The
Ontario Weekly Notes

Vol. II. TORONTO, APRIL 19, 1911. No. 30.

COURT OF APPEAL.

APRIL 1ST, 1911.

NATIONAL TRUST CO. v. MILLER.

Trespass on Lands—Cutting and Removing Timber—Rights Reserved by Crown—Possession, Actual and Constructive—Acquisition of Crown Rights—License to Patentee—Title to Pine Trees.

Appeal by defendants, the Eastern Construction Co., and by Miller and Dickson, from the judgment of CLUTE, J., of June 17th, 1910, whereby he gave judgment for the plaintiffs for $3,157 damages and costs, and dismissed the claim of Miller and Dickson by third party notice against the Eastern Construction Co., and gave judgment for plaintiffs in the action of Schmidt v. Miller for $1,053 damages and costs. The action was for alleged trespass of the defendants in entering on plaintiffs' lands and cutting and removing timber.

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

I. F. Hellmuth, K.C., and F. Aylesworth, for the Eastern Construction Co.

W. M. Douglas, K.C., for Miller and Dickson.

J. R. Cartwright, K.C., for the Ontario Government.

J. A. Macintosh, and W. H. Wallbridge, for the plaintiffs.

The judgment of the Court was delivered by MEREDITH, J.A.:—I am obliged to differ from the learned trial Judge in one important matter; but, generally, agree with him in his findings of fact, as well as in his conclusions in the other matters involved in the action.

I am unable to understand why the plaintiffs should be considered to have been in possession of the rights reserved by the Crown, any more than that the Crown should be considered to have been in possession of the rights granted to the plaintiffs.

There was no actual possession by the plaintiffs, and their constructive possession was of that only to which they acquired title under the grant.

Therefore I can see no more reason for permitting the plaintiffs to recover for an invasion of Crown rights than for the Crown to recover for trespass upon the property of the plaintiffs. In so far as the plaintiffs have sustained injury to any of their rights, caused by the defendants, they are entitled to compensation; but not for injuries done to the rights of the Crown.

But, if this were not so, how could the plaintiffs rightly recover for injuries sustained by the Crown? It is not a case of setting up the jus tertii; the defendants have acquired the rights of the Crown, and are setting up their own rights so acquired.

So that the main question in the action really comes down to this: To what extent have the rights of the plaintiffs been encroached upon, and what sum will reasonably compensate them for the injury done?

The Crown excepted from the grant, "all pine trees standing and being on the land, which pine trees shall continue to be the property of Her Majesty" . . .; giving leave, however, to the patentee, to cut such of them as might be necessary for certain specified purposes; but this leave did not vest in the plaintiffs the title to any pine trees, or hamper the right of the Crown to sell them; so long as they remained, the patentee might use them to the extent of the leave given, but he acquired no title to them until so appropriated, nor any right to prevent the removal of them by the Crown, or by anyone who had acquired any right to them from the Crown; all this was made very plain on the face of the patent, which contained this provision: "Any person holding a license to cut timber or saw logs may, at all times during the continuance of the license, enter upon the lands and cut and remove such trees, and make all necessary roads for that purpose."

The defendants Miller and Dickson cut other than pine trees, and are said to have done unnecessary injury to the plaintiffs' rights in cutting and removing them, as well as in cutting and removing the pine trees; therefore, unless the parties can agree as to these things, there ought to be the usual reference, reserving further directions and all questions of costs throughout, except of this appeal.

Agreeing with the learned Judge in his findings of the facts affecting the claim of the defendants Miller and Dickson over against their co-defendants, this claim fails, and the appeal, in respect of it, should be dismissed with costs to such co-defendants.

Upon the finding of the learned Judge, that the defendants The Eastern Construction Company, Limited, took the goods in question with a knowledge of all the circumstances, his holding that they also are liable for their value is right, though this is a matter of no great moment now, there being no liability in respect of the pine taken.

The defendants should have their costs of this appeal upon the final taxation of costs, when such set-offs as are proper may be made.

MAGEE, J.A., will also give written reasons later.

HIGH COURT OF JUSTICE.

BRITTON, J. APRIL 1ST, 1911.

DUNDAS v. WILSON.

Malicious Prosecution—Reasonable and Probable Cause—Honest Belief—Submission of Facts to Counsel—Charge to Jury.

Action for malicious prosecution, tried at Woodstock with a jury.

T. Wells, K.C., and J. C. Hegler, K.C., for the plaintiff.

F. R. Ball, K.C., for the defendant.

BRITTON, J.:—The plaintiff was charged by the defendant with stealing dog muzzles. The plaintiff was arrested and sent for trial to the General Sessions for the county of Oxford, where the grand jury ignored the bill.

At the close of the evidence defendant's counsel moved for dismissal of the action on the ground that plaintiff had not shewn the absence of reasonable and probable cause. I was of opinion that upon the evidence, so far as the evidence is not in conflict, taking everything most strongly against the plaintiff, there was not reasonable and probable cause for the prosecution instituted by the defendant. My decision, however, was reserved and I charged the jury that if they found that the defendant at the time of laying the information honestly believed that the plaintiff on the 14th February, 1910, stole dog muzzles, and if the defendant so believing submitted to counsel all the facts known to the defendant, and simply acted upon the advice

of counsel in laying the information, they should find a verdict for the defendant.

The jury found for the plaintiff, and assessed the damages at $500. Upon that verdict the judgment should be entered for the plaintiff with costs and the defendant should be prevented from setting off costs.

LATCHFORD, J. APRIL 1ST, 1911.

BLANSHARD v. BISHOP.

Landlord and Tenant—Illegal Distress—Building Regarded as Chattel—Intention of Parties—Notice and Appraisement—Special Damage.

Action for damages for breach of a covenant and agreement, for illegal distress and withholding possession, and for an accounting.

H. A. Tibbetts, for the plaintiff.
A. D. George, for the defendant.

LATCHFORD, J.:—At the close of the evidence, after disposing of the claim for damages for breach of covenant, I suggested a settlement of this suit on what seemed to me a practicable and equitable basis. I have recently been informed that efforts to adjust matters between the parties have proved futile, and I now proceed to dispose of the case.

Both plaintiff and defendant intended that the building should be regarded as a chattel. It rested by its own weight on the land, and could be removed without injury to the land, though the removal integre, salve, et commode, might be difficult. The intention of the parties is, however, the governing circumstance. In Holland v. Hodgson (1872), L.R. 7 C.P. 328, Lord Blackburn says, at p. 335: "Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances are such as to shew that they were intended to be part of the land." See also Bing Kee v. Yick Chong (1910), 43 S.C.R. 334. The building as a chattel was properly the subject of distress. But as the rent claimed was due, the distress itself was not illegal: Tancred v. Leyland (1851), 16 Q.B. 669 at p. 678. There were irregularities. No notice was given or

appraisement made, as required by R.S.O. ch. 342, sec. 16; and in the absence, as here, of proof of special damage, the tenant is without redress. The action fails, and is dismissed with costs.

LATCHFORD, J., IN CHAMBERS. APRIL 3RD, 1911.

KEYES v. McKEON.

Inspection of Building—Order for, by Deputy County Judge—Jurisdiction—Appointment under County Judges Act, 9 Edw. VII. ch. 29, sec. 10—Production of Commission Unnecessary—Authority of Deputy Judge under Judicature Act, sec. 185—Alleged Undue Haste—Inclusion of Solicitors and Witnesses in Order—Con. Rules, 10, 571—Prevention of Inspection by Force—Costs.

Motion by defendant for an order setting aside an order made on March 23rd, on the application of the plaintiff, by E. Sydney Smith, Esq., as Local Judge of the High Court of Justice at Stratford, authorising the plaintiff, his solicitors, and certain named witnesses, to examine the building in connection with the construction of which this action was brought. It was objected that Mr. Smith had no jurisdiction to make the order; that it was made arbitrarily and with undue haste, and that it was wrong in authorising the plaintiff, his solicitors, and six witnesses to inspect the building.

W. Proudfoot, K.C., for the defendant.
F. Aylesworth, for the plaintiff.

LATCHFORD, J. (after stating the nature of the motion as above):—The ground of attack upon the jurisdiction is that Mr. Smith being but a deputy County Judge, is not a Local Judge of the High Court. A County Court Judge may appoint a barrister as deputy under sec. 20 of the Division Courts Act, 10 Edw. VII. ch. 32. The jurisdiction of such a deputy is restricted to the powers which may properly be exercised by a County Judge acting as Judge of the Division Court: Reg. v. Fee (1884), 3 O.R. 107 at p. 112. Under sec. 4 of the County Courts Act, 10 Edw. VII. ch. 30, a county Judge may appoint a deputy to preside over a particular sitting of the County Court. But Mr. Smith was, it appears, not appointed deputy Judge

under either of the statutes referred to. His appointment was made by the Governor-General in Council, under the provisions of the County Judges Act, 9 Edw. VII. ch. 29, sec. 10. Mr. Gorman, in the second edition of his excellent manual of County Court Practice, points out in his notes to this section the distinction between an appointment made under it, and one made under sec. 4 of the County Courts Act. Upon the argument before me it was not disputed that when Mr. Smith's jurisdiction was questioned, he produced his commission from the Crown. It was not necessary that he should have done this. The presumption of law is that a person acting in a public capacity was properly appointed, and duly authorised so to act: Osler, J., in Reg. v. Fee, ubi sup. at p. 109. That presumption is not met in the present case by any evidence. By sec. 11 of the County Judges Act, "a deputy Judge in case of death, illness or absence of the Judge shall have authority to perform in the place of the Judge, in the county for which he is appointed, all the duties of and incident to the office of the Judge, and all acts required or allowed to be done by the Judge under this or any other Act, unless therein otherwise expressly provided." There is nowhere to be found anything prohibiting a deputy Judge from exercising the powers of local Judges of the High Court of Justice conferred by sec. 185 of the Judicature Act upon county Judges. I think it clear from the enactments cited that (except in the county of York, as stated in sec. 185) a deputy Judge appointed as Mr. Smith was appointed, has the same jurisdiction as a County Court Judge. The first objection fails.

[The learned Judge then gave reasons for holding that the order was not made with undue haste, and, with reference to the last ground of objection taken by the defendant, the judgment proceeds]:

It may be that the notice was drafted with reference to Con. Rule 571, which mentions only the plaintiff and his witnesses as the persons who may be authorised to make the inspection. But the inclusion in the order of the names of the solicitors, and witnesses of whom the defendant had no notice, has not been shewn to have been to the prejudice of the defendant in any way whatever. Moreover, under Con. Rule 10, the Judge had power to authorise "any person or persons" to enter upon the land and property of the defendant to make any inspection necessary for the proper determination of the matter in dispute. I regard the order as quite a proper one in the circumstances, and the appeal of the defendant against it is dismissed with costs.

But whether carelessly or carefully made, an order of the Court should be conformed to until it is set aside or stayed, and any person, having notice or knowledge of it, who contemns it does so at his peril. The order was duly served, but the inspection was prevented with some shew of force. The plaintiff asks that I should order the defendant to pay the costs incident to the refusal of the defendant to allow the inspection. The plaintiff had served notice of motion, returnable before the presiding Judge of the assizes at London, on the 27th March, for an order striking out the statement of defence, or, in the alternative, that the defendant pay to the plaintiff the costs to which the plaintiff was put in his attempt to make the inspection. The application was not, I understand, disposed of. The learned Chief Justice of the King's Bench, who presided at London on the 27th, is still seized of the motion, and I make no order in regard to it.

[See Keyes v. McKeon, infra, p. 1014.]

MIDDLETON, J. APRIL 4TH, 1911.

RE WADSWORTH.

Will—Devise—Income to be Paid Wife for Maintenance of Herself and Children—Dower—Election—Intention to Exclude Right to Dower—Reduction of Income to be Paid to Widow.

Motion under Con. Rule 938, by the Toronto General Trusts Corporation, executors of the will of J. A. J. Wadsworth, for the direction of the Court as to whether or not they should allow to the testator's widow, dower in his lands in addition to the provisions made for her by the will.

G. F. Henderson, K.C., for the executors.
H. Aylen, K.C., for the widow.
T. Lewis, K.C., for the official guardian.

MIDDLETON, J. [Reference to the principles laid down by Kindersley, V.-C., in Gibson v. Gibson (1852), 1 Drew. 42, as governing the case, and shewing that in order to justify the Court in putting the widow to her election between her dower and the benefits given her by the will, it must be satisfied that there is a positive intention to exclude her from dower, either expressed or clearly implied, which intention must be apparent

upon the face of the will itself. The judgment then proceeds:]—The same Judge in Parker v. Sowerby (1853), 1 Drew. 540, says: "It is not sufficient to collect an intention that the testator does not mean his widow to have her dower, but you must find an intention so to dispose of his estate that her claim to dower would be inconsistent with that disposition." In the same case in appeal, Lord Cranworth said: "It is not, I think, quite correct to state the general rule of law as being that to raise a case of election against the wife, the will must shew that the testator had in his mind her right to dower, and that he meant to exclude it. The rule rather is, that it must appear from the will that the testator intended to dispose of his property in a manner inconsistent with his wife's right to dower."

A blending of the real and personal estate, not for the purpose of its equal division, but in order to obtain an income out of which payments are to be made annually to his wife and other objects of his bounty is not enough: Leys v. Toronto General Trusts Co., 22 O.R. 605; and the fact that in this case the share of the income to be paid the wife is to be paid her for the maintenance of herself and the children makes against the contention. If the testator intended to purchase the dower, the widow would be given the price free from the obligation to maintain. All the provisions of this will can be carried into effect by regarding the will as operating upon that which was his own property. The widow by asserting her claim will no doubt reduce the income, and it is two-thirds of this reduced income that is to be paid to her.

Costs of all parties out of the estate. The executors' as between solicitor and client.

BOYD, C. APRIL 6TH, 1911.

RE BROWN AND TOWNSHIP OF EAST FLAMBOROUGH.

Municipal Corporations—Local Option By-law—Motion to Quash—Adoption by Electors—Three-fifths Majority—Computation—Spoilt and Rejected Ballots not to be Considered—Who are Electors Voting—6 Edw. VII. ch. 47, sec. 24 (4) (5).

Motion to quash a by-law to prohibit the sale by retail of spirituous, fermented or other manufactured liquors in the township.

W. E. S. Knowles, for the applicant.
W. E. Raney, K.C., for the township.

BOYD, C.:—In voting on ordinary by-laws the votes for and against are summed up, and the result depends upon whether the required majority of the electors voting upon the by-law have approved or disapproved of it: Municipal Act of 1903, sec. 364.

In voting upon a bonus by-law the assent of two-thirds of all the ratepayers entitled to vote on the by-law (unless the number voting against does not exceed one-fifth of the total entitled to vote, when the assent of three-fifths only of all such ratepayers shall be necessary), ib. sec. 366*a*.

In voting on "local option" by-laws, in case three-fifths of the electors voting upon such by-law approve of the same, the council shall pass the same: 6 Edw. VII. ch. 47, sec. 24 (4), and in case it does not receive the approval of at least three-fifths of the electors voting thereon, the council shall not pass the same (ib. sub-sec. 5).

In this local option voting, the constituency is all the persons entitled to vote at municipal elections; and the argument before me is that the language used as to this kind of vote requires that all the votes cast shall be regarded and counted in order to ascertain whether three-fifths of the electors voting on the occasion approve of the by-law. Spoilt and rejected ballots are to be included as representing those who have not approved, and if these worthless ballots, added to the ballots of those who disapproved, are more than two-fifths of the total vote then the by-law is lost.

In this case 594 electors cast ballots; 352 for the by-law and 216 against, and 26 ballots were not counted because of their legal defects. If the 26 were excluded from the summing up, there are three-fifths of the positive votes in approval; if the 26 ballots are included, and are to be regarded as not in approval, because of their negative or illegal form, then there are about 4 votes short of the three-fifths approval.

One would not resort to this method of giving effect to wasted or worthless ballots unless coerced to it by the language of the statute. The common sense view of the matter is that the electors, the potential voters, who fail to mark their ballots as required by law, have lost their votes; their attempt at voting so as to influence the result is a failure and a nullity. One cannot tell how they may have meant to vote, whether for or against the by-law, and to assume in practical effect that they all meant

to vote against the by-law is a violent and unbelievable assumption.

Does the language then require such a construction in order to neutralise the apparent three-fifths vote of approval? The Act speaks of three-fifths of the electors voting on the by-law approving of the same, here the total body of presumably qualified electors coming to vote was 594; 594 ballots were given out and returned, but of these 26 were spoiled or wrongly used and could not be counted, and were cast out as bad. Now they were bad for all purposes so far as ascertaining the mind and vote of the elector was concerned. So many electors appeared for the purpose of voting, but 26 of them did not succeed in any effective voting; only 568 cast a legal vote. The Act, I think, means that the electors voting are those who cast a legally marked and intelligible ballot one way or the other; all others do not count, and might as well stay at home.

The general provision as to declaring the result of the poll is in sec. 364 of the Municipal Act, 1903: The clerk is to sum up the number of votes for and against the by-law, and shall declare the result, and shall certify whether the required majority of the electors voting on the by-law have approved or disapproved of the same.

The dealing is with the legal votes—not the spoiled ballots—the electors to be reckoned are those who have voted for or against—who have thus expressed intelligibly on the face of the ballot-paper their approval or disapproval of the by-law. These, and these only, in my opinion, are the electors voting upon the by-law.

The statute requires for success three-fifths of the electors voting; that is to say, three-fifths of the votes actually cast at the election, and this means votes validly cast, and does not refer to votes spoiled or wasted by improper ballots, for such bad votes are "the same as if the vote had never been cast": Reg. v. Mayor of Tewkesbury, L.R. 3 Q.B., at p. 636. In brief, the 26 bad ballots were from electors who did not vote within the meaning of the local option clauses.

The contention now made was fully considered in 1907 by Judge Morgan in a local option case: Re Weston, 9 O.W.R. 250, and his conclusion was adopted by Mr. Justice Mabee later in the same year in Re Cleary, 14 O.L.R. 392. This case, on another point, was not followed in Re Mitchell, 16 O.L.R. 573, by Mr. Justice Clute, but the decision as applicable to the present case stands, and I agree with the results stated in the 1907 judgments, which I see no reason for now disturbing.

This objection is overruled.

Other objections were raised which I disposed of on the argument. A last objection as to insufficient notification was left open for further evidence, but I am now advised that this objection is abandoned.

In the result, therefore, the application to quash fails, and is dismissed with costs.

DIVISIONAL COURT. APRIL 7TH, 1911.

COUNTY OF WENTWORTH v. TOWNSHIP OF WEST FLAMBOROUGH.

Highway—Township Boundary Line—Deviation—Substituted Road—Assumption by County—Evidence—By-law—Plan—Dedication—Compulsory and Permissive Provisions—Municipal Act, 1903, *secs.* 617, 622-24, 641, 648-653.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., ante, p. 360, in which the facts are stated.

The appeal was heard by BOYD, C., CLUTE and SUTHERLAND, JJ.

J. L. Counsell, for the plaintiffs.

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

BOYD, C. [Reference to Municipal Act of 1887, secs. 536, 538 (1903, secs. 620, 622)]—The former section declares the duties cast upon the township councils in respect of boundary line roads, and the latter declares that such boundary line roads are under the joint jurisdiction of the township councils, although the road may deviate occasionally from the exact boundary line so as to be wholly in one township at that place of deviation. [Reference to County of Victoria v. Peterborough, 15 A.R., per Osler, J.A., at pp. 624-626, where he refers to McBride v. York, 31 U.C.R. 355.] Osler, J.A., then proceeds: "The term 'deviation' indicates a departure from some other course or way which might have been pursued at more or less inconvenience, and is inappropriate where there is none such to follow or deviate from. It is used in this Act (i.e., the Municipal Act) as meaning a departure from the allotted road allowance in the boundary line, where that is necessary for the purpose of obtaining a good line of road," p. 627: his words later imply that it

would be a reasonable construction of the Act to hold that the term "deviation" applied to a road substituted for the possible one on the boundary line; ib.

In the Court below, Robertson, J., had in like manner dealt with the word "deviate." He said it means to leave the original or established course and to take another course therefrom: in doing this, how is it possible to avoid going wholly within one of the municipalities, etc. And having once done so, the evident intention of the Act is to enable the road to be made where it is most convenient and most useful to the two interested municipalities: 15 O.R. at p. 452. This language is not affected though his decision was overruled in the Court of Appeal . . . "Deviation," as used in railroad legislation, has also this liberal meaning, as permitting a change of line from that laid down on the plans to a new line, not to deviate more than the prescribed distance—a changing of the site from one place to the other: Doe d. Payne v. Bristol, 6 M. & W. 320, 341, 345; Murphy v. Kingston, 11 O.R. 302. In Herron v. Rathmines, (1892) A.C. at p. 517, Lord Watson said: "Deviation in its ordinary and natural sense and also in the sense in which it has been used in Acts of Parliament, simply means shifting the work in its integrity from one site to another, which may be deemed more suitable."

Applying this definition to the facts of the case, it would appear that the site of the road contemplated in the improved part of the boundary road allowance has been, for sufficient physical reasons, shifted by the act of the county council to the travelled Guelph road now established about parallel to the unopened allowance, access to which from the opened and travelled part of the boundary line road is by means of a municipal concession road at right angles to the boundary line, and up to which the Guelph road has been opened. This Guelph road was originally opened through the private lands of Carroll, and by him dedicated to public use. This dedication has been accepted by the action of the council of the county in which both Flamborough townships are situate, and that council has conveyed to him, in lieu thereof, the old unopened part of the boundary line allowance, which has been thus become permanently closed by proper municipal action: Re McBride & Toronto, 31 U.C.R. 353, and O'Connor v. Clarke, 35 U.C.R. 85.

The plan of this Carroll or Guelph road was registered in 1857. The action of the county council in accepting this road, and directing a conveyance to the private owner Carroll of the unopened part of the old allowance, was carried out in the end of 1863, and since then the Carroll road has been used as part

or extension of the boundary line road, substituted for or taken over in lieu of the old impassable site. This public transaction, in which the representatives of both townships who were members of the county council adjudged that the original road allowance between the townships should be conveyed to Carroll in lieu of the road laid out by him, and certified to be fit for all the purposes of a public highway, should estop everyone from saying that the new road was not substituted for the other, and that, as a consequence, the new road is within the meaning of the statute, a deviation of the boundary line unopened allowance for road and therefore, for the repair and maintenance of which both townships are liable, though this part lies entirely within the territory of Flamborough East.

The county acting in good faith, after notification to the defendants and those making objection to being at all liable, proceeded, perhaps with not the greatest regularity, to expend money, some $200, in making the repairs of which the half has been paid by Flamborough East. The other half the defendants refuse to pay, and hence this action.

East Flamborough made application under sec. 648 of the Municipal Act to the county council on 3rd June, 1907, to adjust the dispute between the two Flamboroughs, and this was passed on by the council in the presence of representatives of both on 7th June, and after inspection of the road in dispute, it was resolved that as before this time the township of East Flamborough had done the repairs without consulting West Flamborough, that would not be disturbed, but as for the future the road in dispute should be deemed the town line between the townships, and that both should bear a like sum in keeping the road in repair.

On 26th September, 1907, the council of the county resolved under sec. 652 of the Act that it was expedient and necessary to appoint a commissioner to see that the road shall be placed and maintained in fit repair, and that all expenses incurred in doing so shall be chargeable to, and collectable from the two townships in equal proportions, and Peter Ray was appointed to carry out this provision.

The county council adjudicated that half the expense of keeping the place in repair should be borne by each township interested, but no steps were taken to fix beforehand how much that was to be. The county proceeded to appoint a Commissioner to enforce that order and do the work, and the townships failing to intervene, the work was done by the Commissioner, and the moiety of that outlay has been paid by one of the interested townships, but not by the defendants.

The modus operandi provided by the statute is not very clear. I can find only one reference to the sections in a case reported, O'Connor v. Otonabee, 35 U.C.R. 86, where the county made five yearly grants for the entire line, amounting in all to $875, which was expended by a Commissioner appointed for the purpose, and it is said this is the course directed to be taken by secs. 434, 435, and 436, when the county is doing the work for the townships, because the townships are not willing to do the work themselves.

The proper reading of secs. 648-653 is to be considered. As pointed out by Mr. Harrison in his Municipal Manual, the original of sec. 648 supposes that one of the townships is disposed to do what is required; but sec. 649 is where all neglect or refuse to act, and that case of joint inaction or refusal is provided for by sec. 650 referring to petitions provided for in terms by sec. 649. I read secs. 650 and 651 as closely connected together, and as conferring a permissive power to act under sec. 649. That is indicated by the amendment made in 1869, changing what was then sec. 341, sub-sec. 4, from compulsory to permissive provisions (33 Vict. ch. 26, sec. 16). So that in effect secs. 649, 650 and 651 are to be read as bracketed together, and as of permissive character. 648 and 652 may be read together as of compulsory character, i.e., when once the county has directed joint action, or declared joint liability on the part of the townships, it shall be the duty of the county to appoint a Commissioner to execute and enforce these orders as to the joint road, and if the representatives of the townships do not intimate their intention to execute the work themselves (the initiative as to the intention to so intervene rests on the township) then it is open for the county council to proceed "during the favourable season" and finish the work. If the county has not predetermined the exact amount to be spent, that does not, as I read the Act, disqualify that body from doing the work and recovering the outlay from the township in default.

Section 651 as to a prior determination of the amount, whether by statute labour or money expenditure or both, is not a necessary step in the proceeding; it is a permissive provision only. [Discussion of this point and reference to Huron v. London, 4 U.C.R. 303, and Wellington v. Wilmot, 17 U.C.R. 86, 87].

Owing to the difficulty of the law on these sections, I would not be averse in the present case to avoid any allegation that unnecessary expenditure has been incurred by the county, and to say that it should be referred to the Master to moderate the

amount, if the township so desires, otherwise judgment should go for the payment claimed (less $100 which I understand has been paid for part of the road).

This litigation arose out of the repudiation of any liability for the road in question by the defendants, and therefore the costs of action up to the hearing should be paid by the defendants, and also the costs of appeal.

There will be no costs to either party of a reference, if asked.

CLUTE, J.:—I agree.

SUTHERLAND, J.:—I agree.

DIVISIONAL COURT. APRIL 10TH, 1911.

AUSTIN v. RILEY.

Free Grants and Homesteads Act—Crown Grant—Reservation of Mines and Minerals—Sale by Patentee of Mineral Rights—8 Edw. VII. ch. 17, sec. 4, sub-sec. 3—Cancellation of Reservation—Construction—Confirmation of Title of Original Patentee.

Appeal from the judgment of Garrow, J.A., in favour of plaintiff.

This case came before this Court and judgment was given in July last (1 O.W.N. 1049), allowing the appeal, upon the ground that under R.S.O. (1897) ch. 29, sec. 20, the conveyance to the plaintiff was void, his grantor's wife not having joined therein as required by the Act. Both counsel and Court were under the impression that said grantor was at the time of the conveyance married. It was ascertained before judgment was entered that his wife had died on the 30th of August, 1899, the deed in question having been executed only four days after.

The case was thereupon re-argued on the 31st of January, 1911, before MULOCK, C.J.Ex.D., CLUTE, and SUTHERLAND, JJ.

R. J. McLaughlin, K.C., for the defendant.

A. J. R. Snow, K.C., for the plaintiff.

CLUTE, J. [After stating the facts, which are set out in the report cited]:—8 Edw. VII. ch. 17, sec. 4, sub-sec. 3, rescinds and makes void the reservations of mines and minerals contained in the patent, and declares that "all mines, ores and minerals in such lands shall be deemed to have passed with the said lands to the subsequent and present owners thereof."

The trial Judge construed the statute, not as a present conveyance or release of the mineral rights to the person who at that time had acquired the title conferred by the patent, but as a withdrawal ab initio of the reservation, and confirmation of the title of the original patentee, and of all persons claiming under him, as if no such reservation had been made.

I agree in this construction of the statute. It is, I think, its natural meaning, and gives effect to every part of it without injustice to anyone.

The defendant Riley is in no better position than his grantor. The document under which the plaintiff claims was registered, and he had actual notice of the plaintiff's claim and of his work upon the land. The plaintiff gets that for which he paid, and the defendant suffers no injustice, the minerals having been reserved in his grant.

Mr. McLaughlin urged that upon examination of the file in the Crown Lands Department, a copy of which was admitted as evidence at the trial, it would appear that the plaintiff had really agreed to pay $400 for minerals, of which $100 was to go to Clement and the balance to the Crown; that the Crown intended to benefit the original settler, and it was therefore an injustice to permit the plaintiff to have the benefit of the statute.

Having taken the view I do of the true construction to be placed upon the statute, I do not think any effect can be given to this argument. Clement assumed to sell the minerals and was paid his price, leaving the plaintiff to settle with the Crown Lands Department. The defendant never purchased or intended to purchase any right to the minerals. Clement has not, and so far as at present appears, does not intend to make claim, either to the minerals or to the $300, and the defendant is not in a position to take an objection which rests upon the remote possibility of Clement making some such claim.

The appeal is dismissed with costs.

MULOCK, C.J.:—I agree.

SUTHERLAND, J.:—I agree.

SUTHERLAND, J. APRIL 10TH, 1911.

RE MILNE AND TOWNSHIP OF THOROLD.

Municipal Corporation—Local Option By-law—Motion to Quash —Ballot not in Prescribed Form—Alleged Misleading Effect—Use of Similar Ballot in Voting on Another By-Law—Evidence—Result of Election not Affected—Liquor License Act, sec. 141 (8)—8 *Edw. VII. ch.* 54, *sec.* 10.

Motion to quash a local option by-law on the grounds set forth in the judgment.

J. Haverson, K.C., for the applicant.

H. S. White, and J. F. Cross, for the respondent corporation.

SUTHERLAND, J.:—This is a motion on behalf of the applicant, David Milne, for an order that by-law No. 13, passed on the 4th February, 1911, by the Municipal Council of the township of Thorold, and entitled "A By-law to prohibit the sale by retail of spirituous, fermented or other manufactured liquors in the municipality of the township of Thorold," be quashed upon the following, among other grounds:

1. That the ballots used for voting on the said by-law were not in accordance with the form prescribed by sub-sec. 8 of sec. 141 of the Liquor License Act, that instead of being in the form prescribed by the said Act, requiring the words, "for local option," and "against local option," there were used the words, "for the by-law," and "against the by-law."

2. That by reason of the use of the said ballot many electors were misled, and the vote as given does not truly represent the vote of the electorate.

The vote upon the said by-law was taken on the 2nd day of January, 1911, when 330 votes were cast for the by-law and 209 against it, with the result that the by-law was carried by a small, but substantial majority beyond the three-fifths majority required.

The form of ballot used has printed on the face of it in rather small type the folllowing words: "January 2nd, 1911, voting on by-law to prohibit the sale of intoxicating liquors submitted by the council of the township of Thorold," in addition to the words "for the by-law" and "against the by-law."

It appears that at the election in question, in addition to the

regular municipal ballot for the purpose of electing members to the council, there was a third ballot similar in size to the ballot, which I shall term the "Local Option Ballot" already mentioned, but different in colour, and having printed upon it the following, "January 2nd, 1911, voting on by-law to grant certain rights to the Niagara Falls, Welland and Dunnville Electric Railway, submitted by the council of the township of Thorold," and also the words "for the by-law" and "against the by-law."

It is contended on behalf of the applicant that in consequence of the similarity of these ballot papers, and in consequence of the fact that the local option ballot was contrary to the statutory form in that it did not have the words "for local option" and "against local option," but the substituted words "for the by-law and "against the by-law," the electors were confused and misled, no proper vote can be said to have been taken, and the by-law should be set aside.

[The learned Judge referred to evidence which had been adduced to shew that electors had been confused and misled by the improper marking of the ballots, which evidence did not impress him as at all satisfactory. Reference was also made to Re Sinclair and Town of Owen Sound, 12 O.L.R. 488, as an authority in this connection—also to Re Giles and Town of Almonte (a case decided after the passing of 8 Edw. VII. ch. 54, sec. 10), 1 O.W.N. 698, per Meredith, C.J.C.P., in the first instance, and to the same case in appeal, 21 O.L.R. 362, per Britton, J., and per Clute, J., at p. 365. The judgment proceeds] :—

The conduct of the election in question is not attacked in any other material respect. It is, however, contended on behalf of counsel for the applicant, that he has distinguished the present case from those already adverted to in this judgment, by shewing that several persons were actually misled, and that the effect of this is to supply something which, had it been present in those cases, would have led to a different result.

It seems to me, however, that in view of the decision of an appellate Court in Re Giles and Almonte, as to a ballot in the form in question, it would not be proper for me, even under the circumstances disclosed upon this application, to set aside the by-law. The will of the electors should be given effect to, if possible. I cannot see upon the evidence before me that the result of the election has been affected by the alleged confusion caused to the electors by the form of the ballot.

With some hesitation, I dismiss the application, but I think under the circumstances it should be without costs.

SUTHERLAND, J., IN CHAMBERS. APRIL 11TH, 1911.

REX v. JOHNSON & CAREY CO., LTD.

Criminal Law—Alien Labour Act—Conviction—Motion to Quash—"Written Consent" under sec. 5 of Act, Insufficient —Statement of Time, Place, and Nature of Offence.

Application to quash the conviction made on the 3rd January, 1911, by His Honour Judge Fitch, whereby upon the information of Knute Olson and Ed. Olson he convicted the defendants Johnson & Carey Company, Limited, under the Alien Labour Act, R.S.C. ch. 97, sec. 5, of having unlawfully imported into Canada alien labourers, contrary to the said Act, and imposed a fine of $500.

E. Coatsworth, K.C., for the motion.
A. E. Knox, contra.

SUTHERLAND, J. (after stating the facts):—Among a number of objections taken to the conviction is the following:

5. That no written consent to the prosecution of the defendants was procured or filed, as required by sec. 5 of the said Alien Labour Act.

Upon the argument it was not contended that "no written consent" had been procured, but that the one given was not sufficient. This alleged consent is in the following words: "I hereby consent to proceedings being taken against Johnson & Carey, Co., Ltd., for breach of the Alien Labour Act in hiring K. Olson and Ed. Olson against the terms of said Act. Dec. 20th, 1910. (signed) C. R. Fitch, District Judge." This alleged consent is written below a typewritten notice in the following words: "In the District Court of the district of Rainy River. In the matter of the Alien Labour Act, and in the matter of Johnson and Carey Company, Limited. Take Notice that an application will be made on behalf of Knute Olson and Ed. Olson, on Tuesday, the twentieth day of December, A.D. 1910, at the hour of ten o'clock in the forenoon, before his Honour Judge Fitch at his Chambers in the Court House, Fort Frances, for an order directing a prosecution of the above named Johnson and Carey Company, Limited, for breaches of the above Act. Dated at Fort Frances this sixteenth day of December, A.D. 1910. H. A. Tibbetts, solicitor for applicants."

It is contended on behalf of the applicant that such a con-

sent is insufficient under the terms of the Act, upon the authority of Rex v. Breckenridge, 10 O.L.R. 459, in that the time when, and the place where the offence under the Act is alleged to have been committed are not set out at all in the consent, nor is the particular offence intended to be charged. In the report of said case at p. 461, Meredith, C.J., in delivering the judgment of the Divisional Court, over which he was presiding, says: "The written consent should, in my opinion, at the least contain a general statement of the offence alleged to have been committed, not necessarily in the technical form which would be required in an information or conviction, but mentioning the name of the person in respect of whom the offence is alleged to have been committed, and the time and place, with sufficient certainty to identify the particular offence intended to be charged."

The consent in the present case contains no mention of the time when, or place where any offence under the Act is alleged to have been committed, and the nature of the offence is very indefinitely set forth in the words "in hiring K. Olson and Ed. Olson against the terms of said Act."

I think the case cited is in point, and the conviction must be quashed, upon the ground that no sufficient consent was given to proceedings being taken under the Act.

Having come to this conclusion, I do not think it necessary to deal with the other grounds raised in the notice of motion. The conviction will, therefore, be quashed with costs.

The money paid into Court by way of fine and as security for costs on the appeal, will be paid out to the applicant.

SHEPARD v. SHEPARD—LATCHFORD, J.—MARCH 31.

Will—Construction—Line of Division of Farm—Intention of Testator—Leave to Mortgage Devised Lands—Costs.]—Motion by the executors of Joseph Shepard, in part for the construction of the will of Michael Shepard, who died in 1873, being at the time of his death the owner of 202 acres of lot 17 in the first concession west of Yonge street in the county of York. The main question for decision was whether the testator intended to divide his farm into two parts, equal in area, or into two parts, each conforming to the line between the north and south halves of the lot. The plaintiffs claimed that the latter was the true construction, under which they would be entitled to 103.5 acres,

while Albert Shepard would get the remaining 98.5 acres, or with the addition of a small piece of lot 16, 99.3 acres in all. Under the other construction, Joseph and Albert would each be entitled to 101 acres. The learned Judge gave reasons in writing for the view taken by him, that the line intended by the testator to divide the properties devised to Joseph and Albert was, upon the proper construction of the will, having regard to all the circumstances, the line between the north half and the south half of lot 17. Judgment accordingly, and leave also granted, as asked, to the executors of Thomas Shepard to mortgage the lands devised to him for an amount sufficient to discharge the proper debts of the estate. Costs of the plaintiffs as between solicitor and client, and the costs of Helen Shepard and of the official guardian, to be paid out of the estate of Joseph Shepard forthwith after taxation. The opinion was expressed that the same result might have been attained at much less expense by an originating notice. A. G. F. Lawrence, for the plaintiffs. S. C. Smoke, K.C., for the defendant, Helen Shepard. J. R. Meredith, for the infants. W. E. Raney, K.C., for the other defendants.

BROWN v. CLENDENNAN—LATCHFORD, J., IN CHAMBERS—MARCH 31—MIDDLETON, J.—APRIL 4.

Land Titles Act—Registration—Motion to Stay till Determination of Action—Leave to Appeal—Security for Costs.]—Motion by plaintiff for an order staying until the determination of this action, the registration of the defendant under the Land Titles Act, as the owner of lot 17 on the south side of Humberside avenue, Toronto Junction. LATCHFORD, J., said that he saw no good reason why registration should be further delayed, and dismissed the motion with costs. On a motion being subsequently made by the plaintiff for leave to appeal from this judgment, MIDDLETON, J., before whom the motion for leave to appeal was made, said that the aspect of the case indicated by Skill v. Thompson, did not appear to have been presented to Latchford, J., and that apparently the Court thought in that case that the bringing of an action was enough to found a caution, and that on a motion to vacate a caution, the merits of the case should not be gone into. As however there was not much confidence to be placed in the plaintiff's bona fides, he would be

required to proceed with diligence, and as a term of this order, to give security for the costs of the appeal by paying $25 into Court within a week, and to agree to expedite his action if the Court so ordered on the appeal. In default of security the motion to be dismissed with costs. If security given, costs to be in the appeal. A. E. H. Creswicke, K.C., for the plaintiff. W. J. McMaster, for the defendant.

KEYES v. MCKEON—FALCONBRIDGE, C.J.K.B.—APRIL 3.

Work Done on Building—Action for Balance—Attempt to Inspect Building—Reference—Costs.]—Action to recover balance claimed to be due to the plaintiff for work done for the defendant, in the erection of a church at St. Columban, in the township of McKillop. Reference to the Master at Stratford to take the accounts subject to the findings of the jury. All questions of costs reserved until motion for further directions, except the costs ordered to be paid by defendant to plaintiff, by Latchford, J., (ante, p. 997), and the costs of plaintiff's attempt to inspect the building which are to be paid by defendant on the final taxation. J. J. Coughlin, for plaintiff. W. Proudfoot, K.C., for defendant.

RE CUERRIER—SUTHERLAND, J., IN CHAMBERS—APRIL 4.

Executors—Sale of Land to Son of Testator.]—Motion by executors for an order sanctioning sale of land to son of deceased. Order made allowing and sanctioning sale of the land in question for $3,000, less the amount of the mortgage paid by the purchaser. Purchase money to be paid into Court after deducting costs of action. No order to be made at present on the question of maintenance. J. A. Macintosh, for the executors. F. W. Harcourt, K.C., for the infants.

BANK OF OTTAWA v. BRADFIELD—SUTHERLAND, J., IN CHAMBERS—APRIL 5.

Guardian ad Litem of Defendant—Motion to Appoint—Notice of Application to Defendant.]—Motion by defendant for an order appointing a guardian ad litem of the defendant. The

learned Judge was of the opinion that, while the material filed in support of the application by the defendant's solicitor makes out an apparently strong case as to the mental incapacity of the defendant, it would be improper, under the circumstances, to dispose of the matter without giving him an opportunity to be heard, and that in any case he should have had notice of the application, which did not appear to have been given: Wolfe v. Ogilvy, 12 P.R. 645. The motion would therefore be enlarged until Friday the 14th inst., to permit of the defendant being served. The plaintiffs should not be prejudiced by the delay, in the early trial or disposition of the action. J. A. Macintosh, for the defendant. S. G. Crowell, for the plaintiffs.

NORTHERN SULPHITE v. OCCIDENTAL SYNDICATE—MASTER IN CHAMBERS—APRIL 6.

Pleading—Statement of Defence—Admission Caused by Misconception of Minute in Books—Motion to Withdraw, and Substitute Another Defence — Excusable Mistake — Reference to Trial Judge.]—In this action, the plaintiffs asked to have it declared that certain bonds of the Imperial Land Co., now in Court, are their property. In the statement of defence, it was stated that these bonds were purchased from their various holders by the defendants as agents for the plaintiffs. Since that time there has been evidence taken on commission in London, England, from which it appeared that the statement as to the defendants' agency was based upon a misapprehension by the solicitors here as to a minute in the defendants' books which are at present in England. Under these circumstances, the defendants moved to be allowed to withdraw their statement of defence, and deliver another which will omit that admission, and put their defence in a different shape, and more in accordance with the evidence obtained on the commission, and the other facts of the case. Held, that, according to the decision in Williams v. Leonard, 16 P.R. 544, 17 P.R. 73, the motion was entitled to succeed. It is quite clear that the admission of agency was made under a mistake, which was excusable under the existing conditions. It was suggested by the plaintiffs' counsel that the motion should be referred to the trial Judge. But this does not seem the proper course, as the record in its present shape would perhaps be read by the Judge. This would not only impose useless labour on him, but might also give a wrong impression

of the facts admitted. The plaintiffs to have such further time to reply as they may require, and the costs lost or occasioned by this motion to be to them in any event. H. W. Mickle, for the defendants. R. B. Henderson, for the plaintiffs.

GERRY v. WATER COMMISSIONERS OF LONDON—SUTHERLAND, J.—APRIL 7.

Water Works Commissioners—Expropriation Proceedings—Injunction to Restrain—Motion to Continue till Trial—Defendants not Really Concerned in Arbitration.]—Motion for an order to continue until the trial of the action, an interim injunction, restraining the defendants from proceeding with the arbitration instituted by them, for the compulsory expropriation of the plaintiff's lands. The contention was put forward by the plaintiff on this application, that there is a valid and subsisting agreement between the Board of Water Commissioners and the Hon. Adam Beck, under which Mr. Beck is to acquire the lands in question, and convey them to the corporation of the City of London, that it was no part of that agreement that the defendants should acquire those lands, and that the defendants' by-law directing expropriation, while ostensibly passed to acquire for the purposes of their water works the lands and premises in question, was really passed at the request of Mr. Beck, and so as to enable him indirectly to compel the plaintiff, by arbitration with the Board of Water Commissioners, to give up his land, instead of Mr. Beck himself acquiring the lands. It was contended on behalf of the defendants that as the Board of Water Commissioners had the right to acquire the lands in question for water works purposes, and as the proceedings being taken are regular, it is not proper that the arbitration proceedings should be stayed. It was contended on the part of the plaintiff in this connection, that the rights of the Board are curtailed by its act of incorporation to the works therein mentioned, and thereunder provided for. The learned Judge stated that he would be inclined to think that the Board is properly authorised to acquire the lands for water works purposes if they so desired, apart from the agreement in question; but that in the face of the terms of the said agreement, and of the opinion which the plaintiff had obtained from a solicitor that the Board has no right to proceed with the arbitration, and of the fact that he desires to have that question first settled in an action, he does

not think it proper to refuse to continue the injunction until the trial of the action. It was practically admitted on all hands that no interests will be seriously affected by so doing, and he thought it would be more appropriate and convenient to have the preliminary questions in issue disposed of before the arbitration goes on. [Reference to Wood v. Lillies, 61 Law Journal (Chy.) 158; North London Ry. Co. v. Great Northern Ry. Co. 11 Q.B.D. 30; Farrar v. Cooper, 44 Ch.D. 323; Kitts v. Moore (1895), 1 Q.B.D. 253; Bentinck v. Norfolk Estuary Co., 26 Law Journal 404.] The injunction to be continued until trial, which, in the circumstances, should be hastened as much as possible. The costs of the motion for the injunction, and of this motion, to be disposed of by the trial Judge. J. M. McEvoy, for the plaintiff. G. H. Watson, K.C., for the defendants.

HUNT v. MOORE—DIVISIONAL COURT—APRIL 7.

Sale of Lands—Agent—Claim for Commission—Refusal to Carry out Contract.]—Appeal by defendant from judgment of the District Court, Thunder Bay, of 31st January, 1911. The action was for the recovery of $650 claimed for commission by plaintiff, a real estate agent, for the sale of defendant's lands. At the trial, judgment was given for plaintiff for amount claimed and costs. The judgment of the Court (BOYD, C., CLUTE and SUTHERLAND, JJ.) was delivered by BOYD, C., to the following effect: "Hewitson, we are now told, refuses to carry out the contract, but whether he can be forced, or not, does not appear to me material on this appeal. Upon the evidence before us the plaintiff earned his right to be paid a commission; he had a contract signed in proper and intelligible terms—if the legal effect of it is different from what one of the parties thought, that does not oust the legal claim by the agent, who did all that he needed to do in securing a purchaser on the terms proposed. Appeal should be dismissed with costs." F. Aylesworth, for the defendant. H. Cassels, K.C., for the plaintiff.

RE COOK ESTATE—SUTHERLAND, J.—APRIL 10.

Will—Legacy—Vested Interest.]—Motion by the executors of the estate of William Cook, for the construction of his will. William Cook died on the 30th May, 1888, having first made his last will, dated 28th May, 1888, which contained the following

clause: "At the death of my wife, I give and bequeath to my son William Cook my farm, lot ten . . . subject to the following legacies: (a) to my daughter Sarah, . . . one hundred dollars to be paid one year after the death of my wife; (b) to my daughters Mary Ann, Emma, and Charlotte, each one-fifth of the valuation of my farm lot ten as aforesaid, after the deduction of one hundred dollars to be paid to my daughter Sarah as aforesaid, and to be paid in four equal annual payments, the first of which shall be made one year after the death of my wife." The said Charlotte Cook, who had in the meantime married one Herbert W. Steeles, died in or about the year 1892, and the widow of the deceased testator, Eliza Cook, died in or about the month of December, 1906. Judgment (after stating the facts as above): The opinion of the Court is asked as to whether the interest of Charlotte Cook (Steeles) was a vested one under the terms of said will, or whether, in order to be entitled to the legacy in her favour therein mentioned, it was necessary that she should survive her mother. It seems to me, that the case of Town v. Borden (1882), 1 O.R. 327, is in point, and that Charlotte Cook took a vested interest. There is nothing to indicate in the will any intention that should any of the legatees mentioned in the clause in question die before the mother, her share should go to a survivor. I think, therefore, under the will, I must hold that Charlotte (Steeles) took a vested interest, and that her representatives are entitled to the legacy she would have claimed had she survived. The costs of all parties will be out of the estate." M. Grant, for the executors. W. Proudfoot, K.C., for representatives of Charlotte Cook. C. W. Plaxton, for the other beneficiaries.

METAL SHINGLE CO. v. ANDERSON—MASTER IN CHAMBERS—APRIL 10.

Action in County Court—Motion to Transfer to Another County—Condition that Defendants Should Admit Right of Action Against Co-defendant—Costs.]—Motion by defendants for an order transferring the action from the County Court of Waterloo to the County Court of Essex. The defendants reside at Leamington in the latter county, and on their real grounds of defence, all the evidence will be there. Their statement of defence, however, denies certain allegations in the statement of claim, as to the sale and delivering of the goods in ques-

tion in the action to one Johnston, their co-defendant, against whom judgment has gone by default. The Master said that the denial did not seem to be material to their defence, and if they were willing to withdraw this denial, and admit the right of action of the plaintiffs as against Johnston, there would be no reason why the order asked for should not be made, as no witnesses will be required on the part of the plaintiffs, except such as may prove the existence of the partnership relied on by them, and these will of necessity be at or near Leamington. If the moving defendants accede to the above, the order will be made reciting their admission of the plaintiffs' claim as against Johnston, with costs in the cause. If they do not agree to this, the motion will be dismissed with costs to the plaintiffs only in the cause. T. H. Peine, for the defendants. D. C. Ross, for the plaintiff company.

ARNOLDI v. HAWES, GIBSON & CO.—MASTER IN CHAMBERS—APRIL 11.

Action Against Partners—Statement of Defence in Individual Name—"Subsequent Proceedings"—Conflict of Decision.]—Motion to set aside statement of defence of defendant Hawes. The facts are similar to those in Langman v. Hudson, 14 P.R. 215, and the statement of defence in question is in accordance with that decision, given in 1891. Since that case, however, the question was very fully considered by the Court of Appeal in England in a case of Ellis v. Wadeson (1899), 1 Q.B. 714. From that judgment it seems clear that the motion should succeed so far as to require the statement of defence to be amended, and read as made "on behalf of the firm:" Ellis v. Wadeson, supra, at p. 720. As the point is novel, and the cases above cited are in conflict, the costs will be in the cause. D. D. Grierson, for the plaintiff. J. R. Roaf, for the defendants.