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HIGH COURT OF JUSTICE.

DIVISIONAL COURT. FEBRUARY 16TH, 1911.

BROWN v. CANADIAN PACIFIC R.W. CO.

Railway—Person Stealing Ride on Train—Order from Conductor to Get off while Train Moving—Injury—Evidence—Negligence—Findings of Jury—Former Trial—New Trial Directed by Court of Appeal—Identity of Evidence—Res Judicata.

Appeal by the defendants from the judgment of TEETZEL, J., upon the findings of a jury, in favour of the plaintiff for the recovery of $1,000 damages for injuries sustained by the plaintiff in getting off a moving train, by the order of the conductor. The plaintiff was "stealing a ride" upon the train, and, when the conductor discovered him, he either motioned with his hand or told the plaintiff to get off. There was conflicting evidence as to the rate at which the train was going; the plaintiff fell and got between a car and the platform, and was injured.

The judgment appealed from was given at the second trial of the action; at the first trial there was a verdict and judgment for the plaintiff for $2,000. This was set aside by the Court of Appeal, 13 O.W.R. 879, and a new trial ordered; the order was affirmed by the Supreme Court of Canada.

At the second trial the jury found, in answer to questions: (1) that the plaintiff got off the train under compulsion of the conductor's order; (2) that the plaintiff had reasonable grounds for believing that, if he did not obey the order, he would be put off by physical force; (3) that the conductor ordered the plaintiff off the train; (3a) that he did so by wave of the hand and by word of mouth; (4) that the speed of the train was such as to make it dangerous to get off; (5) that the conductor ought to have known that it was dangerous; (6) that, having regard to the circumstances and the place at which the order was given, and the speed at which the train was moving, the conduct of

the conductor in giving the order was not reasonable and proper; (7) that the plaintiff himself was not guilty of any negligence in attempting to get off the train when he did, or in the manner of his attempt; and (8) that the plaintiff's injury was attributable to the negligence of the conductor in not stopping the train.

The appeal was heard by MULOCK, C.J.Ex.D., BRITTON and SUTHERLAND, JJ.

I. F. Hellmuth, K.C., and G. A. Walker, for the defendants.

L. F. Heyd, K.C., for the plaintiff.

MULOCK, C.J. (after setting out the facts and part of the evidence and referring to the judgment of Osler, J.A., 13 O.W.R. at p. 881) :—On the present appeal the defendants argued that, inasmuch as the evidence in support of the plaintiff's case at the second trial, with the exception of that of Egerton (who was not called as a witness at the second trial), was substantially the same as that adduced in the plaintiff's behalf at the former trial, this case is practically res judicata.

I do not feel myself, however, in a position to give effect to that argument. The cause of the accident, according to the finding of the jury at the first trial, was, "Conductor, because he had no right to put them off the train while moving," and one of Mr. Justice Osler's reasons for ordering a new trial was the uncertainty as to the meaning of that answer to the question, which is quite open to his observation that it is an "assertion of a proposition of law rather than a finding of fact."

I construe Mr. Justice Osler's judgment as being to the effect that the jury did not clearly find actionable negligence on the part of the defendants; and his observation that, but for Egerton's evidence, the case might have been properly withdrawn from the jury is, I think, obiter. . . .

[The Chief Justice then set out the questions put to the jury and their answers.]

There was evidence, I think, in support of these findings, which could not properly have been withdrawn from the jury. According to the evidence of the plaintiff and Sharpe (the plaintiff's companion, who was also "stealing a ride"), the conductor ordered the plaintiff off whilst the train was in motion, going at a speed of from 10 to 13 miles an hour; his order was imperative and accompanied by violent language and his walking towards the two men. It was for the jury to determine whether, from his language and demeanour, the conductor in-

tended by physical force to put the plaintiff off the train. It does not appear that the plaintiff delayed unreasonably in complying with the conductor's order. According to Sharpe, he was the nearer one to the step; the plaintiff followed Sharpe at once, holding on to the railing and running with the train a short distance. The plaintiff's conduct in clinging to the railing and running with the car is some evidence as to the speed of the train; and the jury might properly have reasoned that if, at the moment the plaintiff alighted upon the platform, he could have safely let go of the railing, he would have done so, and that his clinging to it indicated a rate of speed at the moment considerably in excess of the three or four miles an hour spoken of by the conductor.

It is true that the plaintiff was unlawfully upon the train, but that circumstance does not entitle the conductor to force him off the train when going at a speed that might reasonably have been attended with danger to the plaintiff.

If the evidence on behalf of the plaintiff was true, it was ample to support the findings of the jury, and it was for them to say what weight they attached to it, in view of the evidence to the contrary.

They having found as they did, I see no ground upon which to disturb their findings, and, therefore, think this appeal must be dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

SUTHERLAND, J., also concurred.

TEETZEL, J., IN CHAMBERS. FEBRUARY 18TH, 1911.

RE BELDING LUMBER CO.

Company—Winding-up Order under Dominion Act—Stay of Proceedings—Order under sec. 19—Assignment for General Benefit of Creditors—Wishes of Majority of Creditors—Discretion—Stay until Further Order.

Application on behalf of a number of the creditors of the company, under sec. 19 of the Winding-up Act, R.S.C. 1906 ch. 144, for an order to stay the proceedings under the winding-up order made herein on the 9th instant: ante 739.

W. R. Smyth, K.C., for the applicants.

W. J. McWhinney, K.C., for the creditor on whose application the winding-up order was made.

TEETZEL, J.:—On the 6th instant the company made an assignment for the general benefit of creditors to Mr. Clarkson, who was, under the winding-up order, also appointed provisional liquidator.

Section 19 of the Winding-up Act reads as follows: "19. The Court may, upon the application of any creditor or contributory, at any time after the winding-up order is made, and upon proof, to the satisfaction of the Court, that all proceedings in relation to the winding-up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as the Court thinks fit."

The application to stay is supported by a large majority in number and value of all the creditors of the company, who, at a meeting of creditors assembled in pursuance of a notice which had been sent out by the assignee, passed a resolution in favour of the winding-up of the company being proceeded with under the assignment in preference to the order under the Winding-up Act.

There does not, from the material filed either upon this or upon the application for the winding-up order, appear to be any special circumstance which would render proceeding under the Winding-up Act more advantageous than under the Assignments and Preferences Act; and, being of opinion that the liquidation proceedings may be more expeditiously and inexpensively proceeded with under the latter Act, and in deference to the wishes in that behalf of the great majority in number and value of the creditors, I consider that this is a case in which the discretion of the Court should be exercised under sec. 19, and that an order should issue staying the proceedings under the winding-up order until such time as the Court may further order, on the application of any creditor on two days' notice.

The costs of this application and of and incidental to the winding-up order, including the costs of the provisional liquidator, will be taxed and paid out of the estate.

DIVISIONAL COURT. FEBRUARY 18TH, 1911.

GILL v. GREAT WEST LIFE ASSURANCE CO.

Life Insurance—Action for Return of First Premium—Action Maintainable—Policy not Conforming to Application—Payment of Extra Premium—Limitation of Actions—Reasonable Terms—Compliance with Insurance Act—Time for Making Payments—"Yearly for the Following Fourteeen Years"—Value of Policy—Discrepancy—Interest of Beneficiary—Surrender of Policy.

Appeal by the plaintiff from the judgment of the Junior Judge of the County Court of Carleton, dismissing the action with costs.

The plaintiff alleged that he made an application to the defendants for the issue by them of a policy insuring his life for $4,000; that he paid to the defendants $108.80, the amount of the first year's premium; that the defendants delivered to him a policy of insurance which did not contain the terms and provisions required by the plaintiff in his application, and also contained terms and provisions which were not provided for in his application; and claimed a return of the $108.80 paid.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and LATCHFORD, JJ.

M. G. Powell, for the plaintiff.

C. J. R. Bethune, for the defendants.

FALCONBRIDGE, C.J.:—The only clauses in the policy to which any objection was taken by the plaintiff, in pleading or in evidence, were: (a) the provision requiring the payment by the plaintiff of an additional premium of $50 per year for every $1,000 of the face value of the policy, in case the plaintiff should engage in military or naval service in time of war; and (b) a provision that all claims under the policy should be void after the expiration of one year from the date of the death of the insured, unless enforced by suit or action commenced before the expiration of said year.

The learned Judge found that these were reasonable and necessary terms to protect the company. Clause (a) is set out in the application signed by the plaintiff, and clause (b) is within the provision of R.S.O. 1897 ch. 203, sec. 148 (2).

These objections were entirely abandoned on the argument of the appeal. The plaintiff now—referring to exhibit 3, "Explanation of the Special Policy"—complains of the clause in the body of the policy allowing the company sixty days for payment after receipt of satisfactory proofs of death. This delay is mentioned by sec. 80 of ch. 203. But it is further objected by the plaintiff that this section sanctions the deferring of the payment for sixty days, only as regards the first payment of $200; and that the subsequent annual payments should not be subject to the same delay.

This would make a loss in interest to the beneficiary of $33.33, spread over fifteen years—not a very substantial matter. I think that "yearly for the following fourteen years" fairly means yearly from the time provided by law for payment of the first instalment.

Another objection is founded on a supposed difference between the amount mentioned in the explanation (exhibit 3), $2,981, required for the policy to be deemed to have matured as an endowment, and the sum mentioned in the clause headed "Distribution of Profits" at the top of the second page of the policy. I think this apparent discrepancy is reasonably explained by the clause at the foot of the same page, which states the commuted value of the policy to be $2,981—that sum being the amount which the beneficiary has the option to demand and receive in cash.

There is also a trivial objection regarding the date of the policy. . . .

I think these new objections, never advanced by the plaintiff himself, and manifestly an afterthought of counsel, ought to be viewed very strictly. It is to be borne in mind that, as the learned Judge points out, the action was not tried until the first year's insurance under the policy had expired. It is true, however, that the plaintiff promptly returned his policy to the company—and the company endeavoured to send it back to him.

The defendants' counsel urged that this action was not maintainable, and that the plaintiff's only remedy would be by suit for reformation of the policy to make it conform to the application. I think that the action is quite maintainable. . . .

[Reference to Am. & Eng. Encyc. of Law, 2nd ed., vol. 16, pp. 854, 952; Tifft v. Pheonix Mutual Life Insurance Co., 6 Lansing (N.Y.) 198.]

It was also objected by Mr. Bethune that the plaintiff's wife, who was named as beneficiary, did not join in the return or attempted surrender of the policy.

The exact point is covered by La Marche v. New York Life Insurance Co., 126 Cal. 498. If the plaintiff never applied for the policy which the defendants assumed to issue and which he did not accept nor agree to accept, his wife would have no interest therein.

But the plaintiff has failed to prove his case. The objections now put forward are as untenable as that formerly advanced; and the appeal ought to be dismissed with costs.

BRITTON, J., agreed with the reasons given by the Chief Justice, and stated his own views in writing, mainly upon further points presented by the evidence and upon the argument. In his opinion, the policy tendered was what the plaintiff wanted and applied for, and so he was not entitled to a return of the premium. The appeal should be dismissed with costs.

LATCHFORD, J., agreed in the result.

DIVISIONAL COURT. FEBRUARY 18TH, 1911.

*WILLIAM HAMILTON MANUFACTURING CO. v. HAMILTON STEEL AND IRON CO.

Company—Winding-up—Action by Company in Liquidation—Breach of Contract—Non-delivery of Goods Contracted for—Time—Adoption of Contract by Liquidator—Failure to Tender or Secure Payment—Relief from Further Delivery under Contract by Non-payment for Part Delivered.

Appeal by the plaintiffs from the judgment of BRITTON, J., 1 O.W.N. 1075, dismissing the action.

The appeal was heard by BOYD, C., RIDDELL and MIDDLETON, JJ.

F. R. MacKelcan, for the plaintiffs.

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

BOYD, C.:—In Ex p. Chalmers, L.R. 8 Ch. 289, the buyer of goods on credit became insolvent, with one instalment of goods delivered as yet unpaid; his liquidator was held to have no right to demand future deliveries without paying for them in

*To be reported in the Ontario Law Reports.

cash and also paying the price of the former delivery. The contract there was for 330 tons of blasting powder, at 8s. 6d. per cwt., to be delivered 30 tons per month from February to December; "payment by cash in fourteen days from date of each delivery."

This contract was for 250 tons of pig iron, at $20.25 per ton, to be delivered in equal monthly proportions between June and December, payable cash in thirty days. This is in form the same as the other; but with this further under-printed memorandum added: "Each monthly delivery is to be treated as a separate contract, independent of deliveries of other months."

It is argued that this latter clause is a distinctive difference which removes the case from the authority of Ex p. Chalmers. But in essence it only expressed what would be implied in every contract containing within itself a power of apportionment as to delivery and payment. The contract relates to the whole of the goods, with provisions for severance as to the successive deliveries which do not control the contract as a whole when the insolvency of the buyer intervenes, upon which a modification of his right arises.

Each delivery is to be treated as a separate independent contract, divisible in reference to each delivery, and, when payment in cash has been made for each delivery, as to so much of the contract it may be regarded as actually divided from the remainder and at an end by complete fulfilment. But this is not so, and there is no severance in fact, while the buyer is in default as to payment of that proportion. Such is the present case, so that the contract is still to be regarded as entire. This condition applies also to the option exercised as to the further quantity of 250 tons, which was exercised upon the same terms and is incorporated with the first order. The matter is by no means in the same legal state as if there had been separately written contracts as to each portion; for there would not be then one contract for the whole.

The rules of fair dealing must prevail in commercial as in other concerns. The price of iron has risen, and the liquidator, acting for the body of creditors, desires to take the benefit of the contract. But it is against equity to allow the liquidator to choose the good part and ignore the just claims of the seller to be paid for what has been delivered. It is not equitable to leave him to resort to such dividend as he may get in the liquidation, and allow the liquidator to make profit out of the unfulfilled part of the beneficial contract.

That is the doctrine which, I understand, is potentially enforced in Ex p. Chalmers to a contract for sale by instalments, and it is a salutary rule which has been well applied to the present case.

The judgment in appeal should be affirmed with costs.

MIDDLETON, J., agreed in that result, for reasons stated in

RIDDELL, J., dissenting, was of opinion, for reasons stated in writing, that the plaintiffs' appeal should be allowed, and judgment entered for them for $133 damages for breach of contract, without costs here or below.
writing.

RIDDELL, J., IN CHAMBERS. FEBRUARY 21ST, 1911.

McILHARGEY v. QUEEN.

Costs—Scale of—County Court Appeal—Costs of Opposing Appeal—Con. Rule 1132—*Set-off—Judgment—Entry—Con. Rules* 791, 827.

Appeal by the defendant from the ruling of the Senior Taxing Officer at Toronto, that the costs of the plaintiff on the defendant's appeal to a Divisional Court should be taxed on the County Court scale without a right of set-off.

R. T. Harding, for the defendant.
Featherston Aylesworth, for the plaintiff.

RIDDELL, J.:—This action brought in the County Court of the County of Perth for rent, resulted in a judgment for the plaintiff for $200; an appeal to a Divisional Court resulted in an order dismissing the appeal "with costs to be paid by the defendant to the plaintiff forthwith after taxation thereof, upon the same being certified to the said County Court pursuant to the statute in that behalf."

Another Divisional Court has decided (ante 364) that the action was of the proper competence of the Division Court.

The costs of the order of the Divisional Court first-mentioned came on for taxation before the Taxing Officer in Toronto, who has held that the costs must be taxed on the County Court scale without a set-off, *i.e.*, that Con. Rule 1132 does not apply. The defendant now appeals.

I think the appeal must be dismissed. Con. Rule 1132 was never intended to cover such a case.

When an appeal is taken to a Divisional Court, it is taken not from the reasons for judgment but from the judgment itself. The judgment is not in theory a judgment until it has been signed by the officer; and before the judgment comes up for review by a Divisional Court, it is in theory entered: Con. Rules 791, 827; although, by a convenient practice, it is sometimes only settled: Con. Rule 791.

The costs provided for by Con. Rule 1132 are those which are or may be mentioned in the judgment as entered "on entering judgment." If the Divisional Court sees fit to do so, the order of the Divisional Court may fix the scale—but, unless something is said in the order itself, the costs of such an order must be taxed on the scale appropriate to the proceeding without reference to Con. Rule 1132. Holmes v. Bready, 18 P.R. 79, is still good law, although some of the reasoning does not apply to such cases as the present.

The appeal will be dismissed, with costs on the County Court scale.

MIDDLETON, J. FEBRUARY 21ST, 1911.

RE MILLER.

Will—Construction—Life Interest—Remainder — Survivorship —Reference to Period of Distribution—Intestacy—Representation of Parties.

Motion by the executors of the will of Thomas Miller for an order declaring the true construction of the will.

M. D. Fraser, K.C., for the executors.

C. G. Jarvis, for the next of kin of Margaret Patton and of the testator except the surviving nieces.

J. Vining, for the surviving nieces.

MIDDLETON, J.:—The rule is well settled that when there is a gift to A. for life, and after his death to others, and any words are used in connection with the gift in remainder indicating survivorship, these refer to the period of distribution and not to the death of the testator.

Apart from this rule of construction, I think the intention of the testator can well be gathered from the two clauses 5 and

6. In the earlier clause an immediate gift is made to three nieces, and there is no mention of survivorship; but, when the life estate of the widow intervenes, the survivors alone take. The nieces were the objects of the testator's bounty, and they, and not their next of kin, are to take. The word "surviving" is used in both members of the clause, and, while it might have the meaning of "longest living" when referring to the two daughters of a brother or sister, one of whom had died, the whole context shews that this is not the sense in which the word was used by the testator.

None of the cases cited really conflict with the general rule —they are instances in which the Court has found a contrary intention. None of them are at all like this case.

There is no intestacy—upon the death of a niece her share is gone, and the survivors take.

The order should recite that those represented by Mr. Jarvis sufficiently represent the next of kin of the testator and the next of kin of Margaret Patton (other than the surviving nieces, who are represented by Mr. Vining).

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

LATCHFORD, J. FEBRUARY 21ST, 1911.

ROSE v. PARENT.

Improvements—Lien for—Mistake of Title—Bona Fides—R.S.O. 1897 *ch.* 119, *sec.* 30—*Damages—Occupation Rent—Set-off.*

Motion by the plaintiff in the Weekly Court at Ottawa, upon consent of all parties, for judgment upon the points of law raised by the pleadings.

M. J. Gorman, K.C., for the plaintiff.
J. A. Ritchie, for the defendants other than the infants.
A. C. T. Lewis, for the Official Guardian.

LATCHFORD, J.:—In 1894, one Narcisse Parent devised his real estate to his wife for life or during widowhood, with one-half the remainder as his widow might appoint, and the other half to his brothers and sisters, a nephew, and a niece. The

widow, the nephew, and a brother-in-law were appointed executors. Parent died on the 27th December, 1894, and on the 25th February, 1895, probate was duly granted to the executors named in the will.

On the 9th December, 1905, the executors assumed to convey the lands in question to the plaintiff. The deed recites that the testator by his said will empowered them "to execute and give deeds of conveyance for his real estate." No such power is, however, given in the will.

The consideration for the sale of the property was $1,000. No money was paid by the plaintiff to the executors, but a mortgage was given to them for the whole purchase-money. The plaintiff, relying upon the representation of the executors, and in the bonâ fide belief that he had a good title, entered into possession of the land and made permanent improvements to the value, he alleges, of $615, before discovering that his title was imperfect. He claims the value of the improvements, and to be entitled to a further sum of $600, "the natural increase in the value of the lands."

The defendants, who are the executors, the nephew and niece named in the will, and the other persons interested in remainder in the lands, say that the recitals of fact in the deed were innocently made, and set forth what the executors believed to be their powers under the will. They further aver that any statements in the deed which are not in accordance with the facts are due to a misunderstanding on the part of the conveyancer who prepared the deed, and that they executed the conveyance "believing it had been properly drawn and truly recited such powers as they had under the will of the late Narcisse Parent." The defendants also plead that, the will having been proved, the plaintiff might have examined the same, and that they are not responsible for his want of knowledge of the terms of the will.

The principal facts in the case are not in dispute, and the sole question for determination is their legal effect. It was not disputed upon the argument that the plaintiff and the executors acted in good faith. Their misfortune was that, instead of consulting a solicitor, they employed an ignorant rural conveyancer. That the plaintiff could have ascertained the true state of the title, is not, I think, material. The plaintiff is entitled to compensation for the lasting improvements which he has made upon the land, and to a lien upon the same, to the extent of the amount by which the value of the land is enhanced by such improvements: R.S.O. 1897 ch. 119, sec. 30. But I do

not think the plaintiff is, in addition, entitled to damages. See Bain v. Fothergill, L.R. 7 H.L. 158. Against the enhancement in value of the land by the plaintiff's lasting improvements, the defendants are entitled to set off an occupation rent from the date the plaintiff was let into possession, and any claim they may have for goods which they say they supplied to the plaintiff. If the parties cannot agree, there will be a reference to the Master at L'Orignal.

The principles to be adopted in determining the compensation and occupation rent are admirably stated in the judgment of the Chancellor in Munsie v. Lindsay, 11 O.R. 520.

Costs of the motion in the cause. Costs of action and reference reserved until Master has made his report.

DIVISIONAL COURT. FEBRUARY 21ST, 1911.

*MURRAY v. McKENZIE.

Infant—Gift of Chattels—Voidable Gift—Repudiation after Majority—Action for Return—Delay in Bringing—Absence of Change of Position by Donee—Transfer of Bonds—Failure to Set aside—Divided Success—Costs.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., ante 302, dismissing the action, which was for an account, the return of certain jewellery given by the plaintiff, while an infant, to the defendant, who was his adopted mother's executrix, to set aside a transfer of certain bonds, and for other relief.

The appeal was heard by BOYD, C., RIDDELL and MIDDLETON, JJ.

S. H. Bradford, K.C., for the plaintiff.

W. R. Smyth, K.C., for the defendant.

The judgment of the Court was delivered by BOYD, C.:—Authorities are scanty on the subject of gifts made by infants. An infant is, by our law and the English, incapable of making a valid will, for very obvious reasons; yet the modern view as to donations of chattels is that the gift of an infant is not void but voidable. . . .

*To be reported in the Ontario Law Reports.

[Reference to Taylor v. Johnston, 19 Ch. D. 603.]

No doubt, the gift may be ratified after majority is attained by the infant, and this does not call for any positive act; length of time may be sufficient; or it may be otherwise made to appear that there was a fixed, deliberate, and unbiassed determination that the transaction should not be impeached. See Mitchell v. Hornfray, 7 Q.B.D. 592. On the other hand, when the infant has derived no benefit from what has been done, and the position of the donee has not been affected by delay, the donor, come of age, may repudiate after a very considerable time: Encyc. of the Laws of England, 2nd ed., p. 162; and an example is given in the text of a lapse of 37 years in In re Jones, [1893] 2 Ch. 461.

The gift here was of jewellery which had been bequeathed to the plaintiff by his mother (adopted), and which, when he was about nineteen years of age, he handed back to her executrix, with whom he was living, and subject to whose control he is said to have been. He came of age in June, 1906; asked for a return of the jewellery soon after; had a letter written to the same effect in November, 1909; and brought this action in December, 1909. The defendant expresses her willingness to return the articles, and offered to do so pending action, but objected to do so as the result of litigation. The matter rested in this way, blocked chiefly by the question of costs.

The question as to what is a reasonable time for asserting his rights by an infant, come of age, in a voidable transaction, is one upon the facts for the opinion of the Court. Here there has been no note of acquiescence by the plaintiff, and the defendant has in no way changed her position or suffered any disadvantage by the three years' delay; and I think the plaintiff is rightly in Court and should get a return of the things and his costs as to that part of the case. Yet, as he fails as to the part of the case relating to the Petawawa bonds, he should pay costs as to that. But, acting on the well-known rule in the case of divided success, there should be no costs to either party of action or of appeal. Judgment will be entered accordingly.

DIVISIONAL COURT. FEBRUARY 21ST, 1911.

*ROCHE v. ALLAN.

Deed—Construction—Party Wall—Right to Build into—Compensation—"Assigns"—Erection of Building—Trespass—Easement—"Privilege"—Restrictive Covenant.

Appeal by the plaintiff from the judgment of the County Court of York, dismissing the action, which was brought to recover damages for trespass and to compel the removal of a frame building.

The appeal was heard by BOYD, C., RIDDELL and MIDDLETON, JJ.

J. W. McCullough and F. J. Roche, for the plaintiff.

McGregor Young, K.C., for the defendant.

RIDDELL, J.:—On the east side of Main street, in Newmarket, are two adjoining lots, Nos. 27 and 28 respectively, the former to the north. . . .

One Caldwell was the owner of the former lot; Millard of the latter: each lot was about 112 feet deep, running to Cedar street, and "No. 27 had been conveyed to Caldwell by Millard, it is said. (In the deed, No. 267, the grantor to Caldwell is not Millard, but that is immaterial). Millard build a wall upon the south part of the land which he is said to have conveyed to Caldwell, which wall was 14 inches thick, and ran 80 feet east from the margin of Main street. The mistake was not discovered until later. This wall was used by the two proprietors as a party wall. Thereafter, Caldwell built a continuation—I am using the word in a general sense—of this wall eastward, and used it as the south wall of his building. The result was that, in 1871, the two had the use of a party wall from Main street east for 80 feet, and Caldwell a further wall of 20 feet in a line with this, but Millard did not use this 20 feet at all; then there was a distance of 12 feet to the end of the lots yet unoccupied.

The mistake was discovered that Millard had conveyed to Caldwell 4 feet too much, or at least Caldwell had 4 feet too

*To be reported in the Ontario Law Reports.

much; and a conveyance was made to arrange matters between the neighbours. . . .

A conveyance was executed by Caldwell and his wife, of the first and second parts, and Millard, of the third part, accurately describing by metes and bounds the south 4 feet of Caldwell's land, so that the north boundary of the lands conveyed runs along the north side of the wall, and containing the following: "The said party of the first part reserving nevertheless the right to build into the wall now erected by the said party of the third part, to the depth of 80 feet from Main street, and should the said party of the third part desire to build into the wall now erected by the said party of the first part to the extent of 20 feet in rear of the before mentioned 80 feet of wall, he, the said party of the third part, may have the privilege of so doing by paying one half of the value of said 20 feet of wall as it then exists, and should either of the parties wish to carry said wall any higher than it is at present, he may have the privilege of doing so at his own expense, but the wall to be continued the same thickness as it now exists. And should either of the said parties wish to extend said wall to Cedar street, they may have the privilege of doing so, either separately or jointly as may be agreed upon at the time."

This conveyance was registered as No. 267. Millard did not build on or use the 20 feet.

Caldwell died: his executor in 1893 conveyed No. 27 to the plaintiff, "together with the rights and privileges as to party wall contained in a certain deed from said . . . Caldwell to . . . Millard dated," etc.

In 1904, Millard conveyed to the defendant, who claimed the right to use and did use the 20 feet as a party wall, but refused and refuses to pay for the "privilege." He has also built a frame building on the 12 feet, reaching to Cedar street.

The plaintiff sued in the County Court of York for damages for trespass in respect of the 20 feet and a mandatory injunction to remove the frame building.

The County Court Judge dismissed the action, and the plaintiff now appeals.

The action divides itself into two parts: (1) whether the defendant must pay the plaintiff for the use of the 20 feet of wall; and (2) whether the defendant was within his rights in building the frame building on the 12 feet.

There is no provision in the deed No. 267 that the words "party of the first part" or "party of the third part" shall

include in their meaning "assigns"—and no assistance can be had from the Acts respecting Short Forms of Conveyances, etc.—the statutory words not being used: Re Gilchrist and Island, 11 O.R. 537; Clark v. Harvey, 16 O.R. 159; Barry v. Anderson, 18 A.R. 247.

Of the three provisions in deed No. 267, the first is an express reservation to build into the 80 foot wall, so that the lot to the south became subject to an easement in favour of the property to which the use of the wall was at the time of the conveyance appurtenant. This easement may fairly be considered to be a "right and privilege as to party wall," and accordingly to pass by the deed of 1893, even if it did not pass under the general words.

The third, I interpret as meaning that it was the agreement that, in case either Millard or Caldwell wished to extend "said wall," i.e., the 20 foot wall, further east over the 12 feet to Cedar street, he might do so at his own expense. The parties might, indeed, agree to build it jointly on terms to be arranged at the time, but, in the absence of such agreement, either party might build at his own expense without any consent of the other. This, it seems to me, reserved in Caldwell the right to an easement, which right he might exercise at some future time. I think this right to an easement may fairly be considered a right or privilege "as to party wall," and so it will pass by the deed of 1893. But we need not consider the matter at length, as the defendant has agreed that the plaintiff may be declared entitled to this easement. Of course, the defendant may, until such time as the plaintiff chooses to exercise this right, use the land in any way and put it to any use he sees fit. The land is his, and he can do what he likes with it, unless and until the plaintiff sees fit to exercise his right to build a wall.

The meaning and effect of the second provision may be of more difficulty.

The fact that the grantee is to have the "privilege" of doing something upon land which would be his own, if the description by metes and bounds were followed, would seem to indicate that the land covered by the 20 foot wall and the wall itself were to remain the property of the grantor, the grantee to have an easement upon paying a sum of money—the fact that this wall was the wall of the grantor's building only, and not used by the grantee, assists that interpretation. If such be the correct interpretation, and the fee in this land and wall remained in Caldwell, his executors have not conveyed that land; "rights and privileges as to party wall" means the right and (or)

privilege to do something to or at or on a party wall, to build a party wall, and the like—the expression does not mean the party wall itself or the land upon which it stands. Or it may be thought that the grantor was conveying and did convey the land and wall; but he was to be paid a further sum in case the grantee should use the land in a particular manner. If so, this further sum would form the subject of a vendor's lien upon the land: Quart v. Eager, 12 O.W.R. 5, 735.

But again, this is not a right or privilege as to party wall—it is no more than a contract right to receive money—and that does not pass by the conveyance to the plaintiff.

There is, moreover, the difficulty that it is the grantor who is to receive this money, and from the grantee, not the assignee of the grantor from the assignee of the grantee. The former difficulty, it is possible, might be got over by a proper form of conveyance, but the latter could not—so that in no case could the defendant be ordered to pay, although the declaration that a lien existed might be effective.

I am, however, of the opinion that, if the land did pass to Millard by the deed 276, the contract as to the 80 feet is purely personal, and, when the parties disposed of the land, all obligation to pay at all ceased. In any view, I do not think that any action lies upon this branch of the case.

I am of opinion that the appeal should be allowed in part, that the declaration consented to by the defendant should be made, and the judgment in other respects confirmed; and that there should be no costs here or below.

I do not think that effect can be given to the argument that the second provision is in reality and in law a restrictive covenant by Millard.

MIDDLETON, J., for reasons stated in writing, agreed in the disposition of the case made by RIDDELL, J.

BOYD, C., dissented, being of opinion, for reasons stated in writing, that the plaintiff was entitled to compensation in money for the user of the 20 foot wall, and to maintain an action therefor.

DIVISIONAL COURT. FEBRUARY 21ST, 1911.

*McCUAIG v. LALONDE.

Landlord and Tenant—Lease of Dwelling-house—Implied Obligation not to Use for Different Purpose—Use as Hospital—Infectious Disease—Damages—Injury to Reversion—Estimation of—Evidence.

Appeal by the plaintiff from the judgment of the Judge of the County Court of Stormont, Dundas, and Glengarry, dismissing the action.

The defendant was a hotel-keeper; his children taking diphtheria, he was informed by the Medical Health Officer that, unless they were removed from the hotel, it must be placarded. As the defendant was making from $25 to $40 a day, he did not like the idea of his hotel being in effect closed; so he went to the plaintiff, who had a small dwelling-house to let, and took the house at $8 per month rent. He gave the plaintiff to understand that the reason for his wanting the house was that his wife was near her confinement, and he wanted the house to enable her to be confined outside the hotel. The children were taken into the house; and in fifteen minutes thereafter the house was placarded. After the children had recovered, the defendant fumigated the house, but not efficiently. The plaintiff thought that, before renting the house again, she should repaper it, etc., and did so. There was natural delay in renting the house after that also.

The action was to recover damages for the injury to the house and the plaintiff's loss thereby.

The appeal was heard by BOYD, C., RIDDELL and MIDDLETON, JJ.

C. H. Cline, for the plaintiff.

G. I. Gogo, for the defendant.

RIDDELL, J.:— . . . The law is correctly laid down in 24 Cyc. 1061: "Where the contract of lease is silent on the subject, the lessee has by implication the right to put the premises to such use and employment as he pleases, not materially different from that in which they are usually employed, to

*To be reported in the Ontario Law Reports.

which they are adapted, and for which they were constructed. The law, however, implies an obligation on the part of the lessee to use the property in a proper and tenant-like manner, without exposing the buildings to ruin or waste by acts of omission or commission, and not to put them to a use or employment materially different from that in which they are usually employed . . . .''

[Reference to Keith v. Reid, L.R. 2 H.L.Sc. 39, 41; Leach v. Thomas, 7 C. & P. 327; Auworth v. Johnson, 5 C. & P. 239; Nave v. Berry, 22 Ala. 382; Miles v. Lawrance, 99 Ga. 402; Mersey v. Chapin, 162 Mass. 176; United States v. Bostwick, 94 U.S. 53.]

Upon principle, I see no difference in the present case from a case in which the tenant has allowed a quantity of filth to be placed upon the floors, ceiling, and walls of the building. The bacilli of diphtheria are infinitely more deleterious to a residence and dangerous to the health of any future occupant than mud or filth of any visible character.

The defendant does not deserve any consideration; but the only damages to be given are those proved—not vindictive damages.

The plaintiff should properly have proved damage to the reversion; the course taken at the trial was to prove what it cost her to put the house in proper condition and her loss of money; the damage to the reversion must be at least these amounts, and probably more.

I think the plaintiff should have a judgment for $240 and costs here and below. . . .

BOYD, C., agreed in the conclusion of RIDDELL, J., for reasons stated in writing, in the course of which he referred to Bonnett v. Sadler, 14 Ves. 528; Keates v. Earl of Cadogan, 10 C.B. 591; Sarson v. Roberts, [1895] 2 Q.B. 396; Manchester Bonded Warehouse Co. v. Carr, 5 C.P.D. 512.

MIDDLETON, J., concurred.

DIVISIONAL COURT. FEBRUARY 22ND, 1911.

*CORBY v. GRAND TRUNK R.W. CO.

Railway—Carriage of Goods—Delay in Transit—Delay in Giving Notice to Consignees of Arrival—Injury to Perishable Goods by Delay—Liability of Carrier—Contract Made with another Carrier—Connecting Line—Privity—Remedy of Consignees—Bill of Lading—Condition—Foreign Carrier—Damages.

Appeal by the plaintiff from the judgment of the Judge of the County Court of Carleton dismissing the action, which was brought to recover damages for injury to fruit purchased by the plaintiffs in New York and consigned to them at Ottawa, by reason of the defendants' delay in delivering the fruit, as alleged.

The appeal was heard by BOYD, C., RIDDELL and MIDDLETON, JJ.

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

W. E. Foster, for the defendants.

MIDDLETON, J.:—A car-load of pineapples was purchased by the plaintiffs in New York, and was consigned by the vendors to them on the 22nd June, 1910. The goods were delivered to the New York Central Railroad Company, and were consigned to Ottawa, and the route specified was via the defendants' railway, which connects with the New York Central at Cecil Junction. The fruit did not arrive in Ottawa until the 25th June (Saturday) at 4 p.m., and no notice of its arrival was given to the plaintiffs until the morning of the 27th at 11.30. The fruit was then badly damaged by heating—a substantial portion of the injury taking place between Saturday afternoon and Monday morning, though there probably was some injury during the most unreasonable time taken in the journey. The delay in the journey took place partly upon the New York Central line and partly upon the defendants' line.

The County Court Judge has dismissed the action.

Many grounds were suggested by the defendants why they should not be called upon to pay. First it is said there is no privity. . . .

*To be reported in the Ontario Law Reports.

"If a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser, and the whole property immediately vests in him, and he alone can bring an action for any injury done to the goods:" Dutton v. Solomonson, 3 B. & P. 584.

Then, a contract made with the initial carrier, applicable to the whole journey, defines the terms upon which the subsequent carrier undertakes to carry, and must be deemed to be the contract between the parties: Hall v. North Eastern R.W. Co., L.R. 10 Q.B. 437; Bicknell v. Grand Trunk R.W. Co., 26 A.R. 431; Sutherland v. Grand Trunk R.W. Co., 18 O.L.R. 139; Corby v. Grand Trunk R.W. Co., 6 O.W.R. 491.

If this be not correct, then the railway company, when they undertook the carriage of the goods, received them as common carriers, and there is no restriction upon their common law liability.

The different railway companies carrying goods for many years indorsed a condition upon the bill of lading limiting the liability of the initial carrier to loss happening upon its own line. . . . The contract was deemed unfair, because the initial carrier has the choice of the route to be followed in taking the freight to its destination, and because, the onus being upon the consignee to prove that the loss took place while the goods were in the custody of a particular carrier, he frequently failed altogether, because it was impossible to prove exactly when and where the loss took place.

To remedy this injustice, sec. 20 of the Interstate Commerce Act (U.S.) was passed, making the initial or receiving carrier liable for any loss during the whole carriage, and giving to that carrier a right over against the carrier upon whose line the loss was incurred.

This was not intended to and did not relieve the subsequent carrier from direct liability to the consignee, if the consignee chose to assert it, but gave him a remedy generally more certain and more convenient. To meet this change in the law, the condition limiting the liability of each carrier in a series conducting a continuous carriage to loss on its own line was amended by adding "except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed;" and in this amended form the condition of the bill of lading has been approved by the United States Interstate Commerce Commission; and this is the condition indorsed upon the bill of lading now in question.

This form of bill has not been approved for Canadian business generally by our own Railway Board, but by an order of the 17th May, 1910, this bill is approved as to all traffic which may be carried from the United States in or through Canada.

On the 15th July, 1909, a form of bill applicable to Canadian traffic was adopted, which embodies the same principle in a clause (2) more elaborately framed, but which has no application to this action, which must be dealt with on the United States form of contract. . . .

Clause 5 provides for the termination of the liability as carriers upon the expiry of 48 hours after notice that the goods are ready for delivery, and until then the railway company remain liable as carriers, and not as warehousemen.

Apart from contract, when it is not, in the circumstances, the duty of the carrier to deliver the goods, it is his duty to give notice to the consignee of their arrival: Macnamara, 2nd ed., p. 84; and his liability as carrier continues in the meantime: Bourne v. Gatliffe, 11 Cl. & F. 45.

When, as here, the goods are known to be of a perishable nature, it is the carrier's duty to give notice promptly. There was no difficulty in the way of instant notice being given . . . . The great delay in the transit, the fact that the next day was a Sunday, the fact that the bad condition of the car could be readily ascertained, and the knowledge that fruit requires to be promptly unloaded, as the danger of injury from heating is greatest when the motion and consequent ventilation of the car ceases—all called for prompt action; and manifestly the defendants failed to discharge the duty devolving upon them, and as carriers are liable for the loss. . . .

I agree in a judgment for $200, in addition to the $103 paid into Court as the proceeds of the sale, with costs here and below.

BOYD, C., agreed in this result, for reasons stated in writing.

RIDDELL, J., with some doubt, also agreed in the result.

CLUTE, J. FEBRUARY 23RD, 1911.

*CAINE v. BIRMEN.

Husband and Wife—Action for Declaration of Nullity of Marriage—Insanity of one of the Parties—Jurisdiction of High Court—Judicature Act, sec. 57, sub-sec. 5—Finding of Mental Incompetence—Dismissal of Action for Want of Jurisdiction.

Action for a declaration that the marriage which took place between Annie Caine, the plaintiff, and Max Birmen, the defendant, on the 31st October, 1910, was null and void *ab initio*.

The plaintiff at the time of the ceremony was 18 years old.

W. H. Price, for the plaintiff.

The defendant was not represented.

CLUTE, J.:—The Attorney-General, having been notified, did not think it necessary that he should attend, as the case was not within R.S.O. 1897 ch. 162, sec. 31, added by 7 Edw. VII. ch. 23, sec. 8, and amended by 9 Edw. VII. ch. 62, as the section has relation only to cases where the contracting parties or one of them is under the age of 18 years. In the present case both parties exceeded that age at the time of marriage. It is obvious that sub-sec. 9 of sec. 31, which declares that no trial shall be had until after 30 days' notice to the Attorney-General for Ontario applies only to cases within sec. 31.

The first question that arises in the present case is one of jurisdiction: has this Court authority to declare a marriage void (ab initio) upon the ground that one of the parties was of unsound mind, and therefore incapable of entering into the contract of marriage, at the time the ceremony was performed. . . .

[Reference to Lawless v. Chamberlain, 18 O.R. 296; T. v. B., 15 O.L.R. 224; Menzies v. Farnon, 18 O.L.R. 174; May v. May, 2 O.W.N. 68; Hancock v. Peaty, L.R. 1 P. & D. 335; Turner v. Meyers, 1 Hagg. Cons. 414; A. v. B., L.R. 1 P. & D. 559, 561; McQueen's Husband and Wife, 4th ed., p. 208; Browning v. Reane, 2 Phill. 69; Durham v. Durham, 10 P.D. 81; Cannon v. Smalley, 10 P.D. 97; Cooper v. Crane, [1891] P. 369; Bartlett v. Rice, 72 L.T.R. 122.]

The jurisdiction of the High Court is defined by the Judicature Act, R.S.O. 1897 ch. 51, secs. 25 to 41 inclusive. I think

*To be reported in the Ontario Law Reports.

it clear that jurisdiction to decide this question is not found in any of those sections. Section 57, sub-sec. 5, provides that "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not. . . .

[Reference to Bunnell v. Gordon, 20 O.R. 281; Holmested and Langton's Judicature Act, 3rd ed., p. 49; Grand Junction Waterworks Co. v. Hampton Urban District Council, [1898] 2 Ch. 331.]

But for the decision in the Lawless case, and having regard to the adoption of sec. 57, sub-sec. 5, from the old Chancery Order and the decisions thereunder, I should have thought that it was not intended to extend the jurisdiction of the Court except in the limited sense that a declaratory judgment might be given where the Court had jurisdiction over the subject-matter, although no further relief was asked; and this view, it appears to me, has special application to a case affecting the validity of marriage. I should rather accept the view of the case in T. v. B., 15 O.L.R. 224. . . . Having regard to the fact that this decision and that in the Lawless case are both by the Chancellor . . . I think I am at liberty to decide this question according to the view I entertain, and that is, that, the case not being within the provisions of the statute above referred to, this Court has no jurisdiction to decide the question of the validity of the marriage.

As a different view may be taken by another Court, and to save the necessity of a reference back, I proceed to find the facts, upon the evidence, as they appear to me.

[The learned Judge then detailed the evidence as to the mental condition of the plaintiff.]

I find as a fact that she is and was at the time of the marriage ceremony of unsound mind.

I may say that I suggested and desired that the witnesses and the coloured minister who performed the ceremony should have been produced and examined in Court. This, however, was not done.

The case is a deplorable one and one in which the parents of the child are entitled to sympathy, and I regret that, having regard to the view I take of the law, I am unable to grant the relief asked.

The action is dismissed.

[The decision of a Divisional Court in May v. May, 2 O.W.N. 413, affirming the judgment of LATCHFORD, J., 2 O.W.N. 68, upon the ground that the High Court had no jurisdiction to entertain an action to declare a marriage void because the parties were related within the prohibited degrees, is in accord with the above decision.]

FAIR v. TIERNEY—MASTER IN CHAMBERS—FEB. 17.

Writ of Summons—Delay in Service—Renewal—Lis Pendens—Knowledge of Defendants—Terms — Speedy Trial—Costs.]—Motion by the plaintiff for an order for renewal of the writ of summons and for service. The writ was issued on the 5th April, 1909, and a certificate of lis pendens registered against lands alleged by the plaintiff to have been bought with the money of the plaintiff's execution debtors, and conveyed to the defendant Tierney. The writ had never been served, but this was through oversight; its existence and the fact of the registry of the certificate were well known to the defendants and their solicitor. The Master said that the order asked for by the plaintiff should be made, for the reasons given in Muir v. Guinane, 10 O.L.R. 367. If the plaintiff did not desire to proceed against the defendant Grier, the writ could be amended. The writ should be served at once and the statement of claim delivered in two days after appearance, and the trial expedited. Costs to the defendants. W. R. Smyth, K.C., for the plaintiff. T. N. Phelan, for the defendants.

MCLELLAN v. STERLING BANK OF CANADA—MASTER IN CHAMBERS—FEB. 17.

Interpleader—Moneys of Deceased Person Deposited in Bank—Rival Claims by Executors and Payee of Cheque—Right to Interpleader—Conduct of Bank—Terms of Order—Costs.]—Motion by the defendants for an interpleader order. The plaintiff's brother died on the 21st November, 1910. Two or three days earlier he made out a cheque in the plaintiff's favour (as the plaintiff said) for $2,750, drawn on the defendants' branch bank at Alton. This was presented by the plaintiff on the 24th November (three days after the death), and was

deposited in that branch bank to the credit of the plaintiff. But no money was paid out, and some time afterwards the executors of the deceased claimed the money from the defendants. The plaintiff then began this action, and served the writ of summons on the 1st February. On the 6th February the defendants made this application for an interpleader order. It was said in the plaintiff's affidavit that the manager of the branch bank was aware of the death when he credited the plaintiff's account with the amount of the cheque. Held, that this knowledge was a revocation of the bank's authority to pay: Bills of Exchange Act, R.S.C. 1906 ch. 119, sec. 167. Under the older cases the action of the defendants might have deprived them of the right to interplead: Crawshay v. Thornton, 1 My. & Cr. 1. But by the Judicature Act the law has been changed, and an order should now be made: In re Mersey Docks Co., [1899] 1 Q.B. 546; Attenborough v. St. Katherines Docks Co., 3 C.P.D. 450; Molsons Bank v. Eager, 10 O.L.R. 452, 455. Order made directing payment into Court by the defendants within a week of the $2,750 and accrued interest to abide further order. Thereupon the present action will be stayed, and the executors are to take action within a week against the plaintiff to have the cheque cancelled and the moneys declared to belong to the estate of their testator, on the ground that it was obtained from the deceased by fraud and undue influence. As between the present plaintiff and the executors, the costs of this motion will be costs in the action to be brought. As between the plaintiff and the defendants, if the plaintiff succeeds in the action of the executors, or fails and brings no action against the defendants, there will be no costs. If he fails and brings an action, these costs will be costs in that action. Irving S. Fairty, for the defendants. C. R. McKeown, K.C., for the plaintiff. D. C. Ross, for the executors.

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*WILSON LUMBER CO. v. SIMPSON—DIVISIONAL COURT—FEB. 17.

Vendor and Purchaser—Contract for Sale of Land—Misstatement of Depth—"More or Less"—Specific Performance—Compensation for Deficiency.]—Appeal by the plaintiffs from the judgment of MEREDITH, C.J.C.P., ante 410. The Court (BOYD, C., RIDDELL and MIDDLETON, JJ.) dismissed the appeal with costs. F. Erichsen Brown, for the plaintiffs. K. F. Mackenzie, for the defendant.

*To be reported in the Ontario Law Reports.

REX v. ATLAS—TEETZEL, J., IN CHAMBERS—FEB. 18.

Criminal Law—Procedure—Removal of Indictment from Sessions into High Court.]—Motion on behalf of the defendant for a certiorari to remove into the High Court an indictment found against him on the 31st March, 1910, by the grand jury at the General Sessions of the Peace for the County of York. TEETZEL, J., said that, upon the perusal of the material filed and a consideration of all the authorities cited and others referred to in Halsbury's Laws of England, vol. 10, pp. 181-3, he was of opinion that a case had been established which warranted, within the authorities, an order being made to remove the indictment into the High Court; and he directed that an order should issue accordingly. No costs. S. H. Bradford, K.C., for the defendant. J. R. Cartwright, K.C., and T. L. Monahan, for the Crown.

SEXTON v. BROCKENSHIRE—TEETZEL, J.—FEB. 18.

Interim Injunction—Covenant—Restraint of Trade—Legal Right not Clear—Relative Convenience or Inconvenience.]—Motion by the plaintiff for an interim injunction to restrain the defendant from carrying on business as a barber contrary to the provisions of an agreement between him and the plaintiff. TEETZEL, J., said that, upon the material filed upon the application, and having regard particularly to the affidavit of the defendant, who might possibly be entitled to a reformation of the agreement, he was not able to form a satisfactory opinion as to the plaintiff's legal rights; in order to determine those rights, it would be necessary to hear the evidence. It is well-settled practice that, where the legal right is not sufficiently clear upon the material to enable the Court to form an opinion, the Court will generally be governed in deciding an application for an interim injunction by considerations of the relative convenience or inconvenience which may result to the parties from granting or withholding the order; and where the inconvenience seems to be equally divided, the injunction will not be granted: see Dwyre v. Ottawa, 25 A.R. 121, 130. In this case it could not be said that delaying the matter until the trial would result in more loss to the plaintiff than the defendant would suffer if an injunction were to be granted against him and afterwards dissolved. Motion refused; costs in the cause, unless the trial Judge otherwise orders. H. S. White, for the plaintiff. C. F. Ritchie, for the defendant.

SMITH v. HAMILTON STREET R.W. CO.—DIVISIONAL COURT—FEB. 18.

Street Railway—Passenger Falling from Car—Negligence—Contributory Negligence—Findings of Jury—New Trial.]—Appeal by the plaintiff from the judgment of MIDDLETON, J., upon the findings of a jury, dismissing the action, which was brought to recover damages for injuries sustained by the plaintiff by falling, when asleep, from a car of the defendants. The questions put to the jury and their answers were: (1) Was there any negligence on the part of the defendants causing the accident to the plaintiff? A. Yes. (2) If so, what was the negligence? A. If the conductor had been on rear end of car the accident may not have happened. (3) Was the plaintiff guilty of any negligence which caused or contributed to his own injury? A. Yes. (4) Damages? A. $200. There was no objection to the Judge's charge, nor was he asked to submit any further questions, nor was any request made that the jury should be required to explain or expand their answer to question 3. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and LATCHFORD, JJ. The Chief Justice said that the answer to question 2 probably did not assign any real act of negligence; but, leaving that out of consideration, the answer to question 3 was entirely justified by the evidence. The refusal of the Judge to adjourn a jury trial in order to enable the plaintiff to subpœna a witness was a matter entirely within his own discretion. All the members of the Court agreed that there should (upon terms) be a new trial, the findings not being entirely satisfactory. New trial ordered on payment by the plaintiff of the costs of the trial and of this appeal, within thirty days after taxation. Otherwise, appeal dismissed with costs. W. M. McClement, for the plaintiff. M. J. O'Reilly, K.C., for the defendants.

RE NATIONAL TRUST CO. AND EWING—SUTHERLAND, J.—FEB. 20.

Vendor and Purchaser—Title to Land—Tax Sale Deeds—Clouds on Title—Adverse Possession—Evidence.]—Application by the company, vendors, under the Vendors and Purchasers Act, for an order declaring that the objections made by Robert Ewing, the purchaser, to the title of the vendors to the land in question were not valid, and that the vendors had a good marketable title. The objections

related to certain tax sale deeds registered against the land in question. SUTHERLAND, J., was of opinion that, so long as the tax deeds remained on record and appeared to affect the rear 28 feet of the land in question, as they did, they would continue to be clouds on the title, and a purchaser should not be called upon to accept the title until they were removed, and it was the duty of the vendors to remove them: Armour on Titles, 3rd ed., p. 185; Shaw v. Ledyard, 12 Gr. 382. The learned Judge was also of opinion that the proof of the extinction by adverse possession of the title of the purchasers at the tax sales was not satisfactory nor adequate. Application refused. No order as to costs. N. Sommerville, for the vendors. D. C. Ross, for the purchaser.

NATURAL RESOURCES LIMITED v. SATURDAY NIGHT LIMITED—RIDDELL, J., IN CHAMBERS—FEB. 21.

Pleading—Statement of Claim—Libel—Irrelevancy—Suggestion of Motive—Notice of Action—Striking out Parts of Pleading.]—Appeal by the plaintiffs from the order of the Master in Chambers, ante 723, striking out certain paragraphs of the statement of claim. RIDDELL, J., allowed the appeal as to paragraphs 5, 9, and part of 10; the prayer for relief to be limited to the claim for damages as set out in paragraph 9; costs in the cause unless the trial Judge otherwise orders. R. C. H. Cassels, for the plaintiffs. G. M. Clark, for the defendants.

RUSSELL v. GREENSHIELDS—TEETZEL, J., IN CHAMBERS—FEB. 21.

Appeal—Leave to Appeal to Divisional Court—Order of Judge in Chambers—Service out of the Jurisdiction.]—Motion by the defendant for leave to appeal to a Divisional Court from the order of BOYD, C., ante 718, reversing the order of the Master in Chambers, ante 563, setting aside an order made under Con. Rule 162. TEETZEL, J., said that the case was one in which it would be proper to allow the motion, and he accordingly granted leave to appeal. Costs in the cause. W. Nesbitt, K.C., and Britton Osler, for the defendant. I. F. Hellmuth, K.C., for the plaintiff.

MEAFORD ELEVATOR CO. v. PLAYFAIR—TEETZEL, J.—FEB. 22.

Negligence—Unloading of Barge into Elevator—Breaking of Moorings Caused by Operation of another Vessel—Injury to Elevator Leg—Negligence of Persons in Charge of both Vessels —Damages—Loss of Profits.]—Action against James Playfair and the Montreal Transportation Co. for damages for negligence causing injury to the plaintiffs' elevator and loss of profits. The plaintiffs were the owners of a grain elevator at Meaford; the defendant Playfair was the owner of a steam-barge, the "Mountstephen;" and the defendants the Montreal Transportation Co. were the owners of the steam-barge "Kinmount." On the 28th November, 1908, the "Mountstephen" was moored to the plaintiffs' dock for the purpose of unloading into the plaintiffs' elevator a cargo of wheat, and, while the unloading was in progress, the forward cable and bow-line suddenly parted, whereupon the barge surged rapidly aft, with the result that the marine leg of the elevator, which was at the time in the aft or No. 6 hatch, was pulled out of the elevator and so seriously damaged that it could not be repaired during that year's season of navigation, in consequence of which the plaintiffs were unable to make use of their elevator for receiving grain during the remainder of the season. Before the accident, the plaintiffs had removed from the "Mountstephen" about 12,000 bushels from No. 2 hatch and about 4,000 bushels from No. 6 hatch. While the leg was in No. 2 hatch, the "Kinmount" came into harbour, and, after tying up for a few minutes astern of the "Mountstephen," proceeded to pass her and to turn in the harbour so that she might moor to the dock bow to bow with the "Mountstephen." In the process of turning, the "Kinmount" used her propeller wheel, with the result that a great force of water was thrown against the bow of the "Mountstephen" and between the dock and the side of that barge. Teetzel, J., finds as a fact that it was the force of water so thrown that caused the "Mountstephen" to surge so violently aft as to part the cable and line above mentioned; and says that the conclusion he has come to is that, although it could not be said that the "Mountstephen" was not reasonably and sufficiently moored while the waters of the harbour were undisturbed by storm or the movements of other vessels, she was not sufficiently moored to withstand the strain put upon her by the operation of another vessel of the size of the "Kinmount" in turning when the force of water from

the wheel of such ship would be cast against her bow; that it was practicable for the officer in charge of the "Mountstephen" to have so increased the strength of that vessel's moorings, after he became aware of the danger, as to have withstood the extra strain, and that, by not doing so, he was guilty of negligence which directly contributed to the plaintiffs' damage; and that the officer in charge of the "Kinmount" was guilty of the like negligence. If the officer of either ship had done his full duty, the accident would not have happened, and both defendants were liable. The plaintiffs' servants were not guilty of any contributory negligence. Judgment for the plaintiffs against both defendants for $5,700—$700 for the injury to the leg and $5,000 for loss of profits—and costs. A. H. Clarke, K.C., for the plaintiffs. F. E. Hodgins, K.C., for the defendant Playfair. F. King, for the defendants the Montreal Transportation Co.

HORTON v. MACLEAN—MASTER IN CHAMBERS—FEB. 23.

Discovery—Examination of Defendant—Relevant Questions—Further Examination.]—Motion by the plaintiff for an order requiring the defendant to attend for further examination for discovery. The defendant is the managing director of the "World" Newspaper Company. The plaintiff alleged that in October, 1881, he transferred to the defendant 23 shares of the capital stock of the "World" Printing Company, for which the defendant agreed to pay him $2,000 in the event of the ultimate success of the "World" newspaper during the defendant's connection therewith. The action was begun on the 13th January, 1908. On the 10th April, 1908, an order was made for the re-examination of the defendant for discovery: 11 O.W.R. 961. Since then the defendant has been examined, but the examination has never been completed to the plaintiff's satisfaction. The Master said that it was most material for the plaintiff to know precisely at what period, six years before the 13th January, 1908, the newspaper could be said to have achieved success, for some such date must be shewn to prove the defendant's defence of the Statute of Limitations; and the plaintiff was entitled to full discovery to see how this appears from the books and statements of the company's affairs. The Master suggests that it might be arranged between the parties that the secretary of the company should be examined in lieu of the defendant,

the defendant agreeing to be bound by the examination. If this cannot be arranged, the defendant must attend for further examination at some time which will not interfere with his attendance in the House of Commons as a member. Costs to the plaintiff in any event. G. W. Mason, for the plaintiff. K. F. Mackenzie, for the defendant.

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*FITCHET v. WALTON—DIVISIONAL COURT—FEB. 23.

Malicious Arrest—Civil Process—Misleading Affidavit—Absence of Reasonable and Probable Cause—Malice—Intention to Leave Province—Damages.]—Appeal by the defendant from the judgment of BOYD, C., ante 81, 22 O.L.R. 40. The Court (FALCONBRIDGE, C.J.K.B., LATCHFORD and MIDDLETON, JJ.) dismissed the appeal with costs. W. E. Raney, K.C., for the defendant. John W. McCullough and James McCullough, for the plaintiff.

*To be reported in the Ontario Law Reports.