The
Ontario Weekly Notes

Vol. II. TORONTO, DECEMBER 14, 1910. No. 12.

COURT OF APPEAL.

DECEMBER 5TH, 1910.

*REX v. HUGHES.

Criminal Law—Carnal Knowledge of Girl under Fourteen—Second Count for Offence when Girl over Fourteen—Trial of Prisoner on both together—Withdrawal from Jury of Second Count after Evidence all in—Conviction on First Count—Prejudice—Evidence — Admissibility — Exhibiting Child to Jury—Pointing out Likeness to Defendant.

Motion by the defendant for leave to appeal from a conviction and for a direction to the Judge of the County Court of York, before whom and a jury the defendant was tried, to state a case, which he had refused to do.

The defendant was indicted for two offences, set out in separate counts, viz., (1) for having carnal knowledge in 1907 of a girl then under fourteen, and (2) for illicit connection in 1909 with the same girl—being a girl of previously chaste character—and then over fourteen, but under sixteen.

The defendant was tried upon the two counts together, no application being made for a separate trial. But the trial Judge, after all the evidence had been taken, withdrew the second count from the consideration of the jury; and they found the defendant "guilty" upon the first count.

The defendant suggested certain questions which might form the subject of a stated case, viz.: (1) whether it was proper to include the two charges in one indictment, and whether it was proper, after all the evidence had been taken, to submit the first charge to the jury; (2) whether it was proper to exhibit the child of the prosecutrix to the jury as evidence against the defendant; (3) whether it was proper for the jury to hear evidence of criminal intimacy subsequent to 1907; (4) whether there was

*This case will be reported in the Ontario Law Reports.

any evidence of carnal knowledge apart from what occurred after 1907, the prosecutrix's evidence being self-contradictory and uncorroborated; (5) whether there should be a new trial.

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

T. C. Robinette, K.C., and C. W. Plaxton, for the defendant.

E. Bayly, K.C., for the Crown.

The judgment of the Court was delivered by MEREDITH, J.A., who said that it was within the power of the Court to try the two counts together; that no objection was made, nor any application for a separate trial; so that, if the question were one of law, a reserved case was rightly refused on the first point, whilst, if not one of law, there was no power to reserve it.

The second point also failed—the evidence was admissible, and admitted, upon the second count; and the jury were plainly told that it was not admissible upon, and not to be applied to, the first count. The fact that the trial Judge afterwards withdrew from the jury the second count, on the ground that the evidence of the prosecutrix was inconsistent with guilt does not affect the question materially; . . . the jury were not bound to believe all that she said—they might discredit her as to the earlier and credit her as to the later intercourse.

The last point is one upon which there is . . . conflict of authority in . . . the United States of America; but it has long been the practice of the Courts of this province to permit the production of the child at the trial and the pointing out to the jury of the likeness in the child to the defendant. The cold water thrown upon the practice . . . in Udy v. Stewart, 10 O.R. 591, does not seem to have had an appreciable effect upon it. I am unable to see anything objectionable in principle in such evidence; and it ought to be within the power of the Court to prevent an abuse of the practice. . . . Such evidence seems to have been always considered admissible in England. . . . It is also to be borne in mind that the evidence was given upon the second count, and was withdrawn from the jury; . . . all was withdrawn, and that is sufficient in law, however lame it might be in fact.

Application dismissed.

DECEMBER 5TH, 1910.

*REX v. McNULTY.

Criminal Law—Murder—Counselling and Procuring—Illegitimate Child—Evidence—Intimacy of Prisoner with Mother of Child—Admissibility—Improper Relations with other Men—Inadmissibility—Accomplice—Corroboration.

Case stated by BRITTON, J., under the Criminal Code, after trial and conviction of the prisoner upon a charge of having on or about the 26th March, 1910, murdered an unnamed child, of which one Mary Dolan had lately been delivered.

The evidence, which was made part of the case, revealed that the child was actually put to death by its mother, Mary Dolan; and the case of the Crown against the prisoner was that he counselled and procured her to do the act, and so rendered himself a party to and guilty of the crime.

Mary Dolan was the principal witness for the Crown. She deposed to the existence between the prisoner, a married man, and herself, of a criminal intimacy extending over a period of about four years; that he was the father of two children of which she was the mother, the last born being the child in question; that, at his instigation, she had left the first child on the doorstep of an institution in Buffalo, with a sum of money supplied by him; that she became pregnant the second time in the month of June, 1909; that, not long after, she communicated the fact to the prisoner, who procured and advised her to take certain pills with a view to bringing about a miscarriage; that she took them without effect; that eventually she was obliged to leave her father's house in order to avoid discovery by him of her condition, and was thereafter for some time kept concealed by the prisoner in a loft over a driving shed or stable in Orillia; that, between the latter part of October, 1909, and the first week of January following, she, at his instance and with money supplied by him, paid two visits to Toronto, during the latter of which she met a Mrs. Lavoie; that finally on the 9th February, 1910, she again, at the instance of and with funds supplied by the prisoner, went to Toronto and into lodgings at Mrs. Lavoie's, where she remained until the 26th March, during which time the child was born; that the prisoner was made aware of the birth, and afterwards wrote letters to her; that on the 25th March she received a letter from

*This case will be reported in the Ontario Law Reports.

him in which he told her to strangle the child, and instructed her in what manner she might commit the deed and dispose of the body; that, in consequence, she did on the 26th March leave Toronto, taking the child with her, and went to Hawkeston, a station on the Grand Trunk Railway; that later she strangled the child and placed its body in her valise, and proceeded to Orillia, and there met the prisoner, and told him what she had done; that he told her to drop the body from the railway bridge crossing "the Narrows," the stream connecting Lakes Simcoe and Couchiching, and that she did so. There was much more in detail, but the foregoing is a brief outline of her testimony. The body was found in the following July, and Mary Dolan was arrested, and she then accused the prisoner.

Upon cross-examination Mary Dolan was asked whether she was improperly intimate with other men whose names were given, and she positively denied illicit intercourse with any of them.

The case stated that evidence was offered by the Crown and admitted tending to shew the intimacy of the prisoner with Mary Dolan over a period long prior to the birth of the infant murdered, and that it was contended on behalf of the prisoner that such evidence was irrelevant and should not have been received.

It was also stated that evidence was offered on behalf of the prisoner tending to shew the intimacy of Mary Dolan with other men, both before and immediately after the murder, and that such evidence was rejected.

It was further stated that it was contended on behalf of the prisoner that none of the evidence offered by the Crown as corroborative of the statements of Mary Dolan given in evidence was in fact corroborative thereof, and that the learned trial Judge should have so told the jury.

The questions submitted were:—

1. Was my ruling as to admission and rejection of evidence correct?

2. Was my direction to the jury as to corroboration of Mary Dolan, an accomplice, proper?

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

A. E. H. Creswicke, K.C., and J. T. Mulcahy, for the prisoner.

J. A. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

MOSS, C.J.O.:—As to the first question: it was important for the Crown to shew, if it could, such a set of facts and circum-

stances as might reasonably lead to the existence of a motive on the part of the prisoner to be rid of the child. During the whole period of continuance of the alleged intercourse between him and Mary Dolan, he was a married man, and she was an unmarried woman. Any facts or circumstances tending to shew the existence of an intimacy which should not exist between persons so circumstanced were proper to submit to the jury as affording grounds upon which they might reasonably draw the inference that if the fact of the birth became known in the neighbourhood it would be generally believed that he was the child's father, and that he would in consequence be subjected to much embarrassment and annoyance. The jury were also at liberty to draw from these facts and circumstances such inferences as were proper with regard to the prisoner's influence over the woman.

The learned Judge was careful to confine the evidence tendered by the Crown on this branch of the case to matters bearing on these lines of inquiry, and nothing appears to have been admitted that should have been excluded.

With regard to the rejection of evidence, it is sufficient to say that the proposed testimony was not material. Evidence of intimacy with other men before and immediately after the murder could only be admitted for the purpose of contradicting Mary Dolan's answers to questions addressed to her on cross-examination.

These questions were admissible as tending, if answered affirmatively, to impair the value of her testimony with the jury, but, having been asked and answered, the prisoner was bound by the answers and was not at liberty to contradict them. Evidence of statements made by her tending to cast doubt upon the paternity of the child was admitted, and the prisoner had the benefit of that before the jury.

As to the second question, the learned trial Judge could not properly have directed the jury that none of the evidence offered as corroborative of the statements of Mary Dolan was in fact corroborative thereof. Not to mention his letters to Mary Dolan after she became pregnant, the fact of his communicating with Mrs. Lavoie after the birth of the child, his payment of $5 to her in answer to her demand for lodging and expenses due by Mary Dolan, his coming to the railway station to meet Mary Dolan in answer to her message and note sent by the two boys, who were called as witnesses, and various other circumstances, were all corroborative. The weight to be attached to them was for the jury. But they were at liberty to convict upon the testimony of Mary Dolan alone if they felt convinced of her truthfulness. The

learned Judge cautioned them against doing so, in terms most favourable to the prisoner, and it may be assumed that, on arriving at their verdict, they took into consideration everything that had been presented. And it cannot be said that there was not corroborative evidence sufficient to warrant the verdict.

The questions should be answered in the affirmative.

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

MACLAREN, J.A., also concurred.

DECEMBER 5TH, 1910.

RORISON v. BUTLER BROTHERS CONSTRUCTION CO.

Fatal Accidents Act—Death of Young Man Caused by Negligence—Action on Behalf of Parents—Reasonable Expectation of Pecuniary Benefit—Evidence—Excessive Damages—New Trial—Findings of Jury—Grounds on which Negligence Found—Voluntary Assumption of Risk.

Appeal by the defendants from the judgment of a Divisional Court affirming the judgment at the trial before MULOCK, C.J., and a jury, in favour of the plaintiff.

The action was brought by the plaintiff, under R.S.O. 1897 ch. 166, to recover damages for the death of his son Basil D. Rorison, said to have been caused by the negligence of the defendants.

The defendants, an incorporated company, were contractors engaged in the construction of a tunnel under the Detroit river, and the deceased was in the employment of the Detroit River Tunnel Co., also contractors engaged in the same work. On the 8th January, 1910, the deceased was fatally injured by falling down a shaft leading from the surface down to the tunnnel in which he had been employed, up which shaft he was at the time being carried by means of chains and a cable passing round a drum operated from a stationary engine near the top of the shaft. The fall was caused by the deceased, or the chains to which he was attached, coming into contact with timbers which had been left near the mouth or upper exit of the shaft, by reason of which the chains became detached

from a hook attaching them to the cable and fell with him to the bottom. No evidence was called on the part of the defendants.

The jury found that the defendants were guilty of negligence causing the accident: (1) In allowing persons to use the hoist as a means of going up or down the shaft, and by using an unsafe and improper hook; and (2) by the tagman not signalling the engineer to stop hoisting until the cable ceased moving; and they assessed the damages at $4,000, all to go to the mother.

The Divisional Court affirmed the judgment.

The defendants appealed upon two grounds: one, that the defendants, in the circumstances, owed no duty to the deceased, who was not one of their workmen; the other, that the damages were excessive.

The appeal was heard by Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A.

J. H. Rodd, for the defendants.

J. Sale, for the plaintiff.

Garrow, J.A.:—We are all of opinion that, upon the latter ground, there must be a new trial. Damages under R.S.O. 1897 ch. 166 are confined, as has been many times pointed out, to the pecuniary loss sustained by the surviving relatives. No one knows how long a present condition, based upon such casual and uncertain things as continued life, health, and earning capacity, may continue. The son, if he had lived, must still have endured the ordinary risks of compulsory idleness from accident or ill-health, or even from ill-luck in finding employment, or employment which would not have permitted him to reside with his parents. And, as he had reached the marriageable age (26), he might very naturally have married, in which case his bounty to his parents must have ceased or been greatly reduced.

And, upon the other hand, the mother, to whom the jury awarded the whole of the damages, is of the age of 65 years, and in the nature of things cannot require such a provision as if she had been, for instance, the widow of the son.

The amount awarded, $4,000, would, if invested at five per cent., give her an annuity of $200 per annum for life and leave the principal untouched, which seems to be a result quite beyond anything which the evidence or the circumstances would justify, or which could have been properly arrived at

by reasonable men, having in mind the numerous contingencies, to some of which I have referred, which they were bound to consider. As there is to be a new trial, I do not propose to examine at any length the other questions involved, although there are one or two matters upon which it may assist the parties if something is said.

Upon the evidence, as it stands, it is apparent that, although the shaft and its hoisting apparatus were intended to be used only for raising and lowering material, workmen and others in the employment of both contracting companies used it as a means of descending and ascending to and from their work in the tunnel, with the knowledge and acquiescence of Mr. Gass, the defendants' local superintendent. But the defendants were under no obligation to forbid men not in their employment from using the hoist, nor to supply any particular appliances, safe or otherwise, for their use. "A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability:" per Bigelow, C.J., in Sweeney v. Old Colony R. Co., 92 Mass. 368, quoted with approval by Mr. Beven in his work on Negligence, Can. ed., p. 443, note. The first ground of negligence found by the jury would, therefore, be immaterial, and, if it stood alone, insufficient, in my opinion, to support the action.

But, having received the deceased into the apparatus and undertaken to hoist him to the surface, a duty at once arose to exercise towards him reasonable care while that operation was in progress. And the real question to be tried would seem to be, did the tagman and engineer exercise such care on the occasion in question?

The case seems an eminently proper one for submitting the not uncommon question in such cases, did the deceased assume the risk? If he did, that of course would end the action. The excessive danger of doing what he did looks to me, here, very obvious, but a jury may think differently. In any event the jury should, I think, be asked to pass upon it.

We are compelled to be alive to what we so often find to to be the case, that a new trial, however well grounded, may ultimately result in injury rather than benefit to the party complaining, when it is clear, as it is in this case, that the issue must be determined by the jury, so we think it well to repeat to the parties a suggestion made upon the argument, that, if they are content, the damages may be fixed at the sum of $2,500, which to us seems very ample, and, in the event of acceptance by both parties, the appeal would be dismissed with

costs; otherwise the appeal will be allowed and a new trial directed, the costs of the last trial and in the Divisional Court to be costs in the cause to the successful party; the costs of the appeal to be to the defendant in any event.

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

MEREDITH, J.A., also agreed, for reasons stated in writing; but was of opinion that the new trial should be merely a new assessment of damages.

DECEMBER 5TH, 1910.

CLISDELL v. LOVELL.

Vendor and Purchaser—Contract for Sale of Business Property—Sale to Syndicate—Subsequent Sale to Another Person—Rights and Duties of Members of Syndicate—Fraud—Trustee—Agent—Damages for Breach of Duty—Costs.

Appeal by the plaintiffs and the defendant Millar from the judgment of a Divisional Court, 1 O.W.N. 648, allowing the appeal of the two defendants, George A. Case and G. A. Case Limited from the judgment of RIDDELL, J., 13 O.W.R. 748.

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

I. F. Hellmuth, K.C., for the appellants.

H. Cassels, K.C., and R. S. Cassels, K.C., for the defendants George A. Case and G. A. Case Limited.

MACLAREN, J.A.:—Clisdell and Orpen, the plaintiffs, the defendant Millar, and the defendant G. A. Case Limited, were the members of a syndicate formed to purchase the Dominion Brewery at Toronto, George A. Case being the agent and representative of G. A. Case Limited throughout the transaction.

The trial Judge dismissed the plaintiffs' action as against the other defendants, who were the vendors and purchasers of the brewery, but awarded damages against G. A. Case Limited for breach of its duty as a member of the syndicate to the

plaintiffs and Millar (the amount to be determined on a reference), and ordered George A. Case personally and the company to pay the costs of the plaintiffs and Millar.

From this judgment an appeal was taken to a Divisional Court by George A. Case and G. A. Case Limited, with the result that these two defendants were relieved from the judgments pronounced against them by the trial Judge.

The appellants have urged before us that the judgment of the trial Judge against the two defendants named should be restored, and that, in addition, George A. Case personally should be condemned to pay damages.

As regards their position as defendants in this action and their legal liability, George A. Case personally and G. A. Case Limited occupy distinctly different positions. Let us first consider that of George A. Case. When the case was taken to the Divisional Court, the present appellants did not cross-appeal as to that part of the judgment which dismissed the action as to him save as to costs, so that they now cannot obtain anything higher than a restoration of the judgment of the trial Judge. Their appeal as to damages must, therefore, be dismissed.

As to costs, it has been well settled that sec. 119 of the Judicature Act and Rule 1130, which provide that costs shall be in the discretion of the Court or Judge, and that they shall have full power to determine by whom and to what extent the costs are to be paid, do not enable the Court or Judge to condemn a successful party to pay the costs of an unsuccessful party, and that a plaintiff can not be awarded costs against a defendant except where it is held that he had a right of action. See Mitchell v. Vandusen, 14 A.R. 517; Fleming v. City of Toronto, 19 A.R. 318; Dicks v. Yates, 18 Ch. D. 76; Andrew v. Grove, [1902] 1 K.B. 625.

The trial Judge having held that the plaintiffs had no right of action against Case personally, and this not having been appealed against, the Divisional Court was quite right in reversing that part of the judgment which condemned Case personally to pay the plaintiff's costs; and the appeal must be dismissed so far as it relates to him.

The action and the appeal, in so far as they affect G. A. Case Limited, stand upon a entirely different footing. It is a distinct legal entity, although it is so closely associated and indentified with George A. Case as an individual. The formation of the company was a mere device to enable George A. Case to continue to carry on his business as a broker, with-

out being interfered with by his individual creditors, and was composed of members of his family, while he was made its manager, with the most ample powers, at a salary of $2,400 a year, while all his earning and profits were to belong to the company.

The Dominion Brewery was owned in England, and one Foster came to Toronto, as the agent of the owners, to endeavour to effect a sale of it. He retained the late Mr. Barwick as his solicitor, and they put it in the hands of Case as agent to find a purchaser. An agreement was come to by which G. A. Case Limited, as trustee for certain persons, was to become the purchaser, but they were not able to put up the necessary money. Case then tried to induce William Mackenzie to buy, and about the same time a syndicate was formed composed of the plaintiffs, C. Millar, and G. A. Case Limited, to purchase the brewery on the terms of the previous agreement with G. A. Case Limited as trustee. A memorandum was drawn up shewing what each member of the syndicate was to contribute to the purchase, and how the stock of the company to be formed to take over the property was to be divided. George A. Case was not a party to the agreement, and did not sign it except as manager of G. A. Case Limited, but it provided that he was to be paid $12,500 as a commission for purchasing the property, subject to be reduced in case the bankers' charges exceeded a certain sum.

The morning after this agreement was come to, it was learned that William Mackenzie had decided to purchase the property, and a sale was made by Foster to the defendant Lovell, who was trustee for Mackenzie. Various attempts were made to acquire an interest in the purchase for members of the syndicate, but eventually these resulted in nothing, and the present action was instituted by two members of the syndicate, to set aside the sale to Lovell, and, in the alternative, to recover damages against George A. Case and G. A. Case Limited for breach of their duty in aiding and procuring the sale to the trustee for Mackenzie.

The other issues were disposed off; and finally there remained only the alternative claims against George A. Case and G. A. Case Limited, which were disposed of by the trial Judge as above stated.

I am of the opinion that the Divisional Court arrived at the right conclusion concerning the plaintiffs' claim against G. A. Case Limited, which is the only matter we are now considering. The company, if liable to the plaintiffs at all, must be so under the agreement of the 18th December, 1905, forming

the syndicate. That document contains no covenants or undertakings on its behalf, except as to the incorporation of a company to take over the brewery property, and as to the allotment of the stock of the company to be formed.

Counsel for the appellants did not refer us to any authority that would establish, as against a member of a syndicate, such a liability as is sought to be established in this case. They were well aware that George A. Case was the agent of Foster for the sale of the property, and that he was to receive a commission in case he found a purchaser at the price fixed by the vendors. Even admitting that G. A. Case Limited was responsible to the fullest extent claimed by the appellants for all that George A. Case said and did, I cannot see that there is sufficient to establish such a liability as that laid down by the trial Judge. But, even if there were such liability, I think the appellants must still fail. To my mind, the evidence shews clearly that the property was sold to Mackenzie not on account of anything that was done or said by Case after he had entered into the syndicate agreement, but because Barwick had made up his mind, previous to the formation of that agreement, that he would advise a sale to Mackenzie rather than to the syndicate, and that Foster had fully made up his mind to adopt the recommendation of Mr. Barwick. It also appears equally clear from the evidence that the sole contribution of Case to a sale to Mackenzie was his bringing the property to Mackenzie's attention, which was done previous to the agreement for the formation of the syndicate. It does not appear that the fact that Case accompanied Foster to Mackenzie's office, after Mackenzie's offer had been accepted, could have any possible bearing on the result or in any way affect the question of liability in this action.

I am consequently of opinion that the appellants have failed to establish a claim against G. A. Case Limited, and that their appeal against this part of the judgment of the Divisional Court must also be dismissed.

MAGEE, J.A., concurred, for reasons stated in writing.

MOSS, C.J.O., and GARROW, J.A., also concurred.

MEREDITH, J.A., dissented, for reasons stated in writing. He was in favour of restoring the judgment at the trial altogether.

HIGH COURT OF JUSTICE.

MEREDITH, C.J.C.P., IN CHAMBERS. NOVEMBER 18TH, 1910.

*RE ROWLAND AND McCALLUM.

Statute—Construction— Imperative or Directory— Municipal Drainage Act, 1910, *sec.* 48—*Appeal to County Court Judge —Time for Delivering Judgment—Prohibition—Previous Order—Nullity.*

The Corporation of the Township of McKillop decided to proceed with the construction of certain drainage work under the Municipal Drainage Act, 10 Edw. VII. ch. 90, pursuant to a petition signed by a sufficient number of ratepayers. An engineer employed by the corporation made a report on the 4th April, 1910; a by-law was provisionally passed on the 30th April, 1910; and notice in accordance with the requirements of the Act duly served on all interested. No motion to quash the by-law was made. Michael Rowland, a ratepayer, appealed against his assessment for the proposed work. His appeal was heard by the Court of Revision for the township, and was dismissed on the 17th June, 1910. Rowland then appealed to the County Court Judge, pursuant to sec. 44 of the Act. This appeal was heard on the 30th August, 1910, by DOYLE, Co. C.J., who gave judgment on the 28th September, 1910, purporting to set aside the whole drainage scheme—as if the proceedings had been taken under the Ditches and Watercourses Act. An application was thereupon made on behalf of McCallum, one of the ratepayers who had signed the petition, and of the township corporation, for an order of prohibition to the County Court Judge for want of jurisdiction; and an order was made accordingly by FALCONBRIDGE, C.J.K.B., on the 21st October, 1910. The County Court Judge, on the 24th October, gave another judgment allowing Rowland's appeal, reducing his assessment by $50, and directing payment to him of certain disbursemeuts amounting to $15.50.

In respect of this last judgment or order a new motion was made by the same applicants for prohibition, upon three grounds: first, that the County Court Judge was functus after having delivered one judgment on the 28th September; second, that the judgment was of no effect in that it did not apportion the reduction over the remaining property; and third, that the judg-

*This case will be reported in the Ontario Law Reports.

ment was pronounced after the expiration of more than thirty days from the hearing, contrary to the provisions of sec. 48 of the Act.

This motion was heard by MEREDITH, C.J.C.P., in Chambers, on the 18th November, 1910.

H. S. White, for the applicants.

W. Proudfoot, K.C., for Rowland.

MEREDITH, C.J., was of opinion, as to the first objection, that the judgment or order of the 28th September should be treated as a nullity. He expressed no opinion with regard to the second objection, as to which the argument for the respondent was that the apportionment should be made by the clerk under sec. 55 of the Municipal Drainage Act.

The third objection was based upon sec. 48 of the Act, which is: "At the Court so holden the Judge shall hear the appeal, and may adjourn the hearing from time to time, but shall deliver judgment not later than thirty days after the hearing."

Speaking of this, the learned Chief Justice said:—

It is, perhaps, difficult, in view of the decisions, to be absolutely sure of what the proper construction of the statute is. The strongest case that can be invoked in favour of the motion is In re Township of Nottawasaga and County of Simcoe, a decision of the Court of Appeal, reported in 4 O.L.R. 1. The question there arose upon a provision of the Assessment Act . . . that "the judgment . . . shall not be deferred beyond the 1st day of August next after such appeal." It was held that compliance with that provision was imperative, and that after the 1st August the County Court Judge was functus. . . . Then . . . there is the case . . . more applicable to the case in hand . . . Re McFarlane v. Miller, 26 O.R. 516, where the question arose upon the Ditches and Watercourses Act, and the language of the provision under consideration (sub-sec. 6 of sec. 22 of 57 Vict. ch. 55) was: "It shall be the duty of the Judge to hear and determine the appeal . . . within two months after receiving notice. . . ." It was held that that was not an imperative provision having the effect of making the Judge functus after the expiry of the two months. . . .

[The Chief Justice then referred to the words of sec. 48, now under consideration.]

I think these words are directory only. . . . The provision ought to be treated as directory only, if the language used permits, when the consequence of treating it as imperative would be that, owing to no fault of the appellant, by the inaction of the

Judge he would be deprived of his right of appeal. I think a statute ought not to be so construed unless the language of the legislature clearly requires that meaning to be given to it.

When the emphasis that was given by two of the Judges of the Court of Appeal in the Nottawasaga case to the negative form in which the section there under consideration was cast is regarded—that it was a prohibitory section—I think I am not prevented by that decision from holding the provisions of sec. 48 of the Municipal Drainage Act to be directory only.

The motion must be refused with costs.

[Leave to appeal from this decision was granted by RIDDELL, J., on the 1st December: see ante 305.]

BOYD, C. DECEMBER 3RD, 1910.

BROOM v. GODWIN.

Contempt of Court—Breach of Injunction—Settlement—Condition not Fulfilled—Motion to Commit—Delay in Moving—Punishment—Fine—Costs.

Motion by the plaintiff to commit the defendants for contempt of Court in not obeying an injunction order.

The plaintiff in person.

J. T. Loftus, for the defendants.

BOYD, C.:—Having read the affidavits of Broom and wife, Mulvey, and Sinclair, and the opposing affidavits of Godwin and Edmandson, I think it is very clear that the terms contained in the letter signed by Broom and dated the 21st October, 1910, as to being allowed to remove his goods that night or next day, were not complied with, and that he is bound by the terms of that to abstain from making complaint of what happened before.

By an injunction granted on the 30th June, 1910, the defendant and his wife were enjoined from interfering with the rights of the plaintiff in respect to the apartments occupied by him, No. 24 Dundas street, otherwise than by proper and legal procedure in a Court of law, till the action should be tried and disposed of.

By numerous affidavits filed by the plaintiff it appears that

there have been repeated violations of the right of the plaintiff to quiet possession and enjoyment of the apartments since that injunction and down to the date of the motion to commit on the 7th November: these are set out in detail in the notice of motion. No attempt has been made to contradict any of these charges—some of the later ones involving threats and personal violence to the plaintiff and his wife. The only ground relied on before me was that all had been settled by the letter of the 21st October—but that has not become operative, as its condition has not been observed by the defendants.

Seeing that there has been this delay in moving till the legal removal of the plaintiff from possession by the order of the County Court Judge, it is not incumbent on the Court to proceed by way of commitment as upon breach of the injunction for the purpose of enforcing the order of the Court for the benefit of the person who obtained it. But it does not follow that the defendants should escape some punishment for contempt. I will visit the transgressions of the defendants, who both disregarded the injunction granted against them and set it at naught, by imposing a fine of $50, to be levied by execution as a debt due to His Majesty for public use.

The plaintiff acted for himself, and so has incurred no costs which are taxable. For any proper disbursements taxable in an action he may be allowed—these to be settled by the registrar and inserted in the order, and to be paid by the defendants.

RIDDELL, J. DECEMBER 7TH, 1910.

DAVID v. RYAN.

Pleading—Statement of Claim Disclosing no Reasonable Cause of Action—Striking out—Leave to Amend—Company—Shareholder—Costs.

Motion by the defendant to strike out the statement of claim.

M. H. Ludwig, K.C., for the defendant.
H. D. Gamble, K.C., for the plaintiff.

RIDDELL, J.:—The plaintiff sets out in the statement of claim that he is a shareholder in the Turner Company Limited, holding twenty shares; that the defendant is president and general

manager; that the defendant, by improper and wrongful but not illegal acts as such manager (set out at length), has injured the business of the company, diminished its assets, depreciated the value of the stock, and thereby injured the plaintiff.

It is manifest that the party injured is the company, and not the plaintiff. At this stage of legal history the distinction between the company and its shareholders should be well known, and the fact that the company is an absolutely separate legal entity, having legal rights and duties quite apart and separate from those of the shareholders, should be recognised.

The defendant moves to strike out the statement of claim under Con. Rule 261. The plaintiff's counsel asks leave to amend by alleging that his client is a minority shareholder, and that the defendant controls the majority of the stock.

Buckley, 8th ed., p. 549, 9th ed., pp. 612, 613, lays down the rules for actions being brought by a minority shareholder, and it may be that the plaintiff may succeed in bringing himself within these. His style of cause must be amended: Township of Barton v. City of Hamilton, 13 O.W.R. 1118, at p. 1128, and cases cited.

If the plaintiff so desires, he may, on paying the costs of this motion, amend as he may be advised; in any case the statement of claim will be struck out with costs. I have no hesitation in making these payable forthwith—if the statement of claim is a mere experiment by the plaintiff, he should pay the costs of a wholly baseless claim—if all the facts available are not set out, that is no fault of the defendant.

RIDDELL, J. DECEMBER 7TH, 1910.

*RE EDWARDS.

Will—Construction—Bequest of Insurance Moneys to Wife for Life with Remainder to Others, not Preferred Beneficiaries —Insurance Act, secs. 159, 160*—Absolute Right of Wife to Insurance Moneys—Other Benefits Given by Will—Wife not Put to Election—Exception to General Rule.*

Motion by the executors of the will of Richard Edwards, deceased, under Con. Rule 938, for an order determining certain questions arising upon the will.

*This case will be reported in the Ontario Law Reports.

T. D. Delamere, K.C., for the executors.
W. Davidson, K.C., for the infant Norval Craig.
C. S. MacInnes, K.C., for certain charities.
J. R. Meredith, for the widow.
C. G. Jones, for the Inspector of Prisons and Public Charities.

RIDDELL, J.:—The late Richard Edwards in 1883 insured his life in the London and Lancashire Life Assurance Company, for $1,000, in favour of his wife, Jane Ann Edwards, then and now living. This was the only policy ever taken out by him in the said company, and it continued in force until his death, in January of the present year.

By his will, dated the 3rd April, 1909, he made the following provisions:—

"3. I give devise and bequeath to be held in trust (in lieu of dower) all that my freehold . . ." (describing it).

"4. I also give . . . to be held in trust (in lieu of dower) $1,000 life insurance in the London and Lancashire Assurance Company.

"5. I give . . . to be held in trust (in lieu of dower) $1,000 life insurance in the Independent Order of Foresters.

"6. I give . . . to be held in trust (in lieu of dower) what money I may have in any business at the time of my decease.

"7. I also give . . . to be held in trust (in lieu of dower) any share or shares I may have in any business at the time of my decease.

"8. One and all of these bequests are to be held in trust by my executors for the maintenance of my wife Jane Anne Edwards as long as she lives. At her death the residue of my estate, after paying funeral expenses, is to be divided . . . between the following . . . Mrs. Elizabeth Colquhoun, William Edwards, David Edwards, Ida Edwards, Norval Craig, Orphans' Home, and General Hospital.

"9. If Mrs. Elizabeth Colquhoun is dead, her share goes to Mrs. Thomas J. Grigg—if dead goes to general fund. If David Edwards is dead, his share goes to general fund. If William Edwards is dead, his share goes to Ida Edwards, if she survives him; if not, her share goes to general fund. If Norval Craig is dead, his share goes to his next youngest brother."

None of those taking in remainder comes within the preferred class of the Insurance Act, R.S.O. 1897 ch. 203, sec. 159 (2). The assured, therefore, could not make any such disposition of the insurance money as he has attempted to do by his will

—the trust declared by sec. 159 (1) of the statute not being displaced by an effective declaration under sec. 160. The wife was at his death entitled to receive the insurance money—to receive it absolutely and at once: Re Canadian Order of Home Circles and Smith, 14 O.L.R. 322.

The testator, then, has attempted to dispose of property over which he had no power of disposition, and by the same will given his wife property to which she had no claim.

From at least as early as 1794, when Whistler v. Webster, 2 Ves. 366, was decided, it has been clear law that "when a person purports, under a power of appointment, to give property which is the subject of the power to persons who are not objects of the power, that is to say, in fact, to exercise a power he has not got; that if to the person who would be defeated by that gift free disposable property belonging to the testator is given by the same instrument, that raises a case of election . . . when a person coming to claim under an instrument says, if it be a will, 'pay me the legacy,' or 'hand over to me the particular property given to me by that instrument,' the executors have the right to say, 'You must conform to all the provisions of the instrument.' And if the instrument also disposes or purports to dispose of property which belongs by paramount title to the person claiming under it, a case of election arises, and he cannot take under it the benefit which it gives him, unless he is prepared to fulfil the gift which it purports to make of his own property . . . no one can take under and against the same instrument, but, taking under it, is bound to fulfil all its provisions:" per Kay, J., in In re Brocklebank, 34 Ch. D. at pp. 163, 164.

It is argued that the present will raises an election, and that the widow must either allow the insurance money to be disposed of as the will directs or she must lose all benefit under the will.

The case of Griffith v. Howes, 5 O.L.R. 439, is cited against this contention. In that case the Chancellor held that a disposition by a testatrix, by will, of insurance in a benefit society effected so as to be payable to the "legal heirs as designated by her will," which gave the insurance money to her executors for the purpose of paying her debts, did not raise an election.

Were the present case on all fours with the case just mentioned, I should, as at present advised, have been unable to follow it. With much respect, I should "deem" that decision "to be wrong," and, even with the stringent rule laid down in In re Shafer, 15 O.L.R. 266, I should have thought it necessary to refer the matter to a higher Court for decision under the Ontario Judicature Act, sec. 81.

The case is followed by the full Court of King's Bench in Manitoba, in In re Anderson's Estate, 16 Man. L.R. 177. . . .

But I do not think the present is covered by either case, and it may be proper to discuss the decisions. . . .

[Reference to In re Warren's Trusts, 26 Ch. D. 208; Wollaston v. King, L.R. 8 Eq. 165; Moriarity v. Martin, 3 Ir. Ch. R. 26; Carver v. Bowles, L.R. 8, Eq. 165, 174; Woolridge v. Woolridge, Johns. 63; White v. White, 22 Ch. D. 555, 559; In re Bradshaw, [1902] 1 Ch. 436; In re Oliver's Settlement, [1905] 1 Ch. 191; In re Beale's Settlement, [1905] 1 Ch. 256; In re Wright, [1906] 2 Ch. 288; In re Handcock's Trusts, 23 L.R. Ir. 34, 46, 47; In re Nash, [1910] 1 Ch. 1, 10, 11.]

While the two cases in Ontario and Manitoba seem to me, with great respect, to fall within the general rule, the present falls within the "notable exception" referred to by James V.-C., in Wollaston v. King. Here the testator had the power to appoint to any within the class of preferred beneficiaries (it turned out that, in fact, at the time of his death, there was only one person, the wife, within that class, but that is immaterial); he first gave and bequeathed the insurance money in trust for the wife as long as she lived, and then over. It seems to me that this is just what the cases say cannot be done; but the attempt to settle with remainders after the death of the wife does not even raise a case of election. The case would have been, in my view, different, had the insurance money been disposed of away from the wife.

I am of opinion that there is no reason why the widow should not have the insurance money as well as the other benefits under the will.

Costs of all parties out of the insurance money.

The provision in sec. 160, that the assured may give the fund "for the benefit of the wife for life, and of the children after her death," etc., has not been overlooked; the power is not to give to the wife for life unless there be others to take in remainder.

RIDDELL, J. DECEMBER 8TH, 1910.

RE REX v. GRAHAM.

Justice of the Peace—Information—Failure to Proceed upon—Offences Known to the Law—Order nisi.

Motion by one Titchmarsh for an order *nisi* calling upon a magistrate to shew cause why an information sworn to by the applicant had not been proceeded upon.

J. B. Mackenzie, for the applicant.

RIDDELL, J.:—On the 31st October, 1910, Titchmarsh swore before H. Shaver, one of His Majesty's Justices of the Peace in and for the county of Peel, and at the village of Cooksville, in the said county, to an information which charged David Graham with two offences: (1) wrongfully exacting for his own use and benefit, as and when acting as a magistrate, of the applicant Titchmarsh, certain moneys; (2) falsely inserting in a warrant then drawn up and issued a certain statement with knowledge of its falsity, etc.

The first offence alleged is one at the common law: Regina v. Tisdale, 20 U.C.R. 272. The second is not only a common law offence, but it also covered by statute, R.S.C. 1906 ch. 146, secs. 466, 470, (*a*), (*c*), (*d*).

Where a magistrate takes an information, as was done in the present case, it is the usual course to issue a summons or warrant for the accused, and, if the magistrate declines to do either or take any proceedings, this course may and almost always does require explanation. The magistrate has been required several times to proceed—so far has refused, apparently without reason given.

The applicant now moves under R.S.O. 1897 ch. 88, sec. 6, for an order *nisi* calling upon the magistrate to shew cause why the information has not been proceeded upon.

I think the order *nisi* may go, addressed not only to the magistrate, but also to the accused—and in so ordering I express no opinion on the merits.

MIDDLETON, J. DECEMBER 8TH, 1910.

RE MATHE.

Will—Construction—Legatee under Will Bequeathing Share of Estate—Legatee Dying before Testator—Wills Act, sec. 36—Both Wills Taking Effect—Motion for Construction Unnecessary—Costs—Executors—Passing Accounts.

Motion by executors for an order declaring the effect of two wills, heard at the Ottawa Weekly Court.

MIDDLETON, J.:—The testatrix Henriette Mathe, who died on the 13th April, 1910, by her will gave her daughter Sophie certain property, amounting, it is said, to $600. Sophie prede-

ceased her mother, leaving issue. By her will she directed that any property which might come to her from her mother's estate should be divided between her daughters and one of her four sons.

The question submitted is: Does this $600 pass to Sophie's executors to be dealt with by them under her will, or do all her children take as her next of kin.

The Wills Act, sec. 36, applies, and the wills take effect as though Sophie had died immediately after her mother: Johnson v. Johnson, 3 Hare 157; Re Parker, 1 Sw. & Tr. 523; Re Mason, 34 Beav. 494; Re Scott, [1901] 1 Q.B. 228. This may be so declared.

The question of costs has to be dealt with. There was no argument before me. Counsel for all parties admitted that the law was clear, and that there was no room for argument. The motion, it was said, was made with the approval of all those beneficially concerned and upon their written instructions.

The question might well appear to present some difficulty to the lay mind, but to one versed in the law there could not have been any difficulty. Upon the question arising, the executors were entitled to consult a solicitor, and, if well advised, the rights of the parties would have been plain. There was not any necessity for an application to the Court. The Court is to be resorted to only when there is some real doubt. In such cases the executors are entitled to the protection of an order of the Court; in cases which present no difficulty, the executors and their legal advisers must assume the responsibility of acting on well-known and well-understood legal principles.

It is suggested that this small fund of $600 should be depleted by allowing out of it three sets of costs incurred in ascertaining information that any counsel would have imparted for a nominal fee. The consent of the beneficiaries makes no difference, as it is not shewn that they were advised that no application was really necessary. The form of the document signed suggests that they thought they were a real and not an imaginary doubt.

Had the application been opposed, I should have dismissed it with costs as unnecessary and frivolous. As it was assented to, I give no costs.

The theory upon which costs are given out of an estate is that the difficulty is caused by the act of the testator, who has used such ambiguous language, or has in some other way occasioned such difficulty, as to render resort to the Courts a part of the

testamentary expenses necessary to the due administration of the estate: O'Neil v. Owen, 17 O.R. 547.

It follows that this refusal of costs to the executors will preclude the allowance of these costs to them on passing their accounts: see In re Hodgkinson, [1895] 2 Ch. 190.

A fee of $10 for obtaining counsel's advice might properly be then allowed.

FALCONBRIDGE, C.J.K.B. DECEMBER 8TH, 1910.

RE GRAHAM.

Will—Construction—Trust—Absolute Interest—Vested Estate to be in Part Divested in the Event of Marriage.

Motion by Timothy Barber, one of the executors of the will of John Graham, deceased, for an order determining whether, in the events which have happened, (1) George Henry Graham, referred to in the will, has any right or interest in the residue of the real and personal estate of the testator, referred to in paragraphs 3, 4, 5, and 6 of the will; and, if so, (2) what such right or interest may be; and whether (3) the applicant may now safely pay and hand over to Mary Ann Graham all the rest and residue of the personal and real property of the testator, in accordance with the terms of paragraph 4 of the will, and be thereby discharged from the trust under the will, and whether the executrix, Mary Ann Graham, would also be discharged from her executorship and trusteeship.

The testator died on the 14th January, 1910. His will was dated in October, 1908.

By paragraph 1, the testator directed payment of debts, etc.

2. I will and direct that the house and premises where I now reside . . . shall be used as a home for my wife Jane Graham and my daughter Mary Ann Graham so long as my said wife shall live, and from and after the decease of my said wife I give and devise the said property to my said daughter absolutely.

3. All the rest, residue, and remainder of my real and personal estate . . . I give devise and bequeath to my executors hereinafter named upon the following trusts, namely:—

(*a*) To convert into cash . . . all of the said property which may not consist of cash at the time of my decease.

(*b*) To invest and keep invested the moneys . . . in such securities as are by law allowed for investment of trust funds generally, and the income from such investments to pay to my said daughter quarterly for the support and maintenance of herself and my wife . . .

4. On the death of my said wife, I direct my executors to hand over all my property to my said daughter in trust, she to have the sole use and benefit thereof, so long as she shall remain unmarried, and to be allowed to use both capital and interest, or any part thereof, for her support and maintenance, in such manner as to her shall seem fit, without consulting my said executors.

5. And I further direct that, if my said daughter should marry during the lifetime of my son George Henry, then my said daughter is to divide such of my property so held by her in trust as shall at such time remain, into two equal parts, one part to belong to my said daughter absolutely, and the other part to belong to my said son George Henry absolutely.

6. And I further direct that, if my said wife and my said son George Henry should die before my said daughter shall marry, then all my said property . . . shall belong to my said daughter and her heirs absolutely.

7. I hereby . . . appoint my said wife Jane Graham, my said daughter Mary Ann Graham, and my friend Timothy Barber . . . to be the executors and trustees of this my will.

The wife died before the testator. At the time of the application the son and daughter were both living, and the daughter was unmarried.

S. W. Field, for the applicant.

F. Denton, K.C., for Mary Ann Graham.

B. N. Davis, for George Henry Graham.

FALCONBRIDGE, C.J.:—Taking the language of the whole will into consideration, I think it is certain that the testator intended that George Henry Graham should take the interest provided for by paragraph 5.

Paragraph 4 in terms transfers the trust to Mary Ann, and in paragraph 5 the property is again spoken of as being held by her in trust, which is inconsistent with any theory that she should take it absolutely. Paragraph 6 contains the only provision under which she takes absolutely.

Such being, in my view, the true construction, the use of the expression in paragraph 5 "such of my property . . . as shall

at such time remain . . ." will not prevent the intention from taking effect, and Mary Ann does not take an absolute interest.

The executor may not, therefore, pay or hand over to Mary all the rest and residue of the estate.

Costs to all parties out of the estate.

In addition to the cases and authorities cited, I refer to Theobald, Can. ed. (7th), p. 514, and cases there cited.

MIDDLETON, J. DECEMBER 8TH, 1910.

McCULLOCH v. McCULLOCH.

Way—Private Way—Way of Necessity—Access to Highway—Connection between Farms—Prescriptive Right—Evidence of User—Interruption—Real Property Limitation Act, secs. 35, 37.

Action to establish a right of way, either as a way of necessity or as acquired by prescription, between two farms known as the plaintiff's east and west farms, across the defendant's farm, which lay between them.

D. B. Maclennan, K.C., and C. H. Cline, for the plaintiff.
G. I. Gogo and J. G. Harkness, for the defendant.

MIDDLETON, J.:—The plaintiff claims title under James McCulloch, who in 1849 may be assumed to have owned all the lands in question.

On the 3rd December, 1849, James McCulloch conveyed the middle farm to Alexander McCulloch, in consideration of £100. The deed is not produced; a memorial is registered. In it no mention is made of the reservation of any way across the farm conveyed to connect the east and west farms. All the farms abut at the north and south upon unopened road allowances. The plaintiff's west farm and the defendant's farm are crossed by the Glen road. About 35 years ago the side road, half a lot east of the east farm, was opened, and this connects with the Glen road some distance to the north. Access to this road, across the intervening lands owned by one Ranald McCulloch, was shewn to be usual; and a good deal of evidence went to shew that,

whatever the origin of the road across Ranald's land, a prescriptive right now existed.

Ranald was called as a witness and denied that there was any way across his lands, stating that the use was either by permission or clandestine. There is no house on his lands.

Fitchett v. Mellow, 29 O.R. 6, is an answer to the plaintiff's claim that there was a way of necessity. To the cases there cited I would add the later case of Union Lighterage Co. v. London Graving Dock Co., [1902] 2 Ch. 557, in which, at p. 573, Stirling, L.J., points out that the "easement of necessity" which is reserved to the grantor to enable him to reach a land-locked tenement, and which is admitted in Wheeldon v. Burrows, 12 Ch. D. 31, to constitute an exception to the general rule against all implied reservations and re-grants, is one without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of the property. To the same effect is the judgment of Kekewich, J., in Ray v. Hazeldine, [1904] 2 Ch. 17.

When lands sold abut on a road allowance, the purchaser must, in the absence of some special agreement, look to it as the means of access to his property, and, *a fortiori*, one who sells should not be permitted to derogate from his grant by setting up a "way of convenience," in lieu of the road provided by the original survey, if the latter is found to be unfit for convenient use. See on this point Titchmarsh v. Royston, 81 L.T. 673.

The Municipal Act must be taken to provide ample machinery for the opening of the original, or substituted, roads to meet the convenience of the public and inhabitants.

The claim to an easement of necessity is now at an end, even if it ever existed, as access to the east farm can now be had by the Glen road and side road. This touches the east farm at its north-east angle, and, though inconvenient by reason of the swamp upon the farm, it is still access. Holmes v. Goring, 2 Bing. 76, though doubted, seems still good law.

I prefer not to deal with the question of the road across Ranald McCulloch's farm in his absence; and so do not base my decision upon its existence. If necessary, I should, on this evidence, find that this road exists, and, if so, it affords ready and reasonably convenient access to the farm in question, though the distance to be travelled is greater than by the way claimed.

Underlying the whole of the plaintiff's case is the assumption that a "way of necessity" involves access to the other farm instead of access to a highway.

In the alternative, the right of way is claimed by prescription under the statute. The plaintiff claims to have established an uninterrupted user for more than twenty years prior to the interruption by the defendant. It is admitted that more than a year before the bringing of the action the defendant barred the way in question, and since that the way has not been used. This interruption, acquiesced in for more than a year, is relied upon by the defendant.

In my view, it is fatal to the plaintiff's claim. Section 35 of the Real Property Limitation Act, R.S.O. 1897 ch. 133, speaks of a right which "has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years;" but sec. 37 provides that this "shall be deemed and taken to be the period next before some action wherein the claim or matter to which such period relates was or is brought in question;" and the same section defines "interruption" as an act "submitted to or acquiesced in for one year after the party interrupted has had notice thereof, and of the person making or authorising the same."

The obstruction was, I find, submitted to, after notice, for one year, so as to be an "interruption" within the statute.

Knock v. Knock, 27 S.C.R. 664, is authority supporting this view.

Since then the question has been considered more than once in England. . . . [Reference to Colls v. Home and Colonial Stores Limited, [1904] A.C. 179, 189; Hyman v. Van den Bergh, [1908] 1 Ch. 167, 173.]

The plaintiff's right based upon prescription thus fails, and the other matters argued at the hearing need not be considered.

Action dismissed with costs.

BOYD, C. DECEMBER 8TH, 1910.

*GORDON v. MOOSE MOUNTAIN MINING CO.

Timber—Mining Lands—Rights of Patentees—Rights of Timber Licensees—Reservation in Patent—Mines Act—Repeal—Effect of—Saving of Rights—Right to Cut on One Patented Lot for Use on Another—Nature of Operations—Right to Cut for Necessary Purposes—Exceeding Right—Damages—Reference.

*This case will be reported in the Ontario Law Reports.

Action for trespass and for damages for cutting and removing timber from lands under license to the plaintiffs.

R. McKay, K.C., for the plaintiffs.
E. D. Armour, K.C., for the defendants.

BOYD, C.:—The plaintiffs are licensees, with power to cut and remove all red and white pine timber upon the locations set forth in the pleadings during the years 1909 and 1910. The defendants claim to be the owners of the same area under different Crown patents of the lands, as mining lands, which are subject to the reservation to the Crown of all the pine trees standing or being on such lands. The patents were issued under the provisions of the Mines Act of 1897 (R.S.O. ch. 36), and the reservation of timber was controlled by sec. 39 of the Act. The first sub-section provides that all the pine after the patent is to continue to be the property of Her Majesty, and that licensees empowered to cut timber may enter, cut and remove the trees from the patented property during the continuance of the license. By sub-sec. 2, the patentees may cut and use such trees as may be necessary for the purpose of building, fencing, and fuel, on the lands so patented (i.e., as mining lands), or for any other purpose essential to the working of the mines thereon (i.e., on the lands so patented), and may also cut and dispose of all trees required to be removed in actually clearing the land for cultivation. By sub-sec. 3, no pine trees, except for the necessary building, fencing, and fuel, or other purpose essential to the working of the mines, shall be cut beyond the limit of such actual clearing; and all pine trees so cut and disposed of, except for the said necessary building, fencing, and fuel, or other purpose aforesaid, shall be subject to the payment of the same dues as are at the time payable by the holders of licenses to cut timber or saw-logs.

The chief matter in dispute arises under sub-sec. 2, as to the cutting of trees for building, fencing, and fuel, or for any other purpose essential to the working of the mines.

As presented before me, the following contentions were urged:—

1. There was no right to cut at all under sec. 39 of the first Mines Act because that had been repealed, without saving future cutting by the defendants.

2. That there was no right to cut on one lot for use on another lot, though both patented to the same person in different patents.

3. That the patents might be granted for the purpose of working one large mine, and they are in effect unified by the nature of the operatiions.

The Mines Act under which the patents . . . were issued was repealed by 6 Edw. VII. ch. 11, sec. 222, with the proviso that such repeal "shall not affect any rights acquired . . . or any act or thing done" under the said Act.

A new provision appears therein as to "reservation of timber," in terms embodying the same enactment as sub-sec. 1 of R.S.O. 1897 ch. 36, sec. 39. But, as to sub-sec. 2, there is an amendment . . . 6 Edw. VII. ch. 11, sec. 175.

The Act of 1906 is again altogether repealed by the present Act of 8 Edw. VII. ch. 21, sec. 193, which contains, as sec. 112, provisions similar to . . . sec. 175 of the Act of 1906 . . . [Reference to the Interpretation Act, R.S.O. 1897 ch. 1, sec. 8, sub-sec. 50 . . . 7 Edw. VII. ch. 2, sec. 7, sub-sec. 46.]

The upshot is that the patentee, under the statute, sec. 39, had legal permission to take such of the trees as were necessary and essential for the buildings and operations in mining, without let or charge, so long as the limits of the permission were not exceeded. That is, to my mind, a right or privilege which is saved under the general repeal of the first Act. It is a specific right or privilege, part of the consideration of his purchase, which is secured to him by statute, and was subsisting at the time of its repeal. To use the phrase of the Lord Chancellor in Blackwood v. London Chartered Bank of Australia, L.R. 5 P.C. 92, at p. 110, "it was a statutory right, and there is nothing higher among legal rights than a right created by statute." I regard the terms of the contract and grant as not in the nature of an inchoate or potential right or privilege, but one which had been established, which had accrued, and was to be acted upon as occasion arose in the mining operations. I have consulted the following authorities, which mark the distinction and support the conclusion: In re Chaffers, 15 Q.B.D. 467, 470; Prince v. Prince, L.R. 1 Eq. 490, 494; Starey v. Graham, 16 Rep Pat. Cas. 106, 111; Abbott v. Minister for Lands, [1895] A.C. 425; Reynolds v. Attorney-General for Nova Scotia, [1896] A.C. 240; . . . Falvey v. Tregoweth, 16 N.Z.L.R. 341.

The result is, that the plaintiff has a cause of action as to any excess in cutting which he may establish on the reference to the Master.

Enough was admitted to ground a reference as to one class of cutting which I think was unauthorised. That is, the defendants cut on one patented lot pine trees to be used and which

were used upon another lot, also patented. That is against the fair meaning of the language used in the statute; the leave to cut is for the purpose of building, etc., on the lands so patented as mining lands, and also for any other purpose essential to the working of the mine on the lands so patented. If it had meant that the timber from one lot under patent could be transferred to and used upon another lot under patent, that would have been provided for, as we find done in the case of free grant land—the legislation as to which is in pari materia with this mines legislation . . . R.S.O. 1897 ch. 29, sec. 13, sub-sec. 2 . . . In the absence of such a provision, the cutting of the patentee is restricted to the particular lot patented. . . .

[Reference to Parker v. Maxwell, 14 O.R. 239, 244.]

The ascertainment of the amount of damages done by cutting should be referred to the Master at Sudbury; further directions and costs reserved till after report.

DURYEA v. KAUFMAN—MASTER IN CHAMBERS.—DEC. 2.

Particulars—Statement of Defence—Patent for Invention—Infringement—Invalidity.]—Motion by the plaintiff for an order for delivery by the defendant company of particulars of the facts upon which they intended to rely and give evidence at the trial in support of their denial in their statement of defence of the validity of the plaintiff's patents, and further and better particulars of certain matters of which particulars had already been delivered. See judgment of RIDDELL, J., 21 O.L.R. 166. There had been some amendments to the statement of claim since that judgment. The Master said that the validity of the modified starch and maltose patents was no longer in question, and the statement of defence should be amended by striking out the allegation of invalidity of these patents. All that is left to be determined on the present motion is what particulars the plaintiff is entitled to in respect of the allegation of want of novelty in the glucose patent, and what further particulars should be given. "It is clear," the Master says, "that where want of novelty is set up as a defence to a claim for infringement, full and precise particulars should be given, so that the plaintiff may know what case he has to meet." Order made for particulars of paragraph 9 of the defendant company's statement of defence and of paragraph 3 of their counterclaim, stating the names and addresses of those to whom the invention

embodied in the glucose patent was known at the date of its issue, the patents alleged to embody the plaintiff's invention, and where the same were issued, and all other necessary particulars; also particulars of the alleged use by the public of the invention embodied in the glucose patent; with the usual provision confining the defendant company at the trial to proof of the particulars given; also for further and better particulars of paragraph 9 so as to shew in what respect the description of the process contained in the specifications for the glucose patent is not sufficiently clear to enable any person skilled in the art to use the same, the two well-known equivalents set out in sub-clause 11 of the particulars of paragraph 9 already delivered, in what respect the patent was not useful at the time of the alleged invention or at any other time as stated in sub-clause 3 of the particulars already delivered, the additional grounds, if any, to those set forth in sub-clause 8 of the particulars already delivered, shewing why this patent had legally expired before the infringement began, as set out in sub-clause (6) of the particulars already delivered; with the usual provision restricting the defendant company at the trial to proof of such particulars as shall have been given under this order on the defences to which the same are referable. Costs of the motion to be costs in the cause. Casey Wood, for the plaintiff. D. L. McCarthy, K.C., for the defendants.

MANSELL v. ROBERTSON—MASTER IN CHAMBERS.—DEC. 6.

Security for Costs—Libel—Newspaper—Assets in Jurisdiction—Insufficiency.]—Motion by the defendant in an action for newspaper libel for an order for security for costs. The motion was resisted on the ground that the plaintiff had sufficient assets within the Province to answer the costs, if he failed. The Master referred to the affidavits before him, which shewed that the plaintiffs had property, but that it was incumbered, and that he had other liabilities; and said that it did not seem that the plaintiff had assets readily exigible under execution to the amount of $800 or even $400. He cited Bready v. Robertson, 14 P.R. 7; Feaster v. Cooney, 15 P.R. 290; Belair v. Buchanan, 17 P.R. 413, 476. Order that the plaintiff give security within one month, either by bond for $400 or paying $200 into Court, and in default that the action be dismissed. Proceedings stayed meantime. Costs of the motion to be costs in the cause to the defendant. J. T. White, for the defendant. C. H. Porter, for the plaintiff.

CAMERON v. DRISCOLL—MASTER IN CHAMBERS.—DEC. 8.

Venue—Change—County Court—Convenience—Witnesses—Affidavits.]—Motion by the defendant to transfer the action to the County Court of Carleton from the County Court of Renfrew. The action was to recover about $200 for lumber sent to the defendant at Ottawa, but rejected as not being good merchantable stuff, as was ordered. The lumber remained at Ottawa. The whole dispute was as to the quality of the lumber. The Master said that the motion should succeed, following his previous decisions in Canada Carriage Co. v. Down, 1 O.W.N. 444, and Irwin v. McFee, 2 O.W.N. 72. Another reason was that, while the defendant swore to six witnesses all resident at Ottawa, the plaintiff's affidavit gave neither the names nor the residences of any of the eight witnesses whom he spoke of as material, nor any indication of what they would depose to. Strictly speaking, therefore, there was no more substantial answer to the motion than was given in Gardiner v. Beattie, 6 O.W.R. 975, 7 O.W.R. 136. Order made as asked; costs in the cause. H. M. Mowat, K.C., for the defendant. Harcourt Ferguson, for the plaintiff.

RE ROSE—RIDDELL, J.—DEC. 8.

Trusts and Trustees—Appointment by Court of New Trustee—Special Circumstances.]—Petition by Helen Amelia Barnes for the appointment of a trustee of the estate of Harvey Milton Rose, deceased, in place of Delia Caroline Rose, a deceased trustee, to act with the petitioner. RIDDELL, J.:—To avoid all trouble, and ex abundanti cautela, an order may go appointing Helen Amelia Barnes and Robert A. Mulholland trustees under the last will and codicils of Harvey Milton Rose, and vesting his estate in them as such trustees. This order is made in the peculiar circumstances of the case, and is not to be drawn into a precedent. R. L. Defries, for the petitioner.