The
Ontario Weekly Notes

Vol. IV. TORONTO, APRIL 11, 1913. No. 30

APPELLATE DIVISION.

APRIL 2ND, 1913.

*BERNSTEIN v. LYNCH.

Motor Vehicles Act—Collision between Motor Car and Bicycle—Injury to Bicyclist—Negligence—Violation by Driver of Motor Car of sec. 6 of 2 Geo. V. ch. 48—Responsibility of Owner for Act of Driver—Sec. 19 of Act—Findings of Jury—Driver Acting within Scope of Employment—Evidence—Appeal.

Appeal by the defendant from the judgment of DENTON, Jun. Co. C.J., in favour of the plaintiff, upon the findings of a jury, for the recovery of $300 damages, in an action in the County Court of the County of York, brought against the owner of a motor car for injuries sustained by the plaintiff in a collision between a bicycle upon which he was travelling and the motor car, by reason, as he alleged, of the negligence of the defendant's servant who was driving the car.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

W. E. Raney, K.C., for the defendant.

John MacGregor, for the plaintiff.

The judgment of the Court was delivered by SUTHERLAND, J.:—The defendant, a resident of Toronto, was on the 29th August, 1912, the owner of a motor car, and had as his chauffeur or driver one Harry Charles, employed by the week, and who was to be on call at the garage where the machine was kept, "from at least ten o'clock in the morning until five in the afternoon."

*To be reported in the Ontario Law Reports.

On the morning of that day, the chauffeur drove the defendant's daughter to some place in the city where she desired to go; and, upon her alighting, instead of taking the car back to the garage in as direct a way as possible, proceeded to the Star newspaper office, in King street west, and from thence down Jordan street to Wellington street, and westerly along the latter street to a point a little west of York street, intending apparently to go to a hotel down town for his dinner.

The plaintiff, who had left his work in a factory on the south side of Wellington street at twelve o'clock, and who used a bicycle in going from his work to his house, rode out of a lane and attempted to cross Wellington street from the south to the north, in a westerly direction towards Simcoe street.

The motor car came into collision with him, knocking him down and injuring him. He brought this action against the defendant, and the case was tried before Denton, County Court Judge, with a jury.

In answer to question 1 submitted to the jury, they found that the driver of the car was acting "within the usual scope of his employment in driving the car when the collision took place;" and, in answer to other questions, that the occasion was "such as to make it reasonably necessary that the horn should be sounded," and that it was not; that the motor car was "being driven recklessly or negligently or at a speed dangerous to the public;" and that the plaintiff's injuries were "occasioned by the negligence or improper conduct of the driver of the motor car," and not by his own negligence. They assessed his damages at $300.

Upon these findings, judgment was entered by the trial Judge for that amount, with costs; and it is from that judgment that this appeal is.

Counsel for the appellant in argument conceded that it could not be successfully contended that there was no evidence to support the findings other than the first; but at best could be contended only that the evidence was contradictory, and the jury had chosen to believe that offered for the plaintiff.

He based the appeal and the request for a reversal of the judgment on the ground that there was no evidence to support the first finding as to the driver "acting within the usual scope of his employment;" and argued, on the contrary, that the evidence was conclusive that he was, without the permission or sanction of the defendant, using the car to go about his own business. He also contended that sec. 19 of the Motor Vehicles Act, 2 Geo. V. ch. 48, should be construed so as to create a lia-

bility as against the owner only where he himself was driving the car or authorising another to do so.

Whether an act done by an employee is done in the employment is a question for the jury: Beven on Negligence, 3rd (Canadian) ed., vol. 1, p. 583; and see Whatman v. Pearson (1868), L.R. 3 C.P. 422.

Here the chauffeur had undoubtedly taken out the car in the usual course of his employment, and within the hours of the day during which his employment continued. Notwithstanding that the charge of the trial Judge on this point was very favourable to the defendant—and contained the following statement: "It does seem to me that the evidence points strongly to the fact that this man was not acting within the usual scope of his employment at the time"—the jury have found this question of fact in favour of the plaintiff. . . .

[Reference to Burns v. Paulson, L.R. 8 C.P. 563.]

I am unable to see how the jury's finding upon this question can be disturbed. This is, of course, dealing with the matter quite apart from the statute applicable to this case, and only from the point of view of the common law.

The statute in question is 2 Geo. V. ch. 48, and sec. 19 is as follows: "The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council." It is an amendment of, although similar in terms to, 6 Edw. VII. ch. 46, sec. 13. . . .

[Reference to Mattei v. Gillies, 16 O.L.R. 558; Verral v. Dominion Automobile Co., 24 O.L.R. 511, 554; Smith v. Brenner, 12 O.W.R. 9, 12, 1197.]

In the present case the jury have found that the chauffeur had violated the statutory obligation involved in sec. 6 of the present Act, which requires that "every motor vehicle shall be equipped with an alarm bell, gong or horn, and the same shall be sounded whenever it shall be reasonably necessary to notify pedestrians or others of its approach."

The owner of a motor vehicle is not obliged to employ a chauffeur; but, if he does so, he is responsible for any violation by him of the Act: sec. 19. . . . When the chauffeur is driving, the owner is constructively doing so, to the extent of being liable for such violation.

The responsibility attaching to the use of automobiles is dealt with in a comprehensive manner in a New Brunswick case, Campbell v. Pugsley, 7 D.L.R. 177, 180. . . .

I think the appeal must be dismissed with costs.

HIGH COURT DIVISION.

MASTER IN CHAMBERS. MARCH 31ST, 1913.

MORRIS v. CHURCHWARD.

Pleading—Statement of Claim—Breach of Promise of Marriage—Particulars of Promise and Breach—Claim for Seduction and Birth of Child—Maintenance of Child—R.S.O. 1897 *ch.* 169, *secs.* 1, 2, 3—*Amendment—Aggravation of Damages.*

In this action, which was to recover damages for breach of promise of marriage, it was not stated in the statement of claim whether the promise was verbal or in writing. In paragraph 3 the plaintiff alleged seduction by the defendant and birth of a child as a result on the 13th May, 1912, with expense to the plaintiff for nursing and medical attendance and maintenance of the child.

The defendant moved, before pleading, for particulars of the alleged promise and of the alleged marriage of the defendant to another person, and to strike out paragraph 3 as not disclosing any right of action in the plaintiff.

W. H. Kirkpatrick, for the defendant.
M. Wilkins, for the plaintiff.

THE MASTER:—The statement of claim should be amended so as to shew whether the alleged promise was verbal or in writing. If the former is the case, then it would be right to give particulars of the time and place, as also of the date of the marriage which is relied on as the breach of the defendant's promise.

Paragraph 3 seems to have been based on the familiar case of Millington v. Loring, 6 Q.B.D. 190. This justifies the allegation of seduction: see Odgers on Pleading, 5th ed., pp. 398, 419. But this paragraph must be amended, if the claim in respect of the child is to stand.

Chapter 169 of R.S.O. 1897 gives a right of action to any one who provides necessaries for any child born out of lawful wedlock (sec. 1). But it is provided that the fact of paternity must, in such a case as the present, be proved by other testimony than that of the mother (sec. 2); and, by sec. 3, that no action shall be sustained unless the mother has complied with certain directions therein set out. This paragraph should, therefore, be

amended so as to comply with the statute or else limited to the claim for breach of promise as aggravated by the alleged seduction, as in Precedent No. 49 in Odgers, p. 398.

Whatever is essential to the cause of action is a material fact, and should, therefore, be set out in the statement of claim, under Con. Rule 268. See Phillips v. Phillips, 4 Q.B.D. 127, at p. 133, where Brett, L.J., said: "If parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings. Therefore, they ought to state every fact upon which they must rely to make out their right or claim."

The defendant to have ten days after amendment to plead. Costs of the motion will be in the cause.

MIDDLETON, J., IN CHAMBERS. MARCH 31ST, 1913.

*RE MAHER.

Infants—Custody—Agreement by Father with Children's Aid Society—Rights of Mother after Death of Father—Welfare of Infants—Difference in Religion—Proceedings in Juvenile Court—Order for Delivery of Children to Society—Review by High Court on Habeas Corpus—Neglected Children's Act, 8 Edw. VII. ch. 59, secs. 2(1), 10-14—Illegitimate Child—Right of Custody—Costs of Application.

Motion by Mary Helen Metcalf, the mother of the infants Ilene May Maher and Frances Maud Maher, on the return of a writ of habeas corpus, for an order awarding the applicant the custody of the infants.

A. R. Hassard, for the applicant.

T. L. Monahan, for the St. Vincent de Paul Children's Aid Society.

MIDDLETON, J.:—On the return of the writ, it was agreed that the truth and sufficiency of the return should be determined upon viva voce evidence. The evidence was taken before me on the 12th March inst.

*To be reported in the Ontario Law Reports.

The elder infant was born on the 25th August, 1902; the younger infant on the 13th November, 1903. The father and mother were not married until the 8th April, 1903; so that the elder child was not born in wedlock. Edward Maher, the father, was a Roman Catholic; the mother was an Anglican. This diversity of faith proved disastrous, although the evidence discloses little to indicate that religion occupied any prominent place in the life of either party. The father died on the 26th August, 1907. The mother married her present husband, Walter J. Metcalf, on the 3rd December, 1907.

The mother states that it was understood that any boys should be baptised and brought up as Roman Catholics, and that girls were to be brought up as Protestants.

In addition to the two infants named, a boy, now dead, was born, and he was baptised in the Roman Catholic Church. The two girls were also baptised in the Roman Catholic Church. . . . The mother states that these baptisms were without her knowledge. Miss Josephine Maher, who took the children to be baptised, states that it was with the mother's knowledge and approval. . . .

Maher died of consumption, after having been ill for some time. During his ilness he and his wife and children lived with his sisters, who are devout and zealous Roman Catholics. At this time the mother was not behaving well; and there was, no doubt, then ample reason for doubting her fitness to be the custodian of the children. Maher, on the 31st July, 1907, executed a document, prepared on a form in common use by children's aid societies, by which he recited that he was the father of these two girls, and the infant son, then alive, and that he was unable to maintain and care for the children, as he was without means and unable, through illness, to earn a living for himself, or the infant children, and that he was desirous of intrusting the infants to the St. Vincent de Paul Children's Aid Society; and he, therefore, committed the said children to the care of the society, and appointed it to be the lawful guardian of the infants until they attained the age of twenty-one years; releasing to the said society all claims of any kind, nature, or description upon the said children. . . .

The mother kept the children, notwithstanding this, and notwithstanding the knowledge of the society of what had been done. They were for a short time placed in the custody of a Home in Gerrard street, in the city of Toronto; but, after the second marriage, they lived with the mother and stepfather,

together with a child, issue of an earlier marriage of the stepfather.

In 1908, the mother was convicted of forgery, and was imprisoned for thirty days. The family was then reduced to great poverty. The second husband was drinking, and the situation went from bad to worse, till proceedings were taken in the Police Court with reference to the custody of the children. These proceedings dragged on for a considerable time, the children being meanwhile left with the mother and stepfather. Upon the establishment of the Juvenile Court in Toronto, the proceedings were transferred to that Court, and were finally dealt with there, on the 29th January, 1912.

In the meantime—on the 13th October, 1911—the mother had been arrested for larceny, convicted, and sentenced to 60 days' imprisonment; being released on the 3rd December, 1912. Another child had been born, the issue of the second marriage. This child is now some two years of age. It was taken care of by the Protestant's Children's Aid Society, and has now been restored to its mother's custody.

Upon the proceedings before Commissioner Starr, the record shews that, with the consent of the parties—i.e., the mother and the representative of the society—it was agreed that the children should remain in the custody of the society as wards on condition that the mother pay $2 per week—"and if she makes good, children as wards of said society to be returned to her care."

The $2 has not been paid, but the society does not now make any point of this. The reason for payment being asked was that the society makes arrangements for the adoption of children intrusted to it. Mrs. Metcalf desired the children to be retained by the society, and that they should not be put out.

On the same date, the 29th January, the Commissioner, in pursuance of the statute, made an order in the case of each of the infants, finding it to be a dependent and neglected child and in danger of loss of health and morality on account of the immoral conduct and neglect of her mother, and directing the delivery of the child to the care of the society, to be kept at its home in Toronto until placed in an approved foster home. The children have not yet been placed in any foster home, and are still with the society.

The mother and stepfather have both "turned over a new leaf," and the evidence before me entirely satisfies me that, under the circumstances as they now exist, the children can safely and properly be delivered to their custody and control. . . .

Apart from legal difficulties, there is no reason why the order sought by the mother should not be made.

First, it is said that the decision of the Commissioner is final, and that, he having made an order for delivery to the Children's Aid Society, it is not open to the High Court to review it.

The statute 8 Edw. VII. ch. 59 deals with "neglected children." . . .

[Reference to the provisions of sec. 2, sub-sec. 1; secs. 10, 11, 12, 13, and 14.]

Section 14 applies only to the parent who executes the instrument, and does not give to the father the right to hand over a child to a children's aid society, to the prejudice of the mother; and I, therefore, think that the instrument of the 31st July, 1907, may be ignored.

Then sec. 13 recognises the right of the High Court to deal with the custody of an infant whose case has been dealt with by the Commissioner. Power is given to the High Court, in certain circumstances, to decline to make the order sought. This implies the right of the Court to make the order, notwithstanding the prior adjudication of the subordinate tribunal. The power of the Court of Chancery now vested in the Supreme Court to deal with the custody of children can only be taken from that Court by an enactment couched in the clearest and most positive terms. The statute in question falls far short of this, and, as already pointed out, it tacitly recognises that jurisdiction.

With reference to the elder of the two infants, it is further to be observed that, as it was not born in wedlock, Maher had no right whatever. The rights of the mother of an illegitimate child were investigated carefully in a case reported as Re C., 25 O.L.R. 218; and I find nothing to add to what I there said.

In this case I interviewed the infants, and am satisfied that there is so much affection between them that they ought not to be separated; and, therefore, finding no unfitness in the mother to have their control at the present time, I think that I should award her the custody of both.

The only matter which occasions me trouble is the question of the religion of the younger child. The mother has said, and this has not been contradicted, that upon marriage it was understood betwen her husband and herself that any boys born of the marriage should be brought up as Roman Catholics; any girls should be brought up as Protestants. There is nothing definite before me to indicate that the father ever receded from this position. No doubt at his instance, shortly before his death, the

children were baptised in the Roman Catholic Church; and I might well infer from this that he would desire them to be brought up as Roman Catholics; but it must not be forgotten that at that time the mother was not behaving well, and the father may well have thought that she had really abandoned the children. I think that where, as here, the interests of the child demand that there should be a united home, and where as yet the children are too young to have any real religious preference, the Court has power to hand the children over to the custody of the mother, without imposing any condition as to the faith in which they shall be brought up.

I have yet to deal with the question of costs. I appreciate the motives of the Children's Aid Society. Their officers have acted with great care and prudence, and they did no more than their duty in carefully investigating the circumstances; and I would gladly relieve them from payment of costs if I did not realise that in so doing I should necessarily cast a burden upon the parents which, at the present time, they are not financially able to bear. I, therefore, fix the costs, which I order to be paid, at $50. This will not cover the costs of the application, unless the applicant's solicitor is generous to his client.

MIDDLETON, J. MARCH 31ST, 1913.

RE DAVIES.

Will—Construction—Division of Income from Residuary Trust Fund—"Between."

Motion by the executors of the will of William Davies junior, under Con. Rule 938, upon originating notice, for an order determining a question arising upon the construction of the will.

A. M. Denovan, for the executors and the widow.
F. W. Harcourt, K.C., for the daughters, now all adults.

MIDDLETON, J.:—The testator died on the 22nd September, 1892. By his will a trust fund is created, from which the income is to be paid to the wife until the youngest of the children attains the age of twenty-one years or marries. Upon the youngest attaining age, the wife is to receive an annuity of $800. Certain provisions are made for the creation of a residuary trust fund,

to be held in trust for the testator's children in equal shares; the sons to receive their shares on attaining age; the shares of the daughter are to be invested, and the income paid to them without power of anticipation. The will provides that when the residuary trust fund "yields to each of my daughters an income of not less than $800 per annum all surplus income arising from said residuary trust fund is to be divided equally between my said wife and my said daughters share and share alike." The fund held to answer the wife's annuity is to be ultimately divided amongst the children.

The question raised is as to the meaning of the clause above-quoted, relating to the surplus income from the residuary trust fund. The widow contends that it is to be divided into two shares, one of which is to go to her and the other to her three daughters, share and share alike. The daughters, on the other hand, contend that the income is to be divided into four shares.

I have read many cases, but have failed to find any that throw real light upon the words used; and I have come to the conclusion that the daughters' contention must prevail.

The argument for the widow hinges mainly upon the meaning of the word "between." It is said that this implies a division into two equal parts; but, apart from the fact that the strict etymological meaning of the word "between" is not always observed, and that it is frequently used as equivalent to "among," I find it stated in Murray's Dictionary that the word may be used as "expressing division and distribution to two (or more) partakers;" and, after giving many senses in which the word can be properly used, this note follows: "In all senses 'between' has been from its earliest appearance extended to more than two."

In seeking to ascertain the intention of the testator from the words used, I cannot shut my eyes to the general scope of the will. There is first the setting apart of a fund sufficient to produce an income for the widow of $800. Then there is the setting apart of the residuary fund to produce an income for the daughters. As soon as the income of each daughter equals the income of the mother, then the testator naturally and reasonably provides that the surplus income shall be divided—as I think—into four shares, so that the mother and daughters shall be put in a position of equality as to income.

The costs of all parties may come out of the estate.

KELLY, J. MARCH 31ST, 1913.

OTTAWA AND GLOUCESTER ROAD CO. v. CITY OF OTTAWA.

Highway—Bridge—Liability for Maintenance and Repair—Road Company—Municipal Corporations, City, County, and Township—Right of Road Company to Abandon—General Road Companies Act—By-law—Agreement—Validating Statute.

Action against the Corporations of the City of Ottawa, County of Carleton, and Township of Gloucester, for a declaration of the Court determining the question of the incidence of liability for the repair and maintenance of a bridge known as "Billings bridge" crossing the Rideau river at the present southerly boundary of the City of Ottawa.

G. F. Henderson, K.C., and W. D. Herridge, for the plaintiffs.

T. McVeity, for the defendants the Corporation of the City of Ottawa.

D. H. Maclean, for the defendants the Corporation of the County of Carleton.

G. McLaurin, for the defendants the Corporation of the Township of Gloucester.

KELLY, J., referred to the incorporation of the plaintiff company in January, 1865, under the Road Companies Act, C.S.U.C. 1859 ch. 49; to an agreement between the plaintiff company and the county corporation of the 4th February, 1878; to a conveyance of the bridge by the county corporation to the plaintiff company on the 21st September, 1878; to an Act, 42 Vict. ch. 48(O.), validating the deed, and declaring that it should be the duty of the plaintiff company to keep and maintain the bridge in good and proper repair; to an order of the Ontario Railway and Municipal Board, made in December, 1907, annexing to the city of Ottawa that part of the township of Nepean between the south limit of the city and the Rideau river through which the plaintiff's company's road ran; to a by-law of the City of Ottawa, passed on the 19th October, 1908, authorising the taking possession of toll roads within the city boundaries, and providing for an arbitration, as a result of which an award was

made finding that Billings bridge was worn out and practically useless, and allowing the plaintiff company the value of the piers and abutments at the north end of the bridge; to a conveyance by the plaintiff company to the city corporation of certain parts of the company's toll roads within the new limits, dated the 24th July, 1909; to resolutions passed in December, 1911, by the councils of the County of Carleton and the Township of Gloucester calling on the plaintiff company to repair the bridge; to a prior intimation given by the plaintiff company of their intention to abandon the remaining part of the bridge, unless the municipalities should repair; and to a by-law passed by the plaintiff company on the 21st March, 1912, under the provisions of the General Road Companies Act, abandoning the part of the bridge which still remained the property of the company, notice whereof was given to each of the defendants; and to other facts and circumstances; and proceeded:—

I do not agree that, in the circumstances under which the settlement of the 7th February, 1878, was made, the plaintiff company's rights in that respect are to be determined only by the agreement and deed and Act of the Legislature, or that the settlement excludes the application of the terms of the General Road Companies Act.

The county corporation must be taken to have had knowledge of the purposes for which the plaintiffs were incorporated, and of the application to companies then incorporated of the statute then in force relating to their duties and rights.

The necessity for the agreement arose from the doubts that existed as to the liability for repairs to the bridge, which, the agreement admitted, was part of the plaintiffs' road, and which was in existence before the plaintiffs were incorporated or took over the road.

The terms of the agreement of settlement as to the liability of the plaintiffs for repairs, etc., must be taken to apply to repairs and maintenance such as the plaintiffs were liable for in respect of other parts of the road, and subject to whatever rights the statute gave them to abandon and relieve themselves from liability on such abandonment.

The agreement of settlement in that respect could not have been intended to do more than make it clear that the plaintiffs, from the time the bridge was rebuilt and reinstated, were to be subject to the obligation of keeping it in repair as provided in sec. 98 of the General Road Companies Act then in force (R.S.O. 1877 ch. 152), and under which Act a road company, notwith-

standing the obligation for repair imposed upon it by sec. 98, had the right to abandon and so be relieved from further responsibility.

This view is strengthened when one takes into consideration the provision of the agreement by which the plaintiffs' liability is limited to the time during which they are the owners of and control the road—a provision which, to my mind, indicates that the intention of the parties to the agreement was, to make the plaintiffs liable in respect of the bridge in the same manner as for other parts of the road, and subject to the terms of the statute.

The following statutory provisions have particular application to this case: sub-sec. 2 of sec. 613 of the Consolidated Municipal Act, 1903; . . . 22 Vict. ch. 54, sec. 339; . . . sec. 8 of the General Road Companies Act, R.S.O. 1897 ch. 193; . . . sec. 50 of the same Act; . . . sec. 103 of the same Act. . . .

The exclusive jurisdiction over Billings bridge, at and prior to the time the plaintiffs were incorporated and acquired the road, was in the county. The part of the bridge which was not taken by the city continued, until the plaintiffs abandoned it, to be a part of their road; and, it not being an intermediate part of the road, was subject to abandonment without the consent of the municipal council of the county.

It was stated in Regina v. County of Haldimand, 38 U.C.R. 396, at p. 408, that where part of the road is abandoned the statutory provision relating thereto, 29 Vict. ch. 36, sec. 9, would have to be construed so as to correspond with the general provisions referred to in that judgment, and which included the provisions applying to cases of abandonment of the whole road; and R.S.O. 1897 ch. 193, sec. 50, sub-sec. 2, which was in force at the time the plaintiffs passed the by-law of abandonment, is in effect the same as 29 Vict. ch. 36, sec. 9.

The case above-cited was in many respects like the present one, but differed from it in two important particulars. There the abandonment was not, as required by the statute, made by by-law; and, secondly, prior to the company assuming control, no bridge existed over which the county had the exclusive jurisdiction referred to in the Act; and, as said by Wilson, J., who delivered the judgment (at p. 409), "there was nothing for the county council to resume;" and also (p. 408), "if the municipal body does not assume the road or work, they resume, that is, there is cast upon them again by 35 Vict. ch. 33, sec.

12'' (afterwards R.S.O. 1897 ch. 193, sec. 51), ''only their own original road.''

Moreover, there is to be found in sec. 617, sub-sec. 1, of the Consolidated Municipal Act, 1903, the following: ''In case of a bridge over a river, stream, pond or lake, forming or crossing a boundary line between two or more counties or a county, city or separated town, such bridge shall be erected and maintained by the councils of the counties, or county, city and separated town.''

My conclusion is, therefore, that the plaintiffs had the right to abandon the part of the bridge which they purported to abandon by their by-law of the 21st March, 1912; and that, on passing that by-law and giving the required notices thereof, they were relieved from further liability in respect of the bridge.

As to the other question, namely, on whom the responsibility rests since the abandonment, I am of opinion, having regard to the various statutory enactments in force at that time, that the jurisdiction over the part of the bridge abandoned by the plaintiffs and their responsibility in respect thereof, have fallen back upon the county. In reaching this conclusion, I have not overlooked the fact of the annexation to the city of the lands immediately to the north of the bridge.

The effect of the various statutes does not, in my view, bear out the contention that this jurisdiction and this responsibility have devolved upon the township.

The northerly portion of the bridge became the property of the city, on the extension of the city limits, and the various happenings which followed; and the city and county are together now liable for the erection, repair, and maintenance of the whole bridge.

There will, therefore, be judgment according to these conclusions.

The plaintiffs' costs will be payable by the county corporation; there will be no costs of the other parties.

MIDDLETON, J. MARCH 31ST, 1913.

BASHFORTH v. PROVINCIAL STEEL CO.

Master and Servant—Employment of Works Manager by Incorporated Company — Action for Salary—Suspension—Dismissal—Resolution—Notice—Sufficiency—Justification—Incapacity—Misconduct—Counterclaim — Improper Expenditure by Manager—Costs.

Action for salary and for a share of profits under the terms of the plaintiff's agreement of hiring with the defendants, an incorporated company, as their works manager at Cobourg. The plaintiff claimed $290.94, balance of salary to the 31st August, 1912; $1,003.35, salary due on the 30th November, 1912; some small sums for light and fuel; and $300 for profits.

By the agreement, which was dated the 22nd November, 1911, the plaintiff was employed for four years from the 1st December, 1911, as general works manager, at a salary of £800 per annum, in quarterly payments, and five per cent. of the net profit over and above £1,500 per annum, and the use of a house and a supply of light and fuel.

In August, 1912, he was suspended by the defendants' board of directors, and on the 25th October received a letter from the secretary which, it was said, amounted to a dismissal.

In April, 1912, he had been elected a director and vice-president of the company.

The plaintiff denied the fact of his discharge and its validity, and sued for his salary upon the theory that the agreement was still in force.

The defendants alleged that on the 22nd October, 1912, the plaintiff was, for good cause, dismissed from their employment; and they brought into Court the amount which they said was due to him for salary up to that date, together with the costs of the action up to the date of payment in.

The defendants also counterclaimed for the damage sustained by reason of improper expenditure by the plaintiff.

The action and counterclaim were tried before MIDDLETON, J., without a jury, at Cobourg, on the 4th, 5th, and 6th March, 1913.

F. M. Field, K.C., and W. F. Kerr, for the plaintiff.

E. F. B. Johnston, K.C., A. C. McMaster, and J. F. Keith, for the defendants.

MIDDLETON, J. (after setting out the facts):—The plaintiff's colleagues on the board of directors were Mr. William Beattie and Mr. Alexander Q. C. O'Brien, the secretary-treasurer of the company. Some difficulty had arisen . . . by reason of the plaintiff taking the position that he was the general manager of the company, instead of the "general works manager." . . .

At a meeting of the board . . . on the 20th August, 1912, Messrs. Bashforth (plaintiff), Beattie, and O'Brien being present, Mr. O'Brien made a statement . . . embodying charges of flagrant misconduct and incapacity on the part of the plaintiff. O'Brien then moved a resolution for an investigation by two members of the board, and that in the meantime the plaintiff be requested to refrain from active participation in the company's business. . . . This was seconded by Mr. Beattie, and is said to have been carried.

Following this, a copy of the resolution . . . was mailed by Mr. O'Brien to the plaintiff, with a letter . . . requesting the plaintiff to govern himself in accordance therewith. Contemporaneously, a notice, dated the 21st August, 1912, was posted at the works, signed by O'Brien . . . that "until further orders Mr. Davis will take charge of the mill, in the absence of the general works manager." . . .

A special meeting of shareholders was held on the 4th October, 1912, when the directorate was reconstituted; Mr. Sheldon . . . was elected to the directorate.

On the 22nd October, a resolution was passed by the directors as follows: "Whereas, under date of August 30th, 1912, the general works manager, Mr. Andrew Bashforth, was suspended by resolution of the board of directors pending investigation into his conduct, and whereas investigation has been made resulting in confirmation of the allegations, be it resolved to notify Mr. Bashforth that his services will be immediately dispensed with, and the solicitor of the company be instructed to take the necessary steps to carry out the requirements of the board and to notify Mr. Bashforth forthwith."

On the 25th October, a letter was sent to Mr. Bashforth, signed "The Provincial Steel Company Limited, A. Q. C. O'Brien, secretary," stating: "We beg to advise you that the board of directors, at their meeting on August 30th, 1912, passed a resolution that your services be immediately dispensed with. The grounds of this resolution you are aware of, as you have been on suspension for some time while the directors were investigating your conduct. You will please take this letter as notice accordingly."

It will be observed that there are two errors. . . The resolution of suspension was on the 20th August, not the 30th; and the resolution of dismissal was on the 22nd October, not the 30th August. . . .

Mr. Bashforth . . . says that, when he got the letter of the 25th October, he knew he was dismissed. I agree with him, and think there can be no question that the letter of the 25th October was an adequate notice of dismissal. It bears the signature of the company, by its secretary, and I think would have been ample justification for Mr. Bashforth then instituting an action for wrongful dismissal, if so advised.

Turning now to the legal question argued, it is said that the positions of director and general works manager are so inconsistent as to make it impossible for the same individual to hold both. This is based upon King v. Tizzard, 9 B. & C. 418, where it is held that the offices of alderman and town clerk were incompatible, and where Lord Tenterden based his finding upon the statement that "he would fill the two incompatible situations of master and servant."

I do not think it necessary to review the cases bearing upon this topic, because I am convinced that they do not apply here; for there is, in my view, no incompatibility between the two offices. The directors are not the master; they are the servants. The company is the master; and Bashforth was made a director at a shareholders' meeting of the company, after he had been appointed works manager. Nothing in practice is more common than to have those charged with the administration of the affairs of the company as managers also upon the board of directors, who are themselves managers; so as to insure harmony in the workings of the company. Whether this is wise in a particular case must be left to the judgment of the shareholders.

As pointed out in Re Matthew Guy Carriage and Automobile Co., 3 O.W.N. 1233, 26 O.L.R. 377, the Privy Council took the view in Burland v. Earle, [1902] A.C. 83, 101, that a director was entitled to remuneration payable under an agreement made with him before he became director.

So that, on all these grounds, the objection fails.

The question whether the company rightfully dismissed Bashforth has given me much anxiety. I realise the serious effect to the parties of any finding; yet I cannot feel doubt as to the result. I think the company were justified in what they did. As is usually the case in actions of this type, when the master seeks to justify the discharge of an employee, the whole career

of the employee during the course of the employment is gone into in painful detail, and much is sought to be made of minor matters.

In this case I base my finding upon broad grounds. Before Mr. Bashforth's employment with the company, he had been employed as an engineer; and I have no reason to doubt his ability as an engineer. He was here employed, not merely as engineer, but as general works manager, which involved his taking charge of the operative end of the company's business, and required, if his efforts were to be successful, executive ability of a somewhat high order. This, unfortunately, Mr. Bashforth does not possess. Under the supervision and guidance of a competent executive officer, he, no doubt, had been a great success in his employment in England; but when he came to Canada, and had to face the very difficult situation existing in Cobourg, he did not prove equal to the task. Besides this negative reason for his failure, other serious defects developed. Instead of being content to fill the position he was entitled to by his employment, that of general works manager, he at once assumed the rôle of general manager, and, as a natural consequence, found himself in conflict with Mr. O'Brien, the secretary-treasurer of the company. Being unused to the conditions prevailing in Canada between employer and employee, Mr. Bashforth also fell foul of the men employed, unless these men had been previously trained in England, and were, therefore, prepared for his methods.

In the result, time and energy that ought to have been spent in bringing the factory into satisfactory and economical operation were wasted in useless bickering. This, combined with the lack of executive ability already referred to, resulted in the work of the mill being continued, it is true with some improvement, yet at an enormous loss. . . . Bashforth knew when he was employed that it was the desire of Mr. Heath (the principal shareholder and president) that the works should redeem themselves out of their own earnings. Yet the first thing he did was to spend some $3,000 in fixing up the residence. He also spent $4,000 in the purchase of some new rolls, without having taken any adequate steps to see that they could be used to advantage. . . .

It is impossible to lay down in any satisfactory way, in general terms, what will justify a discharge. Every case must to some extent depend upon its own circumstances. Where, as here, the employment is that of the manager of an important branch of an undertaking such as this, and where the failure results in a heavy financial loss, as was the case here, the unfitness

here existing would, to my mind, justify the discharge. In addition to this, there was in this case, I think, such misconduct in reference to the matters alluded to as warrants dismissal. . .

The defendants counterclaim for the damage sustained by reason of the improper expenditure. I gathered from the attitude taken by counsel that the counterclaim was put forward rather as a shield than as a sword. Some minor claims were made by the plaintiff with respect to a balance deducted from his salary cheque in August, and with respect to small sums claimed for fuel and lighting. On some of these items he is probably entitled to recover; but these are not the real subject-matter of the litigation. I think I shall be doing the plaintiff no injustice if I set off anything that may be due to him in respect of these items against the damages which he would be liable to pay upon the counterclaim. The loss in respect of the unauthorised expenditure on the residence building alone would more than counterbalance anything coming to him on this head. If I have mistaken the defendants' attitude, I may be spoken to.

In the result, the action fails, and should be dismissed with costs, if demanded.

The plaintiff has remained in possession of the works house up to the present time. That matter is not before me in any way; and I would suggest to the defendants that they can well afford to be generous, and to forgo costs and any claim in respect of occupation rent of the premises, in view of the hardship upon the plaintiff by now having to begin again in England or elsewhere.

CLUTE, J. MARCH 31ST, 1913.

*CURRY v. E.M.F. CO. LIMITED AND STUDEBAKER CO. LIMITED.

Principal and Agent—Exclusive Agency for Sale of Goods in Defined Territory—Sales Made by Principals in Territory without Intervention of Agent—Breach of Contract—Evidence—Nominal Damages.

Appeal by the plaintiffs and cross-appeal by the defendants from the report of a Referee to whom the action was referred (by consent) for trial.

*To be reported in the Ontario Law Reports.

All the questions raised by the appeal were disposed of at the hearing, except the question arising upon the claim of the plaintiffs, the agents of the defendants for the sale of their cars in a defined territory, to a commission upon sales of cars to three persons, in the plaintiffs' territory, but not effected through the plaintiffs' agency—the plaintiffs contending that, under the contract between them and the defendants, the defendants had no right to sell machines within the plaintiffs' territory while the agency continued.

The Referee found as a fact that the defendants did sell three cars in the plaintiffs' exclusive district, while the contract was in force; but that the plaintiffs were entitled only to nominal damages.

J. H. Rodd, for the plaintiffs.

J. H. Coburn, for the defendants.

CLUTE, J., said that the authorities referred to by counsel for the plaintiffs—Evans on Principal and Agent, 2nd ed., pp. 402, 405, 407; Simpson v. Lamb, 17 C.B. 603; Prickett v. Badger, 1 C.B.N.S. 296; Green v. Bartlett, 32 L.J.C.P. 261; Green v. Reed, 3 F. & F. 226—did not cover the point involved; and he was not able to find any English or Canadian authority applicable to the case.

It seemed to be conceded that the contract gave the exclusive right to the plaintiffs as sales-agents within the county of Essex; but there was nothing in the contract which entitled them to a commission on sales made by the defendants within the territory; and, that being so, damages for the breach would have to be proven as in any other case.

There was no evidence upon which the Court could justly say what, if any, damage the plaintiffs had suffered by reason of the breach.

The learned Judge referred to two American cases, Roberts v. Minneapolis Threshing Machine Co., 8 S. Dak. 579, and Brush-Swan Electric Light Co. v. Brush Electric Co., 49 Fed. Repr. 5, which were in point.

In the present case, there was no evidence to shew that the plaintiffs earned or would have earned any commission on sales to any of these persons if the sales had not been made by the defendants, nor was there any evidence that the plaintiffs pro-

moted in any way the sales which were made by the defendants.

The learned Judge agreed with the Referee that there was a breach of the contract, but that only nominal damages could, upon the evidence, be allowed.

Both appeal and cross-appeal dismissed without costs.

MASTER IN CHAMBERS. APRIL 1ST, 1913.

LUCIANI v. TORONTO CONSTRUCTION CO.

Fatal Accidents Act—Action Brought on Behalf of Parents of Deceased Person by Infant—Power of Attorney—Status of Plaintiff—Assignee of Claim—Letters of Administration not Granted—Time-limit for Bringing Action—Con. Rules 259, 261, 298, 312—*Motion to Set aside Statement of Claim—Cause of Action—Jurisdiction of Master in Chambers—Reference to Judge.*

The plaintiff was an infant suing, by his next friend, for damages for the death of his brother. By the statement of claim he alleged that he sued on behalf of the parents of his deceased brother, who was killed on the 3rd December, 1911, while working for the defendant company. The writ was issued on the 22nd November, 1912.

The parents of the deceased resided in Italy. The action was brought under a power of attorney from them to the plaintiff, dated the 2nd November, 1912. This authorised him "for us and in our behalf and for our use and benefit to sue the said (defendants) for damages . . . the said action to be brought in the name of our said attorney but for our benefit;" and he was empowered to give discharges for anything paid in compromise of their claim, and to make any settlement, as he might think fit. At the same time the parents executed an absolute assignment of their claim to the plaintiff; but this was not mentioned in the statement of claim.

The defendants moved to set aside the statement of claim and to dismiss the action, or to stay all further proceedings, or for security for costs.

Grayson Smith, for the defendants.

D. C. Ross, for the plaintiff.

THE MASTER:—It was argued in support of the motion that an infant could not take a power of attorney. But the contrary is stated to be the law in 31 Cyc. 1212, where it is said: "All the cases are agreed that an infant may in general act as an agent."

Then it was submitted that, in any case, the action should have been brought in the name of the parents, and that there is no power in the attorney to sue unless he could do so as assignee. (See McCormack v. Toronto R.W. Co., 13 O.L.R. 656, and Powley v. Mickleborough, 21 O.L.R. 556.)

This objection seemes well taken. The only case on the point I have found is In re Wallace, 14 Q.B.D. 22, also reported in 54 L.J.Q.B. 293, 51 L.T.R. 551, and 33 W.R. 66—which seems to shew that it was thought to be a new and important decision. See 31 Cyc. 1394. That was the case of a petition in bankruptcy by a creditor, which had to be signed by himself. But the Court of Appeal held that a signature of the creditor by his attorney was sufficient, because, it was said, "the signature is essential to the doing of the act—the commencement of the proceedings in bankruptcy—which is authorised." That is a reason which does not apply to the commencement of an action.

It was argued by counsel for the plaintiff that I had no power to dismiss the action or to strike out the statement of claim as not shewing any cause of action. It is pointed out in Harris v. Elliott, ante 939, that this can only be done under Con. Rule 259 or Con. Rule 261 or under the inherent jurisdiction of the Court.

Nor can Con. Rule 298 be used to strike out the name of the plaintiff. The proper procedure would have been for the plaintiff to have taken out letters of administration, as, no doubt, he could have done under his power of attorney, except for the fact that he will not be of full age until May next. Owing to the slow progress of the case, it cannot be tried until next autumn, if a jury is asked for, as, no doubt, will be the case.

The case could, therefore, be put into the correct form, if stayed until administration had been granted, with leave to the plaintiff to amend the writ and statement of claim accordingly. The right to do this was denied, relying on the case of Blayborough v. Brantford Gas Co., 18 O.L.R. 243, citing and following McHugh v. Grand Trunk R.W. Co., 2 O.L.R. 600. Here, however, there is no attempt to do what was attempted in those cases. The action is brought on behalf of those entitled; and, if the plaintiff had alleged that he was the administrator, the action could have proceeded and he could have obtained the necessary letters of administration before the trial. Under

Dini v. Fauquier, 8 O.L.R. 712, approved on this point in the Court of Appeal in Johnston v. Dominion of Canada Guarantee, etc., Co., 17 O.L.R. 462, this would have been sufficient.

Much as I would like to give effect to the principles of Con. Rule 312, and to those considerations emphasised in Sharp v. Grand Trunk R.W. Co., 1 O.L.R. 200, at p. 206, I am unable to see how the mistake as to the form of action can be remedied—in view of the time limited for bringing actions of this kind. See Williams v. Harrison, 6 O.L.R. 685, and cases cited there.

Nothing, therefore, remains but that this motion be referred to a Judge, who will deal with it under Con. Rule 261, or in such other way as he thinks best.

KELLY, J. APRIL 1ST, 1913.

CITY OF TORONTO v. STEWART.

Municipal Corporations—Prohibition of Erection of Apartment Houses on Residential Streets—2 Geo. V. ch. 40, sec. 10—City By-law—"Location" before Passing of By-law—Actual Work Done.

Action to restrain the defendant from locating or proceeding to locate an apartment house on the east side of Oriole road, in the city of Toronto, in contravention of a city by-law.

Irving S. Fairty, for the plaintiffs.
George Wilkie, for the defendant.

KELLY, J.:—The defendant is the owner of a parcel of land, situate on the east side of Oriole road, in Toronto, having a frontage on Oriole road of about 211 feet, and running easterly about 437 feet; the easterly 250 feet of the property has a width of about 224 feet.

Running easterly and westerly through this property, the defendant has laid out a private way, or street, 66 feet wide, the northerly limit of which, at Oriole road, is distant 72 feet 8 inches from the northerly limit of his property. On the part of the property lying to the north of this private way, by a depth of about 142 feet 6 inches, the defendant erected an apartment house fronting on Oriole road, and to the east of it a garage.

On the lands on the north side of the private way, and immediately to the east of the parcel on which are the apartment house and garage, the defendant contemplated building another apartment house, and on the 30th January, 1912, applied to the City Architect for a permit for the erection thereof; the permit was granted on the 2nd February, 1912.

The site for the location of the building was then staked out, and from that time up to April, 1912, the defendant made contracts with some of the contractors for the erection of this building. Prior to the 13th May, when by-law No. 6061 of the City of Toronto was passed, prohibiting the location of an apartment or tenement house "upon the property fronting or abutting upon" Oriole road and other streets therein named, the work of excavation, particularly of a trench for the foundation walls, was commenced, but was discontinued for a time, owing, as the defendant says, to his having been unable to obtain brick with which to proceed.

Some time after the passing of the by-law, work was again proceeded with; and on the 25th September, 1912, this action was commenced to restrain the defendant from locating or proceeding with the location of the apartment house referred to.

The defendant sets up that, before the passing of the by-law, the building had been located; that the by-law is invalid; and that the apartment house is not being located on property fronting or abutting on any of the streets named in the by-law.

On the whole evidence, I am satisfied that, prior to the passing of the by-law, there was a location of this apartment house, not merely by defining and staking out upon the ground the position the building would occupy, but by the actual doing of some of the excavation work for it.

Doubts as to this were raised by the evidence of witnesses for the plaintiffs. Some of them, however, frankly admitted that work might have been done without their having observed it. As against this, there is the positive testimony of the defendant and other witnesses, which I have no reason for rejecting, that the excavation work referred to was done prior to the passing of the by-law, it being specially mentioned that on the 6th May workmen were engaged in doing this very work. There was, therefore, more than a design or intention on the part of the defendant to erect this building on this land; there was the actual use of the land for the purposes of the building and work of excavation actually done in furtherance of that purpose.

Following the decision of Middleton, J., in City of Toronto v. Wheeler, 3 O.W.N. 1424, and of a Divisional Court in City

of Toronto v. Williams, 27 O.L.R. 186, I am of opinion that the defendant had located the apartment house, within the meaning of these decisions, prior to the passing of the by-law.

I have not dealt with the other objections raised by the defendant; a consideration of these may lead to the conclusion that the property on which this apartment house is being built does not front or abut on any of the streets named in the by-law.

The judgment in Re Dinnick and McCallum, ante 687 (in appeal), helps to that conclusion.

Finding, as I do, for the defendant, on the ground of location of the building prior to the passing of the by-law, I express no view on the defendant's other objections.

The action is dismissed with costs.

LENNOX, J. APRIL 2ND, 1913.

RE WARREN AND TOWN OF WHITBY.

Public Health Act, 1912—*Appointment of Medical Officer of Health — By-law — Tenure of Office of Officer Appointed under Former Act—Change in Policy Effected by New Act —Contract—Termination—Appointment by Tender—Municipal Act*, 1903, *sec.* 320.

Motion by Frank Warren, a physician and surgeon, to quash by-law No. 832 of the Town of Whitby, in so far as it related to the appointment of C. F. McGillivray as Medical Officer of Health for the town.

Eric N. Armour, for the applicant.

J. E. Farewell, K.C., for the town corporation.

LENNOX, J.:—Upon the merits this is not a matter inviting judicial action. It does not appear that the appointment made was not a good appointment, or that the council acted in haste, in bad faith, or contrary to the public interest. It is not suggested that the people of Whitby are behind Dr. Warren in his attempt to veto the action of their municipal council.

He is acting solely in his own interest, and for his individual satisfaction or gain.

It could not be pretended that he was harshly treated; for his appointment, as he knew from undeviating practice, termin-

ated at latest in January, 1913; and meantime, under the statute then in force, his tenure of office was always at the will of the council; his engagement was a temporary one, revocable at any time, without forfeiture by the municipality, and without the obligation of assigning cause.

The Public Health Act of 1912, amongst other things, inaugurates an essentially new policy as regards local Medical Officers of Health. Their qualifications were not defined under the old Act; they are defined now. There might be such an officer under the old Act; there *must be* such an officer under the new one. If appointed by the council, his tenure of office was formerly at the will of the council; but, under the Act of 1912, an appointee continues in office during residence and good behaviour, can only be removed for cause, and then only with the approval of the Provincial Board. In addition to all this, new duties are assigned to this officer and new powers are vested in him. Many of these provisions involve, outside of ordinary professional attainments, the exercise of important discretionary functions and the possession of financial and administrative capacity. See, for instance, new sections 38, 40, 41, 42, 52, 72, and 87; not to speak of many other amendments throughout the Act.

I cannot, therefore, accede to the applicant's contention that, upon the new Act coming into force, in June, 1912, a new contract was thereby created between him and the municipality; that he ceased to be a temporary and became a permanent officer of the municipality; and that, from that day on, the council ceased to have any say in the matter; yet the officer, on his part, would not be bound to remain in the service of the municipality. The radical nature of the changes introduced I would take to be an answer to all this.

However, in any case, though I attach no importance to the verbal change from "Medical Health Officer" to "Medical Officer of Health," the applicant could hardly be said to be the officer described in the 37th and other sections of the Act, under the definition contained in sub-sec. (g) of sec. 2, namely: "'Medical Officer of Health' shall mean the medical officer of health of the municipality appointed under this Act." Dr. Warren's apointment was not under this Act.

On the other hand, Dr. McGillivray has been appointed under it, and can be dismissed only under the terms of sec. 37.

I am satisfied that there was no infraction of sec. 320 of the Consolidated Municipal Act, 1903, relating to appointment by tender.

The motion is dismissed with costs.

KELLY, J. APRIL 3RD, 1913.

ARMSTRONG CARTAGE CO. v. COUNTY OF PEEL.

Highway—Nonrepair—Injury to Motor Vehicle—Knowledge of Unsafe Condition—Liability of County Corporation—Highway Improvement Act, 1912—*Damages—Cost of Repairs—Expenses—Loss of Use of Vehicle—Remoteness.*

Action to recover $1,500 damages for injuries and loss resulting from injuries to the plaintiffs' auto-truck by breaking through a bridge on the highway between Brampton and Cooksville, which bridge, as the plaintiffs alleged was out of repair.

Counterclaim by the defendants, the Corporation of the County of Peel, for $250 expenses incurred in repairing the bridge, which they said was injured by the plaintiffs' negligence and improper use.

The action and counterclaim were tried before KELLY, J., without a jury, at Brampton, on the 12th and 13th March, 1913.

G. S. Kerr, K.C., and G. C. Thomson, for the plaintiffs.

T. J. Blain and D. O. Cameron, for the defendants.

KELLY, J:—At the close of the trial, I expressed the opinion that, on the evidence, the bridge in question was, at the time the accident occurred and for many months prior thereto, badly out of repair and exceedingly dangerous for those having occasion to pass over it, and that those whose duty it was to maintain and repair it had ample means of knowing—and must have known—of its unsafe condition. It is inconceivable that the defendants could have been in ignorance of its condition, if reliance is to be placed on the evidence offered for the plaintiffs, not only as to want of repair, but also as to the length of time prior to the accident during which evidences of weakness and defects were apparent to those making use of it. That evidence I accept.

The road of which the bridge formed part is an important highway, on which there is much public traffic of all kinds usually seen on leading roads in long and well settled country places.

On the argument, counsel for the defendants contended (though this defence was not expressly raised in the pleadings) that the defendants were not, under the Highway Improvement Act and amendments thereto, liable for maintenance and repair.

This road was assumed by the defendants as part of a county road system under the provisions of that Act, and a great deal of work of construction and repair had been done on it prior to the 22nd June, 1912, when the accident happened which resulted in this action. The defendants' engineer says that the defendants had performed work on the road almost up to the bridge, and were working in its direction, but had not reached it.

Whatever doubt might have been entertained as to the liability, of the defendants, on the law as it stood prior to the passing of the Highway Improvement Act of 1912 (2 Geo. V. ch. 11)—and, on the evidence, I felt no uncertainty about the defendants' liability—such doubts were set at rest by the provisions of that Act. I am, therefore, of the opinion that the defendants are liable.

The other question for determination is the amount of damages sustained by the plaintiffs.

For making repairs to the auto-truck, necessitated by the accident, and including the item of $25 for towing the truck from Cooksville, the plaintiffs are entitled to $279.44.

For expenses at the time of the accident, moving the safe to Toronto, cost of taking the auto-truck from the place of the accident and bringing it to Toronto, freight charges on the safe and truck from Toronto to Hamilton, and telephone charges (all included in the item of $673.35 set out in the plaintiffs' particulars), I allow $147.50, in arriving at which I make a deduction of $25 from the item of $76.80 for moving the safe to Toronto.

Some of the other charges making up this $147.50 may appear to be excessive; but the situation in which the plaintiffs found themselves as the result of the accident was unusual; and they, no doubt, acted as reasonably as the circumstances permitted in their efforts to remedy the trouble with as little delay as possible; and it was shewn that they actually paid the amounts charged for these items.

The remaining item of $733.08 claimed by the plaintiffs is for damages in being deprived of the use of the truck for 82 days. The defendants contend that such damages are too remote to be charged against them.

The question of remoteness of damage has been much discussed by the Courts and text-writers, and the cases bearing upon it are numerous. In Halsbury's Laws of England, vol. 21, at p. 485, it is summarised thus: "Where a chattel has been injured owing to a negligent act, the cost of repairing it, the

difference in value between the former worth and that of the chattel when repaired, and the damage sustained owing to the loss of use of the chattel while being repaired, are all recoverable." Amongst the cases there cited are The Greta Holme, [1897] A.C. 596, and The Argentino (1889), 14 App. Cas. 519. . . .

Here it is shewn that the truck which was damaged was in daily use by the plaintiffs in their business; that to supply its place and do its work during the time the repairs were being made thereto, it was necessary for the plaintiffs to hire teams at a cost per day, in excess of what would have been the cost of operating the truck, of $8.94; and this charge they make for 82 days, from the 22nd June, the date of the accident, until the 1st October, when the truck was returned to them repaired.

Admitting the plaintiffs' right to recover for such loss, the amount claimed—or rather the time for which the claim is made—is excessive. The evidence shews that the repairs necessitated by the accident could have been made in from two to three weeks.

On the 11th July, an estimate of the cost of the repairs was furnished to the plaintiffs by the persons who made them; but it was not until the 10th August that the plaintiffs gave instructions for the repairs to be proceeded with. Making an allowance of a reasonable time for delivery of the truck to the company for repair and for arranging about the repairs, and for the time necessary to make the same, and a further reasonable time for delivery to the plaintiffs at Hamilton, when repaired, I think 33 working days is a reasonable estimate of the time for which the plaintiffs were deprived of the use of the truck owing to the damage which it had sustained in the accident. For that time, at the rate of $8.94 per day, the plaintiffs would be entitled to $295.02.

This, with the above items of $279.44 and $147.50, makes a total of $721.96, the amount to which, I think, the plaintiffs are entitled.

In making this calculation, I have not overlooked the question of interest or of probable depreciation of the truck through wear and tear, had it been in service during the 82 days. I may mention, too, in explanation, that it was shewn by the evidence that part of the delay in having the repairs done was due

to negotiations for settlement between the plaintiffs and the insurers of the truck, but which resulted in no benefit either to the plaintiffs or defendants.

Judgment will be in favour of the plaintiffs for $721.96 and costs, and dismissing the defendants' counterclaim with costs.

MEREDITH, C.J.C.P., IN CHAMBERS. APRIL 4TH, 1913.

*REX v. KEENAN.

Criminal Law—Summary Conviction—Person Found Drunk in Public Place—Municipal By-law—2 Geo. V. ch. 17, secs. 19, 34 (O.)—Imprisonment—Habeas Corpus—Certiorari in Aid—Accused not Given Opportunity to Make Defence—Duty of Magistrate—Criminal Code, secs. 686, 687, 721—10 Edw. VII. ch. 37, sec. 4 (O.)—Adequate Relief by Appeal—Criminal Code, sec. 749—Motion to Quash Conviction—Con. Rule 1279—Improvident Issue of Writs—Quashing.

Motion on behalf of John Keenan, a prisoner, upon the return of writs of habeas corpus and certiorari, for his discharge from custody.

T. J. W. O'Connor, for the applicant.
E. Bayly, K.C., for the Crown.

MEREDITH, C.J.C.P.:—. . . The prisoner was convicted, by a Police Magistrate, of having been found drunk in a public place, contrary to a municipal by-law, in the city of Toronto; and, having admitted, upon his trial, that he had been convicted of a like offence, within three months, was committed to an Industrial Farm of the locality for an indeterminate period not exceeding two years, under the provisions of 2 Geo. V. ch. 17, sec. 34, and is now in custody there.

No objection is made to the jurisdiction of the magistrate; everything is, indeed, admitted to have been regular and proper in the prosecution and commitment of the man, except as to the opportunity given to him to make his full defence, upon his trial, to the charge that he was "found drunk" on the occasion in question. That he was then drunk was positively sworn by two

*To be reported in the Ontario Law Reports.

police constables, and he was thereupon convicted of the offence with which he was then charged; and afterwards, being asked, he admitted having been likewise convicted within a month; whereupon the sentence I have mentioned was pronounced against him.

This application is based upon his own affidavit only; in which he asserts that he was not asked, nor given opportunity, to tender his defence; that he was prepared to go into the witness-box and say that he was not drunk; and that he had two witnesses at the Police Court, who, he expected, would say the same thing. Neither of the two witnesses has made any affidavit in this matter.

In answer to the prisoner's affidavit, an affidavit of an assistant clerk of the Police Court in which the man was tried, is filed, in which it is deposed that, after the evidence I have mentioned had been given, the Police Magistrate inquired whether that was all; and that, no further evidence being offered by the defendant, or his counsel—Mr. Curry—the man was convicted.

In reply, an affidavit of Mr. Curry is filed in which he deposes that he did not act as counsel for the prisoner upon his trial; so that anything said or done by him on that occasion should be taken as having been done in mere friendliness towards a man upon his trial, with a vivid prospect of a term in an Industrial Farm before him.

Upon the whole evidence now before me, I find that the man was guilty of the charge made against him—the offence of which he was convicted; that at his trial he had no intention of giving evidence in his own defence; that, if he had had any such intention, nothing was said or done preventing him from giving effect to it; that the severity of the sentence, differing so much from his former experiences in the same Court, has brought into his mind new notions; and that desire to escape from it, and indulge in his drinking habits, accounts for his testimony being given now, by affidavit, instead of in the witness-box, at the trial. I cannot think that, even as a passing friend of the accused, Mr. Curry, who is quite familiar with the practice in the Court in which the man was being tried, and who admittedly gave some advice to him, would have permitted him to be deprived of his right to make his full defence, without some out-spoken objection, if the man were not being given every reasonable opportunity to meet the case made against him.

But it is contended that legislation expressly provides that, after the evidence for the prosecution had been taken, it was the duty of the magistrate to have asked if he wished to call any

witnesses, and, if he did, to have heard them: see the Criminal Code, secs. 686 and 687; and that that was not done, and, being left undone, vitiated the whole proceeding.

These sections, 686 and 687, which are the basis of these contentions are, however, not applicable to summary proceedings; they are part of the preliminary procedure in prosecutions for indictable offences. . . .

Section 721 of the Criminal Code is made applicable to prosecutions under provincial enactments by 10 Edw. VII. ch. 37, sec. 4 (O.); but it does not . . . expressly make secs. 686 and 687 applicable to summary prosecutions; for the reason . . . there was no need that it should. Section 721, as far as it affects the question, deals only with the manner of taking the evidence of the witnesses—procedure separately provided for in secs. 682, 683, 684, and, in part, 687.

But, assuming all that is contended for, in the prisoner's behalf, in this respect, to be well founded, the case was assuredly one for an appeal, not for consideration on a writ of certiorari. It really, in substance, involves a question of fact, whether the man was drunk as charged: if he were unquestionably guilty, he should not escape from a fitting punishment merely because of an irregularity which in no way prejudiced him: and so, if guilt were questionable, it ought to be determined upon a fair and full new trial by way of appeal, in which there would be no irregularity—whether or not there was any upon the trial before the Police Magistrate.

The rule in the Courts of the neighbouring States is plain and strong against giving relief by way of a writ of certiorari when adequate relief can be had upon an appeal: see Encyclopædia of Pleading and Practice, vol. 4, pp. 50 *et seq.* The rule in England has not been so strong; but in such a case as this, in which an equal right to appeal is conferred on each of the parties —prosecutor as well as accused (10 Edw. VII. ch. 37, sec. 4, and the Criminal Code, Part XV., sec. 749)—the discretion to refuse the writ would, I think, be well exercised; and, indeed, ought to be so exercised, no question of jurisdiction being involved, but merely one of fact, and so essentially a case for an appeal, which would be, in all respects, a new trial. And it should make no difference if the prisoner has now, of his own accord only, let the time for appealing pass.

But, whether that be so or not, the Legislature of this Province, in plain words adopting the practice in the Courts of the United States of America, has prohibited certiorari in all cases

in which an appeal, giving adequate relief, lies against convictions and orders made under provincial enactments, as the conviction in question was: 2 Geo. V. ch. 17, sec. 19.

That such an appeal as the prisoner might have taken in this case would afford an adequate remedy, and, indeed, would be the only means by which complete justice could be done, under all possible circumstances, is obvious.

It is, however, contended that the writ of certiorari referred to in this legislation is not such a writ of certiorari as was issued in this matter, "in aid" of the writ of habeas corpus also issued in it; what the writ meant is that which was commonly employed in proceedings taken to quash convictions.

But that contention I cannot but consider fallacious. In the first place, proceedings to quash convictions are not now, nor were when the legislation in point was enacted, taken by way of a writ of certiorari, but must be taken by way of notice of motion: Con. Rule 1279, and the Rules made under the Criminal Code. So that, unless the words "by writ of certiorari," used in the legislation in point, cover such writs as that in question, what were they aimed at? The accompanying words "or otherwise" cover proceedings by way of notice of motion. And in this legislation it is not the quashing of convictions and orders, but is appeals from summary convictions and orders, that is generally being dealt with. . . .

This legislation does not nullify the earlier legislation expressly giving a writ of certiorari in aid of a writ of habeas corpus; it merely restricts it to cases in which such writs are needed. . . .

It was also urged that a conviction brought up as this conviction was could not be quashed; the purpose of the contention being to complete the argument that only writs issued with a view to quash the conviction or order are covered by the legislation; but here, too, the contention is fallacious, or at all events in the teeth of the decision in Regina v. Whelan, 45 U.C.R. 396.

This case, then, being one within the statute 2 Geo. V. ch. 17, sec. 19, the writs were issued improvidently, and should be quashed. An order will go accordingly. . . .

MEREDITH v. SLEMIN—MASTER IN CHAMBERS—APRIL 2.

Venue—Change—Prejudice—Fair Trial—Jury—Terms.]—The facts of this case appear in the note of a previous motion, ante 885. The plaintiff gave security, and served notice of trial for the jury sittings at Brantford commencing on the 8th April, 1913. The defendants moved to change the place of trial, on the ground that a fair trial could not be had at Brantford. The Master referred to similar motions made in Town of Oakville v. Andrews, 2 O.W.R. 608; Brown v. Hazell, ib. 784; Hisey v. Hallman, ib. 403; Baker v. Weldon, ib. 432, in which last case the authorities are cited; and said that such an order is not often made, though it is well settled that a fair trial is beyond all other considerations. The affidavits here in support of the motion put it beyond all doubt that there was a very strong opinion among a large class in Brantford extremely hostile to the defendants. This was shewn by the comments made in a newspaper distributed free in that city, and by the fact that a public subscription had supplied the funds necessary to enable the plaintiff to maintain her action. The same point arose in the somewhat sensational case of Regina v. Ponton, 18 P.R. 210, 429. Here, no doubt, it could be said that in all probability no resident of Brantford would appear on the jury after the defendants had exhausted their right to challenge peremptorily. This argument seemed entitled to prevail in the cases cited from 2 O.W.R. But the condition of affairs was different here. The hostility prevalent in Brantford might not improbably affect the minds of jurors from other parts of the county, either through the newspapers or general conversation. As the issue here was one of conflict between the plaintiff and defendants as to what led to the acts complained of, it was not possible to require the plaintiff to agree to have a trial without a jury, as was done in some of the previous cases. It was desired by both sides to have a speedy trial. Fortunately, this could be had at Simcoe on the 15th April, 1912. Simcoe was sufficiently remote to be fair to both sides, and was on that account to be preferred to Woodstock. There could be no fear of any such scenes as detailed in the report of the Ponton case, supra, being repeated there. The mere possibility of such an outrage is to be guarded against. As the plaintiff was admittedly without means, the defendants must supply the sum necessary to take her witnesses to Simcoe, to be accounted for by the plaintiff, if successful, on the final taxation. Costs of the motion to be costs in the cause. The

notice of trial already given to stand for Simcoe, and the case to be entered there without further payment, if it had already been entered at Brantford. Featherston Aylesworth, for the defendants. T. N. Phelan, for the plaintiff.

BLACKIE v. SENECA SUPERIOR SILVER MINES LIMITED—MASTER IN CHAMBERS—APRIL 3.

Venue—Motion to Change—Convenience—Witnesses—Terms—Avoidance of Delay.]—Motion by the defendants to change the venue from North Bay to Toronto, in an action to recover $6,660 as commission of 5 per cent. on the sale of 844,429 shares of the company's stock at 17½ cents a share—being $7,388.75, less by $728.75 paid on account. The defendants by the statement of defence alleged that the plaintiff was to receive commission only for sales actually made and stock being allotted thereon; also that the whole shares of the company are only 500,000, and that these were so disposed of that in any case the plaintiff could not have had for sale more than 84,429 shares. The Master said that, as no jury notice had been served, it might well be that the case would not be heard at the sittings at North Bay on the 14th April, 1913. The motion was supported by an affidavit of the defendants' solicitor, stating that the president and secretary of the company, as well as the great majority of the shareholders, resided either in the United States or at Toronto, and that this was the fact as to all these persons in respect of whose shares the plaintiff made his claim in the action; and that some at least of these persons must be called as witnesses at the trial. It was further stated that the head-office of the company was at Toronto, and that the books and records would be required for use at the trial. This affidavit was not impeached in any way. The only answer to the motion was an affidavit of the plaintiff stating that he needed two witnesses, both resident at Cobalt, while he himself resided at Cochrane. He did not say that these witnesses had been subpœnaed. The Master said that, on the material and the issues as defined by the pleadings, the motion should be granted. The defendants must undertake to produce at the trial either or both of the plaintiff's witnesses, if in their service. They must also consent to the case being put on the peremptory list in a week after its being set down on the non-jury list at Toronto, if the plaintiff so desired. In this way

no delay would be imposed on the plaintiff. As the cause was at issue, the trial might take place, if the parties should be ready, some time this month. Costs of the motion to be in the cause. Featherston Aylesworth, for the defendants. H. Howitt, for the plaintiff.

SCHOFIELD-HOLDEN v. CITY OF TORONTO—MASTER IN CHAMBERS—APRIL 4.

Discovery—Examination of Officer of Defendant Corporation—Appointment for, after Trial Begun and Adjourned—Previous Examination of two Officers—Undertaking to Produce Correspondence.]—The trial of this action, together with a cognate one of Rickey v. the same defendants, was begun on the 3rd March, 1913, and continued on the three following days. The trial was then adjourned until the 28th April, 1913, in order to have the Harbour Commissioners of the City of Toronto added as defendants. A formal order was made by the trial Judge, which must be considered to have made all necessary provisions and directions so that the trial could go on at the appointed time. No mention was made in the order of any further examination for discovery by either party. But, on the 31st March, the plaintiffs took out an appointment for the examination of an officer of the defendants. The defendants moved to set this aside as being issued without authority. The Master said that these cases were, no doubt, of great importance to the plaintiffs; but that did not authorise any deviation from the practice. The only decision on the point was in Wade v. Tellier, 13 O.W.R. 1132, which seemed precisely in point. As was pointed out there, in Clarke v. Rutherford, 1 O.L.R. 275, it was apparently assumed that an examination for discovery must precede the trial. And this seemed to follow from the ground of the proceeding itself, which is to enable the examining party to prepare for the trial. Once this has begun, there can be no examination without an order being had for that purpose. Here, if deemed necessary, such a term should have been applied for at the adjournment; and the order then made must be deemed to have contained all that either party was entitled to. In Standard Trading Co. v. Seybold, 6 O.L.R. 379, at p. 380, in a case where there had been a postponement of the trial, it was said, "Then was the time when all terms . . . should have been discussed:" per Osler, J.A. The motion was, therefore, entitled to prevail, especially

as two officers of the defendant corporation had already been examined for discovery, one of them on two occasions. Counsel for the defendants, also, on the argument, agreed to furnish the plaintiffs' solicitors with all correspondence relative to the bridge over Keating's cut as soon as it came into his hands. Costs of the motion to the defendants in the cause. C. M. Colquhoun, for the defendants. E. F. Raney, for the plaintiffs.

ANGEVINE v. GOOLD—MASTER IN CHAMBERS—APRIL 4.

Practice—Motion to Dismiss Action for Want of Prosecution—Failure to Prove Default—Summary Judgment—Con. Rule 616—Admissions of Plaintiff on Examination for Discovery—Mental Incompetence of Plaintiff—Jurisdiction of Master in Chambers—Lis Pendens.]—This action was commenced on the 16th September, 1912. The statement of defence was delivered on the 6th December. The action was apparently a non-jury action. The place of trial named was Welland. The defendant moved to dismiss for want of prosecution; and also, under Con. Rule 616, on admissions of the plaintiff in his examination for discovery, or to vacate the registry of a certificate of lis pendens. The Master said that there was no default, as the non-jury sittings at Welland were fixed for the 20th May, when, it was said, the plaintiff would be able to attend. If this did not prove to be the case, the motion could be renewed. At present it was premature, under Leyburn v. Knoke, 17 P.R. 410.—The plaintiff asked to be given a lien on the lands set out in the statement of claim, alleging that they were purchased by the defendant with money given to her by him to invest for his benefit. Against these lands he had registered a certificate of lis pendens, which certainly could not be vacated before the trial, which was only six or seven weeks off.—Then, could Con. Rule 616 be applied in favour of the defendant? The plaintiff's examination certainly disclosed a very unfortunate mental condition—so much so that it was doubtful whether he should not be represented by a committee or next friend, as provided by Con. Rule 217. The affidavit of his physician, filed in answer to the motion, stated that the plaintiff was over eighty years of age, and was suffering from senile dementia, a disease which affected his mind to the extent of rendering him unable to understand and appreciate the nature of a question or of the answer he might give. Whatever effect should be given to this hereafter, it seemed sufficient to shew that the action could not be dismissed on account of the

admissions of the plaintiff. It was said by Riddell, J., in Jasperson v. Township of Romney, 12 O.W.R. 115, at p. 117, that the Master in Chambers had no jurisdiction to apply this Rule; or, if he had, and refused the application, his discretion would not be interfered with.—It, therefore, appeared that the motion could not succeed in any of its aspects, and must be dismissed with costs in the cause to the plaintiff, leaving the defendant to take such other steps as she might be advised, in view of what had been sworn to be the mental condition of the plaintiff. Featherston Aylesworth, for the defendant. J. M. Ferguson, for the plaintiff.

CINNAMON v. WOODMEN OF THE WORLD—MASTER IN CHAMBERS—APRIL 5.

Trial—Motion to Postpone—Affidavit—Con. Rule 518—Absence of Material Witness—Failure to Shew Nature of Expected Testimony — Refusal of Motion—Undertaking—Terms.]—The action having been set down for trial at the Toronto non-jury sittings on the 11th March, 1913, the plaintiff moved to postpone the trial until the autumn. The motion was supported by an affidavit of the plaintiff's solicitor, stating that one Daniel Cinnamon was a material witness for the plaintiff, and that he left the city of Toronto "for the Mediterranean" on the 12th March, and would not return until September. The solicitor also stated that he did not know, nor, as he was advised, did the plaintiff know, of the intended departure of Daniel Cinnamon until shortly before the 12th March. It was not stated from whom the information was derived, nor what evidence the man was expected to give. The action was brought against a benefit society to recover the amount for which the plaintiff's deceased husband was insured. Daniel Cinnamon was the uncle of the deceased and the administrator of his estate. On the argument, it was said by counsel for the plaintiff that this man would testify in support of the allegation in the reply that the general course of dealing between the defendant society and the members thereof had been such as to constitute an estoppel against the defendants and a waiver of any such right of suspension or forfeiture as was set up in the statement of defence as an answer to the plaintiff's claim. The Master said that the affidavit in support of the motion should have been made by the plaintiff herself; Con. Rule 518 had been disregarded. But a more serious

objection was, that there was no intimation in the affidavit of the point on which the witness could give material evidence. Even accepting the suggestion made on the argument, a sufficient ground for postponement was not shewn. A course of dealing could not be proved by one witness. The case in many respects resembled Macdonald v. Sovereign Bank of Canada, 3 O.W.N. 849, 1006; and such an order as was made in that case by MIDDLETON, J., should be made in this case. The order should provide that the trial be proceeded with at the present sittings, if the defendants so desired, on their undertaking that if, in the opinion of the trial Judge, Daniel Cinnamon could give any such testimony as would justify such a course, the trial should be adjourned until his return or until his evidence had been given on commission, or otherwise as the trial Judge might deem proper. Costs in the cause unless otherwise ordered by the trial Judge. J. M. Ferguson, for the plaintiff. Featherston Aylesworth, for the defendants.

COUNTY COURT OF THE COUNTY OF YORK.

WINCHESTER, Co. C.J. APRIL 2ND, 1913.

REX EX REL. GARDHOUSE v. IRWIN.

Municipal Corporations—Commissioner of Water and Light—High School Trustee—Incompatible Offices—Quo Warranto Application — Vacating Office of Commissioner — Municipal Waterworks Act—Municipal Act.

Application in the nature of quo warranto to set aside the election of E. F. Irwin as commissioner of water and light for the Village of Weston, on the ground that he was disqualified to sit as such, as he was a member of the High School Board of Trustees of the Village of Weston at the time of his election as such commissioner.

C. W. Plaxton, for the relator.
James S. Fullerton, K.C., for the respondent.

WINCHESTER, Co. C.J.:—Counsel admitted that Dr. E. F. Irwin was elected over Sydney Macklem as commissioner of

water and light for the Village of Weston at the election held on the 6th January, 1913. It was also admitted that Dr. Irwin was High School trustee for the Village of Weston at that time, and still is, and that the relator was duly qualified to vote at such election and was a proper relator. Counsel for the relator contended that Dr. Irwin, being a High School trustee, was disqualified to become a commissioner of water and light under the statutes. He referred to the Municipal Waterworks Act, R.S.O. 1897 ch. 235, secs. 40 and 54, and the Municipal Act, 1903, secs. 80 and 207.

By sec. 54 of the Municipal Waterworks Act, it is provided that that Act shall be read and construed as part of the Municipal Act. Section 40 of the Waterworks Act provides for the election of commissioners as therein set forth. Section 41, subsec. 5, provides that "the place of a commissioner shall become vacant from the same causes as the seat of a member of the council of the corporation." The Consolidated Municipal Act, 3 Edw. VII. ch. 19, sec. 80, sets out a list of persons disqualified from being members of councils. In the list High School trustee is included.

Section 207 of the Consolidated Municipal Act provides as to when the seat of a councillor may become vacant after his elevation, as follows: "If, after the election of a person as a member of council, he is convicted of felony or infamous crime, or becomes insolvent within the meaning of any Insolvent Act in force in this Province, or applies for relief as an indigent debtor, or remains in close custody, or assigns his property for the benefit of the creditors, or absents himself from the meetings of the council for three months without being authorised so to do by a resolution of the council entered upon its minutes, his seat in the council shall thereby become vacant, and the council shall forthwith declare the seat vacant and order a new election."

Section 208 provides for the taking of certain proceedings to unseat a member of the council, as follows: "In the event of a member of council forfeiting his seat at the council or his right thereto, or becoming disqualified to hold his seat, or of his seat becoming vacant by disqualification or otherwise, he shall forthwith resign his seat, and in the event of his omitting to do so within ten days thereafter, proceedings may be taken to unseat such member, as provided by sections 219 to 244, both inclusive, of this Act, and the said section shall, for the purpose of such proceedings, apply to any such forfeiture, disqualification or vacancy."

Sections 219 to 244 provide for the procedure in setting aside the election of a member of the council.

Counsel for the respondent contends that, while sec. 207 provides for the vacancy referred to in sec. 41(5) of the Waterworks Act, the subsequent sections of the Municipal Act do not apply, as the commissioner of waterworks is not named in any of these sections, and that there are no clauses in the Consolidated Municipal Act or Waterworks Act which make procedure under sec. 219 of the Consolidated Municipal Act applicable to a commissioner under the Waterworks Act, it being specifically applied to mayor, warden, reeve, deputy-reeve, etc. (naming them), and that there are no sections of the Act made applicable to a waterworks commissioner; and he submits that being a High School trustee is not a disqualification under the Waterworks Act; and that, if it be a disqualification, the procedure taken herein is not the proper procedure and cannot avail the relator, as the Waterworks Act provides that the place of a commissioner shall become vacant from the same causes as the seat of a member of the council of the corporation.

The question to decide is, what are the causes which will render the seat of a member of the council of the corporation vacant?

Section 80 of the Consolidated Municipal Act provides that a High School trustee is disqualified from being a member of the council of the corporation.

Section 207 states some of the causes by which a member of the council renders his seat in the council vacant.

It appears to me that sec. 208 refers, not only to the causes rendering the seat of the member of the council vacant, after he becomes a member of the council, but also to his disqualification under sec. 80.

In my opinion, the causes which would render the seat of a member of the council vacant are set out in these sections, 207 and 208. In sec. 208 the words are, "or of his seat becoming vacant by disqualification or otherwise." What is the disqualification referred to in this section? The disqualifications referred to in the Act are those set forth in sec. 80: "No Judge . . . no High School trustee . . . shall be qualified to be a member of the council of any municipal corporation." These are disqualifications which affect a member of the council prior to his election, and which would render his seat vacant. If the commissioner of water and light must have the same qualifications as the member of the council, and his seat becomes vacant from the same causes as the seat of a member of the council of the

corporation, then it appears to me that, under sec. 80, he is disqualified from becoming a waterworks commissioner, as well as for the causes set forth in sec. 207.

It was argued by the relator that there were reasons why a High School trustee should not become a commissioner of water and light, and it may very well be that conflicting interests might arise. The question of disqualification on similar ground, and reasons therefor, were set forth in Regina ex rel. Boyes v. Detlor, 4 P.R. 195. The case of a county councillor and a member of a school board came up in Rex ex rel. Zimmerman v. Steele, 5 O.L.R. 565, and Rex ex rel. O'Donnell v. Bloomfield, 5 O.L.R. 596, where it was held that it was incompatible for a school trustee to qualify as a county councillor.

In my opinion, the words of sec. 41, sub-sec. 5, of the Waterworks Act provide for the disqualification of a commissioner, and refer to the causes for which his seat may become vacant, and these causes are those set forth in secs. 80, 207, and 208 of the Consolidated Municipal Act; and "commissioner" may be read and construed as referring to a member of council in the Consolidated Municipal Act, under sec. 54 of the Waterworks Act.

I hold, therefore, that Dr. Irwin, being a High School trustee, is disqualified from becoming a commissioner of water and light for the same municipality.

I, therefore, declare vacant the seat of Dr. Irwin as commissioner of water and light for the Village of Weston.