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COURT OF APPEAL.

NOVEMBER 15TH, 1909.

PRINGLE v. HUTSON.

Mortgage—Assignment—Re-assignment — Covenant for Payment —Right of Action of Assignee—Mortgagee Joined as Co-plaintiff—Trustee and Cestuis que Trust—Proviso for Re-payment —Rate of Interest post Diem—Credits—Costs.

Appeal by the defendant from the judgment of MEREDITH, C.J.C.P., in favour of the plaintiff in an action upon the covenant for payment contained in a mortgage made by the defendant to the plaintiff Smith.

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

A. J. Russell Snow, K.C., for the defendant.

F. Arnoldi, K.C., for the plaintiffs.

OSLER, J.A.:—As the action was originally brought, the plaintiff Pringle was sole plaintiff, claiming as assignee of Smith, the mortgagee, but, notice of the assignment being denied by the defence, an order was made in Chambers allowing the mortgagee to be added as a co-plaintiff, and as thus constituted the action went to trial. There it appeared that the mortgage money had been advanced by two separate lenders for whom the mortgagee was trustee, and that, by an earlier assignment than that under which the plaintiff Pringle at first claimed, the mortgage, the covenants therein, and the mortgage money, had been assigned to the cestuis que trust or their representatives to hold in proportion to their

respective interests in the moneys secured, and that, by divers mesne assignments and conveyances and appointments of new trustees, the mortgage and the covenants and the mortgaged property had before action been further assigned by the cestuis que trust to and had become vested in the plaintiff Pringle. No notice of any of these assignments had been given to the defendant.

Under these circumstances, it appears to me clear that the legal right to maintain the action remained in the plaintiff Smith, the original mortgagee, in whom and the plaintiff Pringle between them the whole legal and equitable title to the mortgage and the moneys secured thereby was vested. I do not see how the earlier assignment to the cestuis que trust defeated the right of action on the covenant or the right of those assignees or those claiming under them to sue thereon in Smith's name, when no notice had been given to the debtor. If the covenant could not legally be divided, it has not been divided, and the original covenantee must be entitled to sue as trustee for the parties beneficially interested in the mortgage money, as he does her. Scarlett v. Nattress, 23 A. R. 297, may be referred to.

As to the plaintiff's right to recover interest at 7 per cent. upon overdue principal and upon any arrears of interest which were due on the 20th February, 1893, the language of the covenant seems reasonably plain. The principal was to become due on the 20th February, 1893; interest meantime half-yearly, 20th February and 20th August, at 7 per cent.; "and, in the event of the said principal and interest, or any part thereof, remaining unpaid after any of the days above limited for payment thereof, then in every such case (the mortgage to be void) upon payment also of interest at the rate aforesaid upon all interest and principal so remaining unpaid from the day or days above limited for payment thereof until payment shall be made." I do not see how the right to interest at the mortgage rate upon principal remaining due after the 20th February, 1893, and also upon any interest which was then due (though not subsequent interest) could be more clearly expressed. See Imperial Trusts Co. v. New York Security and Trust Co., 10 O. L. R. 289. But authorities are needless when the language is plain.

Moss, C.J.O., for reasons stated in writing, reached the same conclusions as Osler, J.A., upon the two questions dealt with by the latter. Upon the question of the rate of interest post diem the Chief Justice referred to and distinguished St. John v. Rykert, 10 S. C. R. 278; Powell v. Peck, 15 A. R. 138; and

People's Loan and Deposit Co. v. Grant, 18 S. C. R. 275. The Chief Justice then dealt with two other questions raised by the appeal, as follows:—

As to the non-allowance of credits, this appears to be founded on accounts laid before the Surrogate Court, and, as explained, they do not appear to shew payments or allowances of which the defendant is entitled to the benefit, save those with which he is credited in the statement (exhibit 8) of the computation of the amount due to the plaintiffs.

As to the award of costs against the defendant, the action was properly constituted at the time of, if not before, the trial. And the costs relating to the addition of Smith as a co-plaintiff were dealt with by the Master in Chambers.

The defendant did not then submit to pay, but contested the action throughout, and, having failed, there appears no good reason why he should not bear the costs.

The appeal should be dismissed with costs.

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

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

NOVEMBER 15TH, 1909.

WESTON v. PERRY.

Husband and Wife—Alienation of Husband's Affections—Cause of Action.

Appeal by the plaintiff from an order of a Divisional Court dismissing the plaintiff's appeal from an order of MAGEE, J., at nisi prius, striking out paragraph 2 of the statement of claim, which charged the defendant with enticing the plaintiff's husband from her.

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

J. B. Mackenzie, for the plaintiff.

T. N. Phelan, for the defendant.

Moss, C.J.O.:—I am unable to perceive any ground upon which, consistently with what was said as well as what was actually decided in Lellis v. Lambert, 24 A. R. 653, the judgment now in appeal should be disturbed.

The appellant's counsel referred to a number of cases decided by Courts of some of the States of the American Union. Some of these decisions tend to maintain the opinion that an action such as is sought to be maintained here lay at the common law, and relying on others the learned counsel contended that, even if the action was not maintainable at common law, the effect of the legislation concerning the rights of married women now in force in this province is to give the right. But little or no assistance is to be derived from these decisions in the face of the decisions of our own and the English Courts which clearly point to the opposite conclusion.

I think the defendant's case may well rest, as it was rested by Mr. Phelan in argument, upon Lellis v. Lambert.

I would dismiss the appeal with costs.

The other members of the Court concurred, OSLER and MEREDITH, JJ.A., giving reasons in writing.

NOVEMBER 15TH, 1909.

OVEREND v. BURTON STEWART AND MILNE CO.

Patent for Invention—Infringement—Novelty—Utility—Burden of Proof—Findings of Fact—Appeal—Simplicity of Invention—Former Patent—Failure to Keep on Foot—Disclosure of Invention—Failure to Manufacture—Patent Act, sec. 38—Failure to Mark Articles—Patent Act, sec. 55—Penalty under sec. 69—Damages—Costs.

Appeal by the defendants from a judgment of ANGLIN, J., at the trial, awarding the plaintiff an injunction restraining the defendants from infringing, in the manufacture and sale of curry-combs, the plaintiff's patent, number 53318, and the sum of $20.80 as and for damages and the costs of the action.

The plaintiff's patent was granted to him on the 24th August, 1896, and purported to be for certain improvements in curry-combs, the invention of one F. H. Burke.

There was an earlier patent, number 49400, granted to F. H. Burke on the 5th July, 1895, intended to cover the same invention as that covered by the patent to the plaintiff. It was not kept on foot, and some of the questions in issue in this action were based upon the specifications and claim upon which it was granted.

Although in their statement of defence the defendants denied that they infringed the plaintiff's patent, the evidence at the trial established that the defendants manufactured and sold a curry-comb which was an exact copy of that manufactured under the plaintiff's patent, and it was not disputed that, assuming the validity of that patent, there had been an infringement.

But the defendants attacked the validity of the patent, and put forward a number of objections, all of which were determined adversely to them by the trial Judge.

The appeal was heard by Moss, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

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

D. W. Dumble, K.C., and A. W. Anglin, K.C., for the plaintiff.

Moss, C.J.O.:—It is to be borne in mind that, although the production of the patent and proof of the specifications were probably sufficient to cast upon the defendants the onus of establishing the defences of want of novelty and utility (see sec. 34 of the Patent Act; Amory v. Brown, L. R. 8 Eq. 663; Harris v. Rothwell, 4 Rep. Pat. Cas. 225, 229; Young v. White, 23 L. J. Ch. 190, 196; Ward v. Hill, 18 Rep. Pat. Cas. 481); the plaintiff's case was not allowed to rest there. Evidence in support of the novelty and utility of the patented article and of the idea originating with Burke was adduced. Against this was evidence adduced by the defendants.

These issues were questions of fact to be determined by the learned trial Judge upon the whole evidence.

It is true that before an appellate Court the findings upon facts of a Judge of first instance are not conclusive, and that they are not more so in this case than in any other. The duty of examining the evidence and weighing the conclusions reached by the trial Judge upon it is not to be ignored by the appellate Court. But in endeavouring to balance the testimony and to give the findings their proper value it is important to remember upon which side lies the burden of proof. A man is not to be deprived of the benefit of his labour, skill, and ingenuity, and the results of the

exercise of that faculty spoken of as invention, unless upon cogent and convincing proof, either that what he has produced has not added anything useful or novel to previous knowledge of the subject or that what he has patented was known to others before he patented it. . . .

[The Chief Justice then set forth the specifications and claims of the plaintiff's patent.]

In each of these the claim of invention is substantially the same, the form given to the corrugated scalloped edged rings producing a set of teeth in which each tooth has its highest point out of alignment to the adjacent tooth, thus giving to the face of the comb a new property, and one which, according to the evidence, has proved of great utility in actual practice.

Perhaps no stronger testimonial to its usefulness could be offered than that given by Mr. Milne, the defendants' manager, a man of 40 years' experience in the manufacture and sale of currycombs, when, notwithstanding the disclaimer of the defendants' counsel, he frankly stated that he was not saying it was not useful, that if he did say so he was wrong, and that if they had not thought it was useful, they would not have made it. . . .

[Reference to Lucas v. Miller, 2 Rep. Pat. Cas. 155, per Kay, J., at p. 160; Miller v. Scarle, 10 Rep. Pat. Cas. 106, per Bowen, L.J., at p. 111.]

While evidence of a large demand is not conclusive on the question of utility, it is cogent evidence not only of utility but also of novelty: Erlich v. Ihlee, 5 Rep. Pat. Cas. 198, per Kekewich, J., at p. 205.

But the plaintiff does not rest merely on demand and sales as demonstrating novelty.

Fetherstonhaugh, a patent solicitor and expert engaged in that class of work for 28 years, and practising for himself for 18 years, testified that he had had occasion to become familiar with the art, and had seen and was aware through reports of patents in the Gazette and examination of patents or of copies of patents of the existence of a great number of patented currycombs and their descriptions, and that he was not aware of any comb prior to the plaintiff's with the distinctive feature of Burke's invention. This evidence would be sufficient in itself in the absence of any countervailing testimony: see Galloway v. Blearen, 1 Web. Pat. Cas. 521, at pp. 525-6. But in addition to this Burke's evidence shews that when he set himself to devise the comb he subsequently produced and at the time when he finally evolved it there was in use no comb embodying his idea. And, as the learned trial Judge

has found, the evidence for the defence fails to controvert these statements . . .

It was argued that there was in fact no invention, no inventive ingenuity exercised, that the thing was so simple as to be quite apparent to any person at all familiar with the use of currycombs.

This somewhat well-worn argument has been many times answered. In many instances simplicity, so far from being considered an objection, is deemed a merit, and where a device is new and useful very little invention suffices to support the patent: Fulton on Patents, 2nd ed., p. 47.

The next question arises upon the fact of the issue to Burke of the patent No. 49400, followed by a failure to keep it on foot. Did the description in the specification disclose the plaintiff's invention and so make it public as to render ineffectual the issue to the plaintiff of patent No. 53318 as a protection against user by the public of the invention therein described?

It is common ground that Burke had completed his invention when he made the application on which patent No. 49400 issued and that he intended to cover all that he had invented. But accepting the specification, drawings, and claim attached to patent No. 53318 as embodying the true description of Burke's invention, a comparison of them with the specification, drawings, and claim attached to patent No. 49400 makes it very clear that the latter do not cover the invention.

The latter specification and claim make no reference whatever to the distinctive feature of the teeth out of alignment with one another, and the drawings do not suggest anything of that nature. The claim states: "I make no claim for the pressed back handle and corrugated rims, for I am aware that these are not new, but what I claim as my invention and desire to secure by patent is: the corrugated edges C on plain or corrugated metal rims of currycombs substantially as and for the purpose hereinbefore set forth."

For all that appears, what is claimed and sought to be secured by patent is nothing more than a comb formed by means of a plain or corrugated strip with edges scalloped after a fashion already known and used. It wholly failed to describe that which was the essence of the invention, the teeth out of alignment forming an entirely different edge and putting upon the comb a face new and differing from any theretofore produced. It may now be easy to say that a skilled workman, reading the specification and looking at the drawings attached to patent No. 49400, could make the article Burke had intended to cover, and there is evidence

to that effect. But there is equally strong evidence to the contrary, and, in the conflict of opinion, it appears to commend itself more to one's understanding than the other. And the better conclusion is that at which the trial Judge arrived. It is true that the Chown Co. were making the article for Burke, but from a sample provided by him, and of course he could make it in the proper form, although he or the person acting for him in applying for the patent failed to describe that form.

There remain the questions as to the alleged failure to manufacture in these two years under sec. 38 of the Patent Act, and as to effect of failure to properly mark the articles as required by sec. 55.

The evidence shews that shortly after obtaining the patent No. 49400, the W. W. Chown Co. commenced to manufacture the comb substantially in the form really intended for the trade, and continued under Burke and the plaintiff to make it until 1903, and they continued to sell what they had manufactured until 1906. In that year, as the result of an action by the plaintiff against the Eclipse Manufacturing Co., that company took from the plaintiff a license to manufacture, and have since continued to manufacture the comb on a royalty paid to the plaintiff.

There seems, therefore, to have been no want of compliance with sec. 38.

As to the other objection, the learned trial Judge points out that the only consequence to the plaintiff of a breach of sec. 55 is a penalty imposed by sec. 69. There is no provision similar to that in the United States, that on any suit for infringement by the party so failing to mark, no damages shall be recovered by the plaintiff except on proof that the defendant was duly notified of the infringement and continued after said notice to make, use, or vend the article so patented. But, even under that enactment, the failure to mark does not affect the right to an injunction but only goes to the question of damages: Goodyear v. Allen, 3 Fish Pat. Cas. 374.

Although it is unimportant in this case, it is a fact that the defendants were duly notified and after notice, and even after the commencement of the action, they made and sold the patented article.

The damages awarded ($20.80) are so trifling as to be of no real importance.

As to the allowance to the plaintiffs of their costs, that, in the circumstances of this case, was a matter wholly within the discretion of the learned trial Judge. But, even if the matter were one proper for review, it must be borne in mind that throughout

the defendants contested the plaintiff's right, and as already mentioned made sales after being notified of the infringement.

The appeal should be dismissed with costs.

NOVEMBER 15TH, 1909.

GLEDHILL v. TELEGRAM PRINTING CO.

Principal and Agent—Agent's Commission on Advertising Secured for Principal—Contract of Agency—Construction—Advertising "Originating in his Territory" — Defining Clause — "Final Contract"—"Insertion Order."

Appeal by the defendants from an order of a Divisional Court, 13 O. W. R. 1000, affirming an order of MULOCK, C.J.Ex.D., upon an appeal from the report of an official referee.

The sole question upon the appeal was whether the defendants were rightly found liable to pay commission in respect of a contract for advertising in the defendants' newspaper, published in Winnipeg, entered into between the defendants and the T. Eaton Co. on the 1st September, 1904.

Under the agreement between the defendants and the plaintiff, the latter's compensation was to be fixed by reference to the amount paid to the defendants for advertising originating in his territory, that is, in the province of Ontario, including the city of Toronto.

The plaintiff's compensation was 20 per cent. of the net amount paid to the defendants for advertising originating in the plaintiff's territory.

The agreement between the defendants and the plaintiff contained the following clause: "Business originating in Toronto as above mentioned is to be further defined as business for which the final contract or insertion order is sent from a Toronto office, either direct from the advertiser or through a Toronto advertising agency."

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

A. H. F. Lefroy, K.C., and J. E. Jones, for the defendants.

G. H. Kilmer, K.C., and J. A. McAndrew, for the plaintiff.

MOSS, C.J.O.:—Was the advertising done under the agreement with the T. Eaton Co. "advertising for which the final contract or

insertion order was sent from a Toronto office direct from the advertiser," within the meaning of the agreement with the plaintiff? If the agreement with the T. Eaton Co. is found to be a complete, final contract in itself, the plaintiff is entitled to receive the compensation. . . . It seems clear that in this case the parties were treating final contracts as something distinct from insertion orders. . . . Nothing was absolutely concluded between the parties until the paper was duly signed. Previously to that the matter rested entirely in the goodwill of the parties. The T. Eaton Co. might or might not give the defendants an order or orders to publish advertisements. They were not bound in any manner that would render them liable for breach of agreement if they did not do so. But when the paper was signed they became bound to furnish advertisements to fill the reserved space, or to pay for it, whether they did or not. The paper which bound them, being signed and thus finally concluded at Toronto, became a final contract sent from a Toronto office direct from the advertiser, within the express terms of the agreement with the plaintiff. . . .

Appeal dismissed.

OSLER, GARROW, MACLAREN and MEREDITH, J.A., concurred; MEREDITH, J.A., stating reasons in writing.

NOVEMBER 15TH, 1909

RODD v. COUNTY OF ESSEX.

Municipal Corporations—County of Essex—Office of Crown Attorney and Clerk of the Peace—Provision for, in City of Windsor—Duty of County Council.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., in favour of the plaintiff, the Clerk of the Peace and Crown Attorney for the county of Essex, declaring that the proper place for his office was the city of Windsor, in that county, notwithstanding that Sandwich was the county town, and requiring the defendants to provide a proper office for him in Windsor, and for the recovery of $150 damages, equivalent to a share of the rent paid by the plaintiff for his office in Windsor since the defendants' refusal to provide one for him there.

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

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

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

OSLER, J.A.: . . . The duty of the county council is prescribed by sec. 506 (1) of the Municipal Act, 1903, by which they are bound, subject to certain exceptions, to provide proper offices, together with fuel, light, stationery, and furniture, for all offices connected with the courts of justice. The Crown Attorney is an officer, within the meaning of this section, for whom the county council is bound to provide offices and accommodation: Re Lees and County of Carleton, 33 U. C. R. 409. Nothing in the section expressly says where the offices are to be provided, and the County Crown Attorneys Act, R. S. O. 1897 ch. 97, is equally silent on the subject. The court house must be in the county town, and the Courts are held and housed there, and offices and rooms connected with the court house are spoken of as offices of which the county council are to have the care. It may appear from sec. 10 of the Jurors' Act, 9 Edw. VII. ch. 34 (R. S. O. ch. 61, sec. 13), that the office of the Clerk of the Peace is not necessarily in the court house, but may be elsewhere in the county town, and it must be manifest to every one that in ordinary circumstances the county town, and prima facie the court house there, is the natural and reasonable seat for all offices connected with the Courts and the administration of justice other than Division Courts, considering the duties which the holders of such offices have to perform.

I see no authority for saying that the Crown Attorney or any other officer connected with the courts of justice can compel the county council to provide offices in Windsor. Any inference to be drawn from legislation is opposed to such a contention. The Clerk of the County Court, the Deputy Clerk of the Crown, and the Registrar of the Surrogate Court, in each county, are required by law to keep or hold their offices in the court house or at some convenient place in the county town, but in the case of the county of Essex it is further provided that, subject to such arrangements as the county council assent to and to the approval of the Lieutenant-Governor in council, each of the before mentioned officers may keep "an" office at some convenient place in the city of Windsor: R. S. O. 1897 ch. 51, sec. 156; ch. 55, sec. 7; ch. 59, sec. 13. There is no such provision in the case of the Crown Attorney, and, though there is also no positive requirement that the office shall be kept in the court house or in the county town, the only consequence is that, in the absence of authority to the county council to acquire property in the city of Windsor, or to assent to arrangements by the holder of the office to maintain or keep "an" office there, the

control rests in the discretion of the council, who may provide the proper office in the court house—the natural place for it under ordinary conditions, and the legislature has not in the case of this particular office contemplated extraordinary ones—or elsewhere in the county town.

I do not see what power the Courts have to declare that the office shall be established or arrangements made for it in Windsor, simply because the tide of business life has flowed away from Sandwich, where the county buildings are, and in which in other counties this and other offices are provided for. If in this respect the discretion of the council is to be subject to control, it is a matter for legislation, not for the Courts.

Whether or not the county council have power to acquire land or property for an office in the city of Windsor is a question not now necessary to be considered.

The appeal should be allowed.

MOSS, C.J.O., GARROW, MACLAREN, and MEREDITH, JJ.A., concurred; MEREDITH, J.A., giving reasons in writing.

NOVEMBER 15TH, 1909.

ROBINSON v. MORRIS.

Trespass—False Imprisonment — Warrant of Arrest—Delay in Issue—Prisoner out on Bail—Commencement of Term of Imprisonment—R. S. C. 1906 ch. 148, sec. 3—Lawful Imprisonment—Constable.

Appeal by the plaintiff from the order of a Divisional Court affirming the judgment of MAGEE, J., at the trial, dismissing the action, which was for trespass and false imprisonment. There were two defendants—Morris (a constable) and the corporation of the town of North Toronto.

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

J. B. Mackenzie, for the plaintiff.

C. J. Holman, K.C., for the defendant Morris.

T. A. Gibson, for the defendant corporation.

MEREDITH, J.A.:— . . . The plaintiff having been convicted of an offence under the Liquor License Act, at the instance of

counsel acting for him, with a view to appealing against the conviction (whether an appeal lay or not is not very material), the usual proceedings for the enforcement of the conviction were delayed, and the plaintiff bailed to appear when called upon, his own recognizance alone being taken. Subsequently, no proceedings, by way of appeal or otherwise, being taken by the plaintiff to question the validity of the conviction, it was acted upon, without the plaintiff being called upon to appear under his recognizance. The conviction was made on the 17th January; and the plaintiff was arrested and imprisoned under it on the 27th March following.

Under habeas corpus proceedings the plaintiff was discharged from custody in the following month of June, on the ground that the term of imprisonment began on the 17th January, not on the day of his arrest, and that it had expired when these proceedings were taken. The learned Judge who made the order thought that R. S. C. 1906 ch. 148, sec. 3, applied and had that effect. He also held that the plaintiff was not at large without lawful cause, under the recognizance, and so had not been guilty of an escape, and could not be treated as if so guilty—under R. S. C. 1906 ch. 146, sec. 196. But, if the plaintiff were lawfully out on bail, the time would not count; whilst, if unlawfully, it would be an escape, and equally the time would not count. He did not say, in his reported reasons—14 O. L. R. 519—why he did not give effect to the provisions of sec. 3 of R. S. C. 1906 ch. 148, that "no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced." Nor did he say why the case might not properly be treated as one in which the sentence directed that the imprisonment should not begin until the time allowed for taking steps to question the conviction had elapsed, which would be within another exception to the statutory provision: see The King v. Taylor, 12 Can. Crim. Cas. 244.

Assuming that enactment to be applicable to such a case as this, without at all saying that it is, why should not each of these provisions be applicable to this case? The plaintiff was certainly "out on bail" from the time of his trial until his imprisonment; and the magistrate certainly in effect directed that the term of the imprisonment should not begin until the warrant was issued. We are now dealing with a claim for damages only; and in such how can the plaintiff, who gave his recognizance to appear, and for whose benefit alone the delay was permitted, be heard now to say that he should have damages because he was not refused the benefit —not immediately thrown into prison?

I think the imprisonment was lawful, and would have been lawful had the whole term been served; the action, therefore, in

my opinion, failed, and was properly dismissed, as this appeal should be.

OSLER, J.A., gave reasons in writing for the same conclusion, pointing out, inter alia, that if sec. 3 of R. S. C. 1906 ch. 148 did not apply, the term of imprisonment would commence only at the date of the defendant's arrest or his lodgment in gaol under the warrant: Paley on Summary Convictions, 8th ed., p. 357; Bawdler's Case, 12 Q. B. 612, 619; Ex p. Ffoulkes, 15 M. & W. 612; Braham v. Joyce, 4 Ex. 487; Henderson v. Preston, 21 Q. B. D. 362; The Queen v. McDonald, 6 Can. Crim Cas. 1; 25 Am. & Eng. Encyc. of Law, 2nd ed., pp. 326, 327; The King v. Taylor, 12 Can. Crim. Cas. 244. . . .

He further said, in answer to the objection that there was no proof of the defendant Morris being a constable, that it was enough that he appeared to have been acting as such; the regularity of his appointment would be presumed. But there was in addition some evidence of his actual appointment as a county constable.

The town corporation were made defendants, it was impossible to understand on what ground, as the defendant Morris was neither their servant nor agent in executing the warrant.

Appeal dismissed with costs.

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

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. NOVEMBER 11TH, 1909.

McCUAIG v. INDEPENDENT ORDER OF FORESTERS.

Life Insurance — Benefit Society — Beneficiary Member — Total Disability through Insanity—Failure to Pay Dues—Failure to Comply with Rules of Society—Total Disability Fund.

Angus McCuaig was a member of the Dominion police force and a member of the Independent Order of Foresters—a regular beneficiary member, as appeared from his certificate No. 424032, dated 18th November, 1904. At the end of October, 1906, being a member in good standing, he became "unfit mentally and physically to perform further duty," "totally incapacitated from doing any work or following any employment," having first shewed

symptoms in April, 1906. This incapacity continued until his death, which took place on 3rd April, 1909, after the beginning of this action. His dues continued to be paid till those due March, 1908. It was admitted by both parties that the money to pay these dues was, till December, 1907, his own, and was paid by his family till that time; thereafter the local court of which he was a member, or some of the brethren, paid till the end of February, 1908, for him. He had, about November, 1906, gone to the Asylum for the Insane at Brockville, where he remained until the time of his death.

On the 13th January, 1099, his wife wrote the Supreme Chief Ranger of the defendants, saying that her husband had been totally disabled since the summer of 1906; that, being mentally unbalanced, he failed to apply for $1,000 to which he was entitled from the total disability fund, but continued to pay until the 1st December, 1907, and the court then carried him to the 1st February, 1908. She made application for the $1,000, and, after speaking of the handsome way in which he had been treated by the Dominion police authorities, she added: "We beg that the Foresters will shew him the same consideration, and will not take advantage of his insanity. It is only recently we have learned of the disability fund." The Supreme Chief Ranger answered that McCuaig had been suspended on the 1st March, 1908, for non-payment, and pointed out what she should have done if she desired her husband to be placed on the total disability list, and added: "Not having done this, and not having paid his assessments, and he having been reported from the Order for non-payment, we have no power to now reinstate him or to place him on the probationary list or pay any benefits on his account to any one." Thereupon this action was brought by the wife and by the husband acting by a next friend.

It was tried before CLUTE, J., at Ottawa, without a jury, on the 15th June, 1909. In the judgment as settled the plaintiffs recovered the sum of $1,000 and costs, without prejudice to their rights to bring a further action for the remaining $1,000 by reason of the death of Angus McCuaig.

The defendants appealed.

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

Shirley Denison, for the defendants.

A. E. Fripp, K.C., for the plaintiffs.

RIDDELL, J. (after setting out the facts and portions of the constitution and rules of the defendants):—The certificate issued to McCuaig expressly provides that the constitution and laws of the Order are made a part of it. It makes McCuaig a beneficiary member "to the extent of $2,000, less any amount which he paid . . . on account of total and permanent disability . .;" and, amongst other sections, expressly refers to what is now, in the revision of 1905, sec. 158. This provides: (1) Subject to the provisions of this section and of secs. 4, sub-secs. 5 and 6, 131, 132, 145, 151, and 154, every member whose policy or benefit certificate provides for the total disability benefit, and who shall become totally and permanently disabled, either through accident or disease or old age, from following or directing any employment, labour, trade, occupation, business, or profession, shall become entitled to the total disability benefit . . ." The sections referred to are not of importance in this inquiry.

It is not and cannot be disputed that McCuaig came, about October or November, 1906, literally within this section; and, had proper application been made then or shortly before his suspension for non-payment of dues, it is conceded that he would have been entitled to receive the $1,000. But subsequent sub-secs. of this sec. 158 are appealed to as shewing that, in the event which has happened, this claim cannot succeed. Sub-section (2) provides: "(2) The total disability benefit on account of accident or disease shall consist of one-half of the amount of the member's insurance or mortuary benefit remaining unpaid at the date such member is adjudged to be totally and permanently disabled, together with exemption from further taxation of any kind in the Order except as provided in this section and sec. 156; which benefit shall be payable in 5 equal annual instalments . . ."

It seems to me free from any doubt that the word "adjudged" is used not of an adjudication by a court of law or any other tribunal than that referred to in the succeeding sub-section. Sub-section (3) provides that whenever a member becomes totally and permanently disabled . . he may by himself, or, if personally incapable, by some one on his behalf, file notice of such disability . . with the Supreme Secretary; thereupon the Supreme Secretary lays it before the medical officer, who is to make full inquiry and investigation, and then report to the Supreme Chief Ranger, "whereupon the Supreme Chief Ranger, if satisfied that the disability is total and permanent within the meaning of the constitution and laws . . . shall instruct the Supreme Secretary to place the member on the probationary list for total disability; but, if the Supreme Chief Ranger does not instruct the Supreme Secre-

tary to place the member on the probationary list, the notice shall become and be null and void." . . .

While the sub-sec. (1), giving the right to the total disability benefit, conditions that right upon the member becoming disabled, the amount of such benefit is not anywhere fixed except in sub-sec. (2), and that sub-section fixes the amount at one-half the amount of the insurance benefit remaining unpaid at the date of such member being adjudged to be totally and permanently disabled. Before the amount can be arrived at, there must be an adjudication, and that adjudication is, as it would appear, an adjudication by the Supreme Chief Ranger. If such an adjudication is desired on behalf of a member, a method is provided by the constitution; but, if the member for any reason prefers to remain an ordinary member, there is no reason why he should not do so. . . . That he must be a member in good standing when he applies for the benefit, I think clear from the whole constitution—sec. 158 (6) may be specially referred to as shewing that he ceases to pay dues, etc., only on being put on the probationary list. . . .

This unfortunate man has failed to live up to the requirements of his Order; and the action fails.

The appeal should be allowed and the action dismissed, both with costs, if asked for. . . .

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

TEETZEL, J., also agreed in the result, and referred to Taylor v. Caldwell, 3 B. & S. 826; Gamble v. Accident Insurance Co., 4 Ir. R. C. L. 204; Bacon on Benefit Societies and Life Insurance, 3rd ed., sec. 384; Walsh v. Consumnes, 108 Cal. 496.

CLUTE, J. NOVEMBER 12TH, 1909.

HORRIGAN v. CITY OF PORT ARTHUR.

Municipal Corporations — Contract with Hydro-Electric Power Commission—Powers of Council — By-law — Submission to Electors — Invalidity — Publication — Previous By-law — Statutes.

Motion by the plaintiff for an interim injunction restraining the defendants the city corporation and their mayor and clerk

from executing a contract between the Hydro-Electric Power Commission of Ontario and the city corporation, referred to in a certain by-law submitted to the electors of the city on the 4th November, 1909, intituled "By-law No. , to take the vote of the ratepayers of the city of Port Arthur entitled to vote on money by-laws whether the mayor or clerk should execute the contract with the Hydro-Electric Power Commission hereto attached."

The by-law was published in two daily papers at Port Arthur continuously from the 21st October to the 4th November, 1909.

A previous by-law (No. 881) had been submitted to the electors and approved by a majority; it purported to authorise "the municipal council of the town of Port Arthur to enter into a contract with the Hydro-Electric Power Commission of Ontario to supply the electric power and energy for the use of the corporation and the inhabitants thereof"—reciting the Act 6 Edw. VII. ch. 15 (O.)

That Act was repealed by 7 Edw. VII. ch. 19, sec. 25, sub-sec. 1; but sub-sec. 2 provided that any contract which might have been entered into under the authority of the repealed Act might be entered into after the passing of the repealing Act, with the same effect, etc.

The Act 9 Edw. VII. ch. 19, sec. 11, provided that where the municipal corporation applied for a supply of power and the question had been submitted to the vote of the electors pursuant to paragraph 1a of sec. 533 of the Municipal Act and the amendments thereto, and the electors had voted in favour of a supply from the Commission, the council of the corporation may authorise the entering into a contract with the Commission without submitting a by-law for the assent of the electors.

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

I. F. Hellmuth, K.C., and F. H. Keefer, K.C., for the defendants.

CLUTE, J., held that the by-law (881) submitted under the Act of 1906 was invalid because it did not publish the estimates and the contract so as to enable the voters to judge of that on which they were asked to vote; that such submission was not within sec. 11 of the Act of 1909 because it was not and was not intended to be a general submission of the question, but had relation to the Act of 1906; that the submission of the by-law and contract on the 4th November, 1909, was insufficient and illegal for the want of proper publication; that there was in fact no proper submission under sec. 533; that, therefore, sec. 11 of the Act of 1909

could not be invoked to support the by-law; and the council had no right to enter into the proposed contract.

Injunction granted until the trial, upon the usual undertaking; costs of the motion to be costs in the cause unless otherwise directed by the trial Judge.

CLUTE, J., IN CHAMBERS. NOVEMBER 13TH, 1909

RYCKMAN v. RANDOLPH.

Writ of Summons—Defendants Resident out of Ontario—Carrying on Business in Ontario—Partnership—Service on Person in Ontario—Con. Rules 222, 223.

Appeal by the plaintiff from the order of the Master in Chambers, ante 150, setting aside the service of the writ of summons on John J. Dixon for the defendants E. & C. Randolph.

C. S. MacInnes, K.C., for the plaintiff.

W. E. Middleton, K.C., for the defendants E. & C. Randolph.

Strachan Johnston, for Dixon.

CLUTE, J., said that it was contended on behalf of the plaintiff that the defendants Randolph carried on business in Toronto within the meaning of Con. Rules 222 and 223, and that service upon Dixon, who was alleged to be in their employment, was good service. The sole question was whether these defendants carried on business in Toronto within the meaning of those Rules. There was no doubt that Dixon had the control and management of the business carried on in Toronto; but the question was whether that business was the business of the defendants Wright & Co., or whether the Randolphs were partners. Wright & Co. were brokers in Buffalo, and the Randolphs brokers in New York. . . .

The learned Judge then outlined the facts, as stated in the affidavits and depositions, and said that he was wholly unable to see how it could be said that a partnership existed between the Randolphs and Wright & Co. It appeared to him that, so far as the business as carried on at the time of the service of the writ was concerned, it was the ordinary business of brokers carrying on business in Toronto, with correspondents in New York, who, for a certain consideration, transacted such business as they saw fit to accept for the clients of the Toronto firm, and charged such

rate therefor as had been agreed upon. The fact that on sales in New York on "short account" the Wright firm were to receive half of the amount which the Randolphs received did not, in his opinion, constitute a partnership or business carried on in Toronto. The Randolphs had no place of business in Toronto; they had no persons in their employment there; they had no persons to represent them there; they were not interested in the business carried on there except to the extent of the charge which they had made upon purchases and sales in New York

The following cases relied on by the plaintiff could not be successfully invoked in support of his contention: Dunlop v. Actien, [1902] 1 K. B. 342; La Bourgogne, [1899] P. 1, 18; La Compagnie Générale v. Law, [1899] A. C. 431; Palmer v. Gould, [1894] W. N. 63; Mackenzie v. Fleming H. Revell Co., 7 O. W. R. 414; Erichsen v. Last, 8 Q. B. D. 414.

See contra: Singleton v. Roberts, 70 L. T. R. 687; Grant v. Anderson, [1892] 1 Q. B. 108, 116; Baillie v. Goodwin, 33 Ch. D. 604; The Princesse Clementine, [1897] P. 18.

Appeal dismissed with costs.

BRITTON, J., IN CHAMBERS. NOVEMBER 13TH, 1909.

RE MARTIN AND GARLOW.

Criminal Law — Certiorari — Application to Remove Order for Payment by Prosecutor of Costs of Unsuccessful Prosecution —Non-compliance with Rules of Court—Recognizance—Criminal Code, sec. 576 (b)—Rules of Supreme Court of Judicature for Ontario—Application to Prosecutor.

On the 15th May, 1908, William Martin laid before Albert E. Harris, a justice of the peace for the county of Brant, an information and complaint that David Garlow, on or about the 4th March, 1908, had in his possession a bottle of whisky on an Indian Reserve, and was drunk on the Indian Reserve, contrary to the provisions of the Indian Act.

Apparently this charge was heard by two justices of the peace, of whom Albert E. Harris was one, and on the 6th June, 1908, the charge was dismissed, and the complainant, Martin, was ordered to pay the costs, amounting to $14.

On the 4th September, 1908, the justice of the peace, Harris, issued a warrant for the arrest of Martin and for his imprison-

ment for 30 days, unless the costs, and the further costs of commitment and conveying Martin to gaol, were sooner paid. On this warrant Martin was arrested, and upon his arrest he paid the costs. It did not appear just when the costs were paid, but Martin was committed to gaol on the 11th August, 1909.

On the 1st October, 1909, Martin served notice of motion for a writ of certiorari for the removal into the High Court of the order dismissing the information and complaint and all things pertaining to the same.

The motion was heard by BRITTON, J., in Chambers.

J. B. Mackenzie, for Martin.

H. W. Shapley, for Garlow.

BRITTON, J.:—It is alleged in the notice of motion that the magistrate Harris acted alone when dealing with this complaint, and so acted without jurisdiction, and for this reason, besides others, the order of dismissal was illegal. The affidavits filed in answer to this motion satisfy me that the magistrate Harris did not act alone in making the order of dismissal. That order was made by two justices, viz., Albert E. Harris and Thomas Hunter.

It was contended by Mr. Mackenzie that a prosecutor is in no way affected by the Rules of Court in regard to certiorari. These Rules have not been complied with — no recognizance has been entered into or filed, and no deposit has been made by the informant.

I am not able to agree with the applicant's contention. The Rules, in terms, clearly apply and are operative against the prosecutor, who, in this case, cannot be said to be really acting on behalf of the Crown.

Section 1126 of the Criminal Code does not make any distinction between prosecutor and defendant as to what the Court may order and direct before a motion to quash will be entertained. An order has been made requiring a recognizance or deposit.

Section 576 of the Code gives power to the Supreme Court of Judicature for Ontario to make Rules (sub-sec. b) "for regulating in criminal matters the pleading and procedure in the Court, including the subjects of mandamus, certiorari, habeas corpus, prohibition, quo warranto, bail, and costs. . . ."

Such Rules were made on the 27th March, 1908; they were laid before both Houses of Parliament, and have been published in the Canada Gazette: see vol. 41, p. 3160.

Chapter 34, 8 Edw. VII., makes similar provision. As I have said, the prosecutor's case on a motion to set aside a warrant for commitment for non-payment of costs, cannot be treated as the case of the King.

Upon all the facts and circumstances of this case, the motion will be dismissed without costs.

DIVISIONAL COURT. NOVEMBER 13TH, 1909

RE ROGERS AND MCFARLAND.

Appeal to Divisional Court—Decision of Mining Commissioner—Mining Act of Ontario, 1908, sec. 151 (3)—"Deemed to be Abandoned"—Failure to Lodge Certificate of Setting Down—Time—Power to Extend.

Motion by the James Proprietory Mining Co. to quash the appeal of L. T. Rogers from a decision of the Mining Commissioner.

On the 21st October, 1904, George McFarland located the south 160 acres of lot 3 in the 6th concession of the township of James, under the Veteran Land Grants Act, 1 Edw. VII. ch. 6, and on the 1st March, 1907, applied to the Department for a patent. On the 22nd March, 1907, Rogers staked out a portion of this as a mining claim, viz., the north-west quarter of the south half of the lot, about 40 acres. On the 3rd April, 1907, a patent issued to McFarland of the land, granting him expressly all mines and minerals. On the 10th April, 1907, Rogers's claim was recorded in the office of the Mining Recorder at Haileybury, and on the 12th September, 1907, a certificate of record was issued. The title of McFarland by that time had been vested in the James Proprietory Mining Co. The Deputy Minister of Mines, at the instance of this company, applied to the Mining Commissioner for the cancellation of the mining claim and of the certificate of record based thereon. The Commissioner held the claim invalid, and ordered it, as well as the certificate of record, to be cancelled, on the 9th September, 1909. This was entered in the books of the Mining Recorder on the 13th September, 1909. On the 18th September, 1909, a notice of appeal to a Divisional Court was filed in the same office. On the 15th September a copy of the notice of appeal was sent to the Bureau of Mines, Toronto, and a copy to the Mining Recorder at Elk Lake City; and on the same

day the solicitors for the James Proprietory Mining Co. were served with the same notice. On the 1st October the appeal was set down, but no order extending the time was procured.

By sec. 151 (2) of the Mining Act of Ontario, 1908, 8 Edw. VII. ch. 21, "the award or order of the Commissioner shall be final and conclusive unless where an appeal lies it is appealed from within 15 days after the filing thereof or within such further period not exceeding 15 days as the Commissioner or a Judge of the Supreme Court may allow."

By sub-sec. (3), "the appeal shall be begun by filing a notice of appeal with the Recorder of the division in which the property in question or a part of it is situate and paying to him the prescribed fee, and unless such filing and payment are so made, and unless the appeal is set down and a certificate of such setting down lodged with the Recorder within 5 days after the expiration of said 15 days or the further time allowed under sub-section 2, the appeal shall be deemed to be abandoned."

The notice of the motion to quash the appeal was served on the 29th October, and the motion was heard by FALCONBRIDGE C.J.K.B., BRITTON and RIDDELL, JJ., on the 5th November, 1909.

A. McLean Macdonell, K.C., for the James Proprietory Mining Co.

J. R. Cartwright, K.C., for the Bureau of Mines.

W. M. Douglas, K.C., for Duncan Chisholm.

F. R. MacKelcan, for L. T. Rogers, the appellant.

RIDDELL, J.:—Here the order of the Mining Commissioner was filed on the 13th September, 1909; 15 days thereafter was the 28th September, Tuesday; 5 days after the expiration of the 15 days was Sunday the 3rd October, or at the latest Monday the 4th October. Even if a Judge had acted, the time for lodging the certificate of setting down expired before the present time, i.e., expired on the 18th October. This appeal, by the express words of the statute, must now "be deemed to be abandoned." The result must depend upon the meaning to be attached to the word "deemed."

The word etymologically does not differ from doom, damn, or condemn, but of course etymology is not always a safe guide to the meaning of a word, even in a statute.

I am unable, however, to find anything in the cases, either in England, Ontario, or the United States, which assists the appellant. In some of the cases the word has been considered in such

legislation as, e.g., that contained in the present Act in sections such as 48, 78 (4), etc.; but in most of the cases the question was, does the word "deem" mean for all purposes or only for the purposes of the Act? . . . .

[Reference to De Beauvoir v. Welch, 7 B. & C. 266; Re Shafer, 10 O. W. R. 409, 412; Ex p. Walton, 17 Ch. D. 746; Milnes v. Mayor of Huddersfield, 12 Q. B. D.; Lawrence v. Wilcocks, [1892] 1 Q. B. 696; Green v. Marsh, [1892] 2 Q. B. 330; Hill v. England and Wales I. D. Co., 9 App. Cas. 448; Earl Cowley v. Inland Revenue Commissioners, [1899] A. C. 198; Regina v. Manning, 2 C. & K. 887; Walton v. Gavin, 16 Q. B. 48; Commonwealth v. Pratt, 125 Mass. 246; Blaufus v. People, 69 N. Y. 107; Kirchoff Lumber Co. v. Olmstead, 85 Cal. 80, 24 Pac. R. 648; Cory v. Spencer, 67 Kans. 648, 63 L. R. A. 275, 73 Pac. R. 920; Lawrence v. Ledleigh, 58 Kans. 594, 50 Pac. R. 600; Powell v. Spackman, 63 Pac. R. 503; Kelly v. Owen, 7 Wall. 496; Leonard v. Grant, 5 Fed. R. 11; Burrell v. Pittsburg, 62 Pa. 472, 474; Campbell v. Barrie, 31 U. C. R. 279; Nunes v. Carter, L. R. 1 P. C. 342; Lawson v. McGeoch, 20 A. R. 464.]

It would, I think, be quite impossible for us, so far as the authorities go, to hold that "deem" means anything less than "adjudged" or "conclusively considered" for the purposes of the legislation.

Neither am I at all impressed with the circumstance that in sec. 92 a discovery not appealed against or finally allowed on appeal is to be deemed conclusively to be a discovery of valuable mineral in place—the expression is explained immediately afterwards. It cannot be called in question in any cause, matter, or proceeding in any Court or under this Act. Quite a different case is being provided for in the two sections. But in any case the meaning of the word "deemed" is not in any view to be cut down because of the circumstance that the legislature have in another used a pleonastic expression. We have "full and complete" and the like used when one of the words would do as well —a term is "fully to be complete and ended"—"fully paid up shares" are nothing but "paid up shares."

The word "deem" is used in many places in this Act. In some instances it refers to the judgment of some officer, e.g., secs. 48, 78 (4), 80 (1), 86, 123 (1), 133 (1), (3), 137 (2), (5), 138, 139 (1), 167 (3), 187 (1), (2). Leaving aside these sections, we find by sec. 27 (1) that the license shall be deemed to be the license of the licensee; sec. 38, a water power of a certain kind shall not be deemed part of the claim; sec. 83, non-compliance with any requirement of the Act shall be deemed to be an aban-

donment; sec. 129, the Court may transfer any case to the Commissioner which should have been brought before him, and thereafter it shall be deemed to be a proceeding before him; sec. 162, an abandoned mine not properly fenced shall be deemed to be a nuisance. In all these there can be no doubt of the meaning of the word.

Where the legislature has placed such a bar to our entertaining an appeal, we have no power to extend the time: Reekie v. McNeil, 31 O. R. 444, and cases cited. And the provision of sec. 153 of the Act, that the practice and procedure on an appeal to a Divisional Court shall be the same as in ordinary cases under the Judicature Act, does not assist the appellant any more than the similar provision in the County Courts Act, R. S. O. 1897, ch. 55, sec. 40, assisted the appellant in Reekie v. McNeil.

FALCONBRIDGE, C.J.:—I agree. As to the meaning of the word "deemed," I refer also to The Queen, L. R. 2 Ad. & Ecc. 354; Lowe v. Darling & Son, [1906] 2 K. B. 772; Shepherd v. Broome, [1904] A. C. 342.

The appeal will be quashed with costs as of a motion to quash only.

BRITTON, J., concurred.

MEREDITH, C.J.C.P. NOVEMBER 16TH, 1909.

LAMONT v. WENGER.

Damages—Fraud and Misrepresentation—Sale of Creameries—Measure of Damages—Difference between Purchase Price and Actual Value—Loss in Operation.

Appeal by the defendant from the report of the local Master at Woodstock under a reference directed "to ascertain and state what damages, if any, the plaintiffs have sustained by reason of the fraud referred to in the pleadings."

The fraud was in respect of two creameries which, the plaintiffs alleged, they were induced to purchase relying upon certain representations of the defendant and his agent as to the output, expenses, and profits of the creameries for the year 1904-5, which were, as they alleged, false and fraudulent.

The purchase price was $4,830.

The Master found that the value of one of the creameries was $367.50 and of the other $532.50, and allowed as damages the difference between the aggregate of these two sums and the purchase money, viz., $3,930, with interest at 5 per cent., amounting to $715.05.

The Master also allowed as damages $3,440.14, which he ascertained to be the loss sustained by the plaintiffs in the operation of the creameries by them after the purchase.

G. H. Watson, K.C., for the defendant, contended that the true measure of damages was the difference between the purchase price of the creameries and their actual value at the time they were purchased, and that, so measured, the damages awarded were excessive, and that the Master erred in allowing damages for the loss sustained by the plaintiffs in the operation of the creameries.

J. G. Wallace, K.C., for the plaintiffs.

MEREDITH, C.J., held that the contention of the defendant was entitled to prevail, and that the report in so far as it allowed damages for the loss sustained by the plaintiffs in the operation of the creameries must be set aside.

He referred to Kerr on Fraud, 3rd ed., pp. 375-6; Mayne on Damages, 8th ed., p. 237; Peek v. Derry, 37 Ch. D. 541, 578, 591, 594; Broome v. Speak, [1903] 1 Ch. 586, 605; Tomlin v. Luce, 43 Ch. D. 191; Smith v. Bolles, 132 U. S. 125; Crater v. Binninger, 33 N. J. Law 513; Sedgwick on Damages, 8th ed., vol. 2, secs. 778, 779, 780, 781; Atwater v. Whiteman, 41 Fed. Repr. 427; Glaspell v. Northern Pacific R. Co., 43 Fed. Repr. 900; Buschman v. Codd, 52 Md. 202; Barley v. Walford, 15 L. J. Q. B. 369.

Damages reduced to $4,645.05, and the report varied accordingly unless the defendant desires that further argument be had as to the findings as to the actual value of the creameries. If further argument not desired, the costs of the appeal to be costs in the cause to the defendant.

MACMAHON, J. NOVEMBER 17TH, 1909.

DICKS v. SUN LIFE ASSURANCE CO.

Life Insurance—Policies Payable to Children of Assured—Change by Direction in Will—Appointment of Trustee to Receive Insurance Moneys—Validity of Payment to Trustee.

Action by the five children of May Dicks, who died on the 2nd March, 1895, to recover sums alleged to be due to them under two policies of insurance upon the life of their mother.

By the terms of the policies, the amounts secured thereby were payable on the death of the assured to her "children surviving at her death, share and share alike."

By her will, dated the 10th December, 1894, probate whereof was granted to her husband on the 12th March, 1895, May Dicks appointed her husband executor and devised and bequeathed to him all her estate, real and personal, and appointed him trustee to receive all moneys payable under certain policies of insurance on her life (including the two on which this action was founded), all of which she declared to be for the benefit of her children. She also directed that her real and personal estate, including all moneys accruing from the policies of life insurance, were to be held by her husband on specified trusts, for the benefit of the children.

On the 18th December, 1895, the defendants paid the amount of the two policies and interest, $10,220.27, to Arthur A. Dicks, the husband, and he delivered up the policies to the defendants and executed a receipt under seal in which he described himself as "executor of will, trustee of minor children, and administrator of the estate of the late May Dicks."

The five children were all minors at that time, but at the time of this action three of them had attained majority.

A. J. Russell Snow, K.C., for plaintiffs.

W. Mulock, for defendants.

MacMahon, J., held, following Campbell v. Dunn, 22 O. R. 98, that the insurance moneys were validly paid to Arthur A. Dicks; and did not consider the question arising on the Statute of Limitations.

Action dismissed with costs.

Britton, J., in Chambers. November 18th, 1909.

REX v. LORENZO.

Criminal Law—Police Magistrate—Summary Conviction—Refusal to Adjourn—Defendant not Allowed Fair Opportunity to make Defence—Evidence.

Motion to quash a conviction.

James Haverson, K.C., for the defendant.

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

BRITTON, J.:—The defendant was convicted by Thomas Stoddart, police magistrate for the town of Copper Cliff, on the 8th September, 1909, for selling liquor without a license. It is alleged that the sale took place at the town of Copper Cliff on the 1st September, 1909.

The information was laid by one Herman Vick, a constable and detective, on the 6th September. No summons was issued, but on the 7th September "a warrant in the first instance" was issued, and on the 8th September, about 10 a.m., it is said, the defendant was arrested. He was brought before the police magistrate, and gave bail for his appearance on that day at 5 p.m. No doubt the defendant was told, at least in a general way, what his offence was, although it does not appear that any copy of the warrant was served upon or given to him. The defendant had time to see or communicate with his solicitor, Mr. Mulligan. The defendant appeared at 5 o'clock. . . .

[An adjournment to secure one Gegen and others as witnesses was asked for and refused.]

Vick, the prosecutor, in an affidavit used in opposing the present motion, states that Gegen . . was present in the court during the hearing. I assume that neither the defendant nor Mr. Mulligan nor the police magistrate then knew of Gegen's presence, or he would have been called, and no adjournment would have been asked for, so far as Gegen was concerned. Vick was a detective and constable as well. It is a fair inference that he heard all that took place in regard to the request for and refusal of an adjournment. He knew that Gegen was wanted, and would have been subpœnaed had the adjournment been granted, and yet he did not inform any one of Gegen's presence. That Gegen did not speak up, even if he understood English and heard what was being said, need occasion no surprise. It was the duty of Vick, in the circumstances, to have either called Gegen or to have informed the defendant or his solicitor or the police magistrate of Gegen's presence.

The police magistrate says he did not believe the defendant; certainly he did not or there would have been no conviction; and he did believe the witness Boutineu, "who admitted that he was an informer in the case," as he gave his evidence so frankly.

It certainly was quite within the province of the police magistrate to reject the evidence of any witness as unworthy of belief and to accept the evidence of another, but that is not the point. In this case the defendant swore exactly opposite to the witness Boutineu, and an adjournment was asked, for a very short time, to procure evidence to corroborate the defendant, so that at least

the defendant would have a chance of having the police magistrate believe him in preference or in opposition to the evidence for the prosecution. There is no question of dealing with the evidence as it stood. The defendant wanted something further on his own behalf. The police magistrate says that, in his opinion, the application by the defendant was made for the purpose of delay. It certainly was, but for such delay—reasonable, reduced to a minimum —as would enable the defendant to get the evidence of one or more of three named persons believed to be then within a short distance of the place where the trial was proceeding, and, as it turns out, upon the evidence of the prosecutor, one of these named persons was present in court, although not to the knowledge of the defendant or magistrate.

In my opinion, the defendant did not get a fair trial. "He was not allowed a fair and reasonable opportunity to make his defence," and, having reached that conclusion, the decision in Rex v. Farrell, 15 O. L. R. 100, is binding upon me. The defendant was not admitted to make his full answer and defence to the charge: see sec. 713 of the Criminal Code.

It is, subject to the question of depriving a defendant of a fair trial, for the magistrate to say what is reasonable time after service for a defendant to appear and stand trial, and further what is reasonable service. Here the defendant did appear; and, under all the circumstances of the case, should he be held to simply depend upon his own denial, or should, upon terms that would prevent any possible miscarriage, an adjournment have been granted? No harm, as it seems to me, could have resulted from such adjournment. Upon his arrest in the morning he had given bail to the satisfaction of the magistrate himself, for his appearance at 5 o'clock. He then appeared. Had an adjournment been granted until a later hour that evening, or until some convenient time a little later, the defendant would have been obliged to renew his bail or remain in custody. At such cost, can it be said that for the purpose of fair trial the defendant was not entitled to an adjournment? It is reasonable, if a person plead not guilty before a magistrate and requires time for his defence and to produce his evidence, that he should get it. "A defendant should be duly summoned and fully heard:" see Paley on Summary Convictions, 8th ed., pp. 118, 119. See also Regina v. Eli, 10 O. R. 727.

The conviction should be quashed. No costs.

BRITTON, J., IN CHAMBERS. NOVEMBER 18TH, 1909.

REX v. LUIGI.

Criminal Law—Police Magistrate — Summary Conviction—Refusal to Adjourn—Defendant not Allowed Fair Opportunity to Make Defence—Evidence.

Motion to quash a conviction.

James Haverson, K.C., for the defendant.

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

BRITTON, J.:—An information was laid on the 23rd September, 1909, against the defendant for unlawfully selling liquor without a license, on the 16th September, at Copper Cliff. The defendant was arrested on the 23rd September, and was at once brought before the police magistrate and gave bail for his appearance for trial on the 25th September at 2 o'clock p.m. The defendant, with Mr. Mulligan as his counsel, did appear. The defendant entered his plea of "not guilty," and the trial proceeded.

The witnesses for the prosecution were one Bowley and detective Fade. The evidence of Bowley, if believed, clearly established the offence as charged. He stated that there was a sale upon the premises of the defendant upon the day named of two bottles of beer and one glass of spirits. The sale, as witness stated, was made by the wife of the defendant, but the defendant himself came in and saw his wife serve the beer and spirits. Upon cross-examination by Mr. Mulligan, Bowley stated that, besides himself, there were present, at the time of sale, detective Fade and a person named Hawkins, and that in all eight bottles of beer and one of spirits were sold to the three persons or to one or more of them. Detective Fade was called and corroborated Bowley. At the close of the evidence for the prosecution Mr. Mulligan asked for an adjournment for the purpose of bringing Hawkins to give evidence. It was alleged that both witnesses who had testified were detectives; that the defendant was arrested on the 23rd; and that he was not able to consult his counsel until the morning of the trial.

The motion to quash is made on the ground that the defendant was denied the opportunity of producing at the trial necessary and named witnesses, viz., Hawkins and the wife of the defendant, and that thus the defendant was deprived of a fair trial.

The defendant was, of course, entitled to a fair trial, and, in my opinion, it would have been a very fair and proper thing, as the

defendant's counsel asked for it, to have granted the adjournment and to have heard the evidence of Hawkins, if brought before him by the defendant to testify on his behalf; but it was open to comment, and no doubt the police magistrate was influenced by this, that the defendant himself did not offer to give evidence, denying, if he could have done so, that part of the evidence for the prosecution in reference to his own presence when the liquor was being sold and consumed.

I cannot say that he did not have fair and reasonable opportunity to make his defence.

This case is very different in its facts from Rex v. Lorenzo, just decided by me. Here the defendant was arrested on the 23rd and gave bail for the 25th. He could on the evening of the 23rd and all day of the 24th have made all necessary inquiry. He could, so far as appears, have had his wife present with him at the hearing. If the defendant had denied what was sworn to in reference to himself, and the wife had also on oath denied the charge, and then if the magistrate had refused a short adjournment for the purpose of procuring the evidence of Hawkins on the defendant's behalf, if he could have given exculpatory evidence, I should have come to a different conclusion. This case must be dealt with upon its own facts. The granting an adjournment as asked was in the discretion of the police magistrate, but such discretion is not to be exercised in such a way as that the defendant will be deprived of a fair trial. In this case the evidence leads to the conclusion that there was a fair trial, and that any longer delay would not have assisted the defendant.

Upon all the evidence and upon full consideration of all that took place upon the application for the adjournment, I cannot say that the defendant did not have a fair trial, within the meaning of the authorities, so I will dismiss the motion, but without costs.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. NOVEMBER 18TH, 1909.

RE TATHAM v. ATKINSON.

Division Courts—Demand for Trial by Jury—Motion for Judgment under sec. 116 of the Division Courts Act—Jurisdiction—Prohibition.

Motion by the defendant for prohibition to the 8th Division Court in the county of Bruce.

The plaintiff sued for $64.96. The defendant filed a dispute note and a demand for a trial by jury. At the trial the plaintiff challenged the panel as not being drawn from the proper municipality, and the trial was postponed. The plaintiff then moved for judgment under sec. 116 of the Division Courts Act, and judgment was granted by the Judge.

Frank McCarthy, for the defendant, contended that his demand for a jury trial made it impossible for the plaintiff to obtain a summary judgment under sec. 116.

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

FALCONBRIDGE, C.J.:—It is clear that in general, where a jury notice has been filed, the Judge cannot disregard it, but must try the action with a jury where there is something to try. Here it was held that no defence was shewn. I am of opinion that the jury notice is effective only where the defendant intends to dispute, and has some right to dispute, the plaintiff's claim. Section 116 was added by the legislature in 1885; and under the rule of construction of statutes that a general enactment is governed by a particular one (see Pratt v. Golly, 26 Beav. 610), I am of opinion that sec. 116 prevails over the jury notice here, and that the Judge had the right to act under that section.

Motion dismissed with costs.

RE TOWN OF SARNIA AND COUNTY OF LAMBTON—ASSESSMENT COURT—OCT. 19.

Equalization of Assessment.]—In the matter of an appeal by the Town of Sarnia from the equalized assessment made by the council of the county of Lambton for 1909, the Court appointed by order in council of the 30th September, 1909, for hearing and determining the appeal, composed of Colin G. Snider, Judge of the County Court of Wentworth, D. F. McWatt, Judge of the County Court of Lambton, and A. MacLean, registrar of the county of Lambton, considered the question whether the county assessment placed by various by-laws of some of the municipalities within the county upon certain properties therein, under and by virtue of the Municipal Act, or the actual values of such properties, should be taken as the proper amounts to be considered by the county council in their equalization of the assessment, and adjudged that all such properties should be rated for the purpose

of county equalization, on which the county tax or rate is apportioned upon the local municipalities, at the fixed assessments, and not otherwise. R. J. Towers, for the Town of Sarnia. E. Meredith, K.C., and J. C. Judd, for the county of Lambton. A. Weir, for the town of Petrolia. W. F. Fitzgerald, for the village of Watford. R. V. Le Sueur, for several municipalities in the county.

ONTARIO SEWER PIPE CO. v. MACDONALD—MASTER IN CHAMBERS Nov. 12.

Foreign Commission]—Upon the application of the defendants, an order was made for the issue of a commission to take evidence in the State of Maine. The Master referred to Colonial Development Co. v. Mitchell, ante 134, and the cases there cited. G. H. Kilmer, K.C., for the defendants. J. A. Macintosh, for the plaintiffs.

ROBINSON v. ROBINSON—DIVISIONAL COURT—NOV. 13.

Fresh Evidence on Appeal.]—Upon appeal by the defendant W. A. Robinson from the judgment of RIDDELL, J,. and upon petition by the appellant for the admission of further evidence, a Divisional Court (BOYD, C., MAGEE and LATCHFORD, JJ.), made an interim order for the taking of further evidence before the trial Judge, for the purpose of enabling the Court to dispose satisfactorily of the litigation. W. Laidlaw, K.C., for the appellant. G. W. Holmes, for the plaintiff.

MCBAIN v. TORONTO R. W. CO.—MACMAHON, J.—NOV. 15.

Negligence — Street Railway—Damages—Joint Negligence of two Defendants—Costs.]—The plaintiffs, husband and wife, were injured by the overturning upon them of a tally-ho coach owned by the defendant Verral. In an action against the Toronto Railway Company and Verral to recover damages for the plaintiffs' injuries, it was admitted by the railway company that they were guilty of negligence in running their car at an excessive rate of speed and so striking the coach and causing it to overturn. MACMAHON, J., who tried the action without a jury, found for the plaintiffs against

the railway company, and assessed the plaintiff John McBain's damages at $500 and the plaintiff Elizabeth McBain's at $400, directing judgment to be entered for these sums with costs. The plaintiffs alleged joint negligence of the two defendants. No negligence being proved against the defendant Verral, the action as against him was dismissed with costs, with a direction that these costs when paid should be recovered by the plaintiffs against the defendants the railway company: Bullock v. London General Omnibus Co., [1907] 1 K. B. 264. J. M. Godfrey, for the plaintiffs. D. L. McCarthy, K.C., for the railway company. J. W. Curry, K.C., for the defendant Verral.

REX v. LANSING—BRITTON, J., IN CHAMBERS—NOV. 15.

Conviction—Trespass—Enclosed Land—Shooting—Notice.]—The defendant was on the 1st October, 1909, convicted by a magistrate of unlawfully trespassing "with guns and sporting implements in pursuit of game" upon the lands of the prosecutor, in the township of Cartwright. The offence intended to be charged was under 7 Edw. VII. ch. 49, sec. 25 (O.): "No person shall, at any time, hunt, shoot, or with a gun or other sporting implement about his person or in his possession go upon any enclosed land of another, after having had notice not to hunt or shoot thereon." The conviction was quashed, for these reasons: (1) no trespass was shewn as to any land of the prosecutor's enclosed within the meaning of the statute; (2) upon the undisputed evidence, no such offence as alleged by the prosecutor was shewn to have been committed by the defendant; (3) the "sign boards" were not shewn to be such as the statute requires to establish notice; (4) the title to land was brought in question. Costs were given against the prosecutor, but not against the magistrate. G. P. Deacon, for the defendant. W. H. Harris, for the prosecutor.

RUSTON v. GALLEY—MASTER IN CHAMBERS—NOV. 17.

Parties — Mistake — Discontinuance — Costs.]—The plaintiff moved to be allowed to add the wife of the defendant as a co-defendant, as it was stated by the defendant on his examination for discovery that he had deeded the property in question to her many years ago. The Master gave the plaintiff leave to discontinue the

action, and, for the reasons given in Armstrong v. Armstrong, 9 O. L. R. 14, without costs. Had the defendant at once notified the plaintiff of his mistake, the plaintiff, as he had not searched the registry office, would have had to pay costs. C. E. Macdonald, for the plaintiff. F. J. Dunbar, for the defendant and wife.

McCULLY v. McCULLY—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—NOV. 17.

Interim Alimony.]—An appeal by the defendant from the order of the Master in Chambers, ante 95, was dismissed, with costs to the plaintiff in the cause. The marriage being admitted, and the need of support, to some extent at least, being proved, the wife was prima facie entitled to interim alimony; and the amount was in the Master's discretion. J. A. Macintosh, for the defendant. W. Laidlaw, K.C., for the plaintiff.

REX v. SPINELLI—RIDDELL, J.—NOV. 17.

Criminal Law—Murder—Reserved Case.]—The defendant, an Italian, was on the 12th October, 1909, tried before RIDDELL, J., and a jury at North Bay, for the murder of a Chinaman, and convicted. At the trial no objection was taken to the charge, nor did counsel ask to have a case reserved. The prisoner was sentenced to be hanged on the 26th November. On the 17th November counsel for the prisoner applied for a reserved case, upon various grounds arising upon the evidence and the Judge's charge. The application was refused by RIDDELL, J., who made in writing a detailed examination and analysis of the evidence and charge in relation to the several grounds, concluding that none of them warranted the stating of a case for the Court of Appeal. A. R. Hassard, for the prisoner. J. R. Cartwright, K.C., for the Crown.

CANADIAN PACIFIC R. W. CO. v. CITY OF PORT ARTHUR—MASTER IN CHAMBERS—NOV. 18.

Counterclaim—Exclusion.]—The plaintiffs moved to strike out the counterclaim as improper. The action was to recover $50,000

damages for injury to the plaintiffs' track by the bursting of certain dams and reservoirs constructed by the defendants. The counterclaim was for damages occasioned by a breach of the plaintiffs' agreement, among other things, to keep their terminals at Port Arthur, in reliance on which the defendants bought and conveyed to the plaintiffs valuable water lots and also paid $25,000 to help construct a breakwater, and for a reconveyance of the water lots, etc. The Master made an order striking out the counterclaim, except the 12th paragraph, which was in part applicable to the statement of defence. He referred to Central Bank v. Osborne, 12 P. R. 160; Odell v. Bennett, 13 P. R. 10; Dunlop Tyre Co. v. Ryckman, 5 O. L. R. 249; and cases cited therein. The order to follow the form given in Central Bank v. Osborne. Costs in the cause. G. A. Walker, for the plaintiffs. Featherston Aylesworth, for the defendants.