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MAGEE, J. FEBRUARY 14TH, 1906.

CHAMBERS.

RE PEOPLE'S LOAN AND DEPOSIT CO.

Company — Winding-up—Petition of Creditors—Status of Petitioners — Indebtedness of Company—Ultra Vires—Assignment of Claims to Make up Statutory Amount—Building Society having no Capital Stock—Non-applicability of Winding-up Act—Costs.

Petition by Samuel Saunders and William Cole for an order under the Dominion Winding-up Act for the winding-up of the company.

S. B. Woods, for petitioners.

W. E. Middleton, for the company.

MAGEE, J.:—Cole asserts that the company are indebted to him in $200, and Saunders that they are indebted to him in $932, of which part is original indebtedness due to himself, and the remainder the claims of a number of other persons to whom the company are indebted, and who have assigned their claims to him with a view to his taking proceedings for the benefit of the creditors generally. Neither the petition nor affidavit of Mr. Saunders gives any particulars of the claims of these other creditors or their names or the amount each claimed or how many claims there were. Subsequently, on cross-examination on his affidavit, he produced

22 undated assignments to him by 22 persons, purporting to assign to him claims amounting in the aggregate to $905.50, and he stated that he himself was a creditor for $27 paid by him on two contracts dated 14th April, 1903, but he could not remember the dates of his payments.

It appears that in 1903 there were 2 concerns, unincorporated partnerships, in Toronto, each having 4 partners and calling themselves respectively the Dominion Co-operative Home Building Association and the Sterling Home Buyers' Union, and both doing business on the same plan, which they called a co-operative one. It seems to have been an attempt to do, without incorporation, a business approximating the plan outlined for building societies in sec. 1 of C. S. U. C. ch. 53, under which Act it is said this company were incorporated. The business was to get as many persons as possible to enter into contracts with them, for doing which these persons, called "contractors," were in the first place to pay an initiation or application fee. Each was called a $1,000 contract, and on each the contractor agreed to deposit with the union or association as the commission on the first day of each month $2.50, of which 40 cents was for the expenses of the concern, $2 to be credited to the contractor in a so-called home fund account, and 10 cents was to go to a contingent or reserve fund account. The application fee, about $4 on each contract, was also applicable for expenses of the concern. The contract was expressed to be made between the partnership of the first part and the contractor of the second part, "and between said parties with all other persons who shall make like contracts with these parties."

The home fund account appears to have been intended to be managed in this way. The contracts were to be numbered consecutively—each in order as accepted; whenever there was $50 accumulated in that account from the "deposits" on any one contract and all subsequent to it, then the holder of that one contract was to be entitled to a loan of that amount to be invested in purchase of or paying liens on land or home, but the loans not to go beyond $1,000, to be advanced in monthly sums of $50 each; the contractor was not entitled to any loan unless all obligations incurred under prior contract had been satisfied in full and also all surrender obligations (whatever that means) if any arising on subsequent contracts.

So soon as a contractor thus became entitled to a loan of $50, his contract was said to be matured, and thereafter, instead of $2.50, he paid $5.50 per month to the home fund account, until his total contributions to that account aggregated the amount of his indebtedness. In addition to the $5 he was also to continue to pay monthly 40 cents for expenses and 10 cents for contingent fund. If the contractor did not wish to borrow, the contract makes no provision as to how or when he would get back any of his moneys, but in the company's contracts all moneys at his credit for at least 3 months after maturity are to bear interest at 5 per cent. per annum, and he has the privilege of assigning his contract, but under certain conditions.

It would thus appear that no contractor would be entitled to any money unless there were $50 accumulated from the deposits in the home fund, over and above the obligation to which prior contractors and the "surrender obligation" to which subsequent contractors were entitled, nor unless this accumulation were from deposits on his own and subsequent contracts.

Now all the claims represented by the petitioners are for moneys paid on contracts such as I have referred to, those of Mr. Cole and 7 others being issued by the Sterling Home Buyers' Union, and those of Mr. Saunders and 13 others being issued by the Dominion Co-operative Home Building Association, and two by the People's Loan and Deposit Company, which, it is alleged, assumed the place of the association and union on all the contracts, and the amounts claimed include in every case, I take it, not only the moneys paid for the home fund account, but also for application for contingent fund and expense. There is no evidence that any one of their contract had matured, or that on the face of them any money was payable.

There are affidavits filed on behalf of the petitioners made by 7 of the persons who have assigned their claims to Mr. Saunders, but as to the other 15 assignors there is no evidence whatever that any or what sum is owing to them or any of them, except in the affidavits of W. J. Doran, who was president and manager of the company from November, 1903, till 26th July, 1904, and was previously manager of the union, and Nettie E. Stewart, who was formerly bookkeeper of the company till 17th September, 1904. The former states that the company had dealings with all of the 22 assignors, and, while he cannot say from memory how much money the

company hold of each of them, he believes it would amount to between $800 and $900, "and at all events the company is indebted in pursuance of these contracts in an amount far exceeding $500." The bookkeeper states that she knows the company had dealings with 18 of the 22 assignors (including the 7 who made affidavits), and, while she cannot remember the amounts deposited with the company by the parties individually, she believes it amounts to fully $800, and at all events it would amount to more than $500. She is evidently mistaken in using the expression "deposited with the company," and means with the union or association or this company or the Montreal company, which appeared on the scene later on.

The affidavit of W. J. Doran states that about November, 1903, the government interfered with the business of the association and union, and the manager of each was fined in the police court at Toronto for carrying on the business of a loan corporation without a license. In the subsequent cancellation dated 15th December, 1903, of the company's registry under the Loan Corporations Act, it is said that these fines were imposed in September and October, 1903, respectively, and were imposed under that Act for undertaking and transacting an unlawful business. Possibly it was thought they were using a name, or combination of names, likely to deceive or mislead the public—as prohibited in the amendment of June, 1903, 3 Edw. VII. ch. 16, sec. 9, for the law against unincorporated partnerships entering into such contracts as these was passed in April, 1904, 4 Edw. VII. ch. 17, sec. 4, and I have not found any previous enactment prohibiting such contracts as these being taken by an incorporated partnership, if people chose to deal with it.

However, the fines being inflicted, the members of the two partnerships apparently concluded that their business must be done by some sort of a registered incorporated body, and they turned themselves to the People's Loan and Deposit Company. The company was at that time a shadow. It had been incorporated in 1875 under the Act of 1859 respecting building societies, C. S. U. C. ch. 53, and had had a substantial paid-up capital, but apparently had eventually lost money, for, according to W. J. Doran's affidavit, it had about the spring of 1903 realized on all its assets and distributed them among the shareholders, thereby repaying them 51 cents on the dollar. He says he and his associates

about 23rd November, 1903, purchased the stock held by the then directors of the company, and what stock that was he does not explain; and he with J. H. Maunder and M. C. Hubert, two other partners in the union, and W. J. Holden, one of the partners in the association, became directors of the company, but it had no assets whatever, and he and his associates took transfers of the stock then held by the directors in the company, with a view, he says, of putting new life into the company and underwriting its stock, and he says that the company was at that time duly licensed to carry on the business of a loan corporation. This is his account of the matter, but the Registrar of Loan Corporations, in his subsequent cancellation of the company's registry, states that the company had by proceedings taken under the Joint Stock Companies Winding-up Act, R. S. O. 1897 ch. 222, realized upon its assets, and, after liquidating its debts and liabilities, distributed the surplus among its shareholders, and the distribution was, according to the affidavit of the liquidator, ended on 2nd May, 1903, and that the company's registry under the Loan Corporations Act expired by effluxion of time on 30th June, 1903, and was not then renewed, but on 21st November a temporary renewal was obtained on a representation by the liquidator that some matters were not completed.

Forthwith upon the acquisition on 23rd November of the so-called shares in the company, the association and union transferred to the company the business contracts, obligations, assets, and all moneys intrusted to the union and association, and the company received all the moneys intrusted to the union and association by their respective contract holders, subject to the same trusts attached to the moneys, and undertook to fulfil the trusts with the contract holders. W. J. Doran was appointed president and manager of the company, and he says that he advised any contract holders coming to the office with whom he conversed, and he believes all the officers and agents of the company advised contract holders, that the company had assumed the contracts and undertaken to carry them out and administer the moneys, on the conditions under which the moneys were paid, and the company by and through its officers held itself out as occupying the shoes of the association and union in respect of each and every person having intrusted money to either. The company went on with the business, and itself obtained similar

contracts from a number of persons, and also received payments on some of the contracts of the association and union.

On 15th December, 1903, the Registrar of Loan Corporations, learning that the company was carrying on the business of those concerns, cancelled the registry which had been renewed for a temporary purpose. Another move thus became necessary. It was decided to have a company bearing the same name incorporated in the province of Quebec, under the laws of that province, and having its head office in Montreal, instead of Toronto. This was done, the shareholders of the new company being W. J. Doran and his wife, J. H. Maunder and his wife, and M. C. Hubert—of whom Doran, Maunder, and Hubert were directors.

Doran's affidavit states that thereupon about 12th February, 1903, the People's Loan and Deposit Company of Toronto transferred to the People's Loan and Deposit Company of Montreal all the contracts it had with contractors, all the assets, money, property, and obligations of every kind represented by those contracts, and the Montreal company received the same, subject to the trusts connected therewith, and agreed to administer the moneys in every respect as the union and association had undertaken, and accepted the same, well knowing that the moneys were paid for the purposes mentioned, and became responsible to all the persons whose contracts were transferred. A copy of the agreement of transfer is put in, but it has not the schedule containing a list of mortgages transferred. By the agreement the Toronto company has the right of redemption in case a "license of incorporation" be granted by the government of Ontario to the Toronto company. The consideration expressed for the transfer is $1. and that the assignees will perform all the obligations in the mortgages and contracts.

The affidavit goes on to state that the chief reason for this transfer was that the officers in the Toronto company perceived that the company was going behind financially, and would be unable to carry on the business which it had undertaken, and in order to protect the assets from any of its contractors who might take proceedings against the company. A circular issued from the People's Loan and Deposit Company, Montreal, on 28th March, "to our contract holders in Toronto," says: "By the transfer of the business of the old company, you are secured from the loss which would have been entailed by any attempt to wind up our business in Ontario. If we were to throw this matter in the

Courts, you would not realize anything on your payments. As it is, we are able to carry out your contracts as before, except that you will be put to the inconvenience of making your payments direct to Montreal."

After the transfer some of the contractors continued making payments to the Montreal company, but the number had been diminishing from the time of the cancellation of the registry, so that from 1,500 who were making payments at the time the business of the union and association was taken over, it fell to 500 at the time Doran left the company on 26th July, 1904. According to the affidavit the Toronto company received from the union and association all the moneys intrusted to those concerns on the contracts, which I do not assume to mean anything more than the home fund and possibly the contingent account. Between that and his leaving the company he says the company had used about $5,000 of the home fund moneys improperly to pay salaries and expenses, and to pay 3 of the partners in the association for having turned over the business. He does not distinguish between the Toronto company and the Montreal company as to how much each had so improperly used. He says that, when he left, there was due on matured contracts at least $5,000, to meet which the company had no "money" save a few hundred dollars which it kept for current expenses, and he says the company was then hopelessly insolvent and he believes it is utterly impossible for it to fulfil the terms of the contracts made and assumed by the company, and the objects for which the moneys were intrusted by the company had, in his judgment, totally failed, and it is beyond the company's power to fulfil the trusts imposed on the moneys and undertaken by the company. Elsewhere in the affidavit he says the company, at the time of taking over the businesses, had no assets and had none when he separated from the company, except some office furniture worth about $500, "and the trust moneys and properties received from said association and union and persons holding contracts with said company." What he means by this, in the light of his other statements, and which company he means, he does not explain. A "report of business up to 30th April, 1904," issued by the company from Montreal, and on which his name is printed as president, states the "number of contracts issued 2,860, amount of contracts $2,365,000. Number of contracts matured 86. Amount ad-

vanced thereon $34,029. Total receipts on home fund $30,653.50. Total receipts on contingent fund $1,427.35. Premiums due $27,045.05." These being stated to be exclusive of collections for April in one province, which should add at least $1,000. It would be possible for the company to have very little money on hand and yet be perfectly solvent. The plan of co-operation would seem to intend that whenever there was $50 on hand in the home fund it should be lent out on a matured contract.

Now, bearing in mind these different changes of the business, let us look at the petitioners' claims. Mr. Cole held 6 contracts of the Sterling Home Buyers' Union. He paid the union $15 application fee, which he admits was to go for expenses. He also made 3 monthly payments to the union of $15 each, of which $36 would go to the home fund, $1.80 for contingent fund, and $7.20 for expenses. He then paid the People's Loan and Deposit Company of Toronto 3 monthly payments, 1 before and 2 after the cancellation of the registry, in all $45, which would be applicable in the same way, and he continued paying after the transfer to the Montreal company up till 30th July, 1904, 6 payments, $90 in all, of which $72 would go to the home fund, $3.60 to contingent fund, and $14.40 for expenses. These last 6 payments he says he made at the Toronto company's head office. He heard nothing of there being two companies till afterwards, and he does not claim to be a creditor of the Montreal company, but of the Toronto company. The Toronto company cannot well be treated as a debtor for the application fee or the expenses, and if it is held for the payments to the union as well as the subsequent ones, and also for the contingent fund, the total would be $151.20. He admits on cross-examination that none of his 6 contracts have matured, and that until then he was not entitled to get any money back. He says he looks to both the union and the company for his moneys, and he never released the union, but he says when this company took over the union business he went to the company's office and was told by Mr. Doran that the company had assumed his contract, and he went on paying.

Of those who have assigned their claims to Mr. Saunders, 3, E. Gardiner, J. Campbell, and J. C. Hoare, paid to the Montreal company $24, $36, and $2, respectively, for the home fund. Two others, Palmer and McGonigal, made payments after the transfer to the Montreal company. Two

others, C. Fernie and C. M. Hardy, say their last payment was to the Toronto company. No particulars are given as to the others.

The position then is, that Mr. Cole alone is not a creditor for $200. Mr. Saunders's own beneficial claim is probably not over $20, excluding expense moneys, and probably no one of those who have assigned to him has a claim of even $50 against the Toronto company. Each of the assignments to him by the union and association contractors transfers the contract and all benefits and advantages contained therein to him for the purpose of taking action to secure and enforce the assignor's just rights under the contract as against the union or association, the members thereof; and the People's Loan and Deposit Company has assumed the contract. So that none of the assignors are abandoning their claims against the union or association or the partners therein. The assignments authorize Mr. Saunders, upon realizing the claim, to deduct his expenses and remit the balance to the assignor.

Now, it is to be noted that, upon the material first filed and mentioned in the notice of presentation of the petition, the petitioners did not make out any case. That material was only the affidavits of the two petitioners, who did not sufficiently verify the statements in the petition, and though on their cross-examination more particulars were obtained as to their individual claims, etc., and the names of the 22 assignors, and the amounts of their claims, these latter could not be verified, and they were only able to give vague hearsay evidence as to the main allegation on which the petition must rest. From the cross-examination their individual beneficial claims against the company would not together amount to $200.

It is only from the affidavits subsequently filed that we can get information as to the claims of the 22 assignors and as to the allegations against the company.

At the time this company took over the moneys, assets, contracts, and business of the two unincorporated partnerships, it had no assets whatever, no paid up capital, not even a liability of shareholders on subscribed capital. The petition alleges that the capital which had years before been subscribed had been paid up. It had recognized the applicability to it of the Ontario Winding-up Act. It had been practically wound up under the Act and had paid the proceeds

of its assets, so far as they would extend, back to the shareholders. The renewal of its license on 21st November was obtained by a subterfuge, and it was cancelled on 15th December. Under C. S. U. C. 1859 ch. 53, an Act respecting building societies, and the amendments, it would have no authority to receive these moneys and securities and contracts. That Act was in the schedule of Acts not repealed by R. S. O. 1877. I do not find that it has been expressly repealed since. Neither would the company have such powers under the Act respecting building societies of R. S. O. 1877 or 1887, which were replaced by the Loan Corporations Act of 1897, 60 Vict. ch. 38, now R. S. O. 1897 ch. 205.

Except from the cancellation of the company's registry, a copy of which has been put in by the petitioners, I have no evidence of the winding-up proceedings taken, but they are there stated to be under the Ontario Winding-up Act, R. S. O. 1897 ch. 222, and that Act by sec. 8 provides that the company shall from the date of commencement of the winding-up proceedings cease to carry on its business except in so far as required for the beneficial winding-up thereof. It does not appear whether the proceedings were had under sec. 40, or sec. 48, and therefore it is possible it has not been actually dissolved. I must take it that on 23rd November, 1903, the taking over of the business, contracts, and moneys of the union and association and the subsequent receipt of moneys on the contracts, both before and after the cancellation of the registry on 15th December, was ultra vires of the company. Then, too, I do not see that I can for this purpose put the case of these contractors higher than that of privies to the dealings with the company, entitled to treat it as their debtor, had the transaction been intra vires. That being so, the decision of Giffard, L.J., in Re National Permanent Benefit Building Society, L. R. 5 Ch. 309, seems to be in point, and I must hold that the petitioners have no standing as petitioning creditors under the Winding-up Act.

There is no proof that any of the identical moneys of any of these contractors went to the company; no doubt some did, but, if Doran's affidavit is correct, there was no shortage up to the time of the transfer to the company, and in the ordinary course of business these contractors' payments to the home fund account would have been lent out on the mortgages which were transferred to the company. Being so legitimately invested in mortgages, or in so far as that was

done, I do not see how the company could be treated as indebted to the contractors, without their privity, beyond the moneys actually received.

Then another question arises. The Winding-up Act allows "a creditor for a sum of at least $200" to be a petitioner for the winding-up order. Why was this limit put on and can it be avoided by joining in the petition two or more creditors for smaller sums so as to make an aggregate of $200? Or can one person have several claims assigned to him for the express purpose of making up a total of $200 to enable him to be a petitioner, although he acquires no beneficial interest whatever in them? Obviously the legislature had some reason in fixing a limit, and that must have been to prevent companies being harassed by such radical proceedings for small amounts.

Under the Insolvent Act of 1875, a demand upon a debtor to make an assignment for his creditors could be made by one or more creditors for sums of not less than $100, and amounting in the aggregate to $500, and the debtor might shew in answer that their claims did not amount to $100 each. While to obtain a writ of attachment against a trader the creditor had to swear to a debt in a sum provable in insolvency of not less than $200.

In Carrier v. Allin, 2 A. R. 15, where a creditor had bought another creditor's claim so as to make him a creditor for $200 and enable him to take out a writ of attachment, it was held valid. In England the Companies Act, 1862, sec. 82, allows any one or more creditors to be petitioners, and by sec. 80 a creditor by assignment or otherwise to whom the company at law or in equity is indebted in a sum exceeding £50 then due, may serve a demand for payment so as to have the company declared unable to pay its debts.

In In re Paris Skating Rink Co., 5 Ch. D. 959, a petition by the assignor and assignee of a debt was refused, because, after its being originally filed by the assignee, he had assigned the debt and the right to proceed with the petition, which was then amended by joining the assignee as petitioner. The chief objection was the sale of the right to proceed with the petition.

In In re Oorigine's Gold Mining Co., 29 Sol. J. 204, the Court of Appeal seem to have hesitated at allowing a petition by the assignee of a debt assigned to enable him to file a petition alone for winding-up, the beneficial interest still

remaining in the assignor, but they allowed the assignor to be joined as petitioner.

In In re London and Birmingham, etc., Alkali Co., 1 DeG. F. & J. 257, which arose under the Joint Stock Companies Act of 1856, the Lord Chancellor said there might be a question whether the assignee of a judgment could be petitioner, but it was not necessary to decide it, as the assignor was joined with him.

In Ex p. Cully, In re Adams, 9 Ch. D. 307, a case in bankruptcy, the petitioner was assignee of a judgment, but really held it as trustee for another person, and had no beneficial interest in it—the petition was dismissed. It was held that the old rule in bankruptcy that both the legal and beneficial owners of the debt (the latter not being under disability) must join in petition and in the affidavit, was still in force, and that the Act allowing assignment of choses in action made no change in the old rule—that, as put by James, L.J., "for the safety of mankind the beneficial owner must join in the requisite oath that the money is justly and truly due, that it has not been paid, and that he has no security for it."

In In re European Banking Co., L. R. 2 Eq. 521, a petition was refused because the petitioner had not sufficient interest in the debt—it having been attached by his own creditors.

In In re Harper, 20 Ch. D. 307, the buying up of debts to take bankruptcy proceedings was denounced by Jessel, M.R., as a gross abuse of the bankruptcy laws. And in Ex p. Griffin, 12 Ch. D. 480, which was a sequel to Ex p. Cully, the petition by the assignee of a debt was refused, it appearing that the proceedings in bankruptcy were not taken with a view to obtain payment of the debt, but the debt was purchased in order to be able to take proceedings in bankruptcy, but with ulterior purposes. The circumstances here are, of course, different, but those cases shew that the assigning of claims for the purposes of a petition in bankruptcy is not encouraged.

Whatever one might wish to do in the present case, the same rule must be applied as would be in cases of other companies which may come before the Court. I think the rule adopted in bankruptcy proceedings is a salutary one, that the real and beneficial owner of the debt should join in the petition and proof. Perhaps no better instance of the necessity

for the rule can be offered than the present, where Mr. Saunders has not the slightest knowledge of the correctness of the amounts to which he, no doubt in perfect good faith, but as I think incorrectly, swears.

Then also I think the legislature did not intend and does not allow a creditor for a less sum than $200 to be a petitioner, and, if that be so, it would follow that it would only be a colourable avoidance of the rule if creditors for smaller sums were allowed to assign their claims for the purpose of making up a sufficient amount, but without parting with any beneficial interest in them. As I have already said, none of these contractors are by the terms of their contracts entitled to have any moneys payable to them, and in the view I have taken it is unnecessary to discuss whether, even if the whole purpose of the contract has failed, either from the acts of the legislature or otherwise, they can be said to be entitled to recover a debt, or only entitled to have a fund consisting of securities and money administered for the benefit of themselves and others. See In re Uruguay, etc., R. W. Co., 11 Ch. D. 772. So too it is not necessary to discuss whether any or all of those who contracted with the union or association are creditors of the Toronto company, nor whether those who made payments to the Montreal company accepted that company as their debtor.

There would also be the question whether this company is subject to the Dominion Winding-up Act, which does not apply to building societies not having a capital stock. As a fact, it has not even any assets, for it had none in November, 1903, and transferred all it subsequently had to the Montreal company. I dismiss the petition upon the grounds that the alleged debt was ultra vires of the company, and that no one of the claims on which the petition is based amounts to $200, and that the claims in which the petitioner was beneficially interested do not together amount to $200.

The course adopted by the company does not entitle it to costs.

CARTWRIGHT, MASTER. FEBRUARY 19TH, 1906.

CHAMBERS.

DOBLE v. FRONTENAC CEREAL CO.

Default Judgment—Setting aside—Abatement of Action—Delay.

Motion by defendants to set aside a default judgment.

W. E. Raney, for defendants.

F. King, Kingston, for plaintiff.

THE MASTER:—In this case the judgment must be set aside, as it was signed after the action had abated, by reason of the transfer of plaintiff's claim. His assignee before the signing of such judgment had commenced a new action, which is still pending.

Apart from this ground, there can be no doubt that the judgment would have to be set aside under the principle of Radford v. Barwick, 10 O. L. R. 720, 6 O. W. R. 765.

Here the service of the writ was made in January, 1903, and the judgment signed in December, 1905. It would seem desirable to have a Rule passed that no default judgment should be signed after 6 months from the date of service of the writ, without notice to defendant or his consent to be filed.

No blame here in anyway attaches to plaintiff's solicitor, who had what he was justified in considering instructions to proceed from an authorized agent of the plaintiff.

The motion must be allowed and the judgment set aside with costs. The plaintiff will probably consent to a dismissal of the action at once, as nothing will be gained by retaining it under present circumstances.

CARTWRIGHT, MASTER. FEBRUARY 19TH, 1906.

CHAMBERS.

BEUTENMILLER v. GRAND TRUNK R. W. CO.

Pleading—Joinder of Causes of Action—Action for Damages for Death of Workman—Claims at Common Law and under Workmen's Compensation Act — Alternative Claims.

Action by the widow of a railway engine driver, who was killed by a collision while in defendants' service, to recover

$10,000 damages for his death upon the common law liability, and in the alternative for $5,000 damages under the Workmen's Compensation for Injuries Act.

Defendants, not having delivered any statement of defence, moved for an order requiring plaintiff to elect upon which claim she would proceed.

D. L. McCarthy, for defendants.

H. E. Rose, for plaintiff.

THE MASTER:—It was said, and no doubt truly, that in these cases the defendants are put to a great deal of expense in order to meet the claim under the common law, which in most cases is never pressed at the trial.

This, however, does not seem to be any reason for granting an order for which no precedent can be found. If defendants can shew to the trial Judge that they have been put to unnecessary costs, no doubt such order will be made as will meet the justice of the case.

If these cases are of sufficient frequency and importance to require an amendment of Rule 232 et seq., representation should be made to the proper quarter, and such relief be obtained as seems just. Until that is done, such motions must be dismissed, as this is, with costs to plaintiff in any event.

On the question of alternative claims and the limits within which they must be confined, see Hives v. Pepper, 6 O. W. R. 713.

MAGEE, J. FEBRUARY 19TH, 1906.

WEEKLY COURT.

SCHARF v. FITZGERALD.

Division Courts—Execution against Lands—Previous Return of Nulla Bona—Transcript from one Division Court to another—Execution Issued from Wrong Court—Invalidity—Injunction to Restrain Sale.

Motion by plaintiffs to continue an interim injunction restraining defendant from selling land under execution.

Frank Ford, for plaintiffs.

H. E. Rose, for defendant Fitzgerald.

MAGEE, J.:—Plaintiffs are owners of land bought from Robert and Adelaide Toles, and seek to restrain defendant Fitzgerald from selling it under execution issued by him against the lands of Robert and Adelaide Toles, and placed in the sheriff's hands before the sale and conveyance to plaintiffs. The land is in the county of Lambton.

The defendant Fitzgerald recovered judgment in October, 1901, against the Toleses in the 5th Division Court in the county of Lambton for $41.39 and costs. Without issuing execution in that Court, he caused a transcript and certificate of the judgment under sec. 22 of the Division Courts Act to be sent to the 5th Division Court in the county of Kent, in the territory of which the Toleses then resided. From the latter Court an execution against goods was issued to the bailiff of that Court, and a return of nulla bona was made by him in November, 1901, and on 14th February, 1902, an execution against the lands was issued from the same Court to the sheriff of Lambton county. That execution was duly renewed within 3 years, and under it the sheriff is now proceeding, at the instance of defendant Fitzgerald, the execution creditor, to sell certain village lots in Wyoming.

These lots from the date of the judgment down to September, 1904, belonged to Adelaide Toles, subject to a mortgage for about $29. About 1st September, 1904, she sold them to the present plaintiffs, or one of them, for $75, out of which the mortgage was paid and a discharge registered. The date of registration does not appear. To raise money to pay that mortgage plaintiffs gave a mortgage on the same lands to another person. How it is that plaintiffs and the later mortgagee accepted the title with plaintiffs' execution standing in the way does not appear.

Shortly before this present action, these plaintiffs joined with the execution debtors (Toles) in an application to the Judge of the County Court of Kent to set aside the execution for the reasons urged here against its validity. That application stood adjourned, and plaintiffs say that the County Court Judge expressed the opinion that they should proceed in this Court to restrain the sale.

It is asserted by defendant Fitzgerald, and not contradicted by plaintiffs, that at no time since the judgment against them have the execution debtors had any goods in the county of Lambton, and therefore it would have been a useless expense to issue execution from the Division Court there against goods.

The only authority for issuing writs of execution against lands from Division Courts is contained in sec. 230 of the Division Courts Act originally passed in 1894, being sec. 8 of 57 Vict. ch. 23. It enacts that in case an execution is returned nulla bona by a bailiff "in the Court in which judgment was recovered," the judgment creditor may sue out execution against lands of the judgment debtor, and the clerk of "the Court in which such judgment was obtained" shall issue a writ of execution against the lands to the sheriff of the county in which such return of nulla bona is made, or to the sheriff of any other county in which lands of the judgment debtor are situate. The prescribed form of writ recites that judgment was "recovered" in the Court from which the writ issues. Can it be said in this case that judgment was recovered or obtained in the Kent Division Court? As between that Court and the Lambton Division Court, it appears to me that the legislature clearly intended the latter as the one from which the execution against lands was to issue.

Before 1894 the only way to reach the judgment debtor's lands under a Division Court judgment was to obtain a transcript of the judgment from the Division Courts and file it in the County Court, whereupon it became a judgment of the latter Court, and execution against lands or goods could issue there: R. S. O. 1887 ch. 51, secs. 223, 224, 226. This transcript it was necessary to issue from the Division Court in which judgment was originally recovered, and it could not issue from a Division Court to which a transcript had been sent from the original Court: Burgess v. Tully, 24 C. P. 549; Jones v. Paxton, 19 A. R. 163. The difference between the effect of a transcript to another Division Court and that of a transcript to a County Court was very great. In the latter case the judgment became a judgment of the County Court, and ceased to be a judgment of the Division Court, and proceedings there ceased. In the former case it did not become a judgment of the Court receiving the transcript, but still remained a judgment in the original Division Court—and, subject to certain restrictions, proceedings might still be taken there: Re Elliott v. Norris, 17 O. R. 78; Jones v. Paxton, 19 A. R. 163; Ryan v. McCartney, 19 A. R. 423; Farr v. Robins, 12 C. P. 35; Kehoe v. Brown, 13 C. P. 549.

I do not see any indication that when the legislature made the change in 1894 anything more was intended to be done than to simplify the proceedings by having the execution issued from the same Court which formerly issued the transcript to the County Court—and indeed the words used seem, as I have said, to indicate clearly that the original Division Court was intended.

Section 36 of the Evidence Act is not, I think, without some bearing. That was originally sec. 4 of 57 Vict. ch. 26 (O.), which, by sec. 3, also allowed execution against lands to issue from Division Courts, there being two enactments to that effect in the same session. Section 3 was repealed in the following year by 58 Vict. ch. 14, sec. 2. Section 4 declares that in proving title under a sheriff's conveyance based on an execution from the Division Court, it shall be sufficient to prove the judgment recovered in the Division Court, without proof of any prior proceedings. It cannot be said that this suggests anything about transcripts as forming the basis of the execution.

The mere fact that, after a transcript to another Division Court, restrictions are placed upon further proceedings in the Court issuing the transcript, has little bearing. The important fact is that proceedings can still be taken there. And a similar restriction is imposed when execution against lands is issued from the original Court, though undoubtedly the judgment still remains in the Court issuing it.

It is true that by sec. 223 it is declared that all proceedings may be taken for enforcing and collecting the judgment in the Division Court receiving a transcript, by the officers thereof, that could be had or taken for the like purpose upon judgment recovered in any Division Court. But that provision was in the Act since 1855, and yet did not enable such Court to issue transcripts to a County Court. Without passing upon the question whether the sheriff would be an officer of the Court within the section, it is sufficient to point out that the legislature in conferring the new power in 1894 placed the limitation upon it as to the Court in which it should be exercised. . . .

It seems desirable that the various authorities sent to other jurisdictions to collect a judgment should all emanate from the original Court, and not that each Court receiving a transcript should be a new centre.

It is not necessary to consider whether a return of nulla bona in the Kent Division Court, certified to the Lambton Court, would be sufficient compliance with . . . sec. 230, or whether it might be necessary to issue execution against goods in the original Court. . . .

[Reference to Jones v. Paxton, 19 A. R. 163; Turner v. Tourangeau, 8 O. L. R. 221, 4 O. W. R. 12.]

For the present motion it is sufficient that the Kent Division Court had not authority to issue the writ against lands.

A question is raised as to the right of plaintiffs to have priority for the amount paid on the mortgage, but I understood that defendant Fitzgerald was not inclined to press his claim in that respect, and it is at all events unnecessary to discuss it, in the view I have taken as to the validity of the execution.

The injunction is continued. Costs in the cause, unless the trial Judge otherwise orders. If the parties desire, the motion may be turned into a motion for judgment.

FEBRUARY 19TH, 1906.

DIVISIONAL COURT.

BASSANI v. CANADIAN PACIFIC R. W. CO.

Master and Servant—Injury to Servant—Negligence of Foreman of Company — Open Hatch in Vessel—Absence of Lights—Evidence—Workmen's Compensation Act.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., upon findings of a jury, in favour of plaintiff for $350 in an action to recover damages for personal injuries received by plaintiff by falling at night into an open unguarded hatch in a vessel which he was engaged in unloading for defendants.

W. R. White, K.C., for defendants.

A. H. Marsh, K.C., for plaintiff.

The judgment of the Court (BOYD, C., STREET, J., MABEE, J.), was delivered by

BOYD, C.:—. . . I do not see that the case could have been withdrawn from the jury. There is evidence of negligence to go to them, and enough evidence to justify their verdict and findings. Much of the evidence goes to shew that the details in the blue print plan are not

accurate. For instance, the space between hatches 3 and 4 is nearly all filled by coal bunkers, and these at such a height as might well shut out any view of the lamps placed on the rail near the gang plank or ladder. And these lamps on the rail were nearly amidships, and so placed that to get at them the men had to go close to hatch 3. Most of them took the course followed by plaintiff, i.e., as they came up from the hatch they faced the dock; to turn to the stern would take them away from the lights on the rail—the obvious course was to turn as plaintiff did and go forward along by the coal bunkers till the narrow passage was reached between the coal bin and hatch 3—where, one of them says, was a plank, and it was about that corner of the hatch that plaintiff fell in. The evidence is very strong that there were no lights or no available lights for the guidance of the men on deck other than the two lights on the rail, and these might not be seen till one had got to the end of the coal-bins. The deck at the place where the men got out from the hold was, I should judge, in darkness, and they had to find their way as best they could to the gang ladder to go into the next boat to unload. The evidence shews that the men have to move about pretty quickly, and the course taken by plaintiff was apparently the obvious and most direct way to get out, but the removal of the lights from hatch 3 by the foreman, as found by the jury, before the hatch was closed, was the cause of plaintiff's mishap.

Carter v. Clarke, 78 L. T. 76, shews this case to be within the scope of the Workmen's Compensation Act.

Appeal dismissed with costs.

CARTWRIGHT, MASTER. FEBRUARY 20TH, 1906.

CHAMBERS.

DOMINION CANISTER CO. v. LAMOUREUX.

Writ of Summons—Service out of Jurisdiction—Contract—Sale of Goods—Action for Price—Place of Payment—Conditional Appearance.

Motion by defendant to set aside order for service of writ of summons out of the jurisdiction, and service made in pursuance thereof, in an action for the price of goods sold and delivered.

W. J. Boland, for defendant.

J. L. Counsell, Hamilton, for plaintiffs.

THE MASTER:—The matter has been gone into at some length. Whatever new contract was made in June, 1904 (if there was a contract), was by letters. These are produced, but are silent as to the place of payment. It is therefore impossible at present to say for certain where the alleged breach occurred. The arrangement in June, 1904 (if a new contract), was certainly, or at least prima facie, made in Ontario by plaintiffs' letter of acceptance posted at Dundas to defendant at Montreal.

In these circumstances, the rule laid down in Canadian Radiator Co. v. Cuthbertson, 9 O. L. R. 126, 5 O. W. R. 66, would seem to be applicable. The same course was adopted in Blackley v. Elite Costume Co., 9 O. L. R. 382, 5 O. W. R. 57, where the whole question was considered by a Divisional Court, and a similar order was upheld.

Whether the arrangement in June, 1904, was a new contract or was a part of the original contract of November, 1902 (which was admittedly to be performed at Montreal), cannot be satisfactorily determined on the present material. The defendant must, therefore, have leave to enter a conditional appearance, and should do so within 10 days. The costs of this motion will be in the cause. The examinations already had should be used as examinations for discovery as far as possible.

FALCONBRIDGE, C.J. FEBRUARY 20TH, 1906.

CHAMBERS.

McKERGOW v. COMSTOCK.

Discovery—Examination of Plaintiff—Libel—Defence—Relevancy of Questions.

Appeal by plaintiff from order of Master in Chambers (ante 197) requiring plaintiff to attend for further examination for discovery.

John Jennings, for plaintiff.

C. A. Moss, for defendants.

FALCONBRIDGE, C.J., dismissed the appeal with costs to defendants in any event.

CARTWRIGHT, MASTER. FEBRUARY 20TH, 1906.

CHAMBERS.

COPELAND-CHATTERSON CO. v. BUSINESS SYSTEMS LIMITED.

Particulars—Statement of Claim—Infringement of Patents —Other Claims — Postponement till after Discovery — Difference in English Practice.

Motion by defendants for particulars of the amended statement of claim.

G. H. Kilmer, for defendants.

W. E. Raney, for plaintiffs.

THE MASTER:—The statement of claim, as finally amended after the various decisions in 6 O. W. R. 555, 7 O. W. R. 42, 72, contains 48 paragraphs of allegations of fact, which are followed by 17 clauses of prayer for relief. . . . Defendants are asking particulars of 21 out of the 48 paragraphs. . . . There was no affidavit that the particulars were necessary for purposes of pleading, and the argument was based on the view that the statement of claim was too indefinite to require defendants to plead thereto. Leave was asked to file the customary affidavit, if it was thought necessary to have it. . . .

It is true, as said in Odgers on Pleading, 5th ed., p. 178, that "it is no objection to an application for particulars that the applicant must know the true facts of the case better than his opponent."

It is no less true, as said in Waynes Merthyr Co. v. Radford, [1896] 1 Ch. 29, that "no hard and fast rule can be laid down as to when particulars should precede or follow discovery." Each case must depend on its own circumstances.

In the circumstances of this case, I think particulars should be ordered only as to the alleged infringement of plaintiffs' patents. These seem to be necessary under Smith v. Greey, 11 P. R. 159, and the practice which has prevailed since that date.

As to the other branches of plaintiffs' claim, I do not see any present necessity for making any order. It was suggested on the argument that defendants could only deny the

alleged wrongful acts, as the statement of claim now stands, whereas they might desire to plead by way of confession and avoidance. But no suggestion was made as to how this could arise, and I am not able to think of any assistance that would come from giving particulars.

On this whole question of particulars it is to be remembered that the English cases are to be qualified in their application in this province by the absence in the English practice of any of such powers of examination for discovery as are given by ours. . . .

[Reference to Odgers on Pleading, 5th ed., p. 174; Temperton v. Russell, 9 Times L. R. 318, 319.]

If, after discovery or at any later stage, defendants think fit to do so, they may renew their motion. If they do not, the costs of this motion will be in the cause. If they do renew, costs will be disposed of on the renewed motion. Defendants should deliver statement of defence within 10 days after delivery of the particulars ordered.

There was also an argument that some breaches of plaintiffs' claim do not disclose any cause of action, because there is no allegation of special damage. It was said that this was established by Ratcliffe v. Evans, [1892] 2 Q. B. 524; White v. Mellin, [1895] A. C. 154; and Smith's Master and Servant, 4th ed., p. 157. If this is so, it would be a ground of demurrer, and cannot be dealt with by me. . . .

The true principle in regard to an order for particulars is given in Odgers on Pleading, 5th ed., p. 178: "Particulars will be ordered whenever the Master is satisfied that without them the applicant cannot tell what is going to be proved against him at the trial." . . .

TEETZEL, J. FEBRUARY 21ST, 1906.

WEEKLY COURT.

RE ZIMMERMAN AND SENNER.

Will—Construction—Devise—Charge on Unspecified Portion of Lands Devised—Conveyance of—Portion of Lands free from Charge—Vendor and Purchaser.

Petition by vendor under Vendors and Purchasers Act. The question arose on the following clause in the will of the late Gilbert Milligan, a former owner of the property in

question: "I leave to my son James the Chestnut street property, also the north house on Robert street, and if my grandson John grows up a good young man, that my son James will give him one house, so that he may have a house for himself." Besides the house on Robert street, there were 3 houses on the Chestnut street property, 194, 196, and 198. The house in question was 198, and was purchased by the vendor from James Milligan. The grandson John, as it was conceded upon the argument, had attained his majority; but whether he was "a good young man" was not established, nor did it appear that James Milligan had yet given him one of the 4 houses. It was, however, conceded that James was still the registered owner of 2 of the 4 houses.

L. F. Heyd, K.C., for vendor.

D. D. Grierson, for the purchaser.

TEETZEL, J., held that in these circumstances the vendor was not bound to obtain a release from the grandson John. The right to select the particular house out of the 4 devised is vested in James; the time for the selection has arrived; and James, being still the owner of 2 of the houses, has it within his power to give John one of them. Without deciding whether all the houses would be affected by any charge in favour of John until he should have "grown up," it is quite clear that now there is no such charge, and that so long as James retains at least one of the houses which he could give to John, he may freely convey the others.

Order so declaring. Costs of motion to be fixed by the registrar and paid to the vendor.

TEETZEL, J. FEBRUARY 21ST, 1906.

WEEKLY COURT.

RE VILLAGE OF BEAMSVILLE AND FIELD-MARSHALL.

Arbitration and Award — Appeal from Award—Absence of Provision for in Submission—Application of Provision of Municipal Act Giving Right of Appeal—Submission Including Matters outside Municipal Act—Breach of Contract—Trespass—Validity of Submission.

Motion by Agnes Field-Marshall to quash the appeal of the village corporation from an award of arbitrators, chiefly

upon the following grounds: (1) that the reference to arbitration was not governed by those provisions of the Municipal Act under which an appeal lies as of right; (2) that the submission contained no agreement for an appeal; (3) that it referred to arbitration matters in dispute other than the value of lands taken or injuriously affected.

E. D. Armour, K.C., and C. H. Pettit, Grimsby, for the applicant.

G. Lynch-Staunton, K.C., and A. W. Marquis, St. Catharines, for the village corporation, appellants.

TEETZEL, J.:—For the purpose of disposing of the motion, I do not deem it necessary to determine whether, notwithstanding by-laws 155 and 165, passed in 1894, a further by-law was necessary to entitle the municipality to make the alterations in their waterworks system upon the applicant's land, because both parties appear to have appointed arbitrators without any suggestion of a further by-law being required, and because after the appointment the parties entered into an agreement of submission, in which it is recited that "it is deemed advisable that the scope of such arbitration and the jurisdiction of the arbitrators appointed in making their award should be clearly defined." After specifying the lands taken, occupied, or entered upon, the agreement proceeds to provide that damages, if any, to be awarded shall include all the damages occasioned to the applicant by reason of "all acts of the said municipal corporation or their servants previous to the notice appointing arbitrators served on behalf of said municipal corporation . . . and including therein all damages occasioned by or resulting from any trespass by the said municipal corporation or their servants to or upon the lands of (the applicant) and using or in any way injuriously affecting the same or the water supply of (the applicant) and any other benefits or advantages purtenant to her lands."

Paragraph 3 recites that the applicant claims damages for breach of contract, "and it is agreed that the arbitrators shall have authority and power to hear evidence as to the same and to determine whether there has been any such breach of contract, and . . . shall have power to award damages resulting from such breach of contract or occasioned thereby."

Paragraph 4 provides that the foregoing provisions shall not restrict the jurisdiction of the arbitrators or the scope of the arbitration, "but, in addition to the power conferred by the foregoing provisions, said arbitrators shall have all the powers conferred upon them by the Municipal Act and the Municipal Waterworks Act."

Assuming that the rights of the municipality had not become exhausted under by-laws 155 and 165, and that a further by-law was not necessary, . . . an award of compensation to the applicant for damages by reason of the land having been injuriously affected, would not require adoption under sec. 463 of the Municipal Act, and would be appealable under sec. 464: Re McLellan and Township of Chinguacousy, 18 P. R. 246.

The difficulty, however, is that the submission refers other matters to the arbitrators, namely, questions of claims for damages "from any trespass," etc. and damages "for breach of contract." I think these are both questions not within the jurisdiction of arbitrators appointed pursuant to notice under the Municipal Act. The function of such arbitrators (sec. 451) is to determine the compensation to be paid for land "entered upon, taken, or used by the municipal corporation in the exercise of any of its powers or which is injuriously affected thereby"—and without special authority from both parties such arbitrators would not have power to arbitrate upon matters outside the statutory authority.

The award is for a lump sum. . . . In the absence of anything to the contrary on the face of the award, it must be assumed that something for these claims entered into the amount awarded. But for the agreement of the parties I think neither of these claims could have been considered by the arbitrators in estimating the damages under the Act, and therefore that the right to appeal does not depend upon the provisions of the Municipal Act, but upon the terms of the submission, and is governed in that respect by the Arbitrations Act, R. S. O. 1897 ch. 62;; and, as there is no provision for an appeal, as provided for in sec. 14 of that Act, and no agreement that sec. 462 of the Municipal Act shall apply, there is consequently no right to appeal, and the municipal corporation are, I think, limited to moving to set aside the award under sec. 12 of the Arbitrations Act, or for

any objections thereto at common law, but are not entitled to have the Court review the award on the merits. . . .

[Reference to Darlington v. Hardy, [1891] 1 Q. B. 245.]

I do not think the argument of counsel for the municipality against the validity of the agreement of submission can prevail. The submission appears to be signed by the reeve and clerk, and is under the seal of the municipality, and was prepared by their solicitor, and recognized by both parties preliminary to and during the arbitration, and accepted by all the arbitrators as fixing the scope of the arbitration and their jurisdiction in making their award; and I think it must be accepted upon this motion as conclusive against the corporation.

The notice of appeal may be amended as counsel for the municipality may be advised, and allowed to stand as a motion to set aside the award or refer it back; but the appeal must be quashed, and the costs of this motion will be costs to the applicant on final taxation.

FEBRUARY 21ST, 1906.

DIVISIONAL COURT.

KELLY v. TOWNSHIP OF WHITCHURCH.

BAKER v. TOWNSHIP OF WHITCHURCH.

Way—Non-repair—Injury to Persons Driving on Highway—Logs Piled Thereon—Notice to Municipal Corporation—Negligence—Contributory Negligence.

Appeal by defendants from judgment of MABEE, J., at the trial, 6 O. W. R. 839.

J. W. McCullough, for defendants.

Grayson Smith, for third party.

C. R. Fitch, Stouffville, for plaintiffs.

The Court (MEREDITH, C.J., BRITTON, J., TEETZEL, J.), dismissed the appeal with costs.

CARTWRIGHT, MASTER. FEBRUARY 22ND, 1906.

CHAMBERS.

REX EX REL. CAVERS v. KELLY.

Municipal Elections—Irregularities—Declarations of Qualification—Saving Clause of Statute—Compliance with Statute—Subscription—Commissioner.

Motion in the nature of a quo warranto to set aside the election of the mayor and councillors of the town of Oakville, who were declared elected without a contest, because they only had filed declarations of qualification pursuant to sec. 129 of the Municipal Act, 3 Edw. VII. ch. 19.

The ground of attack was that the declarations made by defendants were invalid for three reasons: (1) because they were insensible and did not comply with sec. 129, sub-sec. 3 (a); (2) because it was not stated that they were subscribed as required by sec. 311 (1); and (3) that the declarations were made before a commissioner for taking affidavits and not before one of the persons mentioned in sec. 315.

W. R. Riddell, K.C., and A. F. Lobb, for the relator.

D. O. Cameron, for defendants Reynolds and Foster.

W. E. Middleton, for the other defendants.

THE MASTER:—Before entering on a consideration of the specific objections, it may be useful to consider generally some of the provisions of the Municipal Act which were brought under consideration by this motion, as I am of opinion that, even if such objections were tenable, they are only such as may well be dealt with under sec. 204.

The principle that every one is supposed to know the law may not be of universal application. It may, however, be reasonably held to extend in respect of the Municipal Act to all who assume to take part in municipal elections. Such persons cannot complain if knowledge is imputed to them, if not of all the provisions of ch. 19 of 3 Edw. VII., yet at least of those affecting such elections.

The sections which are most in question on the present motion are secs. 129 (3 a), 204, 314, and 315.

The first of these is plain and distinct, and is most beneficial in its operation. It prevents unqualified candidates

from being elected. It saves them from the expense, annoyance, and possible humiliation of being unseated after a short lived triumph. It also affords a candidate a reasonable time after nomination within which to decide whether he will accept or decline, and enables him if he so desires to put aside the proferred honour. All who are in any way prominent in these elections must be held to know the effect of this section, and no attention can be paid to any veiled suggestion that an election by acclamation (such as the present) was only by reason of an oversight on the part of other candidates who omitted to file the necessary declaration. The section is essentially in the public interest, and should not be in any way impaired by judicial decision. It tends to finality and to prevent the peace of the community being disturbed by unnecessary elections.

In the same way sec. 204 is also to be liberally applied, for the reason as to finality given in Regina ex rel. McKenzie v. Martin, 28 O. R. 523. The judgment of Meredith, C.J., in Rex ex rel. Warr v. Walsh, 5 O. L. R. at p. 272, 2 O. W. R. 108, 129, points in the same direction. Had the present motion come before the learned Chief Justice, there is little doubt how it would have been disposed of if he had thought it necessary to invoke this section. Even if the declarations of qualification were open to all the objections taken by counsel for the relator, I do not see how it can be denied that they "did not affect the result of the election." That was complete when it became apparent that just the full number of candidates and no more had filed the necessary declarations to entitle them to be declared elected.

I am, however, of opinion that the objections are not tenable. Section 315 clearly applies not to the declaration necessary under sec. 129 (3 a), but to those which had to be made before sec. 129 (3 a) was passed. It was argued that this later section prescribes a statutory declaration in accordance with the form contained in sec. 311 of this Act or to the like effect, that (the person nominated) possesses the necessary qualification, and that a literal compliance with that form was insensible. I think, however, that "in accordance with" means "the same as." In any case there is a direct assertion that the deponent "has" the necessary qualification, and the other words may be rejected as surplusage. Even if it should be held that the declaration was informal, it would not seem to be outside of the scope of sec.

204. That section follows the wording of sec. 80 of 37 & 38 Vict. ch. 9 (D.) In considering its effect in the South Renfrew case, H. E. C. 705, the late Sir Adam Wilson thought that a far more serious defect could not have been held to have affected the result of the election if one had taken place in spite of the defect in the nomination paper.

The other two objections are of no force unless sec. 129 (3 a) is controlled by sec. 315. The former section only requires the nominee to file "a statutory declaration," &c., and this was admittedly done. The section must be interpreted by itself. If the intention had been to confine the persons before whom such declaration was to be made to those named in sec. 315, it would have been easy to do so. In any case it seems reasonable to hold that under R. S. O. 1897 ch. 74, sec. 13, the commissioner for taking affidavits had power to receive these declarations. This would appear to be the result of sec. 8 (sub.-sec. 19) and sec. 9 of the Interpretation Act, when read together with sec. 2 (sub-sec. 12) of the Judicature Act.

On all these grounds, therefore, I think the motion should be dismissed and with costs, except as against Reynolds. He was no doubt disqualified by reason of his being a school trustee (see Rex ex rel. Jamieson v. Cook, 9 O. L. R. 466, 5 O. W. R. 359). But it is at least doubtful if he was properly brought into this motion under sec. 225 of the Municipal Act. In any case the costs were not substantially increased by his presence. As against him the motion will be dismissed without costs.

TEETZEL, J. FEBRUARY 23RD, 1906.

CHAMBERS.

REX EX REL. MARTIN v. WATSON.

Municipal Elections—Qualification of Alderman—Declaration at Nomination—Omission to Disclose Qualifying Property—Mistake — Subsequent Declaration — Actual Qualification.

Appeal by relator in a quo warranto proceeding from judgment of acting Judge of County Court of Essex, refusing to set aside the election of defendant as an alderman for the city of Windsor.

W. M. Douglas, K.C., for relator.

D. L. McCarthy, for defendant.

TEETZEL, J.:—The main question is whether the declaration required by sec. 129, sub-sec. 3 (a), of the Consolidated Municipal Act, 1903, as amended by 4 Edw. VII. ch. 22, sec. 4, to be taken by a candidate on the day of or following the nomination, must disclose the property upon which he relies for qualification, and whether, if it does not, the election is void notwithstanding that he is in fact duly qualified for election.

The declaration in question was made on the day following nomination, and, while strictly in form required by the statute, the property therein mentioned, though of sufficient assessed value, did not in fact qualify defendant, owing to an incumbrance upon it not referred to in the declaration. After his election and before taking office, defendant made the declaration required by sec. 311 of the Municipal Act, 1903, in which he set forth the freehold property described in the first declaration, together with leasehold property which by itself was sufficient to qualify him for the office.

From the facts appearing in evidence, it is fair to assume that the omission to place in the first declaration the leasehold property was an honest mistake, and, as the declarant affirms in effect that he possessed the necessary qualification for the office, which he in fact did, and having in view the manifest purpose of the provision in question, as stated by the acting County Court Judge, namely, to prevent persons who know they have not the necessary qualification becoming candidates and getting their names placed upon the ballot papers, it would be a very harsh interpretation of this statute to hold that the election in question is void.

While the declaration required by sec. 311 is, no doubt, a prerequisite to the discharge of the duties of the office, as decided in Regina ex rel. Clancy v. St. Jean, 46 U. C. R. 77, cited by Mr. Douglas, I find that such declaration was duly taken by the respondent.

The first declaration being on its face sufficient in form, and having in view its limited purpose, and defendant being in fact duly qualified for the election, and having been elected, I think it is too late, after the election, to contend that the misstatement regarding the qualifying property mentioned in the first declaration is a ground for setting aside the election, which is otherwise free from objection.

Appeal dismissed with costs to defendant.

MAGEE, J. FEBRUARY 23RD, 1906.

TRIAL.

QUACKENBUSH v. BROWN.

Mortgage—Discharge—Form and Effect of—Intention to Take Assignment—Mistake in Conveyancing—Subrogation—Chargee of Land Joining in Mortgage as Surety for Owner—Extension of Time to Owner—Reservation of Rights—Release of Surety—Declaration of Priority—Action — Parties — Amendment — Will — Condition —Fulfilment.

Action to establish priority of charge on land in favour of plaintiff under his father's will to a conveyance of the same land made to defendant, and for other relief.

MAGEE, J.:—Plaintiff's father, Barnard Quackenbush, by his will dated 27th July, 1882, gave all his property, real and personal, to his wife for her life, and then to his son Willet, subject only to the payment of testator's debts, the funeral expenses of the testator, his wife, and his son Jared (plaintiff), and testamentary expenses and the charges of proving and registering the will and caring for plaintiff, furnishing him with all money, meat and drink, also clothing, as a person in his station of life might require.

A codicil, dated 29th December, 1882, states: "I do hereby revoke the support and maintenance of Jared unless he remains at home on the premises, and if he do remain at home his bequest shall be and remain as in my last will." He then bequeathed $25 each to his 4 sons, to be paid them by Willet.

Testator died 28th June, 1883.

The land in question, east half of south half of lot 11 in the 3rd concession of Percy township, formed part of his estate. After his death his son Willet lived on it, plaintiff living with him. The farm is a poor one, and Willet got into debt. His goods were seized, and he decided to sell the land to his brother William for $400, subject to plaintiff's right to maintenance. William had to borrow the money, and one Walker . . . agreed to advance the amount on the security of a first mortgage on the land. Walker intrusted

the preparation of the papers to a local unprofessional conveyancer, Hurlburt, now deceased. In order to give the mortgage priority plaintiff was asked to join in it. . . . Plaintiff is illiterate and unable to read or write, and has always had trouble with his eyes, which of late years has made him almost totally blind. . . . It is conceded by his counsel that the mortgage given to Walker was perfectly good while in Walker's hands as against plaintiff. It is dated 26th March, 1891, made between William and Jared Quackenbush, mortgagors, of the first part, William's wife, of the second part, and Walker, mortgagee, of the third part; the consideration, $400, is expressed to be paid to the mortgagors, and both mortgagees join in the covenants. The indorsed receipt for the consideration money is signed by both. Plaintiff, however, swears that he received no part of the moneys advanced, but all went to William to pay Willet the purchase money, and there is no reason to suppose that plaintiff's statement is not correct or that he joined otherwise than for William's accommodation, and that, as between themselves, the mortgage would be payable wholly by William. The deed from Willet to William bears the same date as the mortgage.

. . .

After the deed Willet left the farm and William took possession and resided on it until his death in January, 1903, and plaintiff lived with him and helped to work it and was supported there.

During that time plaintiff paid some visits to other relatives, and on one of these occasions was absent about two months. In September, 1902, a nephew from the United States . . . asked plaintiff to go with him for a visit. . . . He left on the farm a horse and cow. . . . I am unable to find that he had any intention of permanent removal. He left early in September, 1902. Before his return William . . . died in January, 1903, leaving a widow and young children.

Before his death he and his wife became anxious about the long overdue mortgage, and . . . applied to defendant (Miss Brown), who . . . was a distant relative of William's wife, to take over the mortgage. . . She went to their farm on 16th January, 1903, and there consented to their request. William was then too ill to leave the house, and . . . she stipulated that he should deed the farm

to her so as to avoid expense and trouble in case he failed to pay. When there, something was said to her about plaintiff having signed off his rights by signing the mortgage. . . . William's wife . . . went with defendant to Walker, the mortgagee, and defendant told him she wished to take up his mortgage. He says he understood she was going to take a mortgage. He went to the office of Hurlburt . . . and told Hurlburt that defendant was going to take up his mortgage, and instructed Hurlburt to draw a discharge. Defendant and William's wife also went there and instructed Hurlburt to draw the papers to carry out the arrangement arrived at. Hurlburt thereupon drew a deed of the land from William and his wife to defendant, and a so-called discharge of the mortgage. The deed contains the ordinary covenants in statutory short form by William, and has no recitals, and makes no mention of plaintiff's rights nor of the mortgage, and the expressed consideration is $450. Defendant gave Walker her cheque for $420, and he signed the discharge and left it with Hurlburt, not to be registered till Walker should learn that defendant's cheque was paid. Defendant says that she gave William's wife $30 wherewith to pay the expenses of the witness, $6,50, and meet William's immediate needs. . . . The deed was signed that day by William's wife, and was afterwards taken out to William's house and signed by him there within a day or two. Both deed and discharge bear date 16th January, 1903, and both were registered . . . on 22nd January, 1903. . . The mortgage . . . has indorsed on it the registrar's certificate that a discharge has been registered.

The discharge calls for some comment. It purports to be in the ordinary statutory form, and is indorsed "Robert Walker to W. A. Quackenbush—discharge of mortgage;" but by it Walker certifies that "Amanda S. Brown has satisfied all money due or to grow due upon a mortgage made by William Allen Quackenbush and Mary Elizabeth his wife to Robert Walker" . . . (giving properly the other particulars required in the statutory form), "and that such mortgage has not been assigned." No mention is made in it of plaintiff having joined in the mortgage, though R. S. O. ch. 136, schedule L., seems to call for the name of the mortgagors to be stated. There is no explanation as to how or why this omission was made. Hurlburt must have had the mortgage before him, and one can only conjecture whether

it was a mere clerical error, or whether the conveyancer had the idea that by not mentioning plaintiff's name the mortgage would be kept alive as to his interest in the lands. If such was his idea, it would have been quite in accordance with the intention of the parties. . . .

In the same month, very shortly afterwards, William died . . . leaving his widow, a young woman, with infant children. . . . She said she could not keep plaintiff. . . . After seeing defendant, she told plaintiff's nephew that plaintiff had signed off and had no right and could not stay there.

So matters rested until January, 1904. William's widow remained with her children on the farm. . . . In March, 1904, plaintiff and the same nephew . . . went to the farm and spoke to the widow about plaintiff's maintenance there. She said she could not support him. . . . Then the nephew went to see defendant, who said plaintiff had no right and could not stay on the farm. Then the nephew arranged with the widow to allow plaintiff to stay on the farm for a couple of weeks . . . and the nephew paid her $4 for two weeks' board. At the end of the two weeks she refused to allow him to stay longer. Up to this time defendant had not exercised any acts of ownership or possession. . . .

This action was begun on 10th May, 1904.

Then defendant's solicitor prepared an assignment from Walker to defendant of the mortgage, and had it executed by Walker. The assignment bears date 16th May, 1903, and recites that on that date defendant paid Walker $420 and was entitled to an assignment, but by mistake the mortgage was discharged instead of being assigned, and states that the assignment is dated back to correct the error. The actual date of the execution was 25th May, 1904.

The original right of plaintiff, after his father's death, to be cared and provided for under his father's will was not contested by defendant.

It was argued that he had lost it by removal to the United States. I find as a fact that he went there without any intention of remaining and merely on a temporary visit . . . intending to return to the farm, but that his visit was prolonged owing to his brother's death and the widow's unwillingness and . . . inability to support him on the premises.

Therefore, I hold that his rights under the will have not been forfeited, even assuming the words in the codicil as to remaining at home to refer to the period after the father's death.

On the evidence I find also as a fact that plaintiff received no part of the moneys advanced by Walker on the security of the mortgage from plaintiff and his brother William, and that he only executed it to increase the security of the mortgagee for the accommodation of William, who received the whole of the consideration. . . . It was conceded . . . that the mortgage was binding upon plaintiff in the hands of the mortgagee.

I find that defendant supposed when she advanced her money that the effect of the transaction was that plaintiff's interest was cut out so far as she was concerned, and that, had she known that he had any claim in priority to her, she would not have paid out her money to Walker, and that it was not her intention nor that of any of the parties to the transaction with her that she should be in a worse position than he, and had it been thought by defendant or the mortgagee or William that plaintiff's interest would be revived or released, that would have been guarded against. . . .

The Registry Act, R. S. O. 1897 ch. 136, sec. 76, prescribes the effect of a registered certificate, in the form in schedule L. or to the like effect, as a discharge or release of the mortgage and a reconveyance of the original estate of the mortgagor, which has to be read in connection with the Interpretation Act, R. S. O. 1897 ch. 1, sec. 8, clause 24, as to reading the singular number as plural, and clause 35 as to slight deviations. . . . 62 Vict. ch. 16, sec. 7, directs that the names of the parties to each document by which the subsequent holder of the mortgage claims title to it be given, and schedule M. is a little more explicit.

Undoubtedly the statutes intend that some indication of the makers of the mortgage should be given. The object of the certificate, however, would seem to be rather to identify the instrument which is to be discharged than to indicate who shall have the benefit of it. The statute itself does the latter. . . .

I think there was a valid discharge, notwithstanding the omission of plaintiff's name, as it sufficiently identifies the mortgage. There could be no other bearing that registry number and registered on that day. Departures from the

statutory form have been held immaterial in several cases: Re Ridout, 2 C. P. 477; Carrick v. Smith, 35 U. C. R. 348, Re Mara, 16 O. R. 391.

It is not necessary, however, in the view which I take of defendant's right to relief, to decide whether this operates as a valid discharge and reconveyance as to either William's interest in the land or plaintiff's or both. It had the statutory effect either as to both mortgagors or only as to the one named in it, or it was ineffectual unless as a piece of evidence.

Assuming it to have been as valid as if both mortgagors had been named in it, then what are defendant's rights? It seems to me unnecessary to enter into any nice considerations as to the relative order in which the deed and discharge took effect. They both bear the same date and are registered at the same minute, though the discharge bears the first registry number. The deed to defendant has the expressed consideration of $450 and the ordinary statutory short form covenants against William's own acts, making no exception or mention of the mortgage. This would presuppose a clear title, but the discharge certifies payment of the mortgage by defendant, which presupposes that she has an existing interest. Certainly the deed must have been delivered before it was registered, and the discharge could not take effect as a reconveyance till registered: see Imperial Bank v. Metcalfe, 11 O. R. 467; Re Music Hall Block, 8 O. R. 225. It was, however, all one transaction, and should be so dealt with.

It must be borne in mind that, though defendant took a deed, she was not a purchaser. It was in reality only a mortgage. Not being a purchaser, there was no implied agreement by her to discharge any incumbrances either to plaintiff or to Walker: Beatty v. Fitzsimmons, 23 O. R. 245; Walker v. Dickson, 20 A. R. 96; Fraser v. Fairbanks, 23 S. C. R. 79. Apart from any implied agreement, there was no actual agreement by her to do so. The application to her and the arrangement was that she should take over the mortgage, not discharge it. It may have been negligent in her not to have had the title examined and not to ascertain her position and protect herself, but therein she was no worse than the plaintiff in Brown v. McLean, 18 O. R. 533, or the defendant in Abell v. Morrison, 19 O. R. 669, or the plaintiff in McLeod v. Wadland, 25 O. R. 118, in which last case relief was refused on the ground of subsequent conduct.

As put . . . in Brown v. McLean, the discharge, if sufficient in form, should operate in favour of those entitled to it. That would be in this case to restore to plaintiff the interest he had mortgaged, and to convey to defendant, as the assignee of the other mortgagor, the land subject to that charge. But, as against this restoration, defendant is, on the principle adopted in Brown v. McLean and Abell v. Morrison, entitled to relief. She was entitled to take an assignment. There was no intention on the part of any one that she should take the security subject to plaintiff's charge. The intention was the other way. . . . It would be an unhappy result if defendant should, as a result of a well intended act, be put to loss, and that plaintiff should, by an accident, gain, at her expense, an advantage which was not contemplated. It would be one which, in my view, it would be inequitable that he should make use of: see Howes v. Lee, 17 Gr. 459. Defendant should be placed in as good a position as if she had taken an assignment to herself of the Walker mortgage in the first place. Had she done that, it could not, in the circumstances, be held that plaintiff, as against her, was entitled to priority or to a restoration of his charge as against the mortgage. . . .

The evidence, I think, clearly establishes that William would have had the right to redeem, and that there was an agreement for giving time upon the mortgage. The effect of that agreement and of any reservation, if any, of remedies against William or his interest in the land, is not in question upon the record. Owing, however, to the change of defendant's position by the evidence from that taken in the statement of defence, it would be proper to allow an amendment of the pleadings, and therefore it is as well that I should deal with the question of the extension.

It is, I think, clearly established that plaintiff was only a surety, and only mortgaged his interest as surety for his brother, and that this was well known to the mortgagee Walker. Defendant is his assignee, and must, as against plaintiff, who was one of the mortgagors, take subject to the equities under which Walker held, apart from any knowledge which should be imputed to her from the nature of the transaction into which she was entering, and which, I think, must affect her with knowledge that William was the person to pay the whole debt. Having this knowledge imputed to her, she entered into an agreement, oral but binding upon

her in equity, from the execution of the deed, to give a substantial extension of time to William. That agreement, so binding, would ordinarily relieve the surety from liability and entitle him to have his property released from the mortgage, unless in as far as she reserved her remedies against him or it. As regards his liability personally, I do not think it could be said that she reserved them in any way or expected or intended to look to him. As regards his mortgaged interest, it is, I think, equally clear that she did intend to and did reserve all her rights against it. It was the essence of the transaction between her and William that she was to have the property clear of any interest of defendant. But then she was not reserving the right to proceed against that interest at any time, but only at the same time as against William's interest, and was extending the time as much in relation to one as the other. The case falls within the decision of Shepley v. Hurd, 3 A. R. 549, and plaintiff is, by reason of the extension, entitled to have his interest relieved from the mortgage.

The result is, that, as between these parties, I hold that plaintiff is entitled to have his rights under his father's will in priority to defendant's title. But, inasmuch as it appears that there is an outstanding equity of redemption in the estate of William Allen Quackenbush, I cannot in other respects direct judgment to be entered as asked for either by plaintiff or defendant, in the absence of William's widow and real and personal representatives. If either party desires to have them added as parties to this action, they may speak to the matter, but perhaps the question of plaintiff's priority is really all they desire to have decided. Both plaintiff and defendant have been led into the trouble through a willingness to help others; but, as the unsuccessful party, defendant should pay the costs, unless the other parties are added, in which case the costs are reserved to be disposed of when plaintiff's rights against them are disposed of.

FEBRUARY 23RD, 1906.

DIVISIONAL COURT.

McKAY v. VILLAGE OF PORT DOVER.

Way—Non-repair—Injury to Pedestrian — Defect in Sidewalk—Liability of Municipality—Negligence—Contributory Negligence—Damages.

Appeal by plaintiff from judgment of BRITTON, J., 6 O. W. R. 878, dismissing action without costs.

The appeal was heard by BOYD, C., STREET, J., MABEE, J.

W. S. McBrayne, Hamilton, for plaintiff.

T. R. Slaght, K.C., for defendants.

BOYD, C.:— . . . Upon the evidence the learned Judge has found that the place where the accident happened on the sidewalk was not in such a condition as to indicate negligence on the part of the municipality. He finds that the walk was in a state of repair sufficient for ordinary travel, and in effect that the slight defect was not one from which danger was reasonably to be expected. . . . It had existed for perhaps a month before the accident, and had been seen by plaintiff herself, but no complaints were made of its condition, and some persons passing over it did not notice it—it was comparatively so slight. The planks in the walk were sound as a whole, and the walk in fair passable condition for pedestrian travel.

The village of Port Dover has a summer population of some 1,200 people, and such care is not to be expected there as in a larger and more populated centre. The walks were gone over bi-yearly, in the spring and autumn. And in this particular year this place had been specially examined by a member of the council to see whether it should be replaced by another kind of walk, and he saw nothing calling for repair; this was in the month of May. If the trial Judge had found the other way, it would have been a matter of difficulty to reverse him, and it is equally so on his present finding, because the whole question is of fact and as to the degree of repair and likelihood of danger or accident resulting from the lack of repair.

A case going very much further than this in exempting from liability is Betz v. Yonkers, 74 Hun 73, as finally

decided in appeal in S. C., 148 N. Y. 67, which again was followed in 1896 in Grant v. Enfield, 11 N. Y. App. Div. 358.

On the other hand, cases rather in plaintiff's favour (but presenting features of aggravation beyond what exist in the case in hand) are Dempsey v. Pinora, 94 Ga. 420, and Hull v. Fond du Lac, 42 Wisc. 274. All these cases are not cited of course as authorities, but they shew that no fixed rules can be laid down in sidewalk litigation—and especially where the nature of the defect is such as is found here.

I would affirm the decision, without costs.

STREET, J., concurred.

MABEE, J., dissented, giving reasons in writing, and referring to Castor v. Uxbridge, 39 U. C. R. 113.

FEBRUARY 23RD, 1906.

DIVISIONAL COURT.

RE HARSHA.

Extradition—Prisoner in Custody under Warrant—Release on Habeas Corpus—Re-arrest for Same Offence—New Evidence—Insufficiency of Evidence on Former Charge—Res Judicata—Nemo bis Vexari—Habeas Corpus Act—Inapplicability—Complaint — Affidavit—Information and Belief—Evidence before Commissioner—Information—Transmission to Minister of Justice.

Application on behalf of Fred Harsha for a writ of habeas corpus, on the grounds: (1) that the prisoner was arrested a second time for the same offence after his release on habeas corpus; (2) that the matter was res judicata between the parties; (3) that the complaint against the prisoner was on information and belief only; (4) that no evidence was received by the Judge; and (5) that neither the information and complaint nor the warrant was transmitted to the Minister of Justice by the Judge.

See reports of decisions upon previous applications, ante, pp. 97, 155.

J. B. Mackenzie, for the applicant.

R. W. Eyre, for the State of Illinois.

The judgment of the Court (BOYD, C., STREET, J., MABEE, J.), was delivered by

BOYD, C.:—The Court of Appeal discharged the prisoner from custody on the ground that there was no proper evidence of the commission of alleged offence, or identifying the document with the forgery of which prisoner was charged . . . Re Harsha, ante 97, 103.

In Regina v. Ganz, 9 Q. B. D. at p. 105, Manisty, J., says: "In order to give the magistrate jurisdiction there must be a crime charged which is within the treaty, and the magistrate must have before him evidence such as would justify according to the law of England (Canada) the committal for trial of the prisoner if the crime had been committed in England, and there must be a foreign warrant authorizing the arrest," etc.

In this case the crime charged in the first warrant was that of forgery, and no doubt the same crime is charged in the second warrant. But now it is proved that further additional and new evidence has been discovered or will be forthcoming whereby the deficiencies pointed out may and no doubt will be remedied. Having regard to the character and nature of extradition proceedings, it appears perfectly competent to take this course, and no rights of the prisoner and no safeguards of the law are thereby invaded.

The law is very distinct that when there is no evidence or no sufficient evidence before the magistrate in these extradition matters, he is held to be without jurisdiction, and a committal for surrender is, in such conditions, an unwarrantable act in excess of his jurisdiction: Regina v. Maurer, 10 Q. B. D. 515, 516.

The magistrate is charged with the duty of considering whether the evidence before him is sufficient according to law to justify the committal of the accused for trial; he is not to determine and dispose of the case by giving judgment upon it, but he states his opinion . . . that there is a prima facie case, and on that ground issues his warrant of committal for the purposes of surrender to the foreign country; and in that forum the trial takes place, and the guilt or innocence of the accused is established: see per Hawkins, J., in Re Castioni, [1891] 1 Q. B. 161.

The doctrine of res judicata or of former jeopardy or of autrefois acquit is in each particular quite inapplicable to this method of preliminary inqury. Had the magistrate thought the first evidence laid before him insufficient and de-

clined to interfere or dismissed the accused, that would be no bar to his or another magistrate's taking up the matter de novo upon better or more convincing evidence. Such is unquestionably the rule in the ordinary matters of procedure before magistrates in the case of indictable offences; and to this practice are assimilated extradition proceedings by the provisions of . . sec. 9 of R. S. C. ch. 142. This was recognized and affirmed as to the procedure in extradition by a strong Court in Regina v. Morton, 19 C. P. 9—the effect of which decision has not been interfered with by any provision of the Criminal Code. It does not affect the legal result if the magistrate assumes to commit illegally or without evidence, and has been set right by the Court upon habeas corpus by the discharge of the accused from custody. That gets rid of the illegal commitment, but not of the underlying charge, which may again be investigated for the purpose of extradition. . . .

[Reference to Ex p. Seitz, Q. R. 8 Q. B. 392.]

The accused may be arrested and imprisoned again for the same offence, provided it is not upon the same state of facts. If, as in this case, the discharge is for want of evidence, that may be supplied upon a subsequent re-arrest for the same extraditable offence. If the decision upon the habeas corpus is, that upon the merits . . . no offence has been committed—that all available evidence discloses no crime—that discharge is of course final to all intents and purposes. But, falling short of this, the discharge is final only so far as that particular proceeding is concerned. The matter may be re-agitated on another state of facts, with respect to the same alleged offence. The Court would fail in its duty and the whole purpose of the extradition comity would be frustrated if a man apparently guilty of the crime charged could escape by technicalities and subtleties that are discreditable enough in ordinary criminal law without being imported into extradition procedure.

I find that the United States Courts entertain like views upon this question, and it is well that both countries should agree in facilitating legal reciprocity in the transfer of fugitive offenders. . . .

[Reference to Re White, 45 Fed. R. 239; Re Kelly, 26 Fed. R. 852; Ex p. M., 9 Peters (U.S.) 45.]

Touching the effect of the Habeas Corpus Act, 31 Car. II. ch. 2, sec. 6, in this case, reliance was placed upon a dictum in Attorney-General v. Kwok-a-Sing, L. R. 5 P. C.

202, where it is said: "They do not say that the section may not also apply to cases where a prisoner is discharged unconditionally upon the ground that the warrant on which he is detained shews no valid cause for his detention. They think, however, it can only apply when the second arrest is substantially for the same cause as the first, so that the return to the second writ of habeas corpus raises for the opinion of the Court the same question with reference to the validity of the grounds of detention as the first." The object of the section is succinctly given in Short & Mellor's Crown Practice, p. 337, thus: "Provision is made against a person set at large upon habeas corpus being vexatiously committed again for the same offence." The language of Mellish, L.J., in 5 P. C., indicates, I think, that he was regarding the second arrest as involving substantially the same matters of investigation and of evidence as the first arrest; and that is manifestly not the case in the present inquiry, for here the second proceeding is to supplement and make good what was lacking in the first; so far from being vexatious, it is in the interest of justice and international comity that the charge should be further prosecuted.

But I think the better view is that taken by a Victoria Court, viz., that this statute does not apply to extradition proceedings. The preamble of the English Act shews that it is passed for the benefit of those of the King's subjects who are in custody, and it was held . . . in Re Gerhard, 27 Vict. L. R. 655, that the "offence" mentioned in sec. 6 must be limited to offences cognizable by a Court in some part of His Majesty's dominions, and, so far as the State of Victoria was concerned, an offence that could be tried and determined there. That is pertinent to the present extradition crime, which cannot be heard, tried, or determined in Canada or Ontario—but which may be tried in the proper Court of the United States upon and after the prisoner's surrender.

I think that Ex p. Benet, 6 Q. B. 481, is also an authority that the statute of Charles is not applicable to extra-territorial crimes, the perpetrators of which have taken refuge in England or her colonies, though the common law writ of habeas corpus may run in their favour. Indeed the remedy by means of this process is given at a certain stage expressly in sec. 12 of the Extradition Act of Canada, though it may, doubtless, run at any stage of the proceedings when illegal custody exists.

The opinion held by the Victorian Judge was expressed in an early case on the statute, Rex v. McIntosh, 1 Stra. 308, in which a person committed for treason done in Scotland was refused the benefit of the Habeas Corpus Act because the Court could not try a crime committed in that country, and so also bail was refused.

My brother Street (Re Harsha, ante 155), thought bail ought not to be granted in extradition cases, as did Osler, J.A., in Re Watts, 3 O. L. R. 279, 1 O. W. R. 133. See also Platt's Case, 1 Leach C. C. 157.

Another matter argued was that the affidavit grounding the arrest was made upon information and belief only, and this is said in some cases to be fatal. Our general practice is regulated by sec. 558 of the Criminal Code: any one who, on reasonable and probable grounds, believes that any person has committed an indictable offence, may make a complaint or lay an information in writing and under oath before any magistrate, etc.; and by sec. 559 the justice shall hear and consider the allegations . . . and if of opinion that a case for so doing is made out, he shall issue . . . a warrant, etc. The special Act respecting Extradition requires for this preliminary step that the warrant should issue if the justice is of opinion that the evidence is sufficient, and that, as is pointed out by Jessel, M.R., in Regina v. Weil, 9 Q. B. D. 706, is matter of judicial discretion. An affidavit on information and belief, without disclosing the grounds of information and belief, was received and acted on in Merchants Bank v. Morton, 15 Gr. 276, and even in the United States there has been a relaxation in recent cases of the old rule, and, as said in Ex p. Sterama, 77 Fed. R. 597: "The old complaint may in some instances be upon information and belief. The exigencies may be such that the criminal may escape punishment unless he is promptly apprehended." And see Ex p. Keller, 36 Fed. R. 685, and Regina v. Bradshaw, L. R. 1 Ex. 106.

There is no merit in this objection, for it is notorious that proceedings were before the Courts for the extradition of the applicant for several weeks, and the committing magistrate might well entertain the new application on the sworn information laid before him.

The remaining objections are not subjects of present investigation, for the reason that the inquiry is still pending and is to be prosecuted before the Judge. Given, as in this case, a warrant valid on its face, and not being upon a con-

viction or judgment, the prisoner is to be held with a view to further inquiry and the production of evidence which may lead to his discharge or to his being committed for surrender. The practice is defined by Kelly, C. B., in Ex p. Terrany, 4 Ex. D. 68: "In a case where there must be further inquiry which requires the continued imprisonment of the party charged, if a habeas corpus be obtained, he is not to be discharged, but should be remanded for the purpose of the further inquiry before a competent authority in order that he may be either put upon his trial or discharged according to the result of the inquiry.

The jurisdiction of the Divisional Court was not questioned, but it is not to be taken that we could act as on an appeal if objection were raised.

We dismissed the application at the close of the argument, but now give our reasons "for the convenience of the profession."

FEBRUARY 23RD, 1906.

C.A.

MILLOY v. WELLINGTON.

Husband and Wife—Criminal Conversation—Abandonment of Wife—Evidence—Improper Reception—Misdirection—Excessive Damages—New Trial—Appeal from Order Directing—Death of Plaintiff—Revivor—Reduction of Damages—Consent of Parties to Disposal of Case—Nominal Damages—Costs.

Appeal by defendant and cross-appeal by plaintiff from order of a Divisional Court, 4 O. W. R. 82, holding that there was a case proper to be submitted to the jury, but directing a new trial on the ground of improper reception of evidence, misdirection, and excessive damages.

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

E. B. Ryckman and C. S. MacInnes, for defendant.

W. R. Smyth, for plaintiff.

OSLER, J.A.:—We cannot, in my opinion, hold that the deceased plaintiff had lost his right of action. If abandonment of the wife is a defence in an action of this kind, the

evidence, fairly read, without resting upon isolated expressions, warranted the jury in finding that there had been no abandonment, and that the husband had not in point of law forfeited the right to complain of the loss of the matrimonial consortium, all chance of the renewal of which was certainly put an end to by the conduct of defendant, however venial that may, in the circumstances, be thought to have been. At the same time it must be said that a verdict for defendant, or a verdict for plaintiff with nominal damages, would have been quite justified by the evidence of plaintiff's conduct towards his wife, and more satisfactory than the extravagant verdict which has been set aside.

As the case stood at the close of the argument, we should have been obliged to dismiss the appeal and plaintiff's cross-appeal; the former because the case could not have been withdrawn from the jury on any such ground, sc., of abandonment, as is now contended for; and the latter because there was a plain miscarriage at the trial in more than one respect, notably by the admission of improper evidence and otherwise, as pointed out in the judgment below directing a new trial, which must have prevented the jury from considering the case in those aspects which invited a verdict for defendant, and which probably led them to assess the damages at a sum which, in the circumstances, cannot but be deemed inordinately large.

Since the judgment in appeal was given, the original plaintiff has died, and the action has been revived under the statute by his administrator. But, even though the principle on which, in that event, damages are to be assessed may not be affected by the death—and I do not say that it is not—it is, or ought to be, hopeless to expect that a jury would look with sympathy upon the claim of a mere representative, more especially when the conduct of the intestate was such as ought to repel it, were he alive to continue the prosecution of the suit.

To put an end to the further litigation of a very painful case, both parties have, since the argument, very reasonably agreed to the suggestion of the Court that the Court may finally dispose of the case and direct judgment for either party as they may think proper.

Upon full consideration of the whole of the facts, we think that justice will be done by directing judgment for plaintiff for $5 as nominal damages, with all costs of the

action not already disposed of by the Divisional Court, on the High Court scale, and by dismissing the appeal and cross-appeal with the costs appropriate to each.

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

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

FEBRUARY 23RD, 1906.

C.A.

UYLAKI v. DAWSON.

GYORGY v. DAWSON.

Master and Servant—Injury to Servant—Negligence of Master—Duty to Servant—Defective Appliances—New Trial.

Appeals by defendants from orders of a Divisional Court, 6 O. W. R. 569, directing new trials of 3 actions.

W. R. Riddell, K.C., for defendants.

F. W. Griffiths, Niagara Falls, for plaintiffs.

THE COURT (MOSS, C.J.O., OSLER and GARROW, JJ.A., MAGEE and MABEE, JJ.), dismissed the appeals with costs, agreeing with the opinion of ANGLIN and CLUTE, JJ., in the Court below.

TEETZEL, J. FEBRUARY 24TH, 1906.

CHAMBERS.

REX EX REL. MARTIN v. MOIR.

Municipal Elections—Election of Alderman for City—Property Qualification—Tenancy of House—Value—Assessment Roll—Yearly Tenant—Indefinite Term.

Appeal by defendant from order of acting Judge of County Court of Essex, in a quo warranto proceeding, setting aside the appellant's election as alderman for the city of

Windsor, on the ground of insufficient property qualification, according to the requirements of sec. 76 of the Municipal Act, 1903.

D. L. McCarthy, for appellant.

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

TEETZEL, J.:—The appellant is the manager of the business of the Shedden Cartage Co. at the city of Windsor. The company own lots 41 and 42 on the south side of Arthur street in that city, upon the front of which is a dwelling-house occupied exclusively by the appellant and his family, and upon the rear of the lots is a barn used exclusively by the company. . . .

The two lots with the buildings are assessed in the name of the appellant as tenant for $3,200, made up of $600 for the lots and $2,600 for the buildings; and, while on the assessment roll the values of the buildings are not separated, I find upon the evidence that the house is worth at least $1,600.

It was argued that the company and the appellant were joint tenants within the contemplation of sec. 93 of the Municipal Act, and therefore the appellant could only be considered as qualified to the extent of $1,600, being $400 short of the necessary qualification under sec. 76.

I am of opinion, however, upon the evidence, that, except as to the passage way or entrance from the street, there was no joint or common occupancy between the appellant and the company, but a separate occupancy of the respective buildings.

There is no evidence whatever of the value of that portion of the lots occupied by and appurtenant to the barn, as distinct from that portion occupied by and appurtenant to the house, and, with great respect, I think the learned Judge erred in his finding that the last mentioned portion and the house were not of the assessable value of $2,000, and in assuming that the burden was upon the appellant to prove such value.

That the whole land was worth $600 was not contested, and the assessor swore that the house was worth from $1,600 to $1,800. Upon the assessment roll the appellant was assessed in his own name as tenant for $3,200, and was, therefore, prima facie qualified under sec. 76, and I think the

burden was clearly upon the relator in these proceedings to establish by positive evidence that the actual value of the property in which appellant had a leasehold interest was less than $2,000. In my opinion, the relator entirely failed to sustain this burden.

It was further argued . . .that, upon the evidence, the appellant had in fact no leasehold interest whatever in the property, but that he was only an occupant of the property as a servant of the company, or at most was only a monthly and not a yearly tenant, as required by sub-sec. 5 of sec. 76. . . .

I think the appellant's interest was that of a yearly tenant. The evidence shews that appellant was engaged as manager 13 years ago for an indefinite term. . . . As to the tenancy he says: 'I am paying a rental of $72 per year for the use of the premises. I charge myself with $6 per month for rent. Hamilton (the company's inspector) told me I could stay forever or as long as I behaved myself. There is no agreement that I have a right to occupy if I cease to be agent." . . . Mr. Hamilton says: "He is renting it from us at $72 per year payable monthly, no time specified."

Upon the undisputed facts and evidence it is quite clear that appellant is a tenant and not a mere occupant as servant of the company. His occupancy of the house and land in question was not necessary for the performance of his duties as manager. If the occupancy be strictly ancillary or subservient to the performance of the duties which the occupier has to perform, his occupation is that of a servant and not that of tenant. . . .

[Reference to Dobson v. Jones, 5 M. & G. 112; Hughes v. Overseers of Chatham, 5 M. & G. 54; Smith v. Seghill, L. R. 10 Q. B. 422; Redman & Lyon's Landlord and Tenant, 5th ed., p. 15.]

I am also of opinion, upon the evidence, that appellant was a yearly and not a monthly tenant or tenant at will. . . . .

[Reference to Bastow v. Cox, 11 Q. B. 122; Pope v. Garland, 4 Y. & C. at p. 399; Redman & Lyon, p. 34.]

The fact that the rent is, by agreement, payable monthly, or that the contract of service may be terminated at the will of either party, cannot affect the nature of the estate which the appellant has in the property, which . . . is clearly . . . that of a yearly tenant.

Appeal allowed with costs and order set aside with costs.

FEBRUARY 24TH, 1906.

DIVISIONAL COURT.

LOVELL v. LOVELL.

Husband and Wife—Alimony—Cruelty not Amounting to Personal Violence—Threats — Wife Leaving Husband—Justification—Condonation—Findings of Trial Judge—Appeal.

Appeal by defendant from judgment of BOYD, C., 6 O. W. R. 621, awarding permanent alimony to plaintiff.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., CLUTE, J.

G. H. Watson, K.C., for defendant.

J. King, K.C., for plaintiff.

FALCONBRIDGE, C.J.:—The Chancellor's findings of fact are amply supported by the evidence as it appears in black and white, without reference to any question of demeanour of witnesses, as to which he pronounces in favour of plaintiff.

Every case of this nature is to be "decided upon the facts held by the Judge to be proved, and the relation of such facts to the whole married life of the parties to the suit:" per Lord Halsbury, L.C., in Russell v. Russell, [1897] A. C. at p. 420.

The Chancellor has, to my mind, demonstrated conclusively that these facts bring the case well within the lines of the leading decisions, which he cites and from which he makes apposite quotations.

The appeal must be dismissed with costs.

CLUTE, J., gave reasons in writing for the same conclusion, referring at some length to the leading authorities, which are set out in the former report.

STREET, J., dissented, giving elaborate reasons in writing. He referred first to sec. 34 of the Judicature Act; then to the words of Lord Herschell in Russell v. Russell, [1897] A. C. at pp. 456-7: "I think it may confidently be asserted

that in not a single case was a divorce on the ground of cruelty granted unless there had been bodily hurt or injury to health or a reasonable apprehension of one or other of these." He then reviewed the evidence at length, and referred to some of the authorities, concluding as follows:

The cases all shew that where no actual violence has taken place, nothing short of long continued and systematic harshness on the part of the husband, amounting in fact to steady insult, not due to any misbehaviour on her part, will justify a wife in leaving her husband and claiming alimony from him.

I have been unable to find in the present case such conduct on the part of the husband as this, however lacking he may have been at times in courtesy to her, and in a proper consideration for her feelings. . . . I am convinced that it is desirable that plaintiff and defendant, in their own interests as well as for the sake of the child, should not be separated, as they will be in all probability for ever, if this action should be successful. I believe that it is a great misfortune from the standpoint of public policy that encouragement should be given by the Courts to the idea that separations of married persons are to be supported upon any but the most weighty grounds.