The
Ontario Weekly Notes

Vol. III. TORONTO, JUNE 26, 1912. No. 41.

COURT OF APPEAL.

JUNE 18TH, 1912.

*NELLES v. HESSELTINE.

Appeal to Supreme Court of Canada—Order "Allowing Appeal" from Judgment of Court of Appeal—Supreme Court Act, secs. 38 (c), 48 (e), 71—Jurisdiction of Court of Appeal—Judgment, Final or Interlocutory—Appeal not Brought within Prescribed Time—Refusal to Enlarge Time.

Application on behalf of the defendants the Windsor Essex and Lake Shore Rapid Railway Company for an order allowing, in terms of sec. 71 of the Supreme Court Act, an appeal to the Supreme Court from a judgment pronounced by the Court of Appeal in this action, on the 21st April, 1908 (11 O.W.R. 1062).

The same application was first made to Moss, C.J.O., in Chambers, and, was refused (ante 862); and the present application was both by way of appeal from the order in Chambers, and by way of a substantive motion.

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

M. Wilson, K.C., and A. H. F. Lefroy, K.C., for the applicants.

C. J. Holman, K.C., for the plaintiffs.

MACLAREN, J.A.:—The motion made before the Chief Justice was based exclusively upon sec. 71 of the Supreme Court Act;

*To be reported in the Ontario Law Reports.

and sec. 38 of the Act was not cited or referred to. On the motion before the full Court, counsel for the appellant stated that he desired to present his claim not only by way of appeal, but also as a substantive motion under sec. 38, as well as sec. 71, and he read in support of his motion affidavits that were made subsequent to the decision of the Chief Justice refusing the motion presented to him, chiefly as to the intention of the defendants to appeal.

The action was instituted in 1906 for the specific performance of two agreements whereby certain stock and bonds of the company were to be handed over to the plaintiffs. The trial Judge ordered specific performance, and in default damages. On appeal to this Court, the judgment was modified, but specific performance was decreed against the company, on the 21st April, 1908: 11 O.W.R. 1062. There was no appeal from this judgment; and, the company not delivering the stock or bonds, there was a reference before the Master to assess the damages, and he made his report on the 7th April, 1909. The company appealed, and the appeal came before MEREDITH, C.J., who, on the 23rd January, 1911, gave judgment reducing the damages: 2 O.W.N. 643. The company further appealed to this Court, and on the 28th September, 1911, their appeal was dismissed: ante 65.

From this last judgment an appeal was taken to the Supreme Court of Canada, which is still pending. The company moved in the Supreme Court to have an appeal from the judgment of this Court of the 21st April, 1908, included in their appeal to that Court. This motion came before the Registrar, who held that the Supreme Court had no jurisdiction to grant this or to extend the time for appealing; and an appeal from the Registrar was heard by the full Court and dismissed on the 23rd February, 1912: 21 O.W.R. 201. . . .

In my opinion, the company might have appealed as of right from the last-named judgment within the 60 days provided by sec. 69 of the Supreme Court Act, although it is not a final judgment; and there is nothing to the contrary in the cases of Union Bank of Halifax v. Dickie, 41 S.C.R. 13; Wenger v. Lamont, ib. 603; Clarke v. Goodall, 44 S.C.R. 284; or Crown Life Insurance Co. v. Skinner, ib. 616—as these were all common law actions.

Section 38 (c) of the Supreme Court Act gives an appeal to that Court from any judgment, whether final or not, of the highest Court of final resort in any Province other than Quebec,

where the Court of original jurisdiction is a Superior Court, in any action, suit, cause, matter, or judicial proceeding in the nature of a suit or proceeding in equity.

In my opinion, no leave would have been necessary to take this appeal; but, in case it were, application might have been made either to the Supreme Court or this Court under sec. 48 (e) of the Act.

Assuming that we still have the power, under sec. 71 of the Supreme Court Act, to extend the time and allow the appeal, I am strongly of the opinion that it should not be done. It seems to be eminently a fitting case for the application of the old maxim, *interest reipublicæ ut sit finis litium.* Instead of taking an appeal within 60 days after the judgment of the 21st April, 1908, as they had a right to do, the company chose to acquiesce in the judgment, and to take their chances of shewing on the reference what they had previously alleged, namely, that the stock and bonds in question were really of no value. Having failed to convince the Referee of this, or to convince the High Court or this Court on the respective appeals to them, they are now proceeding with their appeal to the Supreme Court from the judgment of this Court of the 28th September, 1911. This they have a perfect right to do; and, if they succeed, they will be entitled to the full benefit of such relief as they may obtain. But it is quite another question when they come, after four years of litigation, and after having put the plaintiffs to the expenditure of large sums of money and a large amount of labour, and now ask leave to do what they should have done four years ago, if at all, and attempt to reopen the question that was then practically closed.

The officers of the company state in their affidavits that they were advised by their solicitor that they could not appeal from the judgment of the 21st April, 1908, until the amount of damages was ascertained and fixed so as to make it final; while the solicitor in his affidavit does not go so far, but says that, on account of the reference being directed by the Court of Appeal in the judgment of the 21st April, 1908, it was not thought advisable to appeal at that time to the Supreme Court, as the same was not a final judgment.

It was not suggested to us on behalf of the applicants that this was a case that might come under sec. 48 (c) of the Supreme Court Act; we were asked to grant the extension under sec. 71, which allows us do it "under special circumstances."

It is true that, in construing Con. Rule 353, as to an extension of the time for appealing to this Court, we have never

been so strict as the Court of Appeal in England under their corresponding Rule. For illustrations of their refusal to extend the time on account of a mistake by counsel or solicitors, see International Financial Society v. City of Moscow Gas Co., 7 Ch. D. 241; In re Helsby, [1894] 1 Q.B. 742; In re Coles and Ravenshear, [1907] 1 K.B. 1. It is to be observed that in these cases there was no such delay as in this case; the application in each case was made shortly after the time had expired; there was no decision, as here, that it was not "advisable" to appeal at the time. There was there no deliberate choice of a particular course and a determination to take chances, as here, nor any postponement for years of what is required to be done by the statute within a limited number of days.

No precedent was cited to us where anything approaching the facts and circumstances of the present case had been held to be such "special circumstances" as would justify such an order as now asked for.

I am of opinion that the application of the appellants, both by way of appeal and as a substantive motion, should be dismissed, and that the company should be limited to the appeal which they now have pending in the Supreme Court, and to such relief as they may be able to obtain from their appeal from the final judgment of this Court and such interlocutory judgments as may properly be brought up on such appeal.

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

MEREDITH, J.A., dissented, for reasons stated in writing.

Application dismissed.

JUNE 18TH, 1912.

McDOUGALL v. OCCIDENTAL SYNDICATE LIMITED.

Foreign Judgment—Action on—Defence — Fraud — Failure to Prove.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., noted, sub nom. Johnston v. Occidental Syndicate Limited, ante 60, in favour of the plaintiff in an action upon a judgment recovered in the Yukon Territorial Court.

The appeal was heard by GARROW, MEREDITH, and MAGEE, JJ.A., and LATCHFORD and LENNOX, JJ.

H. W. Mickle, for the defendants.

R. C. H. Cassels, for the plaintiff.

GARROW, J.A.:—The action was brought upon a judgment recovered by one Frederick Charles Johnston against the defendants, an English joint stock company, in the Territorial Court of the Yukon Territory, which was assigned to the present plaintiff after the action commenced; and by an order of revivor dated the 12th December, 1911, the action was directed to be continued in the name of the present plaintiff.

The judgment in the Yukon Court was recovered in the month of February, 1907. The defendants appeared to the writ of summons, and were represented by counsel before the Court on the motion for judgment. Mr. Archibald Baird Craig, the defendants' managing director, then in Canada, made an affidavit of the facts from the defendants' standpoint, which was read and used upon the motion. The defence suggested in that affidavit is not that the then plaintiff's claim was entirely unfounded, but that, if he had a claim at all, it was not against these defendants, but against another company called "The Klondike Eldorado Company Limited." And upon this affidavit, as well as upon the other materials before him, the learned Judge of that Court found in favour of the plaintiff.

Fraud is not explicitly pleaded upon this record. An application to amend so as to set up a defence of that nature was made at the trial, and was reserved by the learned Chief Justice. The application is now renewed; and, as it must depend for its success upon the evidence already given, I see no objections to formally granting it.

The state of the pleadings, however, is not the defendants' main difficulty, which goes much deeper. And their difficulty is this: they are not by the evidence seeking to set up such a fraud as would avoid the judgment under the principles discussed and approved in Jacobs v. Beaver, 17 O.L.R. 496, recently before this Court, to which the learned Chief Justice refers in his judgment, but practically to have the question which was before the Yukon Court, and upon which that Court necessarily passed in awarding judgment in favour of the plaintiff, tried over again. What is presented is really not, properly speaking, a case of fraud at all.

The Klondike Eldorado Company, by which Johnston was apparently originally employed, was connected with and

largely owned by the defendants, and those interested in the defendants as shareholders, in addition to which the defendants were large creditors for money advanced to the former company. The Klondike Eldorado Company became, on the evidence, practically moribund some years before the action in the Yukon Court was commenced. But that company had owned certain mining claims considered of value, which were in charge of Johnston, who apparently continued in such charge for the benefit of those interested—in other words, for the defendants' benefit, as well as for the benefit of any others in like case who were interested as creditors of or shareholders in the Klondike Eldorado Company. And out of such charge, for the services rendered and advances made, the claim actually sued upon arose. The story is somewhat meagrely told, but it is quite apparent that there were communications from John Craig, a director of the defendants in Canada, to Johnston, by virtue of which he might well believe that he was, if not in the defendants' actual employment, to look to them for payment. The defendants now attempt to repudiate these communications, and also to repudiate Johnston's services, not by saying they were not rendered, but that they were rendered to the moribund Klondike Eldorado Company.

The letters subsequently discovered in a barrel, upon which stress is laid, merely support what cannot be denied, that Johnston was originally employed by the Klondike Eldorado Company. They in no way shew, or tend to shew, that the claim subsequently made upon the defendants was not made in good faith, or even that, had the letters been before the Yukon Court, the result would probably have been different. What that Court had to pass upon, after reading, as it must be assumed was done, the affidavit of A. B. Craig, was, whether, regarding the subsequent correspondence with John Craig and Mr. McKee, the then plaintiff had made out a case upon which to charge the defendants.

The conclusion reached may have been erroneous, or even unjust; with that we have nothing to do. The point is, that it was not, so far as appears, obtained by any fraud practised upon the Court by the plaintiff; for which reason, I agree with the judgment of the learned Chief Justice.

The appeal should be dismissed with costs.

MEREDITH, J.A.:—If the judgment sued upon were obtained by fraud, the Courts of this Province will not give effect to it: that is now quite settled law of the Province, as well as gener-

ally, whatever formerly may have been the view of this Court upon the subject.

So the single question for consideration in this case should have been, and is, one of fact—whether the judgment in the Yukon Court was obtained by fraud.

From the whole evidence adduced in this case, it appears that the plaintiff had a good cause of action, but that he was in doubt as to his real debtor: one McKee had employed him, but apparently McKee was acting for the company who, the defendants say, are the real debtors, or else for the defendants; and these two companies seem to have been in some way related to one another; the one is said to have been the outcome of the other. The plaintiff first threatened McKee with an action, asserting that in any case he was answerable for the debt; subsequently he sued the defendants for it in the Yukon Court, and there recovered judgment for the amount of it against them, in summary proceedings.

It is quite clear that there was no fraud, in the sense of a pretence of a debt which had no existence in fact; nor can I think it proved that there was fraud in the assertion of a debt on the part of the defendants, knowing that they were not the real debtors, or in asserting that they really were, when in truth he did not know whether they were or not; and, however much the plaintiff may have been mistaken in any respect, if at all, as it does not appear to me to be proved that he was dishonest in any of these respects, fraud in obtaining the judgment has not been established; and so the plaintiff was rightly held entitled to succeed.

Whether the judgment in the Yukon Court ought to have been made upon a summary application; and, if so, whether it ought to be opened up now and sent down to a trial in the usual way in view of all the circumstances of the case, especially the subsequently discovered evidence, are questions for the Yukon Courts, where justice between the parties will be done, if they are applied to.

MAGEE, J.A., and LATCHFORD and LENNOX, JJ., concurred.

Appeal dismissed.

JUNE 18TH, 1912.

NORTHERN SULPHITE MILLS LIMITED v. CRAIG.

Principal and Agent—Purchase of Bonds by Agent—Dispute as to Ownership—Evidence — Purchase for Principal — Agent's Lien for Part of Purchase-money Paid—Companies —Transactions between—Several Liens.

Appeal by the defendants the Occidental Syndicate Limited from the judgment of MEREDITH, C.J.C.P., ante 214.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

C. A. Masten, K.C., and H. W. Mickle, for the defendants.

I. F. Hellmuth, K.C., and J. H. Moss, K.C., for the plaintiffs.

The judgment of the Court was delivered by GARROW, J.A.:—The action was brought by the plaintiff E. R. C. Clarkson, as receiver of the Northern Sulphite Mills of Canada Limited, to recover from the defendants, John Craig and the Occidental Syndicate Limited, certain first mortgage bonds of the Imperial Land Company for $500 each, alleged to be the property of the plaintiff company.

The questions involved, which are almost entirely questions of fact, seem to depend less upon contradictory evidence, of which there is very little, than upon the proper inferences to be drawn from certain of the facts appearing in evidence, which are not in themselves decisive or plainly pointing only in one direction. There were, it appears, several joint stock companies, some organised in England and some in Canada, all more or less related, namely, the defendant company, which was in some respects the parent company, the plaintiff company, the Imperial Land Company, and the Imperial Paper Mills Company. The three latter companies were engaged in certain undertakings at or near Sturgeon Falls, in this Province, which included the manufacture of pulp and paper, and, in the case of the land company, the sale of lands.

The defendant company acted at London, England, in financial matters for the other companies. Its board of directors consisted of Archibald Baird Craig, chairman and managing director, his brother, the defendant John Craig, and William Rich-

ard Loxley. The same gentlemen were also the directors of the plaintiff company. Both companies occupied the same offices in London and employed the same office staff. The defendant John Craig was also the managing director of the plaintiff company and of the paper mills company, and was president of the land company, and resided in Canada. The defendant company had, as agent for the land company, floated for it certain bonds, of a total issue of $50,000, and, among them, those now in question, which bonds were to mature on the 1st January, 1906. The land company was apparently not at that time prepared to take them up. The defendant company had also, as agent for the plaintiff company, floated certain bonds of that company, the proceeds of which were still in hand at the credit of that company. It was the intention of the land company to issue additional bonds, with the proceeds of which the bonds so maturing would be paid; and, pending such issue, the requisite money required to retire them was transferred by the common directors from the account of the plaintiff company to that of the defendant company, and by the latter used to take up the bonds now in question. Of these there were originally in all 52. One was subsequently paid by the land company itself out of its own money, and is now no longer in question. Forty of them were so taken up and received from the holders in London; the other 12 were sent by the holders direct to the office of the land company in Canada for redemption, and were there taken up out of money which had been remitted for the purpose by the defendant company to the land company. The 40 so taken up in London were afterwards sent to J. H. Payne, secretary-treasurer of the land company, at Sturgeon Falls, in a letter written by William Tait, the defendant company's secretary, the date of which does not appear, but it was evidently written in January, 1906, in which Mr. Tait said: "I am sending you by this mail the following debentures and coupons which have been paid by this syndicate on behalf of your company on the 1st instant, viz.," etc. Mr. Payne afterwards handed these to the defendant John Craig, who had, at the time, the other 12 in his possession, and the whole were placed by him in the safe of the Imperial Paper Mills Company for safekeeping, where they remained until brought into Court under the order made in this action before trial.

The original minute of the transaction, dated the 15th January, 1906, in the defendant company's books, is set out in full

in the judgment of the learned Chief Justice, from which it appears that the transaction then bore the appearance merely of a payment by the defendant on behalf of the land company. Nothing is said in it about the source of the money with which the payment was made, or otherwise to indicate that the plaintiff company was interested

The new bond issue of the land company not having for some reason materialised, the defendant company's auditor, Andrew Wilson Tait, who was also auditor for the plaintiff company, intervened; and, at his suggestion, the original minute was so amended as to read as if the defendant company had acted in the matter only as agent for the plaintiff company; and a corresponding minute was made in the books of the plaintiff company to agree with the amended minute in the defendant company's books. The necessary entries were also then made in the books of account of the respective companies so as to shew that the bonds had been purchased and were the property of the plaintiff company, and not of the defendant company. All of which was done under the direction and with the consent of the same directors who had been the parties to the original minute; and, indeed, could not have been done without their consent. And from that time forth until this litigation began, the matter apparently so stood in the books of both companies.

The defendant company now contends that, notwithstanding such entries, it was the purchaser and is the owner of the 51 bonds in question, and that the money of the plaintiff company which was used in the purchase should be regarded either as a loan to it from the plaintiff company, or as a repayment by it upon account of its indebtedness to the defendant company.

These several contentions were determined by the learned Chief Justice in favour of the plaintiff company; and with his conclusions I agree.

I do not, however, regard it as essential to go so far as to hold that what was done in July was, as he apparently thought, intended to express and carry out the original intention held by the parties in the previous month of January. The whole transaction, including the use made of the money of the plaintiff company, was clearly of a temporary character, intended merely to bridge the gap until the new bond issue of the land company came forward, which until midsummer, Mr. A. B. Craig says, was expected "any day." To speak of it as a repayment by the plaintiff company of a debt not yet due, and,

even if due, a considerable over-payment, or as a loan of money in the ordinary sense by the one company to the other, seems to me, in the light of all the evidence, to be simply absurd. No one at the time, I am satisfied, intended either a loan or a repayment. The money was there under the control of the two gentlemen who comprised the quorum of the bonds of both companies, and it was used for such temporary purpose practically as a convenience for the land company, with the intention of a speedy readjustment when the new bonds of that company were sold. It was never for a moment intended that the bonds so acquired should be permanently held by either company. And, when it was afterwards found that the original intention could not be carried out, through the temporary failure of the source of expected recoupment, it was quite within the power of the parties to give the temporary transaction of January the more permanent form given to it in July, by which the bonds formally became the property of the company which had supplied the chief part of the funds for their acquirement. The amount actually paid for the bonds apparently somewhat exceeded the amount withdrawn from the account of the plaintiff company; and for such excess the learned Chief Justice has, apparently without objection, given to the defendant company a lien.

But, in addition, the defendant company claimed before us a lien of the nature of a general lien upon the bonds for the balance owing by the plaintiff company upon the accounts between them, a claim not apparently made before the learned Chief Justice, or at all events not dealt with in his judgment.

Such a lien depends, of course, upon proof that the party claiming it is in possession of the property in respect of which the lien is asserted; and such proof is, in my opinion, wholly absent in this case. As I have said, the bonds were physically in the safe of the Imperial Paper Mills Company when the litigation began. They had been placed there by the defendant John Craig, who received them from the land company, of which he was president; and the only reasonable or proper inference upon the whole evidence, his own included, is, that, in so placing them, he acted for and on behalf of the land company, and not as a director of the defendant company, as he now asserts—another instance, of which we see so many, of "wisdom after the event." He had, so far as appears, no instruction from his co-directors in London to require or to assert a right to the possession of the bonds. The 40 redeemed in England

had been sent without limitation of any kind direct to the land company, to which company the holders also sent the remaining 12; and any possession afterwards acquired by John Craig from that company was clearly so acquired solely in his character of an officer of that company. The exact date at which the bonds were placed in the Imperial Paper Mills Company's safe is not stated in the evidence, further than that it occurred some time in the year 1906. If it was after the date of the change made in London, on the 30th July of that year, by which the plaintiff company became the owners, it might even be said that the possession of the defendant John Craig was that of the plaintiff company, of which, in addition to his other numerous and one would think slightly embarrassing offices, he was the managing director. But it is not necessary to go so far; because, in my opinion, the reasonable and proper inference upon the whole evidence is, as I have before stated, that such possession was and remained that of the land company only.

For these reasons, I would dismiss the appeal with costs.

JUNE 18TH, 1912.

THOMPSON v. GRAND TRUNK R.W. CO.

Railway—Injury to and Death of Person Lawfully in Station-yard—Nonrepair of Roadway — Invitation — Negligence—Contributory Negligence—Findings of Jury—Dominion Railway Act, sec. 284.

Appeal by the defendants from the judgment of TEETZEL, J., in favour of the plaintiff, upon the findings of a jury, in an action by Sarah Thompson to recover damages for the death of her husband, John Thompson, who was thrown from his waggon at Caledonia station and killed, owing, as alleged, to the negligence of the defendants in respect of the condition of the railway premises.

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

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

H. Arrell, for the plaintiff.

GARROW, J.A.:—The deceased was a teamster, and was employed to unload gas pipes from a car standing upon the de-

fendants' track in their station-yard at Caledonia station. On the morning of the 17th May, 1911, he went with his team to begin the work, and while in the station-yard was thrown from his waggon and killed. The immediate cause of the jolt which threw him from the waggon was the sudden descent of one of the wheels into a rut in the roadway, which roadway, it is said by the plaintiff, was out of repair—such lack of repair being the negligence of which the plaintiff complains. The defendants deny that the roadway in question formed any part of the station-yard, and say that another and sufficient roadway along the other side of the track had been supplied and properly maintained, and was the only roadway which the deceased was entitled to use.

The roadway in question is upon the former site of a track which had for some reason been removed southerly a distance of about ten feet some two years before the accident—after which, as the undisputed evidence shews, teams began to be driven in and out over the ground formerly occupied by that track, a custom which continued without interruption by the defendants until the accident in question. There was some evidence that the condition of the road at the time of the accident had continued for some time prior thereto. The rut is described as two feet long and about eight inches deep.

The defendants called no witnesses. At the close of the plaintiff's case, a motion of nonsuit was made, upon the ground that no cause of action had been established, which was refused, and the case went to the jury, who, in answer to questions, found that the place on which the deceased was driving at the time of the accident was used by the public openly and constantly as a road for teams before the accident; that the defendants were guilty of negligence in allowing the rut or hole to remain as it existed at the time of the accident; that such negligence was the cause of the injury; that there was no contributory negligence; and they assessed the damages at the sum of $5,000, for which sum the plaintiff has judgment.

The case could not, I think, have been withdrawn from the jury. The material issues were upon questions of fact; and the findings are, I think, warranted by the evidence. The Dominion Railway Act, by sec. 284, imposes a duty upon railway companies to furnish adequate and suitable accommodation for the carriage, unloading, and delivery of traffic. And, although the road upon the south side was the better road, there was nothing to indicate that the other road upon the north side was not

also to be used as part of the accommodation furnished. That it was being used, and used extensively and continuously, is abundantly clear from the evidence. And that it was out of repair and dangerous, to the knowledge of the station agent in charge, long before the accident, was not, on the evidence, an unreasonable inference, especially as the station agent was not called to deny it.

That it was necessary in order to reach the northerly roadway to drive over the rails which lay between the one road and the other, while of some significance, was certainly not, under the circumstances, conclusive.

The appeal, in my opinion, fails and should be dismissed with costs.

MEREDITH, J.A.:—There was evidence upon which the jury might find that the road, on the south side of the track, was apparently one intended to be used for the purpose of loading and unloading cars standing on the track lying between it and the road on the north side of it; also that the man who was killed was proceeding by way of the northerly road to the southerly one, there to unload the car, and was acting with ordinary care in so doing; and that the accident was caused by the negligence of the defendants in leaving a dangerous hole in the southerly road; and so a case for the jury was made; and the question of contributory negligence was also one for them on the facts of the case.

If the defendants did not intend the southerly road to be so used, they should have given notice to that effect or have stopped it up; for as it was it constituted an invitation, and one of an attractive character, saving the turning around of waggons on either side to unload there.

I would dismiss the appeal.

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

Appeal dismissed.

JUNE 18TH, 1912.

CUNNINGHAM v. MICHIGAN CENTRAL R.R. CO.

Railway—Injury to Person on Track—Negligence—Trespasser —Leave — Acquiescence — Findings of Jury—Warning of Approach of Engine—Speed—Cause of Injury.

Appeal by the defendants from the judgment of TEETZEL, J., upon the findings of a jury, in favour of the plaintiff, a brakesman employed by the Toronto Hamilton and Buffalo Railway Company, who, while engaged in checking cars for his employers, was struck by an engine in charge of the defendants' servants, and injured, in an action for damages for his injuries. The jury found negligence, and assessed the plaintiff's damages at $1,500, for which sum he was awarded judgment with costs.

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

D. W. Saunders, K.C., and A. A. Ingram, for the defendants.

D. L. McCarthy, K.C., and J. G. Gauld, K.C., for the plaintiff.

The judgment of the Court was delivered by MEREDITH, J.A.: —It seems to me to be impossible to support the judgment in this case, directed to be entered in the plaintiff's favour at the trial.

In the first place, there is no evidence of any duty to the plaintiff, on the part of the defendants, the breach of which had anything to do with his injury. He was in the place where the accident happened without the leave or knowledge of the defendants, as far as the evidence shews. The work he was engaged in was premature; he had no right to interfere with the cars in any way until they were delivered by the defendants to his masters, the other railway company. That which he was doing was being done for his own convenience, and was at best but only a cursory glance at cars which might, and probably would, be so delivered in due course—a glance which might, and no doubt would generally, aid in the convenient disposition of some of the cars after such delivery in due course. There is no evidence of any duty, or right, on the part of the other railway company to interfere, in any manner, with any cars, such as those in question, until they were duly delivered; the delivery being made by the transfer of way-bills, through the station-master, or the night

operator performing his duty, and shunting the cars from the defendants' lines into the line of the other railway company. So that there seems to me to be no lawful justification for the plaintiff, or any other of the servants of the other railway company, going among the tracks of the defendants for any purpose in connection with these cars. But it was said that it had been habitually done by them, and that from such conduct it ought to be conclusively presumed that it was done with the leave of the defendants. There is, however, no such evidence sufficient, in my opinion, to support even a prima facie case of such leave. The whole evidence is that of the plaintiff, who said that he had done the same sort of thing, in the night-time, for several months; and that of a brakesman of the defendants, that he had "seen them come out different times there." Surely there is in this no reasonable evidence of any knowledge on the part of the defendants of the plaintiff's actions in this respect, not to speak of acquiescence in it amounting to even leave, much less a right. The plaintiff, then, being really a trespasser upon the defendants' property, it cannot be reasonably contended that there was a breach of any duty towards him.

Assuming, however, that the plaintiff had a right to be where he was, on what ground can it be said that the defendants were guilty of negligence towards him? The jury have said, in not slowing speed and giving such warning as ringing the bell or blowing the whistle of the engine of the train by which he was injured on approach to station or yard limits. It is not proved, nor is it now contended, that any "warnings" which legislation provides for were not given; the evidence is that they were given; so that that which the jury must have meant was additional warning, because the warnings required by statute and given were given on approaching the station or yard limits; it may be that they meant within the yard limits, though there is no evidence that the bell was not continuously rung. Having given all the warnings required by statute-law, and the railway being fenced, no jury has a right to be a law-maker in each particular case, and in effect overrule legislation without any peculiar circumstances requiring a reduction of speed. It ought not to be the law that each jury may in each particular case determine what ought to have been the speed of a railway train, though there are no kind of peculiar circumstances in the particular case requiring a lessening of the statute-permitted speed.

Again, the plaintiff testified that, if the bell were ringing, he could not hear it; he said, "You could not hear a bell very far

coming that distance;" and two witnesses, both trainmen, and one the engineer of the train on which the plaintiff was employed, testified that, immediately after the accident, the plaintiff said that he saw the train coming, but mistook the place where he was standing, thinking there was a track between him and the west-bound line on which the oncoming train was; that is, that his own mistake, not any want of warning, caused his injury. The most that he would testify to, opposed to this, was that he had no recollection of saying it, and that, if he did, it was untrue; so that I cannot think there was any reasonable evidence that the accident was caused by the speed of, or any want of warning from, the train by which he was struck. His statement at the time is the only reasonable one of the cause of the accident, having regard to the fact that he was an experienced brakesman, with a knowledge of the yard and of the movement of trains at the time, especially of the incoming, about that time, of the fast train by which he was struck, in the noise of its oncoming, after signalling its approach, and in the glare of the head-light of the engine.

I would allow the appeal and dismiss the action.

JUNE 18TH, 1912.

STOCKS v. BOULTER.

Fraud and Misrepresentation—Sale of Farm—Completed Transaction—Reliance on Representations Made by Vendor—Inspection of Farm—Purchase Induced by Representations—Absence of Evidence of Affirmance or Waiver—Rescission—Damages—Findings of Fact of Trial Judge—Appeal.

Appeal by the defendants from the judgment of CLUTE, J., ante 277.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

A. W. Anglin, K.C., and C. A. Moss, for the defendants.

R. McKay, K.C., for the plaintiff.

GARROW, J.A.:—The plaintiff's case, as disclosed in the statement of claim, is, that the defendant Wellington Boulter had, by certain false and fraudulent representations, induced the plaintiff to purchase that defendant's farm in the township of

Sophiasburg, in the county of Prince Edward, and the farm stock and implements thereon. The transaction had been completed and the purchase-money paid, a part in cash and the balance by a mortgage on the land to the defendant Nancy Helen Boulter, the wife of the defendant Wellington Boulter, and the plaintiff had been let into possession.

The defendant pleaded that all representations which had been made in the course of the transaction were true in substance and in fact; that, if they or any of them were false, the same were not false to the knowledge of the defendant Wellington Boulter; and that, in any event, the plaintiff did not rely upon the representations, but upon the inspection and examination of the property made by himself and by others for him. . . .

The issues were largely upon questions of fact; and, after hearing some forty witnesses, the learned Judge determined them all in favour of the plaintiff—properly, in my opinion.

In his judgment the learned Judge uses this language: "I think the plaintiff was a truthful witness. I entertain no doubt that his evidence is substantially true and accurate. I was also favourably impressed with Alexander McLaren and Peter Forin (witnesses called by the plaintiff). Where the defendant and his witnesses differ from the plaintiff and his witnesses, I think the latter are entitled to credit."

To interfere with a trial Judge's conclusion upon the facts, under such circumstances, would be as unsafe as it is, fortunately, unusual. Nor do I suggest that, if I had the power, I have any inclination to do so. On the contrary, I am of opinion, after a careful perusal of the evidence, and especially of that of the defendant Boulter himself, that the learned Judge's conclusions are entirely justified thereby. . . .

The keynote, if I may call it so, to the whole transaction is, I think, the method by which the quantity of land, originally offered as 300 acres, was reduced. It appears that the plaintiff did not come forward at the time first arranged, but at a somewhat later date. The defendant, anxious for his own purposes to break the apparent continuity of the negotiations, speaks of the personal negotiations which took place after the plaintiff came east, as "a new deal," in the course of which, as he says, he withdrew from his original offer the parcel containing from 30 to 40 acres, which was divided from the rest by a road. But he made no corresponding reduction in his price; nor, it is, I think, perfectly clear, upon the whole evidence, did he make or attempt to make it clear to the plaintiff that the original offer had been so modified.

That this circumstance must have greatly impressed the learned Judge is, I think, apparent, if from nothing else, from the circumstance that the appeal-book contains about four printed pages of an examination of the defendant Wellington Boulter by the learned Judge, entirely devoted to an endeavour to ascertain, if possible, exactly at what stage in the negotiations the plaintiff was informed that he was getting the reduced acreage, while paying the full price. And the result of a perusal of it is to leave me, as it apparently left the learned Judge, under the strong impression that what was done was a carefully planned piece of deception, devised after the defendant saw the purchaser.

It is not necessary to discuss at any length the details of the other representations. . . . The learned Judge's finding that the plaintiff relied upon the representations is amply borne out. And it is no answer in itself to say as a defence that he had the opportunity to do so, unless it also appears that he was relying upon his own judgment, and not upon the representations. Nor is there, in my opinion, anything in the defendants' contention that the plaintiff had elected to abide by the purchase, or that he had so dealt with the property that rescission should not be awarded. When the deception appeared early in the following season, he at once became active in asserting his rights. He could not have been reasonably expected to do so earlier, because he was still in ignorance of the facts. In the meantime, he had made the lease of the orchard upon which the defendant relies; but the lease has been cancelled, and the plaintiff is now in a position to restore the land, practically in the state and condition in which he received it. It is not every dealing with the property which will take away a plaintiff's right to rescission upon the ground of fraud: see Adam v. Newbiggin, 13 App. Cas. 308; Erlanger v. New Sombrero Phosphate Co., 3 App. Cas. 1218. The remedy is, of course, an equitable one in its origin, and involves the corresponding duty to do equity to the other side. This, however, only means such equity as the Court may regard as necessary substantially to restore the parties to their original positions.

Counsel for the defendants also contended that actual fraud is not specifically found by the learned trial Judge. This argument, however, seems to me to be not based upon a reasonable interpretation of the language of the judgment. . . . The learned Judge said: "I reluctantly reach the conclusion that the plaintiff was overreached in the deal. . . . He must or should have known that the representations were false." This

language . . . read in the light of the pleadings, where the issue presented was plainly one of actual fraud, could only mean that the representations were not merely false but false to the knowledge of the defendant, and were made for the purpose of deceiving.

"Overreach" in the Century Dictionary is given, as one of its meanings, to deceive by cunning, artifice, or sagacity: cheat: outwit." That the learned Judge had quite in mind the distinction between the nature of misrepresentations which are sufficient to justify rescission before, and those which must be established after, completion, is further made clear by the authorities to which he refers.

Finally, the defendant contends that the sale of the lands and chattels were separate transactions; but I agree with the learned Judge in thinking that they were not. . . .

In my opinion, the appeal should be dismissed with costs.

MEREDITH, J.A.:—It seems to me to have been well proved at the trial that the plaintiff was induced to purchase the property in question by false statements as to very material facts made to him by the defendant for the purpose of inducing him to purchase, and made with full knowledge of their falseness; and that, I have no doubt, was the finding of the trial Judge, unhesitatingly reached, however it may have been expressed.

The abstraction of the 30 acres, or whatever the actual quantity may be, from the land offered, and the great difference between truth and assertion as to the orchard and as to the quality of the land, are things unexplainable and inexcusable, especially in dealing with one who was an entire stranger, not only in the locality, but indeed in this part of the Empire, and one who was brought into the transaction through the innocent interposition of a judicial officer of the locality, which might very well put him off his guard. They were not, in any sense, mere matters of opinion or of mere commendation; they were material and essential.

Nor can I find in the evidence anything sufficient to prevent a rescission of the contract on the ground of fraud; there could be no affirmance binding upon the plaintiff, in the absence of knowledge of such things as gave a right to rescind. The sale of the future produce of the orchard, made as it was, was not intended to be more than a personal contract, and it has been wholly annulled by the parties to it. There was no intention to make any election or to waive any right. But all this is im-

material, because damages have been assessed by the trial Judge at a reasonable amount, and the defendant prefers a rescission, which the plaintiff also prefers.

I would dismiss the appeal.

MACLAREN and MAGEE, JJ.A., and LENNOX, J., concurred.

Appeal dismissed.

JUNE 18TH, 1912.

HYATT v. ALLEN.

Company—Directors—Secret Profits—Trust for Shareholders—Principal and Agent—Fiduciary Relationship—Transfers of Shares to Directors—Class Action by Certain Shareholders—Fraud—Account of Profits.

Appeal by the defendants from the judgment of a Divisional Court, ante 370, affirming (with two variations) the judgment of SUTHERLAND, J., 2 O.W.N. 927.

The appeal was heard by GARROW, MEREDITH, and MAGEE, JJ.A., and LATCHFORD and LENNOX, JJ.

J. W. Bain, K.C., and M. L. Gordon, for the defendants.

E. G. Porter, K.C., and J. A. Wright, for the plaintiffs.

GARROW, J.A.:—The action was brought by 22 shareholders in the Lakeside Canning Company Limited, on behalf of themselves and all the other shareholders except the defendants, against the defendants other than the company, to obtain certain declarations and accounts in respect of certain transactions whereby, it was alleged, the defendants the directors obtained from the other shareholders transfers of their shares. . . .

The questions with which Sutherland, J., had to deal were chiefly questions of fact, depending upon contradictory evidence and involving the credibility of the witnesses; and, that being so, I am unable to see any satisfactory ground upon which we in this Court could reverse his main conclusions, especially as they have since received unanimous indorsement in the Divisional Court.

The action is essentially one to compel the defendants (other than the company, which, upon the argument of the appeal, was, by consent, dismissed from the record) to account for the pro-

ceeds received by them as the alleged agents for the plaintiffs upon the sale or other disposal made by them of the plaintiffs' shares.

The case in no way, in my opinion, turns upon a nice question of the relation ordinarily existing between a director and an individual shareholder, such as was considered in Percival v. Wright, [1902] 2 Ch. 421, upon which counsel for the appellants relied. It may well be that, under ordinary circumstances, there is no fiduciary relation existing between a director and a shareholder, although the range of the judgment in that case seems to be somewhat wider than the very simple facts required. But there is certainly nothing to prevent a director from becoming the agent of the shareholders under special circumstances, and thus establishing such a relationship. And that, apparently, is exactly what occurred in this case.

The recital in the option which the shareholders signed reads as follows: "Whereas the directors of the Lakeside Canning Company Limited, parties of the first part, have been interviewed by Garnet P. Grant of Montreal, representing certain merger interests in connection with the combining of the principal canning plants of Ontario, for the purpose of purchasing the plant of the Lakeside Canning Company Limited; and whereas it becomes necessary for the said directors to secure the consent of the majority of the shareholders of the said company in order that they may transact any business relating to the sale of the plant and property of the said company."

At what time the scheme on the part of the defendants to acquire the shares for themselves originated, is not clear; but that there was such a scheme is, as was found by the learned trial Judge, beyond question. And there are circumstances which suggest that it may even have been at least in their minds before the date of the options. The recital before-quoted, however, in the light of the circumstances, quite justified the shareholders in assuming the contrary, and in believing that the obligation and duty which the defendants were thereby undertaking was simply that of agents, "in order," to quote from the recital, "that they may transact any business relating to the sale of the plant and property of the said company." The options might well, under the circumstances, have been regarded by the plaintiffs as a power and instruction to the defendants to sell the assets of the company at a price to realise for the shareholders at least the sum per share mentioned in the options. And, if that is a proper assumption, and more was realised, the surplus would, of course, in that case also, belong to the shareholders.

Between the giving of the options, and the so-called exercise of them by the defendants in the following month of February, no bargain of any kind had been made between the plaintiffs and the defendants. The transfers then put before the plaintiffs for execution were prepared by the defendants, and were executed in blank as to the purchasers' names. There was nothing, therefore, upon the surface, to indicate to a careful, or even to a suspicious, shareholder, that the options were being exercised otherwise than in pursuance of the original intention.

The defendants' position would have been stronger if they had been less reticent; for, from a perusal of the evidence, it is clear that as little information as possible of the position of affairs was conveyed to the shareholders, who in no sufficient way had it brought home to them that, instead of a sale to the merger, they were selling out to the directors. Did the directors at that time know that in all probability the deal with the merger was going through? There is much reason to believe that they did. Negotiations had been steadily in progress from the previous month of November, and had apparently so advanced that in a letter dated the 25th January, 1910, from G. P. Grant, who represented the merger, to the defendant A. Allen, a leading director, he says: "Mr. Drury has been asked to attend to the necessary searches . . . in connection with your agreement with me to enter the cannery merger."

Details may not have been arranged perhaps, and there were titles to be searched and appraisements to be made before the transaction was closed. The option to Mr. Grant on behalf of the merger did not expire until early in March; and, in the meantime, these preliminaries were progressing in apparently regular course. So much so that by the 25th February all the documents necessary to carry out the sale to the merger had been executed ready for delivery over, on payment of the price. Then there is a total absence of any cause whatever, other than the suggested one of obtaining a profit at the expense of the other shareholders, why the defendants should, at that particular time, have taken up the shares belonging to the plaintiffs. They, it is true, did so with money of their own, obtained from the Standard Bank, but the notes which were discounted to raise it were, as was probably anticipated, retired out of the proceeds subsequently received from the merger when the deal went through. So, after all, the transaction was not so bold a financial venture as it might seem to an outsider.

The learned trial Judge found a case of actual fraud against the defendants, a conclusion with which I do not quarrel. But,

as was pointed out on the argument, it is not necessary to go quite so far; for the moment it appeared—as, in my opinion, it clearly did—that, under the original option given by the plaintiffs to the defendants, they became agents for the plaintiffs in the transaction, a fiduciary relationship was established which, on well-known legal principles, prevented the agents from obtaining a profit at the expense of their principals. See Ex p. Larkey, 4 Ch. D. 566, at p. 580; Parker v. McKenna, L.R. 10 Ch. 96, at p. 118; and the cases collected in Kerr on Frauds, 4th ed. (1910), p. 155 et seq.

It was argued by counsel for the appellants that the action is not a class action; and, perhaps, strictly speaking, it is not; but the record may be so amended as to eliminate that feature, as in effect was done by the judgment of the Divisional Court. It was further objected that there is misjoinder, because the causes of action are said to be several, and not joint. This objection, however, even if well-founded, which I am inclined to doubt, is not one which, in the interests of justice, I feel any call to give effect to, or even seriously to consider at this stage of the litigation.

The appeal should, in my opinion, be dismissed with costs.

MEREDITH, J.A., was of the same opinion, for reasons stated in writing.

MAGEE, J.A., and LATCHFORD and LENNOX, JJ., also concurred.

Appeal dismissed.

JUNE 18TH, 1912.

JONES v. CANADIAN PACIFIC R.W. CO.

Railway—Injury to and Death of Fireman—Collision—Snow-plough Train—Negligence of Engine-driver—Workmen's Compensation for Injuries Act—Negligence at Common Law—System and Rules of Company—Findings of Jury—Misdirection—Inconclusiveness—New Trial.

Appeal by the defendants from the judgment of CLUTE, J., upon the findings of a jury, in favour of the plaintiff, the administratrix of the estate of Gilbert Jones, who was an engine-fireman in the defendants' service, and, when acting as such upon a

snow-plough train, was killed in a collision, to recover damages for his death. The plaintiff alleged negligence on the part of the defendants.

The questions left to the jury and their answers were as follows:—

1. Were the defendants guilty of negligence that caused the death of Gilbert Jones? A. Yes.

2. If so, what was the negligence? A. By not having a competent employee in charge of snow-plough train.

3. Did the defendants permit Weymark (signalman) to engage in the operation of the train on which Jones was when he came to his death, without first requiring such employee to pass an examination in train rules and undergo a satisfactory eye and ear test by a competent examiner? A. Yes.

4. Did the plaintiff suffer the damage complained of thereby? A. Yes.

5. Did the deceased come to his death by reason of the defendants operating the railway by a negligent system? A. Yes.

6. If so, what was the negligent system? A. By allowing Weymark to operate snow-plough train without having passed the eye and ear test.

7. Might the deceased Gilbert Jones have avoided the accident by the exercise of reasonable care? A. No.

And the jury assessed the damages at $6,000, for which sum judgment was given in favour of the plaintiff with costs.

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

I. F. Hellmuth, K.C., and Angus MacMurchy, K.C., for the defendants.

Sir George C. Gibbons, K.C., for the plaintiff.

The judgment of the Court was delivered by Meredith, J.A.:—There was, in my opinion, a mistrial of this case; it was not presented to the jury as it should have been; and, consequently, the jury's findings are inconclusive. No objection was made, on either side, in this respect; and so it may fairly be said, as it was in the plaintiff's behalf, that the verdict ought to be sustained, and held to be sufficient to support a judgment in the plaintiff's favour, if, in any way, reasonably it can. But I am unable to find any such way; or to understand how anything more can be done for the plaintiff than to direct a new trial, if she remains unwilling to accept the judgment which the defendants are willing she should have.

Liability under the Workmen's Compensation for Injuries enactments is admitted by the defendants; and was, I think, conclusively proved through the negligence of the engineer in charge of the locomotive engine which was propelling the train. Although signals had been regularly given by the signalman on the snow-plough until the first highway level crossing after passing Schaw station was passed; no signal of any character came from the snow-plough from that on until the accident; none for any other of the level highway crossings; none though the train ran through McRae station; and none for Guelph Junction station, though the train had passed both distant and near semaphores, and was in the station-yard, when the accident occurred.

Failing to get from time to time the signals which should have come from the snow-plough, what possible excuse can the engineer, or indeed the conductor, have for forging ahead over level crossings, past one stopping-place, and into the yard of the next, without making the least effort to learn the cause of such obvious and dangerous failure to give the necessary warnings of the approach of the train, a train not running on "schedule time," and a snow-plough train at that? The engineer must have known that something was wrong: and there should have been signals from time to time; even if he were blind, he must have known that. The difficulty which the findings occasion are primarily the result of insufficient questions; the jury were not asked whose negligence was the proximate cause of the disaster. No just judgment can be given, in the plaintiff's favour at all events, until the real cause of the accident has been found. If it were, as the defendants admit, the negligence of the engineer, the damages awarded by the jury must be reduced; if it were negligence on the part of the signalman, not arising from defective hearing or eyesight, a mere question would arise as to the measure of such damages—whether they are limited under the enactments I have mentioned or not—if the plaintiff would be entitled to any.

It may be that the crucial question was avoided in the fear that it might involve a finding under which the plaintiff would be limited to damages under the enactments; but, whether so or not, this case is another one illustrating the needs for conformity with the usual questions aimed at eliciting all the material facts, irrespective of what the legal result of the whole truth may be.

The jury were evidently under the impression that the employment of an unqualified signalman made the defendants

answerable for all the mishaps of the train arising in any way from want of proper signals from him; a view which, instead of being dispelled, may, I fear, have had some sort of encouragement from the trial Judge, his charge upon the more vital part of it being in these words: "As I understood the argument of the defence upon that point, it was suggested that, even although there might be (he did not admit that there was) a breach of that rule, yet it was not the breach of that rule which caused the injury which caused the death; that the death was not the natural result, was not the proximate cause. Well, that is for you to say. Should that train have been sent out at all, if you find it was not under competent management? Should they have directed or permitted Jones to go out with that train, if it was not properly manned? Did it devolve upon them, if they chose to disregard the order of the Board, to see that no accident should occur? Did they not, in fact, assume the risk of a safe conveyance of their servant, if they chose to disregard the order of the Board which directed what was to be done for that safety?"

That, I have no doubt, contains a good deal of misdirection, and misdirection which has a bearing upon the question of a new trial, even though misdirection not objected to.

The jury ought to have been plainly told that a mere breach of the rule did not give a right of action under it, that there must not only be a breach of the rule, but also injury flowing from it, to give a right of action such as this. They ought to have been plainly told, if they were told anything upon the subject, that, unless the accident was caused by the incapacity or negligence of the signalman, the plaintiff had no right of action under the rule.

The jury did not find that the accident was caused by any such incapacity or negligence; and so the verdict which is based upon the rule alone cannot stand. I cannot think that they meant to find that either the hearing or sight of the signalman was defective; but, if they did, there was no evidence upon which reasonable men could so find. They make no distinction between sight and hearing; the ear test is as prominent in their findings as the eye test; and yet it is very plain that the signalman was not deaf; if he had been, all who came in contact with him would have known it; and it is also obvious that defective hearing could not have had anything to do with the accident. But it was argued that the man may have been colour-blind; if he were, some attempt at least should have been made to prove it; it is

not likely that it could have existed in a railway servant without some one knowing something about it in some way—his wife, his relatives, and his fellow-workmen; the examination which he did pass is opposed to any such notion; so, too, as to colour-blindness being the cause of the accident: colour-blindness would not have prevented his seeing the colourless highway, the semaphores, switches, and buildings, all calling for a signal which was not given. Colour-blind or not, he could have seen the semaphores; and, no matter what he might have deemed the colour of their lamps, it was equally his duty to signal the approach to Guelph Junction station. Whatever, then, may have been the cause of silence at these points, and at the highways, it was not colour-blindness. So that in these two respects there was not only no reasonable evidence, but, in my opinion, not a scintilla of evidence.

If there had been any reasonable evidence that colour-blindness was the cause of the accident, and if the jury had found that it did cause it, the judgment in the plaintiff's favour—subject to any question as to excessive damages—ought to stand; whilst, if there were reasonable evidence that the accident was caused by some negligence of the signalman, apart from any want of qualification required by the rule, and if the jury had found that it was so caused, the question would arise whether the plaintiff's damages—if entitled to any—should be limited, under the enactment I have mentioned, or not; a question better not dealt with until it necessarily arises. But neither is the case.

Upon the whole evidence, it might reasonably be found that the accident was not caused by any want of qualification or negligence on the part of the signalman; and in that case the defendants' liability would be limited, because, as the defendants admit, the accident was caused, not by any breach of the rule, which it is admitted has the effect of an enactment, but by the negligence of the engineer, a fellow-workman in common employment with the man in respect of whose death this action is brought.

It is quite within the range of possibility, if not extremely probable, that the failure to signal after the last of the series of signals, duly given from Woodstock to the first highway after passing Schaw, was caused by some injury to, or displacement of, the signalling machinery, which the signalman had not power to correct, or indeed may possibly not have known of, on account of the noise of the snow-plough in which he was cooped up; or it may be by reason of some accident or illness suddenly incapaci-

tating the man; things which shew the gross want of care on the part of him who had control of the motive power of the train in the engine, as well as of the conductor of the train.

The plaintiff, having failed to establish a claim at common law, as it is called, might, in strictness, have her action dismissed if she refuse to accept—as she does—the offer of judgment under the Workmen's Compensation for Injuries Act; but that would be a harsh method of procedure; for the Court, as well as the parties, is to blame for the failure to elicit at the trial all the facts needful for a consideration of the plaintiff's claim in all its aspects.

I would, therefore, allow the appeal; and direct a new trial. The plaintiff should pay the costs of this appeal in any event: the other costs wasted may not unfairly be costs in the action.

JUNE 18TH, 1912.

*REX v. COHEN.

Criminal Law—Indictment—Change from Obtaining Money by False Pretences to Obtaining Credit by False Pretences—Criminal Code, secs. 405, 405A, 889, 890—*Power of Court to Amend—Grand Jury.*

Case stated by DENTON, Jun. J. of the County Court of the County of York, presiding at the General Sessions.

The case was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

T. C. Robinette, K.C., for the defendant.

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

MACLAREN, J.A.:—The defendant was indicted at the General Sessions, Toronto, for having knowingly and fraudulently by false pretences obtained from the Northern Crown Bank $5,000 with intent to defraud the said bank; and the grand jury returned a true bill against him.

During the trial, at the close of the case for the Crown, the defendant's counsel took the objection that the offence charged in the indictment had not been made out; that sec. 405 of the Criminal Code, under which the charge was laid, required that

*To be reported in the Ontario Law Reports.

the accused must have obtained something capable of being stolen; whereas, according to the evidence for the Crown, the most that had been obtained from the bank in this case was a line of credit for a joint stock company of which the defendant was a director, and credit was something that could not be stolen. Counsel relied upon a decision of the Quebec Court of Appeal, Regina v. Boyd, Q.R. 5 Q.B. 1.

The County Court Judge held that the objection was well taken; but that the indictment might be amended by striking out the words charging the defendant with obtaining the $5,000, and substituting a charge under sec. 405A of the Code, that "in incurring a debt or liability to the Northern Crown Bank he obtained credit from the said bank under false pretences;" and the indictment was so amended. This section, 405A, was added to the Code in 1907 by 7 & 8 Edw. VII. ch. 18, sec. 6, to supply the defect in the law pointed out in the Boyd case.

The trial proceeded on the amended indictment, and the jury found the defendant guilty. At the request of counsel for the defence, the Judge reserved for this Court the following question: "Had I the power to amend the indictment at the time and in the manner stated?"

The law as to the amendment of an indictment in a case like the present is found in sec. 889 of the Code, which provides: "If on the trial of any indictment there appears to be a variance between the evidence given and the charge in any count in the indictment . . . the court before which the case is tried may, if of opinion that the accused has not been misled or prejudiced in his defence by such variance, amend the indictment or any count in it or any . . . particular so as to make it comformable with the proof." Section 890(3) provides that "the propriety of making or refusing to make any such amendment shall be deemed a question for the court, and the decision of the court upon it may be reserved for the Court of Appeal, or may be brought before the Court of Appeal like any other question of law."

Section 889, above-quoted, was first enacted in the Criminal Code of 1892, as sec. 723. Although it has been in force for nearly 20 years and has been largely used, we were not referred at the argument to a single reported case in which it has been construed by any Court. The corresponding provision in the English criminal law is very different, so that we do not find any direct authority there. It is sec. 1 of 14 & 15 Vict. ch. 100, and enumerates a list of amendments that may be made, such

as variances in the names of places, persons, owners of property, etc., or in the name or description of any matter or thing named or described in the indictment. Our own law before 1892 was not unlike the English, and is to be found in R.S.C. 1886 ch. 174, sec. 238, where any variance in "names, dates, places or other circumstances, not material to the merits of the case, and by the misstatement whereof the person on trial cannot be prejudiced in his defence on such merits," may be amended by the Court. This was taken from the Criminal Procedure Act of 1869, which was practically an adaptation of the English statute of 1851.

There are two reported cases in which amendments under sec. 889 of the Code (then sec. 723) were discussed and upheld. The first is Regina v. Patterson (1895), 26 O.R. 650. . . .

The other is a Montreal case, The Queen v. Weir (No. 3), 3 Can. Crim. Cas. 262 (1899). . . .

Although secs. 405 and 405A both relate to false pretences, yet they differ. The former relates exclusively to obtaining money, chattels, etc., something "capable of being stolen;" the latter exclusively to the obtaining of credit; the punishment in the former case may be three years' imprisonment; in the latter, the maximum is one year; the former is an adaptation of sec. 86 of the English Larceny Act; the latter is derived from sec. 13 of the English Debtors Act, 1869 (32 & 33 Vict. ch. 62).

If the amendment had been simply the substitution of another article capable of being stolen, as, for instance, the substitution of promissory notes, or other valuable securities, for the "five thousand dollars," the transaction being the same as that disclosed in the preliminary examination, to use the language of Wurtele, J., it would seem to me that the amendment might have been upheld.

Another question of importance is, whether the defendant was not deprived of his right to have the grand jury pass upon his case. It may be argued that the grand jury have not found a true bill against him for the offence for which he was tried. The formula by which the grand jury give their assent to the bill reported by their foreman is, that they are content that the Court shall amend any matter of form in the indictment, altering no matter of substance without their privity. May it not be said to be a matter of substance, and not of form, to substitute what may be said to be a different offence, expressed in different terms, under a different section, and with a different punishment?

It was also argued that evidence was put in by the Crown that was admissible under the indictment before the amendment, but which would have been inadmissible under the amended indictment, and that the defendant was prejudiced thereby. Particulars of these were not given. If correct, it would, no doubt, be a serious matter. However, I do not wish to base my decision on this.

On the whole, I am of the opinion, for the foregoing reasons, that the trial Judge had not the power to amend the indictment at the time and in the manner stated, and that the question reserved by him should be answered in the negative.

MEREDITH and MAGEE, JJ.A., each gave reasons in writing for the same conclusion.

GARROW, J.A., and LENNOX, J., also concurred.

Conviction quashed.

JUNE 18TH, 1912.

*REX v. HONAN.

Criminal Law—Keeping Common Betting House—Jurisdiction of Magistrate—Criminal Code, secs. 773, 774—Amending Act, 8 & 9 Edw. VII. ch. 9—"Absolute" Jurisdiction, not Dependent on Consent—Evidence—Articles Obtained by Trespass—Admissibility.

Case stated by George Taylor Denison, one of the Police Magistrates for the City of Toronto, at the request of the defendants, who were convicted by him of keeping a common betting house.

The questions stated by the Police Magistrate were: (1) Was I right in refusing to allow the accused to elect? (2) Was I right in authorising George Kennedy, a Police Inspector, to act, in the absence of the Chief Constable and Deputy Chief Constable, they being in the city and attending to their ordinary duties? (3) Was I right in admitting in evidence certain articles seized?

The case was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

*To be reported in the Ontario Law Reports.

T. J. W. O'Connor, for the defendants.
J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

The judgment of the Court was delivered by MEREDITH, J.A.:—The purpose of the amendments to secs. 773 and 774 of the Criminal Code, made in the year 1909, was to make those sections applicable to such a case as this and others of the same character: to change the law in this respect from that which this Court had then recently, and a Quebec appellate Court had long before, held it to be, to that which in those cases it was contended for the Crown that it was: and the only question now is, whether Parliament has sufficiently expressed that purpose in the language used in making the amendments.

In the plainest words possible—it has made sec. 773 cover such a case as this; that is unquestionable; but it is urged that the change made in sec. 774 is not sufficient for that purpose. In that contention I am quite unable to agree.

Section 773 enumerates in detail the charges which a "magistrate" may hear and determine in a summary way; and plainly included in them is the charge in question in this case, which is described as keeping a disorderly house under sec. 228; and that section in plain terms comprises any common bawdy house, common gaming house, or common betting house, as in previous sections defined.

Then sec. 774 proceeds to make the jurisdiction of the magistrate, conferred upon him by sec. 773 "absolute" in the case of keeping a disorderly house; that is, in case of keeping a disorderly house, as set out in the preceding section conferring the jurisdiction, that jurisdiction is to be absolute; and the remodelling of sec. 774, in respect of inmates and frequenters, makes it quite plain also that, in framing these amendments, due regard was had to that which was, in these respects, pointed out in the case of Rex v. Lee Guey, 15 O.L.R. 235, to which I have already adverted.

So that, in my opinion, the charge in this case is clearly one covered by sec. 774, as well as 773, as amended in the year 1909, 8 & 9 Edw. VII. ch. 9, schedule; and, therefore, the "magistrate" had "absolute" jurisdiction.

Nor can I think that the magistrate erred in admitting the evidence objected to; the question is not, by what means was the evidence procured? but is, whether the things proved were evidence, and it is not contended that they were not; all that is urged is, that the evidence ought to have been rejected because it was obtained by means of a trespass—as it is asserted—upon

the property of the accused by the police officers engaged in this prosecution. The criminal who wields the "jimmy" or the bludgeon, or uses any other criminally unlawful means or methods, has no right to insist upon being met by the law only when in kid gloves or satin slippers; it is still quite permissible to "set a thief to catch a thief;" see Rex v. White, 18 O.L.R. 640.

This disposes of the first and third questions adversely to the accused, and makes it unnecessary to consider the second; though I may add that, if magistrates will endeavour to give to the plain words of statutes their plain meaning, without letting that which may or may not suit their conveniences, or that which in their narrower environments may seem to be a better law, sway them, they will not find much difficulty in pursuing the right course.

Conviction affirmed.

JUNE 18TH, 1912.

STOKES v. GRIFFIN CURLED HAIR CO.

Master and Servant—Injury to Servant—Infant Employed in Factory—Dangerous Machine—Absence of Instruction and Warning—Employment of Competent Manager and Foreman—Question not Raised at Trial.

Appeal by the defendants from the judgment of SUTHERLAND, J., upon the findings of a jury, in favour of the plaintiff, an infant (suing by his next friend), in an action for damages for injuries sustained while working at a machine in the defendants' factory.

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

D. C. ROSS, for the defendants.

J. E. Jones, for the plaintiff.

GARROW, J.A.:—The action was brought by the plaintiff, an employee of the defendants, to recover damages caused to him by an injury to his hand while in such employment, in the operation of a machine called a "picker," in use in the defendants' factory, at the city of Toronto.

The case came on for trial before Sutherland, J., and a jury, when, upon the findings of the jury, there was judgment in favour of the plaintiff for $1,200.

The jury, in answer to questions, said, among other findings of no present importance, that the plaintiff was injured by reason of the negligence of the defendants, which consisted in not having been properly instructed and warned of the danger; and that there was no contributory negligence.

There was, in my opinion, reasonable evidence to warrant these conclusions. By consent, a view of the machine in action was had by the jury during the trial. There were thereby placed in a position, in which we are not, to consider the evidence and to see whether or not the machine was a dangerous one and liable to clog, as the plaintiff alleged.

The plaintiff had not been hired to operate the machine in question. From the beginning of his employment on the 17th July until the accident on the 5th September, he had only actually operated it occasionally for very short periods at a time, apparently as a sort of stop-gap. On the day of the accident, his evidence is, Mr. Collins, the foreman, came to him where he was engaged on other work and said, "You had better go on this machine while Harvey goes down and cleans the office." He had never seen the inside of the machine, and did not know that at the back, where the injury occurred, there were rapidly revolving spikes. And he says that he was never instructed in the use of the machine or warned of the danger of doing what he did. These spikes, it appears, could be separately distinguished only when the machine was at a standstill. When rapidly revolving, as it did when in use, their individuality was lost, and the whole resembled a solid revolving metal cylinder. It is, under the circumstances, a reasonable assumption that the machine was a dangerous machine to an operator ignorant of its construction; and that proper instructions as to its use and management were necessary for the reasonable safety of the plaintiff. The duty to intruct is really not denied. No objections to the charge of the learned Judge dealing with that portion of the subject were made. But the defendants, among other things, contended that the plaintiff had been properly instructed, relying apparently upon the evidence of the manager, Mr. Griffin. But even Mr. Griffin does not pretend that he gave any particular instructions about the use of the machine to the plaintiff. What he says is more by way of general instructions, that no man or boy would be allowed to feed the machine who did not have some acquaintance with it, and, speak-

ing of the plaintiff particularly, "he had his instructions for to not have anything to do with machinery until he became properly acquainted with it." The plaintiff had been ordered by the foreman to take charge of the machine while another boy, who had been in charge, was sent to clean the office. There is no pretence that Mr. Collins gave any instructions or had been directed by the defendants to do so. So that the only issue presented at the trial as to instruction was that between the plaintiff's evidence, on the one hand, and the evidence of Mr. Griffin, on the other. And the jury, quite properly I think, accepted the plaintiff's version.

Before us a new issue was presented by counsel, namely, that, as the defendants' operations are carried on by and through their manager and foreman, they cannot be liable for a failure to instruct, if these gentlemen were competent. And reference was made to the recent case of Young v. Hoffman, [1907] 2 K.B. 646, where most of the modern cases are discussed. At the trial in that case it was proposed by counsel for the defendant to raise the issue now for the first time raised in this Court, but the trial Judge refused. His refusal was reversed by the Court of Appeal, and a new trial directed. And it was declared to be the law that the duty of the master to instruct may be delegated to a proper and competent person occupying the position of superintendent or foreman, as had been held in the earlier case in the same volume of Cribb v. Kynoch Limited, at p. 548. What would have been the result in this case if the point now presented had been raised at the trial, we do not know; but that it was not intended to be raised is very clear, I think.

Upon the whole, I do not think that we should now interfere, which we could only do by granting the doubtful indulgence of a new trial. The plaintiff received a very severe injury, practically destroying his hand. And he has been awarded a very moderate sum indeed for such a serious injury. The case bears no resemblance, in my opinion, to the case of Smith v. Royal Canadian Yacht Club, ante 19, so much relied upon by the learned counsel for the defendants. The plaintiff there had been guilty of inexcusable negligence, not through ignorance, for he knew what he was about. Here the plaintiff, ignorant of the danger, was trying to unclog the machine in order to proceed with his employers' work. Of the danger of doing so while the machine was in motion he had never been warned, and was wholly ignorant, as all the circumstances shew.

I would dismiss the appeal with costs.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

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

Appeal dismissed.

JUNE 18TH, 1912.

FISHER AND SON LIMITED v. DOOLITTLE AND WILCOX LIMITED.

Trespass to Land—Possession—Sufficiency—Injunction—Damages — Fouling Stream — Nuisance—Filling up Stream — Apprehended Danger—Statute of Limitations—Damages—Costs.

Appeal by the defendants and cross-appeal by the plaintiffs from the judgment of BRITTON, J., 2 O.W.N. 259.

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

E. D. Armour, K.C., and T. C. Haslett, K.C., for the defendants.

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

GARROW, J.A.:—The plaintiffs own a paper mill at the town of Dundas, which has been established and in use for many years. The water used in the mill is derived from a stream flowing down through a ravine southerly across the tracks of the defendants the Grand Trunk Railway Company, the pond being to the north and the mill to the south of such tracks.

The defendants Doolittle and Wilcox Limited own land upon the table-land above the ravine, upon which they carried on quarrying operations. And, desiring a dumping ground for the surface and other débris accruing from such operations, obtained a lease from the defendants the Grand Trunk Railway Company of land which extends from the east bank of the pond upwards towards the table-land belonging to the other defendants, with the right to dump such débris upon it. And this débris, which consists largely of clay and sand, it is said by the plaintiffs, is falling or being carried down the declivity into the pond, affecting and fouling the water, and threatening the integrity of the pond itself, which, it is said, is being slowly filled up thereby.

The plaintiffs claim to be the owners of the east bank, either by paper title or by length of possession, and, in any event, that they are entitled to restrain the defendants from injuriously fouling or otherwise affecting the pond or its waters by means of such dumping.

The defendants deny the plaintiffs' title to the lands upon the east bank where the dumpings were made, and assert title therein in themselves, but do not deny the plaintiffs' title to the mill or to the pond.

Britton, J., was of the opinion that the plaintiffs had failed to prove a paper title to what he in his judgment calls the "gorge," which would, I suppose, include the east bank; but held, upon the evidence, that the plaintiffs were in possession when the lease before-mentioned was executed, and that such possession was sufficient to entitle the plaintiffs to maintain the action for the trespasses complained of; and was evidently of the opinion that the defendants had also failed to establish a paper title; otherwise it would have been necessary to determine the larger question which the plaintiffs raise, that their possession had ripened into a title under the Statute of Limitations.

The learned Judge also held that, so far, the plaintiffs had not suffered appreciable damage from the acts of the defendants, but that there was a well-founded apprehension of danger resulting from the dumps falling towards or into the stream, against which he awarded the plaintiffs the sum of $200 towards the erection of a wall to intercept such dumpings, or, in the alternative, a reference as to damages and an injunction restraining the defendants from trespassing on the lands of which the plaintiffs are in possession and from dumping or depositing any earth, rubbish, stones, or other material upon such lands.

There was thus no adjudication upon the question of title to the lands on the east of the pond, either on the part of the plaintiffs or of the defendants, further than the declaration that the plaintiffs are in possession.

The defendants appeal, and claim to have proved title to such lands in themselves, and also contend that, no damages having been established, they were entitled to have the action dismissed.

The plaintiffs cross-appeal, and contend that the evidence establishes a good paper title in them; and, failing a paper title, that they have proved a good title by possession; and they also claim a reference as to actual damages already sustained.

The title of the plaintiffs to the mill or to the land covered by the water in the dam, or to the use hitherto made of such water, is not in dispute.

While the action from one point of view is an action of trespass, involving the question of title to the east bank, that is not its main feature, which is a complaint of what in law would be wrongful, whether the defendants did or did not own the east bank, namely, the dumping there on a steep and rocky declivity of large quantities of material which it was probable would slide down or be washed down and thus reach and injure the plaintiffs' pond and his mill. If the land upon which this dumping was taking place was the plaintiffs', then it was trespass; but, if it was not, it was at least in the nature of a nuisance; so that, in either view, the plaintiffs were entitled to some, if not all, of the relief granted by the learned trial Judge.

These being the circumstances as they appear to me in the evidence, the case does not, in my opinion, call for an adjudication upon the question of title upon either side—a question, I may say, which has given us all much labour and anxiety in attempting to unravel the tangled mess created by years of careless and inaccurate conveyancing. The plaintiffs' relief may well, I think, stand upon that which is undisputed, namely, their right to the mill and to the pond, leaving all other questions of title to be hereafter adjusted between the parties, peaceably I hope, or by further litigation if they are foolish.

The evidence fully, in my opinion, justifies the injunction which was granted. I also think the plaintiffs were entitled to something more than mere nominal damages, which sum, to avoid the expense of a reference, I would allow at the sum of $100. And this should take the place of the $200 allowed by Britton, J., towards a protecting wall. And the present recovery should be without prejudice to subsequent suits for damages subsequently arising by reason of the acts now complained of.

The plaintiffs should have their costs of the action, but the parties may well be left to bear their own costs of the appeal to this Court, under the circumstances.

MEREDITH and MAGEE, JJ.A., agreed in the result, for reasons stated by each in writing.

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

Judgment below varied.

JUNE 18TH, 1912.

*RE FRASER.
FRASER v. ROBERTSON.
McCORMICK v. FRASER.

Lunatic—Inquiry under Lunacy Act, sec. 7—Finding by Trial Judge—Reversal by Divisional Court—Fresh Evidence Received on Appeal—Powers of Court—Retrial by Court—Judgment as of First Instance—Con. Rule 498—Examination of Alleged Lunatic—Declaration of Incapacity to Manage Affairs—Unsoundness of Mind—Further Appeal to Court of Appeal—New Trial Ordered because of Erroneous Course Taken by Divisional Court.

Appeal by Michael Fraser from the order of a Divisional Court, 24 O.L.R. 222, 2 O.W.N. 1321, reversing the judgment of Britton, J., upon an issue as to whether the appellant was of unsound mind, and finding, upon new evidence, that he was of unsound mind, and incapable of managing himself or his affairs.

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

G. H. Watson, K.C., J. King, K.C., and F. W. Grant, for the appellant.

A. E. H. Creswicke, K.C., and A. McLean Macdonell, K.C., for Catherine McCormick, the respondent.

MOSS, C.J.O.:— . . . The Divisional Court did not dispose of the appeal upon the record as it came before it from the trial Court. While the argument was in progress, it, apparently of its own motion, without any application on the part of the then appellant or any notice of intention on her behalf to make an application, and against objection on behalf of Fraser, directed that the evidence of further witnesses be taken before it. Under this direction, eleven witnesses testified before the Court, all but one of whom had not testified before the trial Judge. The Court also appointed one of these witnesses, a medical practitioner, to make a special personal examination and inquiry into the medical condition and capacity of Michael Fraser and report his conclusions. In addition, the Judges constituting the Court made a special visit to Fraser's home, and themselves questioned him, the interview lasting, it is said, about two hours.

*To be reported in the Ontario Law Reports.

Upon the record thus procured, more than upon the original record, the argument was resumed and concluded. So that, as stated by Middleton, J., "Originally an appeal, the hearing was reopened, and the matter fell to be dealt with by us upon the original evidence and the new evidence, and upon this we are called upon to pronounce, not as upon an appeal, but as in the first instance—and if, in the result, we differ from the learned trial Judge, we are not reviewing him but are arriving at a different conclusion upon widely different evidence:" 24 O.L.R. 266.

It is quite apparent from the opinions of the learned Judges that, on finally disposing of the case, the Court proceeded almost entirely upon the material which was not part of the record when the appeal was taken from the decision of the learned trial Judge. . . .

The action of the Divisional Court is sought to be upheld, first, upon the ground that under the Lunacy Act, 9 Edw. VII. ch. 37, and the Con. Rules with respect to appeals, there was jurisdiction, and secondly, that, having regard to the nature of the inquiry and to the inherent as well as statutory jurisdiction of the Court over the persons and estates of lunatics or persons of unsound mind incapable of managing themselves or their affairs, it is not only within the powers of the Court, but it is its imperative duty, to adopt methods of investigation and prescribe rules of procedure which, in a case of ordinary litigation between subjects, could not and would not be permitted. With great deference, I am unable to subscribe to either of these propositions.

It is, of course, beyond dispute that the Court, either as the inheritor or statutory delegate of the powers, jurisdiction, and duty of the King as parens patriæ, or as the instrument of the Legislature for the care and protection of the persons and estates of lunatics or persons of unsound mind as defined by the Lunacy Act, possesses most extensive powers, jurisdiction, and authority in regard to such matters.

But the exercise of these powers or the right to exercise them is based, not upon the allegation of any one, not even of the Crown or of the Attorney-General as representing the Crown, that a person is a lunatic or of unsound mind and incapable of managing himself or his affairs, but upon a finding and adjudication, after due inquiry, that such is the case. The inquiry into that question is to be conducted in the same manner and according to the same rules of law and procedure as any other trial where a trial is to take place. . . .

[Reference to the provisions of secs. 3, 6, and 7 of the Lunacy Act, 9 Edw. VII. ch. 37.]

It is plain that the statute confers upon the Court no power of dealing with an issue, either at the trial or upon an appeal, beyond that which it possesses in the case of an ordinary action.

Nor is there any ground for the contention that special power or authority outside the statute is vested in the Court so as to enable it to conduct the trial of an issue or appeal from the order made otherwise than according to the rules of law, precedure, and practice governing trials of ordinary actions. . . . .

In this case, the test must be, whether what has been done is justified by the law and rules of practice and procedure applicable to appeals from a judgment entered at or after the trial of an action. If so, then the question would be, whether, upon the record as now before this Court, the finding and adjudication and the declaration of unsoundness of mind is sustainable upon the whole case. If, on the other hand, what has been done, or any substantial part of it, was contrary to the law and rules of practice and procedure applicable to such appeals, and therefore beyond the powers and jurisdiction of the Court, all such proceedings are coram non judice and not binding upon Fraser.

The power of appellate tribunals to direct the reception of further evidence is, it is scarcely necessary to say, purely statutory and only exercisable to the extent conferred either expressly or by fair implication.

Here the authority of the Divisional Court is derived from Con. Rule 498, which has the force of a statute. . . .

Obviously it was not the intention to throw the case in appeal open to the reception of further evidence, unless upon special grounds shewn for obtaining the special leave of the Court. . . .

In doing what was done in this case, the Divisional Court has gone much beyond anything that has ever been done by any appellate tribunal in this Province. . . .

In dealing with the reception of further evidence bearing on matters which had occurred before the judgment, order, or decision upon the merits at the trial, and which might have been produced at the trial, the appellate tribunals have always exercised great caution, for reasons which are explained in some of the cases and are sufficiently apparent. The manifest danger in most cases of throwing open the whole matter after it had been investigated at a trial, and the opinion of the trial Judge and his reasons for it have become known, has been very generally recognised.

In no case has the direction for reception of further evidence been made to extend to what is in substance a retrial of the whole case, where, as appears from the opinions of the Judges, the evidence adduced at the trial formed the least important factor, the appellate tribunal taking the place of the trial Judge; and, as Middleton, J., says, pronouncing not as upon an appeal but as in the first instance.

For this course I am unable to find any warrant in the law, statutory or otherwise. In my opinion, the course which the Divisional Court, if not satisfied upon the argument of the appeal that the case had been so fully developed as to enable a proper decision to be given, should have adopted, was to direct a new trial. That would have sent the case to the proper tribunal designated alike by the Judicature Act and the Lunacy Act for the trial of the issue directed. And it does not appear to me that there exists any power or authority in an appellate tribunal virtually to assume the functions of a trial Judge and enter upon a trial at which, as Middleton, J., says, the evidence adduced was widely different from that heard by the trial Judge.

Nor do I think that there is any warrant for the examination of Fraser by an appellate tribunal. That appears to be something that is done by the trial Judge at or before the conclusion of the trial before him. Section 7 (4) is explicit upon the subject, and there is nowhere any expansion of the right or duty enabling the appellate tribunal to substitute itself for the trial Judge in the conduct of such an examination. The judgment of the Judicial Committee in Kessowji Issur v. Great Indian Peninsular R. W. Co., 96 L.T.R. 859, though dealing with a differently expressed statute, bears upon both these questions, and supports, I think, the views here expressed.

If these conclusions be correct, it follows that much of the record now before this Court is not properly before it. The question then is, whether this Court should deal with the case upon the record as it was when the appeal came before the Divisional Court.

After giving the case the best consideration in my power, I think we should not do so, but that we should do what the Divisional Court might have done under the circumstances, and direct a new trial.

I greatly regret that this result has the effect of putting aside that which was done by the Divisional Court with an evident desire fully to elicit facts and circumstances that may prove very material and important in arriving at a just conclusion upon the issue directed.

But, in the view I hold with regard to the powers and authority of the Court, I am unable to perceive any alternative.

I would set aside the order of the Divisional Court and direct a new trial; the costs of the former trial and of the proceedings before the Divisional Court and of this appeal to be disposed of by the Judge presiding at the new trial.

GARROW, J.A., agreed in the result, for reasons stated in writing.

MACLAREN and MAGEE, JJ.A., also concurred.

MEREDITH, J.A., dissented, for reasons stated in writing.

New trial ordered; MEREDITH, J.A., *dissenting.*

HIGH COURT OF JUSTICE.

MIDDLETON, J. JUNE 14TH, 1912.

CITY OF TORONTO v. WHEELER.

Municipal Corporations—"Location" of Garages on City Streets—2 Geo. V. ch. 40, sec. 10—By-law—Permit for Erection of Garage before Statute—Vested Rights—Construction of Statutes—Injunction.

Motion by the plaintiffs, the Corporation of the City of Toronto, for an injunction restraining the erection by the defendant of a building intended to be erected and used as a garage for hire or gain.

By consent of counsel, the motion was turned into a motion for judgment in the action.

H. Howitt, for the plaintiffs.

W. C. Chisholm, K.C., for the defendant.

MIDDLETON, J.:—By sec. 10 of the Municipal Act, 1912, 2 Geo. V. ch. 40, sec. 541a of the Municipal Act, 1903, as amended by 4 Edw. VII. ch. 22, sec. 19, was further amended by conferring upon cities the power "to prohibit, regulate, and control the location on certain streets, to be named in the by-law of . . garages to be used for hire or gain." This statute was assented to on the 16th April, 1912.

A by-law in the terms of the statute was passed on the 13th May. Prior to the coming in force of the statute, the defendant, desiring to erect a garage upon one of the streets subsequently included in the by-law, entered into treaty with the owner of the lands in question, and, contemporaneously, plans of his proposed building were prepared and submitted to the City Architect for his approval, under the requirements of the building by-law. On the 17th April, the defendant received a building permit, authorising the construction of the building in accordance with the plans and specifications submitted. He thereupon completed his purchase of the land and proceeded to make contracts for the erection of the buildings, and at the present time has the excavation well under way.

The sole question is, whether the municipality can at this stage interfere with what was sanctioned by the permit issued on the 17th April.

With reference to legislation of this kind, it is, I think, a sound principle that the Legislature could not have contemplated an interference with vested rights, unless the language used clearly required some other construction to be given to the enactment.

The language here used is by no means free from difficulty and ambiguity. What is prohibited is not, as in sub-sec. (b), the "location, erection, and use of buildings," for the objectionable purpose, but the "location" only; and, I think, it may fairly be said that what had been done previous to the enactment of the by-law in question constituted a complete location of the garage. The context indicates that "location" is used in some sense differing from "erection and use."

It would be manifestly most unfair so to construe the statute as to leave the defendant in the position in which he would find himself if, on the faith of the municipal assent indicated by the building-permit, he had purchased the lands and entered into contracts for the erection of his building, and was then enjoined from the completion of the work already entered into upon the ground.

For this reason, I think the action fails, and must be dismissed with costs.

MIDDLETON. J. JUNE 14TH, 1912.

CITY OF TORONTO v. FOSS.

Municipal Corporations—Prevention of Use of Building as Store or Manufactory—Municipal Act, 1903, *sec.* 541*a*—4 *Edw. VII. ch.* 22, *sec.* 19—*By-law—Ladies' Tailoring Business—"Store"—"Manufactory"—Injunction—Stay of Operation—Costs.*

Motion by the plaintiffs, the Corporation of the City of Toronto, for an injunction restraining the use by the defendant of certain premises upon Avenue road, Toronto, as a ladies' tailoring establishment.

By consent of counsel, the motion was turned into a motion for judgment.

C. M. Colquhoun, for the plaintiffs.
W. C. Chisholm, K.C., for the defendant.

MIDDLETON, J.:—Section 541a of the Municipal Act, as amended by 4 Edw. VII. ch. 22, sec. 19, empowers the plaintiffs "to prevent, regulate, and control the location, erection, and use of buildings for laundries, butcher's shops, stores, and manufactories."

A by-law was passed on the 4th January, 1905, prohibiting the location of stores and manufactories upon Avenue road.

The sole question is, whether the defendant is using the house in question as a store or manufactory, within the meaning of this by-law.

In January last, the defendant rented the premises in question, which theretofore had been constructed for and used as a residence. He therein carries on a ladies' tailoring business, in the course of which he purchases suit lengths of cloth, sells them if approved by customers, and makes them into suits. If the goods produced do not meet the taste of the customers, he purchases goods from retail stores and makes these up. He also makes up goods brought in to him by his customers.

The building has not been structurally altered, and is used by the defendant as his residence, as well as for the purposes of his business. Those employed by him to assist him in his business use a room in the building as a sewing-room.

I do not think that this use of the building constitutes it a manufactory, within the meaning of the statute. It is true that

the word "manufactory" or "factory" has a dictionary meaning wide enough to cover the case; but I think that the word, as used by the Legislature, contemplates operations on a larger scale than this, and that the use of a room in a dwelling-house by three or four persons as a sewing-room falls short of what is required.

I am, however, of opinion that what is done does constitute the premises a "store," within the meaning of the statute.

Counsel agreed, upon the argument, that the word "store" was here used as equivalent to the word "shop." It is a place where goods and merchandise are bought and sold; and, when the object of the statute is borne in mind, I think this is the thing which is intended to be prohibited. Slightly modified meanings are given to the word in different contexts. The cases may be found collected in Words and Phrases Judicially Defined, vol. 7, p. 6672. I do not see that any good purpose would be served by reviewing and attempting to classify cases here.

It is said that the plaintiffs have not enforced the by-law in similar cases. I do not think that this really affects the matter; but the circumstances, I think, justify my directing that the injunction shall not become operative for a period of six months, so as to enable the defendant to make other arrangements.

Judgment will, therefore, be for the injunction sought, with the stay indicated. I do not think it is a case in which costs should be awarded.

TEETZEL, J. JUNE 14TH, 1912.

BINKLEY v. STEWART CO.

Principal and Agent—Negligence of Agent—Neglect to Insure Property—Agreement.

Action for damages for the defendant's negligence in not effecting an insurance on the plaintiff's stock, in violation of an alleged undertaking or agreement by the defendant to effect such insurance.

H. D. Gamble, K.C., and F. L. Smiley, for the plaintiff.
R. McKay, K.C., and D. T. K. McEwen, for the defendants.

TEETZEL, J.:—On the 10th July, 1911, the plaintiff applied to the defendants, an incorporated company carrying on business as insurance agents at New Liskeard, for $1,000 in-

surance on his stock of goods in his store at Cochrane. The insurance was not effected, and the stock was destroyed on the 11th July.

Upon the evidence, I find the following additional facts: (1) that the defendants did not unconditionally agree to place or effect the insurance; (2) that the defendants agreed only to submit an application for such insurance; (3) that the defendants did submit such application, and in connection therewith were not guilty of any negligence; and (4) that it does not appear that the defendants had any authority from any insurance company to bind it by an interim receipt or otherwise in respect of property in Cochrane, unless approved by the company.

Upon these facts, the case is excluded from the application of such authorities as Baxter v. Jones (1903), 6 O.L.R. 360, and Rudd Paper Box Co. v. Rice (1911), 2 O.W.N. 1417, cited by Mr. Gamble.

The action must be dismissed with costs.

MIDDLETON, J. JUNE 15TH, 1912.

RE GWYNNE.

Will—Construction—Bequest of Sum of Money—"Free of Legacy Duty"—Foreign Charity—9 Edw. VII. ch. 12, sec. 6 (2)—"To be Carried out in Ontario"—Succession Duty—Right of Executors to Deduct from Amount of Legacy.

Application by the executors of the late Eliza Anne Gwynne for the determination of certain questions arising under her will.

D. T. Symons, K.C., for the executors.

T. P. Galt, K.C., for the British Union for the Abolition of Vivisection.

J. R. Cartwright, K.C., for the Treasurer of Ontario.

C. A. Moss, for the residuary legatee and certain specific legatees.

MIDDLETON, J.:—By the will in question the testatrix bequeathed "unto the Society called the British Union for the Abolition of Vivisection the sum of $75,000 free of legacy duty."

The British Union for the Abolition of Vivisection is an English organisation, having for its object "by means of active and systematic propaganda throughout the United Kingdom to secure the abolition of vivisection" and "to influence in favour of the object of the Union, candidates at elections, Parliamentary or municipal, and for county or parish councils, and to assist, if advisable, in the financial support of a direct Parliamentary representative."

This society is a charity, in the technical sense in which that term is used at law: In re Foveaux, Cross v. London Anti-Vivisection Society, [1895] 2 Ch. 501.

The first question is, whether the legacy is liable to succession duty. The statute 9 Edw. VII. ch. 12, sec. 6, sub-sec. 2, provides that "no duty shall be leviable on property devised or bequeathed for religious, charitable, or educational purposes, to be carried out in Ontario or by a corporation or person resident in Ontario."

In order that the legacy to this British corporation should be free from duty, it is essential that the charitable purpose should be one "to be carried out in Ontario;" that is, one which must, according to the terms of the devise, be carried out in Ontario; and it is not sufficient that the money might without breach of trust be expended within Ontario.

The reason for this exception is easily found when the history of the statute is borne in mind. By the preamble to the original Act, it is recited that "the Province expends very large sums annually for asylums for the insane and idiots and institutions for the blind and for deaf mutes, and towards the support of hospitals and other charities, and it is expedient to provide a fund for defraying part of this expenditure by a succession duty." It is, therefore, quite logical that funds themselves bequeathed for the purpose of charities within the Province should be exempt from this form of taxation.

The expression "to be carried out in Ontario" is very similar to the expression found in Con. Rule 162, permitting service of process out of Ontario, where the action is on a contract "which is to be performed in Ontario." This Rule has invariably been treated as applicable only where the contract expressly requires performance within Ontario.

The second question arises upon the expression used by the testatrix by which this legacy is to be "free of *legacy* duty." Does this shift the incidence of the duty from the legatee to the residuary estate?

It is argued that "legacy duty" is not equivalent to "succession duty;" and it is pointed out in support of this contention that in another clause of the will the testatrix has used the expression "succession duty." This clause reads: "By reason of my estate being liable to pay succession duty to the Province, I do not in this my will remember other charities."

There is in England a definite meaning attached to the expression "legacy duty;" but in Ontario there is only the one inheritance tax. The statute calls this "succession duty." It is a duty imposed upon all property devolving upon death; and it is a tax which has to be borne by the legatee unless the will contains some provision casting the burden upon the residuary estate.

When the testatrix, domiciled in Ontario and speaking with reference to a bequest of property within Ontario, directs that it shall be free from legacy duty, I think I must hold that the intention was to exonerate this property from all duty payable upon the legacy. In other words, the succession duty is the only legacy duty known to Ontario law.

For these reasons, I answer the questions submitted by finding that the legacy is subject to the payment of succession duty, and that the executors are not entitled to deduct the duty from the legacy.

The costs of all parties may be paid out of the estate; those of the executors as between solicitor and client.

RIDDELL, J. JUNE 17TH, 1912.

DANBROOK v. PARMER.

Vendor and Purchaser—Contract for Sale of Land—Repudiation—Rescission—Possession.

An action by the executors of John Whyte, deceased, for rescission of an agreement for the sale of land by the deceased to the defendant, and for possession of the land, and for other relief.

P. McDonald, for the plaintiff.
R. N. Ball, for the defendant.

RIDDELL, J.:—The action is by the executors of the late John Whyte. Whyte and the defendant entered into an agree-

ment on the 15th November, 1909, for the purchase by the defendant of 25 acres of land "for $650, $50 to be paid down, interest 5 per cent. per annum. . . . Mr. E. D. Parmer of the second part agrees to leave the second growth maple standing, this timber contains a ridge through the swamp until $100 is paid. Mr. John Whyte of the first part agrees to give the deed of the land one year from the present date." The defendant did not pay the $50 cash agreed upon, but gave a note at one year for $52.50, in lieu of the cash; he went into possession and tilled the land, removed timber, contrary to the agreement, and took away part of the fences, etc. Whyte died in August, 1911; and the executors, finding the note among the assets, demanded payment. The defendant refused to pay either the note or the remainder of the purchase-price, and insisted that the agreement was, that Whyte was to give him a deed upon the payment of the $50 and take a mortgage for the remainder of the purchase-money at 5 per cent.—the defendant not to cut the timber on the ridge till he had paid $100, but to have the right so to do thereafter. The provision as to leaving this timber standing until $100 should be paid certainly indicates that something of the kind was or might have been in contemplation; and the document cannot be interpreted in the sense contended for.

The conduct of the defendant amounts to a repudiation of the agreement as it stands: the plaintiffs accept this repudiation, and expressly waive any right they may have to damages of any kind. They are, therefore, entitled to an order rescinding the agreement and for possession of the land.

The same conclusion is to be arrived at by another route. The defendant insists that his understanding of the agreement was as he says; the plaintiffs may admit that, but insist that the document sets out their testator's understanding of the agreement. The parties were, then, not ad idem; and the document should be cancelled and the defendant ordered to give up possession.

The plaintiffs will have their costs.

DIVISIONAL COURT. JUNE 17TH, 1912.

*HUNTER v. RICHARDS.

Water and Watercourses—Mill-owners—Pollution of Stream—Prescription—Lost Grant—Payments—Acknowledgment—Interruption—Nuisance—R.S.O. 1897 ch. 133, *sec.* 35—*Easement—Public Policy—Violation of Statute—R.S.C.* 1906 *ch.* 115, *sec.* 19—*Damages—Injunction.*

Appeal by the defendants from the judgment of LATCHFORD, J., 2 O.W.N. 855.

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

W. N. Tilley, for the defendants.

P. White, K.C., for the plaintiff.

CLUTE, J.:—The plaintiff is the owner of lot 10 in the 1st concession of Grattan, through which flows Constant creek, and has had for a period of years a dam and water power on the said creek where the same crosses his said lot, from which he derives power to operate a chopping-mill. The defendants own lot 9 in the 2nd concession of Grattan, through which also flows Constant creek, where the same crosses their said lot, and thereby they operate a saw-mill on the said lot. The lands and mill of the defendants are higher up on the creek than the lands and mill of the plaintiff. The plaintiff claims to have the stream flow to and through his lands without obstruction or hindrance and without the same being polluted. He charges that the defendants, at various times during the years 1905 to 1909 inclusive, polluted the stream by throwing into the same saw-dust and other mill refuse, thereby causing damage to his mill-pond and water power, preventing his running his mill, and causing damage to his lands; that the matters complained of are contrary to the provisions of R.S.O. 1897 ch. 142; and that the defendants by their dam penned back the waters of the creek, and prevented the free and uninterrupted flow thereof to the plaintiff's mill, whereby he was at various times unable to operate the same. The plaintiff claims damages and an injunction restraining the defendants from polluting this stream and penning back the waters thereof, and asks for a declaration of the plaintiff's rights to the waters of the said stream. . . .

The trial Judge found in favour of the plaintiff for the recovery of $200 damages and costs, and granted an injunction

*To be reported in the Ontario Law Reports.

restraining the defendants from discharging refuse into the creek to the injury of the plaintiff; the order to be suspended for four months to enable the defendants so to alter their mill that no additional damage may be done. . . .

The grant from the Crown to Duncan Fergusson, the defendants' predecessor in title of lots 7, 8, and 9 in the 2nd concession of Grattan, is dated the 8th June, 1859, and contains no special grant in respect of the water power or the building of the mill, and expressly reserves to the Crown "the free use, passage, and enjoyment of, in, over, and upon all navigable waters . . . . . .

Since the argument, the report of Wyatt v. Attorney-General, [1911] A.C. 489, has come to hand. . . . The effect of this decision upon the present case is, I think, to limit the plaintiff's rights to the terms of the patent, which cannot be enlarged by the correspondence relating to the grant. . . .

The right by prescription claimed in this case under the statute 10 Edw. VII. ch. 34, sec. 35 (R.S.O. 1897 ch. 133, sec. 35) is inchoate till action brought, and the user must be continuous and of right. "The periods mentioned in the Act are periods next before some action wherein the claim or matter to which such period relates is brought into question. Consequently, although the Act apparently renders the right indefeasible after twenty years' user, the combined operation of these two provisions renders it necessary for a person seeking to establish a prescriptive claim under the statute, to prove uninterrupted enjoyment for a period of twenty years immediately previous to and terminating in some action or suit in which the right is called into question: "Halsbury's Laws of England, vol. 11., p. 272, sec. 542, where the authorities are collected; Hyman v. Vandenbergh, [1908] 1 Ch. 167 (C.A.); Parker v. Mitchell (1840), 11 A. & E. 788; Wright v. Williams (1836), 1 M. & W. 77; Richards v. Fry (1838), 7 A. & E. 698; Ward v. Robins (1846), 15 M. & W. 237, 242. "The period is not necessarily the period before the pending action; it may be the period before any action in which the right was brought into question:" Cooper v. Hubbuck (1862), 12 C.B.N.S. 456.

There is no doubt that the defendants and their predecessors in title have used their saw-mill since it was erected in 1854. At that time it was a comparatively small mill. It does not appear clearly when the various improvements that now exist were made. . . . In 1896, the defendants paid to the plaintiff $100, and subsequent thereto down to the year

1903 paid the sum of $10. The plaintiff contends that these payments are a complete answer to the defendants' claim to a prescriptive right. It, therefore, becomes important to ascertain, with as much accuracy as possible, precisely what these payments were for. . . .

I think the plain meaning of what took place is, that, the plaintiff complaining of the injury to his property by reason of saw-dust and other refuse being permitted to pass into the stream, the defendants paid $100 in 1896 for the damages so occasioned, and paid $10 a year thereafter until 1903, when they erected their burner in order to destroy the refuse of the mill and prevent it from going into the stream. This, in my opinion, operated as an interruption to the prescriptive right. . . .

[Reference to Gardner v. Hodgson, [1903] A.C. 229.]

In the present case it seems to me idle to argue in favour of a lost grant. . . .

[Reference to Angus v. Dalton, 3 Q.B.D. 85, 4 Q.B.D. 162, 6 App. Cas. 740; Goddard's Law of Easements, 7th ed., pp. 172, 176-182, 287; Re Cockburn, 27 O.R. 450; Rochdale Canal Co. v. Radcliffe (1852), 18 Q.B. 287; Neaverson v. Peterborough Rural Council, [1902] 1 Ch. 557 (C.A.); Gale on Easements, 8th ed., pp. 127, 194, 195, 197, 199; Leconfield v. Lonsdale (1870), L.R. 5 C.P. 657, 726; Rangeley v. Midland R.W. Co., L.R. 3 Ch. 310; London and North Western R.W. Co. v. Evans, [1892] 2 Ch. 442; Mill v. Commissioners of the New Forest, 18 C.B. 60; Birmingham v. Ross, 38 Ch. D. 295.]

We have the grant itself, and no such right as is claimed is given. It is true that the defendants' predecessor in title was permitted to purchase the land upon which his mill was afterwards erected, upon the understanding that he should build a saw-mill, but this does not, in my opinion, raise the presumption of an implied grant to foul the stream. . . .

[Reference to Attorney-General v. Harrison (1866), 12 Gr. 466, 470, 473, 478; Rex v. Ward, 4 A. & E. 384.]

We have in clear evidence the original grant and the subsequent user. By the first the land alone is granted; as to the second there has, in my opinion, been an interruption of the alleged user, preventing any prescriptive right from arising. I think it may fairly be said, upon the evidence, that the user was at all times contentious, was objected to, and these objections were afterwards recognised as valid by the payments that were made and by making provision to burn the refuse. See Burrows v. Lang, [1901] 2 Ch. 510; Goddard, 7th ed., p. 258.

Mr. Tilley strongly urged that the payment of the $100 and the $10 was for injury done over and above the prescriptive title. It is, I think, a sufficient answer to that position to say that no such claim was made at the time of payment; no suggestion was made that a limited prescriptive right was claimed, or that the payment was for the excess.

There is a further difficulty in the plaintiff's way. The learned trial Judge has found that prior to 1896 the injury to the plaintiff was comparatively trifling. It was owing to the increased capacity of the mill that the injury was done. There could, therefore, be no right, prior to 1896, either by prescription or lost grant, to justify the user of the mill, as it has been used since that date. . . .

[Reference to Crossley & Sons v. Lightowler, L.R. 2 Ch. 478; Goldsmith v. Tunbridge Wells Improvement Commissioners, L.R. 1 Eq. 161; Attorney-General v. Acton Local Board, 22 Ch. D. 221.]

In considering a case of this kind, it should not be forgotten that it is a well-established rule of law that every land-owner has a natural right that the water of a natural stream which passes over his land shall be suffered to continue in its natural state; that is, not only that it shall be uninterrupted in its course, but also that it shall be suffered to continue in its naturally pure condition. The leading case for this principle is Wood v. Wood, 2 Ex. 748. See Goddard, pp. 105, 106. . . .

Here is the necessity to inquire whether R.S.C. 1906 ch. 115, sec. 19, creates a prohibition of the defendants fouling the stream in the present case. . . . This section is, I think, applicable to the present case. . . . There was, I think, sufficient evidence to bring this case within the operation of the statute. The principle that would apply is, that to foul a stream, being prohibited by Act of Parliament, is against public policy, and no prescriptive right could be obtained against the policy of the law; and the same principle applies to prevent the presumption of a lost grant arising in such a case. . . .

[Reference to Halsbury's Laws of England, vol. 11., sec. 533; Neaverson v. Peterborough Rural Council, [1902] 1 Ch. 557, 573; Rochdale Canal Co. v. Radcliffe, 18 Q.B. 287; Clayton v. Corby, 5 Q.B. 415; Goodman v. Saltash Corporation, 7 App. Cas. 633, 648.]

In my opinion, the judgment of the trial Judge is right and ought to be affirmed, and the appeal dismissed with costs.

MULOCK, C.J., concurred.

RIDDELL, J., dissented, for reasons stated in writing.

LATCHFORD, J. JUNE 18TH, 1912.

PHILLIPS v. CONGER LUMBER CO.

Timber—Rights of Lessee under Mining Lease from Crown—R.S.O. 1897 ch. 36, sec. 40—Trespass—Cutting Timber—Damages—Sale of Timber—Conversion by Purchaser—Measure of Damages—Amendment.

Action for damages for trespass and wrongful cutting of timber on the plaintiff's land.

H. H. Dewart, K.C., and J. P. Weeks, for the plaintiff.
F. R. Powell, K.C., for the defendant Watts.
D. L. McCarthy, K.C., for the defendants the Conger Lumber Company.

LATCHFORD, J.:—Under a demise from the Crown, dated the 14th October, 1904, and duly registered under the Land Titles Act, the plaintiff is the holder of a mining lease, for a term of ten years, of the south halves of lots 32 and 33 in the 7th concession of the township of Foley. The defendant Watts had, it appeared, previously applied to the Crown Lands Department to be located for the lots; but, before the lease to the plaintiff issued, released to the plaintiff his claim for damages to the surface rights; and, some time in 1904—the document bears no date—transferred to the plaintiff all his right, title, and interest in the south halves of the lots mentioned. Watts sought upon the trial to impeach the latter document, but I declined to allow him to do so. He had not given any intimation that he intended the attack, and his manner in giving his testimony led me to place little reliance on any of his unsupported statements.

Some prospecting was done upon the property, and a shaft sunk on an adjoining lot to the south. It was contended that the work done was not a sufficient compliance with the requirements of the Mining Act. This, however, is a matter between the Crown and the lessee; and in any case there was in this

regard, according to credible evidence, a sufficient compliance with the statute.

But little mining was done during the years 1909 and 1910. The property was unoccupied; the owner lived at a distance—Watts near by; settlement in the neighbourhood was sparse; hemlock and other trees now of value stood near the invisible line between the mining claim and the lands of Watts to the south of it: all circumstances ideally favourable for the trespass which, I find, the defendant Watts was tempted to commit. He yielded to the temptation without, I think, much resistance, and with full knowledge that he was sinning against the absent owner, who, as lessee of the mining rights, was entitled, under the statute in force when the lease was made (R.S.O. 1897 ch. 36, sec. 40), to such trees other than pine as were necessary for building, fencing, or fuel, or any other purpose necessary for the working of the mine or the clearing of the land. The legislation subsequently enacted did not affect the lessee's rights to the timber: Gordon v. Moose Mountain Mining Co. (1910), 22 O.L.R. 373.

It is, upon the evidence, difficult to determine the exact amount of the damages resulting from the trespass. . . .

As against Watts there will be judgment for $624.20 and costs.

His co-defendants had no knowledge of the trespass of 1909-10 when they purchased the timber which he had made in that season. But in April, 1911, before they had taken possession of the logs cut by Watts in 1910-11, they were notified of the trespass and that the plaintiff claimed the logs. They, nevertheless, took possession of the logs, and thus converted them to their own use. They are not liable for Watts's trespass, of which up to that time they were ignorant. But they then became liable for the conversion. The measure of damages against them is the value of what was cut in trespass as of the date of the conversion: see Greer v. Faulkner (1908), 40 S.C.R. 399.

This may, in the absence of other evidence, be taken to be determinable by the prices paid to Watts. . . .

There will be judgment against the Conger Lumber Company for $959 with costs.

Any sum realised against one of the parties is to be applied upon the judgment against the other.

All amendments may be made in the pleadings considered requisite or necessary to change the frame of the action as against the Conger Lumber Company from trespass to conversion.

RIDDELL, J., IN CHAMBERS. JUNE 19TH, 1912.

RE TURNER.

Executors—Application for Advice—R.S.O. 1897 *ch.* 129, *sec.* 39 (1)—*Con. Rule* 938—*Question whether Land or Proceeds Belongs to Estate of Testratrix—Practice—Substituted Service—Absentee.*

Application by the executors of Anne E. Turner for advice under R.S.O. 1897 ch. 129, sec. 39 (1).

E. R. Read, for the applicants.

RIDDELL, J.:—John Turner died in 1887, having devised lot 6 on the north side of Marlborough street, Brantford, subject to a mortgage in favour of a loan company, to his daughter; in 1889, the daughter married Horace Spence, and about a year later died in child-bed, intestate; her child died within a few months—whereby the husband became the owner of the lot. He verbally renounced, it is said, all claim to the lot, giving it up to Anne E. Turner, his mother-in-law, the widow of John Turner. She died in 1908, having been in receipt of the rent of the lot from the time of her grandchild's death in about 1891. In her will she left her real estate upon trust for sale, the proceeds to be in trust for her daughter Mrs. Chittenden for life, or, if she should survive her husband, absolutely; if she should predecease him, then her children were to have it in equal shares. It is said that these children are now of full age, and are the persons entitled to the estate. I assume, therefore, that Mrs. Chittenden died before her husband.

The assignees of the mortgagees under John E. Turner's mortgage has sold for $1,505. After paying the mortgage, there remained a balance of $679.09. This was claimed by the Brantford Trust Company Limited, as executors of Anne E. Turner, and paid to them under a bond of indemnity.

It appears that Spence, shortly after the death of his child, went away sailing, and has led the life of a sailor ever since—about four times a year communicating with his father, the last time from the West Indies.

The executors of Anne E. Turner now apply for advice under R.S.O. 1897 ch. 129, sec. 30 (1), and base the practice on Con. Rule 938 (g). They ask advice as to what they are to do with this sum of $679.09.

A few months ago, I again pointed out that the statute does not authorise the determination of questions of this kind on an application for advice: Re Rally (1911), 25 O.L.R. 112. What is, of course, desired is to determine whether Spence or the estate of Mrs. Turner is entitled to this sum; and that is not "any question respecting the management or administration of the property."

The motion, then, is refused.

Then I am asked for leave to serve Spence substitutionally by delivering a notice under Con. Rule 938 (a). That is equally out of the question. The Con. Rule was not intended to enable a determination of whether certain property belongs to an estate or not.

When trust companies take over the administration of an estate, they have the same obligations as other executors or administrators—their whole function is not to make or lose money for their shareholders; and they must take all the obligations, as well as the emoluments, of private executors. If they have in their hands money which rightfully belongs to Spence, that is a matter for them to adjust—and there is no short-cut provided by the Legislature. It is said that Spence's father is likely to hear from him before long; if so, one would think a reasonable course for those depositees of the money would be to see what position Spence takes in reference to it—it may be that he will release all right to the money or convey all right he may have to the company or the grandchildren of Anne E. Turner, and so get rid of any difficulty; or it may be that he will insist upon being paid the sum himself or that it be paid to his father. Then it will be for the company to decide what to do. I am not giving this as any advice, but throw it out as a suggestion of what ordinary business methods and practice would indicate should be done.

As things are now, the application for substitutional service is also refused.

As there was no opposition, there will be no costs: but the applicants are not to be allowed to charge the costs of this application against the estate.

RIDDELL, J., IN CHAMBERS. JUNE 19TH, 1912.

REX v. PALANGIO.

Immigration—Attempt to Land Prohibited Alien in Canada—Immigration Act, 1910, *sec.* 33(2), (7), (8)—*Misrepresentation of Citizenship—Offence—Conviction—Police Magistrate—Jurisdiction.*

Motion by the defendant to quash his conviction by the Police Magistrate at Cochrane for an offence against the Immigration Act.

J. M. Godfrey, for the defendant.
No one appeared to oppose the motion.

RIDDELL, J.:—Vincenzio Palangio appeared before the Police Magistrate at Cochrane, on a charge set out in an information by a travelling Immigration Inspector, for that the defendant did "knowingly and wilfully assist to land or attempt to land in Canada one Michele Malerbo, a prohibited immigrant."

The charge is based upon sec. 33(8) of the Immigration Act, 1910, 9 & 10 Edw. VII. ch. 27 (D.) The Act of 1911 (1 & 2 Geo. V. ch. 12) does not modify this sub-section, which reads: "Any transportation company or person knowingly and wilfully landing or assisting to land or attempting to land in Canada any prohibited immigrant or person whose entry into Canada has been forbidden by this Act shall be guilty of an offence . . ."

At the trial it was made to appear that G. Malerbo, an Italian in Cochrane, had a brother, Michele Malerbo, in Schenectady; G. Malerbo spoke to the defendant about him, and the defendant furnished false naturalization papers to bring Michele Malerbo in, charging $15 for them. The defendant did not send the papers to Michele Malerbo, but handed them to the man who was doing the writing (that is how I interpret the magistrate's "dowing the wrighting"). The defendant told G. Malerbo, also, that his brother would have to have lots of money and good clothes and look intelligent to get into Canada, and then it would be a chance whether he could get in or not; and G. Malerbo sent his brother $40 and a ticket.

At the conclusion of the case, the magistrate wrote the following memorandum upon the papers: "The Court ajudgas James Plango guilty of furnishing Agostino Ballarine natur-

allzation papers to one John Patta to be enclosed in a letter and sent to Schenectady, N.Y. State, to be used as Micheal Malerbo papers of citizen of citizanship, thairby evading the Imegration Agents and landing in this Country under false ducomants;'' and imposed a fine of $150 and $110.05 costs or three months' ''Imprisament.''

The defendant, who is said to have had two houses, two stores, and two banks, one at North Bay and one at Cochrane, richly deserves punishment — much more severe than that awarded. If his offence be such as the Police Magistrate could inquire into, and any proper amendment be made, I should not interfere.

It is said that sec. 33 (8) applies only to the prohibited classes mentioned in sec. 3 of the Act; but I do not think that it is so limited.

Section 33 (2) provides that ''every passenger or other person seeking to land in Canada shall answer truly all questions put to him by any officer when examined under the authority of this Act.'' And sub-sec. 7 provides that ''any person who enters Canada . . by . . . misrepresentation . . . shall be guilty of an offence under this Act . . . may be arrested . . . and if found not to be a Canadian citizen . . such entry shall in itself be sufficient cause for deportation. . .''

Anything which is an offence under the Act is forbidden by the Act—it is forbidden by the Act that any one should enter Canada by misrepresentation. The defendant and his co-conspirators intended Michele Malerbo to enter Canada by misrepresentation of his citizenship—and I do not think it any stretch of the meaning of the Act to hold that Michele Malerbo was a person whose entry into Canada was forbidden under the Act, within the meaning of sec. 33(8).

Then the defendant knowingly and wilfully furnished, in Cochrane, what the Police Magistrate calls ''papars'' which ''had fawling on the floore and got durty,'' when the letter was ''a wrighting'' to Michele Malerbo to be sent to him to be used as part of the misrepresentation which would effect his entry into Canada. This was, in my view, ''an attempting to land in Canada'' a ''person whose entry into Canada has been forbidden by this Act.''

The motion should be refused; as no one appeared contra, there will, of course, be no costs.

The Clerk in Chambers will send the papers to the County Crown Attorney and draw his attention to the conspiracy dis-

closed in the depositions, with a view to prosecution of the persons concerned. It is high time that the villainous practice of fraudulent immigration received a check, and that those who so brazenly attempt to circumvent the policy of the country should understand their true position.

RIDDELL, J., IN CHAMBERS. JUNE 19TH, 1912.

RE CORR.

Evidence—Foreign Commission—Inquiry as to Next of Kin of Deceased Intestate—Availability and Usefulness of Testimony Sought—Terms Imposed on Granting Commission—Security for Costs.

Appeal by certain claimants of the estate of Felix Corr, deceased, from an order of the Master in Ordinary refusing to direct the issue of a commission to take evidence in Ireland. See the judgment of MIDDLETON, J., ante 1177.

J. S. Fullerton, K.C., and G. S. Hodgson, for the appellants.
J. R. Cartwright, K.C., for the Attorney-General.

RIDDELL, J.:—This is another step in the case in which my brother Middleton gave a judgment, ante 1177.

The proceedings before the Master in Ordinary, which I have been compelled to read, deserve all the animadversions in that judgment; but they may be excused, if not justified, by the circumstance that at the first meeting (as the statement made to me goes) it was suggested by the Master and agreed to by counsel that they would most likely be able to ascertain the person entitled to the estate by having the meetings for and the taking of evidence very informal; and the matter was so carried on without objection by any party and in absolute good faith—all parties apparently believing that some evidence might be picked up that would give a clue to indicate, as between the two Felix Corrs, which was the rightful one. This course should not have been followed, even on consent: the Court is not a Court of inquiry, and the rights of other litigants should not be delayed by the time of the Master being taken by a proceeding not justified by the practice. If the Crown was desirous of an inquiry along the lines suggested, a commission might have issued.

After the judgment already referred to, an application was made to the Master for a commission to Ireland, and this was refused. . . .

The judgment of Middleton, J., ante 1177, was on an application for payment out of Court of part of the fund to pay the disbursements of a commission; and, while the learned Judge expressed a strong view as to the value, or want of value, of the evidence to be sought, the decision was based upon the viciousness of the principle involved. I need not say that I entirely agree with my brother Middleton in that regard. But this is quite a different application. The appellants recognise that the onus is upon them to prove their claim—and that, if they fail to prove their claim, they must be barred. It is no longer a friendly inquest, but a law-suit, they are in.

They are desirous of adducing evidence which they believe to be available—and, unless it is perfectly plain that the alleged evidence will not be available, or, if it be available, will be wholly useless, they should be allowed to procure the evidence, unless the rights of some other party would suffer. It is the Crown alone which can be affected by these proceedings. No doubt, the Province can manage to get along for a time without the use of this money—and the money itself is safe and bearing interest. Costs must be considered; and, in case a commission should issue, the appellants would be required to pay into Court a substantial sum—a sum sufficient to cover these costs in case they failed to prove their claim.

No considerable delay need be occasioned; there is no reason why the commission should not be executed during vacation.

From a careful perusal of the material, I am not certain that evidence may not be available which may assist the appellants. There does not seem to be such certainty of the time of the arrival of the deceased in Toronto, much less of his leaving Ireland, as to exclude the Felix Corr through whom a claim is made. Whether witnesses can identify the Toronto Felix Corr by any means with that Felix Corr, is not, to my mind, quite certain. Some minds would, no doubt, place little reliance upon an identification by means of a painting. . . .

I do not think that the appellants should be cut out of all opportunity to adduce all possible evidence to assist in making out a claim to this money.

If the appellants pay into Court the sum of $400 as security for any costs which may be awarded against them in respect of the commission or the application or order therefor, including

this appeal, the execution of the said commission, and the return thereof—and undertake to proceed with all due speed—the appeal will be allowed; costs of the motion and appeal to be disposed of by the Court after the Master's report.

RIDDELL, J., IN CHAMBERS. JUNE 19TH, 1912.

*POWELL-REES LIMITED v. ANGLO-CANADIAN MORTGAGE CO.

Judgment Debtor — Company — Existence of—Charter—Loan Corporations Act — Examination of Director—"Officer"—Con. Rule 902—Order for Examination Unnecessary—Practice—Order for Issue of Subpœna—Costs—Appeal.

Appeal by E. R. Reynolds from the order of the Master in Chambers, ante 1375, allowing the plaintiffs (judgment creditors of the defendant company) to examine the appellant, as an "officer" of the company, for discovery in aid of execution, under the provisions of Con. Rule 902. See also ante 844.

John MacGregor, for the appellant.

M. C. Cameron, for the plaintiffs.

RIDDELL, J. (after setting out the facts):—The main objection to this examination is, that the company is non-existent as a company, and the judgment is a nullity. It is to be noted that it is not the company which raises that objection, but Reynolds, who pretended to be its president when he was seeking money for it in England.

But there was a body corporate formed by the letters patent—none the less a body corporate because it was not to exercise the functions of a loan company until it was registered. A corporation has certain powers "necessarily and inseparably incident to every corporation;" and among them is the power "to sue and be sued, implead or be impleaded . . . by its corporate name:" Blackstone, vol. 1, p. 475; cf. Thames Conservators v. Ash (1829), 10 B. & C. 249, 8 L.J. O.S. Q.B. 226. Of course, the paramount power of the Legislature may intervene and direct all actions for or against a corporation to be brought in some other name—as, for example, in Marsh v. Actna Lodge, 27 Ill. 421—but there is nothing of the kind here.

*To be reported in the Ontario Law Reports.

The provision in the charter which apparently gives the power to sue and be sued by the corporate name only so long as the company is registered is not justified by the Act, and is wholly unnecessary—the power exists without any such provision. And, granted incorporation which is effective by the statute, there is no power to limit the effects of the same by a provision in the letters patent. It would be absurd, in my view, that, for example, the company could not, in its own name, sue a director or agent who had received a large sum of money on behalf of the company. There is nothing in this objection on principle. Nor does Simmons v. Liberal Opinion Limited, In re Dunn (1911), 27 Times L.R. 278, apply—there, there was no company, no corporation at all by that name: see per the Master of the Rolls (p. 279, col. 2), "a non-existing corporation."

The other point is as to the position of Reynolds.

Under Con. Rule 902, the officers of a company may be examined; and this includes those who have been such officers: Societé Générale du Commerce et de l'Industrie en France v. Johann Maria Farina & Co., [1904] 1 K.B. 794.

Under Con. Rule 903, "any clerk or employee or former clerk or employee of the judgment debtor" may be examined; but such an examination requires an order.

The word "officer" is ambiguous—the meaning may and often does depend upon the context. Perhaps the strongest argument in favour of the appeal is to be found in sec. 94 of the Loan Corporations Act, R.S.O. 1897 ch. 205, directing the *directors* to appoint *officers*.

But, for the purposes of Con. Rule 902, that "officer" includes "director" is beyond doubt. . .

[Reference to the Farina case, supra; Holmested & Langton's Judicature Act, p. 1138; Attorney-General v. North Metropolitan Tramways Co., [1892] 3 Ch. 70, 74; Chaddock v. British South Africa Co., [1896] 2 Q.B. 153.]

It is plain that Reynolds is a proper officer to examine under Con. Rule 902; and, had his objection been that no order was necessary for his examination, I think I should have given effect to such an objection. His objection was not to the practice, but to the right to examine him at all.

It is not beyond the powers of the Court to order a subpœna to issue for service on an officer for an examination under Con. Rule 902—however unnecessary such an order may be. The formal order of the Master in Chambers has not been drawn up.

The proper order to make is, that a subpœna (duces tecum, if desired) issue for the examination of Reynolds under Con. Rule 902.

There will be no costs of the unnecessary application before the Master. Reynolds will pay the costs of the appeal forthwith after taxation thereof.

KELLY, J. JUNE 19TH, 1912.

KARCH v. KARCH.

Husband and Wife—Alimony—Desertion—Cause of—Custody of Children—Quantum of Allowance for Alimony.

Action for alimony, tried before KELLY, J., without a jury, at Berlin. See ante 1032.

H. Guthrie, K.C., for the plaintiff.
W. E. S. Knowles, for the defendant.

KELLY, J.:—This action presents features not usually found in alimony actions.

The defendant left his home on the 20th November, 1911, and now refuses to live with the plaintiff. The only charge of any kind made by the plaintiff against him, apart from that of his deserting the home, is what she calls his stinginess, although she gives no evidence intended to shew specific instances of this, except a statement that the defendant found fault with her for having bought a coat at a price which he considered excessive.

Any troubles between this couple, the plaintiff says, arose almost entirely on money matters.

She alleges that the defendant at times told her he could not afford things; but she admits that this was not a serious matter. Her further evidence is to the effect that he had provided properly for his home, that he is not a spendthrift, that he did not frequent hotels, and was not addicted to other habits which might be objectionable.

The cause of the husband's leaving the home and now refusing to live with the plaintiff is to be found in her general conduct towards him. He is a machinist, working in his brother's shop, in Hespeler, close by his residence, and has been earning $50 a month. The family consists of two daughters, one eleven

and the other eight years of age. On the plaintiff's own admission, she has not for some years, except in the months of June, July, and August, gotten up in the morning in time to prepare breakfast for the defendant. There is evidence of other acts of hers which indicate that she was not as considerate as a wife should be of her husband's welfare. She justifies part, at least, of her conduct in this respect, by saying that it was with his approval and consent.

Any such approval and consent on his part was, no doubt, given for peace' sake, and because he was indulgently inclined.

He complains, and the plaintiff has not denied it, that she subjected him to continual nagging and scolding, that she was neglectful of his interests, and was extravagant in money matters.

He seems to have submitted to all this until November, 1911. On the 18th November, she was not at home when he returned from work, and had made no preparation for his supper. On the 20th November, when she was again about to leave home, he remonstrated with her about being away and not preparing his meals, and she told him to "fish for his supper." When he returned from work on that evening, she was not at home, and had not prepared his supper. He then left the house and remained away from Hespeler for about six weeks, when he returned and resumed work at his brother's shop; he was still working there at the time of the trial. After leaving the home, he continued to have the tradespeople call there and supply his wife and children with whatever provisions they needed, and he paid the accounts therefor. Since November, the plaintiff and the two children have continued to reside in his house. In the time of his absence she had the lock of the house door, of which the defendant had a key, removed, and a new lock put on, so that on the only occasion of any attempt on his part to return to the house—which was in March, 1912—he was unable to get in. Whatever may then have been his intention as to returning, he was most positive at the trial in his declaration of refusal to live with the plaintiff. The plaintiff has made no attempt at reconcilliation, nor has she communicated with him during the time of his absence; but there is no evidence of refusal on her part to live with him.

Without going further into details of the evidence, the conclusion I have come to is, that the husband is an industrious, thrifty man, not given to any bad habits; that, while living with the plaintiff, he properly provided for his home and family; and that, for peace' sake or through indulgence towards his wife,

he condoned what might be termed her neglect of him; and finally left because of her lack of interest in him and her nagging and scolding.

In the light of such authorities as Nelligan v. Nelligan, 26 O.R. 8, and Forster v. Forster, 1 O.W.N. 93, 419, though her conduct was not free from objection, the plaintiff has not so misconducted herself as to disentitle her to alimony, the defendant refusing to live with her.

In addition to alimony, the plaintiff asks the custody of the two children and an order for their maintenance by the defendant. To this I do not think she is entitled. The husband is a fit and proper person to have the custody of these children; and he is willing and able to care for them. In fact it was shewn that for years an important part of the personal care of the younger child fell to him. The house is his; and I think, in view of all the circumstances, that he should remain in it with the children, and there maintain and support them.

Though the plaintiff has not disentitled herself to alimony, I do not think that this is a case where great liberality should be displayed in making her an allowance.

In addition to his personal earnings of $50 per month, the defendant has investments which realise an income of about $300 per year, so that his annual income is about $900, and he owns the house. I allow the plaintiff alimony at the rate of $5 per week; the defendant to have the custody of the two children and to maintain and support them in his home; she will have the right to visit them weekly.

At the trial I urged the parties to make a further effort to bring their differences to an end, so that the home should not in any sense be broken up, and I intimated that I would withhold judgment for a time to see if they could affect a reconciliation. I have not heard that this has been accomplished. The case is an unfortunate one, happening as it does between people possessed of all the possibilities of making a comfortable home. The plaintiff's indifference to and lack of interest in her husband's welfare, and the nagging and scolding of which he complains, have contributed largely to the present condition of affairs.

I still entertain the hope that there may be a reconciliation; and I cannot better express what I think will aid much in accomplishing this than to repeat the words made use of in the judgment in Waring v. Waring, 2 Phill. Ecc. 132: "I recommend to her the duty of self-examination; and to consider whether her own behaviour may not remove the evil, and con-

sist better with her duty to her husband, her children, and herself."

The plaintiff is entitled to her costs of the action.

BRITTON, J. JUNE 14TH, 1912.

CANADIAN ELECTRIC AND WATER POWER CO. v. TOWN OF PERTH —BRITTON, J.— JUNE 14.

Contract—Construction — Water Supply—Municipal Corporation—Compliance with Contract—Acceptance—Counterclaim—Default—Damages.]—There were three actions between the same parties. The first was for the recovery of $3,000 and interest for the use of hydrants in supplying the defendants with water for the years 1905, 1906, and 1907; the second, for the same service in the years 1908, 1909, and 1910; and the third, for the same service for 1911. The actions were tried together. The defence to the three actions was, that the plaintiffs had failed to comply with the agreement set out in the schedule to 62 Vict. ch. 70 (O.), between one Charlebois and the defendants, the plaintiffs now standing in the place of Charlebois, by virtue of assignments ratified and confirmed by the Act. The learned Judge, after referring to the agreement and to the facts and the evidence, said that, in his opinion, the contract, as to the construction of the waterworks system, was reasonably complied with—the evidence was overwhelming that the defendants had accepted the work as a compliance with the contract as to buildings, pumps, engines, and all the plant and apparatus necessary to do the work required of the plaintiffs.—The defendants alleged that, whatever was the condition in prior years, it was such on the 9th May, 1905, that they had the right to complain and to deduct $25 for each day the plaintiffs were in default after the expiration of three days from the giving of notice under clause 25 of the agreement. The defendants counterclaimed for damages generally, and for the per diem liquidated damages as above. As to this, the learned Judge found that the clauses in the contract as to maintaining the water system created conditions subsequent to the acceptance by the defendants of the construction and installation work, and that the covenant of the plaintiffs was a continuing one, protecting the defendants from payment of hydrant rents, if the plaintiffs made default under clause 25, according to the proper construc-

tion of that clause. He also found that the plaintiffs were not, on the 9th May, 1905, in default in maintaining the system so as to give reasonably the best results for fire purposes; and that there was on the part of the plaintiffs a substantial compliance with the contract. Judgments for the plaintiffs in all three actions, with costs, and counterclaims dismissed with costs. G. H. Watson, K.C., and J. A. Stewart for the plaintiffs. G. F. Henderson, K.C., and J. A. Hutcheson, K.C., for the defendants.

REX v. HARRAN—KELLY, J., IN CHAMBERS—JUNE 17.

Appeal—Leave to Appeal from Order Refusing to Quash Conviction.]—Motion by the defendant for leave to appeal from the order of MIDDLETON, J., ante 1107. Motion refused with costs. G. P. Deacon, for the defendant. D. L. McCarthy, K.C., for the prosecutor.

O'HEARN v. RICHARDSON—DIVISIONAL COURT—JUNE 17.

Vendor and Purchaser—Contract for Sale of Land—Default by Purchaser—Time made of Essence—Termination of Contract—Absence of Fraud or Waiver.]—Appeal by the plaintiff from the judgment of SUTHERLAND, J., ante 945. The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and KELLY, JJ. The Court, being of opinion that the case was governed by Labelle v. O'Connor, 15 O.L.R. 528, dismissed the appeal with costs; giving the plaintiff leave to appeal to the Court of Appeal. J. E. Day, for the plaintiff. J. W. Mitchell, for the defendant.

JEWER v. THOMPSON—DIVISIONAL COURT—JUNE 18.

Vendor and Purchaser—Contract for Sale of Land—Objections to Title—Right of Way—Admission by Vendor of Validity of Objections—Termination of Contract—Registration—Discharge.]—Appeal by the defendant from the judgment of BRITTON, J., ante 1122. The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and KELLY, JJ. The Court dismissed the appeal with costs. J. J. Maclennan, for the defendant. F. E. Hodgins, K.C., for the plaintiffs.

KEENAN WOODWARE CO. v. FOSTER—MASTER IN CHAMBERS—JUNE 19.

Venue—Motion to Change—County Court Action—Witnesses—Convenience.]—Motion by the defendant to transfer the action from the County Court of the County of Grey to the District Court of the District of Sault Ste. Marie. The action was brought in respect of a sale of poplar bolts by the defendant to the plaintiffs; and the main question was, whether there was a compliance by the defendant with the terms of the written agreement as to the place of delivery. The defendant swore to seven witnesses in the district of Sault Ste. Marie, and the plaintiffs to twelve in the county of Grey. The Master said that it would be a matter of surprise if either party called half the number of witnesses named: Sturgeon v. Port Burwell Fish Co., 7 O.W.R. 359, 360, 380. An action reasonably brought in one county cannot be transferred to another, without proof of at least a considerable, if not an overwhelming, preponderance of convenience. It could not be said this had been shewn here. Motion dismissed; any extra costs of a trial at Owen Sound to be to the defendant in any event. Costs of the motion to be costs in the cause. H. S. White, for the defendant. Featherston Aylesworth, for the plaintiffs.

CORRECTION.

In Robinson v. Grand Trunk R.W. Co., ante 1345, the junior counsel for the defendants was *W. E. Foster,* not *D'Arcy Tate,* K.C.