subsequent to the payment into Court.

MAY 5TH, 1909.

C.A.

BANK OF OTTAWA v. TOWNSHIP OF ROXBOROUGH.

Municipal Corporations — Drainage — Municipal Drainage Act—Claim for Payment for Construction Work—Assignment—Forum—Action in High Court—Summary Dismissal for Want of Jurisdiction—Powers of Drainage Referee.

Appeal by plaintiffs from order of a Divisional Court, 11 O. W. R. 1106, affirming judgment of FALCONBRIDGE, C.J., ib. 320.

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

W. E. Middleton, K.C., and W. Greene, Ottawa for plaintiffs.

C. H. Cline, Cornwall, for defendants.

Moss, C.J.O.:—It appears to me, with deference, that it was most unfortunate that the important questions which have been raised and discussed, and which involve such serious consequences, should have been brought up, dealt with, and disposed of in the form in which they have come before the Court.

The objection raised by the defendants is to the plaintiffs' right to maintain the action in the High Court of Justice, on the ground that it has no jurisdiction to entertain it—that the sole jurisdiction is vested in another tribunal created and established under the provisions of the Municipal Drainage Act.

It does not very clearly appear whether the point of law thus raised was brought up for hearing and disposal under Rule 259 or Rule 273. It was probably intended to deal with it under the former Rule, and it is probable that it was by consent of the parties set down for hearing, though that is not shewn in the proceedings. But, as I understand the practice, no matter under which Rule it was brought on for hearing, the rule is the same, that in considering the point of law raised the party raising it must admit, for the purposes of the argument, that the pleading on which it is alleged the question arises is true in fact, just as under the old practice a party demurring was taken to admit the truth of the pleading demurred to.

The objection taken in the statement of defence is really equivalent to a demurrer to the statement of claim; per Lord Esher, M.R., in Solomon v. Warner, [1891] 1 Q. B. 734, at p. 735. See also Armour, C.J., in Hollender v. Ffoulkes, 26 O. R. 61, at p. 65.

The affidavit filed on behalf of the defendants is merely formal. It does not assume to traverse any of the allegations of fact set forth in the statement of claim, but merely expresses a belief, founded on information stated to have been received from others, that there is no claim except claims in connection with drainage contracts, and even that is called in question by the counter-affidavit filed on behalf of the plaintiffs.

For the purposes of the argument as to want of jurisdiction, the allegations of the statement of defence ought not to be regarded. Unless this were so, a defendant might support his point of law by putting upon record statements which were untrue in fact and which he would utterly fail to support by evidence at the trial. No doubt, the parties

might admit all the essential facts that could be proved on both sides, and thus reduce the matter to a pure point of law, but that is not this case.

Looking, therefore, at the allegations of the statement of claim, which the plaintiffs undertake to prove, if permitted, and assuming as, for the purposes of the discussion of the point of law it should be, that they are true, I am unable to say at present that the High Court has not jurisdiction to entertain the action. The short substance of the 3rd to the 12th paragraphs, inclusive, is that, on or about certain specified times, certain persons therein named performed work on drainage construction for the defendants, and that in respect of such work large sums of money became due and payble to the said persons, and that the debts, accounts, and moneys due or owing to them by the defendants were duly transferred by the said persons to the plaintiffs, and that express notice in writing of such assignments were given to the defendants.

Then follow some most material allegations, viz.:—

Paragraph 13. The said persons fully performed the said works of drainage construction, and all conditions have been fulfilled and all times elapsed whereby the said persons were entitled to be paid a large sum of money, to wit, the sum of $35,000 or thereabouts.

Paragraph 14. The defendants, notwithstanding such assignments and notices thereof, have failed, neglected, and refused to pay the plaintiffs the said sum of $35,000.

Paragraph 15. The defendants, notwithstanding the assignments and notices thereof, have, contrary to the said assignments and notices, paid to the said persons large sums of money to which the plaintiffs were entitled under the said assignments, to wit, the sum of $20,000 or thereabouts.

The claim is for ascertainment of the amount due and owing and for payment thereof to the plaintiffs, and for a declaration that payments made after notice of the assignment are of no effect against the plaintiffs.

How can it be said that upon this statement of claim it manifestly appears that the High Court has no jurisdiction to entertain the action, and that it does so manifestly appear that the action should be summarily dismissed?

There is presented a plain, simple case of an indebtedness by the defendants, assigned to the plaintiffs, the time for payment elapsed, but the defendants have not paid the plaintiffs, and, not only that, but, having in hand money

payable to the plaintiffs by virtue of the assignments and notices, they have paid said moneys to the amount of $20,000 to their original creditors, the plaintiffs' assignors.

Why should such a case as is here presented be withdrawn from the High Court and relegated for adjudication to any other tribunal? The High Court is constantly engaged in dealing with claims similar in character. There is nothing to suggest the necessity of any investigation by the Drainage Referee. For all that appears, the defendants either have the necessary funds in hand or have provided for their payment by by-laws assessing the lands benefited by the works or drainage construction performed by the plaintiffs' assignors. It is shewn that they had in hand moneys out of which they paid the plaintiffs' assignors $20,000 in respect of these works or drainage construction, which should have been paid to the plaintiffs.

At present this does not appear to be a case for the application of sec. 95 of the Municipal Drainage Act. That section deals only with cases of damages occasioned to others by reason of the construction of the drainage works in the way provided for by the municipality, and does not refer to the claim of a contractor or workmen to be paid for work performed by them, which is the nature of the claim shewn by the plaintiffs in this case.

It is impossible to foretell what may develop when the facts are investigated at the trial, but it will then be for the trial Judge to deal with the case. In the meantime the plaintiffs are entitled to an opportunity of having their action tried in the forum which they have selected.

In my opinion, they should not have been deprived of that right upon a summary proceeding, and the case should have been allewed to proceed to trial in the ordinary way.

The appeal should be allowed, and there should be substituted for the order pronounced by Falconbridge, C.J., a declaration that the points of law should not now be determined, but should stand to be determined at the trial of the action.

Costs throughout to the plaintiffs.

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

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

MAY 5TH, 1909.

C.A.

RONSON v. CANADIAN PACIFIC R. W. CO.

Damages—Fatal Accidents Act—Death by Defendants' Negligence of Wife and Mother of Plaintiffs—Assessment of Damages by Jury—Husband's Loss—Children's Loss—Expectation of Pecuniary Benefit—Excessive Damages—New Trial.

Appeal by defendants from judgment at the trial of the Judge of the County Court of Elgin, sitting for MAGEE, J., upon the findings of a jury, in favour of the plaintiffs.

The action was brought to recover damages for the death of Eleanor Ronson through the negligent operation of an engine and train by the defendants upon their railway.

G. T. Blackstock, K.C., and Angus MacMurchy, K.C., for defendants.

C. A. Masten, K.C., and V. A. Sinclair, Tilsonburg, for plaintiffs.

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

GARROW, J.A.:—Eleanor Ronson was the wife of James Ronson, and the plaintiffs Charles L. Ronson, George E. Ronson, and Sarah E. Moffatt, are their children. The plaintiff Edgar Sandham is the executor of the last will of Eleanor Ronson, and the plaintiffs Charles L. Ronson and George E. Ronson are the executors of the last will of their father, who died after the accident and before action.

The accident occurred on 3rd September, 1907, but Eleanor Ronson survived until 12th November, 1907. The defendants at the trial admitted negligence. The jury assessed the damages at the following sums: to the executors of James Ronson, $325; to Sarah Moffatt, the daughter, $600; to Charles L. Ronson, a son, $700; and to George Ronson, a son, $1,500.

James Ronson was a farmer, living with Eleanor Ronson, his wife, upon lands apparently owned by him, in the township of Middleton, in the county of Norfolk.

Eleanor Ronson, according to the evidence, was a capable, managing sort of woman, but there is no evidence that she had any considerable property or means of her own. What she managed, and no doubt managed very well, was, as far as appears, wholly the property of her husband. She was evidently very fond of her children and of helping them, but always apparently out of her husband's property. In addition, she was always ready with competent advice and with active help in time of sickness or other stress.

The eldest child was Sarah. She was 36 years of age, and had been married and away from her parents' home for 12 years. The next was Charles. His age was 27 years. He, too, had been married for some years, and was doing for himself on land which his father had sold to him at a reduced price, helping him also with his live stock. The youngest was George, 21 years, who resided at home, and who, after the accident, and before his mother's death, also married and went to live on land supplied by his father.

The damages recoverable under R. S. O. 1897 ch. 166 are entirely pecuniary in their nature. The plaintiffs must shew by reasonable evidence that but for the negligent act of the defendants they were likely to have gained the amount of the damages which they seek to compel the defendants to pay. And they must shew not merely willingness on the part of the deceased, but ability, that is, the means to do that which was not done because of the death. These children were all beyond the age when they required a mother's care in the ordinary sense, or, with spouses of their own, were very likely to be guided by a mother's advice.

The mother's own property was of so small an amount as to be quite insignificant as a source of pecuniary assistance to her children, and the personal services of a woman 62 years of age, as nurse or as a helper in the field, could in any event not have been reasonably expected to continue very long. There is not a particle of evidence (if it is of any consequence) that in helping the children out of her husband's property, she was not acting simply as his agent, and with his entire concurrence. And, in the absence of evidence, that is, I think, the proper presumption. So that on every ground, and however viewed, the large

damages assessed by the jury are not based upon any proper view of the facts, and are at least grossly excessive.

I say "at least," because I have had, and still have, considerable doubt in the case of some if not of all the children, whether there was any reasonable evidence for the jury of pecuniary loss in any proper sense. But, upon the whole, I think it will be safer to permit the case to go to a new assessment, leaving this question entirely open.

The judgment in favour of the executors of James Ronson was not, I think, successfully or even seriously attacked, and may stand, and the appeal as to it be dismissed with costs.

The appeal should otherwise be allowed, and with costs, for the plaintiffs fail in that which was seriously in contention.

The costs of the last trial, except as to the plaintiffs the executors, should, in the circumstances, be reserved to be dealt with by the trial Judge.

MAY 5TH, 1909.

C.A.

LAMONT v. CANADIAN TRANSFER CO.

Carriers—Lost Luggage—Contract of Carriage—Receipt—Condition Limiting Liability—Notice—Agents of Owner—Alteration of Oral Contract—Negligence—Inevitable Accident—Damages not Limited to Amount Specified in Notice.

Appeal by defendants from order of a Divisional Court (12 O. W. R. 882) reversing, by a majority, the judgment of BOYD, C., the trial Judge, who dismissed the action (11 O. W. R. 953), and awarding the plaintiff judgment for the value of a trunk and its contents carried by defendants for hire, and lost by them.

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

G. H. Watson, K.C., and B. N. Davis, for defendants.

R. S. Robertson, Stratford, for plaintiff.

Moss, C.J.O.:—There is nothing in the pleadings or otherwise to prevent an examination of the actual facts as proved at the trial, or the ascertainment of the position of the parties towards each other as appearing in the evidence.

The terms of the defendants' charter of incorporation, as well as the testimony given on their behalf, shew that the defendants are common carriers. They are exercising a public employment and undertake to carry and deliver (among other things) baggage or luggage for customers to and from railways, steamboats, and other public conveyances.

And of this opinion was the learned trial Judge, who said (11 O. W. R. p. 953): "The defendants are, no doubt, in the position of common carriers, and they have become incorporated under the general Dominion statute for the purpose of carrying on a baggage transfer company."

Further on (at p. 954) the learned trial Judge stated the law applicable to persons in the position of common carriers as follows: "The law is that a common carrier who gives no notice limiting his liability, is an insurer of the property received; but, if he gives notice, which is brought home to the customer, that he will be liable only to a limited extent, he ceases to be an insurer beyond that limit."

The onus is on the carrier to prove that he has brought home to the customer notice limiting the liability.

The defendants admit the receipt by them of the trunk and its loss, but do not seek to escape from all liability. They set up notice to the plaintiff of a stipulation or condition limiting their liability to $50. And the question is, whether they have proved that there was incorporated in the contract between the plaintiff and them a stipulation, express or properly implied, the effect of which was to limit the defendants' liability. The answer depends on whether the defendants have brought home to the plaintiff notice of the condition printed on the "receipt" for his trunk, which the plaintiff has in his possession. The condition limits the defendants' liability to $50, but ought the plaintiff to be held to be aware of and to have accepted the condition as a part of the contract for the carriage and delivery of his trunk?

It may be assumed that, if the defendants had been able to prove that at the time of the delivery of the trunk to the

defendants and the payment of the 25 cents charge for its carriage to and delivery at 53 Robert street, the "receipt" had been given to and received by the plaintiff's father-in-law, or by Horn, both of whom acted for him in transferring the trunk to the defendants' custody, it would not have been necessary for them to have gone further in the way of affecting the plaintiff with notice of the condition. But that was not this case. The "receipt" was not delivered contemporaneously with the assumption by the defendants of the custody of the trunk and the receipt of the charge for carriage and delivery. That being the case, the defendants were not entitled to rely upon the mere after-taking of the receipt as sufficient. They were called upon, in the circumstances, to shew either that they took other steps beyond mere delivery of the receipt to draw attention to its special nature, or that, in some reasonable way, knowledge of the condition was brought home to the plaintiff, who accepted it as a term of the contract. Actual knowledge of the existence of the condition cannot, upon the evidence, be imputed to the plaintiff, his wife, or any of those concerned in his behalf, nor is there any good reason for inferring that any one of them supposed or believed that the defendants' course of doing business for the travelling public was subject to any special condition respecting the liability of the defendants in case of loss or damage to the property they undertook to carry.

The utmost that appears is that Horn knew that the defendants were in the habit of usually giving receipts, but he was not aware of their form or contents.

The defendants have failed to shew a special contract taking them, as respects liability for loss, out of the ordinary rule, and the appeal fails.

GARROW, J.A., gave reasons in writing for the same conclusion.

OSLER and MACLAREN, JJ.A., also concurred.

MEREDITH, J.A., dissenting, agreed with the view of BOYD, C., for reasons stated in writing.

Appeal dismissed with costs.

MAY 5TH, 1909.

C.A.

HANSFORD v. GRAND TRUNK R. W. CO.

Railway—Injury to and Consequent Death of Person Crossing Track of Defendants—Injury Done by Engine of another Railway Company Using Tracks under Agreement with Defendants—Cars Placed on Track by the other Company so as to Obstruct View of Deceased—Fault of Station Agent Paid by Defendants—Findings of Jury—Cause of Accident—Negligence of other Company—Station Agent Servant of both Companies—Circumstances of Employment—Damages—Fatal Accidents Act—Pecuniary Interest of Father in Continuance of Life of Lad of 14—Excessive Damages.

Appeal by defendants from Judgment of CLUTE, J., upon the findings of a jury, in favour of plaintiff in an action for damages for the death of his son, caused, as alleged, by defendants' negligence.

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

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

A. H. F. Lefroy, K.C., and B. H. Ardagh, for plaintiff.

GARROW, J.A.:—On 18th February, 1908, Percy Hansford, aged 14 years, the plaintiff's son, was driving a horse and waggon south along Windermere avenue, a little to the west of the city of Toronto, intending to cross the railway tracks used by the defendants, and also used by the Canadian Pacific Railway Company, under an agreement with the defendants, when he was struck by an engine attached to an express train of the Canadian Pacific Railway Company, and killed.

The jury found: (1) that the defendants were guilty of negligence; (2) by allowing cars to stand on the highway; (3) "Q. Did the defendants by their agents or employees wilfully permit a car or cars or any portion thereof to stand on any part of the crossing or highway in question for a longer period than 5 minutes at one time, immediately

prior to the accident? A. Yes." (4) "Q. If you find that cars were so placed on the highway, who placed them there? A. C. P. R." (5) "Q. Whose duty was it to see that the cars were properly placed and not allow them unlawfully to obstruct the highway? A. The G. T. R. agent at Swansea." (6) "Q. Was the leaving of the cars on the highway the cause of the accident? A. Yes." (7) No contributory negligence; and (8) damages $2,500; for which there was judgment.

The railway track was originally owned and used exclusively by the defendants, but by an agreement (afterwards confirmed by statute) dated 13th May, 1896, made between the defendants and the Canadian Pacific Railway Company, the former demised and leased to the latter, for a term not yet expired, "the right jointly and equally with the party of the first part (the defendants) of using and enjoying the road, roadbed, track, side-tracks, switches, bridges, stations, buildings, tanks, coal-shutes, cattle-guards, and all the fixtures pertaining thereto, of the road of the party of the first part, and a full and unrestricted and unincumbered use in common with the said party of the first part of the said party's railroad property and fixtures above mentioned between Hamilton Junction and the city of Toronto. . . ."

Clause 6 provides that the rules regulating the government of trains and of employees of both parties, and all rules regulating the use of the road and fixtures, shall be those prescribed by the defendants for the government of its own employees, the men employed upon the trains and in charge of the motive power of the Canadian Pacific Railway Co. being for the time, while moving upon the road of the defendants, as fully under the directions of the officers and agents of the defendants as if they were in the service of the defendants.

Clause 7 provides that "the men employed upon the repairs and in the operation of the said joint section, and as switchmen, agents, and operators, though paid by the said party of the first part (the defendants) shall be considered as in the joint employ of the parties hereto . . ."

The 8th and 9th clauses were also referred to on the argument, but have no direct bearing upon the questions arising on the appeal, except to shew that it was apparently the intention that in operating the railway each company should be solely responsible for the negligence of its own employees.

The accident occurred at or near the station at Swansea, where one Peter Slair was the station agent. He was appointed, and, in the first instance, paid, by the defendants, but his salary was in part refunded to the defendants by the Canadian Pacific Railway Co., and he acted as agent for both companies under the agreement.

As station agent he had charge of the yard, and his duty required him to direct the placing of such empty freight cars for both companies as arrived at his station in the ordinary course of business. For convenience it had been arranged that the shunting required to be done on behalf of the defendants should be done early in the forenoon, and that the shunting for the other company should be done later in the forenoon—an order of procedure which had, apparently, been followed for some time before the day of the accident. On that day the defendants' shunting engine arrived about 9 o'clock, and left two empty cars at a warehouse near the station. No one has said that those cars were left upon the crossing by the defendants' servants.

The shunting engine of the other company arrived, with a number of freight cars, between 11 o'clock and noon, and were still in the yard when the accident occurred, and in the course of shunting placed the cars upon the crossing, as found by the jury.

The facts not now in dispute, therefore, are that the cars were unlawfully placed where they were, upon the crossing, by the servants of the Canadian Pacific Railway Company, in consequence of which the deceased was unable to see along the track, and was run over and killed by an engine also in charge of other servants of the same company.

It was not contended that the defendants are liable merely because of their ownership of the railway, as for a nuisance, nor that the defendants are jointly liable with the Canadian Pacific Railway Company. But what is contended on the part of the plaintiff is that, because the station agent was the defendants' servant, and neglected as such servant to cause the cars to be properly placed so as not to stand upon the crossing, the defendants are liable.

If either company is liable, the liability of the other company is certainly the more obvious of the two. That company is in lawful joint possession of the railway with the defendants. It was its cars which blocked the view, improperly placed there by its servants, and it was an engine

manned by others of its servants which actually ran the poor boy down. That negligence was, therefore, clearly the direct potential cause of what occurred, and not the so-called negligence, assuming it to be established, of the station agent, which, after all, was a cause secondary and remote.

Both companies cannot be both severally liable. This was pointed out by Littledale, J., in his celebrated judgment in Laugher v. Pointer, 5 B. & C. 547, where he said (p. 559) that the law does not recognise a several liability in two principals who are unconnected; if they are jointly liable, you may sue either, but you cannot have two separately liable. This is quoted with approval in Reedie v. London and North Western R. W. Co., 4 Ex. 244, at p. 257, by Rolf, B., delivering the judgment of the Court, who says: "This doctrine is one of general application, irrespective of the nature of the employment, and, applying the principle to the present case, it would be impossible to hold the defendants liable without at the same time deciding that the contractors are not liable, which it would be impossible to be contended."

So her to accuse the defendants is plainly to excuse the other company, a result which, in my opinion, the evidence would not warrant.

But, in any event, the station agent was, in a sense, the joint agent of both companies; and, in receiving and placing empty cars for the use of customers of the Canadian Pacific Railway Co, a matter of no interest to the defendants, he was, in my opinion, acting solely for the former company.

The question is not, I think, to be determined solely by considering who employed or who paid him. The subject, it is true, has been controversial for a long time, but the effect of the cases, especially the more modern, is that the whole circumstances of the employment must be looked at, and the real effect of the actual relation existing must not be lost sight of in deference to a formula about hiring or paying. The question is not so much whose servant he is, as whose hand did the act, the hand of the defendants or that of the other company. In Jones v. Scullard, [1898] 2 Q. B., it is said that a man may at the same time in law serve two masters, and that that one alone will be answerable for his neglect in whose service he was acting at the time of the default, and to whose control he was subject.

The same thing is said in effect in Rourke v. White Moss Colliery Co., 2 C. P. D. 205, and in Murray v. Currie, L. R. 6 C. P. 24. And the principle of these cases is further affirmed in Dewar v. Tasker, 22 Times L. R. 303, and Perkins v. Stead, 23 Times L. R. 433. See also Kimball v. Cushman, 103 Mass. 194, at p. 198, where it is said by Wells, J., that it need not be shewn where, as in that case, what may be called the special master is sued, that the servant should be under any special engagement of service to him, or entitled to receive compensation from him directly. It is enough that at the time of the accident he was in charge of the defendant's property (a horse) by his assent and authority, engaged in his business, and, in respect of that property and business, under his control.

There are, therefore, no real difficulties in the way of doing justice by holding, upon the undisputed facts in evidence, either as matter of fact or of law, upon the proper construction of the agreement, or upon both, that the station agent was as to these cars, and his power of control over them at the time of the injury, the agent of the Canadian Pacific Railway Co. alone. And, if that is the proper, as it certainly is the just, conclusion, there must, in any view, be an end to the case.

The case to which we were referred of Grand Trunk R. W. Co. v. Huard, 36 S. C. R. 655, does not, I think, govern this. There is a general similarity in the terms of the agreements in both cases, but there is this very decided difference, that there the sole cause of the collision was the negligence of the train despatcher, while here the effective cause, in which at the most the station agent played a very minor part, was the act of the trainmen in charge of the cars of the Canadian Pacific Railway Co.

In any event, there must have been a new trial, because the damages were assessed at a sum quite beyond what any view of the evidence would fairly warrant. But it would be a pity to grant a new trial and put the parties to all the additional expense, if in the end the plaintiff must fail.

The appeal should, in my opinion, be allowed, and the action be dismissed, both with costs, if demanded.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented, being of opinion, for reasons stated in writing, that there should be a new trial, upon the ground that the damages were excessive.

MAY 5TH, 1909.

C.A.

REX v. O'GORMAN ET AL.

Criminal Law—Conspiracy—County Court Judge's Criminal Court for County of York—Jurisdiction—Indictment—Several Counts—Offences Alleged to have been Committed in the County of York and in another County—Preliminary Examination Held by Police Magistrate at Toronto—Defendants Residing out of County—Election to be tried by County Court Judge—Failure to Establish Offence Committed in County of York—Overt Act of one Defendant as Alleged in one Count, Committed in County of York—Evidence—Corroboration.

Case stated by the Judge of the County Court of York, sitting in the County Court Judge's Criminal Court, upon the trial of the prisoners before him upon charges of conspiracy of which, subject to the case, they were found guilty.

The charge sheet or indictment contained 23 counts, all for offences, ranging over several years, against the election law, including bribery and other corrupt practices, interference with ballots and other election papers, opening a ballot-box, and other offences of a similar nature.

In many, but not all of the counts, the offences were said to have been committed at the city of Toronto, in the county of York, and at the city of London, in the county of Middlesex, and at other places in the province, unknown.

None of the prisoners resided in the county of York, but were brought into that county solely by virtue of process issued under the information, which was laid before and the preliminary examination held by the police magistrate at the city of Toronto.

The questions reserved were as follows:—

"(1) The accused not being found or apprehended in the county of York, but having been committed for trial by the police magistrate for the city of Toronto, and a true bill upon the indictment indicated above having been found against them by the grand jury at the assizes in Toronto, and having been admitted to bail to appear and stand their trial at the assizes, and the accused before the sittings of

the Assize Court having surrendered to the sheriff of the county of York, and elected trial before me; under these circumstances and the circumstances shewn in the evidence, had I jurisdiction to try the case?

"(2) Was it competent for the Crown to charge in the various counts in the indictment, or charge sheet, a conspiracy 'at the city of Toronto, in the county of York, and at the city of London, in the county of Middlesex, and at other places,' and was the Crown bound to elect to proceed upon some one conspiracy in each count, and is the indictment or charge sheet bad for that reason?

"(3) Is there evidence sufficient to support my finding of guilty as against the accused or any of them?

"(4) I being of opinion that Pritchett is not reliable and ought to be corroborated in essential points, is there corroboration in the evidence as to the connection of O'Gorman with Pritchett in any conspiracy charged in the charge sheet?

"(5) The illegal acts which it is charged that the accused conspired to do being no longer punishable as such, because barred by statute limiting the time for bringing prosecutions therefor, can a charge of conspiracy to do the act barred be maintained?

"(6) The defendants moved before Mr. Justice Britton for an order changing the venue in this case to London. The Crown then proposed to prove the accused guilty of a conspiracy in Toronto, and the Judge refused the order to change the venue, stating in his reported judgment: 'Upon the assumption that the accused will not be convicted unless the Crown establishes that they did in fact commit one or more of these offences at Toronto as charged, what is there before me to shew that it is expedient to the ends of justice that the trial should not take place in Toronto?' In view of the accused having delivered themselves to the sheriff of the county of York, and requiring a summary trial before me, had I, as Judge of the County Court of York, exercising jurisdiction under the sections of the Criminal Code applicable in that behalf, jurisdiction to try the accused, or, owing to the fact that the Crown had failed to establish any offence against any of the accused except O'Gorman committed in Toronto, should I have discharged the accused other than O'Gorman?"

The case was heard by Moss, C.J.O., Osler, Garrow, Maclaren, JJ.A., and Teetzel, J.

G. Lynch-Staunton, K.C., and E. Bayly, K.C., for the Crown.

E. F. B. Johnston, K.C., J. M. McEvoy, London, and George Wilkie, for the defendants.

Garrow, J.A.:—Two separate and distinct conspiracies were found by the learned Judge to be established—one between the prisoner O'Gorman and a man called Pritchett, to unlawfully spoil or otherwise interfere with ballots; the other between all the defendants, for bribery and other corrupt and illegal acts in connection with an election held in the city of London to the House of Commons in June, 1905.

In the first mentioned conspiracy there was evidence, if believed, of certain overt acts at the city of Toronto; but, treating the second as a separate and distinct offence, as was held by the learned County Court Judge to be the case, the evidence would not warrant a similar conclusion as to it. It is, indeed, beyond question that the latter offence was wholly committed at the city of London, with no overt acts, so far as appears, outside of the county of which that city forms a part, which circumstance gives rise to the serious question of jurisdiction raised by numbers 1 and 6 of the questions submitted.

By the common law the rule was well established that the trial of all criminal offences must take place in the county or district in which the crime was committed: see Rex v. Harris, 3 Burr. 1330. But, in the case of the crime of conspiracy, the trial might be had either where the criminal agreement, the gist of the action, was made, or where any overt act occurred: see Regina v. Connolly et al., 25 O. R. 190, and the cases there cited.

And the rule of the common law was not, I think, intended to be abrogated by the provisions of the Criminal Code, except to the extent therein expressly mentioned. The theory still is that local offences shall be tried locally, and not alone out of consideration for the prisoner, but in order that each locality may in this way be made to bear its proper share of enforcing the criminal law against he local offender.

Nothing in the Code would allow a justice of the peace at Toronto to receive an information and issue his warrant

for a crime wholly committed in the county of Middlesex, if the party charged resided and actually was there at the time the information was laid.

The indictment must, except in the case of an indictment ordered by a Judge or by the authority of the Attorney-General—see secs. 870, 873—be preceded by a preliminary inquiry before a justice, which, of course, means a justice having territorial jurisdiction: see sec. 653 et seq. And in this way, and subject of course to the exceptions, the common law rule as to locality is still effectually maintained.

The exception here relied on as conferring jurisdiction is that contained in sec. 577, which reads as follows: "Unless otherwise specially provided in this Act, every Court of criminal jurisdiction in any province is competent to try any crime or offence within the jurisdiction of such Court to try, wherever committed within the province, if the accused is found or apprehended or is in custody within the jurisdiction of such Court, if he has been committed for trial to such Court, or ordered to be tried before such Court, or before any other Court, the jurisdiction of which has by lawful authority been transferred to such first-mentioned Court under any Act for the time being in force."

This section first appeared in the Criminal Code of 1892, as sec. 640. Before that there were a number of special provisions upon the subject of the place of trial of various criminal offences: see the Act respecting Criminal Procedure, R. S. C. ch. 174, secs. 6 to 23. And, by sec. 140 of that Act, no indictment could be preferred without the consent of the Court or of the Attorney-General in the case of several offences, of which conspiracy was one, without a preliminary inquiry before a justice of the peace. The territorial jurisdiction of the justice, as expressed in sec. 30 of that Act, is substantially the same as that defined in sec. 554 of the Code of 1892, and in sec. 653 of the present Code, R. S. C. 1906 ch. 146. And in both Acts, in the former by sec. 641, and in the latter by secs. 870-873, the power to prefer on indictment is limited in very much the same way, namely, (subject to exceptions) by a preliminary examination before a justice, in which either the person charged has been committed, or the prosecutor has been bound over to prosecute. And sec. 140 of the Criminal Procedure Act finally disappears as no longer necessary, since by the new machinery practically all prosecutions were

to be begun by the preliminary inquiry required by that section. And gone also are the special provisions as to the place of trial to which I have referred, contained in secs. 8 to 23 of that Act, as also no longer necessary because of the introduction of the section (577 of the present Code) which I have before set out—which confers jurisdiction where the prisoner is found or apprehended, or is in custody, the latter being the words upon which the Crown relies, and upon which the judgment of the learned Judge upon this branch rests.

It must, I think, be assumed that a charge of conspiracy committed at the county of York and the county of Middlesex is not the same offence as a charge of the same offence of conspiracy committed at the county of Middlesex alone. In the former the prosecution could lawfully take place in either county, or where the prisoners were found or apprehended, but in the latter the justice at Toronto would only have jurisdiction to enter upon the inquiry if the prisoners were or were suspected to be, or resided or were suspected to reside, within the limits over which such justice had jurisdiction. See sec. 653 of the present Code. And no one pretends that these prisoners were or were suspected to be or resided or were suspected to reside within the county of York, until they were forced into that jurisdiction under process in this prosecution. They have never to this moment been charged, either before a justice or elsewhere, with the offence of which they have been found guilty, namely, a conspiracy wholly entered to and wholly carried on in the county of Middlesex. The objection could not, by reason of the form of the charge, be raised until the facts were disclosed on the trial. The allegation of the place at which the offence was committed was a material one, and necessary to be proved to confer the jurisdiction. The custody in which the prisoners were was solely a custody in respect of the charge as laid, conferring jurisdiction to try that charge, but not any other charge which the Crown might see fit to prefer. The construction of statutory provisions respecting criminal procedure and the liberty of the subject is strict: see the remarks of Cockburn, C.J., in Martin v. Mackonachie, 3 Q. B. D. at p. 775: "All proceedings in pœnam are, it need scarcely be observed, strictissimi juris: nor should it be forgotten that the formalities of law, though here and there they may lead to the escape of an offender, are intended on the whole to ensure the safe

administration of justice, and the protection of innocence, and must be observed. A party accused has a right to insist on them as matters of right of which he cannot be deprived against his will, and the Judge must see that they are followed."

Here, the right of these prisoners was clearly to be tried in the county of Middlesex, where the offence with which they were charged was committed, and where they resided and were (except perhaps O'Gorman) when the prosecution began, and where the large majority of the witnesses also resided. That right was interfered with by the Crown by introducing into the charge, it may be assumed in good faith, the important element of a Toronto connection, which turned out to be foundationless in fact. And, failing to prove that, the whole charge, in my opinion, failed. The prisoners were entitled to say, "We were never before a justice, or in custody, nor otherwise charged with the offences of which we have been found guilty, and we were never asked to elect, nor did we ever elect, to be tried upon such a charge before you."

Under sec. 827 of the present Code, the Crown officer's duty in the County Court Judge's Criminal Court is to prefer the charge for which the prisoner was committed. By sec. 834, he may, with the consent of the Judge, prefer another charge than that for which the prisoner was committed, but, by sub-sec. 2, this charge takes the place of the other, and similar proceedings as to election, etc., must take place: sec. 835, it is true, allows the Judge some latitude, the latitude namely which a jury has, familiar instances of which are, to find the prisoner guilty of an attempt, upon a charge of an offence, or generally of a lesser offence which is included in a greater one charged.

But this could not apply to the offence of conspiracy, which is either conspiracy or nothing, or justify the finding of a conspiracy charged as committed in one county, but proved to have been wholly committed in another.

The important matter of jurisdiction cannot be made to depend on the good or bad faith of the Crown officer responsible for initiating the prosecution, in inserting a false instead of a true locality as the place where the offence was committed, where locality is material.

The recently decided case of Re Seeley, 41 S. C. R. 5, to which we were referred, has, having regard to its facts, no bearing upon the questions to be here determined. The

motion there was for a writ of habeas corpus after the trial and conviction, and the sections of the Code in question were not the same as here, and the facts were wholly different.

For these reasons, I think the 1st and 6th questions should be answered against the learned Judge's jurisdiction to try the alleged conspiracy in respect of the London election.

As to question 2. The indictment or charge sheet is not, I think, open to the objection suggested in this question, but it was quite competent for the learned Judge, if he apprehended unfairness to the prisoners from the very comprehensive and indefinite nature of the charges, to have directed an election to be made. Nothing, however, now seems to turn upon this question or its proper answer, so I do not pursue the subject further.

As to questions 3 and 4, these need only be regarded as they bear upon the alleged conspiracy between the prisoner O'Gorman and Pritchett.

The learned Judge, in his reasons for judgment, made part of the case, states that Pritchett is only to be believed when "fully" corroborated, which, I take it, must mean corroborated as to every important and certainly as to every vital circumstance to which he deposes.

Now, one of two vital things was to be proved, the first the criminal agreement itself, or, secondly, overt acts from which this agreement might be reasonably inferred. And it seems to me to be clear that the only part of Pritchett's evidence in which he implicates O'Gorman, which is at all corroborated, is that part in which he states that he did certain unlawful things. That he was in certain electoral districts for the unlawful purposes charged is beyond question, but what is there except his own evidence to connect his acts with O'Gorman, any more than with Reid or Molloy or any of the other prisoners, or indeed with any other of the apparently numerous up-to-date politicians, all of whom I dare say did not reside in the city of London? Absolutely nothing that I have been able to find in a careful perusal of the evidence; and I therefore think this charge, which wholly failed as to the other prisoners, should also have failed as to O'Gorman. We were referred to the case of Rex v. Gray, 64 J. P. 327, where a somewhat similar

question was treated as largely one of fact. To some extent, perhaps, it may be, but it is worthy of observation that, even in that case, the things which were held to be corroborated were those which did not depend alone upon the prosecutor's evidence. The question whether there is any evidence is always a question of law, and so also, in my opinion, usually must be the question whether evidence requiring corroboration has been corroborated.

It is not necessary, I think, to answer question 5, in view of the other answers before stated.

Upon the whole case I think the conviction as to both offences should be quashed. And I have reached this conclusion with the less compunction (notwithstanding the fact that most serious offences against the election laws of the country are disclosed in the evidence as having been committed by the prisoners or some of them, offences which I would greatly regret to even appear to condone) for two reasons: the first, because it apears that the offences themselves which formed the subject of the conspiracies charged were actually completed, and the prosecution should under these circumstances have more properly been for the completed offences and not for the conspiracy—a course not to be encouraged. See Regina v. Boulton et al., 12 Cox C. C. 87, at p. 93; and, second, because it is and always was apparent that the only natural and proper place of trial was at London, and not at Toronto, and the attempt to force the trial at the latter city and the opposition to the very reasonable proposition to change the venue, which, if granted, would have obviated all difficulties, savours of unfairness and even of oppression.

MACLAREN, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., OSLER, J.A., and TEETZEL, J., also concurred.

MAY 5TH, 1909.

C.A.

BIRD v. LAVALLEE.

Vendor and Purchaser—Contract for Sale of Land—Vendor's Action for Specific Performance—Objections to Title—Rescission of Contract—Solicitor's Letter—Finding of Trial Judge—Reference as to Title—Appeal—Judgment as Entered not Conforming with Judgment as Pronounced—Amendment on Appeal—Costs.

Appeal by the defendant from a judgment of MULOCK, C.J., at the trial without a jury, in favour of the plaintiff, the vendor, in an action for the specific performance of an agreement in writing for the sale and purchase of certain timber rights and of a small parcel of land spoken of as "the mill site."

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

F. E. Hodgins, K.C., and H. E. Stone, Parry Sound, for defendant.

T. E. Godson, Bracebridge, for plaintiff.

MOSS, C.J.O.:—The agreement is dated 19th July, 1907, and was arrived at after negotiations opening apparently in February, 1907, and proceeded with in a leisurely manner on both sides until the agreement was finally reduced to writing. The amount of the purchase money was $6,000, of which the sum of $10 was paid on the day the agreement was signed. The balance was to be paid on the plaintiff satisfying all proper requisitions on title and delivering to the defendant proper and satisfactory conveyances. No time for completion is mentioned in the writing.

At the time when the agreement was entered into, the plaintiff's title to some, if not all, the timber interests was imperfect by reason of want of mental capacity, infancy, and inability to join in proper instruments of conveyance, on the part of some persons who were entitled to some interest or claim. But it seems, nevertheless, that he had a substantial interest in and title to them. It would rather

seem that the difficulties were not so much of title as of conveyancing, and this was known or communicated to the defendant, and he and his solicitors were, from time to time, informed of the difficulties which were being experienced and the steps that were being taken in the course of perfecting the titles. There were interviews and correspondence with reference to the requisitions on title made by the defendant's solicitors, and matters so proceeded until 30th September, 1907. On that day the defendant's solicitors wrote to the plaintiff's solicitor referring to some propositions that had been made with a view to the settlement of the objections to the title. The letter stated that the solicitors were instructed that, unless the plaintiff "could furnish proper transfers to the Scarr lots," the defendant was not disposed to accept the titles, and added: "We judge from the result of our last interview with yourself and Mrs. Scarr, that the satisfying of our client's requisitions in this regard is impossible, so that we suppose there is no other course but to let the matter drop." But this conclusion, which appears to have been solely the solicitors' idea, was not accepted by their client or the plaintiff, for on 5th October the defendant, in response to a letter from the plaintiff of 3rd October, wrote that they were prepared to close up their end of the transaction as soon as the plaintiff could give satisfactory title re Scarr lots. Steps were being taken to obtain the sanction of the High Court to a conveyance on behalf of infant children of the Scarr family, and these were proceeded with, and finally an order obtained on 2nd January, 1908, but, on being applied to to complete, the defendant and his solicitors took the position that, to use the expression in their letter, "the deal was off," and refused to proceed further, and, after further correspondence and efforts to adjust the matter, this action was commenced.

At the trial an attempt was made on the part of the defendant to go into the question whether at the date of the agreement, or on 30th September, or at the time of the trial, the plaintiff had or could shew a good title to all or any of the various properties forming the subject matter of the sale; but this was not permitted, and properly so, for two sufficient reasons: first, because of the general rule observed in actions for specific performance, that the Court will not, in general, permit the question whether a good title can be made or not to be tried in the first instance, but will direct a reference; and, secondly, because of the

rule stated by Lord Langdale in Lucas v. James, 7 Ha. 410, at p. 425, that, in order that it may be proper for the Court to enter upon the question of title at the trial, the defect or supposed defect in the title should be prominently put forward in the pleadings, which was not the case in this instance.

The real question for trial was, whether there had been a cancellation or rescission of the agreement, though even that issue was not very distinctly raised by the pleadings. The learned Chief Justice dealt with it, however, and held that the agreement had not been put an end to but was still subsisting. And it seems plain that the letter of 30th September did not amount to a rescission. The defendant was not entitled summarily to repudiate the agreement and declare it off: Hatten v. Russell, 38 Ch. D. 334. But, even if he was, the letter did not do so in a distinct and definite manner. It did nothing more than suggest the writer's opinion that there was no course left but to let the matter drop, an opinion which it afterwards appeared was not shared by his client. And, notwithstanding that letter, the matter of making the title was allowed to proceed.

Finding this issue against the defendant, the learned Chief Justice directed judgment to be entered declaring that there was a binding contract between the plaintiff and defendant, and that, subject to the inquiries directed, the same ought to be specifically performed. He then directed a reference to the Master to inquire whether a good title could be made, and when the plaintiff was in a position to make title, with inquiries as to compensation or abatement in the purchase money, in case it appeared that a good title could not be made in respect of some of the properties; and reserving further directions and costs.

These directions, if properly embodied in the formal judgment, would have offered the defendant all the protection and relief he was entitled to at that stage of the action: see Seton on Judgments, 6th ed., vol. 3, p. 2226, and notes p. 2230 and p. 2260 (6), and notes 2261 and 2262. But, in framing the formal judgment, the direction to inquire as to when it was first shewn that a good title could be made, was omitted. Whether this arose from oversight or from some other cause, the defendant could have had it rectified by motion to vary the minutes. A proper direction to that effect, in apt language, should now be inserted, and the formal judgment varied to that extent. But the de-

fendant is not entitled to any part of the costs of the appeal, which should be made costs in the action to the plaintiff only. The latter was responsible for the issue of the judgment in proper form, and is not without blame for the omission to follow the directions of the learned Chief Justice, and he should only be allowed the costs of the appeal in case of his ultimate success in the action.

If any difficulty arises in framing the variation of the judgment, it may be spoken to in Chambers.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

OSLER, GARROW, and MACLAREN, JJ.A., also concurred.

MAY 5TH, 1909.

C.A.

GIOVINAZZO v. CANADIAN PACIFIC R. W. CO.

Master and Servant — Injury to Servant and Consequent Death—Workmen's Compensation Act—Notice Prescribed by sec. 9—Reasonable Excuse for Failure to Give —Administrator Suing under Fatal Accidents Act — Letters of Administration—Ignorance of Law—Reasonable Promptitude—Actionable Negligence — Workman Run over by Train in Railway Yard—Findings of Jury —Licensee—Statutory Duty—Defective System.

Appeal by defendants and cross-appeal by plaintiff against an order of a Divisional Court, ante 24, granting a new trial, on appeal by the defendants from the judgment at the trial before CLUTE, J., and a jury in favour of the plaintiff in an action by him, as administrator, to recover damages caused by the death of his brother Michele Giovinazzo, caused, it was said, by the negligence of the defendants.

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

I. F. Hellmuth, K.C., and Angus MacMurchy, K.C., for defendants.

H. L. Dunn, for plaintiff.

GARROW, J.A.:—Deceased was a workman in the defendants' employment at their yards at Toronto Junction. A few minutes after 6 o'clock p.m. of 19th September, 1907, he and other workmen were returning from work, and, as they had been accustomed to do, were passing along and over the tracks in the yard to reach the subway and exit, when deceased was struck by an engine and killed.

The jury found, in answer to questions, that the defendants were guilty of negligence by blowing off steam or hot water at such a critical moment, with such a large number of employees between the tracks; that deceased came to his death by reason of the negligence of a person in charge of an engine of defendants, such negligence consisting in blowing off the steam or hot water, and that a proper look-out was not kept in a proper place on both engines when backing; that there was no contributory negligence; and damages $600.

The Divisional Court was of the opinion that the position of the deceased, in view of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, was, in the absence of any finding to the contrary, that of a mere licensee; that he could not claim the benefit of sec. 276 of the Railway Act (Dominion), because the engine was not passing over a highway at rail level, but that the deceased might have had cause to complain of a defective system from the facts developed in the evidence, although not specifically mentioned in the pleadings; and a new trial was ordered, with leave to amend.

The Court also held that the circumstances were sufficient to excuse the giving of a written notice as required by R. S. O. 1897 ch. 160, sec. 9, no such notice having been given in time.

The defendants appeal from this judgment, in so far as it grants leave to amend and a new trial, and the plaintiff cross-appeals, and asks to have the judgment at the trial restored.

A careful perusal of the evidence has led me to the conclusion that the true position of the deceased, at the time of the accident, was not that of a mere licensee, as held by the Divisional Court, but of a person upon the defendants' premises by their invitation, and to whom, therefore, the defendants owed a duty to take reasonable care that he should not be injured, within the rule laid down in such cases as Indermaur v. Dames, L. R. 1 C. P. 274, L. R. 2 C. P. 231, and York v. Canada Atlantic Steamship Co., 22 S. C. R. 167.

It is not, however, in the result, necessary to discuss at any length this point of view, because it seems to me that the plaintiff must fail upon the question of the want of notice.

The right to recover damages caused by the negligence of a fellow-servant is, of course, based entirely upon the statute; and that right is conferred upon condition (sec. 9) that notice that injury has been sustained is given within 12 weeks, and the action commenced within 6 months from the occurrence of the accident, or, in case of death, within 12 months from the time of death, provided that in case of death the want of such notice shall be no bar to the maintenance of the action, if the Judge shall be of the opinion that there was a reasonable excuse for such want of notice: see also secs. 13 and 14.

The death occurred on 19th September, 1907. The plaintiff heard of it on 7th November, 1907, while at Kenora in this province. He came to Toronto on 5th December, 1907, and, not later than 7th December, had consulted his present solicitor and instructed him to obtain a settlement of the claim, or in default to bring suit.

The time for giving the notice did not expire until 12th December, 1907, and, however sufficient the excuse may have been for the time lost before the solicitor was instructed, after that it would be entirely another matter. The interval from the 7th to the 12th was, of course, ample in which to have given the notice, and the only excuse offered for not having done so during that interval is the solicitor's mistaken idea that he could not give the notice until he had obtained leters of administration.

The question, therefore, really resolves itself into this: is ignorance of the law a "reasonable excuse," which question must, I think, be answered in the negative, if any useful effect is to be given to the provision.

In O'Connor v. City of Hamilton, 10 O. L. R. 529, at p. 536, 6 O. W. R. 227, 231, Osler, J.A., says: "In the present case it is enough to say that the plaintiff was not misled by any one into not giving notice, and was under no disability except that of ignorance (of the law), which can hardly be invoked as excuse for omitting to observe the requirements of the Act." The question there, it is true, arose under the Municipal Act, in which it is said the requirements as to notice are somewhat more strict than under the Workmen's Compensation for Injuries Act (see Armstrong v. Canada Atlantic R. W. Co., 4 O. L. R. 560, 1 O. W. R. 612); but

upon such a question as this it would be, I think, wholly illogical and unreasonable to hold that ignorance is an excuse under the one Act and not an excuse under the other.

For these reasons, I think the defendants' appeal should be allowed, and the action dismissed. But, under the circumstances, the whole should be without costs.

OSLER and MEREDITH, JJ.A., concurred, for reasons stated by each in writing.

MOSS, C.J.O., and MACLAREN, JJ.A., also concurred.

MACMAHON, J. MAY 6TH, 1909.

CHAMBERS.

RE STICKNEY.

Division Courts—Judgment Debtor — Examination—Committal for Fraud—Imprisonment—Habeas Corpus—Warrant of Commitment—Finding of Fraud—Sufficiency—Warrant not Defective on its Face—Habeas Corpus Act, sec. 1—"Process."

Motion on behalf of Noah Stickney, upon the return of a writ of habeas corpus, for an order for his discharge from custody.

W. J. Tremeear, for the applicant.

J. H. Moss, K.C., for the plaintiff in the Division Court action of Wilson v. Thompson et al.

MACMAHON, J.:—By an order of Mr. Justice Riddell, dated 1st May, 1909, a writ of habeas corpus was issued commanding the sheriff of the county of Oxford to bring up the body of Noah Stickney detained in his custody. The gaoler made answer to the said writ stating that Noah Stickney was detained in custody in gaol under the warrant attached to the said writ since 24th April, 1909.

On the return of the writ and answer, Mr. Tremeear moved for Stickney's discharge from custody, on the ground, among others, that the warrant directed to be issued by the learned County Court Judge, siting as Judge of the 1st

Division Court in the county of Oxford, in the suit of Morrison Wilson, plaintiff, against Douglas Thompson, N. Stickney, and William H. Durham, defendants, in which the said Noah Stickney, one of the defendants, was examined as a judgment debtor in an action brought on a judgment recovered against said defendants for $125.76 debt and $5.82 for costs, is bad on its face, as it charged that the defendant was guilty of fraud in incurring the debt on which the judgment was recovered, whereas the reasons for finding fraud negative the commission of it.

The warrant attached to the writ of habeas corpus recites that a summons was duly issued out of the 1st Division Court to answer such questions as might be put to him touching his estate and effects, and the manner and circumstances in which he contracted the debt which was the subject of the action in which judgment was recovered against him. It also recites that he appeared and was examined and stated that he signed the note, the subject matter of the judgment, at the request of his co-defendants only, and that the debt was not a debt of his, and that he did not intend to pay it, and further stated that at the time he signed the note he knew it was to be discounted. It is further recited: "And whereas it appears that the defendant N. Stickney, at the time he signed the said note, knew that he was unable to pay the same, and signed the said note and delivered the same with the object of having it discounted with some bona fide purchaser for value, and never intending to pay the same. And whereas it appears that what the said N. Stickney has done in signing the said note and allowing the same to be discounted with a bona fide purchaser for value, and at the same time never intending to pay the same, constitutes a fraud for which he should be committed."

He is committed by the Judge for a term of 20 days to the common gaol.

By sec. 243, sub-sec. 2, of the Division Courts Act, "the person obtaining the summons (for the examination of a debtor) and all witnesses whom the Judge thinks requisite, may be examined upon oath touching the inquiries authorised to be made as aforesaid."

The Judge may also have examined the execution creditor, who in an affidavit filed says that the note upon which the judgment was recovered against the execution debtors was a renewal of a note for a similar amount which was given by the defendants (in the Division Court action) Stickney

and Durham, as the price of pigs purchased by them jointly from Douglas Thompson, the other defendant in said action, and he believed that Stickney was the owner of the farm on which he lived and the implements thereon, but it turned out that his wife was the owner thereof.

The learned County Court Judge has found facts which, in his judicial opinion, suggest fraud, which is all that is necessary to support the warrant. See judgment of Lord Chancellor Halsbury in Ex p. Barnes, [1896] A. C. at pp. 150-1.

I do not consider the warrant defective on its face.

I thought it advisable to deal with the motion in the aspect of the case so forcibly presented by Mr. Tremeear; but, in my view, the warrant is "process" within the meaning of sec. 1 of the Habeas Corpus Act, R. S. O. 1897 ch. 83, and the case is therefore concluded by Anderson v. Vanstone, 16 P. R. 243.

In Stroud's Judicial Dictionary, vol. 3, p. 1565, it is said that under the Summary Jurisdiction Act in England, 44 & 45 Vict. ch. 24, sec. 8, "process" includes any summons or warrant of citation to appear . . . also any warrant of commitment, any warrant of imprisonment, any warrant of distress," &c.

The motion fails and must be dismissed with costs.

MAY 6TH, 1909.

DIVISIONAL COURT.

LEHMAN v. KESTER.

Release—Judgment Recovered by Plaintiff—Release without Consideration—Undue Influence of Strangers—Threats—Religious Influence—Absence of Solicitor's Advice—Absence of Fraud—Validity of Release—Seduction—Findings of Jury—Motion for New Trial.

Appeal by defendant from judgment of MAGEE, J., in favour of plaintiff for the recovery of $1,200, upon the findings of a jury, in an action for seduction, and motion for a new trial of the action; and appeal also by defendant from the judgment of MACMAHON, J., ante 346, finding in favour of the plaintiff an issue directed to be tried as to the validity of a release of the judgment.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

J. W. Curry, K.C., and C. R. Fitch, Stouffville, for defendant.

J. M. Godfrey and T. N. Phelan, for plaintiff.

RIDDELL, J.:—The plaintiff is a member of the Mennonite church; one of the tenets of that church is that the members must not go to law; indeed, it is said that going to law will, according to the creed of this body, imperil the soul of the man so offending (p. 51).

The plaintiff brought an action for seduction against the defendant, who is not a Mennonite (p. 63). The Bishop of the plaintiff's church, Mr. Wideman, met the plaintiff before the action came on for trial, and told him "that the Bible teaches in opposite direction from that;" beyond question, the Bishop really was anxious about the soul of this erring member of his flock, and was desirous of persuading him from a course which, according to his creed, was fraught with fearful danger. The plaintiff made some excuse about an appointment, and the desire of his spiritual friend was not gratified. The action proceeded, and resulted in a verdict for $1,200.

The defendant was not satisfied with this result, and caused a notice of motion to be served by way of appeal to a Divisional Court. Pending this appeal, a settlement of the action was arrived at through the intervention of Mr. Wideman and another member of the Mennonite body, Mr. Hoover; the validity of this settlement being challenged by the plaintiff, an issue was directed upon this point; the issue was tried by my brother MacMahon at the Toronto sittings in January last, and judgment was given in favour of the plaintiff (ante 346). The defendant appealed from this judgment, as well as from the judgment after the trial of the action, and both appeals came on before us 2nd March, 1909. Upon the hearing we decided that, consistently with the rules governing jury trials, we could not interfere with the judgment at the trial. It may well be that great injustice was done by the jury against the defendant, but the case was left to them fairly, and there was evidence which, if believed, would justify them in finding as they did.

In respect to the settlement, the facts are that the plaintiff, who had been caretaker of the church, and who had, of his own motion, given up the keys a few days before, came on 8th November to the church, at which was present Mr. Hoover, who seems to be a prominent member of the church. This was on Sunday; the plaintiff went to his seat in the church, called Hoover over to him, and said: "I am sorry for all I have done; if you see Samuel Wideman, tell him to come over in two weeks, and I will confess to the church that I have done wrong, if the Lord lets me live. I have been misled by others" (p. 38). The plaintiff says that he added, "if the thing was settled" (p. 13); but this the witness Hoover denies, and the learned Judge fully accepts Hoover's account.

Wideman and Hoover went to the plaintiff's place on the 16th November. No imputation is made against Hoover or the Bishop of any desire on their part for anything but the salvation of the soul of the plaintiff. They were in no way acting as agents for the defendant, and it cannot be contended, and it is not, that they had any intent or desire to benefit any one else. The defendant had a few days before seen Hoover, as he had heard that the plaintiff was going to make a confession; the church had told him that he was ready to make a confession; and the defendant said he came out to find out the nature of the apology. The defendant has insisted throughout on his innocence.

According to the story of the plaintiff, Wideman and Hoover threatened to expel him from the church if he did not go to the defendant and ask his forgiveness, saying "you know the church rule" (p. 4). In addition to the apology to the defendant, he says, they wanted him to go before the congregation and say that he had done wrong, and said that, if he did not do so, they would expel him from the church (p. 5); they thought he had done wrong in bringing the action because it was against the rules of the church (p. 14).

This was no new experience for the plaintiff. On a previous occasion the same daughter had had a child, and Wideman had on that occasion threatened the plaintiff that, if he went to law, he would be expelled from the church (p. 18). An action was not brought on that occasion. Upon the present occasion there is a little conflict as to the part taken by each; but I do not think anything turns on this conflict. It seems quite clear that the brethren who were reasoning with the

plaintiff were doing so solely for the sake of his soul's salvation, that they, as well as he, knew that it was necessary that the plaintiff should apologise to the defendant and give up the judgment he had obtained before he could be in good standing, and that all three were convinced that reconciliation with the church was needed through a confession of his sin and an abandonment of the results of it before he could, according to the belief which they had in common, be safe from eternal punishment. No temporal advantage to any one, and certainly not to the church or any one connected with it, was in the mind of any person taking part in this interview; it was just faithful brethren striving with an erring brother and earnestly endeavouring to bring him back to the truth. The fear that the plaintiff would not have money to keep the illegitimate child was met by the statement of Hoover that the child would be taken care of (p. 43); and the fear that the defendant would not pay the costs was met by the Bishop undertaking that if the defendant did not pay the costs he himself would. No doubt, in much of this, one having no knowledge of the methods of certain religious bodies, might be tempted to suspect indirect motive, but I venture to think that all that took place was wholly natural, and precisely what might be expected in such a religious body as this; and, as I have said, no attack is made upon the good faith and perfect candour and honesty of both Bishop and Hoover.

In the result the plaintiff is brought to a sense of his sin; and agrees to give up his ill-gotten gains; the defendant at first refuses to settle without an apology from daughter and father who have wronged him so, as he claims, and as, were it not for the finding of the jury, I should be inclined to think they had—of course, under our practice, in the circumstances, we cannot set aside the findings of the jury, however much we should like to do so.

A solicitor who has not acted for either party in the action, is seen, and the plaintiff abandons his judgment; the defendant, having received the apology of the plaintiff alone, is content with that, the daughter not being a member of the church, and agrees to drop his appeal and pay the costs.

No influence was exercised over the plaintiff other than that necessarily following from the fear of losing his church connection and the eternal consequences of his sin; and no benefit was obtained, desired, or expected for the Bishop or Hoover or the church or any one connected with it.

I do not think it necessary to enter into an inquiry as to the circumstances under which the plaintiff rued what he had done or the cause of his relapse into the wrong path. If he has the right to repudiate the settlement or if he has not, the motive is immaterial.

If this were the case of a gift, the fact that the plaintiff was wholly innocent and even ignorant of the influence exercised would be immaterial: Allcard v. Skinner, 36 Ch. D. 145, and cases there cited. This is not wholly a gift; no doubt, the plaintiff was giving up something to which we have held he was entitled. But no one could be sure that the judgment of a Divisional Court would be in that sense, and no one can say what view an appellate Court would take of our decision.

The plaintiff was getting an agreement that his costs would be paid—which indeed he was as certain of under the judgment if not reversed; he was obtaining freedom from the fear that he might himself have to pay costs of a successful appeal, and, in addition to these, he had obtained the assurance, probably enforceable, that the child would be taken care of. It would seem that the object of the action was largely to procure maintenance for the child. Practically all the judgment could give him was assured to him; the consideration for his release was substantial, and the simple question is—"Is the defendant to be prejudiced by the fact that, without his knowledge and without his procurement, and for a purpose entirely foreign to him, the plaintiff had been induced to enter into this contract by undue spiritual influence?"

One of the greatest masters of our law, in one of his most noted judgments (Mr. Justice Buller in Master v. Miller, 4 T. R. 320, 2 H. Bl. 140, 1 Anst. 225, 1 Sm. L. C. 767, at p. 786 of the last named report) says: "It is a common saying in our law books that fraud vitiates everything. I do not quarrel with the phrase, or mean in the smallest degree to impeach the various cases which have been founded on the proof of fraud. But still we must recollect that the principle . . . is always applied ad hominem. He who is guilty of a fraud shall never be permitted to avail himself of it; and, if a contract founded on fraud be questioned between the parties to that contract, I agree that, as against the person who has committed the fraud, and who endeavours to avail himself of it, the contract shall be considered as null and void. But there is no case in which a fraud in-

tended by one man shall overturn a fair and bona fide contract between two others." This principle I do not find questioned in any case; it is common sense, and, in my judgment, good law. No finding against the good faith of the defendant has been made; and none should be made, notwithstanding the finding of the jury. Good faith being supposed, the contract cannot, in my judgment, be said to be unfair; so that, even if this were a case of fraud, the contract should not be declared void.

In the case of undue influence, which may be defined, after Holland (Jurisprudence, p. 239), as consisting of "acts which, though not fraudulent, amount to an abuse of the power which circumstances have given to the will of one individual over that of another," the rule cannot be more stringent than in a case of express fraud.

Pollock on Contracts, 7th ed., p. 638, says: "It appears to be at least doubtful whether a contract can be set aside on the ground of influence exerted on one of the parties by a stranger to the contract, who did not expect to derive any benefit from it;" and, after citing Bentley v. Mackay, 31 Beav. 143, 151, he says: "On principle the answer should clearly be in the negative." I agree with the learned author as to principle, and, not finding any case binding me to hold the contrary, adopt his conclusion.

We have here also the absence of the other ingredient necessary to set aside a contract on the ground of undue influence, namely, the knowledge of the defendant or circumstances sufficient to give him notice of such undue influence. See Pollock, p. 637.

It is, moreover, at least doubtful whether the influence exerted in this case is what is in law called "undue influence." "Solicitation, importunity, argument, and persuasion are not undue influence:" Cyc., vol. 9, p. 455.

I am of opinion that this appeal should be allowed; but justice will be done by allowing this appeal without costs here or below. The dismissal of the appeal from the judgment upon the jury trial will also be without costs, the settlement being affirmed, but the grounds urged for a new trial being overruled.

BRITTON, J., for reasons stated in writing, agreed with the opinion of RIDDELL, J., and in the result.

FALCONBRIDGE, C.J.:—I have delayed this for a time with a view of writing something. But I do not know that I can usefully add anything to what my learned brothers have said.

I agree in the result arrived at by them.

MAY 6TH, 1909.

DIVISIONAL COURT.

COPELAND-CHATTERSON CO. v. BUSINESS SYSTEMS LIMITED.

Damages—Inciting or Procuring Breach of Contract — Actionable Wrong—Sale of Goods to Customers Subject to Restriction—Rival in Business, with Notice of Restriction, Inducing Customer to Break Contract—Malice — Proof of Damage—Injunction—Modification—Nominal Damages—Reference—Costs.

Appeal by defendants from judgment of BOYD, C., ante 259, in favour of plaintiffs.

G. H. Kilmer, K.C., for defendants.

W. E. Raney, K.C., for plaintiffs.

THE COURT (MULOCK, C.J., MAGEE, J., CLUTE, J.), varied the judgment by narrowing the injunction so that it is to restrain defendants from making contracts with persons whom they know to have made contracts with plaintiffs, and with this variation judgment affirmed with costs.

MEREDITH, C. J. MAY 7TH, 1909.

CHAMBERS.

FOSTER v. MACDONALD.

Slander—Pleading—Statement of Defence—Justification — Particulars—Fair Comment—Mitigation of Damages — Provocatory Challenge—Irrelevant Matters—Embarrassment—Scope of Trial—Specific Charges.

Appeal by defendant and cross-appeal by plaintiff from order of Master in Chambers, ante 1012.

N. W. Rowell, K.C., for defendant.

I. F. Hellmuth, K.C., for plaintiff.

MEREDITH, C.J., varied the order below as follows: Defendant to be allowed to amend clause 17 of paragraph 6 by giving list of speculative investments; paragraph 11 to be amended to shew that plaintiff is not entitled. Paragraph 7 to be confined to pleading mitigation of damages, and allegation of justification to be struck out. Clause 8 of paragraph 7 to become part of paragraph 8, and all words from "wherefore" to be struck out. Costs in the cause.

RIDDELL, J. MAY 8TH, 1909.

TRIAL.

JOHNSON v. BROWN.

Contract—Action against Executor for Value of Services Rendered to Testatrix—Understanding between Plaintiff and Testatrix that Compensation to be Made by Will—Quantum Meruit—Statute of Limitations—Recovery for Six Years only before Death.

Action against the executor of Grace Walters, deceased, to recover the value of plaintiff's services to the testatrix in her lifetime.

J. C. Makins, Stratford, for plaintiff.

R. T. Harding, Stratford, for defendant.

RIDDELL, J.:—The plaintiff is a labourer, residing in Stratford. His family and that of Mrs. Grace Walters had been on very friendly terms. She was the widow of a blacksmith in Stratford, and had been left with moderate means for the support of herself and her invalid son. About 11 years ago, she requested the plaintiff to come and look after the son; this he did, and, the son dying not long after, Mrs. Walters asked him to remain and look after things about the house, garden, &c., which needed looking after. She had a servant, Miss D., also in the house, and she required a great deal of personal attention. The plaintiff did remain, and looked after the place generally till the death of Mrs. Walters. Mrs. Walters was a very exact woman, insisting on paying cash for all she got; she paid Miss D., also, very punctually, and seems generally to have had a sense of what

was due to others in the way of prompt payment. No express bargain or suggestion of an express bargain was made with the plaintiff; Mrs. Walters never promised to reward him for his services, either by ante mortem payment or by legacy. The plaintiff performed the services in the hope of a legacy, in the expectation that the widow would do the right thing by him in her will. He got his board and lodging, but, as I now think and find, his services were worth at least $2 a week (my estimate at the trial was too low) in excess of the value of the board and lodging. Mrs. Walters died, leaving an estate of about $3,000 to be divided amongst her nephews and nieces; the plaintiff was not, as he expected to be, remembered in her will, and now he brings this action for the value of his services, against the executor of Mrs. Walters.

The case came on for trial at Stratford before me without a jury. I reserved judgment and now proceed to dispose of the matter.

The facts of this case differentiate it from the case of a mere volunteer officiously performing services with no expectation of reward and no intention of obtaining or seeking reward, and also from the case of a member of the family performing in the house of another member of the family services to that other without express contract. In neither of these cases, of course, can the person performing such services recover. And again, the case is not one in which there was an express contract to reward for the services by a provision in the will, in which case it is equally clear that the services, or at least such of them as were rendered within 6 years of the teste of the writ, must be paid for by the estate.

I have read the cases cited by counsel and those mentioned in Walker v. Boughner, 20 O. R. 448, at p. 457, 15 Am. and Eng. Encyc. of Law, 2nd ed., p. 1079, and many others, and I nowhere else find the law more accurately stated than by the former Chief Justice of the Queen's Bench, Armour, C.J., in Walker v. Boughner, 20 O. R. at p. 457, thus: "Where a party renders services to another in the expectation of a legacy and in sole reliance on the testator's generosity, without any contract, express or implied, that compensation shall be provided for him by will, and the party for whom such services are rendered dies without making such provision, no action lies: but where from the circumstances of the case it is manifest that it was understood by

both parties that compensation should be made by will, and none is made, an action lies to recover the value of such services."

I do not think it helpful to discuss the cases such as Osborn v. Governors of Guy's Hospital, 2 Str. 728, Baxter v. Gray, 3 M. & Gr. 771, and the like, having in the cases in our own Court the law so happily and accurately expressed.

Considering that Mrs. Walters had no children, the work which the plaintiff continuously did, the necessity for some one doing this work, the value of the work, and all the circumstances of the case, I think it must be held, as I do hold, that Mrs. Walters understood, as undoubtedly the plaintiff did, that compensation should be made by will. This being the case, the plaintiff is entitled to recover as on a quantum meruit.

Were it not for Cross v. Cleary, 29 O. R. 542, I should hold that the whole period could be recovered for. No action could possibly be brought before the death, and it would seem against principle that the Statute of Limitations should be held to begin to run at a time anterior to that at which an action could be brought. But I am bound by Cross v. Cleary, unless and until it should be overruled; and I must hold that payment for services going back to 6 years before the teste of the writ only can be recovered in this action. The writ is issued 8th April, 1909; the services recoverable for then began 8th April, 1903; Mrs. Walters died 26th September, 1908: there are 5 years 24 3-7 weeks= 284 3-7 weeks. This at $2 per week=$568.85.

The plaintiff may amend his pleadings, claiming this sum, and have judgment for this sum and costs.

It may be that the plaintiff, if the defendant is satisfied to abide by this judgment, may accept the $500 claimed in full, in which case no amendment need be made, and the judgment will be for $500 and costs.

The executor will have his costs, solicitor and client, out of the estate.