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HIGH COURT OF JUSTICE.

MIDDLETON, J.

OCTOBER 7TH, 1910.

*COLVILLE v. SMALL.

Champerty—Action by Assignee-trustee—Assignment of Contract—Provision for Division of Proceeds—Absence of Right of Indemnity against Assignors—R. S. O. 1897 ch. 327—Invalid Contract—Illegality—Public Policy—Dismissal of Action.

Motion by the defendant, in an action by an assignee of the contract sued on, for the summary determination of the question whether the assignment to the plaintiff was champertous.

It was agreed at the hearing of the motion that the pleadings should be amended so as to raise the question, and that the point of law should be treated as raised and argued under Con. Rule 259 and upon a motion to stay the action or dismiss it, under Con. Rule 616, on the admissions made by the plaintiff in his examination for discovery, or for the same relief upon the same material by an appeal to the inherent jurisdiction of the Court.

J. L. Counsell, for the defendant.

W. M. McClemont, for the plaintiff.

MIDDLETON, J.:—The plaintiff's case, as stated in his examination and in an affidavit made explanatory of certain answers, is that his solicitor recommended him to the assignors as a collector who would take in charge the collection of the claim, and also asked him if he would do so. Thereafter the claim was assigned to him by document which authorises the assignee to sue and recover and out of the proceeds first to pay costs and then to divide the proceeds equally between the assignors and assignee.

* This case will be reported in the Ontario Law Reports.

The plaintiff says that in retaining his solicitor to prosecute this action he pledged his own credit to him, and has no right of indemnity against the assignors.

This is champerty of the plainest description. . . .

[Reference to 2 Inst. 208; R. S. O. 1897 ch. 327; Kenney v. Browne, 3 Ridg. P. C. 362, 498, et seq.; Re Solicitor, 14 O. L. R. 464; Carr v. Tannahill, 30 U. C. R. 217, and cases there collected; Bell v. Warwick, 50 L. J. Q. B. 382.]

Does the fact that the assignment is champertous afford any answer to the plaintiff's claim? The assignment is absolute, and vests the right of action in the plaintiff, and he alone can sue. Is the existence of a champertous agreement between the plaintiff and his assignors any reason why the defendant should not be compelled to pay his debt? Is it not entirely res inter alios acta—a matter of no concern to the defendant? So the plaintiff presents his case; and, no doubt, many American decisions go to support his contention. "The weight of authority, however, supports the rule that the fact that there is an illegal and champertous contract for the prosecution of a cause of action is no ground of defence thereto, and can only be set up between the parties when the champertous agreement itself is sought to be enforced:" 6 Cyc. 881. This is the law of England and Ontario only when the action is brought by the person in whom the cause of action is originally vested. When the action is brought by an assignee, in his own name, and the assignment is shewn to be champertous, then the Court treats it as "invalid," to use the word of the statute (R. S. O. 1897 ch. 327, sec. 2), and void for all purposes; and, this illegality appearing, the Court refuses, upon grounds of public policy, its aid to the plaintiff, whose title is tainted by illegality: Prosser v. Edmonds, 1 Y. & C. Ex. 481; Little v. Hawkins, 19 Gr. 267; Hilton v. Woods, L. R. 4 Eq. 432; . . . Power v. Phelan, 4 Q. L. R. 57. . . .

In this way the case is determined quite apart from the doctrine with which the question here arising is sometimes coupled in some of the earlier cases—that at common law, as well as in equity, a mere right to sue was not regarded as being capable of assignment. Now, by statute, a cause of action arising out of contract can be freely assigned: see cases collected upon an earlier application in this case (ante 12). but this still leaves open for consideration all questions arising upon the illegality of the transaction.

The result is in accordance with the general law relating to illegality. See Scott v. Brown, [1892] 2 Q. B. 724; Clark v. Hagar, 22 S. C. R. 510; Gedge v. Royal Exchange Assurance Cor-

poration, [1900] 2 Q. B. 214; Brown v. Moore, 32 S. C. R. 93; Continental Wall Paper Co. v. Louis Voight, 212 U. S. 227.

In the result, the legal objection taken by the defendant is well-founded, and the action must be dismissed with costs.

MIDDLETON, J. OCTOBER 8TH, 1910.

*MANUFACTURERS LUMBER CO. v. PIGEON.

Receiver — Equitable Execution — Money Payable to Judgment Debtor under Contract—Retention as Security for Repairs—Effect of Receiving Order—Form — Costs—9 Edw. VII. ch. 48, sec. 25 (O.)

Appeal by the plaintiffs, judgment creditors, from an order of the Local Judge at Stratford dismissing the appellants' motion for an order for the appointment of a receiver by way of equitable execution.

W. G. Owens, for the plaintiffs.

R. S. Robertson, for the defendant.

MIDDLETON, J.:—The fund sought to be made available by the judgment creditors is $1,360 now held by the Corporation of the City of Stratford under the terms of a contract for the construction of paving. The money has been earned in the sense that the construction work is entirely completed, but under the terms of the contract, the contractor is bound, without further remuneration than the original contract price, to maintain the works in perfect repair for a specified time. In default of his making repairs in compliance with notice and demand, the city corporation may repair and charge the cost to the contractor, and may resort to a percentage of the contract price which is to be held by the city corporation during the term for which the contractor is bound to maintain.

It is admitted that this sum is not a *debitum in præsenti* which can be reached by the ordinary process of attachment. Garnishee process contemplates a sum certain which can be ordered to be paid either presently or at a future date. The amount to be paid in this case must remain uncertain until it is ascertained what sum, if any, the city corporation may be entitled to deduct from it under the terms of the contract.

*This case will be reported in the Ontario Law Reports.

An execution creditor is entitled to the appointment of a receiver to aid him in reaching assets which are in their nature exigible to answer his claim, but which, for some reason, cannot be reached by the ordinary mode of execution, *i.e.*, under a fi. fa. or by garnishee process. . . .

The sanguine creditor who has thought that it ought always to seem "just and convenient" that his debt should be paid, has learned that in the true meaning of this phrase . . . it does not confer any new power upon the Court, but only indicates that the old well-known jurisdiction might be exercised, as it always was, when justice and convenience so demanded: Harris v. Beauchamp, [1894] 1 Q. B. 801; O'Donnell v. Faulkner, 1 O. L. R. 21. . . .

[Reference to the following cases where an order was refused: Holmes v. Millage, [1893] 1 Q. B. 551; Central Bank of Canada v. Ellis, 20 A. R. 364; Cadogan v. Lyric Theatre Limited, [1894] 3 Ch. 338; Stewart v. Jones, 1 O. L. R. 34; Re McInnes v. McGaw, 30 O. R. 38; Weekes v. Frawley, 23 O. R. 235; Edwards v. Picard, [1909] 2 K. B. 903.]

The case most nearly approaching this is In re Johnson, [1898] 2 I. R. 551, where it was held that money earned under an entire contract not yet completely performed could not be reached by receivership. I quite agree that money payable under an entire contract upon completion of the work cannot be reached until the work is actually completed. The fact that the bulk of the work is done, and that what remains to be done is only an insignificant part of the whole makes no difference. Though in one sense the greater portion of the money has been earned, as a matter of law none is earned until all the work is done.

This case comes very close to the line, and it is hard to say with certainty upon which side it falls. I have come to the conclusion that the money is earned and has been pledged by the contractor as security for the performance of his contract to maintain and repair the work. This, it seems to me, is a contract collateral to the construction contract, and the price to be paid is the price of construction only, and not of construction and maintenance. The maintenance is by way of warranty of the quality of the work, and is to be done gratis for the period named. . . .

The effect of the receivership order is not to affect or change in any way the rights of third parties, but merely to substitute for the debtor the hand of the receiver, who as an officer of the Court may assert the debtor's rights in the debtor's name, and apply the proceeds in payment of his debt. While in one sense it is an "execution," the rights of the parties may be more clearly appre-

hended if the receiver is regarded as the debtor's attorney by judicial appointment, or as assignee, by compulsion, of the chose in action: McGuin v. Fretts, 13 O. R. 699; Stuart v. Grough, 14 O. R. 255; Mones v. McCallum, 17 P. R. 356, 398; Flegg v. Prentis, [1892] 2 Ch. 428.

The order will, therefore, go for the appointment of a receiver to demand and receive the fund in question or any part thereof as and when the same may become payable by the City of Stratford. The order must be so framed as to conform to the requirements of 9 Edw. VII. ch. 48, sec. 25; and the costs of the application here and below will be dealt with as there provided.

BOYD, C.

OCTOBER 8TH, 1910.

FITCHET v. WALTON.

Malicious Arrest—Arrest on Civil Process—Ca. Re.—Affidavit to Hold to Bail—Intent of Debtor to Leave Province—Knowledge of Creditor—Reasonable and Probable Cause—Suppression of Facts—Attempt to Force Settlement—Malice—Action for Wrongful Arrest—Damages — Discharge of Judgment in Action in which Arrest Made.

Action for damages for the wrongful and malicious arrest of the plaintiff upon an order for arrest in the nature of a ca. re., obtained by the defendant upon an ex parte application, based upon an affidavit that the plaintiff was about to leave the province.

This was the second trial of the action, and took place before BOYD, C., without a jury, a previous trial with a jury having resulted in a verdict for the plaintiff for $1,500, which was set aside.

John W. McCullough and James McCullough, for the plaintiff.

W. E. Raney, K.C., and T. H. Lennox, K.C., for the defendant.

BOYD, C., after referring to Coffey v. Scane, 25 O. R. 22, 34, 22 A. R. 269, 272, 274, Scane v. Coffey, 15 P. R. 112, 119, 121, Beam v. Beatty, 2 O. L. R. 362, 363, proceeded:—

The application (for the order to arrest) must be based on sworn, written, evidence contained in the affidavit. In this case it was sought to eke out or modify a part of the affidavit by some

oral explanation or some supplemental information given by the applicant, who himself drew the affidavit and appeared in person before the Judge. This kind of evidence was not given or tendered on the former trial, and I took it with much hesitation and scruple. The Judge himself was not called, and it is not desirable that he should be called, nor could his testimony on this point be, in my opinion, properly admissible. In the face of what the defendant swore on the former trial, "that he told the Judge only what was in the affidavit," I do not think I can take into account the alleged oral and unsworn additions. But, even if admitted, they would not overcome the many serious difficulties that arise in being able to regard the affidavit as other than unfair and misleading.

The real test is, on the evidence, what was the knowledge possessed by or the information communicated to the creditor at the time he made the affidavit? That is to be investigated having regard to what is set forth in the four corners of the affidavit for arrest: he is to be taken as having relied only on what he chooses to set forth therein, and the scope of what he knew at that time is the matter to be considered in judging of the reasonable and probable cause for his action: Shaw v. McKenzie, 6 S. C. R. 181.

. . . .

[The Chancellor then dealt with the facts of the case.]

A view of all the facts and circumstances leads me to the conclusion that they are quite inconsistent with reasonable and probable cause for making an affidavit that the man was forthwith about to leave the province with intent to defraud the plaintiff. The affidavit as it stands produces a false effect by suppression, and was intended to be used for the intimidation of the plaintiff so as to coerce him into making a settlement. These elements afford sufficient evidence of "malice," as legally used, to justify the action. Fitchet was in gaol seventeen days before his discharge on affidavits.

At the last trial the jury gave $1,500 damages: this is too much, but I think justice will be served by a verdict for $500 and a discharge of the judgment recovered on the three notes, with the costs of that action in favour of the plaintiff.

The plaintiff should get his costs of this litigation.

Cox v. English Scottish and Australian Bank, [1905] A. C. 168, 171, and Hêtu v. Dixville Butter and Cheese Association, 40 S. C. R. 128, may be usefully referred to.

DIVISIONAL COURT. OCTOBER 10TH, 1910.

*CHARBONNEAU v. McCUSKER.

Trespass—Dispute as to Boundary between Farms—Agreement—Evidence—Statute of Limitations — Proof of True Line—Survey—R. S. O. 1897 ch. 181, secs. 14, 15, 17, 23, 24, 36—Method Adopted—Astronomical Observations — Possession—Sufficiency of, to Maintain Trespass—Ownership Subject to Mortgage—Judicature Act, sec. 58 (4)—Costs.

Appeal by the defendant from the judgment of the County Court of Prescott and Russell in favour of the plaintiff in an action for trespass to land.

The appeal was heard by FALCONBRIDGE, C.J.K.B., MACLAREN, J.A., and RIDDELL, J.

J. A. MacInnes, for the defendant.

C. G. O'Brian, for the plaintiff.

The judgment of the Court was delivered by RIDDELL, J.:—

. . . The township of Alfred, in the county of Prescott, lies with its north end upon the Ottawa river; the governing line is the western boundary, which runs approximately north and south and between the townships of Alfred on the east and North Plantaganet and South Plantaganet on the west: the concession lines are at right angles to the governing line and 1¼ miles apart: the lots are ¼ of a mile wide, and contain 200 acres each—they number from east to west.

The plaintiff owns, subject to a mortgage, lot 33 of the 3rd concession, and the defendant, lot 34, immediately to the west thereof. Most of the line between these lots has been fixed for years, and the action concerns only about 6 rods at the south. The action is in trespass to determine the boundary at that place.

One defence set up is an alleged agreement between the adjoining owners, but I agree with the learned trial Judge that this is not established. . . .

The main defence at the trial was the Statute of Limitations, but it is quite clear that this defence also fails. . . .

[Reference to Rogers v. Nixon, an unreported decision of a Divisional Court (Armour, C.J., and Street, J.), 21st December, 1889.]

* This case will be reported in the Ontario Law Reports.

While it is plain that at the trial the real defence was based upon the statute . . . it was earnestly and ably contended that the plaintiff had not made out the true line. . . . The defendant does not suggest any other line, but he relies, as he may, upon an alleged failure of the plaintiff to make out his case. . . .

[Reference to the original survey of the township in 1797; a survey made by R. Hamilton in 1880; R. S. O. 1897 ch. 181, secs. 14, 15, 17, 23, 24, 36; and a survey recently made for the plaintiff by one Wilkie.]

The plaintiff is . . satisfied with Wilkie's line, and certainly the defendant cannot complain.

The defendant raised before us the same objections he raised before the trial Judge. A Court is not concerned with the question whether the surveyor took the prescribed means for determining his data; he should, of course, follow the directions of the statute; but the Court is concerned with the facts, and not with the manner of determining the facts. There can be no doubt that the monuments planted by Hamilton were found by Wilkie; and it is a matter of indifference what method he adopted to satisfy himself that they were real monuments, or whether he took any, or was himself satisfied. In reality we do not take his conclusions as to the points these monuments mark, and we do not trouble to inquire if he came to the conclusion he did on proper evidence.

As to the post at the north-east corner of lot 34, the evidence of the defendant himself is quite enough.

Much complaint is made that Wilkie did not take astronomical observations, as it is argued he should have done under sec. 36. It would be a sufficient answer to say . . . that the Court is concerned with the true line, and not with the surveyor's method of finding it or laying it down. But there is no necessity for finding the true astronomical bearing of the governing line, so long as the line to be run is on the same astronomical course, that is, has the same astronomical bearing. . . .

The remaining argument for the defendant is, that the plaintiff had not such possession as enabled him to sue in trespass. Street v. Crooks, 6 C. P. 124, is relied upon. But, bearing in mind that no other person was in actual possession of the land in question, the case does not support the proposition. As is pointed out (p. 127), "the title draws the possession to it if there be no other party in possession;" and the plaintiff failed there because there was some one else in actual possession. There can be no doubt that where one has the paper title to a piece of land, and

comes upon it and occupies in fact part thereof, he is considered in law in possession of the whole, unless another is in actual physical occupation of some part to the exclusion of the true owner. . . . . [Re Bain and Leslie, 25 O. R. 136, 141, and Heyland v. Scott, 19 U. C. R. 165, 172, referred to.] But, if he has no title, he is in possession in law only of that part of which he is in possession in fact: Lake v. Briley, 5 U. C. R. 136, and many other cases.

The possession was certainly as much here as in Conway v. Brookman, 35 S. C. R. 185. Assuming the rule as to trespass to be as stated in Street v. Crooks—and Baker v. Mills, 11 O. R. 253, may be looked at upon that point—and assuming further that the form of action is now of any importance, there was sufficient possession in the plaintiff to satisfy the rule. The fact that he is a mere mortgagor is rendered immaterial by the Ontario Judicature Act, sec. 58 (4): McMullen v. Free, Ch. D., unreported.

The defendant complains that he has been saddled with costs, although he paid money into Court, and no further or greater amount of damages has been assessed against him. But he did not admit the plaintiff's title, which was the main matter in dispute, and it was necessary for the plaintiff to proceed to trial to obtain his desired relief.

I cannot find anything in the conduct of the plaintiff which should deprive him of costs; he seems throughout to have acted most reasonably and as one who did not desire unduly to press his own rights or at all to encroach upon those of others.

I do not think there is any error in the conclusions of the Court below, and I entirely concur in the able written judgment of the County Court Judge.

The appeal should be dismissed with costs.

CLUTE, J. OCTOBER 11TH, 1910.

*DAWSON v. NIAGARA AND ST. CATHARINES R. W. CO.

Damages—Workmen's Compensation for Injuries Act—Death of Workman—Action by Widow—Assessment of Damages by Jury—Deduction of Insurance Moneys Received—Right to Correct Verdict.

Action by the widow and administratrix of the estate of George William Dawson, who was killed while in the employment of the

*This case will be reported in the Ontario Law Reports.

defendants, to recover damages for his death. The action was brought under the Workmen's Compensation for Injuries Act.

The trial was at St. Catharines before CLUTE, J., and a jury.

E. A. Lancaster, K.C., and E. H. Campbell, for the plaintiff.

McGregor Young, K.C., and G. F. Peterson, for the defendants.

CLUTE, J.:—The jury found that the defendants were guilty of negligence that caused the accident; that the death was caused by a defect in the construction of the ways and plant, and also by reason of the negligence of the superintendent, whose order the deceased was bound to obey and did obey, while acting in obedience to such order; and that the plaintiff was not guilty of contributory negligence.

In addressing the jury, counsel for the plaintiff—under what I think was a misapprehension of the law and of the rights of his client, told the jury that they should find what was equal to the wages for three years of a person in the same grade as the plaintiff, which would amount to between $2,200 and $2,400, and that from that they should deduct $1,000 for insurance which the plaintiff had received.

I endeavoured to correct this in my charge to the jury, and, on their returning a verdict of $1,200, it was quite obvious that they had deducted the $1,000 for insurance, but did not say so in their verdict. Thereupon I asked them if they meant to find that $2,200 was the amount of the damages, and from that had deducted $1,000, leaving $1,200 as the verdict, and to that they all answered that that is what they meant.

There is no doubt, upon the evidence, that the damages would amount to at least $2,200 . . .

The question is, whether the verdict should be entered for $1,200 or $2,200. . . .

[Reference to Beckett v. Grand Trunk R. W. Co., 8 O. R. 601. 13 A. R. 174; and Grand Trunk R. W. Co. v. Jennings, 13 App. Cas. 800.]

That action (the Jennings case), it will be observed, was under Lord Campbell's Act; and, had the damages in the present case been assessed under Lord Campbell's Act, without the limitation imposed by the Workmen's Compensation for Injuries Act, it could scarcely be doubted that, having regard to the earning power of the deceased, his age, and that of the plaintiff, a very much larger verdict would have been given.

It may be noted that the law is now changed in England. By 8 Edw. VII. ch. 7 it is provided that in assessing damages under

Lord Campbell's Act there shall not be taken into account any sum paid or payable under any contract of insurance, whether before or after the passing of the Act.

Section 7 of the Workmen's Compensation for Injuries Act, which limits the amount of compensation, also provides that such compensation shall not be subject to any deduction or abatement by reason or on account of or in respect of any matter or thing whatsoever, save such as is specially provided for under sec. 12 of this Act. Section 12 has no reference to insurance.

Having regard to this section, I am of opinion that the jury, having found the damages to be $2,200, ought not to have deducted the $1,000 for insurance; and, there being no dispute as to their having found the amount of damages, I am entitled, upon their answers, to direct judgment to be entered for $2,200, which I accordingly do, with costs of action.

LATCHFORD, J. OCTOBER 12TH, 1910.

BREEN v. CITY OF TORONTO.

Highway — Obstruction or Nonrepair—Injury to Pedestrian — Negligence of Municipal Corporation — Boulevard Forming Part of City Street—By-law Prohibiting Use as Crossing—Other Crossings Provided—Person Injured by Reason of his own Transgression.

Action against the Corporation of the City of Toronto and the Toronto Railway Company for damages for injuries sustained by the plaintiff by falling in the street owing to obstructions or want of repair.

Some scoria blocks had been (to the knowledge of the plaintiff) left on the boulevard in Spadina avenue, prior to being laid down for the purpose of improving the street railway tracks; and the plaintiff, in attempting to cross the avenue, went in among the scoria blocks, and fell, breaking his leg.

At the trial the action was dismissed as against the Toronto Railway Company, but judgment was reserved as to the city corporation.

J. D. Montgomery, for the plaintiff.

H. L. Drayton, K.C., and C. M. Colquhoun, for the defendants the city corporation.

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

LATCHFORD, J.:— . . . The question is as to the liability of the defendants the Corporation of the City of Toronto. That question depends on whether they owed the plaintiff any duty to leave the boulevard on the west side of the tracks unobstructed by the blocks. A by-law has been put in, which prohibits any person from walking upon any boulevard, if there are crossings along, across, or adjoining such boulevard at convenient distances. . . .

[The learned Judge found that there were such crossings.]

The power to set apart and lay out such portions of any street as a municipal council may deem requisite or necessary for the purposes of boulevards was given by 51 Vict. ch. 28, sec. 32, and continued by the Consolidated Municipal Act, 55 Vict. ch. 42, sec. 550, sub-sec. 1; R. S. O. 1897 ch. 223, sec. 637, sub-sec. 3; and 3 Edw. VII. ch. 19, sec. 637, sub-sec. 3.

Power to make regulations for the protection of all boulevards constructed in the public streets was given by 57 Vict. ch. 55, sec. 9, and sec. 638 of R. S. O. 1897 ch. 223, and 3 Edw. VII. ch. 19.

The by-law of the defendants . . . was passed on the 24th October, 1904.

I do not think it possible to restrict the prohibition in the by-laws to boulevards laid out under sec. 638, at or near the sides of public streets. The council had power to enact and did enact a regulation regarding any boulevard. That is this case. The defendants' by-law prohibited the plaintiff from crossing where he was injured, it being shewn that the defendants had provided safe crossings at a convenient distance. Had he conformed to the prohibition, the injury would not have resulted. The tort arises out of the transgression, and the plaintiff has, I think, no remedy.

[Reference to Lowery v. Walker, [1909] 2 K. B. 433; Dean v. Clayton, 7 Taunt. at p. 489; Bird v. Holbrook, 4 Bing. 628; Barnes v. Ward, 9 C. B. at p. 392.]

Action dismissed as against the city corporation without costs.

LATCHFORD, J. OCTOBER 13TH, 1910.

SHAW v. MUTUAL LIFE INSURANCE CO. OF NEW YORK.

Life Insurance—Endowment Policies—Unauthorised Representations by Agent as to Payments out of Reserve and Surplus—Rescission of Contract—Return of Premiums.

In 1888 the plaintiff applied to the defendants, through one McNeil, for insurance to the extent of $2,000, to be covered by two policies, each for $1,000. In his application the plaintiff agreed that "in any distribution of surplus the principles and methods which might be adopted by the company in such distribution, and its determination of the amount equitably belonging to said policy, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under the contract."

Certain representations, oral and written, were made by McNeil, the defendants' agent, before the plaintiff received the policies.

The plaintiff paid his premiums through the twenty-year period, which expired on the 2nd November, 1909, and then exercised the option to surrender the policies and reserve and surplus to which he was entitled. Instead of paying $527 as reserved and $486 as surplus, or $1,013 upon each policy, the defendants offered the plaintiff upon each but $672,82, which the plaintiff refused to accept, and brought this action for $1,013 upon each policy, and also asked for the rescission of the contract and the return of the premiums paid with interest, alleging that the representations of the agent were binding upon the defendants, and were relied on by him (the plaintiff).

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

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

LATCHFORD, J.:— . . . There is no evidence before me that the defendants authorised the representations which McNeil made. The surplus represented by McNeil to be $486 falls short of that amount by more than one-half. But the plaintiff had notice that the surplus was merely an estimate; and in regard to the surplus which the defendants offer to pay he has, upon the evidence, no right to complain. By his application he "ratified and

accepted" in advance "the principles and methods" which the defendants might adopt in the distribution of the surplus. This ratification doubtless applies only to principles that are correct and to methods that are honest. But there is no evidence before me that the defendants in dealing with the surplus acted incorrectly or dishonestly, and the plaintiff cannot base his action for rescission on the representation made in regard to the amount he was stated by McNeil to be likely to receive as "surplus."

But the representation made by McNeil in regard to reserve was . . . "guaranteed." It was positive and unequivocal. It was either false and made with a knowledge of its falseness, or McNeil made it recklessly, not caring whether it was true or false. . . .

[Reference to Mutual Reserve Co. v. Foster, 20 Times L. R. 715, 717.]

Holding, as I do, that McNeil has not been shewn to have been authorised by the defendants to make the representation which he did make in regard to the reserve, it follows that the plaintiff is not entitled to recover the amount which McNeil guaranteed he would receive on that account. But he is, I think, entitled to have the contract rescinded as one induced by a false representation of fact made by McNeil. . . .

[Reference to Provident Savings Co. v. Mowat, 32 S. C. R. 147; Kettlewell v. Refuge Association, [1908] 1 K. B. 545, 549, 552, [1909] A. C. 243; Barwick v. English Joint Stock Bank, L. R. 2 Ex. 259; Swift v. Tewsbury, L. R. 9 Q. B. 301, 312; Langdon v. North-West Mutual Life Insurance Co., 199 N. Y. 188.]

There will, accordingly, be judgment that the plaintiff recover back from the defendants the premiums he has paid them, with interest and costs. If the parties cannot agree as to the amount payable, there will be a reference to the proper officer. The costs of the reference (if any had) to be reserved until after the Master has made his report. The policies will be declared rescinded.

BRENNEN v. BANK OF HAMILTON—MASTER IN CHAMBERS—OCT. 7.

Notice of Trial — Setting down for Trial — Invalidation by Subsequent Pleadings.]—Motion by the plaintiff to set aside the notice of trial and strike the action off the list of cases for trial, on the ground that the notice of trial and setting down had been invalidated by subsequent proceedings. The notice of trial was given by the defendants, and was regular when given, and the case was regularly set down. But subsequently, on the 20th September, an order was made allowing the plaintiff to amend by adding a new defendant and setting up fresh grounds of action. That order required the plaintiff to reply to the statement of defence of the added defendant and to any amended statement of defence of the other defendants within two weeks. The order was accepted by the parties. It made no mention of the notice of trial or of the setting down. Afterwards the solicitors for the two sets of defendants obtained orders amending their statements of defence. The Master gave effect to the plaintiff's contention, following Confederation Life Association v. Labatt, 18 P. R. 238, and made an order as asked, with costs to the plaintiff in any event. Grayson Smith, for the plaintiff. Britton Osler and C. W. Bell, for the defendants.

JOHNSTON v. THOUSAND ISLAND R. W. CO.—FALCONBRIDGE, C.J. K.B.—OCT. 8.

Railway—Injury to Person at Crossing—Dangerous Place—Negligence—Findings of Jury—Amendment.]—Action to recover $5,000 damages for the death of Jessie Johnston, at the railway crossing in Gananoque, through the negligence of the defendants, as alleged. The Chief Justice said that the situation and the locus presented unusually dangerous conditions. The jury's findings were on every point in favour of the plaintiff, and he was entitled to judgment. The facts not being in dispute, and the jury having based a finding thereon, the plaintiff should be allowed to amend the statement of claim by adding, at the end of the first sentence of paragraph 5, the words "and in not bringing the train to a standstill on the west side of King street." Judgment for the plaintiff for $3,000, as apportioned by the jury, and costs. J. L. Whiting, K.C., and J. A. Jackson, for the plaintiff. G. H. Watson, K.C., and W. B Carroll, K.C., for the defendants.

ALLEN v. TURK—LATCHFORD, J.—OCT. 11.

Venue—Change—Fair Trial—Prejudice.] — Appeal by the plaintiff from an order of the Master in Chambers, ante 43, changing the venue from Owen Sound to Toronto. LATCHFORD, J., dismissed the appeal with costs to the defendant in any event. H. S. White, for the plaintiff. Grayson Smith, for the defendant.

MOOREHOUSE v. PERRY—RIDDELL, J.—OCT. 12.

Money Lent—Conflict of Testimony—Credibility of Parties—Finding of Fact.]—Action for money lent. Riddell, J., said that the case was purely one of fact, and must be disposed of upon the credibility of the parties, with such assistance as could be derived from the evidence of two solicitors who were called as witnesses, and from the documents; and from his (the learned Judge's) observation of the witnesses in the box, their conduct and demeanour, he was of opinion that the evidence of the plaintiff was to be accepted rather than that of the defendant. The facts were found in favour of the plaintiff and judgment was given upon his claim for $2,780.23, and dismissing the defendant's counterclaim, both with costs. R. McKay, for the plaintiff. I. F. Hellmuth, K.C., and A. E. Knox, for the defendant.