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COURT OF APPEAL.

FEBRUARY 2ND, 1911.

SKINNER v. CROWN LIFE INSURANCE CO.

Contract—Modifications—Authority of General Manager of Insurance Company—Contract with Agent—Commission on Renewal Premiums—Continuance beyond Lifetime of Agent—Acceptance of Services.

Appeal by the defendants from the judgment of RIDDELL, J., 1 O.W.N. 921, in favour of the plaintiff, the executrix of the late Robert B. Skinner, in an action to recover moneys alleged to be due to the deceased or his estate under a contract with the defendants.

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

F. E. Hodgins, K.C., for the defendants.

C. Miller, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, J.A.:—The learned trial Judge, in my opinion, came to a right conclusion in this case.

It seems to me to be quite plain that, upon the proper interpretation of the letters "modifying the contract," the agent's right to commission upon the premiums paid to the company on policies procured by him should continue as long as they were paid: and the correspondence respecting such modification plainly and expressly shews that such was the purpose of the "modification:" and there is nothing very startling, or even extraordinary, in such an agreement, in the multitude of insurance companies and the great strife for business between them. By the agent's death the company lost nothing directly in respect of these policies: if he had lived, and continued in the agency, nothing directly, and possibly nothing indirectly, would have

been gained: whilst, if the defendants' contention be right, they will gain greatly by the agent's death, out of the business secured by him.

The other point made by the defendants is the stronger one; but, in my opinion, it ought not to prevail.

The agent's agreement, made with Skinner, was one made upon a general form of the company, and one which was intended to be subject to modification: a resolution of the board of directors upon the subject is in these words: "That the three contracts be approved and sealed and signed pursuant to the by-law, and that any letters containing any modifications of the contracts be countersigned by the president and vice-president signing the original contract." The "modifying letters" in connection with Skinner's contract were not so countersigned: but these internal arrangements of the method of doing that which there was power to do, were not binding upon one unaware of them and dealing, in good faith, with the proper officers of the company, as Skinner was and did.

The "modifying letter" was either part of the agreement or an independent collateral agreement on the faith of which the agreement was signed and accepted.

But, if this were not so, then there was no agreement: the parties were never at one; there was unquestionably no agreement, on Skinner's part, to serve except on the terms of the "modifying letter:" and his legal representative should, I think, have, upon that basis, all that has been adjudged to her in this action.

I would dismiss the appeal.

HIGH COURT OF JUSTICE.

BRITTON, J., IN CHAMBERS. JANUARY 23RD, 1911.

REX v. LAWSON.

Criminal Law—Magistrate's Conviction—Destruction of Property—Jurisdiction of Magistrate—Excessive Fine—Compensation—Criminal Code, secs. 238, 239, 539—*Amendment.*

Motion by the defendant to quash his conviction by the Police Magistrate for the District of Algoma on the 12th December, 1910, "for that the said J. Lawson, at Blind River, in the said

district, on the 7th day of December, A.D. 1910, was drunk and disorderly by destroying property belonging to E. Nadon, valued at $75." For that alleged offence the defendant was adjudged to forfeit and pay the sum of $80, to be paid and applied according to law, and also to pay the complainant (not named in the conviction) $4.70 for his costs.

J. B. Mackenzie, for the defendant.
J. R. Cartwright, K.C., for the Crown.

BRITTON, J.:—Fifteen objections, formidable and otherwise, were taken in the notice of motion to quash.

I dispose of the matter upon one objection, viz., that the Police Magistrate, in any possible view of the case, as presented by the evidence, and to whatever offence that evidence may be applied, entirely exceeded his jurisdiction.

If the magistrate proceeded under sec. 539 of the Criminal Code, there was no evidence of the value of the window broken being $75, and, even if there had been, the penalty, on summary conviction, is only $20, as the maximum, and a further sum, not exceeding $20, as reasonable compensation for the damage. Here the amount is fixed at $80, exclusive of costs.

If the magistrate proceeded under sec. 238 of the Code, the vagrancy clause, then, on summary conviction, the fine could not exceed $50: sec. 239. Here the fine imposed was $80. There is no provision in sec. 238 or sec. 239 for compensation for breaking windows. Breaking windows is one of the things constituting a person a vagrant: see sub-sec. (*h*) of sec. 238.

This is not a case for amendment—even if the power to amend is wide enough to allow a valid conviction to be made.

The conviction will be quashed. There will be no order as to costs.

DIVISIONAL COURT. JANUARY 27TH, 1911.

McLACHLAN v. SCHLIEVERT.

Way—Private Way—Easement—Prescription—User—Evidence—Trespass.

Appeal by the plaintiffs from a judgment of the Judge of the County Court of Renfrew, adjudging that the plaintiffs should recover $1 damages without costs for trespasses other than the use of a right of way over reserve L., in the town of Arnprior,

from the rear of lot 41 over road A.; and further declaring that the defendant, as owner and occupier of lot 41, was entitled to such right of way to drive horses, carriages, cattle, and carts. The right was claimed by the defendant as having been acquired by prescription.

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

E. D. Armour, K.C., and A. Burwash, for the plaintiffs.

R. J. Slattery, for the defendant.

The judgment of the Court was delevered by RIDDELL, J.:— In such a case "the user which will create an easement over the lands of another by prescription must be open, notorious, visible, uninterrupted, and undisputed, exercised under a claim of right adverse to the owner, acquiesced in by him, and must have then existed for a period of twenty years. . . . There can be no prescriptive right to pass over another's land in a general manner, and where a right of way by prescription is claimed, a certain and well-defined line of travel must be shewn:" Bushey v. Sanliff (1895), 86 Hun. N.Y. 384. The last proposition is, of course, subject to this, "that where you can find the terminus *a quo* and the terminus *ad quem*, the mere fact that the owner (of the dominant tenement) does not go precisely in the same track for the purpose of going from one place to the other, would not enable the owner of the servient tenement to dispute the right of road:" per Mellish, L.J., in Wimbledon, etc., Co. v. Dixon (1875), 1 Ch. D. 362, at p. 369. The strictness with which evidence adduced in support of an alleged right of way will be weighed is seen in the case of Avery v. Fortune (1908), 11 O.W.R. 784, in which the Court of Appeal reversed a judgment of this Division finding that a right of way had been established by prescription.

With very great respect for the learned County Court Judge, and bearing in mind the duty of an appellate Court in dealing with findings of fact by a trial Judge, I am unable to convince myself that the findings can be supported. As each case must depend upon its own facts, there can be no good purpose attained by setting out the facts and the evidence at large; and I simply say that, in my view, the learned Judge below erred in finding that the evidence disclosed facts sufficient to justify a finding that the right of way alleged had been proved. In this view of the facts, it is not necessary to express any opinion upon any of the many questions of law raised at the argument.

I am of opinion that the appeal should be allowed and the judgment below varied by striking out from the 2nd paragraph thereof all the words from "other than" to the end, and by inserting the word "not" in the 3rd line of the 3rd paragraph between the words "is" and "entitled:" and striking out all of the said paragraph after the words "lot 41" in the 4th line of the said paragraph.

The plaintiffs are entitled to their costs on the County Court scale, both in this Court and the Court below—the judgment below may, if necessary, be amended accordingly.

DIVISIONAL COURT. JANUARY 27TH, 1911.

ISHERWOOD v. ONTARIO AND MINNESOTA POWER CO.

Water and Watercourses—Navigable River—Interference with Natural Flow of Water—Injury to Owner of Saw-mill—Riparian Owner—Justification under Statutory Authority—4 & 5 Edw. VII. ch. 39 (D.)—Agreement with Provincial Government—6 Edw. VII. ch. 132 (O.)—Pleading—Amendment—Navigable Waters Protection Act, R.S.C. 1906 ch. 115—Navigation—Powers of Dominion Parliament—Findings of Jury—Damages.

Appeal by the defendants from the judgment of the Judge of the District Court of Rainy River, upon the findings of a jury, in favour of the plaintiff, in an action to recover the damages sustained by him in consequence of his saw-mill, situate on the banks of the Rainy river, having been shut down owing to the flow of the waters of the river having been interfered with by the defendants.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and SUTHERLAND, JJ.

Glyn Osler, for the defendants.

W. H. McGuire, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, C.J.:—The mill is situate below a dam which the defendants have built across the river, and upon the argument before us they justified their interference with the natural flow of the river under an Act of the Parliament of Canada, 4 & 5

Edw. VII. ch. 139, an agreement dated the 9th January, 1905, made between His Majesty, represented by the Commissioner of Crown Lands for the Province of Ontario, and Edward Wellington Backus and "those associated with him," and an Act of the Legislature of Ontario, 6 Edw. VII. ch. 132.

The defendants do not plead either of these statutes or this agreement as a defence to the action, and the only reference to their powers is contained in the first paragraph of the statement of claim, in which it is stated that they are an incorporated company under letters patent dated the 13th January, 1905, under the Ontario Companies Act, and that "part of their building operations required the erection of a dam across the Rainy river at a point between the town of Fort Francis and the town of International Falls, Minnesota."

At the trial four questions were left to the jury, viz.:—

1. Was the water of the plaintiff's intake pipe on Rainy river lower than usual from the 21st April to the 17th May, 1909?

2. If it was, was it caused by the defendants' dam and works between Fort Francis and International Falls?

3. Could the defendants have avoided the lowness of water; if so, how?

4. What damage did the plaintiff sustain, if any?

The jury answered the first and second questions in the affirmative; to the third question they answered, "Yes, by building coffer-dams in order to prevent the back flow of water while clearing out the tail race;" and they assessed the damages at $390.

It would appear from the shorthand notes of the proceedings at the trial that counsel for the defendants made no attempt to justify the defendants' action under the Dominion statute, but relied mainly on the objection that the plaintiff had not proved that he was a riparian owner; but, as was contended, had admitted that he was not, though the letters patent incorporating the defendants and the agreement of the 9th June, 1909, were put in, and, judging from what was said by the learned District Court Judge in delivering judgment, were relied on as an answer to the action.

Since the argument, the plaintiff has, pursuant to leave, put in the letters patent of his land; and it is now clear that he is a riparian owner, and that what he referred to in his testimony as a road allowance along the river bank is not a road allowance, but a reservation of the "right to use so much of the banks not exceeding one chain in depth from the water's edge as may be necessary for fishery purposes."

As this indulgence was granted to the plaintiff, the defendants should have leave to amend their statement of defence by alleging that their dam and works were constructed under the authority of the Dominion and Provincial statutes and under the agreement with the Crown, and pleading them as a defence to the action, and we deal with the appeal upon the assumption that such amendment has been made.

The Rainy river is a navigable stream, and the boundary between Canada and the United States of America is the middle line of the river.

By the British North America Act, sec. 91, navigation is one of the subjects the authority to make laws as to which is assigned exclusively to the Parliament of Canada.

The Navigable Waters Protection Act, R.S.C. 1906 ch. 115, is a general law passed under the authority of sec. 91, and one of its purposes is to confer upon the Governor in council jurisdiction and authority to authorise the construction in navigable waters of works which otherwise would constitute unlawful obstructions to the navigation of such waters.

As the construction, operation, and maintenance of the defendants' dam and works would interfere with the navigation of the river, it was necessary that they should obtain the authority of the Parliament of Canada under the general Act to which I have referred, or under a special Act, to construct, operate, and maintain them; and they chose the latter mode of authorisation.

It is plain, we think, that the operation and effect of the special Act must be confined to making what otherwise would have been an unlawful obstruction to navigation not unlawful, and to conferring upon the defendants the right to interfere with the navigation of the river, so far as the works with which the special Act deals would interfere with it.

The ownership of the bed of the Rainy river, as well as of the land lying along the stream on the Canadian side, being vested either in the Province or in its grantees, the special Act does not assume to confer, as indeed it could not, any authority to interfere with their property rights.

Had it been intended that the special Act should have that wider effect, it would have been competent for the Parliament of Canada, under the authority of sec. 92, par. 10 (*c*), of the British North America Act, to have declared the dam and works to be for the general advantage of Canada; but the special Act contains no such declaration, and the absence of it, as well as of any provisions for making compensation to the owners of land injuriously affected by the erection, operation, or main-

tenance of the dam and works, indicates clearly that the sole purpose of the Act was, in the exercise of the legislative authority of the Parliament of Canada as to navigation, to permit the defendants to construct their dam and works without being answerable as for an unlawful interference with navigation.

The agreement of the 9th June, 1906, cannot help the defendants. The plaintiff's land was granted to him by letters patent on the 21st November, 1893, and neither the Commissioner of Crown Lands nor the Government of Ontario could take away from the plaintiff any of his proprietary rights under the letters patent, one of which was the riparian right which he is asserting against the defendants.

Paragraph 17 of the agreement was intended to make it clear that the Crown did not assume to do anything which would derogate from its grants. It reads as follows: "17. It is distinctly understood and agreed that the lands, rights, and privileges mentioned in this agreement are confined solely to lands, rights, and privileges the property of the Crown in Ontario under the control and administration of the Government of Ontario, and that no permission is given hereby to the purchasers to overflow or cause to be overflowed any lands not the property of the Crown in Ontario, and not under the control and administration of the said Government, and, if damage is done by the erection of any dam or the construction of any works under this agreement, no recourse shall be had against the Government in respect thereof."

This provision, though not as well drafted as it might have been, was evidently intended to make it clear that, if the defendants should have to pay damages to the owners of property injured by their works, they should not have the right to call upon the Province to be recouped.

I have not overlooked the fact that the latter part of paragraph 17 deals only with overflowing; but that has not the effect of qualifying the earlier part of the paragraph, which limits the grant to lands, rights, and privileges the property of the Crown in Ontario under the control and administration of the Government of Ontario.

The Provincial Act contains nothing which affects the question under consideration, and need not be further referred to.

Having come to the conclusion that neither of the statutes nor the agreement on which the defendants rely is an answer to the plaintiff's action, it is unnecessary to consider the question principally discussed on the argument, whether the answer to the third question, coupled with the answers to the other ques-

tions, entitled the plaintiff to have judgment entered in his favour.

That question would have been important had the defendants succeeded in establishing their right to erect, operate, and maintain their dam and works, without being answerable to property owners for damages necessarily caused by their erection, operation, and maintenance; for, in that case, the right of the plaintiff to recover would have depended on his establishing negligence on the part of the defendants.

The defendants also complain that the damages are excessive. Though the jury have no doubt measured the damages on a somewhat liberal scale, we do not think that a case has been made for directing a new trial on that ground.

The appeal fails, and must be dismissed; but, inasmuch as, without the additional evidence which the plaintiff was permitted to adduce, the appeal would have succeeded, there will be no costs of the appeal to either party.

DIVISIONAL COURT. JANUARY 27TH, 1911.

CASWELL v. TORONTO R.W. CO.

Appeal—Dismissal of Action without Costs upon Undertaking of Counsel for Plaintiff not to Appeal—Absence of Instructions—Agreement not Made with Counsel for Defendants—Want of Mutuality—Counsel Relieved from Undertaking—New Trial—Misstatement of Counsel as to Witness not Called—Bona Fides—Remarks of Judge—Inference—Evidence—Effect on Jury.

Appeal by the plaintiff from the judgment of MEREDITH, C.J.C.P., in favour of the defendants, upon the findings of a jury.

The action was for damages for injuries received by the plaintiff, when a passenger upon a car of the defendants, by being thrown down by a sudden jerk of the car, as the plaintiff alleged, when she was moving towards the door in order to leave the car.

The trial Judge's memorandum of the judgment, made upon the back of the record, was: "Upon the findings of the jury, I direct that the action be dismissed without costs. The dismissal is without costs on the agreement between counsel that there is to be no appeal or motion by the plaintiff against the findings of the jury or the judgment."

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

John W. McCullough, for the plaintiff.

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

CLUTE, J.:—The first question that arises on this appeal is as to the effect of the consent given by counsel that there should be no appeal.

After the jury had retired, the senior counsel for the plaintiff, who was also solicitor, with his client, left the Court. In their absence the jury returned. What occurred is related by the junior counsel, who was there, but had no instructions either from his senior counsel or from the client in the matter. I take the facts from the affidavit of the junior counsel, who gave consent to the judgment. He says: "The jury were out about half an hour, and returned, and the learned Chief Justice asked Mr. Forest, who was there for the defendants, what about the costs of the action? Mr. Forest said, to let the judgment be entered that, if the plaintiff did not appeal, there should be no costs against her. But the learned Chief Justice seemed to think that would not be a proper judgment to enter, and asked me if I would consent that there should be no appeal, and I accordingly consented." . . .

[Reference to Swinfen v. Lord Chelmsford, 5 H. & N. 922; Matthews v. Munster, 20 Q.B.D. 141; Halsbury's Laws of England, vol. 2, p. 398, secs. 667-669; Neale v. Lady Gordon Lennox, [1902] A.C. 465; In re West Devon Great Consols Mine, 38 Ch. D. 51; Rhodes v. Swithenbank, 22 Q.B.D. 577; Hargrave v. Hargrave, 12 Beav. 408; Flight v. Boland, 4 Russ. 298; Merchant's Barrister-at-Law, ed. of 1905, p. 72.]

When the consent was given, counsel for the defendants was not present; but a Mr. Forest, claims agent of the defendants, assumed to act for the defendants. It does not appear that he had any authority whatever to act in the premises, nor do I think his action was binding on the defendants. There was, therefore, a lack of mutuality in the agreement, and, if the defendants were not bound, the plaintiff ought not to be.

As a result then, we have the case of a consent made by the junior counsel in the absence and without the authority of the senior counsel, or the solicitor, or the client, undertaking on behalf of the client that there should be no appeal in case costs were not given against her.

It appears from the affidavit filed that relief from a judgment for costs against the plaintiff was of little or no advantage to

her, as she was a person of no means; and the further fact that the defendants were not represented by counsel, and were not, in my opinion, bound by the consent of Forest, leads me to the conclusion that, in the peculiar circumstances of this case, the plaintiff ought to be relieved from the undertaking made in the manner and in the circumstances above-mentioned, and be permitted to appeal this case upon the merits.

The further grounds of appeal, as stated in the notice of motion, are: that, at the time of the accident, there were four passengers in the car; that the plaintiff had no means of ascertaining who any of the three other passengers were until the day of the trial, when two of the passengers gave their evidence; that counsel for the defendants, at the close of the evidence for the defendants, stated to the Court that the defendants had subpœnaed the third passenger, Miss French, who was a nurse, and that, as she was not in attendance at the trial, he (counsel) presumed that she had been called out upon some case, but he would not ask the Court to delay the trial on her account; that it was not until the 25th October that the plaintiff learned the name and address of the third passenger, and obtained an affidavit from her, and that her evidence will prove the correctness of the plaintiff's evidence as to the happening of the accident.

It is complained that the statement of counsel for the defendants was not true in fact, and was misleading and prejudicial to the plaintiff, and the charge of the learned trial Judge, based on that erroneous statement, was also prejudicial to the plaintiff.

The portion of the learned trial Judge's charge objected to is as follows: "She (the plaintiff) was the only witness. It depends entirely upon her statement, uncorroborated by that of anybody else. Now upon the other side, everybody who was upon the car has been called except one witness, who it is said, was subpœnaed, and, for some reason or other, has not attended the Court, and the statement of these witnesses is in direct contradiction of the account the plaintiff gives."

The witness who was the third passenger upon the car, above referred to, had not in fact been subpœnaed. She had been interviewed by the agent of the defendants, and, according to the statement of the defendants' counsel, the agent had given a false return to counsel, which false statement led counsel to believe that her evidence would be the same as the other witnesses,' and, supposing she had been subpœnaed, he made the statement.

It will be necessary to refer to the evidence at the trial and

also to that of Miss French (given on cross-examination upon her affidavit before the Divisional Court).

The plaintiff says that she rang the bell, and the driver then stopped, and she got up, when the car started, giving a jerk, "went over this way and that"—meaning, I suppose, that it jolted from side to side, which threw her down upon the floor, by which she was injured.

The conductor says that when the car stopped she rose to get off, and while doing so she slipped and fell, and that the car had stopped before she got up.

Cunningham the driver, heard the bell, and heard the woman scream. He looked around and saw her lying on the floor. The car had come to a stop when he heard the scream, and it did not start afterwards.

Mary Farrell, one of the passengers, swore that the car stopped, and the plaintiff stood up to get off, and the floor was wet, and she slipped. She threw herself back to save herself, and she screamed. The car did not start.

Mabel Farrell swore that the car was stopped, and the plaintiff got up and she slipped back. The floor was wet.

Alice French swore that the plaintiff got up before the car stopped, and the jolt of the car stopping caused her to fall. She repeats that, to the best of her knowledge, the plaintiff got up before the car stopped. In the stopping of the car she fell. It was the sudden jolt of the car that threw her to the floor.

It will be seen from this evidence that the three witnesses, the conductor and the two passengers who gave evidence at the trial, agreed with the plaintiff that the car had stopped before she got up; but they all swore that she fell while the car was standing, and that the car had not started again to give her the jolt. Miss French states that the plaintiff got up before the car stopped, and that it was the jolt that threw her down. . . .

No doubt, under the authorities, the plaintiff is not entitled to a new trial for the discovery of merely corroborative evidence. I am of opinion, however, that what was said by counsel, and that portion of the Judge's charge based on the statement of counsel, may have affected the jury. I think any ordinary jury would take the meaning of what was said by counsel and Judge to be: "Here is an accident; the plaintiff gives one story; all the persons but one who were on the car give another story, contradicting her; and the only other witness of the accident has been subpœnaed for this trial, but, for some reason or other, has not attended:" implying that, if she had attended, she would probably have given the same kind of evidence; otherwise the defendants would not have subpœnaed her.

In this respect the trial is unsatisfactory, and leaves one in doubt as to what effect the misleading statement of counsel (though made in good faith) and of the Judge may have had on the jury.

I think there should be a new trial; costs of the former trial and of this appeal, including the cross-examination of the witness on her affidavit, to be costs in the cause.

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

MULOCK, C.J., dissented, for reasons stated in writing. He was unable to see wherein the plaintiff was prejudiced, either by the remarks of the defendants' counsel or by the portion of the learned trial Judge's charge referred to.

BRITTON, J., IN CHAMBERS. JANUARY 27TH, 1911.

REX v. MILKINS.

Liquor License Act—Conviction of Unlicensed Person for Keeping Liquor for Sale—Jurisdiction of Magistrate—Refusal of Adjournment—Amendment of Information—Discretion of Magistrate—Complete Absence of Evidence to Shew that Liquor Intended for Sale—Quashing Conviction—Costs—Protection of Magistrate.

The defendant was, on the 12th December, 1910, convicted at Leamington by the Police Magistrate for that town, for unlawfully keeping liquor for the purpose of sale, barter, and traffic therein, without having any license therefor, and was fined $50 and costs.

The defendant moved to quash the conviction.

J. G. Kerr, for the defendant.

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

BRITTON, J.:—Joseph Booth, Chief of Police for Leamington, saw the defendant at 8.15 in the evening of the 12th November, 1910, in a lane or alley "back of the electric light plant building." The defendant had a case of "Seagram's liquor." There were ten or twelve bottles, called "quart bottles" of liquor, packed in straw in a case, and the defendant was in the act of

unpacking them. Booth said, "Halloa, Hez., what are you doing here?" And the defendant started to grab the bottles off the ground and put them in the cart from which he had taken them. He (the defendant) said he was taking the straw off and was going to take them home. He did not want his mother to know he had them in the house. Booth then said that he would have to seize the liquor. The defendant resisted. Booth desisted, but said to the defendant, "You know you're breaking the law;" and to this, according to Booth's evidence, the defendant said: "I know you can have me up in Court, and can publish me all over the country as a whisky smuggler. You have a father and mother of your own;" and he begged me not to do anything. Dr. Wilson then "happened that way," saw the bottles, and heard part of the altercation between the Chief of Police and defendant.

For some reason, the Chief of Police did not take immediate action, but on the 7th December, 1910, he laid an information on oath before the Police Magistrate charging the defendant with selling intoxicating liquor, at the time mentioned, without having a license as required by law. On the 7th December the defendant was summoned for the 12th December for unlawful selling on the 12th November. The defendant appeared on the 12th December and asked for an enlargement, which was refused by the Police Magistrate. The trial proceeded, and evidence was given as above.

The defendant stated that he ordered the whisky in Windsor —paid for it on the 28th October—that he bought it to take it to "the marsh," where he and others intended to hunt. The whisky did not arrive in time. They went to "the marsh," intending to stay two or three weeks, but found no ducks, and so returned. The whisky did not arrive until after the defendant's return. He explained the delay by a letter from the vendor, that the whisky was not then in stock, etc., etc.

At the close of the case the amendment was made in the information changing the complaint to one of unlawfully keeping liquor for the purpose of sale, barter, and traffic therein, without the license therefor. Upon this charge the defendant was convicted.

The motion to quash is upon the grounds: (1) that the magistrate was without jurisdiction, in that no evidence was adduced before him to shew that the offence charged was committed by the defendant; and (2) that the magistrate proceeded contrary to law in not granting the defendant an adjournment as asked, and in proceeding with the trial in the absence of witnesses whom the defendant might call.

Dealing with the second objection, I need only say that, when the information necessarily required such amendment as was made to give even a colour of right to proceed with the prosecution, a reasonable adjournment might well have been granted to the defendant, but as to that the magistrate has so wide a discretion that, upon the facts of this case, and upon that ground alone, I would not feel at liberty to disturb the conviction.

Upon the first ground, if there was any evidence upon which the Police Magistrate could convict, the conviction should stand, even if the defendant was not really guilty.

The question here is simply this: Was there any evidence of keeping liquor for the purpose of sale, barter, and traffic therein, within the meaning of the Act. The defendant is a painter by trade. He had no shop. He was never a peddler. He had, so far as appears, not used or offered the liquor to any one. There was no preparation for the use of the liquor in any other way than as stated by the defendant. There was nothing in the acquaintance of the defendant with others to warrant the inference of an intended sale.

The section of the Act under which the attacked conviction was made was, no doubt, intended to prevent the keeping of liquor for sale, etc., in any house, building, shop, eating-house, saloon, or house of public entertainment, or in some room or place—the place being either a room or stand where persons might reasonably be expected to go to get liquor.

The defendant, at the time in question, was alone. He was not in that public lane to the knowledge of any one, so far as appears, until the Chief of Police heard the noise of hammering there at 8.15 in the evening. The defendant was near his own home, where he evidently intended to take the liquor and to store it there, without the knowledge of his parents. It is not suggested that the defendant would desire, or would be permitted, to sell this liquor at his home.

There are presumptions against a person where liquor is found in a house, shop, room, or place, in which are proved to exist a bar, counter, etc., etc., when such place is occupied by the person charged; certain other things are by the statute deemed prima facie evidence of the unlawful sale of liquor; but no such facts were shewn in this case as are made presumptive evidence, or prima facie evidence, against a person charged.

In this case there was the bare suspicion. There was not a tittle of evidence to shew that the defendant intended to sell this liquor. Perhaps he did, but the law, stringent as it is, and pro-

perly so, against unlawful selling and against unlawfully having it for the purpose of sale, is not such as to justify a conviction upon the mere suspicion of a police officer or even of a Police Magistrate.

The conviction must be quashed, and with costs against the Police Magistrate, which I fix at $35. Upon payment of these costs within thirty days, I direct that no action be brought against the Police Magistrate for any matter growing out of the information or conviction made herein.

Conviction quashed.

DIVISIONAL COURT. JANUARY 28TH, 1911.

*RE McCULLY.

McCULLY v. McCULLY.

Devolution of Estates Act—Caution—Order Allowing Administratrix to Register—Application to Vacate—Ex Parte Order—Practice—Administration—Con. Rule 954—Partition or Sale of Lands of Intestate—Application for—Status of Applicant—Assignee of Interest.

Appeal by Samuel O. McCully from the orders of LATCHFORD, J., ante 407.

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

J. A. Macintosh, for the appellant.

W. Laidlaw, K.C., for the respondents.

RIDDELL, J.:—Dr. and Mrs. McCully were married in 1875; they had a number of children including Mary B. McB. McCully; in 1895 they separated, and Dr. McCully went to the United States; he obtained a divorce there, and remained; the daughter Mary died intestate on the 6th July, 1906, owning the south part of lot 26, concession D., township of York, subject to certain incumbrances. In 1907 Dr. McCully began to make and press a claim to his share of this land; in June, 1909, Mrs. McCully began an action for alimony against Dr. McCully; Dr. McCully retained a solicitor, Mr. S., of Chatham; the plaintiff obtained an order for interim alimony and disbursements, which are still unpaid and amount to a sum, it is said, of $300 and more. Dr.

*To be reported in the Ontario Law Reports.

McCully renounced all right to administration of the estate of his deceased daughter in favour of the Trusts and Guarantee Co., and that company took proceedings for the issue of letters of administration to them; Mrs. McCully opposed, and, after trial, such letters were issued to her in October, 1909; Dr. McCully, in September, 1909, assigned to his solicitor, Mr. S., all his interest in the land mentioned, "as collateral security for all costs, charges, counsel fees, and disbursements which are now owing by" Dr. McCully to Mr. S., or which may in future be owing by Dr. McCully to Mr. S., in the alimony and administration proceedings; Mr. S. to reassign upon being paid.

In January, 1910, Dr. McCully served notice of motion for partition under Con. Rule 956, returnable on the 15th February; and on the 7th February, 1910, Mr. Justice Latchford allowed Mrs. McCully to file a caution as administratrix under R.S.O. 1897 ch. 127, sec. 14, as amended by 2 Edw. VII. ch. 17, sec. 4 (now 10 Edw. VII. ch. 56, sec. 15).

(1) This is one of the orders appealed from. My brother Latchford was asked to set this order aside, and he refused on the 19th December, 1910. This is the second (2) order appealed from.

(3) On the same day my learned brother refused to make an order for partition, and this is the third order appealed from.

As to the first order, there is no ground for interfering: it may be thought that Dr. McCully should have had notice of the application; and, no doubt, that would have been at least a proper—and perhaps the more regular—course. The facts, however, as alleged on the application, are not controverted; and the precise practice to be followed on such an application must be largely in the discretion of the Judge who hears the motion. He may see fit to require notice to be served, or he may grant the order *ex parte* as the merits of the case may require.

The real ground for the second application is that the administratrix is not proceeding to realise upon the land and divide the property or its proceeds among the beneficiaries.

Since the passing of Con. Rule 954, the Courts have been chary of interfering with the administration of estates by the personal representative duly appointed by the Surrogate Court, unless indeed something is made to appear proving or indicating incompetency or worse on his part. Here I can find nothing to indicate any want of business capacity or any bad faith—and, if an application were made now for administration, I think it would be rightly refused. And, by parity of reasoning, the

land should remain, at least for the present, in the administratrix.

In the consideration of the third question, we must look at the position of all parties with the caution validly filed.

The title to the land became and continues revested in the administratrix: Re Bowerman and Hunter, 18 O.L.R. 122. This was the condition of affairs when the motion for partition came on to be heard.

Byers v. Grove, 2 O.L.R. 754, does not assist. . . .

This plaintiff has conveyed away his interest in the lands by way of collateral security—his position is not better than that of a mortgagee, and that fact alone should, in my view, conclude him.

In England it seems to have been considered that a mortgagor must pay off his mortgage before he can apply for partition: Gibbs v. Hayden, 47 L.T. 184; at least if his mortgagee objects: Sinclair v. James, [1894] 3 Ch. 554; as in any case the mortgagee must be before the Court, and a bill should not be framed for redemption against the mortgagee and partition against others: ib. at p. 557: see also Catton v. Banks, [1893] 2 Ch. 221.

In Ontario, it would seem that an order for partition may be made at the instance of the mortgagor of an undivided interest alone; at least such an order has been made; but that practice is not to be commended—and it can be followed only (if at all) when the other parties do not object.

In McDougall v. McDougall, 14 Gr. 267, an order for partition was made at the instance of a co-tenant who had mortgaged his share, without bringing his mortgagee as a party before the Court. As the other parties had not objected, Van Koughnet, C., held that the mortgagee might be made a party in the Master's office.

In the present instance the co-tenants do object, and McDougall v. McDougall does not apply: cf. Cornish v. Gest, 2 Cox Eq. 27, per Mr. Justice Buller.

Even had Dr. McCully been free from his conveyance, I do not think he would have the right *ex debito justitiæ* to partition—he could not place his rights higher than they would be were the administratrix an express trustee for sale—and in such case, on the objection of the others interested (and in the present case they do object), he could not have an order for partition: Re Dennis, 14 O.R. 267; except in circumstances which do not here exist.

Where land is vested in an administrator, and the real complaint is that the administrator is not acting properly in re-

spect of the estate, the proper course is to apply for administration—and, upon due cause being shewn, such an order may be made. If at any time in the future it be made to appear that the interests of all parties require administration of the estate by the Court, such an order may be applied for, notwithstanding the dismissal of these appeals—and the dismissal of these appeals will not prejudice Dr. McCully in any application he may be advised to make in the future.

With these provisions, the appeals will be dismissed with costs.

FALCONBRIDGE, C.J., and BRITTON, J., agreed in the result.

SUTHERLAND, J., IN CHAMBERS. JANUARY 30TH, 1911.

RE INTERNATIONAL ELECTRIC CO.

Company—Winding-up—Order Made on Petition of Company—Application by Creditor to Vacate—Conduct of Proceedings—Appointment of Liquidator—Place of Reference—Solicitor for Liquidator.

Motion on behalf of the Northern Crown Bank for an order setting aside and vacating a winding-up order made on the 13th January, 1911.

F. Arnoldi, K.C., for the applicants.
J. R. Meredith, for the liquidator.

SUTHERLAND, J.:—The bank obtained a judgment against the International Electric Company Limited, on the 26th November, 1910, for $2,500 and interest, from which an appeal was taken by the company; the appeal is now pending, and will soon be heard. This motion first came on for hearing before Britton, J., on the 20th January, 1911, when he made an order to the effect that all proceedings under the winding-up order be stayed until the 27th January, 1911, and until the motion made on behalf of the Northern Crown Bank to set aside the same, etc., be disposed of.

On the 28th December, 1910, at a special general meeting of the shareholders of the company a resolution was passed authorising the solicitor of the company to petition for a winding-up

order. Upon the 13th January, 1910, an application was accordingly made on behalf of the company at the London Weekly Court to the presiding Judge, who happened to be Meredith, C.J.C.P., who had tried the action of the bank against the company already referred to, and was conversant with all the facts with reference to the condition of the company and the claim of the bank; and an order for the winding-up of the company was made. It provides among other things as follows: "That the London and Western Trusts Company Limited be and they are hereby appointed interim liquidators of the estate and effects of the above-named company, and that it be referred to the Master of this Court at London to appoint a permanent liquidator."

In the affidavit of the solicitor for the company the following statements are made: "(15) All the shareholders of the company, except the promotors thereof and original incorporators, reside in the city of London, and all unpaid subscriptions for stock are owing by persons residing at the city of London. All the assets of the company (excepting patents which were not transferred or delivered) consist of cabinets (which are in the possession of the Electrical Construction Co. of London) and unpaid subscriptions." "(18) There are other creditors besides the Northern Crown Bank, and they reside in the city of London, county of Middlesex." "(20) There are no shareholders, officers, or other persons in connection with the said the London and Western Trusts Company Limited, the interim liquidators, who have any interest whatever in the International Electric Company."

The reliability or good faith of the trust company was not called in question on the motion. The question of the appointment of a permanent liquidator is referred to the usual officer of the Court, the Master at London, who is an experienced official. In these circumstances, I do not think I should be at all justified in making an order setting aside the winding-up order in question.

I was also asked on the argument to direct that the winding-up proceedings be carried on at Toronto, instead of London. I do not think it would be expedient to make this order. Convenience and economy would alike be served by the proceedings being carried on at London.

I was also asked, in any event, to give the conduct of the winding-up proceedings to the Northern Crown Bank or their solicitors. I do not think that a case has been made out for this either. I must assume that the trust company, if appointed permanent liquidators, will act prudently and impartially and in the interests of all parties concerned. It is said that the

solicitor for the company is the solicitor for the liquidators. While not for a moment suggesting that he would act otherwise than properly and impartially, it may be well for the liquidators to consider, and particularly in view of the attitude of the bank with reference to the winding-up order, and the proceedings thereunder, whether it would not be well that an outside and independent solicitor should be retained.

The motion will be dismissed with costs.

DIVISIONAL COURT. JANUARY 30TH, 1911.

WHITE v. THOMPSON.

Ejectment—Unpatented Land—Defence—Jus Tertii—Estoppel.

Appeal by the defendant from the judgment of MAGEE, J., in favour of the plaintiffs, in an action to recover possession of land.

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

S. H. Bradford, K.C., for the defendant.

C. A. Moss, for the plaintiffs.

The judgment of the Court was delivered by RIDDELL, J.:—Henry Ross was in possession for many years of certain land in the township of Sherbrooke, in the county of Haldimand, about an acre in extent, lying east of the Grand river. Sophia Little, a daughter, was living, with her father and her children, upon this land, when she, a widow, intermarried with the defendant. The defendant then went to live with his wife and her children and father until the death of the father. The defendant and his wife had two children born to them. After the death of Henry Ross, in 1888, the defendant continued to live there; as he says, he improved the buildings, fitted up a new house for his family to live in, enlarged the place, and put in a new fence, shade trees, etc., fixed up the barn, etc., etc., paying in all about $200, paid taxes and maintained the home till the death of his wife in 1903. He says he did not move in until after Henry Ross's death, but that seems to be a mistake.

Ejectment is brought, 29th March, 1905, by the children of the defendant's wife, who have a quit-claim from the heirs-at law of Henry Ross, including the wife of the defendant.

It would appear that Henry Ross intended (as the defendant knew) that this land should go to his two grandchildren, who are the plaintiffs.

The defendant was allowed to put in evidence shewing that the patent had never issued for this land. Notwithstanding this, Mr. Justice Magee gave judgment for the plaintiffs. The defendant now appeals and sets up the *jus tertii*, relying upon such cases as Doe dem. Wilkes v. Babcock, 1 C.P. 388.

I do not think the doctrine of these cases is applicable here. The defendant's whole claim to the land is based upon the title of his deceased wife. She made a deed to the plaintiffs, and I think he is estopped from denying the title of the plaintiffs.

It would further appear that the wife of the defendant was let into such possession as she or the defendant ever had by Henry Ross, and, without giving up possession, she would not be allowed to deny Henry Ross's title—the defendant is in the same position; and the plaintiffs have Henry Ross's title.

The appeal should be dismissed with costs.

DIVISIONAL COURT. JANUARY 30TH, 1911.

COSBEY v. DETLOR.

Limitation of Actions—Real Property Limitation Act—Possession of Land—Evidence—Acts of Ownership—User of Land by Passing and Repassing—Easement—Action for Declaration of Title—Form of Judgment—Costs.

Appeal by the defendant and cross-appeal by the plaintiff from the judgment of the Senior Judge of the County Court of Hastings, in an action in that Court to have it declared that the plaintiff was the owner of a small piece of land, and for an injunction to restrain the defendant from further entering or trespassing upon the same, and for damages. The County Court Judge found the plaintiff to be the owner of the land; granted an injunction restraining the defendant from entering or trespassing; further ordered that "the fences as now constructed remain as they are to be repaired or rebuilt from time to time by the parties entitled according to this judgment," and therefore gave no damages for trespass; and he directed that each party should bear his and her own costs of the action.

The defendant appealed on the question of right, and the plaintiff on the question of costs.

The appeals were heard by MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ.

W. N. Ponton, K.C., for the defendant.

E. G. Porter, K.C., for the plaintiff.

CLUTE, J.:—The plaintiff's father was the owner of the north half of lot 26, and occupied the same as a farm. The county gravel road between Belleville and Stirling passes across the north-east corner of the south half of lot 25 and through the north half. The land in dispute is that portion of the north-east corner of the south half of lot 25 so cut off by the road except a small part south of a cross-fence . . . The plaintiff's father died leaving a will, the terms of which do not appear. The estate, however, was administered, and, by a vesting order dated the 23rd December, 1885, the title to the north half of lot 25 was vested in John B. Flint. By deed dated 11th April, 1886, Flint conveyed the north half of lot 25 to the plaintiff. James Cosbey, a brother of the plaintiff, entered into an agreement for the purchase of the east half of the north half of lot 25, of which he had been in possession for some years, under what title or claim does not clearly appear. The evidence, however, shews that he cut and cleared this triangular piece of land in question and fenced the same about thirty years ago—that is, previous to the title vesting in Flint. During this time one Windsor was the owner of the west half of lot 26, which he had owned and kept for about thirty years, and sold to the defendant about eleven years ago. He says that he has known the land in dispute ever since he has been there; that the same was fenced in with the north half of lot 25, with a rail fence, by James Cosbey; that he cleared it, chopped the land off, and fenced it in, about thirty years ago, and from that time to this it has always been fenced in with the north half of the lot and used with it; that it had wheat sown on it one year; that it was ploughed and cropped and used as pasture. The south half of lot 25 at that time belonged to the Canada Company; the agent would occasionally visit it and look over it, and Windsor acted as caretaker for it. He tried to work it a little, but it was so rough that he could not do anything with it most of the time. In so pasturing the cattle he took them across the land in question from his lot to the county road; he bought the right from James Cosbey to cross the land in question for as long as he owned the farm, and paid Cosbey's widow for it. He swears that all the time he passed over it he did so under that agreement and by keeping up a pair of bars there; that, when he sold to the defendant, he did not sell

the right to cross this land. He further says that the defendant told him he had bought the south half of 25, and Windsor said, "There is a little strip south of the swale" (meaning the small piece south of the fence leading from the gravel road to the dividing line between 25 and 26, not claimed by the plaintiff); "if you want that, I will put a line fence between you, and you can put a fence along the road and keep it." The defendant said, no, it was too small; he didn't want to have anything to do with it. . . .

Other witnesses give substantially the same evidence.

The defendant swears that he bought the south half of lot 25 from the Canada Company, and that he subsequently bought the west half of 26 from Windsor; that he fixed up the road fence after he had purchased, and has kept it fixed up ever since; that he repaired the bars, and since that time he has always crossed over the land in question with his cattle and farming implements, and closed the bars after passing through, and so used it from 1898 until the spring of 1910. He further says that before he purchased the Windsor lot he brought his cows down from another pasture field, and would sometimes let down this fence (along the road) and let them in to drink, and that while there, if he was not in a hurry, would let his cattle feed upon the land. The defendant is corroborated by other witnesses as to having crossed the land in question after he purchased from Windsor.

The evidence as to keeping up the fence is contradictory; but, after a careful reading of the evidence, the following facts appear to be tolerably clear. James Cosbey was in possession of lot 25, apparently as owner, prior to his entering into an agreement with the plaintiff for the purchase; while so in possession, in clearing the north half of 25, he cleared the land in question and fenced it in, and continued to crop it and use it for pasture, as his own, with the field with which it was inclosed, during all the period down to his death, and it was afterwards so used by his family. I think it clear that during this period, and down to the purchase by the defendant, James Cosbey and those claiming under him obtained a good title to the land in question by possession.

The effect of the lapse of this statutory period was absolutely to extinguish the title of the Canada Company, which could not be revived merely by re-entry: Lightwood's Time Limit of Action, p. 116; Lee v. Jack, 27 L.J. Ex. 297; Bryan v. Cowdale, 21 W.R. 693. The effect was to make a statutory conveyance to the person in possession: Doe v. Sumner, 12 M. & W. 39.

If this then be the correct view, that the title through which

the defendant claims was extinguished, the subsequent user by the defendant in the manner described would not invest him with a new title. He did not claim an easement; he claimed the land; but the plaintiff, upon the evidence, was in actual possession of the land, having the same inclosed with the balance of her farm. . . .

[Reference to Asher v. Whitlock, L.R. 1 Q.B. 1; Lightwood, pp. 121, 123, 124; Cole v. Brunt, 35 U.C.R. 103; Elliott v. Blumer, 25 C.P. 217.]

It does not, however, clearly appear in what manner the plaintiff received title from James Cosbey. I think, therefore, the judgment below should be varied by striking out that portion thereof which declares that the plaintiff is the owner of the land in question, and in lieu thereof there should be inserted a clause to the effect that the plaintiff is entitled to possession thereof as against the defendant.

With reference to the plaintiff's appeal upon the question of costs, I do not think the judgment below should be varied, having regard to all the circumstances of this case.

Both appeals being unsuccessful, I would dismiss both without costs.

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

MULOCK, C.J., also concurred.

DIVISIONAL COURT. JANUARY 30TH, 1911.

SAGER v. SHEFFER.

Principal and Agent—Agent's Commission on Sale of Land—Purchaser Found by Agent—Sale Brought about by Efforts of Others—Evidence.

Appeal by the plaintiff from the judgment of DENTON, one of the Junior Judges of the County Court of York, dismissing without costs an action brought in that Court for a commission upon the sale of property known as No. 209 Queen street east, in the city of Toronto, for the sum of $23,600.

The trial Judge found that the defendant authorised the plaintiff in general terms to sell the property, but not on a commission of 2½ per cent. for the sum for which it was subse-

quently sold; that the plaintiff was the first man to take Kleinman, who became the purchaser at $23,600, to see the property; that the plaintiff notified the defendant that he had taken Kleinman to see the property; that the sale was afterwards made by other agents, who were paid by the defendant $200 commission; and that the transaction was not the result of anything that the plaintiff did.

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

J. M. Ferguson, for the plaintiff.

L. F. Heyd, K.C., for the defendant.

CLUTE, J., referred to Green v. Bartlett, 14 C.B.N.S. 681; Street v. Smith, 2 Times L.R. 131; Tribe v. Taylor, 1 C.P.D. 505; Lumley v. Nicholson, 2 Times L.R. 118; Mansell v. Clements, L.R. 9 C.P. 139; Thompson v. Thomas, 11 Times L.R. 304; Wilkinson v. Alston, 48 L.J.Q.B. 736; and proceeded as follows:—

In the present case it seems to me clear that the plaintiff did that which resulted in the sale. The parties were brought together by his act; and the form of the agreement entered into by the defendant with the other agents clearly indicates that the defendant realised that the plaintiff had a claim for commission. The trial Judge thought that the defendant had the plaintiff in mind when he got the agents to sign the document (i.e, an agreement to accept $200 commission for the sale and to be responsible for any other agent claiming commission from the sale of the property). He says, "It is a case of the other agents appearing at an opportune time and snatching the transaction out of the hands of the plaintiff." The "continuity," as it is called in Wilkinson v. Alston, 48 L.J.Q.B. 736, was not broken. The purchaser was the person who was first introduced by the plaintiff, and the fact that he concluded the transaction through other agents does not, in my opinion, deprive the plaintiff of his commission.

As to the amount of the commission, the evidence is that the price first named was $24,000. The evidence shews that 2½ per cent. is the usual commission charged on sales of this kind. I think the plaintiff is entitled to recover commission, at that rate, upon $23,600, which would amount to $590.

The judgment of the Court below should be set aside, and judgment entered for the plaintiff for $590 with costs of the action and of this appeal.

Since writing the above, Burchill v. Gowrie, [1910] A.C. 614, has come to hand, which very strongly supports the plaintiff's case.

MULOCK, C.J., concurred.

SUTHERLAND, J., dissented, for reasons stated in writing. He agreed with the opinion of the trial Judge.

MIDDLETON, J. FEBRUARY 2ND, 1911.

STUART v. HAMILTON JOCKEY CLUB.

Company—Shares—Transfer by Unauthorised Person—Liability of Company to True Owner—Rectification of Register—Indemnity against Person Purporting to Transfer and against Transferee—Dividend Received by Transferee—Subsequent Transfer—Indemnity in Respect of Dividend Received by Subsequent Transferee—Tortious Act—Remedy—Costs.

Action by the widow of John J. Stuart, deceased, for a declaration of her right, as administratrix with the will annexed of the estate of her late husband, to three shares of the capital stock of the defendants, an incorporated company, and to compel the defendants to register her as the holder of the shares as such administratrix.

The shares stood in the name of John J. Stuart, and, after his death, his father, John Stuart, assumed to sell them to J. L. Counsell, and executed a document by which he purported to sell, assign, and transfer three shares "standing in the name of John J. Stuart on the books of the said club," and appointed the secretary of the club his attorney to make the transfer upon the books of the club. The secretary assumed that Stuart was executor of his son, and made the transfer to Counsell as from "John J. Stuart estate," and signed it thus: "John J. Stuart estate, John Stuart, executor J. J. Stuart estate, by his attorney, A. R. Loudon" (seal).

This was in June, 1906. The plaintiff did not know of it till March, 1910, or perhaps a year earlier, and began this action in September, 1910.

At the time of the death and at the time of the transfer to Counsell the shares were not supposed to be of value, but in

1910 a dividend of ten per cent. and two bonuses of $200 and $700 per share were declared. Before any of these were paid, Counsell had transferred two of the shares; he received the $200 bonus on the third share. The dividend and the $700 bonus were held by the defendants pending this litigation.

The defendants brought in both John Stuart and Counsell as third parties and claimed indemnity against them.

W. J. Elliott, for the plaintiff.

C. A. Moss, for the defendants.

I. F. Hellmuth, K.C., and J. R. Meredith, for the third party Stuart.

Glyn Osler and R. C. H. Cassels, for the third party Counsell.

MIDDLETON, J.:— . . . Upon the evidence, I cannot find that there was any authority in John Stuart to deal with this stock. His conduct is without excuse or justification of any kind, and the plaintiff has in no way ratified what he did. There is nothing upon which an estoppel can be based. . . .

The shares in question were never validly transferred from the plaintiff, and she has done nothing to preclude her from asserting her title to them. She is, therefore, entitled to a judgment declaring that she is (as administratrix) the holder of the three shares in question, and directing the share-register of the defendants to be rectified accordingly. She is also entitled to judgment against the defendants for the amount of the bonuses and dividend declared, with interest from the dates when they were respectively payable, and her costs. . . .

So far as John Stuart is concerned, he clearly undertook to assign shares standing in the name of his son without having any colour of right to do so, and appointed the secretary of the club his attorney to make the transfer. His wrongful act is the cause of all the trouble; and I have no hesitation in awarding against him a judgment over for the amount which the defendants may be called upon to pay the plaintiff (over and above the dividend and bonus which they still have in hand), including costs and also their costs of defence and of the third party proceedings.

The position of Counsell is different; he is an innocent purchaser; he bought the stock in good faith; and it is not suggested that he had any knowledge of the absence of title in his vendor. . . . Like any one else who purchases from one not the owner, he acquired no title, and he must refund the amount of

the dividend paid to him upon the assumption that he was the owner. The amount paid him was $200 only. The defendants contend that this is not the extent of his liability, but that, having brought them the assignment to himself of the stock in question, and requested that he be recorded as owner, he undertook to indemnify them with respect to the act which he requested to be done. This is denied by Counsell, and it is contended by him that the most than can be said is that the injury to the defendants is the result of the negligence of both the defendants and Counsell in not ascertaining Stuart's lack of title, and in assuming that he had the right to deal with his son's stock, and that this common negligence leaves the parties without any remedy against each other.

The situation is admitted to be different from that found in any case cited, and calls for a very close scrutiny of the authorities. . . .

The $400 bonus paid to Counsell's transferee (that is, the bonus of $200 each on the two shares transferred by Counsell) is the matter now to be dealt with. This is a debt due by the defendants to the plaintiff as the dividend or bonus declared upon her stock.

The indemnity or "right over" sought to be enforced in this action is based upon the theory that this dividend has been paid to Counsell's nominees as the result of his having propounded for registration the assignment in question as a valid and operative document, when in truth it was of no effect whatever. As to this there was no tort on the part of either the defendants or Counsell. . . . The real question is, can the defendants recover against Counsell the dividend which they have paid to his transferee? I think they can, and that Counsell, having transferred stock to which he had no title, really requested the company to pay the dividend to his transferee, and that he stands in no better position than if the dividends had been paid to him. The cases cited deal with the situation arising when the company have made a settlement with the original owner by paying the value of the stock; and it seems to me that different considerations then arise from those involved where, as here, the demand is purely with regard to the dividends paid.

The entry of the transferee under an invalid instrument as owner of the stock, no doubt, is a tort, and damages might be recovered for it; but no such damages are here sought, and I am not called upon to discuss the question of indemnity with respect to an act which is tortious.

I may draw attention to the fact that the expression "not manifestly tortious" has, in the later cases, been replaced by the expression "which is apparently legal." Moxham v. Grant, [1900] 1 Q.B. 88, and The Englishman and The Australia, [1895] P. 212, serve to shew the true meaning and limitation to the qualification of the general rule.

The third parties rely upon the expression "without any default on his own part" found in the judgment of Lord Davey in Sheffield Corporation v. Barclay, [1905] A.C. 392, in the course of a passage adopted as embodying the law in all subsequent cases (*e.g.*, Bank of England v. Cutler, [1908] 2 K.B. 208, at p. 231), as relieving them from responsibility. This is attributing too wide a meaning to these words. They are, it seems to me, added to indicate that there may be a duty owing by the transfer agent to the transferee, breach of which will relieve the transferee from his implied obligation to indemnify, and cannot, I think, be referred to the common error as to the title of the transferor. So that, even if the liability is based upon the doctrine of Sheffield Corporation v. Barclay, I can find no way of escape for Mr. Counsell. So far as he is concerned, I think he may well be relieved from costs, as he is innocent of any wrongdoing, and, so far as the evidence shews, suffers from the misconduct of Stuart.

The judgment against him, then, will be for $600 and interest, without costs.

FEARNSIDE v. MORRIS—MASTER IN CHAMBERS—JAN. 27.

Pleading—Statement of Claim—Relevancy of Allegations—Historical Matter—Reference to Occurrences Subsequent to Matters Complained of.]—Motion by the defendant, before delivery of statement of defence, to strike out paragraphs 6, 7, and 8 of the statement of claim, as irrelevant under Con. Rule 279, and therefore embarrassing. The action was for damages for personal injuries sustained by the plaintiff by the kick of a vicious horse owned by the defendant, which the plaintiff went to look at when advertised for sale by the defendant. By paragraphs 6 and 7 the plaintiff alleged that he took all due care and was not warned of the horse's ugly disposition. By paragraph 8 he alleged that subsequently the horse kicked a lantern held by the defendant or his servant, which set fire to the stable and burnt it and the horse. The Master said that there was nothing really objectionable in paragraphs 6 and 7—they

could be viewed as historical or as in part a rehearsal of the address of the plaintiff's counsel in opening the case to the jury. But paragraph 8 was in violation of the decisions in Cole v. Canadian Pacific R.W. Co., 19 P.R. 104; Gloster v. Toronto Electric Light Co., 4 O.W.R. 532; Prince v. Toronto R.W. Co., 5 O.W.R. 88; Stone v. Stone, 11 O.W.R. 801, 936, and cases there cited. There is always the objection to allowing irrelevant facts to remain on the record, that they would be matters for full discovery, as pointed out in Canavan v. Harris, 8 O.W.R. 325. Order made striking out paragraph 8. Costs in the cause. G. C. Thomson, for the defendant. W. M. McClemont, for the plaintiff.

MACDONELL v. TEMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION—BRITTON, J., IN CHAMBERS—JAN. 27.

Appeal—Leave to Appeal to Divisional Court from Order of Judge in Chambers—Con. Rule 777.]—Motion by the defendants under Con. Rule 777 (1278) for leave to appeal to a Divisional Court from the order of MIDDLETON, J., in Chambers, ante 523. BRITTON, J., said that the proposed appeal involved matters of great importance upon questions of pleading and evidence; and, in his opinion, came within the Rule. Leave to appeal granted; costs in the cause, unless otherwise ordered by the Divisional Court. W. N. Tilley, for the defendants. A. M. Stewart, for the plaintiff.

NIPISSING COCA-COLA BOTTLING WORKS LIMITED v. WISSE—SUTHERLAND J.—JAN. 28.

Interim Injunction—Motion to Continue—Failure to Serve Writ of Summons—Practice—Restraining Sheriff from Selling under Execution—Interpleader Issue.]—Motion by the plaintiffs to continue an interim injunction granted on the 5th January, 1910. The defendant was served with notice of motion to continue the injunction, but not with a copy of the writ of summons, which was issued on the 4th January, 1911. The plaintiffs admitted that the writ had not been served. Held, upon the defendant's objection, that, while the usual practice is to serve the writ with the notice of motion to continue the injunction, and that is the proper course to follow, it is not clear that it is obligatory upon the plaintiffs to follow that course.—The injunction order

restrained the defendant Varin, Sheriff of the District of Nipissing, his agents, etc., from selling or disposing of certain goods and chattels seized under two writs of execution. The goods were claimed by the plaintiffs; and, after the injunction was granted, an interpleader order was made directing an issue to determine the ownership of the goods. An order was made continuing the injunction till the trial and final disposition of the issue. Costs to abide the result of the issue. C. H. Porter, for the plaintiffs. W. R. Smyth, K.C., for the defendant.

EMPIRE ELEVATOR CO. v. THOMPSON & SONS CO.—SUTHERLAND, J.—JAN. 28.

Contract—Payment for Wheat — Liability — Evidence — Undertaking—Letter.]—Appeal by the defendants from the report of the Judge of the District Court of Thunder Bay upon a reference to him for the trial of the action, which was brought to recover 3,800 bushels of No. 1 northern wheat or the value thereof. The Referee found that the plaintiffs were entitled to receive from the defendants 3,800 bushels of grain or the value thereof in money, $3,200, and that the defendants should pay that sum, with interest at five per cent. per annum from the 27th October, 1905, and the costs of the action. SUTHERLAND, J., said that it was abundantly clear from the evidence that the plaintiffs did ship the 3,800 bushels and had not been paid therefor. While the evidence was not in some respects altogether satisfactory, the Referee was justified in finding "that the defendants undertook to pay for this grain, whether handed out to them, or to Mr. Wayland, as their agent, or to Crane & Baird," and that the defendants had become liable to the plaintiffs by virtue of a letter written by the defendants on the 20th March, 1907, in which they said that either Crane & Baird or they themselves would be responsible for the 3,800 bushels. Appeal dismissed with costs. J. W. Bain, K.C., and M. Lockhart Gordon, for the defendants. W. Mulock, for the plaintiffs.

COULTER v. ELVIN—DIVISIONAL COURT—JAN. 28.

Contract—Statute of Frauds—Part Performance—Services —Promise to Give Land at Death—Possession—Equivocal Effect of.]—Appeal by the plaintiffs from the judgment of LATCHFORD,

J., dismissing the action, which was brought by George Coulter and Maggie Coulter, his wife, for the specific performance of a parol agreement said to have been entered into between them and the defendants' testator, Thomas Elvin, since deceased, whereby the latter agreed to give his farm to Maggie Coulter upon his death. Thomas Elvin was a farmer living upon the farm in question. His wife died in October, 1907. Maggie Coulter was the wife's niece, and had lived with the Elvins from her childhood until her marriage. Her husband dying, she returned and again lived with them until her marriage with George Coulter, when she left them to live with her husband. George Coulter, in his testimony at the trial, said that Thomas Elvin, about a week after his wife's death, invited the witness and his wife to move up to the farm and take care of him (the deceased) for the remainder of his days. About Christmas, 1907, the deceased mentioned the matter again—"He wanted me to move up there and take care of him, and he said he would give me a good chance, he would give me the proceeds of the place, and he would give my wife the place after his death, if we would take care of him." The witness said he accepted the offer, told his wife, and she assented, and they moved over to Elvin's farm, and thereafter continued to live with Elvin until his death in 1909, and had since remained in possession. The plaintiff Maggie Coulter testified to words used by Elvin to her—"at the end the place was mine"—"the place is yours when I am dead." The plaintiffs relied on the taking of possession, as disclosed in the evidence, as part performance sufficient to take the case out of the statute. MULOCK, C.J.Ex.D., delivering the judgment of a Divisional Court (composed of himself and SUTHERLAND, J.—MAGEE, J., the third member of the Court, having since the argument been appointed to the Court of Appeal), referred to Maddison v. Alderson, 8 App. Cas. 483, and said that the evidence of the plaintiffs shewed two contracts: one with George Coulter with reference to possession and the retention of possession by him, but determinable at the will of either party; and the other with George Coulter for his wife's benefit, but with reference only to the disposition of the property after Elvin's death; George Coulter was to be entitled to possession on his performing his part of the agreement; and, therefore, it was impossible to say that his possession or that of his wife, whose duty it was to live with her husband, had reference to some other agreement. The circumstance of the plaintiffs being in occupation of the property of the deceased was not unequivocally referable to such an agreement as that set up in this action, and, therefore, was not

necessarily evidence of any such contract. Inasmuch as the possession relied upon was capable of explanation without reference to the alleged agreement, parol evidence was inadmissible to shew the existence of such an agreement, and the statute was an effectual answer to the plaintiffs' claim. Appeal dismissed with costs. F. E. O'Flynn, for the plaintiffs. S. Masson, for the defendants.

RE CARR—MIDDLETON, J.—JAN. 30.

Lunatic—Foreign Domicile—Lands in Ontario—Terms of Order Declaring Lunacy.]—Motion for an order declaring Mary Ann Carr a lunatic. MIDDLETON, J.:—Let an order issue reciting that the said Mary Ann Carr, domiciled and resident in the State of Michigan, has been duly found to be a person of unsound mind by the Courts of that State, and is now confined in the Asylum for the Insane at Pontiac, Michigan, under an order of the Probate Court for the County of Lapier, in that State, and that she is possessed of an interest in lands in Ontario, and that in her interest such lands should be sold. Declare lunacy in the ordinary way and refer to Master to appoint a committee and direct the committee to join in sale of lands, the sale being approved by the Master and the proceeds being paid into Court, subject to further order. Scheme for maintenance to be settled after notice to keeper of Asylum for the Insane at Pontiac. Frank McCarthy, for the applicant.

MARTIN v. BECK MANUFACTURING CO.—DIVISIONAL COURT—JAN. 31.

Contract—Timber—Measurement—Government Scalers.]—Appeal by the defendants from the judgment of LATCHFORD, J., ante 219. The Court (MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ.) dismissed the appeal with costs, but (by consent) varied the judgment by deducting from the amount awarded to the plaintiff the sum of $8, the value of logs which were lost. F. E. Hodgins, K.C., for the defendants. W. A. Finlayson, for the plaintiff.