The
Ontario Weekly Notes

Vol. I. TORONTO, MAY 11, 1910. No. 33.

COURT OF APPEAL.

APRIL 19TH, 1910.

*HUBBERT v. HOME BANK OF CANADA.

Appeal—Court of Appeal—Leave to Appeal from Order of Divisional Court — Promissory Note — Bank — Holder in Due Course.

Motion by the defendants for leave to appeal to the Court of Appeal from the order of a Divisional Court, ante 542, affirming the judgment of BRITTON, J., ante 405, in favour of the plaintiff.

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

J. Bicknell, K.C., for the defendants.

J. D. Falconbridge, for the plaintiff.

THE COURT refused the motion with costs.

APRIL 29TH, 1910.

HAGLE v. LAPLANTE.

New Trial—Discovery of Fresh Evidence—Appeal to Court of Appeal under Judicature Act, sec. 76a—Motion for New Trial—Innkeeper—Death of Guest in Fire.

An appeal by the defendant from the judgment of MULOCK, C.J.ExD., 20 O. L. R. 339, and a motion for a new trial, upon the

* This case will be reported, with the judgments of the Courts below, in the Ontario Law Reports.

ground of the discovery of further evidence, and upon other grounds, disclosed in affidavits filed on behalf of the defendant. The appeal was taken directly to the Court of Appeal by consent, under sec. 76a of the Judicature Act (as enacted by 4 Edw. VII. ch. 11, sec. 2), and the motion for a new trial was made as if to a Divisional Court.

The appeal and motion were heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, JJ.A., and SUTHERLAND, J., on the 28th and 29th April, 1910.

G. H. Watson, K.C., and G. I. Gogo, for the defendant, argued that the new evidence was so contradictory of some of the testimony given on behalf of the plaintiff at the trial, on which the trial Judge had largely based his findings, that an injustice would be done to the defendant if a new trial were not granted.

R. A. Pringle, K.C., for the plaintiff, opposed the application and appeal.

THE COURT, after discussion, directed a new trial, upon terms as to costs arranged between counsel.

HIGH COURT OF JUSTICE.

BRITTON, J. APRIL 29TH, 1910.

*BEER v. WILLIAMS.

Devolution of Estates Act—Action by Judgment Creditor against Heirs-at-Law of Intestate to Make Lands of Intestate Available for Payment of Debt—Lands Vesting in Heirs—Administration not Sought—Right of Action—Bar by Statute of Limitations — Possession under Parol Gift — Acts of Ownership — Uncultivated Land.

Action against the heirs-at-law of Nancy Hillis, who died on the 24th May, 1899, intestate, for a declaration that a debt due to the plaintiff was a charge upon certain land which had been conveyed to Nancy Hillis, and for a sale of the land to pay the debt.

William Lammiman the elder died in 1865, leaving a widow, Nancy Lammiman, and children. The defendant William Lam-

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

miman, one of the children, was then about four years old. The widow married a man named Hillis, and on the 10th November, 1883, the heirs-at-law of William Lammiman the elder conveyed to her, Nancy Hillis, 12½ acres of land, which, with other lands, had been owned by William Lammiman the elder. The consideration stated was $125, apparently not less than the value at that time of the 12½ acres. Nancy Hillis owned another piece of land, 32¼ acres, and on the 17th March, 1896, she gave a mortgage upon it to the plaintiff for $1,100 and interest. After the death of Nancy Hillis in 1899, the plaintiff brought an action upon his mortgage, and the mortgaged land was therein sold, but the amount realised was not sufficient to pay the principal, interest, and costs, the deficiency being $224.06, which was the debt the plaintiff sought in this action to obtain payment of. In the mortgage action there was no claim for administration, and nothing said about other creditors, if any.

In this action the plaintiff did not sue as a judgment creditor with execution in the hands of the sheriff, and did not sue on behalf of all creditors, and did not ask for a general administration of the estate of Nancy Hillis, or for the appointment of an administrator. Her estate had not been administered, and there were no creditors other than the plaintiff, so far as appeared.

The plaintiff maintained his right to proceed in this way if the land in question belonged to the estate of Nancy Hillis.

The defendant William Lammiman pleaded as a bar to the action want of administration, and that this action was barred by the Statute of Limitations.

F. E. Hodgins, K.C., and F. S. Bastedo, for the plaintiff.

D. B. Simpson, K.C., for the defendant William Lammiman.

J. R. Meredith, for the infant defendants.

BRITTON, J.:—The action is brought against the heirs-at-law of Nancy Hillis, not to make them personally liable, but to reach the land in question, which, if it belonged to her, may be treated as an asset in the hands of the heirs for the payment of the debt.

Gardiner v. Gardiner, 2 O. S. 554, decided that lands could be reached by action against an administrator or executor. After the law was established by that decision, actions against the heir became infrequent, if not obsolete, as was pointed out in Rymal v. Ashbery, 12 C. P. 339, at p. 342; and see Armour on Devolution, p. 186.

I do not know of any action, since Gardiner v. Gardiner, brought, as in this one, against the heirs, and counsel did not refer me to any reported case. It is, however, apparent that such an

action may be brought. The legal position is now as pointed out by Mr. Armour, pp. 192, 194, 195. . . .

A possible doubt may arise as to the correctness of my conclusion, for this reason. Nancy Hillis died on the 24th May, 1899, intestate. Under R. S. O. 1897 ch. 127, sec. 13, the land became vested in the heirs on the 24th May, 1900. The statute 3 W. & M. ch. 14 was then in force. The statute 2 Edw. VII. ch. 1, which, by sec. 4, continued the liability of lands of deceased persons for debts of the deceased, also, by sec. 2, repealed (as to the province of Ontario) 3 W. & M. ch. 14. Section 4 of 2 Edw. VII. ch. 1 speaks of lands which "should become" vested. Can that apply to this land, which *had* become vested? If it cannot, can the plaintiff get on in this action without the aid of 3 W. & M. ch. 14, which is now not in force in Ontario?

With some hesitation, I think this action will lie if the land has not become the land of the defendant William Lammiman by virtue of the Statute of Limitations.

The plaintiff's status here is as a judgment creditor. The defendant William Lammiman objected that this had not been proved . . . ; that the papers in the mortgage action were not evidence upon their mere production. . . . I allowed these papers to be put in, subject to the objection. . . .

The defendant William Lammiman claims title by possession. His evidence is that in 1885, by reason of his brother-in-law cutting wood on this lot, he complained, and his mother gave the lot to him. . . . There were no creditors, no one objecting, and this occurred, if it did occur, eleven years before the plaintiff got his mortgage. . . .

Then there was the delivery of the old deeds, if I believe the evidence, as I do, and the keeping of these deeds by the defendant. The defendant's Christian name was the same as that of his father, and the old lady seemed to think that, because the deed was in that name, it would answer for the son. No claim is made by the sisters.

Now, acts of ownership depend upon the circumstances, the conditions, etc., and the kind of land. This . . . was bush land; no buildings upon it; a considerable distance from where the defendant lived, and of comparatively little value. . . .

I quite agree that, according to the authorities, if this case was against Nancy Hillis in her lifetime, and if she averred a want of knowledge of the occupancy or of the acts of ownership by her son, a very different state of things would prevail. Here, if the evidence is accepted, all that the defendant did down to the time of his mother's death was with the complete knowledge of his mother.

When one speaks of the possession being notorious, that means that it must be so public as that, in the natural order of things, knowledge of it would be brought home to the owner of the land so that the owner could take such steps as might be necessary to prevent the occupancy by another ripening into a title by limitation. This is unnecessary here, if the defendant's mother knew what the defendant was doing, and I think she did know it; and, therefore, I give effect to the evidence, and think the defendant William Lammiman has acquired a title by possession.

There is not a suspicion of fraud in this matter. Nancy Hillis seems to have been an honest woman. The transaction as was intended between her and the defendant William Lammiman ought not, at this distance of time, to be disturbed.

The action must be dismissed, and with costs.

DIVISIONAL COURT. APRIL 30TH, 1910.

*NEWMAN v. GRAND TRUNK R. W. CO.

Railway—Carriage of Goods—Claim for Detention—Failure to Give Notice—Condition of Contract—Construction—Misprint —"Or"—"Are."

Appeal by the plaintiff from the judgment of TEETZEL, J., 20 O. L. R. 285, dismissing the action without costs.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

H. D. Smith, for the plaintiff.

W. E. Foster, for the defendants.

FALCONBRIDGE, C.J.:—Through an obvious mistake, the word "or" appears, instead of "are," in the last line of clause 12 of the terms and conditions which are printed on the back of the shipping bill. In this form it received the approval of the Board of Railway Commissioners for Canada, and the mistake has been perpetuated in the forms used by these defendants.

The plaintiff now asks us to declare the whole clause to be insensible and meaningless, to adjudge that the Board has done something in vain, and in fact to reject the clause altogether.

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

We are not at liberty so to do. The learned trial Judge cites authorities to shew that the provision must not be so reduced to a nullity, but that an obvious mistake ought to be corrected.

The appeal must be dismissed, but, as the defendants were guilty of negligence, without costs.

BRITTON, J., agreed, for reasons stated in writing.

RIDDELL, J., also agreed.

SUTHERLAND, J. APRIL 30TH, 1910.

*RE PRANGLEY AND TOWN OF STRATHROY.

Municipal Corporations — Local Option By-law — Voting on — Manner of Taking Vote—Votes of Illiterate Persons and Persons Physically Incapacitated—Neglect of Deputy Returning Officers to Comply with the Provisions of sec. 171 of Municipal Act—Irregularities—Application of Saving Clause, sec. 204.

Application by Prangley to quash by-law No. 642 of the town of Strathroy, being a by-law to prohibit the sale by retail of spirituous, fermented, or other manufactured liquors in the town.

The vote was taken on the by-law on the 3rd January, 1910, and it was given its final reading on the 7th March, 1910.

No objection was urged as to the form of the by-law.

The declaration required to be made by the returning officer as to the vote on the by-law was so made on the 4th January, 1910, and the vote so declared by him was 477 for, and 309 against the by-law. Subsequently, on a scrutiny before the Senior Judge of the County Court of Middlesex, 6 of the votes polled for the by-law were struck off and an additional one added against the by-law, leaving the vote 471 for and 310 against, giving two votes more than the three-fifths necessary to carry the by-law. The margin, therefore, in favour of the by-law was so narrow that, if 6 more votes were struck off, it would be defeated.

Upon this application 10 votes were attacked: in poll No. 1, the votes of Charles Demarry, William Wray, Samuel Carson, Rhoda Calcott, and Margaret Harker; in poll No. 2, the vote of William Ellis; in poll No. 3, the votes of Albert Plaxton, Jennette McKellar, and Emma Cook; and in poll No. 6, the vote of Arthur Cushman.

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

The votes were attacked on two grounds: (1) that these persons were unable to read or write and otherwise incapacitated by blindness or other physical cause from marking their ballot-papers, and that such ballot-papers were marked by the deputy returning officer in each case, without any of the said persons making a declaration of inability to read or physical incapacity, and in the absence and not in the presence of the agents appointed for and against the by-law, and that such ballot-papers were illegal, but were put in the ballot box and counted; (2) that the ballots and votes were not the ballots and votes of the persons named, but were really the ballots and votes of the deputy returning officers.

J. C. Judd, K.C., for the applicant.

T. G. Meredith, K.C., for the corporation.

SUTHERLAND, J., after setting out the facts as above, referred to sec. 171 of R. S. O. 1897 ch. 223, which is the section dealing with the proceedings to be taken in case of incapacity of voters to mark their ballot-papers; and said that it was apparent that no declaration as to incapacity from blindness or other physical cause or inability to read was made by any one of the 10 voters in question; that in some of the cases the ballot-papers were not marked in the presence of the agents of the parties supporting and opposing the by-law; and that no entries opposite the names of these persons in the proper column of the poll-book were made.

Counsel for the motion contends that non-compliance with the prescribed formalities renders the votes void, while the opposing counsel argues that, under sec. 204 of the Act, . . . the irregularities are curable, upon the facts in evidence. . . .

[The learned Judge then set out portions of the evidence.]

There is no doubt that matters seem to have been carried on by the deputy returning officers, in respect of the ballots complained of in a very irregular way; but the questions to be considered are: (1) Were the matters omitted to be done by them matters which, under the statute, it was obligatory to do before the voters could properly cast their ballots? Or (2) are they such irregularities as can be remedied under sec. 204 if "the election was conducted in accordance with the principles laid down in the Act, and such non-compliances, mistakes, or irregularities did not affect the result of the election?"

Let me deal shortly with the 10 voters as follows.

Demarry. The only evidence is that of Whyte, the deputy returning officer. It is plain from his affidavits that the scrutineers were not present when the ballot was marked by the deputy returning officer for the voter; that no declaration was taken as to

the voter's illiteracy, and the other formalities required were not observed. The same state of things is shewn to have occurred so far as the votes of William Wray, Samuel Carson, and Rhoda Calcott are concerned. . . .

Then as to the vote of Margaret Harker. On the evidence it is somewhat in doubt whether she did or did not direct the deputy returning officer how she wanted to vote, or whether any direction that was given was not so given by Mrs. Carruthers. It is clear, of course, upon her own shewing, that she wished to vote for the by-law, and that the ballot was marked according to her direction, and, unless the irregularities complained of are fatal, this should weigh in considering whether her vote should or should not be struck out. I am inclined, with hesitation, to allow her vote.

As to the vote of William Ellis, I think it clear upon the evidence that this vote should be disallowed. There is the plain statement in the first affidavit of the deputy returning officer that he marked the ballot as he liked. Upon the whole evidence I am satisfied that that is what occurred.

As to the vote of Albert Plaxton, his ballot was dealt with very much in the same way as those of Demarry, Wray, Carson, and Calcott. He makes no affidavit, nor is he examined. There are discrepancies in the affidavits made by Leitch as to this vote. . . .

As to her ballot, Margaret McKellar corroborates Leitch in the statement that he marked it as she directed him to do. I think, perhaps, this ballot should also be allowed.

As to the ballot of Emma Cook, there are the same discrepancies in the affidavit of Leitch as with reference to Plaxton's vote. She, however, corroborates him about her ballot being marked as she directed him. I think her ballot should also be allowed.

As to the vote of Arthur Cushman, it stands upon the affidavits of Gibson, and his affidavits do not contain any contradictory statements.

I have thus concluded to disallow the vote of Ellis and to allow the votes of Margaret Harker, Janet McKellar, and Emma Cook. . . .

This leaves the 6 votes of Demarry, Wray, Carson, Rhoda Calcott, Albert Plaxton, and Arthur Cushman to be disposed of. . . .

Had the voters a full and fair opportunity to cast their votes, was the secrecy of the ballot reasonably assured, and was the result of the election affected by anything which was irregularly done?

As to the first point, it is clear that each of the voters in question had a full and fair opportunity to cast his ballot. It is true

that, owing to their alleged illiteracy or physical incapacity, the law has laid down special regulations as to the way in which these ballots should be cast, and which, in the circumstances, were not properly observed.

But what was the real result? Counsel for the applicant laid much stress upon Re Duncan and Town of Midland, 16 O. L. R. 132. . . . That case only goes the length of pointing out the impropriety of the omission to follow the provisions of the Act, but does not expressly hold whether or not the irregularities are curable under sec. 204.

I am inclined to think that, in the circumstances disclosed in this case, they are curable. I cannot, on the facts disclosed, see that they affected the result. At all events, I have come to that conclusion, though with some little hesitation, I confess.

The present case is not like, for example, the case of Re Hickey and Town of Orillia, 17 O. L. R. 317. . . .

I think the reasonable rule I should seek to apply in this case is well expressed by Street, J., in Re Young and Township of Binbrook, 31 O. R. 108, at p. 111: "As a general rule, an election should be held to have been conducted in accordance with the principles laid down in the Act, when the directions of the Act have not been intentionally violated, and when there is no ground for believing that the unintentional violation of them has affected the result." . . .

[Reference to Re Sinclair and Town of Owen Sound, 12 O. L. R. 488, remarks of Mulock, C.J., at p. 502.]

While the applicant's counsel has pressed his objections as strongly as possible, he is not able to attack, and does not pretend to do so, the bona fides of any of the four deputy returning officers. These swear that the six ballots now being dealt with were marked by them in good faith and in each case under and in accordance with the directions of the voter; that no objection was taken by the scrutineers who appeared against the by-law to the method adopted of taking the votes in question, but the said method of taking the votes was acquiesced in by every one present in the polling booth; that they acted absolutely in good faith in taking the votes; and that by taking the votes as they did the result of the poll was not in any way affected.

In these circumstances, I have come to the conclusion that the six votes in question should also be allowed.

It may be said, but what about the question of the secrecy of the ballot? As to this, if the formalities as to taking the declarations had been observed, then the deputy returning officers and scrutineers would have seen how the ballots were marked. They

either did see how they were marked, or could have done so, in the cases in question. They apparently acquiesced in the course taken. They were all sworn to secrecy. While it is true that in one case Mrs. Carruthers was present under circumstances which enabled her to ascertain how a particular ballot was being marked, I cannot find that that fact, under the circumstances, affected the result in any way.

I must, therefore, hold that the motion to quash the by-law fails. I do not think, however, it is a case for costs against the applicant. The irregularities of the deputy returning officers, the appointees of the municipality, were such as to provoke suspicion, and warrant the action taken. The motion will be dismissed without costs.

RIDDELL, J. MAY 2ND, 1910.

*RE ELLIS AND TOWN OF RENFREW.

Municipal Corporations—Local Option By-law—Voting on—Declaration by Clerk of Result—Scrutiny by County Court Judge—Motion to Quash By-law—Inquiry into Validity of Votes—Going behind Findings of County Court Judge — Illiterate Voters—Blind Voter—Ballots Marked by Deputy Returning Officer—Absence of Declarations—Absence of Agents—Secrecy of Voting—Aged Voters Accompanied by Friends—Unmarked Ballot Placed in Box—Ballot Marked in Public — Change of Residence by Voters—Votes Struck off by County Court Judge — Scope of Inquiry on Scrutiny — Ballots Cast Exceeding Number Issued—Ballots Exposed to Public View after Count—Clerk Acting as Deputy Returning Officer—Municipal Act, sec. 204—Application of, to Cure Irregularities—Acquiescence of Applicant—Estoppel.

Motion by Ellis to quash a local option by-law passed by the council of the town of Renfrew after submission to the voters on the 3rd January, 1910.

The vote appeared to be, for the by-law 371, against 232, total 603, majority 139, or 9 votes more than the legal minimum.

On a scrutiny before a County Court Judge, one vote which had been wrongly counted for the by-law was transferred to the other side, two ballots were rejected for defect of form, and 10 persons who voted were found to have had no right to do so, and these were all struck off the winning side, leaving 358 for the by-

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

law, 233 against, total 591, majority 125, or 3 votes more than the legal minimum.

W. Nesbitt, K.C., and J. E. Thompson, for the applicant.

W. E. Raney, K.C., and S. T. Chown, for the corporation.

RIDDELL, J.:—The notice of motion contains 16 separate reasons, but all of these were . . . abandoned upon the argument except Nos. 1, 8, 13, and 16.

For convenience, I speak first of No. 16—"that the by-law . . . was not in fact declared by the clerk . . . to have received the assent of three-fifths of the electors voting thereon; and, in the alternative, if the said clerk . . . did purport to so declare . . . the said declaration was made illegally, the said clerk not carrying out the provisions by law provided in that behalf . . ."

In Re Duncan and Town of Midland, 16 O. L. R. 132, it was thought by the Divisional Court that there was no necessity for a summing up or declaration by the clerk at all (pp. 140, 141); this is criticised by some of the members of the Court of Appeal in the same case; and it is argued that 8 Edw. VII. ch. 54, sec. 11, amending the Liquor License Act, sec. 143, makes a difference. And it may be that the law is still in a state of uncertainty. But in the present case the affidavits of Mr. Chown and of the clerk make it clear that the declaration was made as required by the Act. This objection, then, must fail.

The declaration gives for the result:—

	For the by-law.	Against the by-law.
First ward	124	66
Second ward	116	102
Third ward	131	64
	371	232

The declaration is dated the 4th January, 1910.

We must then start with the case prima facie that there were 603 votes, of which 371 (i.e., more than three-fifths) were for the by-law.

It was argued that we should start with the result found by the County Court Judge . . . but I do not think so. . . .

[Reference to sec. 371 of the Municipal Act.]

There seems to be no doubt that the Court may go behind the findings of the County Court Judge upon motions of this kind; his judgment in disallowing as well as in allowing votes may be attacked. This has frequently been done.

Of the 371 votes counted in the declaration of the clerk for the by-law, it is admitted that one was counted by mistake for instead of against; this leaves 370 for and 233 against. Consequently, even if all these to be disallowed be deducted from the winning side, it will need 21 votes to be struck off to reduce the majority vote below the statutory minimum. . . .

The applicant attacks a number of votes, while relying upon those which have been struck off by the County Court Judge being kept off. . . . I do not think that the applicant can here succeed by shewing a number of invalid votes, together with those struck off by the County Court Judge sufficient to reduce the number below the minimum, unless it also appears that the County Court Judge was right. . . .

The applicant claims the following cases:—

1. Chisholm, Visinski, Kubisenski, Bearon, Rabior, Lepine, Leskie, Knash, Liturski, Verkus (10 in all), illiterates.

2. Robert Timmons, blind.

3. Mrs. Berlanquet and Mrs. McLaren, old women.

4. Jessie Ferguson, declined to vote, but vote counted.

5. Ann McManus, marked her ballot in public.

In addition to these Mary Tackman's vote is questioned . . her vote cannot be struck off. So also . . Mary Utrunky's vote is attacked, but her own affidavit is to be taken.

In respect of class 1, the fact is that they, claiming to be illiterates, were not required by the deputy returning officer to make any declaration as to their incapacity, but the deputy returning officer took a ballot and marked it for the voter in his presence alone and not in the presence of the agents, as it is contended is required by sec. 171 of the Act. . . . The argument is, that the illiterate is given the right to vote only on making the declaration—that, consequently, a vote taken thus is void, and that it is not simply an irregularity. I do not accede to this argument, but it is, in my view, not necessary to decide the question, for reasons that will shortly appear.

(2) In the case of Robert Timmons, the blind voter . . . no declaration was needed; but the irregularity of marking his ballot by the deputy returning officer in presence of the voter alone . . . was committed also in his case. As, however, the right to vote at all cannot be considered to depend upon the manner of voting, this vote cannot be struck off in these proceedings. . . .

(3) Mrs. Berlanquet and Mrs. McLaren are very old women. The former . . . appeared at the polling booth, stated that she was not able to mark her ballot herself, and the deputy return-

ing officer, without requiring any declaration, allowed her and her daughter (not sworn to secrecy) to go into the voting compartment. . . . The scrutineers (including Ellis, the applicant) stated that they were willing and consented thereto. Mrs. McLaren . . . was, in the same way, for the same reason, and upon the same explanation and consent, accompanied by her son-in-law. Mrs. Berlanquet and Mrs. McLaren both marked their ballots themselves, and both swear that the presence of their relatives in the voting compartment did not affect the manner in which they marked their ballots. It nowhere appears that the relatives could or did see the way in which the ballots were marked or the contrary, and it seems manifest that perfect good faith was observed . . . In this class, again, it is not the right to vote, but the manner of voting, that is objected to . . .

(4) Jessie Ferguson's vote, it is contended, should not have been counted. . . . She went into the booth with the intention of voting. She was handed two ballot-papers, one for councillors and one for the by-law; she took them and went into the compartment; returning, she says, she handed them to the deputy returning officer, but does not remember what she said. . . . The deputy returning officer placed both the ballots in the ballot-box. His affidavit says: "From the remark of Miss J. Ferguson, when she handed me her ballot re the by-law, that she did not wish to vote on the by-law, I have always considered that her ballot . . . was one of the unmarked ballots." There were six unmarked or spoiled ballots in the box at this polling place.

I have no great difficulty . . . in arriving at the same conclusion. . . .

(5) Ann McManus, it is said by Kelly, "on receiving her ballot-paper from the deputy returning officer, was allowed by him to mark her ballot in public and without retiring into the compartment." The deputy returning officer and others swear that no one was allowed to mark his ballot in a place where any one could see how she or he marked it.

I do not find that the McManus incident is specifically denied, but, taking it exactly as sworn to by Kelly, the vote is not invalidated by an irregularity in voting.

The result is that there are but 10 votes about which there is any question, in my judgment. But it is necessary that there should be 21 struck off, so that, if full effect be given to these 10 (or indeed the whole 15) the result will not assist the applicant. . . .

Even if we are to look at the County Court Judge's figures, I am not bound by his findings. . . .

He has struck off 12 votes. . . .

[The learned Judge made a statement as to these votes, and said, as to the first five, that there had been no change of residence subsequent to the certification of the list, and consequently that the judgment in the Saltfleet case, 16 O. L. R. at p. 302, did not apply. He also expressed his agreement with the view of Meredith, C.J., in the Orangeville case, 20 O. L. R. 476, as to the scope of the inquiry upon a scrutiny. As to another of the 12 (No. 10) he considered that there was a mere misdescription, and the name was properly on the list.]

Supposing full effect to be given to the other objections by the applicant . . . the whole number of objectionable votes would be . . . 16, and that, we have seen, is not a sufficient number. I am relieved, therefore, of the necessity of deciding upon any of these. . . .

I am not satisfied with several of those I have left undecided, but do not pursue an unnecessary inquiry.

The above disposes of objections 1 (a), (b), (c), (d).

Objection 1 (e) is that in polling subdivision No. 2, 220 ballots were handed out, 220 voters were entered as voting, but 221 ballots were taken out and counted. . . . The County Court Judge . . . did not think it within his province to strike off a vote from the winning side. I agree with him, and in any case the result would be unchanged.

Objection 1 (f) is that after the poll in No. 1 was closed the ballots were thrown loosely into a basket after they were counted and left exposed for some time after the general public were admitted, so that they would have access to them, before being replaced in the ballot box. From the affidavits it sufficiently appears that the deputy returning officer, after the close of the poll and before the general public were admitted, counted the ballots in the presence of the poll clerk and scrutineers, and gave his certificate of the result, and there is no pretence that the numbers so shewn are inaccurate. This does not affect the result, and at the worst was an irregularity after the taking of the vote.

I have now disposed of objection 1.

Objection 8 is that the clerk acted not only as returning officer, but also as deputy returning officer in No. 2. This is said to be an irregularity: Re Pickett and Township of Wainfleet, 28 O. R. 464, 467; but I think it is only an irregularity.

There were, no doubt, a number of irregularities, as we have seen; but I do not think they were of such a character as that sec. 204 should not heal them. . . .

[Reference to Re Duncan and Town of Midland, 16 O. L. R. at p. 140; Re Hickey and Town of Orillia, 17 O. L. R. at p. 341.]

I think all the irregularities set out in the affidavits are wholly covered by sec. 204.

The motion should be dismissed with costs.

I have not thought it necessary to consider the question whether the applicant is not estopped by his acquiescense. Before acceding to that proposition, I should require further consideration: Regina ex rel. Regis v. Cusack, 6 P. R. 303; Regina ex rel. Harris v. Bradburn; 6 P. R. 308, 309; Rex ex rel. McLeod v. Bathurst, 5 O. L. R. 573; Re Giles and Town of Almonte, ante 698.

As at present advised, I should think that in a public matter like the present the doctrine of estoppel has no place.

BOYD, C. MAY 2ND, 1910.

*PIGGOTT v. FRENCH.

Defamation—License Inspector—Notice not to Supply Intoxicating Liquor to Plaintiff—Liquor License Act, sec. 125—Information by Person not within Statute—Unwarrantable Notice—Injury to Business—Liability for Innocent Act—Notice of Action—R. S. O. 1897 ch. 88—"Unlawfully"—"Maliciously"—Public Officer Exceeding Jurisdiction.

Action by William Piggott, a grocer in the town of Wallaceburg, against the License Inspector for the county of Kent, to recover $2,000 damages for the issue of a notice to the hotel-keepers of the county not to supply the plaintiff with intoxicating liquor.

Section 125 of the Liquor License Act, as enacted by 6 Edw. VII. ch. 47, sec. 33, is as follows:—

125.—(1) The husband, wife, parent, child of twenty-one years or upwards, brother, sister, master, guardian or employer, of any person who has the habit of drinking liquor to excess—or the parent, brother or sister, of the husband or wife of such person—or the guardian of any child or children of such person—may give notice in writing, signed by him, or may require the Inspector to give notice to any person licensed to sell, or who sells or is reputed to sell, liquor of any kind, not to deliver liquor to the person having such habit.

One McKnight, who was married to the sister of the plaintiff's first wife, required the defendant, as Inspector, to give the

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

notice, and the Inspector, knowing McKnight, knowing the marriage connection, and believing that McKnight came within the general description of "brother-in-law" of the plaintiff, gave the notice, naming McKnight in the notice as the brother-in-law of the plaintiff.

J. S. Fraser, K.C., for the plaintiff.

M. Wilson, K.C., and J. M. Pike, K.C., for the defendant.

BOYD, C.:— . . . The language of the statute is specific, and is limited (in this connection) to the "parent, brother or sister, of the . . wife" of the person addicted to the excessive use of liquor. In such category McKnight did not come, and he had really no more authority to intervene than the stranger in the street. . . .

It is a serious matter to stigmatise a man in business as one addicted to the use of liquor in excess—to put this into writing and to publish it among the houses of entertainment as the deliberate act of a public officer. . . . The effect of the notice served under the statute . . . is to promulgate a libel (if it is unauthorised) and to expose him to various disabilities and to interfere with his freedom of action to a greater or lesser extent. It is popularly called putting him on "the Indian list"—though neither word is appropriate. . . . This unwarrantable notice did more or less harm to the plaintiff and his business. The principle of law applicable is well stated in Connors v. Darling, 23 U. C. R. 541, in these words: "The law would be in a singularly unsatisfactory state if there could be no redress for an injury committed in clear violation of the precise words of the statute, although without improper motive in the person causing the injury."

What is the legal status of the public officer under R. S. O. 1897 ch. 88, which applies to every functionary fulfilling any public duty (sec. 1, sub-sec. 2)? If what he does is done in the execution of his office, he is entitled to notice of action (secs. 13 and 14). This notice is of different character according to the circumstances of the case as defined in the Act. That is to say, if he is acting in respect of a matter within his jurisdiction, and goes wrong through honest error or innocent irregularity, he is entitled to a notice of action under sec. 1, charging malice and an absence of reasonable and probable cause, and these matters must be proved to establish liability. But if, on the other hand, he acts without jurisdiction (or has exceeded his jurisdiction), under sec. 2, the notice need not contain these charges, and the plaintiff need not prove them in order to recover. The notice in this case

set forth that the act was done unlawfully and maliciously. The latter adverb is superfluous—the former was proved.

Now, this case falls under sec. 2, for the reason very plainly stated by Patteson, J., in Houlden v. Smith, 14 Q. B. 841, in a passage quoted by Osler, J.A., in Sinden v. Brown, 17 A. R. 187. . . . Good faith and honest intention cannot create an authority to act, where the facts before, or known to, the officer shew that the matter is outside of or beyond his jurisdiction.

There is really no discrepancy in any of the cases cited. Kelly v. Barton, 26 O. R. 608, 22 A. R. 522, and Sinden v. Brown, 17 A. R. 187, are both recognised as of authority and in accord, in one of the latest cases, Moriarity v. Harris, 10 O. L. R. 610, which reverses the decision below, cited to me, in 8 O. L. R. 251. . . . Roberts v. Climie, 46 U. C. R. 264.

Judgment must, therefore, be entered for the plaintiff with $100 damages and costs of action.

BOYD, C. MAY 2ND, 1910.

*EVERITT v. TOWNSHIP OF RALEIGH.

Highway—Non-repair—Iron Pipe Left at Side of Road—Vehicle Upset and Occupants Thrown against Pipe—Upset not Caused by Condition of Road—Negligence—Contributory Negligence—Overcrowded Vehicle—Municipal Corporations—Gas Company—Liability.

Action by husband and wife against the Municipal Corporations of the Townships of Raleigh and Harwich and the Volcanic Oil and Gas Company for damages for personal injuries sustained by the plaintiffs by being upset while driving along the town line between Raleigh and Harwich in a buggy, and thrown, as the plaintiffs alleged, against an iron pipe left by the gas company upon the highway. This happened on a dark night; there were eight persons in the buggy; the horse nearly went into the ditch at the side of the travelled centre road; the driver pulled him round; the wheel clamped, and the buggy upset. The pipe was beyond the ditch, on the part of the road left for pedestrians.

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

O. L. Lewis, K.C., and W. G. Richards, for the plaintiffs.

M. Wilson, K.C., and J. M. Pike, K.C., for the defendants the township corporations.

J. G. Kerr, for the defendant company.

BOYD, C.:— . . . The causa causans—the proximate cause of the accident—was the upset of the buggy, which was facilitated at least by its overcrowded and top-heavy condition. So far as the central travelled highway was concerned, it had nothing to do with the misfortunes, by reason of want of repair. If the impact was upon the iron pipe, that was, no doubt, an obstruction on the pedestrian part of the way, but it was placed there as a means of public utility, though left exposed on the surface. I find nothing just in point in the authorities, though this case more nearly approaches Bell Telephone Co. v. City of Chatham, 31 S. C. R. 61, than it does Pow v. Township of West Oxford, 11 O. W. R. 115, 13 O. W. R. 162.

The obstruction at the roadside was not the cause of the injury, but it may be taken to have occasioned its serious extent. It cannot be held, I think, that the company in the buggy and the driver were in the exercise of reasonable care for their own safety when they started on this journey on a pitch-dark, rainy night in an overcrowded vehicle. Nor can it be held that the municipalities failed to exercise proper care for the safety of horses and carriages and travellers thereon by permitting the pipe to lie uncovered at the place next the fence at the side of the road and inside of the well beaten foot-path. It could not be anticipated as a likely result that such a mishap as this would occur, and that one could be thrown from the travelled road, which was in good repair, upon this obstruction, in the place intended for pedestrians.

Costs were multiplied in this case as to pleadings and witnesses and separate defences. Taking it that the plaintiffs were hurt on the iron pipe, which should have been covered with soil, I think that their condition should be considered in dealing with the costs. I would, therefore, while dismissing the action, do so without costs.

Should the case go further, it may be well to say that, had damages been, in my opinion, recoverable, I would have given the man $600 and his wife $100.

RIDDELL, J. MAY 3RD, 1910.

*RE BEGG AND TOWNSHIP OF DUNWICH.

Municipal Corporations—Local Option By-law—Voting on—Persons Voting without Right—Result as to Three-fifths Majority not Affected—Notices not Properly Posted — Municipal Act, sec. 338 (2)—Application of Curative Clause, sec. 204—Publication in Newspaper not in Municipality—Quashing By-law—Costs.

Motion by Begg to quash a by-law of the township to prohibit the sale of liquor, which was submitted to the voters on Monday the 3rd January, 1910, with the result that of a total vote cast of 781, 481 were in favour of the by-law, 469 being the minimum required, and was passed by the council on the 7th March, 1910, there having been no scrutiny.

Frank McCarthy, for the applicant.

J. M. Ferguson, for the township corporation.

RIDDELL, J.:—1. It is asserted that the clerk of the municipality voted, and that some 19 others who had in fact no votes also voted. I do not need to pass upon any of these votes; for, applying the proper rule . . . it will be found that the least number of votes which would require to be struck off to destroy the minimum is 52. . . .

2. That the notices were not properly posted, as required by sec. 338 (2) of the Act.

At least as early as 1850, the Courts said that corporations should be careful to preserve proof of regular notices by affidavits of persons employed to put them up: In re Lafferty v. Wentworth and Halton, 8 U. C. R. 232. (Now, of course, statutory declarations should be taken.) But corporations from that day to this continue to omit the proper precautions, and trouble frequently ensues. . . .

[Examination of the evidence as to posting of notices.]

I think sec. 338 (2) has not been complied with.

The remaining question upon this objection is, whether sec. 204 applies to heal this defect.

In Re Pickett and Township of Wainfleet, 28 O. R. 464, it was held by Osler, J.A. (p. 467), that "the onus of proving that the omission to comply with the statutory direction has not affected the result, is upon the respondents."

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

See also Re Hickey and Town of Orillia, 17 O. L. R. 317, at pp. 331, 332, 342; In re Salter and Township of Beckwith, 4 O. L. R. 51.

This the respondents have wholly failed to meet, and I think the by-law cannot stand.

3. The third objection is to the publication. This was in a paper in the village of Dutton, and consequently not in the municipality of Dunwich, without a resolution by the council.

Section 338 (2) provides: "The council shall . . publish a copy . . in some . . newspaper published either within the municipality or in the county town or in a public newspaper in an adjoining or neighbouring municipality, as the council may designate by resolution." There is no such resolution, but the clerk says, "We always get our printing done there." I think I am bound by the judgment of my brother Britton in In re Salter and Township of Beckwith, 4 O. L. R. 51, at pp. 52, 53, to hold that this objection is not tenable. . . .

[Observations on the omission of municipal officers to follow the plain directions of the statute.]

Had I been able to support the by-law, I should not have awarded the township costs; and, as the motion succeeds, I think the township must pay costs.

Order made quashing by-law with costs.

RIDDELL, J. MAY 3RD, 1910.

RE KNOX.

Will—Construction—Distribution of Estate—Period of Distribution—Death of Children of Testator—Vested Estates.

Motion by the executors for an order determining certain questions as to the distribution of the estate of John Knox, arising upon the construction of his will.

John Knox died on the 30th November, 1901, having made his will, and leaving a widow and four children. A daughter, J. M. Knox, died on the 6th April, 1906, aged 24 years, unmarried, leaving a will whereby all her property went to her mother, the widow. The testator's son, J. D. Knox, died without issue on the 26th December, 1909, over 25 years old, leaving a will which divided all his property equally, share and share alike, between his mother, the widow, and his sisters E. K. and C. C.

The will of John Knox provided: (1) for payment of debts; (2) a sale of Campbellford and Otonabee property; (3) holding

the Peterborough property "for a home for my wife and family;" (4) until the son attained the age of 25 years all the income to be applied in maintenance and support of wife and family; (5) on the son attaining the age of 25, he was to have the testator's business, at a fair price, to be fixed by the executors (this was done); (6) on the son attaining 21 the executors might sell; (7) "I will that the proceeds of my said Queen street property shall be invested if it is sold, or the income from it if it is not sold shall be paid over yearly or as received for the support of my wife so long as she lives or remains my widow;" (8) "I will that on her marriage or death the proceeds of my Queen street property shall be divided equally amongst my children then living, the lawful children of a deceased child to take the parent's share;" (9) "As to my estate other than the Queen street property, I will that it shall be divided equally amongst my children, the children of a deceased child to take the parent's share, but no child to take until he or she attains the age of 25 years;" (10) the executors to have power to advance on account of shares between the ages of 21 and 25, or on the marriage of a daughter, not exceeding half the child's share; (11, 12, 13, and 14, were not important); (15) "I will and direct that my said Otonabee farm shall go to my said son J. D. Knox, the said farm, or the proceeds of it if sold, shall be delivered to him on his attaining the age of 25 years, and that, in addition thereto, he shall have an equal share with my daughters in the final division of my estate."

J. D. Knox did in fact obtain delivery of the farm.

D. W. Dumble, K.C., for the executors.

E. L. Goodwill, for the widow.

F. W. Harcourt, K.C., for the infants.

RIDDELL, J.:—The questions for interpretation are three:—

1. What is the meaning of clause 8?

In the event which has happened, only two of the children can possibly be living at the time of the death or marrying of the mother, but the provision that the lawful children of a deceased child are to take the parent's share modifies the expression "then living" so as to make it plain that the testator intended that at the time of the death of the widow stock should be taken of the family, and if any child were then dead leaving children, then, for the purpose of the division, the child should be considered alive—and the share he would have taken had he been alive should go to his children. But any who might be dead without children should not be counted in the division. J. D.

Knox and J. M. Knox are both in that position, and consequently nothing passed under their wills so far as this property is concerned.

2. Was the share of J. M. Knox in the rest of the estate other than the Queen street property vested, so that she was entitled to anything under clause 9?

The meaning of the will is that until J. D. Knox becomes 25 all the income is to be applied to the maintenance of the family, and it is quite possible that, had that provision not been modified by clause 10, it would have to be held that there could be no vesting until J. D. Knox was 25 years of age. See the cases in Theobald, Can. ed., p. 588. But the testator himself considers that the children may have "shares" before that day, as he authorises the executors "to make advances on account of their shares between the ages of 21 and 25," etc., as above. . . .

[Reference to Vivian v. Mills, 1 Beav. 315; Harrison v. Greenwood, 12 Beav. 192; Walker v. Sampson, 1 K. & J. 713; Powis v. Burdette, 9 Ves. 428; Booth v. Booth, 4 Ves. 399, 407.]

I think there can be no doubt that the child's share vested upon the death of the testator (subject to the application as directed in the will), and that the age is mentioned simply as the time at which they were to have possession.

3. What are the rights of J. D. Knox under clause 15 of the will?

Remembering that a later clause in a will must be given full effect, it seems to me clear that the testator has segregated from the rest of his estate the Otonabee farm (or the proceeds of it if sold.) That is set apart for J. D. Knox, and the executors are given power to sell it and directed to rent it till sold. In the event which has happened, J. D. Knox took the farm as he was entitled to do, and that passes by his will. This farm is thus to be excluded in the consideration of the devolution of the remainder of the estate. In other words, the property is divided into three parts:—

(1) Otonabee farm—that is all J. D. Knox's, under clause 15.

(2) The Queen street property disposed of by clause 8. This is to be kept as a house for "wife and family" until death or marriage of the widow (clause 3) and then sold and the proceeds divided among those children then living and the children (if any) of those who are then dead (if any.) Neither J. D. Knox nor J. M. Knox comes within this category, and consequently neither will affects this property.

3. The remainder of the property is covered by clause 9. The final sentence of clause 15 is introduced to make it quite clear that

J. D. Knox is to share in this and in the Queen street property, if he is otherwise qualified, and not to be debarred by reason of his getting the Otonabee farm. He is qualified to receive a share in this, as is J. M. Knox.

The case was proper to bring before the Court—the costs of all parties will be out of the estate.

RIDDELL, J. MAY 3RD, 1910.

RE GURNEY.

Will—Construction—Distribution of Estate—Period of Distribution—Payment of Income to Widow.

Motion by the executors of the will of Charles Gurney, deceased, for an order determining certain questions as to the distribution of the estate arising upon the construction of the will.

The testator, after providing for his wife, divided his estate into three parts, and as to the third part, which alone was in question here, he made the following provisions:—

"4. The third . . . shall be held by my said trustees in trust to pay the income thereof to Lavinia, wife of my son, Charles, until the time for distribution hereinafter mentioned, if she so long remains his wife or widow, in trust for the maintenance and support of herself and her children issue of her marriage with my son, and, if she should cease to be the wife or widow of my said son, then my trustees shall pay and apply such income or so much thereof as they may deem proper in or towards the support, maintenance, and education of the children issue of such marriage.

"Before my trustees distribute or pay the principal of such third part, they shall, if the said Lavinia be still living and the wife or widow of my said son and so long as she lives and so continues, hold the sum of $10,000 in trust to pay to her the income thereof, and on her death or second marriage such sum of $10,000 shall be distributed and paid as is herein provided for the remaining principal of such third part.

"My trustees shall distribute and pay the principal of such third part, including the sum of $10,000 reserved to provide an annuity for my son's wife, in equal shares unto and among the children issue of such marriage so that each child who is a daughter shall receive her share at the age of 21 years and each child who is a son shall receive his share at the age of 30 years if he shall then

be, in the opinion of my executors . . . a temperate, steady, and industrious man, and any one of the said sons who is not on attaining the age of 30 a temperate, steady, and industrious man shall thereupon cease to have any further share or interest in my said estate, and the portion which he might otherwise have become entitled to on attaining 30 years of age shall go and belong in equal shares to such of his sisters as shall attain the age of 21 years and such of his brothers as shall live to the age of 30 years and be entitled by his conduct to a share in my estate under the provisions of this clause.

"Should any daughter die before attaining 21 years or any son before attaining 30 years without issue, then the portion to which such daughter or son might have become entitled on attaining the age of 21 years and 30 years respectively shall be paid and divided in equal shares unto and among those of my son's children who may be entitled to receive a portion under the provisions of this clause.

"Should any son of my said son die before attaining the age of 30 years, leaving issue, or should any daughter of my said son die before attaining 21 years, leaving issue, then such issue shall be entitled in equal shares to the portion of such third part of the residue of my estate which their parent would have been entitled to, had he or she lived and otherwise fulfilled the conditions mentioned in this clause, and my executors and trustees may during the minority of such issue use and apply the income of such part or a competent portion thereof in or towards the support, maintenance, and education of such issue, and such issue shall also be entitled to any further part of such third part of the residue to which his or their father or mother would have been entitled had he or she lived to the age of 30 years or 21 years as the case may be and fulfilled the conditions in the clause mentioned."

Charles (deceased) left two children: A. A. G., a daughter, born on the 9th May, 1888; and N. G., a son, born on the 5th January, 1890.

At the time of the application the $1,000 annuity had been set aside; A. A. G. had received part of her share, having attained the age of 21; N. G. was still under 21.

Two questions were submitted:—

1. Should the widow of Charles receive the interest upon the share of N. G. until he attains the age of 30 years?

2. What is meant by the words "the time for distribution hereinafter mentioned"?

J. A. Soule, for the executors.

G. Lynch-Staunton, K.C., for Lavinia Gurney.

J. G. Gauld, K.C., for A. A. Gurney.

F. W. Harcourt, K.C., for N. Gurney, infant.

RIDDELL J.:—The scheme of the will is that the trustees are to pay all the income to Lavinia Gurney so long as there is no need for distribution—that when the time comes for distribution (supposing, as is the case, she has not married again) a fund is to be set aside of $10,000, of which she is to receive the interest until her death or second marriage. A. A. Gurney was entitled on the 8th May, 1909, to receive a part of the principal; that made it the duty of the trustees to lay aside $10,000 and pay her half the remainder. The other half is not then distributed, but remains in the hands of the trustees. Whether it is vested in the son, I take to be immaterial—the time has not come for the payment. The testator has made the words "distribute" and "pay" synonymous in respect of principal by the second paragraph of this clause; and I can see no reason why the "time for distribution" may not be the two times for distribution or payment.

Until the death of the son or until he attains the age of 30 years there is no reason why the widow should not receive the income unless and until, after the son is 25 years, the executors see fit to pay some part of the son's share to him under the provisions of the last paragraph in the clause.

This answers both questions.

Costs out of the estate.

MEREDITH, C.J.C.P. MAY 3RD, 1910.

THONGER v. CANADIAN PACIFIC R. W. CO.

Railway — Injury to Passenger — Fall from Vestibule of Car — Proximate Cause—Voluntary Act—Negligence.

Action for damages for injuries sustained by the plaintiff by reason of the negligence of the defendants, as alleged.

The plaintiff was a passenger on a train of the defendants on the 26th August, 1909, and was injured by falling from it, in daylight, just before dark. The coach in which he was travelling was not the rear one, but, beyond saying that, he was unable to say what its position in the train was. He was attacked with a fit of vomiting, and went out upon the platform of his car to relieve

himself. After reaching the platform he became unconscious, and remembered nothing until about two hours later, when he found himself lying on the ground near the railway track.

The train was a vestibuled one; and, according to the testimony of the plaintiff, the vestibule was open when he went out on the platform; and his theory of the accident was that he fell from the platform; but, according to a written statement made by him on the 5th September, 1909, when he got on the platform he saw one of the vestibule doors open, and got down on the first step, taking hold of the bars, after which he remembered nothing until he regained consciousness.

The trial was begun with a jury, but only the assessment of damages was left to them, and they found $1,200.

R. G. Smythe, for the plaintiff.

I. F. Hellmuth, K.C., and G. A. Walker, for the defendants.

MEREDITH, C.J.:— . . . The account given by the plaintiff in the written statement appears to me the more probable one, and it is much more likely that, when he became unconscious, and his hold upon the handles was loosened, he was thrown off by the rapid movement of the train, than that, standing upon the platform itself, he fell or was thrown off; and I find the fact to be as put in the statement.

I am unable to see how, on this state of facts, the plaintiff can recover. The proximate cause of the accident was his own voluntary act, and, but for the unfortunate fit of unconsciousness which came upon him, his standing on the step would not have resulted in any injury to him. It was daylight, and he must have seen that the platform was open on the side to which he went for the purpose of vomiting; indeed, the very purpose for which he went out of the coach indicated that he expected to find the platform open. . . . This ground alone is, in my opinion, sufficient for the determination of the case adversely to the plaintiff; but, if it be not, I am unable to find that the defendants were guilty of any negligence entitling him to recover.

The vestibule is designed to promote the comfort of passengers going from one car to another, and probably to keep out dust and cinders, rather than for the safety of the passengers. There was nothing in the nature of a trap into which the plaintiff was led. The condition of the platform was apparent to any one who went upon it, as the plaintiff went, in daylight, and the use of it as it was would not have been attended with danger but for the act of

the plaintiff himself, and not then even if he had not become unconscious. . . .

[Reference to Campbell v. Canadian Pacific R. W. Co., 1 Can. Ry. Cas. 258.]

The action fails, and must be dismissed, but, under all the circumstances, I may, I think, properly exercise my discretion as to costs by dismissing it without costs.

SUTHERLAND, J., IN CHAMBERS. MAY 4TH, 1910.

MORRISON v. WRIGHT.

Summary Judgment—Con. Rule 603—Affidavit Filed in Answer—Refusal of Local Judge to Enlarge Motion for Cross-examination—Con. Rule 490—Discretion—Appeal.

The plaintiff moved for summary judgment under Con. Rule 603 before the Local Judge at Barrie, after appearance by the defendant to a specially indorsed writ.

The action was on a promissory note alleged to have been made by the defendant in favour of one Duncan S. Currie, who indorsed it to the plaintiff.

The plaintiff filed his own affidavit in the usual form on such motions, alleging therein, as well, that he was "the holder in due course for value of the promissory note sued on in this action," and he filed, in addition, an affidavit by Currie, in which the latter stated that he "was personally present on or about the 14th day of January, 1907, at the town of Collingwood, Ontario, . . . when the defendant Mary Wright signed the said note."

The defendant, in answer to the motion, filed her affidavit, in which she stated that she "did not make or sign the promissory note sued on herein or any note or about the 14th January, 1907, in favour of Duncan S. Currie," and that she had "a good defence on the merits to this action, and the appearance . . . was not entered for the purpose of delay."

On the return of the motion, and with this material before the Local Judge, an application was made to him on behalf of the plaintiff for an enlargement of the motion to enable him to cross-examine the defendant upon her affidavit.

The Local Judge refused the application for the enlargement, and dismissed the motion for immediate judgment, as appeared by his order to that effect dated the 29th March, 1910.

From this order the plaintiff appealed.

A. E. H. Creswicke, K.C., for the plaintiff, contended that under Con. Rule 490, which provides that "a person who had made an affidavit to be used in any action or proceeding, other than on production of documents, may be cross-examined thereon," there was no discretion in the Local Judge to refuse the application to examine, but the plaintiff was entitled to it as of right.

E. W. Bruce, K.C., for the defendant, contra.

SUTHERLAND, J.:—The application under Rule 603 is a summary application, and should only be given effect to in a plain case. It is incumbent upon the defendant, by affidavit or otherwise, to satisfy the Judge hearing the application that she has a good defence to the action on the merits, or has disclosed such facts as may be deemed sufficient to entitle her to defend the action.

The learned Local Judge, in the exercise of his discretion, seems to have come to the conclusion that, upon the statements made in her affidavit, the defendant should be allowed to defend the action, and in Payyanni v. Lookpas, [1880] W. N. 109, it was held that where leave to defend has been given appeals ought not to be encouraged in such cases.

But, while this is so, the question of whether a Judge has or has not a discretion to grant or refuse an application for an enlargement for the purpose mentioned is one of sufficient importance, I think, to justify this appeal; and, reading Rule 490 in the light of the decided cases, I am, with respect, of opinion that he had no such discretion.

Kingsley v. Dunn, 13 P. R. 300, and Townsend v. Hunter, 3 C. L. T. 310, are authorities for the proposition that a party to an action is entitled, as a matter of right, to cross-examine a deponent upon an affidavit filed by the opposite party. If this be so, the Local Judge had no discretion but to grant the enlargement asked by the plaintiff for the purpose mentioned. I think he should have done so, and therefore allow the appeal. The order in question will be set aside, the matter referred back to enable the plaintiff to examine the defendant on her affidavit, and therefore the motion for judgment can be disposed of. The plaintiff will have the costs of the appeal.

MULOCK, C.J.Ex.D. MAY 5TH, 1910.

RE DALE AND TOWNSHIP OF BLANCHARD.

Municipal Corporations — Money By-law—Voting on — Voters' List—Assessment Roll—Court of Revision—Proceedings out of Time—Nullity—Assessment Act—Basis of List—Certificate of County Court Judge—Voters' Lists Act—Finality of List—Qualifications of Voters—Conduct of Voting—Irregularities—Municipal Act—Motion to Quash—Costs.

An application to quash a money by-law of the township granting aid to the St. Mary's and Western Ontario Railway Company.

C. C. Robinson, for the applicant.

J. S. Fullerton, K.C., for the township corporation.

MULOCK, C.J.:— . . . The voting on the by-law took place on the 19th November, 1909, 244 votes being given in its favour and 240 against it, thus resulting in a majority of 4 for the by-law.

The list used for the purposes of such voting was that certified by the County Court Judge on the 6th November, 1909. The applicant contends that such was not the proper list, but that the voters' list of 1908 was the last revised and certified list, and therefore should have been used. . . .

The assessment roll for 1909 was returned to the clerk of the municipality on Saturday the 29th April. Within the 14 days allowed by sec. 65 of the Assessment Act, 4 Edw. VII. ch. 23, in which to appeal, a considerable number of appeals against the roll were duly filed with the clerk. On the 18th May the Court of Revision met and tried the appeals, and the roll was purported to be finally revised and corrected in accordance with the decisions of the Court of Revision. The Court, however, was not entitled to try these appeals until 10 days after the last day for appealing: sec. 61 of the Assessment Act. Thus its action in disposing of the appeals in question on the 18th May was a nullity: Re Dale and Township of Blanchard, ante 65.

The clerk then prepared, on the basis of such revised and corrected roll, the alphabetical list of voters required by sec. 6 of the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4, and adopted the various steps called for by that Act, with a view to the list being finally revised and certified to by the Judge. No appeals were made against the list of voters thus prepared by the clerk,

and the same was duly certified to by the Judge on the 6th November, 1909.

On these facts the applicant contends that, inasmuch as the Court of Revision had no legal right to sit on the 18th May and adjudicate in respect of the appeals from the assessment roll, it was not competent to the Judge to revise and to certify to the voters' list.

It was the duty of the Court of Revision to try each of the appeals in question (sec. 62 of the Assessment Act), and that before the 1st July, 1909 (sub-sec. 20 of sec. 65 of the Assessment Act.) By sub-sec. 1 of sec. 68, an appeal to the County Court Judge shall be at the instance of the municipal corporation, or at the instance of the assessor or assessment commissioner, or at the instance of any ratepayer of the municipality, not only against a decision of the Court of Revision on an appeal to the said Court, but also against omission, neglect, or refusal of the said Court to hear or decide an appeal.

The Court not having before the 1st July tried the appeals, it was competent, under this section, for any ratepayer to have appealed to the Judge against such omission of duty. . . .

Whether the Court omits to hold a legal meeting, or, holding a legal meeting, omits to try all complaints, as required by sec. 62 of the Assessment Act, in either case an appeal lies to the Judge; and, if no appeal is taken, sub-sec. 16 of sec. 6 of the Voters' Lists Act applies. . . .

In this case no appeal having been taken because of the omission of the Court of Revision to sit within the time prescribed by the Assessment Act to dispose of appeals made to that body, or for any other reason, the assessment roll in question, because of the absence of any appeal therefrom, became "deemed to be finally revised and corrected," and constituted a legal basis for the preparation of the voters' list of 1909, and, on its being certified to by the Judge on the 6th November, 1909, it became the proper list to be used for the purpose of the voting on the by-law.

For these reasons, I am of opinion that the objection because of the list of 1909 having been used, fails.

Another objection is, that "several persons voted upon the by-law who were not entitled so to vote." The persons in this objection referred to are those whose names appear on the last revised and certified voters' list, as entitled to vote, but who, the applicant contends, did not possess the qualification entitling them to have their names placed on the list.

It is not open to this Court to deal with this class of objection. By sec. 24 of the Voters' Lists Act, "the certified list shall . . . be final . . . ." . . . .

[Reference in In re Mitchell and Campbellford, 16 O. L. R. 578.]

I therefore am of opinion that it is not competent to the applicant to call in question the findings of the County Court Judge as to the qualifications of the persons whose names he has placed upon the voters' list. This objection, therefore, fails.

The next objection is, that the voting upon the said by-law was not conducted in accordance with the principles laid down in the Ontario Municipal Act, and that the result of the voting was thereby affected.

There is conflicting evidence with reference to the matters contemplated by this objection; but I do not think the evidence shews that the election was not conducted substantially in accordance with the principles laid down in the Act, nor that the result of the election was affected by any non-compliance, mistake, or irregularities. Therefore, the last objection fails.

This litigation, I think, owes its origin to the conduct of the Court of Revision in dealing with the appeals at an illegally held meeting, and omitting to call a legal meeting whereby the appeals might be legally dealt with. In the circumstances of the case, I dismiss the application, but without costs.

DIVISIONAL COURT. MAY 5TH, 1910.

*SELKIRK v. WINDSOR ESSEX AND LAKE SHORE RAPID R. W. CO.

Company—Electric Railway Company — Powers of Provisional Directors—Contract with Promoters of Rival Railway — Payment for Services—Electric Railway Act, sec. 44—Special Act, 1 Edw. VII. ch. 92—Contract Made by Officers of Unorganised Company—Informal Adoption by Shareholders—Liability of Company.

Appeal by the defendants Newman and Nelles from the judgment of RIDDELL, J., 20 O. L. R. 290, in favour of the plaintiffs as against the appellants.

The action was brought against the railway company to enforce a contract purporting to be made on behalf of the company,

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

with the plaintiffs, by the defendants Newman and Nelles, as president and secretary; and against the latter defendants, in the alternative, for damages for misrepresentation.

RIDDELL, J., held that the contract was not binding on the company, but found the appellants liable for misrepresentation.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

E. S. Wigle, K.C., for the appellants.

A. H. Clarke, K.C., for the plaintiffs.

J. M. Pike, K.C., for the defendant company.

The judgment of the Court was delivered by BOYD C.:—We differ from the conclusions of the learned Judge because of a clause in the special Act to which his attention was not directed. He finds that the provisional directors had no power to bind the company, yet unorganised, by making the contract in question as a corporate liability, and therefore places liability for the amount on the two officers who executed the contract, on the ground that they had represented the competence of the company as a matter of fact, and so become answerable in damages to the amount of the bond.

But by the special Act, 1 Edw. VII. ch. 92, sec. 9, the provisional directors may agree to pay for the services of persons who may be employed by the directors for the purpose of assisting the directors in furthering the undertaking or for the purchase of the right of way, and any agreement so made shall be binding on the company. This special Act is incorporated with the clauses of the General Electric Railway Act, R. S. O. 1897 ch. 209, except so far as they shall be inconsistent with the express enactment of the special Act (sec. 12). True it is that by the general Act, in the section cited below, ch. 209, sec. 44, provisional directors are not empowered to enter into such contracts as the one now sued on, and under the general Act it would not be binding on the company. But the express language of the special Act is to prevail, which authorises such an engagement.

The special Act says that this can be done by the provisional directors "when sanctioned by a vote of the shareholders at any general meeting." Upon similar language it was held that a security was not affected by the non-observance of this direction, upon English authorities cited and followed in McDougall v. Lindsay Paper Mill Co., 10 P. R. 247, 252.

Apart from that, in this case the five persons incorporated and named in the Act were the owners of the company and were

the whole body of shareholders, and these all met and discussed the making of this engagement and approved of it before and after it was made—though not formally assembled as a general meeting of the shareholders. They were all the shareholders, and as directors they directed and sanctioned the making of this engagement. Nothing more could be done in the way of substance to comply with the safeguards of the Act, even if they be read as prerequisites.

The judgment should, therefore, be set aside as against the two individual defendants, and judgment entered for the amount of the bond, $1,000, and interest from the date of payment, against the company, and costs of the plaintiffs and individual defendants should be paid in the Court below and in appeal (but not the costs thrown away in appeal by the failure to bring the company before the Divisional Court when the appeal was first launched.)

RIDDELL, J. MAY 5TH, 1910.

*RE PERRIE.

Will—Construction—Devise of Realty in Trust for Joint Enjoyment of two Beneficiaries—Condition that one "Remains Unmarried"—Event of Death not Provided for—Survivorship—Life Estate—Bequest of Contents of House Jointly—Sale by Order of Court—Disposition of Proceeds and Income from—Jewelry, whether Included—Sale of Realty—Disposition of Income.

Application by the executors of the will of Elizabeth Ann Perrie for an order determining certain questions arising upon the construction thereof.

G. Lynch-Staunton, K.C., for the executors.

F. W. Harcourt, K.C., for the members of a class.

G. H. Levy, for societies benefited under the will.

RIDDELL, J.:—The testatrix by her will, after providing for certain beneficiaries, including her husband, Gideon Perrie, made the following provision:—

"31. I give devise and bequeath my residence and property at the north-west corner of Bay and Hunter streets, Hamilton and all the contents thereof, with my horses, carriages, harnesses,

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

and stable furniture, to my executors, in trust to allow my husband, Gideon Perrie, and Theresa Mabel Barry Kuntz to jointly enjoy the same as long as Gideon Perrie remains unmarried, but if he marry, then to Theresa for life, and if Theresa marry and leave a child or children her surviving, then I give devise and bequeath said property to such child or children, but if Theresa die without a child or children her surviving, then said property is to fall into the residue of my estate and become a part thereof."

Then comes a residuary clause, and then follows:—

"33. I authorise and empower my executors and trustees to sell and convert into money all such portions of my estate not herein specifically disposed of, as soon after my decease as they in their discretion shall deem it for the benefit of my estate, and for that purpose to execute all necessary and proper deeds and other instruments, but they may, without incurring any liability for any loss which may happen therefrom, defer such conversion until they in their uncontrolled discretion shall deem best for my estate."

There is also a clause whereby the institutions for whom Mr. Levy appears become, in a certain event, entitled to a share of the residue; and these sufficiently represent the residuary legatees. An order may, if desired, be taken out to that effect.

At the death of the testatrix there were in the house described in paragraph 31, in addition to the usual household furniture, etc., a number of rings and some other jewelry, her property, of considerable value, being worth over $1,000.

The widower and Theresa occupied the house until about 1906, when he failed in health and became of unsound mind. Thereupon . . . Theresa, being still an infant, gave her consent, as far as she could consent, and by leave of the Court, the furniture and contents (except the jewelry), the horses, carriages, harness, etc., were sold, producing nearly $2,000; and the house was rented.

In 1908 an application was made to the Court for opinion, advice, and direction, and on the 20th February, 1908, a judgment was made by Mr. Justice Clute declaring and adjudging (amongst other things) that Mr. Perrie and Miss Kuntz were both entitled to the revenue from the proceeds of this sale and to the revenue produced by renting the house.

In the fall of the same year Miss Kuntz married and is now Mrs. Wardell. She has issue one daughter. After residing in Winnipeg for a time she has returned, and is now living in the house with husband and child.

Mr. Perrie died in January, 1910.

The house is old and not in good repair, and Mrs. Wardell feels that she cannot afford to pay for repairs, rent, taxes, etc., and the suggestion is made that the house should be sold and the proceeds applied in buying or building another house in substitution.

A number of questions are submitted, all of which have reference to the provisions of paragraph 31 above.

It will be seen that the judgment of my brother Clute was made during the lifetime of Mr. Perrie; still material advantage can be derived from that judgment even in the changed state of affairs.

The paragraph in question disposes of mixed property, real and personal. The executors take all, in trust to allow Mr. Perrie and Mrs. Wardell to enjoy the same so long as Mr. Perrie remains unmarried; but, if he marry, then upon other trusts. There is no express provision for the case that has happened, that is, Mr. Perrie dying without remarrying; and it is suggested that there is now an intestacy. . . .

[Reference to Rishton v. Cobb, 5 My. & Cr. 145; In re Boddington, 22 Ch. D. 597, 25 Ch. D. 285; In re Howard, Taylor v. Howard, [1901] 1 Ch. 412; Beard v. Smith, 22 Ky. 430, 498; Grey v. Newark R. R. Co., 65 N. J. Law 51; Knox v. Wells, [1883] W. N. 58; Re Burtinson, Hammond v. Rogerson, 107 L. T. J. 82.]

The real meaning of Rishton v. Cobb is that the surviving widow ceases at death to be in a state of widowhood, but does not cease to "remain unmarried" or "continue unmarried." This is but an interpretation of the meaning in law of the different expressions.

There can be no difference in the case of a surviving husband—he ceases to be in a state of widowhood . . . when he dies, but does still "remain unmarried."

In the present case, then, as it would appear, the effect of the paragraph is to continue the enjoyment by Mrs. Wardell—Mr. Perrie in the event "remains unmarried."

Then it is plain that, as the enjoyment was to be "joint," and of the essence of joint occupancy being the right of survivorship, Mr. Perrie's representatives have no rights in the premises, and Mrs. Wardell has the sole right. . . .

The decision of my brother Clute has put the revenue from the proceeds of the sale of the chattels on the same footing as the enjoyment of these in specie, and the revenue from the rent on the same footing as the enjoyment of the house. Mrs. Wardell, then, is entitled for her life to the revenue from the sale money; and, moreover (as the house is not rented) she has the right for life

to the enjoyment of the house, and, as the executors cannot sell this property under paragraph 33 of the will, as it is specifically disposed of, if it be thought best in the interests of all concerned that the house be sold, there can be no objection to the executors agreeing to pay her interest upon the price obtained for the house, or the revenue therefrom. . . .

The jewelry has not been sold—the question arises whether that is covered by the words "all the contents thereof" in paragraph 31. . . . What was left was to be for the advantage and pleasure of the two who were left, each in his or her own way—and the fact that the enjoyment could not be by both at the same time, and probably by one not at all, cannot change the meaning of the words. . . .

[Reference to In re Johnston, Cockerell v. Earl of Essex, 26 Ch. D. 538; Robson v. Hamilton, [1891] 2 Ch. 559; Re Miller, Daniel v. Daniel, 61 L. T. R. 365.]

In the present case, I think, to use the words of Chitty, J. (in In re Johnston), I shall be only giving effect to the intention of the testatrix by holding, as I do, that this jewelry passes as part of the contents of the house.

The learned Judge then answered the questions submitted. The effect of the questions and answers is, briefly:—

(a) Mrs. Wardell is not entitled to have the proceeds of the sale of the contents of the house, with horses, etc., applied for the purpose of refurnishing the house; she is entitled to the revenue for life.

(b) The revenue should be paid to Mrs. W.

(c) Mrs. W. is entitled to a life estate in the residence; R. S. O. 1897 ch. 119, sec. 11, has no application—the joint tenancy appears on the face of the will.

(d) The jewelry to be considered part of the contents of the residence; Mrs. W. has a life interest in the articles; she may better but not injure them, and should not do anything whereby the substantial identity is destroyed.

(e) As to keeping the residence in repair, payment of taxes, etc., Mrs. W. has all the duties of a life tenant, amongst them those of repair, etc.; and the trustees have no obligation in the premises.

(f) The trustees cannot sell the residence without the permission of Mrs. W. If it is desired to sell, the trustees may make a contract with Mrs. W. to pay her either the income of the purchase money or a fair rate of interest thereon for her life.

Costs of all parties out of the fund.

JONCAS V. CITY OF OTTAWA—BRITTON, J.—APRIL 28.

Highway — Non-repair — Accumulation of Ice and Snow on Sidewalk—Injury to Pedestrian—Municipal Corporation—Gross Negligence.]—Action for damages for personal injuries sustained by the plaintiff by reason of a fall upon a sidewalk upon Barrett lane in the city of Ottawa on the 15th December, 1909, owing, as the plaintiff alleged, to the gross negligence of the defendants in allowing an accumulation of snow and ice to remain on the sidewalk in a treacherous condition after knowledge of that condition. The learned trial Judge finds, upon conflicting evidence, that the sidewalk, at the place where and time when the accident occurred, was in a most dangerous condition, and that that condition had existed for some days and long enough to enable the defendants to become aware of it, and their neglect amounted to gross negligence, as defined by Meredith, C.J., in the quotation from his charge made by Sedgewick, J., in City of Kingston v. Drennan, 27 S. C. R. 46, at p. 54. Damages assessed at $600. Judgment for the plaintiff for that sum, with costs. A. Lemieux, for the plaintiff. Taylor McVeity, for the defendants.

SHUNK V. GENTLES—MASTER IN CHAMBERS—APRIL 29.

Pleading—Statement of Claim—Omission to Serve—Leave to Proceed — Terms — Security for Costs — Payment of Costs.]—Motion by the plaintiff to allow delivery of the statement of claim notwithstanding the lapse of more than three months since appearance. The statement of claim was filed in time, on the 2nd September, 1909, but, by mistake and oversight, was not served until the 7th April, 1910. Held, following Muir v. Guinane, 10 O. L. R. 367, that the plaintiff must be allowed, upon terms, to proceed with his action, the Statute of Limitations not intervening. It was urged that the plaintiff was now resident out of Ontario, and should be required to give security for costs. The plaintiff went in June, 1909, to the province of Alberta, where he became market clerk of a town and bandmaster. His wife stated that he intended to return shortly. Held, that the plaintiff was not non-resident in any such sense as to oblige him to give security for costs: Moffat v. Leonard, 6 O. L. R. 383. It also seemed probable that he had assets in Ontario sufficient to dispense with security, if it could otherwise be required. Order made allowing the plaintiff to proceed upon paying the costs of the motion (fixed at $30) within six weeks, and undertaking to proceed to trial at as early a date as possible. Finberg (Heyd & Heyd), for the plaintiff. T. D. Delamere, K.C., for the defendant.

CASWELL v. BUCHNER—SUTHERLAND, J., IN CHAMBERS—APRIL 29.

Reference—Death of Local Master—New Order of Reference.]—Application by the adult parties for a reference to ascertain whether a sale of the lands and premises in question was made with the approval of the late Master at Welland, and, if so, to whom and at what price or prices, and to report what disposition had been made of the purchase moneys, and to make inquiries as to the persons at present entitled to share in the proceeds, etc. Order made referring the matter to the present Local Master at Welland. Further directions and costs reserved. J. W. Mitchell, for the applicants. F. W. Harcourt, K.C., for the infants.

DURYEA v. KAUFMAN—MASTER IN CHAMBERS—APRIL 29.

Pleading — Statement of Defence and Counterclaim—Inconsistency—Breach of Contract—Infringement of Patent—Invalidity.]—Motion by the plaintiff to strike out or compel an amendment of some parts of the statement of defence and counterclaim of the defendants the Edwardsburg Starch Co. The action was in respect of an agreement made between the parties in January, 1906, which was admitted by the defendants. This recited that the plaintiff had made valuable discoveries in respect of the business carried on by the defendant company, for which he had secured patents both in the United States and Canada. These the defendants were to be allowed to use, on certain conditions, fully set out in the agreement. The plaintiff alleged that he had performed all he was bound to do under the agreement, and that the defendants had taken advantage of his discoveries, but refused to carry out the obligations consequent thereon; and he claimed damages for breaches of the contract, or an account of profits, and an injunction against infringing the patents, and a declaration that the defendants were not entitled to make use of his inventions. The plaintiff asked for an order striking out so much of the company's statement of defence as denied the validity, novelty, and usefulness of the plaintiff's patents, and also clause b of para. 4 of the counterclaim, which asked for a declaration that the defendant company were entitled to use the plaintiff's patents under the agreement in question or that they should be declared invalid. The counterclaim also asked for a declaration that the plaintiff should carry out the agreement and for an order requiring the

plaintiff to go on and carry it out, and damages for the plaintiff's failure to do so. It was contended for the plaintiff that, inasmuch as the defendant company were asking to have the agreement carried out, it was not open to them to attack the validity of the patents, for such inconsistency would be embarrassing. The Master referred to Liardet v. Hammond Electric Light Co., 31 W. R. 710, 711; Evans v. Davis, 10 Ch. D. 747, 27 W. R. 285; Gent v. Hamson, 69 L. T. N. S. 307; Moore v. Ullcoats Mining Co., [1908] 1 Ch. at p. 587; Beam v. Merner, 14 O. R. 412; Evans v. Buck, 4 Ch. D. 432; and said that, if the plaintiff were confining his action to his claims under the agreement, he would be entitled to succeed on this motion; but he had asked for an injunction to restrain the defendant company from infringing his patents; and the statement of defence could not, therefore, be interfered with so as to eliminate the denial of the validity of those patents. On the other hand, the statement of defence seemed to be contrary to the decision in Liardet v. Hammond Electric Light Co.; it did not deny that the plaintiff's inventions were being used, and asked the Court to compel him to carry out the agreement. The Master suggests that the plaintiff should exercise his claim for infringement, and that the statement of defence should thereupon be amended so as to avoid any denial of the validity of the patents. If this suggestion is adopted, an order will be made accordingly. If not, the pleadings are to stand as at present. In either case, the costs of the motion to be costs in the cause. Casey Wood, for the plaintiff. D. L. McCarthy, K.C., for the defendants.

LOCHRIE v. CONSUMERS CORDAGE CO.—BOYD, C.—MAY 2.

Contract—Supply of Material—Modification—Rate of Payment—Changed Conditions—Illegal Combination.]—Action for a declaration of the rights of the parties and for payment of the amount due under a contract for the supply of raw material. The Chancellor finds that under the changed conditions of the tariff the parties modified the arrangement which existed between them so that a reduced sum of $270.83 per month was paid for eight years preceding the action; and that that might fairly be taken as their own settlement of what the future amounts should be; and upon this footing the plaintiff should recover from the 1st January, 1909 (up to which time payment had been made), at the rate of $270.83 per month, with interest when overdue, down to the date of the expiry of the agreement in July, 1911. The judgment as to the sum due at

the commencement of the action, the 2nd April, 1909, to be for payment, and as to the future declaratory. Costs to the plaintiff. The Chancellor added that he was not persuaded that enough had been proved to implicate the plaintiff in the alleged illegal combination, or deprive him of the right to recover upon a deed, for good consideration, valid on its face, and acted on for many years. J. Bicknell, K.C., for the plaintiff. E. E. A. DuVernet, K.C., for the defendants.

McREEDIE v. DALTON—MASTER IN CHAMBERS—MAY 4.

Venue—County Court — Convenience—Expense.]—Motion by the defendant to transfer two actions from the County Court of Welland to the County Court of York. The Master said that, as the plaintiffs resided in Welland, and the transactions which gave rise to the litigation took place there, the principle of McDonald v. Park, 2 O. W. R. 672, was applicable; and if the cases did not come within the letter of Con. Rule 529 (b), they probably came within its spirit. The Master also concluded that there was no such difference in expense in favour of a trial at Toronto as would justify a change. Gideon Grant, for the defendant. J. M. Ferguson, for the plaintiffs.