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HIGH COURT OF JUSTICE.

SUTHERLAND, J. MAY 23RD, 1912.

DILTS v. WARDEN.

Marriage—Action for declaration of Invalidity—Consent Minutes of Judgment—Refusal of Court to Pronounce Judgment—Amendments to Marriage Act—7 Edw. VII. ch. 23, sec. 8—9 Edw. VII. ch. 62.

In this action the plaintiff asked for a judgment or order declaring that the defendant was not her lawful husband, and for an injunction against his interfering with her, and for other relief in connection with the custody and control of their children.

SUTHERLAND, J.:—In her statement of claim the plaintiff alleges that, relying on the defendant's representation that he had obtained a divorce from a woman to whom he had been previously married, she went through a marriage ceremony with him on or about the 26th October, 1896, and that subsequently they lived together and cohabited. There are four children. She alleges further that she has learned that the defendant was not divorced before his marriage to her. In his statement of defence the defendant alleges that he did obtain such divorce.

At the trial, a paper writing indorsed "Minutes of Judgment" was filed, in which it is stated that the parties to the action have agreed that their "pretended marriage" should be "adjudged and declared a nullity upon the grounds set out in the plaintiff's statement of claim." There are other terms as to the custody of and access to the children and as to further interference with the plaintiff by the defendant; and the latter also agreed therein to pay the costs of the action, fixed at $75. This writing purports to be signed by the parties to the action and to be witnessed by their respective solicitors.

No oral testimony was offered at the trial. In these circumstances, counsel appeared and stated that he had been instructed by the solicitors for both parties to do so and ask for judgment in terms of the said agreement.

Without expressing an opinion as to what relief, if any, could be given in this Court in a case such as this, if formal proof were given by evidence under oath that the defendant had gone through a form of marriage with the plaintiff while still the lawful husband of another woman then living, I am of opinion that I should not in any event be asked on the material before me to make any such order as is desired. In the written consent or agreement there is not even an acknowledgment on the part of the defendant of the truthfulness of the allegations of the plaintiff.

In Lawless v. Chamberlain, 18 O.R. 296, at p. 300, the Chancellor points out the care to be taken in matters of this kind, as follows: "Mr. Justice Butt also alludes to the great care and circumspection which should be exercised in dealing with questions affecting the validity of marriage. This is emphatically so as regards the character and quality of the evidence. The rule has long been recognised in cases of annulling marriage that nothing short of the most clear and convincing testimony will justify the interposition of the Court."

This principle is recognised in the Ontario statute of 1907, 7 Edw. VII. ch. 23, sec. 8, as amended by 9 Edw. VII. ch. 62, and in connection with the restricted jurisdiction thereby conferred.

[The learned Judge quoted from the latter statute sub-secs. (6) and (7) added to sec. 31 of the Marriage Act, as enacted by 7 Edw. VII. ch. 23, sec. 8.]

I, therefore, decline to ratify the consent or agreement in question, or to make a declaration as asked.

I do not think, in the circumstances, that I can make any order as to costs.

DIVISIONAL COURT. MAY 23RD, 1912.

T. CAIN v. PEARCE CO.
M. CAIN et al. v. PEARCE CO.
BONTER v. PEARCE CO.
McGRATH v. PEARCE CO.
McMILLAN v. PEARCE CO.

Water and Watercourses—Mill Privileges — Dam — Flooding Lands—Prescription—Damages—Costs—Appeal.

Appeals by the defendants from the judgments of TEETZEL, J., in these five actions.

The judgments (except in the McMillan case) are reported in 2 O.W.N. 1496, 1498.

The appeals were heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

E. F. B. Johnston, K.C., and E. G. Porter, K.C., for the defendants.

H. E. Rose, K.C., for the plaintiffs.

RIDDELL, J.:—These are all actions for damages for overflowing lands. The four first-named were tried before Mr. Justice Teetzel at Belleville in March, 1910; that learned Judge gave written reasons for his judgment (1 O.W.N. 1133); and formal judgments were taken out accordingly, declaring: (2) that the defendants had wrongfully caused the waters of Crow river, etc., to overflow the lands of the plaintiffs; (3) "that the defendants, through themselves and their predecessors in title, have, by continuous user during the twenty years immediately prior to the commencement of this action, acquired an easement by prescription to pen back and flow the waters of Crow river, etc., over and upon the said lands of the plaintiffs to the extent and for the period during each year exercised and enjoyed by them with the old dam in the main channel and other dams then used by them in the three eastern channels, in the condition they were in during the five years immediately preceding the building of the new dam in 1893, but this Court is unable to define either the limits upon the plaintiffs' land to which this right to flow has accrued or the length of time each year that such flooding could be maintained;" (4) that the waters do not flow away so quickly as they did before the improved dam of the defendants; (5) that the plaintiffs are entitled to damages

from six years before the tests of the writ, "but in ascertaining such damage no allowance shall be made for any damage for flooding the plaintiffs' land occasioned by the defendants or others in exercising the right of driving logs down Crow lake or Crow river under R.S.O. 1897 ch. 142, sec. 1;" (6) that the defendants pay said damages; (7) reserving the question of the amount of damages to be ascertained by Mr. Justice Teetzel or a Referee to be appointed; (8) reserving leave to apply for an injunction; (9) further directions and costs reserved until after damages ascertained.

An appeal was taken to this Divisional Court, 2 O.W.N. 887, and we directed the McGrath case to be opened up and retried. In the other three cases we struck out of the judgment, in the third clause, all the words, "but this Court is unable," etc.; to the end of the clause. In the written reasons for judgment it was said (2 O.W.N. at p. 888): "The Referee will determine the extent of the easement, upon the evidence already given, and such further evidence, if any, as any party may adduce upon the reference." But neither party saw fit to have this direction inserted in the formal judgment.

In the McGrath case, we directed the costs of the first trial, of the appeal, and of the new trial, to be in the discretion of the Judge or Referee before whom such new trial should be had.

The four cases came on again before Mr. Justice Teetzel, and also the fifth case, McMillan v. Pearce Co. In the McMillan case the learned Judge found a cause of action proven; and, having assessed the damages at $80, he directed judgment to be entered for the plaintiff for $80 and High Court costs. In the McGrath case (2 O.W.N. 1496), he found damages ($110) in respect of lot 8 and directed judgment to be entered for $110 and High Court costs, including the costs of the appeal, less the sum by which the costs had been increased by reason of the claim for lots 9 and 10. The learned Judge found damages to the amount of $150 in respect of part of lot 9 and $225 in respect of lot 10 and the rest of lot 9; but does not consider that the plaintiff is entitled to these sums.

In the three first-named cases, an assessment of damages was had, and the Judge found $600, $250, and $65—and directed judgment for these sums, with costs on the High Court scale.

The defendants now appeal. A difficulty arose at the outset of the argument as to the propriety of the appeal being brought before a Divisional Court, and it was agreed by all parties that the findings, etc., of Mr. Justice Teetzel should be

considered findings, etc., made by him after a trial; that the matters might be heard by the Divisional Court; and the proper judgment entered up as a Divisional Court judgment.

I have read with care and considered all the material before my learned brother, and can find nothing of which the defendants can complain.

Much of the argument before us consisted of a complaint that the trial Judge did not define the easement of the defendants. But this is not asked for in the pleadings; it was not asked in the argument, voluminous as it was, addressed to the trial Judge; when we made a direction in the Divisional Court, "the Referee will determine the extent of the easement," neither party had it inserted in the judgment; it is not asked in the notice of the present motion; and we were not asked either to allow an amendment of the pleadings or to make a declaration without an amendment.

I think the defendants were well advised in not having the Divisional Court direction made part of the formal judgment —had they done so, no doubt the trial would have taken a different course not at all to their advantage.

From my examination of the evidence, I think that, taking the easement at the very highest that the evidence would at all justify, the learned Judge has been far from generous in his estimate of damages, particularly as, under Con. Rule 552, they are assessed to the date of the assessment.

The right to damages at all in the McGrath and McMillan cases is, in my view, clear.

As to costs: in the first place, leave to appeal has not been given, and my learned brother informs me that he would not give it. But, in any case, the ownership of the land is not admitted, and judgment is properly ordered with costs on the High Court scale.

Pursuant to the arrangement, the judgments will be entered up as Divisional Court judgments—and the appeals will be dismissed with costs on the High Court scale.

BRITTON, J., somewhat reluctantly, agreed in the result, for reasons stated in writing.

FALCONBRIDGE, C.J., also agreed in the result.

MIDDLETON, J. MAY 25TH, 1912.

RE SMITH AND PATTERSON.

Will—Construction—Devise—Power to "Dispose of" Land in Interest of Family—Power to Sell and Pass Fee to Purchaser—Trust—Vendor and Purchaser—Objection to Title.

An application by the vendor, under the Vendors and Purchasers Act, to determine the validity of an objection taken by the purchaser to the vendor's title.

T. A. Gibson, for Smith, the vendor.

F. W. Carey, for Patterson, the purchaser.

MIDDLETON, J.:—The title of the vendor is derived through a will. The testator died on the 8th February, 1892, and devised all his property to his wife, "to be disposed of by her as she may deem just and prudent in the interest of my family." The widow, assuming that this gave her a fee simple, purported to sell the property to the vendor's predecessor in title. The purchaser objects that the words quoted are not sufficient to give the widow a fee simple in the lands or any power to convey them in fee.

Upon the argument the purchaser placed his contention thus: The gift is a gift to the wife of the property "to be disposed of . . . in the interest of my family," and this constitutes an express trust. If the gift had been to the widow in fee, and a power to dispose of the same in the interest of the family had been superadded, this would not reduce the fee.

The case is thus distinguished from most of the authorities dealing with precatory trusts; as, if the argument is well founded, this is an express trust.

After the most careful consideration, I do not think it necessary to deal exhaustively with this argument, because I am convinced that the words "to be disposed of" give the widow a right to sell. It may be that she held the proceeds of the sale in trust for the family, but this would not prevent the title passing by the sale.

The nearest approach to the precise words that I have been able to find is in Countess of Bridgewater v. Duke of Bolton, 6 Mod. 106, where, at p. 111, it is said: "A devise to a man 'to dispose at will and pleasure' is a fee, and this is 'to dispose as he pleases.' A devise was made of land to his wife 'to dispose

thereof upon herself and her children,' and it was held that she had a fee subject to the particular trust for the children."

The power to dispose of property gives the widest possible right to alienate, and must be taken to "comprehend and exhaust every conceivable mode by which property can pass:" Lord Macnaghten in Duke of Northumberland v. Attorney-General, [1905] A.C. 406, 410-11); and enables the party having that power "to sell out and out:" per Farwell, J., in Attorney-General v. Pontypridd Urban Council, [1905] 2 Ch. 441, 450.

This is sufficient to warrant me in holding that the objection to the title is not well founded.

I am inclined to think that, upon the construction of the will, there is not a trust, and that the words used cannot be successfully distinguished from the words construed in the case Lambe v. Eames, L.R. 6 Ch. 597. The words there used, following the gift to the widow, were, "to be at her disposal in any way she may think best for the benefit of herself and family." This was held insufficient to cut down the absolute gift.

The whole tendency of the more recent cases is in favour of restricting the doctrine of precatory trust rather than extending it. See, for example, In re Williams, [1897] 2 Ch. 12; In re Oldfield, [1904] 1 Ch. 549.

Since writing the above, I have found the case of McIsaac v. Beaton, 37 S.C.R. 143, where the words are almost identical with the words here used. The property was given to the wife "to be by her disposed of among my beloved children as she may judge most beneficial for herself and them;" and the Court, affirming the Nova Scotia Courts, held that the widow took the real estate in fee, with power to dispose of it whenever she deemed it was for the benefit of herself and her children so to do.

An order will, therefore, go declaring that the objection to the vendor's title is not well taken, and that under the will and the conveyance in question the vendor's predecessor in title took the land in fee simple.

Costs are not asked.

MIDDLETON, J., IN CHAMBERS. MAY 27TH, 1912.

RE McGILL CHAIR CO.
MUNRO'S CASE.
RE MATTHEW GUY CARRIAGE AND AUTOMOBILE CO.

Company—Winding-up—Leave to Appeal to Court of Appeal from Order of Judge on Appeal from Master—Contributory—Payments to Directors—Policy as to Granting or Refusing Leave—Winding-up Act, R.S.C. 1906 *ch.* 144, *sec.* 101.

Motion by Munro, in the first case, for leave to appeal from the order of MEREDITH, C.J.C.P., ante 1074, allowing the appeal of the liquidator in a winding-up proceeding from an order of the Local Master at Cornwall, and directing that the name of Munro be put upon the list of contributories in respect of two shares.

J. A. Macintosh, for Munro.

George Wilkie, for the liquidator.

Motion by the liquidator, in the second case, for leave to appeal from the order of MIDDLETON, J., ante 1233, allowing the appeal of the directors of the company in a winding-up proceeding, from the order of the Master in Ordinary requiring the directors severally to repay certain sums received by them from the company in remuneration for services rendered.

G. H. Kilmer, K.C., for the liquidator.

F. S. Mearns, for the directors.

MIDDLETON, J.:—In each of these cases an application is made for leave to appeal to the Court of Appeal from the judgment of a Judge in Court upon an appeal from the decision of the Master during the course of a liquidation. The cases have nothing in common save that they involve the consideration of the circumstances under which such leave ought to be granted.

The Dominion Winding-up Act itself, R.S.C. 1906 ch. 144, sec. 101, indicates the policy of the Act, viz., that the decision of a single Judge should be final unless the question to be raised upon the appeal involves future rights or is likely to affect other cases of a similar nature in the winding-up proceeding. Leave may also be granted if the amount involved exceeds $50. This policy is, no doubt, based upon the view that in cases not falling

within the lines indicated it is better that there should be an end of the litigation, and a speedy distribution of the estate, rather than the delay and expense necessarily incident to an appeal. There is not, so far as I know, any reported decision in which the principles to be applied have been the subject of any discussion.

In the McGill case, the judgment in question is reported ante 1074. The decision does affect other cases in the particular winding-up, all the stock of the company having been issued as bonus stock.

The appeal is sought by the shareholder, who thus assumes the risk of costs; and the point involved is certainly of importance. The amount actually in question in all is said to be very considerable. I think it is a proper case in which to permit the further appeal sought.

In the other case, the judgment in question is reported in 3 O.W.N. 1233. No other cases are involved in this liquidation; no future rights are involved; and the amount in question, while nominally just beyond $500, is really very uncertain, as the parties upon whom liability was imposed by the Master are said to be financially worthless, except in the case of one whose financial position is problematical.

The order in question having been pronounced by myself, my inclination is to give the freest possible right of appeal. I suggested to counsel the propriety of having the motion enlarged before some other Judge, for this reason; but counsel preferred that I should deal with the matter myself. As a matter of precaution, I discussed the circumstances with one of my brother Judges. He agreed with me in thinking that this is not a case in which a further appeal ought, in the interest of the liquidator and creditors, to be allowed.

The order sought will, therefore, be granted in the first case (costs in the appeal); and will be refused in the second (with costs).

RIDDELL, J., IN CHAMBERS. MAY 28TH, 1912.

RE PATTISON v. ELLIOTT.

Surrogate Courts—Removal of Testamentary Cause into High Court—Practice—Real Contest — Value of Estate — Right of Appeal—Costs.

Motion by the plaintiffs for an order transferring this cause from a Surrogate Court to the High Court.

W. Proudfoot, K.C., for the plaintiffs.
H. S. White, for the defendants.

RIDDELL, J.:—The late Ann Jane Anderson left an estate of about $3,000. The executors named in a will said to have been made by her presented it for probate in the Surrogate Court of the County of Huron, but the defendants entered a caveat setting up a former will. Pleadings were delivered, in which the execution of the will propounded was disputed, as was the capacity of the deceased; undue influence was also alleged; and the former will set up.

The plaintiffs move to have the matter transferred into the High Court.

Until the decision of Mr. Justice Mabee in Re Wilcox v. Stetter (1906), 7 O.W.R. 65, it was considered almost as of course that a cause would be removed into the High Court where the value of the property was over $2,000, and there was a real dispute. In that case a halt was called to this practice, and a rather more stringent rule was supposed to be laid down. This case I followed in Re Graham v. Graham (1908), 11 O.W.R. 700, "without expressing any independent opinion of my own;" and the Chancellor in Re Reith v. Reith (1908), 16 O.L.R. 168, says: "It is enough if it appears from the nature of the contest and the magnitude of the estate that the higher Court should be the forum of trial. No doubt, much is left to the discretion of the High Court Judge as to the disposal of each application."

I have had an opportunity of consulting a number of my judicial brethren, and the general consenus of opinion is, that, where a fair case of difficulty is made out so that there will be a real contest, the case should be removed, if the amount of the estate brings the case within the statute. There is one reason which has its influence in my own mind, as it has on the minds of some of my brethren. If the case is removed, the opinion of the highest Provincial Court may be taken; while, if the matter remain in the Surrogate Court, this cannot be done.

The only objection to removal is the costs—but the trial Judge has full power to award, if he sees fit, only Surrogate Court costs.

An order will go, in the usual form, removing the cause into the High Court of Justice—costs in the cause, unless otherwise ordered.

BOYD, C. MAY 29TH, 1912.

WELLAND COUNTY LIME WORKS CO. v. AUGUSTINE.

Res Judicata—Contract—Supply of Natural Gas—Non-fulfilment of Condition — Joint Contract — Forfeiture — Relief from—Parties—Judgment in Previous Action.

Action for an injunction and damages in respect of an alleged breach of an agreement.

W. M. German, K.C., and H. R. Morwood, for the plaintiffs.
S. H. Bradford, K.C., and L. Kinnear, for the defendants.

BOYD, C.:—The plaintiffs' rights in this case depend upon an agreement made between them and the defendants on the 20th November, 1903. By this the defendants agreed to give to the plaintiffs the usual oil and gas leases of their respective farms, "to continue so long as the plaintiffs continue to comply with the conditions agreed upon." The condition was, mainly, to supply, free of charge, sufficient gas to heat the defendants' houses.

A well was made and gas procured from it on the lands of one of the defendants, Shurr. From this source gas was supplied by the plaintiffs to both defendants down to June, 1911, when the plaintiffs cut off the supply of gas to the house of the defendant Augustine, and thereafter called upon Shurr to execute a lease of the gas wells as to his land. The defendant Shurr refused; and, in conjunction with Augustine, cut off the plaintiffs' pipes on his land and so stopped the supply of gas from the well in question so far as the plaintiffs were concerned. Then an action was brought by the company, in July, 1911, against Shurr alone, to restrain him from interfering with the gas well, and that he be ordered to carry out the terms of the agreement (i.e., as to the granting of a lease).

This action was tried before Mr. Justice Sutherland, who granted the relief sought, and referred it to the Master to settle the terms of the lease (see ante 398). Upon appeal to a Divisional Court this decision was reversed and the action dismissed (see ante 775). The Court held that the agreement was a joint one and not severable as to Shurr; that both were entitled to be supplied with gas; that the plaintiffs had no right to cut off Augustine and retain a right or claim as against Shurr; and it was further held that the plaintiffs had no right to demand a

lease from Shurr because the plaintiffs had ceased to supply gas to Augustine; and, therefore, the term for which the lease was to be granted had been ended by the action of the plaintiffs. This last ground of decision clearly indicates the opinion of the Court that the plaintiffs had by their own act forfeited their rights under the agreement, and had no locus standi in Court. That judgment of the Divisional Court has been taken to the Court of Appeal, but the appeal has not yet been argued.

In this state of affairs, the present action was brought by the plaintiffs against both defendants, on the 9th April, 1911, based, as the other, upon the written agreement between the parties as to the gas, made in 1903. There is the further allegation that, on the 1st March last, the defendants, without legal authority, took possession of the gas wells and have since prevented the plaintiffs from taking gas therefrom. This is explained in the evidence as being done upon faith of the judgment in the Divisional Court by the defendants. The relief asked is by way of injunction and damages. No evidence was given materially affecting the situation other than that taken on the first trial, which was put in as evidence in this case.

Among other defences, the plea of res judicata is relied on. That appears to be a sufficient defence; for, substantially, what was determined by the Divisional Court is, that the plaintiffs have forfeited their contract by non-compliance with its conditions; and the former judgment did not simply decide that the action could not be maintained on account of the absence of parties. Non-joinder was pleaded in the former action, but the three Judges held upon the merits that the plaintiffs had lost their right to claim a lease from the defendant Shurr of the oil well on his premises. Apart from a lease or the right to a lease, the plaintiffs have no right to or ownership over the well sunk on Shurr's land, though the plaintiffs may have been at several thousand dollars' expense in sinking it.

While the forfeiture declared by the Court continues, it is not competent for the plaintiffs now to litigate as if they were the aggrieved party. They must, by some means, if possible, get rid of this disability before they can be rightly in Court as to the gas well. It may be that a proper application to the Court of Appeal would result in opening up the controversy by adding the co-contractor Augustine on that record and by obtaining relief from the forfeiture upon proper terms. But this is, of course, merely a suggestion: for, if that former judgment stands, it is a complete bar to the relief now sought by the plaintiffs:

and, if it is reversed, the plaintiffs will obtain all that is sought permanently which they had only temporarily under the judgment of Mr. Justice Sutherland. In either view, the present action seems to be not well-advised; and I see no other course but to dismiss it with costs.

CANADIAN OIL CO. v. CLARKSON—MASTER IN CHAMBERS—MAY 25.

Discovery—Examination of Defendant—Action for Price of Goods—Counterclaim—Inferior Quality of Goods—Particulars of Sales and Return of Goods by Customers.]—The plaintiffs claimed $1,130 for goods (chiefly oil) sold and delivered to the defendant. In the statement of defence it was alleged that the oil supplied was not in accordance with the plaintiffs' contract, and that the defendant had sustained damages on this account to the amount of over $3,000, of which $165 was loss of profit on sales and $2,000 for injury to his business. In paragraph 7 of the statement of defence it was said that, after the defendant had sold large quantities of the oil so supplied, to numerous customers, he was obliged to take back a large portion of the oil and make a large reduction on the price of what was kept by the customers. On examination for discovery the defendant was asked to give particulars of these sales, but declined to do so, on the advice of counsel. The plaintiffs moved for an order requiring the defendant to answer these questions. The Master said that, no doubt, the general rule was that parties were not required to give the names of their witnesses; but here it seemed that the defendant was claiming about $1,000 as damages arising out of the rejection of the oil supplied by the plaintiffs after it had been sold by the defendant to his customers, on the assumption that it was of the quality to be supplied by the plaintiffs. The point seemed to be covered by the decision in Ontario and Western Co-operative Fruit Co. v. Hamilton Grimsby and Beamsville R.W. Co., 3 O.W.N. 589, at p. 591; Scott v. Membery, 3 O.L.R. 252. Here the defendant counterclaiming was really a plaintiff asking damages from his vendors, who were entitled to information such as was ordered in the case first cited. Order made as asked; costs to the plaintiffs in the cause. W. N. Tilley, for the plaintiffs. R. B. Henderson, for the defendant.

TEAGLE & SON v. TORONTO BOARD OF EDUCATION—SUTHERLAND, J.—MAY 27.

Building Contract—Extras—Counterclaim—Refusal of Contractors to Execute Contract for another Building—Contract Let at Higher Rate—Neglect to Re-advertise after Rejecting Lower Tenders—Tender not Accepted by Corporation under Corporate Seal—Costs.]—Action by contractors to recover a balance of $1,194 on a contract for the mason work upon the school-building of the Harbord Collegiate Institute, and $561.20 for extras. Included in the extras was an item for $150 for "additional thickness to reinforced concrete floor and alterations made by City Architect before granting permit." The defendants conceded the plaintiffs' claim for $1,194; but counterclaimed for $1,161 in respect of a contract for the mason work on the Earlscourt school-building. The plaintiffs tendered for that work at $13,200, and their tender was accepted, but they refused to execute a contract or do the work; and the defendants said that they were compelled to make a contract at $14,361 with Hewitt & Son. The $1,161 was the difference. The defendants admitted the plaintiffs' claim for extras to the extent of $414.26, being the whole claim, less the $150 item, which was in dispute; and, pending the action, paid the plaintiffs $414.26 and $33 for the difference between $1,194 and $1,161.—The plaintiffs at or before the trial sought leave to amend by increasing the $150 item to $684. They said that they did not know, when tendering, that the work was to be done on the Kahn system, which was more expensive. Upon the evidence, the learned Judge came to the conclusion that the plaintiffs did know that the Kahn system was being required, or should have known in time to make a complaint before going on with the work; and, having allowed it to proceed without doing so, they could not now be heard to make the claim.—The plaintiffs, in reply to the counterclaim, alleged that the tender for the Earlscourt school-building was put in as part of the tender for the Brown school-building, and that by reason of the defendants' course of dealing with the Brown school tender (which was said to have been unfair to the plaintiffs) they were relieved from any liability with respect to the Earlscourt school tender. As to this, the learned Judge said that the tenders were not combined, but separate; and refused to give effect to the plaintiffs' contention in this regard.—Another contention of the plaintiffs in regard to the counterclaim was, that the tender accepted by the defendants for the Earlscourt building, after the plaintiffs had refused to sign the con-

tract, was not the lowest tender, and that there was improper conduct and irregularity on the part of the property committee of the defendants in giving the contract to Hewitt & Son. As to this the learned Judge said that he was unable to find, upon the evidence, that the members of the property committee were guilty of any actual impropriety. But, after the plaintiffs refused to execute the contract, the defendants had made up their minds to endeavour to hold the plaintiffs good for any loss sustained, and it was the duty of the defendants to treat the matter with proper care and consideration; and, after new tenders were asked and received, and when they saw fit to reject two of them, each lower than the plaintiffs' original tender, it would have been only fair, before accepting that of Hewitt & Son, which was $1,161 higher than the plaintiffs', to advertise again; and upon this ground the defendants' counterclaim failed.—The plaintiffs also contended that their tender was never accepted by the defendants under seal, as it should have been to make it binding. The learned Judge said that this was an executory contract, and the acceptance of the tender was not under seal, nor was the contract tendered to the plaintiffs for execution executed by the defendants under their corporate seal. The plaintiffs declined to execute the contract so tendered, and thus in effect withdrew their tender before any binding acceptance. There was no contract which the defendants could enforce or respect of which they could seek to recover damages either by way of counterclaim or of deduction from moneys due by them to the plaintiffs upon another contract. Reference to Halsbury's Laws of England, vol. 3, p. 168; Garland Manufacturing Co. v. Northumberland Paper and Electric Co., 31 O.R. 40.—Judgment for the plaintiffs for $1,161, with interest from the 6th February, 1912, and costs of the action down to the time when they received from the defendants a cheque for $414.26. The plaintiffs' claim for additional extras dismissed without costs; and the defendants' counterclaim dismissed without costs. Shirley Denison, K.C., for the plaintiffs. F. E. Hodgins, K.C., for the defendants.

MADILL v. GRAND TRUNK R.W. CO.—MASTER IN CHAMBERS—MAY 28.

Particulars — Statement of Claim — Negligence — Death in Railway Accident—Res Ipsa Loquitur—Discovery.]—This was an action for damages for the death of the plaintiff's husband

through an accident on the defendants' railway on the 16th June, 1911. In the 4th and 5th paragraphs of the statement of claim the accident was alleged to have been caused by the negligence of the defendants' servants or agents. The defendants moved, before pleading, for particulars of the negligence alleged. The deceased was killed by the car in which he was seated running off the track and falling on its side—he was so seriously injured that he died almost immediately. It was stated on the argument by their counsel that the defendants had not been able to ascertain the cause of the accident. And the plaintiff made affidavit that she was unaware of the cause. Her counsel relied on Smith v. Reid, 17 O.L.R. 265; Young v. Scottish Union and National Insurance Co., 24 Times L.R. 73; McCallum v. Reid, 11 O.W.R. 571. The Master said that the conclusion to be derived from these cases was, that the motion was at least premature. The defendants could safely plead as was done in Smith v. Reid, supra. On examination for discovery, they could find out whether the plaintiff intended to rely solely on the principle of res ipsa loquitur. If not, she could be required to give particulars of any specific acts of negligence to be adduced at the trial. Motion dismissed, without prejudice to its renewal later if desired. Costs to the plaintiff in the cause. Frank McCarthy, for the defendants. J. A. Paterson, K.C., for the plaintiff.

SHAPTER v. GRAND TRUNK R.W. CO.—MASTER IN CHAMBERS—MAY 29.

Discovery—Affidavit on Production—Claim of Privilege—Sufficiency—Railway Accident—Reports for Information of Solicitor—Absence of Special Direction—Reports Made to Board of Railway Commissioners—Examination of Servants of Company.] —In this case an affidavit on production was filed by the defendants, which admittedly was not adequate. Another affidavit was then filed. It, also, was objected to; and the plaintiff moved for a better affidavit. The second part of the first schedule, shewing documents which the defendants objected to produce, mentioned two reports made to their solicitor by their claims agents. In the affidavit privilege was claimed, because "the reports were made solely for the information of the defendants' solicitor and his advice thereon and under a reasonable apprehension of an action or claim being made." It was objected to this that it should have said that these reports were made after

a special direction to that effect from the solicitor, and that a general order to that effect was not sufficient to make such reports privileged. The Master said that no authority was cited for this proposition, which seemed to go further than any decided case. The decision in the analogous case of Swaisland v. Grand Trunk R.W. Co., ante 960, seemed to approve of the claim of privilege made as in the present case: see p. 962.—The second schedule, shewing documents at one time in the defendants' possession, mentioned only reports of the engineer and conductor of the train on which the plaintiff's husband was killed, "made for the purpose of obtaining necessary details for information of the Board of Railway Commissioners, under sec. 292 of the Railway Act, and subsequently destroyed." Section 292(2) says that the Board "may declare any such information so given to be privileged." There was nothing in the material to shew whether any such declaration, either general or special, has been made by the Board. Counsel for the defendants seemed to think that, if this had not been done, then the reports could be seen at the office of the Board. In any case, he conceded that the engineer or the conductor, or both if necessary, and if still in the service of the defendants, could be examined for discovery, when they would have to make full disclosure as to their knowledge, recollection, information, and belief as to the cause of the fatal accident in question. The Master said that this would give the plaintiff all that could be of any service at this stage. Motion dismissed, but with costs to the plaintiff in the cause, as the first affidavit was admittedly irregular. A. Ogden, for the plaintiff. Frank McCarthy, for the defendants.

RAWLINGS v. TOMIKO MILLS LIMITED—BRITTON, J.—MAY 30.

Master and Servant—Injury to Servant—Negligence—Findings of Trial Judge]—Action for damages for personal injuries sustained by the plaintiff while working for the defendants, piling lumber in a mill-yard. The lumber was being transported from one place to another upon a car running on a tramway. Lumber was precipitated from the car upon the plaintiff, and he was badly injured. There were charges of negligence and contributory negligence. BRITTON, J., who tried the action without a jury, at North Bay, reviewed the evidence, in a written opinion of some length, and stated his conclusion that the injury was due to a mere accident, not necessarily attributable to

negligence; and so the plaintiff could not recover. To provide for the possible event of an appeal, the learned Judge assessed the damages at $1,000. Action dismissed without costs. G. A. McGaughey, for the plaintiff. A. E. Fripp, K.C., for the defendants.