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MEREDITH, C.J. FEBRUARY 4TH, 1909.

WEEKLY COURT.

RE GARVIN.

RE COBALT MONARCH MINES LIMITED.

Company—Prospectus—Penalty for Issuing Prospectus Varying from that Filed with Provincial Secretary—Ontario Companies Act, secs. 95, 98, 99, 100—Meaning of "Prospectus"—Advertisement—Director — Agent—Conviction —Appeal—Stated Case.

Appeals by J. W. Garvin and the Cobalt Monarch Mines Limited, upon cases stated by one of the police magistrates for the city of Toronto, from convictions under the Ontario Companies Act for issuing prospectuses alleged not to be in the terms of those filed with the Provincial Secretary.

A. P. Poussette, K.C., for Garvin.

W. N. Ferguson, K.C., for the company.

T. Mulvey, K.C., and J. W. Seymour Corley, K.C., for the Crown.

MEREDITH, C.J.:—I think the Garvin case is reasonably plain, and that the answer to the question submitted by the police magistrate in the stated case must be in favour of the Crown.

By sec. 95 of the Companies Act the word "prospectus," as used in part 7 of the Act, is defined to be "any prospectus, notice, circular, advertisement or other invitation offering for subscription or purchase any shares, debentures, or other securities of a company, or published or issued for the pur-

pose of being used to promote or aid in the subscription or purchase of such shares, debentures, or securities."

Then sec. 98 provides:—

"(1) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus.

"(2) A copy of every such prospectus shall be signed by every person who is named therein as a director or proposed director or provisional director of the company, or by his agent authorised in writing, and shall be filed with the Provincial Secretary, on or before the date of its publication."

Then there is a provision that the Secretary is not to "receive or file any prospectus unless it is so dated and signed. No prospectus shall be issued until so filed, and every prospectus shall state on the face of it that it has been filed."

Section 99 is the one which defines what the prospectus shall contain: "99 (1) Every prospectus issued by or on behalf of a company or in relation to any intended company or by or in behalf of any person who is or has been engaged or interested in the formation or promotion of the company, shall state"—then there are set out a number of things that the prospectus shall state.

Section 100 is the section which imposes the penalty for a failure to comply with the provisions of the sections dealing with the prospectus: "100 (1) Every provisional director, director, or other person responsible for the issue and publication of such prospectus, shall for every violation of the provisions of the next preceding three sections be liable on summary conviction to a penalty not exceeding $200 and costs, provided that no provisional director, director, or other person, shall incur any liability by reason of non-compliance with the said sections—(a) as regards any matter not disclosed, if he was not cognisant thereof; or (b) if the non-compliance arose from an honest mistake of fact on his part." Then there is a further provision limiting the liability.

The whole question seems to turn upon what the meaning of the word "prospectus," as used in sec. 99, is. I think there can be no doubt that the document which was published in this case, and in respect of which the prosecution took place, was a prospectus within the meaning of sec.

99. It is an advertisement designed to accomplish the purpose mentioned in sub-sec. 1 of sec. 95, which I have read.

It is plain from the Act, I think, that it has in view the issue not of one but of several prospectuses, and the policy of the Act appears to be that upon every occasion upon which the company desire to issue a prospectus for the purpose of inviting persons to take stock or to lend money to or to take the debentures of the company, there shall be a prospectus filed, and that it shall contain the information which the Act requires to be inserted in a prospectus; and that what it requires is that the prospectus in every case in which a prospectus is necessary, is to be filed with the Secretary, and that the published prospectus shall state on its face that it has been so filed. It seems to me, therefore, that it follows that when the document in question was published it ought to have contained what the prospectus then on file in the Secretary's office contained; and—I would leave out of consideration any mere verbal difference—that any difference between the advertisement which was published and the prospectus filed made the publication of the advertisement a violation of the Act, and rendered a director who was a party to the issuing of it liable to the penalties mentioned in sec. 100.

It seems to me that the whole purpose of the Act would be defeated if it is practicable to do that which these defendants have done. I have nothing to do with the policy of the Act, It may be that it would sufficiently answer for the protection of the public if a shorter advertisement were permitted than would be necessary if the whole prospectus were inserted.

The case that Mr. Mulvey has cited, Roussell v. Burnham, [1909] 1 Ch. 127, is in accordance with the view which I have expressed, although the question there arose in a different way.

In the other case, I should have had no doubt, in determining upon the case as stated, that a conviction ought not to have been made. Where a company gives an option to a stranger to purchase shares, and that stranger, without authority and without any action upon the part of the company, publishes a prospectus not conforming to the provisions of the Act, I am clearly of opinion that there is no offence by the company under sec. 100; but I understood from counsel for the Crown that there was another question which was desired to be raised—as to whether there

was a violation of the Act in consequence of the publication of a prospectus by the company itself, and also a question of fact which does not appear to me to be open upon the stated case, as to whether in point of fact the company was a party to the publication of the advertisement by Brunskill, who, it is said upon the evidence, ought to be held to be an agent of the company.

The case ought not to leave it to the Court to determine any question of fact, where there is a dispute, but the question of fact should be determined by the magistrate, and the question should be stated in this form: "Assuming the facts to be (stating them just as they are put in the case which has been stated), was the conviction properly made?"

There will be no costs, I suppose, of this appeal.

Ferguson. Will your Lordship, for our information, state in the first case—Mr. Mulvey, I understand, in practice, contends that where a prospectus is filed and signed as required by the Act, our advertisements need not be signed, as long as they comply with the Act. I understand that each advertisement must be signed and filed.

MEREDITH, C.J.:—I think not; and I intended to mention that. That makes against the contention of Mr. Poussette—"Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary to specify the names of original incorporators and the number of shares subscribed by them." That, I think, clearly dispenses with the necessity for publishing the signatures, but leaves it necessary to have them upon the prospectus filed with the Provincial Secretary.

Ferguson. The question is whether the directors for the time being have to sign the advertisement.

MEREDITH, C.J.:—As I have said, I do not think they have. It says "of original incorporation." Suppose that you were going to issue debentures or to issue new stock, then, as I understand the Act, you would have to file a new prospectus.

Poussette. May I trouble your Lordship for a little more advice on this subject? I apprehend that a mere state-

ment that there is such a company offering shares for sale, and that a prospectus can be obtained upon application, would not be an infraction of the Act?

MEREDITH, C.J.:—I do not know. I thought at first that it would not; but I think you had better be on the safe side. You see the words are "every advertisement"—it includes circulars or advertisements asking for subscriptions. I am afraid it is within the Act.

Suppose it says: "Company A. B. offers for sale 100,000 shares of $1 each. Apply to so-and-so." That certainly would be a prospectus within the meaning of sec. 98, which says that "every prospectus issued" shall state so.

Mulvey. This wording of the Act was taken from the English Act, and it was thought advisable not to vary from the wording of that Act, excepting where the procedure in Ontario varied from that in England.

MEREDITH, C.J.:—Then in the Garvin case the answer is in the affirmative, and there will be no costs.

ANGLIN, J. FEBRUARY 19TH, 1909.

WEEKLY COURT.

RE CHARLES H. DAVIES LIMITED.

McNICOL'S CASE.

Company—Winding-up—Contributory—Accommodation Indorsement for Benefit of Company — Shares Issued as Fully Paid—Certificate Given as Security—Misrepresentations—Estoppel.

Appeal by McNicol from an order of an official referee, upon a reference for the winding-up of the company, placing the appellant upon the list of contributories.

R. S. Robertson, Stratford, for the appellant.

R. H. Parmenter, for the liquidator.

ANGLIN, J.:—The only evidence before the learned referee was that of McNicol himself, and, in his judgment, the

referee does not discredit McNicol as a witness. His story is that C. H. Davies, who was managing director of the company, saw him on behalf of the company for the purpose of inducing him to take stock. McNicol at first refused. Davies then offered to take some insurance through McNicol, and upon this inducement McNicol agreed to take one share. Davies wished him to take 5 shares, but McNicol refused. Davies then asked McNicol to give an accommodation note for $400, which McNicol agreed to do. Davies brought him a stock certificate for "5 shares of the par value of $100 each, fully paid, of the capital stock of Charles H. Davies Limited, telling him that, as to 4 of the 5 shares, they were to be security for the accommodation note which McNicol was asked to give. Upon this understanding McNicol took the certificate. The company drew upon him for $100, which he paid. When McNicol's note for $400 matured, Davies wanted him to renew. McNicol renewed, Davies giving him a note for the same amount to shew that McNicol's note was for accommodation. When McNicol's note again matured, Davies wished it again renewed, but McNicol refused to renew it. Davies then asked him to split the note in two, and McNicol thereupon gave him a note for $200, but did not get back the $400 note. When the $200 note matured, Davies asked for its renewal, and McNicol refused. Davies then drew upon McNicol for $200. McNicol at first refused to accept, but finally accepted, getting from Davies a note for the same amount, as he says, to shew that the acceptance was for accommodation. Two of the notes signed by Davies in favour of McNicol are produced; also the draft for $100 paid by McNicol, and the $200 draft accepted, but not paid; the other notes have been lost.

There was no subscription or application for stock by McNicol, and no allotment of stock to him. He attended some of the company's meetings, and accepted a dividend in respect of the $100 paid by him, but, inasmuch as he is admittedly a holder of one share, these acts are equivocal, and cannot create an estoppel against him. McNicol certainly never thought he was acquiring more than one share in the company. As to the other 4 shares, he thought he was obtaining security for a loan which he was making presumably to or for the benefit of the company. It was so represented to him by the company's general manager, who was acting as the company's agent in the sale of the stock. The company issued to McNicol a certificate in which the shares

were described as "fully paid." In most of these particulars the case differs entirely from Re Perrin Plow Co., 12 O. W. R. 387, on which the learned referee relies. There, although at first unwilling, the contributory, Allan, eventually became an applicant for the whole number of shares in respect of which he was held. These shares were duly allotted to him; he took them and gave his note for them, relying on the undertaking of two persons interested in the promotion that they would pay the note for him by instalments. The shares were issued direct to him, and he received dividends upon them and gave a proxy in respect of them. He was held liable as a shareholder.

The present case is, in my view, not distinguishable in principle from Bloomenthal v. Ford, [1897] A. C. 156. In that case the person sought to be made contributory had lent money to a limited company upon the terms that he should have as collateral security fully paid shares in the company, and the company handed to him certificates for 10,000 shares of £1 each. No money had in fact been paid upon the shares, which were issued from the company direct to the lender, but he did not know this, and believed the representation that they were fully paid shares. An order having been made to wind up the company, he was placed upon the list of contributories, but it was held in the House of Lords that since the company had obtained the loan by a representation that the shares were fully paid, which the appellant believed and acted upon, the company and the liquidator were estopped from alleging that the shares were not fully paid, and that the appellant was entitled to have his name removed from the list of contributories.

The representation made in this case by the accredited agent of the company was similar to the representation in the Bloomenthal case. Money was lent for the benefit of the company through their agent, as in the Bloomenthal case. The company issued their certificate for fully paid shares, upon the faith of which the note representing the loan was renewed, and subsequently allowed to stand, the lender believing that he had received security for his claim. Instead of receiving security, the liquidator now maintains that he had subjected himself to a considerable liability. The facts of these two cases are sufficiently similar to render them practically indistinguishable. Upon the authority of Bloomenthal v. Ford, which was not referred to in the judgment of the learned referee, and which, he informs me, was not cited

to him, the appeal must be allowed and the order placing McNicol on the list of contributories reversed. The appellant is entitled to his costs of appeal and of the application to place him on the list of contributories.

LATCHFORD, J. FEBRUARY 22ND, 1909.

WEEKLY COURT.

RE LISTER AND TOWNSHIP OF CLINTON.

Way—Opening up of Original Road Allowance—Township By-law—Part of Allowance Enclosed by Private Owners — Substituted Way — Deflected Road, Including Lands of Private Owners — Notice to Owners — Sufficiency —Municipal Act, 3 Edw. VII. ch. 19, secs. 641, 642, 643 —Compensation to Private Owners—Omission to Provide for—Quashing By-law.

Application by Marion Lister and Henry F. Konkle to quash by-law No. 222 of the township of Clinton, providing for the opening up of the original allowance for roads between lots 15 and 16 in the 1st concession of the township.

E. F. Lazier, Hamilton, for the applicants.

A. C. Kingstone, St. Catharines, for the respondents.

LATCHFORD, J.:—The applicants are the owners of parts of lots 15 and 16 in the broken front concession on Lake Ontario and lots 15 and 16 in the 1st concession of the township of Clinton. The township was surveyed in 1791. The road allowance sought to be opened is shewn on the plan of the survey; but no road is indicated as then existing along the lake shore. The east half of lot 16 in the 1st concession of Clinton and the broken front of said half lot—in all about 80 acres—were granted in 1819 by one Staats Overholt to one Henry Konkle. The deed does not mention or reserve either the road along the lake or the road allowance across the land between the broken front and the first concession. A description by metes and bounds is expressed in the deed, and within such metes and bounds the road allowance now in question was included. From the original Henry Konkle the east half of lot 16 has come down to Mrs. Lister. The description in the conveyance to her on 23rd April, 1888, follows that in the deed from Overholt to Konkle. Whether the applicant Henry F.

Konkle derives title from the Konkle of 1809 or from another, does not appear. He deposes that he was born in Clinton in 1844, and has resided in the township all his life. He and Mrs. Lister and their respective predecessors in title enclosed, occupied, and used as part of their farms, for upwards of 60 years, the road allowance along the base line across lots 15 and 16.

Along the shore of Lake Ontario and running east and west across the lands of Konkle and Mrs. Lister in the broken front concession, a road has long existed; just how long does not appear, but certainly prior to 1850. It lies approximately parallel to the road allowance opened by the by-law. Twice, at least, and probably on 3 occasions, Konkle moved back his fence on the south side of this road to permit the road to be deflected where portions of the road had been washed away by the waters of the lake. He states that on each occasion he moved his fence at the request of the road-master for the township of Clinton.

Mrs. Lister's husband deposes that the fences on her property have been moved back at least 4 times in 20 years, each time a distance of not less than 16 feet. The road on each occasion was deflected. Neither Mrs. Lister nor Konkle received any compensation for the lands they gave for the purposes of the road. Statute labour and the moneys of the township of Clinton were for many years applied in maintaining and improving the road, and at least one bridge upon it near Konkle's lands. It was in fact and law a common and public highway.

Owing to the erosive action of the lake, the road, in 1904 and subsequent years, became out of repair and unfit for travel. Lister urged the council to put it in proper condition; but, owing to the expense entailed, the council declined to take any action, and determined to open up the original road allowance—25 or 30 chains to the south.

Notice of the intention of the council was given to Mrs. Lister and Konkle. One of the notices is as follows:—

"Township of Clinton, July 25th, 1908.

"Mrs. Claudius Lister,

"Madam: I hereby notify you that a by-law will be introduced and passed to open road across lots 15 and 16, known as the base-line, in the township of Clinton, on Monday August 3rd, 1908, at town hall, Beamsville.

"Yours truly,

"G. W. TINLIN,

"Tp. Clerk."

Sections 642 and 643 of the Municipal Act, 3 Edw. VII. ch. 19, are as follows:—

"In case a person is in possession of any part of a government allowance for road, laid out immediately adjoining his lot and enclosed by a lawful fence, and which has not been opened for public use by reason of another road being used in lieu thereof, or is in possession of any government allowance for road parallel or near to which a road has been established by law in lieu thereof, such person shall, as against any private person, be deemed legally possessed thereof until a by-law for opening such allowance for road has been passed by the council having jurisdiction over the same.

"No such by-law shall be passed until notice in writing has been given to the person in possession, at least 8 days before the meeting of the council, that an application will be made for opening such allowance."

A road allowance is shewn on the plan of 1791 along the base-line mentioned in the by-law. The applicants were in possession of these parts of the allowance adjoining their respective lots in the broken front concession. They had such parts enclosed by a lawful fence, and the road allowance so possessed and enclosed had not hitherto been opened to public use by reason of the lake shore road being used in lieu thereof. Mrs. Lister and Konkle were legally in possession of the portions of the base-line road allowance which they occupied, and a by-law opening up the road allowance could not be passed by the township until the notice required by sec. 643 had been given.

The notice given was, I think, sufficient. It was served on 20th July, and gives all the information the statute requires. The rule laid down in Ostrom v. Township of Sidney, 15 A. R. 372, at p. 374, is not, I think, applicable. In Birdsall v. Township of Asphodel, 45 U. C.R. 149, the notice did not state the day on which the council was to consider the by-law, and it was there held that knowledge aliunde was not a sufficient answer to the application to quash the by-law. But in the present case the day is stated. The notice is headed "Township of Clinton," and is signed by Mr. Tinlin as township clerk, and the matter is to be considered at the town or township hall. It is manifestly the township council that would act in the premises. Unless the applicants were misled by the omission to mention the hour of meeting as well as the day, they cannot, in my opinion,

complain. But they attended the meeting of the township council on the day named, or were there represented by counsel, and were heard before the by-law was passed. The notice was, in my opinion, a sufficient compliance with the statute.

The first recital in the by-law, as to the existence of an original road allowance along the base-line, is undoubtedly true.

The second recital is as follows: "And whereas, in addition thereto, there existed from time immemorial, but not in lieu thereof, another road following the course of the shore of Lake Ontario."

The applicants say this statement of fact is unfounded, so far as it states, or appears to intend to state, that the lake shore road had not existed in lieu of the original road allowance. If the lake shore road was in fact in lieu of the original road allowance, the by-law is defective.

Section 641 of the Municipal Act provides, among other matters, that "in case in lieu of an original allowance for road a new or travelled public road has been laid out for which no compensation has been paid to the owner of the lands so appropriated, such owner, if his lands adjoin the . . . original allowance, shall be entitled thereto in lieu of the road so laid out."

It is not open to question that the new road is to be opened in lieu of the old road. The by-law itself recites that, "by reason of the encroachment of the waters of Lake Ontario, a portion of the said highway along the lake shore has been washed away, and there is no means of access or any travelled road sufficient for the purpose of a public highway in the immediate vicinity of lots 15 and 16 in the broken front and 1st concession of said township." It does not necessarily follow because the original road allowance which the by-law purports to open is to take the place of the lake shore road, that the lake shore road was "in lieu of the original road allowance." But when the circumstances of the case are considered, that conclusion is unavoidable. The lake shore road runs in the same direction as the road allowance, and in the same vicinity. When in repair "it serves the purpose and accommodates the traffic of the public that the original road allowance was intended to do:" Beemer v. Village of Grimsby, 13 A. R. 225, 232, per Cameron, C.J.

Neither Mrs. Lister nor Konkle nor any of their predecessors in title received any compensation for the lake shore

road where it crossed their farms, or where it was moved prior to 1904, as often as it was washed away. Their lands adjoin, and in fact encompass on two sides the original road allowance. They are entitled to the parts of the road allowance across their farms; and, although they have not received conveyances from the township, the township could not, in my opinion, pass a by-law to open up the road allowance without providing for compensation to those so entitled. It has not provided for such compensation. On this ground the by-law should be quashed.

Order may issue accordingly, with costs.

TEETZEL, J. FEBRUARY 22ND, 1909.

WEEKLY COURT.

MENZIES v. FARNON.

Marriage—Action for Declaration of Invalidity—One Party under 18—Absence of Parents' Consent—R. S. O. 1897 ch. 162, secs. 15, 31 (1)—Fulfilment of Requirements—Collusion—Motion for Judgment in Default of Appearance—Refusal—Trial on Oral Evidence.

Motion by plaintiff for judgment upon the writ of summons and statement of claim, in default of appearance and defence.

Harcourt Ferguson, for plaintiff.
No one appeared for defendant.

TEETZEL, J.:—The action is brought under the provisions of sec. 8 of 7 Edw. VII. ch. 23 (O.), adding the following to R. S. O. 1897 ch. 162:—

"31. (1) In case a form of marriage shall be gone through between two persons, either one of whom is under the age of 18 years, without the consent required by section 15 of this Act, the High Court of Justice shall have jurisdiction and power, notwithstanding that a license or certificate was granted and that the ceremony was performed by a person authorised by law to solemnise marriage, in an action brought by either party who was at the time of the ceremony under the age of 18 years, to declare and adjudge that a valid marriage was not effected or entered into.

"(2) Provided that such persons have not after the ceremony cohabited or lived together as man and wife, and that such action shall be brought before the person bringing it has attained the age of 19 years.

"Nothing herein contained shall affect the excepted cases mentioned in section 16 of this Act or apply where after the ceremony there has occurred that which, if a valid marriage had taken place, would have been a consummation of the marriage.

"(4) The High Court of Justice shall not be bound to grant relief in the cases provided for by this section where carnal intercourse has taken place between the parties before the ceremony."

Section 15 of R. S. O. 1897 ch. 162 provides that where in case of an intended marriage either of the parties thereto (not being a widower or widow) is under the age of 18 years, the consent of the father of such party, if the father be living, or, if the father be dead, the consent of the mother, if living, or of a guardian, if any be appointed, shall be required before the license is issued. And sub-sec. 2 provides that where such consent is necessary, the license shall not issue without the production of the consent; and that the issuer shall satisfy himself of the genuineness of the consent by satisfactory proof of the addition to the affidavit required of one of the parties.

The plaintiff brings the action by her mother as next friend, and in her statement of claim alleges, among other things, that without the consent or knowledge of either of her parents, on 17th July, 1906, being then only 15 years of age, she went with the defendant through a marriage ceremony before a minister (now deceased) of an English church in this city; that immediately after the ceremony she left the defendant and went home to her mother and remained with her mother continuously until the next day, when she went to England, where she now resides; that the plaintiff and defendant have not cohabited or lived together as man and wife, nor have they seen one another since they parted immediately after the ceremony; and that since the ceremony nothing has occurred which, if a valid marriage had taken place, would have been a consummation of the marriage, and neither before nor after the ceremony did carnal intercourse take place between the parties; and she prays a declaration that the ceremony gone through be-

tween her and the defendant did not constitute a valid marriage.

The defendant did not enter an appearance, but was served with the statement of claim.

The statement of claim purports to be verified by affidavits of the plaintiff and the mother; and an affidavit of the defendant is also filed, in which he says that he procured a marriage license and went through the ceremony with the plaintiff, as alleged by her; that he did not obtain the consent of either of the parents of the plaintiff; and that, so far as he is aware, the plaintiff was married without the consent or knowledge of either of her parents; and also that the plaintiff and he have not cohabited together at any time, nor has any carnal intercourse taken place between them; and he also adds in his affidavit that he is desirous that a decree shall be granted nullifying the marriage between the plaintiff and himself.

According to the certificate of the Deputy Registrar-General, the entry return of the marriage made under the Act contained the information that the defendant was 24 years of age, and that the plaintiff was 18 years of age. Assuming that the defendant knew that plaintiff was much younger and within the age requiring consent of parents, he would be indictable for perjury in making the affidavit without which he could not have obtained the license.

The fact that the defendant failed to enter an appearance, followed by furnishing plaintiff's solicitors with his affidavit to aid the plaintiff in obtaining judgment, seems to me evidence of collusion, which, if established, constitutes a bar to the plaintiff's relief, assuming that the principles followed in England under the Matrimonial Causes Act, 1857, would be adopted in this country in cases under sec. 31 above quoted. See Churchward v. Churchward, [1895] P. 7.

I do not purpose disposing of the motion upon that ground, but upon the ground that I think the circumstances disclosed in evidence in this case are such that the action should not be disposed of upon affidavits, but should be set down for trial as an undefended issue, and the necessary material to bring it within the Act should be adduced by oral evidence in open Court.

Where a marriage has been solemnised, the law strongly presumes that all the legal requisites have been complied with, and the burden is cast upon the plaintiff, under the

Act in question, to establish to the satisfaction of the Court 5 essential facts in order to obtain judgment declaring the marriage invalid: first, that the plaintiff was at the time of the marriage under the age of 18 years; secondly, that the consent required by sec. 15 of the Act was not given; thirdly, that the plaintiff and defendant have not since the ceremony cohabited and lived together; fourthly, that when the plaintiff brought the action she had not attained the age of 19 years; and fifthly, that carnal intercourse did not take place between the parties, either before or after the ceremony.

In refusing this application, I do not assume to lay down any general practice in such cases, but I should think that it would be only in a case where the essentials required by the statute were clearly established, and all evidence of collusion negatived, that judgment should be awarded on affidavit evidence alone.

I think it is to be regretted that the statute has not made some provision for the appointment of a public officer having similar jurisdiction in such cases to that of the King's proctor in England, under the Matrimonial Causes Acts of 1857 and 1860.

By sec. 5 of the last named Act it is provided that "in every case of a petition for dissolution of a marriage it shall be lawful for the Court, if it shall see fit, to direct the necessary papers in the matter to be sent to His Majesty's proctor, who shall, under the directions of the Attorney-General, instruct counsel to argue before the Court any question in relation to such matter which the Court may deem it necessary or expedient to have fully argued," etc.

Where, as in this case, the defendant has committed a fraud upon the marriage laws of the country, if the plaintiff's allegations are true, it seems to me that there should be provision for intervention by some public official to see that the provisions of the relieving Act are not abused, and to avoid the possibility of judgment being obtained by collusion of the parties.

An action of this kind is not only a matter in which the parties themselves are interested, but the public has an interest not only in preventing violations of the Act respecting the solemnisation of marriage, but also in keeping all cases where relief is sought within the strict limitations of sec. 31.

The motion will, therefore, be refused, without prejudice to the plaintiff setting the action down for hearing in the usual way.

FALCONBRIDGE, C.J. FEBRUARY 22ND, 1909.

TRIAL.

GORMALLY v. McFEE.

Landlord and Tenant — Distress when no Rent Due — Evidence—Damages for Illegal Distress—Nominal Damages —Costs.

Action for damages for illegal distress.

G. I. Gogo, Cornwall, and F. T. Costello, Alexandria, for plaintiff.

George Wilkie, for defendant.

FALCONBRIDGE, C.J.:—It is very unfortunate that there had not been a business man on each side to deal with this dispute. A suit in the Division Court for the recovery of $7 would have settled the whole matter in controversy between the parties. As it is, a distress warrant was issued, and this action is the result. It was within the scope of the authority of the agent Donald A. McDonald to make the bargain which the plaintiff swears he did make for the renting of the house. McDonald also, according to the plaintiff, told him to pay the account (exhibit 2) for $20.78, and to keep it off the rent; and told him to pay no attention to exhibit 8 (letter from defendant of 26th December, 1907), but to pay the $20.78 as agreed on and to send her a statement.

It was stated at the trial that McDonald was subpœnaed as a witness for the defendant, and, on his not answering to his name, I offered the defendant an adjournment for the purpose of calling him, which offer was not accepted. The plaintiff's story remains, therefore, entirely uncontradicted, and the distress was made when there was no rent due. The horse seized was promptly replevied. The plaintiff did not lose the chattel, nor the use of it, and there is no evidence of any special damage. It is not conceivable that a distress

arising over so trifling a sum would cause any damage to plaintiff's credit or reputation, if that consideration enters into the matter at all.

The evidence of Robert Gilmour presents a claim for damages which is far too remote; and I do not believe that any sane man would be so far affected by the distress made under these circumstances as to refuse, on that ground alone, to entertain the proposition of the plaintiff with reference to the premises in question.

I direct judgment to be entered for the plaintiff for $5, with full costs on the High Court scale.

CARTWRIGHT, MASTER. FEBRUARY 23RD, 1909.
MEREDITH, C.J. FEBRUARY 26TH, 1909.

CHAMBERS.

STOW v. CURRIE.

Trial—Application for Postponement—Illness of Plaintiff—Inability to Undergo Examination for Discovery — Evidence—Physicians—Detectives.

Motions by plaintiff to be relieved from an undertaking of his former solicitors not to require discovery from defendants until it should be given by him, and to postpone the trial.

Motion by defendants for an order dismissing the action for plaintiff's default in filing an affidavit on production and in attending for examination for discovery.

F. E. Hodgins, K.C., for plaintiff.

Eric N. Armour, for defendants Warner, Gzowski, and Loring.

R. F. Segsworth, for defendants Currie and Otisse.

Featherston Aylesworth, for defendant Segsworth.

F. Arnoldi, K.C., for the defendants the Otisse Milling Company.

THE MASTER:—Though represented by different counsel, the defendants are naturally acting in concert in the present motions, and for all practical purposes were content to leave

the burden of their side to the learned counsel for the Otisse Mining Co., their senior in standing and experience.

There are two motions by the plaintiff and two by the defendants. They were all argued together, and they can best be treated and disposed of together.

The defendants move to have the action dismissed for default of the plaintiff in making his affidavit on production and attending for examination for discovery. The first of these motions was disposed of on the argument, by directing plaintiff to file his affidavit on the 22nd instant, and dismissing the motion without costs: on the other judgment was reserved.

The plaintiff moves to be relieved from an undertaking of his former solicitors not to require discovery from the defendants until it has been given by him. This was opposed by the defendants, although it was pointed out by counsel for the plaintiff that this might cause delay hereafter, for which he could not be held responsible. But, as the opposition was not withdrawn, there cannot be any relief given at present. The defendants stand on their rights, and prefer to run the risk of any future delay caused thereby, and that motion will be dismissed with costs in the cause, without prejudice to a future application.

The other two motions are really only two different aspects of the same question, as viewed from the opposite sides of the record, the plaintiff's answer to the motion to dismiss being that he is physically and mentally unfit to undergo the ordeal of examination. For the same reason, and on the same evidence, he moves to have the trial of this action postponed until April or at least to the last week in March.

The evidence on plaintiff's part consists of affidavits made by two of the best known and experienced medical men practising in this city—Dr. Ogden Jones and Dr. R. A. Stevenson. The former of these gentlemen has known the plaintiff to some extent since last October, when he was consulted by plaintiff as to his hearing. Both physicians made a careful and detailed examination of the patient. The result of this is embodied in their affidavits, in which they state that plaintiff is still only recovering from the effects of nervous strain (the result of a previous trial of the plaintiff on a serious criminal charge, on which it is not necessary further to enlarge), and that he "ought not to be subjected to any severe mental strain such as undergoing an examination for discovery or

giving evidence at a trial until his recovery is complete," and that doing either of these "in his present condition might result in a recurrence of his former trouble" (Dr. Stevenson's affidavit). Dr. Ogden Jones's affidavit explains the fact (to be dealt with later, and relied on by the defendants) of plaintiff having been seen abroad, saying that he "was somewhat improved, especially physically, from having taken the advice which I gave him on my previous visit to take exercise in the open air," though he is "still mentally . . incapable of undergoing an examination or giving evidence at a trial," for reasons similar to those given by Dr. Stevenson. Dr. Jones also says that plaintiff ought before this to have gone to a warmer climate, and that if given a month or 6 weeks to do so and make a complete recovery, he might then be able to continue the action and submit to examination and give evidence at a trial. He concludes by saying: "If he is forced to do either one or the other before that time, it might seriously impair his health."

Both these gentlemen were cross-examined, and their depositions are before me. They were not in any way shaken, in my judgment. On the contrary, this came out on Dr. Stevenson's cross-examination (Q. 54). It had been suggested by Mr. Arnoldi that the plaintiff was shamming (acting "a solemn farce." Q. 96 in Dr. Jones's cross-examination). Dr. Stevenson said: "I did not know anything about the trial, whether it was his interest to get on or not to get on. He seemed to me in his examination to think it would be better to get on if he was able. He said: 'I will have to leave it to you gentlemen pretty well to decide for me whether I can go on or not.'"

After an experience of nearly 6 years in disposing of similar motions, I should not have expected to have heard any further opposition after the evidence of these two medical men and their cross-examinations; but the interests of the defendants are apparently, in their opinion, so important, and a delay of 5 or 6 weeks will prove so disastrous, that they have, through their counsel, attacked the honesty and good faith of the plaintiff (not sparing even that of his counsel), and impeached the competency and intelligence of Drs. Stevenson and Ogden Jones, who, it is boldly urged, were imposed on by the plaintiff's skilful acting of "a solemn farce." It was suggested that at least plaintiff could be examined for discovery—that there was nothing very trying

in that to a party who was content to tell "the truth, the whole truth, and nothing but the truth," in the seclusion of the examiner's office. I regret to be obliged to dissent most emphatically from any such view. I have seen too many such examinations which made me wonder if the examining counsel had ever heard the saying of Lord Chief Justice Cockburn that "the tongue of the advocate should be the sword of the honourable soldier, and not the poisoned dagger of the assassin." Of course if this suggestion of malingering on the part of the plaintiff is to be accepted, there is an end of the matter. But, even then, it would not help the defendants. If the plaintiff can successfully delude the physicians in the quiet of his own room, he could much more plausibly enact the same "solemn farce" in the inevitable stress and excitement of the court room. Then how is this evidence on the part of the plaintiff met by the defendants?

There are, first of all, affidavits of the personal defendants, and of the office boy, clerk, and stenographer of one of the solicitors, that they had met the plaintiff on sundry occasions out in the street, and apparently doing his ordinary business. Whatever little weight these might have is disposed of by the evidence of Dr. Jones that he had advised exercise in the open air, and by that of Dr. Stevenson on this point where, at Q. 52, after being told about this latter point, he says: "A man who was in the state he had been recently, broken down, might be able to do all these things, if he was not under strain." This, however, is not all the material put forward by the defendants. By way of reply there are submitted long affidavits of two well known physicians which criticise and dissect the evidence of their professional brethren, Drs. Stevenson and Ogden Jones, in no friendly spirit. They said, as to those gentlemen and their evidence: "I do not find in the said affidavits or cross-examination grounds which, in my opinion and belief, would warrant the statement that the plaintiff is not in a fit state of health to undergo examination for discovery or any examination as a witness:" par. 3. The affidavits are precisely identical in every respect, even the interlineations being the same, and at the end of the 4th paragraph a blank space is left which would naturally have been used to give illustrations of "some at least of the many ways known to myself and to professional men of experience" (which therefore necessarily Drs. Stevenson and Jones are not, as they did not use them)

"of making such tests," as would have proved or disproved the accuracy of the plaintiff's statements as to his symptoms. Each of these affidavits is about 15 or 16 folios in length. At the end of each it is said, in par. 13, that it is "an independent, unbiassed statement of my views after reading the said affidavits and cross-examinations." The 14th and last paragraph has this remarkable suggestion: "In cases where I have known actual nervous disorder likely to produce a state of excitement and weakness under the strain of examination at a trial, the result of submitting to the examination I have known to produce no exhibition of the kind, but to produce a contrary effect." It would seem, therefore, to be the opinion of these two doctors that if Mr. Stow is really ill, the best and most certain cure will be to do that which his own physicians say would perhaps endanger his life and reason. The only fact that these affidavits prove, if they prove anything, is one that requires no proof. That doctors disagree has long been a commonplace of human experience.

In addition to these gentlemen, the services of another medical gentleman and of two or three witnesses of a very different character were also invoked under the following circumstances. In the belief that the plaintiff was shamming, these detectives were first employed to see him with a view to giving evidence as to his condition. They gained admission by pretending to have a tempting mining proposition for his consideration, and in this way, on 8th February, under feigned names, two of them saw the plaintiff in his rooms at the King Edward Hotel for perhaps 15 minutes. Two days later one of them gained access in the same way and saw him for at most 10 minutes. On this occasion the detective was accompanied by a doctor, who went, as he says himself on his cross-examination, at the detective's sole request and without any invitation from Mr. Stow. He did not venture inside the room, but stood at the threshold. But this was sufficient to allow him, in his opinion, to make an affidavit that plaintiff's "appearance was that of a perfectly healthy, keen-witted, active, aggressive man—he exhibited no signs whatever of any nervous complaint, or that he was on the verge of a nervous break-down, or had in fact anything the matter with him." He knew of the certificate which Dr. Ogden Jones had given, and therefore he says, "I kept the plaintiff under my keen observation" to see if there were any of the symptoms which were mentioned in that certificate. He concludes: "My opinion, judging from

his appearance, is that the plaintiff is in a vigorous state of health." On his cross-examination he admits he was never in the room with the plaintiff at all, "just on the threshold" (Q. 31.) Q. 59. "You knew that you were expected to say that he (i.e., the plaintiff) was able to leave his room?" A. "I had that impression—yes."

This evidence is at most an inference drawn from a few minutes' inspection through the doorway of the unsuspecting plaintiff while engaged in conversation with the pseudo mine-owner. It cannot for a moment be weighed in opposition to the considered judgment of Mr. Stow's own careful and experienced physician, supported as it is by that of Dr. Stevenson.

There still remains something to be said of this use of detectives as witnesses on an interlocutory motion in a civil proceeding. In more than 40 years' acquaintance with legal proceedings, I am thankful to say that I have never heard of such a thing before. Instinctively there rises to the mind the well known maxim: "Ex turpi causa actio non oritur." This is equally applicable to evidence, which must come from an untarnished source, and be free from all taint of suspicion before it can be given any weight. We all know how sternly that litigant is dealt with who is found to have attempted to manufacture evidence. As already remarked, there are circumstances peculiar to this case which make it the first duty of the Court to see that this plaintiff has that fair trial which has often been said to be above all other considerations: see Re Gabourie, 12 P. R. 254, citing Langdon v. Robertson, 12 P. R. 139.

However trying it may be to the defendants, however strongly their minds may be imbued with an "incurable suspicion" that the plaintiff's condition and symptoms are only "a solemn farce," nothing could justify their employment of the self-confessed liar and professional spy. The services of such agents may sometimes be a painful and deplorable necessity. Unhappily there are times when society must submit to use them, as it does those of the accomplice and the informer, but the evidence of hired detectives in civil proceedings is confined to those cases which are heard by the committee of the Senate on applications for divorce. Even there they meet with scant consideration, as will be seen on reference to the case of Bennett v. Empire Printing Co., 16 P. R. at p. 65, and to the facts which gave rise to that action.

A litigant who has a good case can safely rely on the usual methods of fair and open dealing, and the services of only truthful agents and representatives.

In the ordinary case the costs of these motions are given in the cause. But happily this is not an ordinary case, and the interests of justice and the honour of the Court require that its disapproval of what has been done should be emphasised by not merely dismissing the motion of the defendants and allowing that of the plaintiff, but by giving the costs of both these motions to the plaintiff in any event.

The trial should be postponed until the week commencing on Tuesday 13th April, unless plaintiff desires a shorter term.

(Affirmed by MEREDITH, C.J., with a variation as to costs.)

LATCHFORD, J. FEBRUARY 23RD, 1909.

WEEKLY COURT.

RE BROWN ESTATE.

Will—Construction—Bequest of "Balance of the Rents" to Widow after Payment of Annuity to Daughter—Death of Daughter in Lifetime of Testator—Widow Entitled to Whole of Rents—Repairs Charged against Rents—Payment of Debts—Charge on Realty after Exhaustion of Personalty—Apportionment of Charge—Costs.

Application on behalf of Abraham Winger, executor, pursuant to Con. Rule 938, for an order construing the will of Joseph Brown, deceased, and for the opinion of the Court pursuant to sec. 37 of the Act respecting Trustees and Executors.

William Cook, for the applicant.

G. H. Gray, for Leonard Brown, Arthur Brown, and Catherine Quantz.

H. R. Frost, for the widow.

LATCHFORD, J.:—The testator, after directing payment of his debts, devised to his wife his household furniture, which was of trifling value, and "the balance of the rents arising or accruing" from his homestead farm, "after pay-

ment thereout and therefrom of the sum of $200 per annum" to his daughter Susannah Brown during her lifetime. He bequeathed the homestead farm to his grandsons Leonard and Arthur Brown, but they "were not to receive or be allowed possession thereof until after my wife's death, and my executors shall rent the said farm in the meantime, and pay the net proceeds from the said rents as herein directed." The residuary estate was devised to Susannah Brown. The homestead farm, at the time the will was made and when the testator died, was under lease at $400 a year.

Susannah Brown died in the lifetime of the testator. At the time of his death Joseph Brown owned, in addition to the homestead farm, a farm of 63 acres, which he devised to his daughter Catherine Quantz. His personal estate amounted to $198. To pay the debts of the deceased, the surviving executor, Winger, was obliged to borrow $250 in addition to the $198 which was available. It will, it appears, be necessary to expend at least $30 a year for the repair of the buildings and fences on the homestead farm, which still brings in an annual rent of $400.

The first question to be determined is, whether, under the bequest of the "balance of the rents," the whole of the rents received by the executor are payable to the widow of the testator, or only the balance after $200 has been deducted annually.

It is to be observed that the bequest to the wife is not of the balance of the annual rent, but "the balance of the rents arising or accruing from my homestead farm . . . after payment thereout and therefrom," that is, out of such rents and from such rents, "of the sum of $200 per annum to my daughter Susannah Brown during her lifetime." The rents are, I consider, treated as a whole. The testator in so referring to the rents manifests the "contrary intention" which prevents the rule in regard to specific legacies from applying: Theobald, 6th ed., p. 155. Whatever balance of such rents may remain after payment of the annuity for life to the daughter is bequeathed to the wife. The term during which the $200 should be paid to the daughter might be short or long. If that term continued until the death of the testator's widow, the balance of the rents which the widow would receive would be the difference between $200 for that number of years and the total rents. If the daughter lived but a short time, the "balance of the rents" would be the differ-

ence between $200 a year for that time and the total rents. Had the daughter survived the testator for a year, the deduction would amount only to $200, and the balance of the rents bequeathed to the widow to the difference between that sum and all the rents received by the executor from the homestead farm, during the widow's lifetime. As a result of the death of the daughter in the testator's lifetime, the "balance of the rents," "the net proceeds," amount, I think, to the whole of the rents, and the widow is entitled to be paid the rents of the homestead farm. The $200 annuity to Susannah Brown does not fall into the residuary estate.

The repairs necessary to keep the buildings and fences on the homestead farm in the state in which they were in at the death of the testator should be paid by the executor out of the rent and charged against the widow. Apart from such necessary expenditure, the widow is entitled to the rents during her lifetime.

The personalty being exhausted, the debt of $250 is a charge upon the realty in the proportions in which the widow, the devisees in remainder of the homestead farm, and Catherine Quantz benefit under the will. If the parties cannot agree, there will be a reference to an official referee to determine the amount to be contributed by each.

Costs of all parties out of the estate, those of the executor as between solicitor and client; when paid, to be added by executor to present debt and satisfied by parties mentioned in the proportions stated.

CLUTE, J. FEBRUARY 24TH, 1909.

TRIAL.

COWIE v. COWIE.

Husband and Wife—Alimony— Cruelty—Unfounded Suspicions—Injury to Health—Apprehension of Danger to Life—Agreement for Separation—Specific Performance —Claim to Personal Property—Marriage Presents—Custody of Child—Amount of Alimony.

Action by Hannah Cowie against her husband, Robert D. Cowie, for alimony, specific performance of an agreement, and the return of chattels.

J. W. McCullough, for plaintiff.

George Wilkie, for defendant.

CLUTE, J.:—The plaintiff and defendant were married in 1885. The statement of claim charges that the defendant had ill-treated the plaintiff for 3 or 4 years, and had been guilty of great cruelty towards her, and threatened her to such an extent that her life was in danger, and her health was so impaired that prior to the month of September, 1906, she was compelled to leave the defendant's house, and live separate and apart from him; that in the month of September, 1906, the parties entered into the agreement (below mentioned), and thereupon resumed marital relations; that for a short time the defendant acted better towards the plaintiff than hitherto, but, after a few months had elapsed, he again began to ill-treat the plaintiff, and, as time went on, his conduct towards her became worse, so that on 26th March, 1908, for her own safety and protection, the plaintiff was compelled to leave the defendant's house, her health having been already much impaired by the defendant's cruelty towards her; and further that if she had remained much longer with the defendant her health would have been utterly ruined, and that the plaintiff's ill-health was wholly due to the ill-treatment she received from the defendant. Charges of violence are also made, and a further charge that the defendant frequently accused the plaintiff of immorality and crime, so that she was driven almost to distraction, and was unable longer to endure the situation.

Claim is made for certain household furniture and goods bought by the plaintiff from her own savings. The claim further sets out that their two children—the daughter 21 years of age, and the son 11 years of age—refuse to live with the defendant, on account of his cruelty towards the plaintiff.

The agreement of September, 1906, is as follows:—

"This indenture made in duplicate the 8th day of September, 1906, between Robert D. Cowie, of the township of Pickering, in the county of Ontario, farmer, of the first part, and Hannah Cowie, his wife, of the second part.

"Whereas certain differences have arisen between the parties hereto, and they have been living separate and apart, and they have to-day met and talked matters over and agreed to live together again, and the party of the first part acknowledges that he has made accusations against his wife that are not right, and that she has cause for complaint, and he is now sorry for so doing, and he promises that in future he

will use her right, and conduct himself towards her as a husband should do, and that she shall have the rights and privileges of a wife suitable to his circumstances in life, and that he will not abuse or ill-treat her in any way.

"The party of the second part agrees to live with the party of the first part and do her duty as a wife should, so long as the party of the first part uses her as he should do and conducts himself properly.

"Now therefore, in consideration of the premises and of the promise of the one and the other, the parties hereto agree to a reconciliation, and that they will again live together as man and wife and be dutiful and kind to each other.

"That if either party to this agreement violate the same and do not fully carry out their parts, then they agree the one with the other that they will separate and live apart, and that the party of the first part will pay to the party of the second part a sufficient sum per month to properly maintain, clothe, and keep herself and family.

"In witness whereof the parties hereto have hereunto set their hands and seals.

"R. D. Cowie (Seal.)
"Hannah Cowie (Seal)."

The plaintiff asks that the said agreement may be specifically enforced; she also claims alimony, her household furniture, and a declaration that the plaintiff is entitled to the custody of her son, Russell D. Cowie.

The defendant denies all charges of cruelty, and offers to receive the plaintiff as his wife and to keep and maintain her in a suitable and proper manner, and further alleges that her conduct in leaving him disentitles her to alimony.

I expressed my views upon the facts at the close of the case, and reserved for further consideration questions of law. The facts as found by me were in substance as follows:—

Shortly after the birth of the son, the husband gave expression to the suspicion at that time that the son was not his child; this suspicion deepened, and, while in his calm moments he did not believe his wife to be unfaithful, yet he allowed his jealousy to grow into a morbid suspicion, so that every act and incident about the home put him upon inquiry, and the most harmless incidents became causes of increased suspicion, which finally resulted in his accusing his wife of improper relations with a number of reputable persons in that neighbourhood, and for which there was not,

so far as the evidence disclosed, the slightest ground of suspicion. This charge of infidelity was made repeatedly to her and to others, and it became a habit with him to throw out insinuations suggesting his wife's infidelity. The track of a waggon near the premises, or of a bicycle, or of a cattleman calling to inquire if there were any cattle to sell, and trifling incidents of that kind, were seized upon by him to feed his jealousy. He imagined that people were in the house at night; that if his wife went outdoors it was to meet some man; that any noise was evidence that men were prowling about for the purpose of illicit intercourse with his wife; and this not in drunken moods, because he was not a drinking man, but from day to day, from week to week, and year to year.

The effect upon the wife was deplorable, and the doctors who examined her described her as bordering upon physical and mental break-down.

I find as a fact that her condition was largely due to the conduct of the defendant. He slept for years with a revolver at the head of his bed, and, when she removed that, he had some other weapon, in the form of a club or axe, and his reason for so doing, as given to the plaintiff, was to be ready for these people whom he supposed to be lurking about the place, seeking opportunities to have improper relations with his wife. For all of this, so far as I can judge, there was no shadow of foundation in fact. The plaintiff's mind upon this question seemed to be unbalanced, and he was ready to seize upon the most simple incident as proof to him that his suspicions were true. In the witness box, indeed, he acknowledged that he did not believe his wife had been untrue to him, but he still thought these incidents, some of which I have referred to, were just grounds of suspicion. He offered to take her back. I consider his conduct such, having regard to his deep-seated jealousy, that the wife's fear was, to a certain extent, well grounded, and, when she stated that she was afraid to return, in fear of personal injury, on account of her health, I believed what she said. I think the conduct of the defendant towards the plaintiff amounted to legal cruelty: Lovell v. Lovell, 13 O. L. R. 569, 8 O. W. R. 517; Russell v. Russell, [1897] A. C. 395; McKenzie v. McKenzie, [1895] A. C. 284.

The plaintiff is not entitled, in my judgment, to enforce specific performance of the agreement. It provides con-

tingently for future separation, which, under the authorities, cannot be enforced: Leake on Contracts, 5th ed., p. 542, and the cases there cited.

The plaintiff's claim to certain articles which were purchased from money received from the sale of the produce of the farm was abandoned by her counsel at the trial. She is, of course, entitled to the articles which she had received as marriage presents, and other articles belonging to her which she brought with her on her marriage.

I will not dispose of the question of the custody of the child at the present time, further than to say that I think, for the present, it is in the interests of the son to remain with the mother. This is without prejudice to the father making application, as he may be advised, for the custody of the child. At present, according to his own statement, his home is not such a one as could be made comfortable for his son, who is much better for the present where he is.

I am of opinion that the plaintiff is entitled to alimony. It has given me much trouble to fix upon a sum that would be reasonable and proper in the circumstances of this case. The value of the property, real and personal, of the defendant amounts to about $7,000, against which there are liabilities amounting to $3,000. Although both plaintiff and defendant seem to have been industrious, they were not able to reduce, to any considerable amount, the mortgage which has been of long standing upon the farm. They had been barely able to pay the interest and support themselves. The son has to be maintained and educated.

The fair rental of the farm was said to be $300 a year, out of which the interest would have to be paid. Having regard to the value of the chattels, the net rental would be about $300. This, however, cannot be taken as the sole basis upon which to fix alimony: McCullough v. McCullough, 10 Gr. 320. The amount fixed for interim alimony—$18 a month—appears to me to be a reasonable sum to be allowed to the plaintiff for alimony, and I so find. The same is to be paid monthly and to begin from the date when the last payment for interim alimony was due, with all arrears, if any.

The defendant is entitled to see his son once a week, if he so desires, but is not to remove him from the custody of the mother without further order of the Court. The plaintiff is not to embitter the son against the father, or to speak in his presence disparagingly of him.

The plaintiff is entitled to her costs of the action.

FEBRUARY 24TH, 1909.

DIVISIONAL COURT.

UNION BANK OF CANADA v. SCHECHTER.

Bankruptcy and Insolvency—Chattel Mortgage Given by Insolvent—Fraudulent Scheme to Defraud Creditors—Evidence—Findings of Fact—Interpleader Issue Found in Favour of Execution Creditors.

Appeal by defendant from judgment of MACMAHON, J., ante 231.

C. A. Moss, for defendant.

W. E. Middleton, K.C., for plaintiffs.

THE COURT (MACLAREN, J.A., MAGEE, J., LATCHFORD, J.), dismissed the appeal with costs.

OSLER, J.A. FEBRUARY 24TH, 1909.

C.A.—CHAMBERS.

BRETT v. TORONTO R. W. CO.

Appeal to Court of Appeal—Leave to Appeal Directly from Judgment at Trial—Competence of Appeal to Supreme Court of Canada—Interest in Land in Question.

Motion by defendants for leave to appeal to the Court of Appeal directly from the judgment of BOYD, C., at the trial, ante 552.

M. Lockhart Gordon, for defendants.

J. M. Ferguson, for plaintiff.

OSLER, J.A.:—Some interest in real estate appears to be in question in the action, and I think something different from a mere question of a right of servitude. I cannot say, after consideration, that it is clear that the Supreme Court of Canada would not have jurisdiction. On the contrary,

the inclination of my opinion is the other way, and that the case is not within Grimsby Park Co. v. Irving, 41 S. C. R. 35.

As, therefore, the plaintiff will not be substantially delayed nor prejudiced by allowing an appeal to the Court of Appeal directly, passing over the Divisional Court, I make that order. Costs in the cause.

Plans are not to be printed nor more exhibits than may be absolutely necessary.

CARTWRIGHT, MASTER. FEBRUARY 25TH, 1909.

CHAMBERS.

WILLIAMS v. BRANTFORD GAS CO.

Particulars—Statement of Claim—Negligence—Explosion of Gas—Injury to Person—Discovery.

Motion by defendants, before delivery of statement of defence, for particulars of paragraph 2 of statement of claim, charging defendants with negligence and want of care.

W. S. Brewster, K.C., for defendants.

A. A. Miller, for plaintiff.

THE MASTER:—The allegation is that the plaintiff's place of business with the furniture and stock in trade was destroyed "by an explosion of natural gas caused by the defendants' negligence in not properly caring for their gas pipes running in front and in the near vicinity of the plaintiff's place of business, whereby gas escaped from said pipes into the plaintiff's said premises and became ignited."

The affidavit of the manager of the defendants states that, after carefully investigating the matter, he has not been able to discover any negligence on the part of the defendants, or their servants, in the matter, and that it will be impossible to plead until plaintiff gives particulars, i.e., the material facts on which he intends to rely, as directed by Con. Rule 268. Negligence is not such a fact, but only a conclusion of law from acts of omission or commission on the part of a person charged with a duty to others.

The present is not a case like Smith v. Reid, 17 O. L. R. 265, 12 O. W. R. 659. Here it is not possible for the plain-

tiff to reply on the principle of "res ipsa loquitur." A gas company is not an insurer: 20 Cyc. 1170, and cases cited. And there is no more reason to suppose that the accident here arose from the acts of the defendants than from those of the plaintiff himself. It is not a matter of inference at all, but one that must be proved before any liability can attach. This is one of several actions brought in respect of the same explosion. In one case at least, as was stated by Mr. Brewster, a specific act of negligence is alleged. If the present plaintiff is content to rely on this, he can do so, or, if he requires to have discovery of one of the defendants' officers, he can take that step before giving particulars. But it seems clear that some definite acts of negligence must be alleged and particulars given, as was done in the cases of Collins v. Toronto, Hamilton, and Buffalo R. W. Co. and Perkins v. Toronto, Hamilton, and Buffalo R. W. Co., the facts of which are given in 10 O. W. R. 84, where the cases are reported at an earlier stage. See, too, McCallum v Reid, Tambling v. Reid, 11 O. W. R. 571, and p. 10 of appeal book therein. The case of Young v. Scottish Union, 24 Times L. R. 73, does not seem to be in point here.

Plaintiff should elect in a week either to give particulars or have examination.

Appreciating the difficulty of his position, I make the costs of this motion in the cause.

CARTWRIGHT, MASTER. FEBRUARY 27TH, 1909.

CHAMBERS.

ROBINSON v. MILLS.

Security for Costs—Libel—Newspaper—R. S. O. 1897 ch. 68, sec. 10 — Right of Sub-editor to Security — Good Faith — Frivolous Action.

Motion by defendant for security for costs under R. S. O. 1897 ch. 68, sec. 10, and to compel the plaintiff to amend the statement of claim.

John King, K.C., for defendant.

Featherston Aylesworth, for plaintiff.

THE MASTER:—This is an action for libels published in the "Times" newspaper.

The plaintiff is said in the statement of claim to be the sporting editor of the Hamilton "Spectator," and the defendant to be a reporter for the "Times," of that city.

The defendant moves for security for costs under R. S. O. 1897 ch. 68, sec. 10, and makes affidavit that he is the sporting editor of the "Times;" that the action is frivolous, the words complained of being innocent and harmless; that he has a good defence; and that the plaintiff is financially worthless.

The defendant's affidavit says that he has "the control and editorship of the sporting and dramatic intelligence, which is in my hands wholly."

For the motion were cited the following authorities: King's Law of Defamation, pp. 439 and 441; Egan v. Miller, 7 C. L. T. Occ. N. 443; Neil v. Norman, 21 C. L. T. Occ. N. 293; Powell v. Ruskin, 35 C. L. J. 241; Fisher & Strahan's Law of the Press, pp. 52 and 148. None of these authorities define what an editor is, and in all the 3 cases the order for security was refused.

From the reasoning in Egan v. Miller, I should think the defendant here is not an editor within the principle of that decision, unless he has power to publish at his discretion (or perhaps I should rather say indiscretion). The protection of the Act, as it would seem, can only apply to the editor who is responsible for the general management of the paper and its policy in regard to matters of every kind; judging from the above decisions. It is not necessary to extend the words of the Act beyond that limit. It cannot be presumed that it was the intention of the legislature to give the benefit of sec. 10 to every person on the staff of a newspaper who is by courtesy styled an editor of some one department. To do so would be legislation. It is not without significance that in no case yet has security been given to any one in the position of the defendant.

I do not find in defendant's affidavit any assertion "that the statements complained of were published in good faith," which the Act requires to be done.

As the motion also asked to have the statement of claim amended, and it was conceded that this must be done, the order will be directing that to be done, and refusing security: and the costs of the motion will therefore be in the cause.

This action is a counter-stroke to that of Mills v. Hamilton Spectator Co., which was before me a few days ago. Both of them seem frivolous in the ordinary if not in the technical sense of the word. They can only be paralleled by the strife of the rival editors of Eatanswill, embalmed in the pages of Pickwick, where for nearly a century they "have added to the sum of human pleasure and enriched the gayety of nations."

RIDDELL, J. FEBRUARY 27TH, 1909.

TRIAL.

SCARROW v. GUMMER.

Release — Action for Libel — Settlement pending Action — Validity — Pleading — Costs.

Action for libel, tried with a jury at Guelph.

F. R. Blewett, Listowel, for plaintiff.

J. J. Drew, K.C., for defendant.

RIDDELL, J.:—The plaintiff is a mechanic at Palmerston; the defendant is the proprietor and publisher of the Guelph "Weekly Herald." During the absence of the defendant from the country, those left by him to look after the paper published an utterly unjustifiable and gross libel of the plaintiff, charging him with crime. It is not necessary to say more of the libel owing to the course the case has taken.

The action was at issue and was like to be tried at the assizes at Guelph in the autumn of 1908. The defendant was desirous of getting away to a hunting club, and was detained by the pendency of the action. Speaking to certain of his friends and fellow-huntsmen, he said (in effect): "I do not want to settle this libel suit, but if you can get it settled, I shall be able to go a-hunting with you." He, of course, meant that they should try and get the action settled for him, he not to appear in the matter. The friends went to see Major Merewether, the high constable of the county, and employed him to settle the case for *them*. Merewether did not meet the defendant in the matter at all; but it is clear, I think, that nominally acting for others he was in reality acting for the defendant.

Merewether met the plaintiff and made a settlement with him, taking a release under seal "for all claims, causes of action, actions, suits, or proceeding, and from all costs or damages to which I may be entitled against him, this to be taken as an absolute settlement of the same, and of an action by me against him now pending." The sum of $30 agreed upon was then and there paid by Merewether to the plaintiff. The defendant adopted the settlement.

The settlement coming to the knowledge of the plaintiff's solicitors, they demanded to be paid their costs by the defendant. This being refused, and the plaintiff insisting on the action proceeding, a further plea was made setting up the settlement; to this a reply was filed denying the settlement, and claiming a declaration that the release was void, and asking to cancel or reform it. Some interlocutory proceedings were had which need not be noticed.

Upon the case coming on for trial, I withdrew from the jury for trial by myself the question of the validity of the release, leaving to the jury only the libel. The jury found for the plaintiff, as they were bound to do on the evidence, and there remains to be disposed of only the question of the validity of the release.

The plaintiff alleges in substance that he was defrauded; that the real settlement was that the defendant was to pay all costs (including the costs of the plaintiff). He says that he did not read the document fully, that Merewether read it hurriedly after he (M.) had bought him two or three drinks; then when he signed the document Merewether had his hand partly over it, so that it could not be fully read; and that he (the plaintiff) did not understand that he was releasing all claims that his costs should be paid.

I think there can be no doubt that at the time the plaintiff was disheartened; he was not satisfied at the way the litigation was proceeding; he was dissatisfied with the result of an action against the publisher of another newspaper, and with the small amount of money he had got out of it; he was not quite pleased with his solicitors; and was willing to make a settlement for a very small sum in hand. There is no semblance of foundation for the charge that M. led him to drink, or that any advantage was taken of a man partly intoxicated. M. did treat him—he was more than willing to be treated; but it was just the usual treat on closing a deal, which seems to be part of what is considered proper, if not indeed almost absolutely necessary, in many

parts of the country to make a bargain "stick." It is certainly ungenerous for one who has been treated on closing a bargain, to claim that the treat of good-fellowship is a fraud on him, and in this case no advantage was taken of the plaintiff. And equally baseless is the allegation that the document was read rapidly, or that it was covered by the hand of M. when the plaintiff was signing it. The plaintiff is a one-armed man, and M. did put his hand on the paper to steady it while the plaintiff was signing it, but that was all. There can be no possible fault found with M. for his conduct during the negotiations (he did make certain statements which were not strictly true, but they were not at all material); and, unless more appears than has been mentioned, the release must stand.

Notwithstanding that the plaintiff had an ample opportunity to read the document, and notwithstanding that M. read it to him, I should have no difficulty, in view of such cases as Foster v. Mackinnon, L. R. 4 C. P. 704, in holding that the release is not binding, if as a fact the bargain was that the defendant was to pay the plaintiff's costs. No estoppel can arise here: there has nothing been done by either party which could have the effect of preventing the plaintiff having the advantage of the fact (if it were a fact) that the minds were not ad idem. The question is one of fact, viz.: "Was the bargain that the defendant should pay the plaintiff's costs?" I must, on the evidence which I believe, hold that the bargain was not that the defendant should pay the plaintiff's costs, but that the plaintiff thoroughly understood that he (the plaintiff) would have to look after any costs which his solicitors might claim.

In this view, the proper course to pursue is to order the plaintiff to pay the costs incurred since the added plea, including all costs reserved to the trial Judge; the sum of $30 paid in by the plaintiff's solicitor to the clerk of the Court at Guelph, to be applied pro tanto upon these costs, no costs up to and including the added plea, and that the action be dismissed with the costs already mentioned, payable as aforesaid.

ERRATUM.

Page 348, ante, line 15, for 26 Ch. D. read 36 Ch. D.