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APPELLATE DIVISION.

JANUARY 24TH, 1913.

HAINES v. MACKAY.

Trial—Dismissal of Action of Crim. Con.—Proceedings at Trial—Motion to Postpone—Refusal—Plaintiff Failing to Give Evidence in Support of Claim—Witness Confined in Asylum for Insane—Evidence as to Chances of Recovery—Particulars of Statement of Claim—Confinement to Charges Specified in Compliance with Order—Practice.

Appeal by the plaintiff from the judgment of LEITCH, J., dismissing an action for criminal conversation.

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

D. O. Cameron, for the plaintiff.

No one appeared for the defendant.

The judgment of the Court was delivered by RIDDELL, J.:—The statement of claim, delivered on the 18th December, 1911, alleges that "in or about the year 1905 the defendant did seduce, debauch, and have illicit connection with the plaintiff's wife . . . ;" and $50,000 damages are claimed. The defence is a simple denial.

The writ of summons was issued on the 18th September, 1911; and, after the action was at issue for some time, nothing was done to bring it to trial. On the 9th October, 1912, a motion was made by the defendant for an order dismissing the action for want of prosecution. The Master in Chambers made an order that particulars should be served within a time limited, certain costs paid, and the case set down for trial, or the action

should stand dismissed. Particulars were served in time, which alleged the wrongful acts to have taken place in 1908 and 1909. An examination for discovery of the plaintiff is said to have shewn that the date he must have intended to allege was 1907; and a new set of particulars was served on the 20th November, 1912, after the date fixed for serving particulars. No order was procured allowing these particulars nunc pro tunc, but the case was set down, and the costs already referred to paid.

At the trial before Leitch, J., at Milton, on the 2nd December, 1912, Mr. Cameron, counsel for the plaintiff, moved to adjourn the hearing. Counsel for the defendant argued that, by reason of the non-compliance with the Master's order, the case was not properly before the Court—that the action was dead. But he said that he was prepared to go on and fight out the action. The plaintiff's counsel then said (answering the objection of his opponent that the plaintiff could not amend his particulars):—

"Of course, he would have a right to amend; there is no doubt about that. I wanted to move to postpone the case, on the ground that we cannot get our witnesses here. Our main witness is undoubtedly the plaintiff's wife, and she is now in the Asylum at Toronto, and we think is of a good mind, and we had her served with a subpœna; and this morning my client obtains this letter from the Asylum authority (reads). We contend she is in good mind; and there are now in the court-room three doctors from the institution. I do not know how they came here. I suppose they are here to shew cause why this woman should not obey the subpœna that was served on her—two doctors from the asylum and Dr. Bruce Smith. Under the circumstances, I do not think we should be forced to go on."

Mr. Justice Leitch: "Do you think this charge ought to be held over this defendant for any length of time?"

Mr. Cameron: "It is a nasty thing, I admit, holding it over Mr. MacKay; but at the same time this plaintiff has a right to have a trial. It is not his fault that his wife is not here."

Mr. Justice Leitch: "She may be permanently insane."

Mr. Cameron: "No, she is not permanently insane. I do not think she is insane to-day. She is just in there on account of drink and of dope—nothing else. There are three doctors here to-day."

Mr. Justice Leitch: "You want to find out from them if she is insane?"

Mr. Cameron: "Yes; I want to put them in the box and ask if she is insane."

Mr. Justice Leitch: "Have you any objection to that?"

Mr. McEvoy (counsel for the defendant): "None whatever."

Evidence was then given by three medical men that the plaintiff's wife was incurably insane; that she would never be any better, having been in the Asylum since May, 1911. This evidence was given, of course, on the motion of the plaintiff to postpone.

Thereupon the following took place according to the reporter's notes:—

Mr. Justice Leitch: "Well, do you think any good purpose would be served by adjourning this case?"

Mr. Cameron: "Well, of course, this last witness says her memory would be good; and the other two doctors only say she had hallucinations. These last two witnesses both say the only hallucination she had was that about voices."

Mr. Justice Leitch: "Well, you cannot go on, can you?"

Mr. Cameron: "I do not see how we can. I would suggest adjourning to the winter assizes at Toronto. She may be all right by that time."

Mr. Justice Leitch: "With reference to your statement that she is a dope fiend and an alcohol fiend, what was she like when she made those charges?"

Mr. Cameron: "She was all right when she made those charges."

Mr. Justice Leitch: "In the face of that order that Mr. McEvoy has read, and in the face of the witnesses that you have called—Dr. Bruce Smith and Dr. Foster and Dr. Clair—in the face of all the evidence, I would not keep that charge hanging over any man."

Mr. Cameron: "I submit we are entitled to an adjournment."

Mr. Justice Leitch: "I will not adjourn it. If you want to try it, you must go on and try it."

Mr. Cameron: "Then, are these particulars of the 20th November properly delivered, or is the case dead except as to the particulars of 1907?"

Mr. Justice Leitch: "The particulars in compliance with the order were the particulars of 1907."

Mr. Cameron: "Well, the plaintiff abandons these particulars, and says that he and his wife were not in Toronto in 1907. I understand that the defence will be confined to the particulars that were delivered properly and in time."

Mr. Justice Leitch: "The evidence will be confined to the particulars dated the 7th November, 1912. Those were the

particulars that were delivered in pursuance of the order; and those are the only particulars that are before the Court."

Mr. McEvoy: "Then, on the examination for discovery it is admitted that there was no wrong-doing at that time; that the plaintiff's wife was in Owen Sound living; 98½ Denison avenue, the place where they resided, was in Toronto."

Mr. Cameron: "I admit the particulars we served were one year out; and we served them with amended particulars."

Mr. Justice Leitch: "No, I think there has not been a compliance with the order for particulars; and I will dismiss the action."

Mr. Cameron: "Had not your Lordship better wait till we give the evidence?"

Mr. Justice Leitch: "Well, you are not able to give evidence. I will dismiss the action with costs."

Mr. Cameron: "I suppose your Lordship will give us a grant of thirty days' stay?"

It will be seen that Mr. Cameron said that he did not see how he could go on; and that, when a suggestion was made to hear evidence, and the learned Judge said that the plaintiff was not able to give evidence, Mr. Cameron did not contradict the statement or offer any evidence or press that evidence should be taken.

Upon the appeal it was urged that my learned brother dismissed the action because there was no compliance with the Master's order; but this is clearly not so. The action was dismissed because the plaintiff's counsel did not produce evidence. What the learned trial Judge said was a challenge to counsel to produce evidence if he had it.

Counsel now says that he had at the trial eight witnesses who could have given evidence which he hoped would prove a case without the evidence of the plaintiff's wife. No such statement was made at the trial.

In view of what seemed to us the imperfect state of the evidence as reported, we asked the learned trial Judge what took place before him; and he informed us that he asked Mr. Cameron if he had any witnesses who could prove a case, and Mr. Cameron replied in the negative.

It is perfectly plain, even without this statement, that the case was not tried, but was dismissed, simply because the plaintiff did not tender or pretend to have witnesses who could prove a case.

We are not concerned to determine whether the learned trial Judge was right in his impression that only the charges in the

first set of particulars could be gone into. This was not a ruling in the course of a trial. The proper course was for the plaintiff, if he desired a trial on the later charges, to tender his evidence formally and take a ruling thereupon, move to amend the particulars and have an express decision; bring the matter up clearly in some way and have it clearly decided.

The course at the trial was: motion for postponement made by the plaintiff and rightly refused; and the plaintiff then, in effect, admitting that he had no evidence to prove a case.

The Court is always very loath to decide that a plaintiff is not to be allowed to develope any case he may conceive himself to have, or to punish a litigant for any mistake in practice, date, etc. But here the charge is an odious one. The woman alleged to have been seduced is a maniac on the subject of men having sexual intercourse with her, and can never give credible evidence on the subject. The whole course of the plaintiff is indicative of want of good faith; and I cannot but think that the lines must be drawn with some strictness.

I am of opinion that the appeal must be dismissed, but without costs, no counsel appearing to oppose the appeal.

A further fact should be added. Counsel for the plaintiff applied, before trial, to Mr. Justice Middleton for a habeas corpus ad testificandum for the plaintiff's wife. My learned brother did not dismiss the application; but told counsel that he should be furnished with some kind of evidence to shew that the woman could or might give evidence upon which the slightest reliance could be placed; and the application was not further proceeded with.

It seems quite clear that the whole proceeding at the trial was a sham on the part of the plaintiff.

HIGH COURT DIVISION.

SUTHERLAND, J. JANUARY 18TH, 1913.

INGLIS v. JAMES RICHARDSON & SONS LIMITED.

Sale of Goods—Wheat in Elevator—Destruction by Fire—Loss to be Borne by Vendor or Purchaser—Property Passing—Payment of Price—Contract—"Track Owen Sound"—Wheat Sold not Separated in Elevator—Payment of Charges—Notice to Bailee—Course of Dealing—Intention of Parties—Duty to Provide Cars—Unreasonable Delay—Negotiations with Insurance Companies—Vendors Treating Wheat as their own—Estoppel—Salvage Sale.

Action for the return of money paid by the plaintiff to the defendants for wheat stored in an elevator at Owen Sound, and

there destroyed by fire; the question being, whether the plaintiff, the buyer, or the defendants, the sellers, should bear the loss.

The plaintiff, who was a miller, carrying on business near Owen Sound, had been in the habit of purchasing grain from the defendants, who had an office in Toronto, and carried a stock of wheat in the Canadian Pacific Railway elevator at Owen Sound. The defendants had, apparently, no agent at Owen Sound, but were in the habit of sending word to and receiving word from the plaintiff about sales of grain through the agent of the railway company in charge of the elevator there.

The plaintiff on the 2nd November, 1911, through the elevator agent, placed with the defendants an order for 2,000 bushels No. 1 Northern wheat at $1.06 per bushel; and on the next day the defendants forwarded to a bank in Owen Sound an invoice, order, and draft. The invoice was addressed to the plaintiff, and stated that he had bought from the defendants 2,000 bushels of No. 1 Northern wheat at $1.06, and that he was charged therefor $2,120. He was credited with elevator and freight charges $35 and sight draft $2,085; and at the end of the invoice were these words: "Track Owen Sound, order on elevator attached to draft." The order was addressed to the elevator agent, and signed by the defendants; it requested the agent, on presentation, to deliver to the plaintiff 2,000 bushels of No. 1 Northern wheat. The draft was for $2,085, drawn upon the plaintiff by the defendants at sight.

The plaintiff paid and took up the draft on the 7th November, and received the order.

On the 30th November, 1911, the plaintiff, by telephone, placed a further order with the defendants for 2,000 bushels of the same kind of wheat at $1.07 per bushel; and similar documents were on that date forwarded to Owen Sound by the defendants, who also wrote to the plaintiff confirming the sale.

The plaintiff paid this draft on the 4th December, and received a similar order on the agent.

The plaintiff testified that he held the orders, and the grain remained in the elevator to suit his convenience—at any time he could telephone those in charge of the elevator, and they would load a car for him. He also said that they could load the wheat when they liked, and make him take it when they wished.

On the 2nd December, 1911, the plaintiff applied to the elevator agent and received a car of 1,000 bushels on the first order; and up to the 11th December, 1911, had not obtained the remaining 3,000 bushels. On that date a fire occurred, which destroyed

the elevator in which the defendants' wheat of the kind in question, in all about 20,000 bushels, was stored, including the 3,000 bushels belonging either to the plaintiff or the defendants.

W. D. McPherson, K.C., and W. Masson, for the plaintiff.
J. J. Maclennan, for the defendants.

SUTHERLAND, J. (after setting out the facts):—The plaintiff contends that, as there had been no separation by the defendants of his wheat from the rest of the wheat of the same quality, the agreement was still executory, and no property had passed. . . .

[Reference to Lee v. Culp, 8 O.L.R. 210; Box v. Provincial Insurance Co., 18 Gr. 280; Wilson v. Shaver, 3 O.L.R. 110.]

The plaintiff also contends that it was the duty of the defendants to place the wheat in cars on track at Owen Sound, and that the invoices so expressed.

The defendants assert that they paid all charges necessary to have the wheat placed in cars on the track at Owen Sound, deducting the lake freight and elevator charges for that purpose from the price of the grain, as shewn on the invoices, and from the amount of the drafts drawn on the plaintiff; and the plaintiff, accepting the invoices and drafts in this way when he paid the latter, was in a position then to settle with the elevator people for all charges up to then necessary to enable the wheat to be placed on track at Owen Sound, having the money in his own pocket to do so. It is not denied by the plaintiff that the deducted charges paid up everything in the way of charges to that date. The defendants contend, therefore, that the contract was, and the meaning of the words "track Owen Sound," was intended to be and is, on the basis of track Owen Sound, all charges paid. It could not well be contended by the plaintiff, I think, that, if he left the grain in the elevator thereafter for any period, and there were further charges, he could compel the defendants to pay the same. . . .

The course of dealings previously, the terms of the orders, and the course of dealing under the orders in question, I think, bear out the construction of the contract placed on it by the defendants. After he received the orders, the plaintiff applied for the grain purchased by him and for cars in which to receive it, when and as he wanted it, without reference to the defendants at all. They and he treated the grain sold, after the drafts were paid and the orders on the elevator agent taken, as the plaintiff's.

In some cases it has been held that, if the bailee of the com-

modity in question has not been notified, the property does not pass. . . .

[Reference to Coffey v. Quebec Bank, 20 C.P. 110, 116, 124.]

In this case the defendants did not directly give to those in charge of the elevator such notice of the sales to the plaintiff. It is clear, however, that the plaintiff must have shewn the order as to the first 2,000 bushels to the elevator people when receiving the 1,000 bushels, part thereof, from them. And it can certainly be considered that as to this 2,000 bushels there was a notice brought to the attention of the bailee sufficient to cover the case. Both the plaintiff and the elevator people acted on that order.

I have come to the conclusion and I find that the intention of the parties, when the drafts were paid and the orders on the elevator agent taken by the plaintiff, was, that the property in the wheat should pass to the plaintiff.

The defendants make the further contention that "track Owen Sound" means that the cars were to be provided by the plaintiff in which to receive the wheat. . . .

[Reference to Marshall v. Jameson, 42 U.C.R. 115.]

While the terms of this contract are not identical, it seems to me that the Marshall case applies, and that it was the duty of the plaintiff to have provided cars in which to receive his wheat. He paid the first draft on the 7th November, and took delivery, later on, of 1,000 bushels thereunder. He permitted the remaining 1,000 bushels to be left in the elevator from that date until the time of the fire, upwards of a month, when at any time he had a right, under the order in his possession, to get the wheat. He paid the second draft on the 4th December, and allowed the 2,000 bushels paid for by it to remain in the elevator from that date till they were destroyed by fire on the 11th December. I think in each case this delay was unreasonable on his part; and that, the grain being destroyed, he must be at the loss thereof. . . .

The defendants had their wheat and other grain in the elevators at Owen Sound insured under what is called a "blanket policy." The practice was, as between them and the insurance company, that from day to day the quantity of grain going out of the elevator was reported, and at the end of the month the premiums were settled and adjusted on the basis of the varying amounts in the elevator during the previous month. The evidence of the defendants at the trial was to the effect that the insurance on each of the 2,000 bushels in question, after payment of the drafts, was taken out of the benefit of the insurance, and the quantity of grain written off their own books as uncompleted sales.

After the fire, which consumed or damaged a quantity of grain very much in excess of the 20,000 bushels of the kind in question herein, the insurance companies. . . . proceeded to deal with the matter. The underwriters took possession of the damaged grain and made a sale of it. . . . It appears that the plaintiff had no notice of this sale. On the other hand, the defendants were present, made the highest offer for and purchased the damaged wheat, afterwards selling and disposing of it. The plaintiff says that he attempted to buy a quantity of the damaged grain which he saw in a certain bin at the elevator, which he thought was uninjured, and would reasonably fill the contracts which he had made with the defendants. One of the defendants, on the contrary, says that he told the plaintiff that he could take wheat from a particular bin, if he watched it himself to see that he was getting what he desired. I am unable to find, on the evidence, that any definite agreement as to this was come to between the parties after the fire.

The plaintiff, however, says that, in the course of the claim made by the defendants on the insurance companies, which was for a very large sum, they practically treated all the wheat of the kind in question herein in the elevator at the time of the fire as their own, ignoring the contention which they now put forward that the 3,000 bushels of wheat . . . was his at the time of the fire, and the loss of which should be borne by him. The plaintiff contends that the defendants are now estopped from claiming that the wheat was theirs.

At the time of the fire, the defendants say, they were unaware of the fact that the plaintiff had not withdrawn his 3,000 bushels from the elevator. Later, it was discovered that there was apparently more grain therein than they were claiming, and at first the discrepancy seemed to be 1,000 bushels, later 2,000, and finally the 3,000 bushels in question. There are expressions in some of the documents put in at the trial in which the defendants speak of their contract with the plaintiff "on track Owen Sound," and that they will stand between the insurance companies and the plaintiff in the matter of the setlement and payment of their claim for loss.

One of the defendants, however, says that, in view of the large loss they were sustaining in any event and the large amount of insurance moneys which they were claiming and which was involved, and which they were seeking to obtain payment of as soon as possible, they made these references. They also point out, however, that the insurance companies were made aware of the situation, so far as the plaintiff was concerned, and a special

cheque for $558 was issued by the insurance companies payable to the order of the plaintiff and defendants jointly as representing the relative share of the plaintiff in the moneys obtained from the sale of the salvage.

It appears that, before he commenced his action, the existence of this cheque, payable as indicated, was made known to the plaintiff. It is said that he declined to accept it. In any event, it is not pretended that he intimated that he would accept it, nor did he so indicate at the trial. I suppose that this cheque is still available for him if he will now accept it. The amount thereof approximately represents the plaintiff's share of the salvage.

I think the plaintiff's action must be dismissed with costs.

MASTER IN CHAMBERS. JANUARY 20TH, 1913.

GROCOCK v. EDGAR ALLEN & CO. LIMITED.

Discovery—Examination of Officer of Foreign Company Defendant—Con. Rule 1321*—Construction and Scope of.*

Motion by the plaintiff for an order for the examination for discovery of Thomas Hampton, manager for Canada of the defendant company, an English company, with head-office at Sheffield. See the report of a previous decision in the same action, 3 O.W.N. 1315.

The plaintiff swore that Hampton was conversant with the matters in issue in the action, and was, in his (the plaintiff's) opinion, the proper officer to make discovery. The exact nature and duties of Hampton's position were not shewn.

J. J. Maclennan, for the plaintiff.
H. E. Rose, K.C., for the defendants.

THE MASTER:—The motion is made under Con. Rule 1321, the terms of which and its proper scope and application now come up for decision for the first time, so far as I am aware. This Rule was passed on the 23rd September, 1911, to meet the difficulty pointed out in Perrins Limited v. Algoma Tube Works Limited, 8 O.L.R. 634. What has been done has, no doubt, been done designedly; and some important differences appear on a comparison of this Rule with Con. Rules 439 (2) and 454.

Rule 1321 is as follows: "The Court or Judge may order the examination for discovery, at such place and in such manner as may be deemed just and convenient, of an officer residing out of Ontario of any corporation party to any action. Service of the order and of all other papers necessary to obtain such examination may be made upon the solicitor for such party, and if the officer to be examined fails to attend and submit to examination pursuant to such order, the corporation shall be liable, if a plaintiff, to have its action dismissed, and if a defendant, to have its defence struck out and to be placed in the same position as if it had not defended."

The language used puts foreign corporations in the same position as those within the Province, under Con. Rule 439, in the consolidation of 1897, for some purposes.

In consequence of the questions raised as to what the term "officer" meant (see Thomson v. Grand Trunk R.W. Co., 5 O.L.R. 38), on the 20th June, 1903, Rule 439(*a*) was passed, allowing the examination "of any officer or servant" of a corporation; but with the proviso that "such examination shall not be used as evidence at the trial."

Rule 1321 is limited to the examination "of an officer residing out of Ontario." It contains the penalty for default given in Con. Rule 454; but not the proviso against use of such examination as evidence at the trial; and the examination would, therefore, appear to be capable of being so used.

These differences in the language of the three Rules in question must have been deliberately made and must be given full effect to.

In the present case it would be a very serious matter for the defendant company, resident in Sheffield, to have judgment entered against it for default of Mr. Hampton in attending for an examination of which his company never had any notice or knowledge—or to have his admissions, made behind their back and 3,000 miles away, used against them at the trial.

The new Rule, with its serious penalty for default, and the possible use of the depositions taken thereunder, must be applied with caution so as not to do injustice or give rise to unfavourable comment on the administration of justice in this Province, which has always upheld the principle "that a fair trial is above every other consideration."

As at present advised, I think the Rule did not contemplate a case like the present, and was not intended to apply thereto, unless the person to be examined is clearly an "officer."

No doubt, an order must go, when asked for, to examine an

officer of the defendant company at Sheffield. Then the company will have full information to give, as well as the protection of seeing that their case is not prejudiced by any default of the officer or any unwarranted admissions.

The motion will be dismissed; costs in the cause, as the point is new.

MIDDLETON, J. JANUARY 21ST, 1913.

*RE CITY OF TORONTO PLAN M. 188.

Highway—Dedication — Acceptance — Consent under Seal of Municipal Corporation—Memorandum Attached to Plan—Registry Act—Land Titles Act.

Application by the Toronto Housing Company, under the Registry Act, 10 Edw. VII. ch. 60, sec. 85, or the Land Titles Act, 1 Geo. V. ch. 28, sec. 110, whichever might be applicable, to amend plan M. 188 by closing Sparkhall avenue thereon, and opening, in lieu thereof, a new street some distance south of the present street, and by closing Bain avenue, and opening, in lieu thereof, a new street south of the present street—the effect of which would be to give to the owners an additional tier of lots north of Sparkhall avenue.

A. C. McMaster, for the applicants, contended that they had acquired title to all the lots shewn upon the plan; and that, as the city corporation did not make any objection, what the applicants sought ought to be granted.

A. C. Craig, for certain property-owners on Albermarle avenue.

Several other property-owners appeared in person.

MIDDLETON, J. (after stating the facts):—The instrument 19403, mentioned by the Master of Titles, . . . appears to be a copy of the same plan as that registered by the Master as M. 188 . . . .The strip to the north is, however, shewn not as a ten-foot extension of Sparkhall avenue, but, as indicated on plan 60 E, as a nine-foot lane, and a one-foot reservation. This ten-foot strip is also continued across the southern portion of lot 65 (the southern lot facing on Logan avenue). An irregularly-shaped parcel is laid out on the north side of the

*To be reported in the Ontario Law Reports.

lane for the purpose of forming a connection with block X, across which it is apparently intended to extend Sparkhall avenue; and south of block X another triangle is laid out for the same purpose.

This document is not an original; and, save as to the signature of the city corporation, the different writings found upon it are copies only. The portions of the land covered by plan 60 E, above referred to, other than the lane, are coloured green; and Mr. Cook, who appears to have been the owner at that time, signs this memorandum: "I hereby dedicate for the purposes of a public highway the portions of this plan coloured green."

The triangular portion of land south of block X is coloured yellow, and is dedicated by Mr. Williams, its then owner, by a similar memorandum, "for the purpose of a public highway." Mr. E. A. Macdonald also signs a memorandum dedicating as a public highway block X.

Attached to this plan is the following memorandum: "In accordance with report No. 28 of the committee on works, adopted by the city council December 21st, 1891, the consent of the Corporation of the City of Toronto is hereby given to the registration of this plan, shewing Sparkhall avenue as having a width throughout of 59 feet; the limits of said avenue being indicated by the lines between the red letters A, B, C, D, E, F, G, H, I, J, K, L, and the said avenue is accepted as a public highway." This is signed by the mayor, treasurer, and city clerk, and the corporate seal is attached.

The boundaries so indicated include the whole of Sparkhall avenue as shewn upon plan M. 188, and the whole of the ten-foot strip to its north, and the two triangular parcels, and block X, necessary to unite this new section of the street with the portion shewn to the east on plan 685. . . .

By the Surveys Act, now 1 Geo. V. ch. 42—subject to the provisions of the Registry Act as to the amendment or alteration of plans—allowances for road shall be public highways; but, by sub-sec. 6, as amended by 2 Geo. V. ch. 17, sec. 32, where the road "has not been established by by-laws of the municipal corporation, or otherwise assumed by it for public use," and is closed, the part closed does not vest in the municipality, but belongs to the owners of the land included in the plan abutting thereon.

The applicants desire to close the street, contending that, in the result, by virtue of this statute, the portion of Sparkhall avenue laid out upon plan M. 188 would belong to them.

Had it not been for what I think takes the case out of the statute entirely, I would agree with them, as the owners of the one-foot reserve appearing upon the entirely different plan 60 E acquired no potential interest in the portion proposed to be dedicated upon the registration of plan M. 188.

I am, however, of opinion that I must hold that the memorandum executed by the city corporation, and attached to the instrument filed in the land titles office, which I have above quoted, amounts, within the meaning of the statute, to an assumption by the city corporation of the road in question for public use. By this instrument the city corporation has, in the most formal way, accepted the said avenue as a public highway.

The fact that this acceptance was ignored, and perhaps forgotten, when the by-laws of 1906 and 1907 were passed, is, I think, quite immaterial. The earlier deed, evidencing the municipal acceptance, stands unchallenged, and takes the case out of the statute.

Apart from this, I think that the municipal action amounts to an acceptance of the ten feet dedicated by the different owners. It may be that, by reason of outstanding mortgages, this dedication was ineffectual as against the mortgagees; but the tax sales have extinguished the rights of the mortgagees.

Upon the argument it was stated that the mortgage did not cover the line or any part of the reservation upon plan 60 E. Counsel promised to verify this; but no definite information has been given to me. If the case is carried farther, this should be shewn.

The by-laws of 1906 and 1907 also recognise the portion of Sparkhall avenue shewn on plan M. 188 as constituting a highway. They were passed to connect this with the street on plan 685.

Many other objections to the application were urged by counsel; but it is not necessary for me to deal with them.

The application fails, and must be dismissed. I give those represented by Mr. Craig their costs, which I fix at $50.

MIDDLETON, J. JANUARY 22ND, 1913.

NOKES v. KENT CO. LIMITED.

Negligence — Injury to Engineer — Defective Condition of Machinery and Plant—Evidence — Findings of Jury — Motion for Nonsuit—Liability—Contractors—Installation in Premises of Purchaser—Non-acceptance by Purchaser.

Action for damages for injuries sustained by the plaintiff by reason of the negligence of the defendants, as the plaintiff alleged.

The action was tried before MIDDLETON, J., and a jury, at Toronto.

Shirley Denison, K.C., and H. W. A. Foster, for the plaintiff.

H. H. Dewart, K.C., and Harcourt Ferguson, for the defendants.

MIDDLETON, J.:—At the trial I reserved the question of nonsuit, and allowed the jury to answer questions which, counsel agreed, would raise all the issues necessary for the determination of the action. After the jury had answered these questions, the matter was argued at length; the defendants contending that, upon the answers, the plaintiff was not entitled to judgment.

The action arises out of an accident occurring on the 14th August, 1911, by which a quantity of ammonia escaped from a refrigerating plant upon the premises of the Harry Webb Company Limited at Toronto, through the packing of the joint between the cylinder and cylinder-head of the condenser, forming part of the plant aforesaid.

The plaintiff was an engineer employed by the Harry Webb Company, and was at the time of the accident engaged in operating the machine aforesaid. The effect of the inhalation or attempted inhalation of the ammonia gas, and of the exertion incident to turning off the valves of the engine so as to prevent a further escape and injury to others upon the premises, was most serious, as the plaintiff was sixty-two years of age and in a somewhat enfeebled physical condition, because of the fact that he suffered from chronic bronchitis and arterial sclerosis. Ever since the accident he has been disabled and entirely unable to work, and is now practically a dying man.

The defendant company contracted with the Harry Webb Company to install the refrigerating plant aforesaid. By the contract the property in the plant was not to pass to the purchasers until paid for. At the time of the accident, the plant had been installed and was in operation, but had not proved satisfactory, owing to the fact that it did not give sufficient refrigeration. For this reason, the Webb company had declined to accept it; and some modifications were being made in the refrigerating pipes, to remove the objections raised.

The condenser was not manufactured by the defendant company, but purchased by them from the York Manufacturing Company, of York, Pennsylvania. It constituted but one link in the entire outfit, being supplied by the defendants to the Webb company. It was constructed and assembled by the York company, and was shipped by them in a condition in which it was supposed to be ready for erection and operation. Before leaving the factory, it was tested, and found to be perfect and in running order. It was shipped direct from the factory to the Webb company's premises at Toronto, and was there placed in position and connected with the operating dynamo and the pipes constituting the refrigerating plant and condenser system.

At the trial some endeavour was made to shew that the machine was defective in design, owing to the absence of a proper flange to protect the packing constituting the gasket, at the joint between the cylinder and cylinder-head. This contention was entirely displaced by the production of the parts in question, which shewed them to be properly constructed.

To understand the evidence, it is necessary to know in a general way how the plant operated. Essentially it consists of a closed circuit containing ammonia. The ammonia vapour is compressed by the compresser to a pressure of about two hundred pounds; and the effect of this compression is to raise the temperature very considerably. The compressed vapour is then artificially cooled, by bringing the pipes containing it in contact with water. The cool vapour is conducted to the refrigerating pipes and permitted to escape into them, practically at atmospheric pressure. As in the expansion the temperature is reduced precisely to the same extent that it was raised in the compression, and as the starting point of this reduction has been lowered by the cooling of the vapour, a very low temperature is thus produced, which brings about the refrigeration. The ammonia vapour thus expanded is returned again to the compresser, to be started once more through the system.

On the morning in question, the plaintiff was about to put

the machine in operation. He started the compresser. He says —and the jury have believed him—that he opened the exit valve of the compresser, but that, nevertheless, the machine would not operate properly; the pressure rose abnormally, and he stopped the machine. He started it again, when almost immediately the pressure become so great that the ammonia was forced through the packing of the cylinder-head, with the result described.

The defendants contended that this was brought about by the failure to open the discharge-pipe from the condenser, and that in no other way could the pressure necessary to bring about the result have been obtained. Plausible as this theory is, the jury have rejected it.

It appears that, some time prior to this, while the machine was in operation, Nokes drew the attention of the defendants' engineers to the fact that the condenser, which was supposed to operate silently, ran with a heavy pounding. Goulet, who was in charge for them, admits that he was told of this. He thought that it did not indicate anything wrong with the machine; and he instructed Nokes to continue its operation.

The jury have, I think, taken the view, and I so read their findings, that this pounding indicated that there was something wrong with the condenser, and that it then became the duty of the defendants to open it up and ascertain the cause, and that the defendants were negligent in failing to do so. The jury also find, as I understand their answers, that the effect of this pounding was gradually to loosen the packing of the cylinder-head, so that, when it was subjected to a somewhat unusual strain—from whatever cause that was brought about—the loosened packing permitted the ammonia to escape.

After the accident, Goulet was called in. He tightened the bolts on the cylinder-head, thus compressing the packing; and ran the engine without disaster for several days; but he did nothing to remedy the defect that existed in the machine, whatever it was. In the result, about a week thereafter, a somewhat similar accident took place, in which the head was blown off the cylinder, and the discharge valves and other internal mechanism at the cylinder-head were completely wrecked.

I do not think that, under these circumstances, I can nonsuit; in fact, I think the jury were well warranted in taking the view that there was something wrong with this condenser, which would have been discovered had the defendants heeded the warnings given by the unusual noise in its operation. This defect resulted in the escape of the gas on the 14th August, when the cylinder-head was loose enough to yield; and it resulted in the entire wreck of the machine when the cylinder-head was

tightened so that it could not yield. It may have been that, owing to the defective condition of the refrigerating portion of the plant, some ammonia was returned to the condenser in a liquid form. This, in a compresser, operating at the speed of the machine in question, would account for its wrecking, and possibly explain the serious effect of the leakage on the 14th August, which more nearly corresponds with the discharge of some fluid ammonia than with the discharge of mere ammonia gas.

Understanding the facts to be as above set out, I do not think there can be any doubt as to the plaintiff's right to recover in law. The defendants were yet in charge of the machine. They owed to the plaintiff a duty which called upon them to see that the machine was put in order when they had, as here found, knowledge of its defective condition.

No good purpose could be served by reviewing the numerous authorities cited upon the argument.

Judgment will, therefore, go, in accordance with the verdict, for $1,000 and costs.

BRITTON, J. JANUARY 23RD, 1913.

HOLDEN v. RYAN.

Contempt of Court—Disobedience of Judgment—Injunction—Manner of Erecting Building—Structural Alterations to Comply with Judgment—Sufficiency of—Building Restrictions—"Front" of Building—"Main Wall."

Motion by the plaintiff to commit the defendant for contempt of Court by disobedience to the judgment of TEETZEL, J., 3 O.W.N. 1585, restraining the defendant from proceeding with the erection of a building or buildings on the corner of Palmerston avenue and Harbord street, in the city of Toronto, in contravention of certain building restrictions to which the land owned by the defendant was liable.

A. C. McMaster, for the plaintiff.

J. R. Roaf, for the defendant.

BRITTON, J.:—The judgment of Teetzel, J., is, that the building then in course of erection contravened the building restric-

tions: (a) in that the buildings of the defendant being erected were two, and that one of these buildings, viz., the western one, has not appurtenant to it land having a frontage on Palmerston avenue of at least 33 feet; and (b) that this building, not being a stable or outbuilding, being upon the lot which has a frontage upon Harbord street, as well as upon Palmerston avenue, has not its front upon Palmerston avenue. And by that judgment the defendant was restrained from proceeding with the erection of the said buildings unless and until the said buildings are altered so as to conform with the said building restrictions. . . .

The defendant apparently accepted the decision, and proceeded at once to alter the so-called buildings to make them conform with the restrictions.

The objections, in short, are that there are two buildings; and, if so, the western one does not conform to the restrictions; and that, even if only one building, it does not front upon Palmerston avenue, within the true meaning of and as required by the restrictions.

The fact of there being two buildings, as found by the trial Judge, was so found as then there was the "vertical division wall, running north and south, extending the whole height of the building, dividing it into two equal divisions. . . . There is no door or other opening in this division wall, so that there is no means of access to and from the easterly and westerly halves of the building; each half has its independent entrance facing upon Harbord street." That is now changed. There is a door-way through the vertical wall. It was made in good faith as a permanent door-way or passage-way, to be finished and to remain as part of the structure. With such an opening, through a middle wall—called a "fire-wall"—a fire-wall required by the city corporation—and in a building with the four enclosing walls all under one roof, I am not able to say that this building is two buildings within the meaning of the restriction; and, if not, there is no violation of the injunction in that respect. . . .

[Reference to Ilford Park Estates Limited v. Jacobs, [1903] 2 Ch. 522, 526.]

Then, upon the best consideration I can give to the plans and to the affidavit evidence before me, I am of opinion that this building will have its front upon Palmerston avenue. It will not be as convenient or as imposing a front as perhaps should belong to so large and costly a building; but that is a matter between the defendant as owner and her tenants.

A comparatively narrow hall, a dark hall, leading from the street entrance to the stairway and thence to the apartments does not determine the question of front or main entrance. . . . The part fronting on Palmerston avenue will be the main entrance. The building is now—whatever the original intentions were—being so erected that the end fronting on Palmerston avenue will be the predominating front of the building, the main entrance from the outside to all the apartments.

That there may be a shorter and more convenient way for persons approaching the building from the west, and desiring to enter the western apartments, or the westerly end of the easterly apartments, does not affect the question under consideration, nor is it material that the side facing Harbord street has two or more or less doors, or that the southerly side is more architecturally beautiful than the end fronting on Palmerston avenue. That side of the building is the "frontage" on Harbord street, as the word "frontage" is used in restriction 3.

If I had any doubt as to the time, construction and meaning of the restrictions, that doubt should, upon a motion to commit, be resolved in favour of the defendant.

The motion should be dismissed, and with costs.

HODGINS, J.A. JANUARY 23RD, 1913.

DICKSON CO. OF PETERBOROUGH v. GRAHAM.

Landlord and Tenant—Expiry of Lease of Hotel Premises—Action of Ejectment—Defence of New Parol Lease for one Year—Agreement—Failure of Proof—Terms of Agreement—Liquor License—Covenant in Lease—Authority of General Manager and Vice-President of Company—Landlord—Necessity for Action by Board of Directors—Recovery of Possession — Occupation Rent — Injunction — Damages—Double Value—Stay of Proceedings.

Action to recover possession of the premises known as the Oriental Hotel in the city of Peterborough.

The defendant held the hotel under a lease dated the 31st December, 1906, the term in which began on the 1st February, 1907, and expired on the 30th April, 1912.

The defendant alleged that on the 1st May, 1912, an agreement was made between the plaintiff company and himself,

whereby "the plaintiff company demised and relet the premises in question to the defendant for the term of one year commencing on the said 1st day of May, 1912, at the same rental and on the same terms (except those relating to the liquor license) as those contained in a certain lease dated the 31st day of December, 1906, between Richard Hall, trustee, of the first part, the Dickson Company of Peterborough Limited, of the second part, and George N. Graham, of the third part, . . . with the further terms, in addition to the provisions in the said lease contained, and in substitution of those relating to the liquor license, that the defendant should execute a power of attorney to the plaintiff company, authorising the said company to execute a license-transfer of the defendant's liquor license on the expiration of the said term, or other sooner determination of said letting, and that, in case of sale of the realty, the lessors should have the right of purchase of the defendant's license and hotel assets (not including liquor, coal, groceries, and merchandise) for $12,000; the terms of said demise and reletting to be embodied in a formal lease by the plaintiffs' solicitors."

The plaintiffs, on the 10th and 30th May, 1912, served notices to quit on the defendant, and took proceedings, under the overholding tenants sections of the Landlord and Tenant Act, to eject the plaintiff: see Re Dickson Co. of Peterborough and Graham, ante 100, 27 O.L.R. 239.

This action was begun on the 21st October, 1912, and was tried without a jury at Peterborough on the 30th and 31st December, 1912.

G. H. Watson, K.C., and E. L. Goodwill, for the plaintiffs.

D. L. McCarthy, K.C., and F. D. Kerr, for the defendant.

HODGINS, J.A. (after setting out the facts):—Both the now-expired lease and the one it superseded contained the following clause as to the liquor license: "And that he (the lessee) will, at the expiration or other sooner determination of said term, make, procure, or cause to be made or procured, a proper and sufficient transfer of the license to sell liquors upon the said premises to the person specified by the lessor or the company for that purpose, and that he will lend his assistance to procure the assent of the License Commissioners to such transfer; and, upon the completion of such transfer with the assent of the License Commissioners, the lessee to be entitled to be paid by the assignee thereof, as consideration money, an amount equivalent to the proportionate part of the license fee for the unexpired part of the license term." . . .

What occurred earlier than 5 p.m. on the 1st May between Mr. Shook, the plaintiffs' manager, and Mr. Gordon, the defendant's solicitor, . . . is not, in my judgment, of . . . importance. . . . At all events, Mr Shook could not have been averse to negotiating for a sale, and the conversation probably led to the interview later in the day—between 5 and 6 p.m.—at which he (Shook), Dickson Davidson, the defendant, and Mr. Gordon, were present. At that time the license for 12 months from the 1st May, 1912, had been granted to the defendant for the sale of liquors in the Oriental Hotel. . . .

Coming, then, to the agreement which, it is said, was made between the persons named, difficulty is at once experienced because the writing then made, and said to have been initialled, has been lost. Secondary evidence of it is given . . . There is nothing in writing which can be said to contain any agreement, conditional, tentative, or otherwise, on which all parties are united. But the defendant contends that there was a parol agreement that would be sufficient for his purpose if it finally established his position as tenant for a year. . . .

I find . . . that there was no common ground arrived at on the 1st May, and that, even if the words used indicated an understanding, the minds of the parties never came together with regard to the subject-matter of the agreement on the point of greatest importance to both parties. The radical difference was this: that the defendant, while giving a power of attorney to transfer the license, intended to and could defeat its operation, if, on his individual application, he obtained the license for the sale of liquor on premises other than the Oriental Hotel.

But there remains the question whether, assuming that the parties then present agreed upon certain terms, it was anything more than a tentative agreement to proposals which had to be ratified by the board of directors before the plaintiff company were to be bound thereby. Shook was general manager. . . . I find . . . nothing to enable me to say that his authority went far enough to agree to the terms proposed on the 1st May. . . .

Notwithstanding the tendency of the Courts to uphold contracts made by a general manager within the general scope of his authority, where the other party has no notice of any limitation—see Skinner v. Crown Life Assurance Co., 1 O.W.N. 921, 2 O.W.N. 647; National Malleable Castings Co. v. Smith's Falls Malleable Castings Co., 14 O.L.R. 22; Russo-Chinese Bank v. Li Yan Sam, [1910] A.C. 174—I think it is a fair inference to make from the evidence that all parties knew that the action of the general manager was subject to that of the board. . . .

Upon the whole, I have little doubt that there was no concluded agreement, either in terms or in intention, come to on the 1st May, entitling the defendant to a lease for a year, or upon the other matters stated to have been discussed then. If there was, then I find, under the circumstances of this case, no authority in Shook or Dickson Davidson to bind the company, and that all that was done was done subject to the condition that the board should ratify it, which the board did not do. I have not discussed Dickson Davidson's authority as vice-president, because what I have said as to the general manager is applicable to him. His position is not shewn to be of greater practical importance, and is certainly of no greater legal authority.

I do not desire to put my judgment upon the ground that any of the parties are not to be believed. I rest it upon an analysis of the evidence, giving such weight to each part of it as I think it deserves, and having regard to the fact that witnesses may often be honestly mistaken, and that the surrounding facts and circumstances accord more nearly with the contention of the plaintiffs than with that of the defendant. . . .

The result is what might be expected. A draft lease was prepared and rejected. If there had been an agreement come to, it might have been necessary to have examined the terms of the draft in order to see if the defendant was justified in refusing to sign it. He, however, relied upon the supposed arrangement; and, as that fails, his objections to the various clauses are unimportant. I think the defendant's conduct relieved the plaintiff company from nominating any one to take a transfer of the license or from tendering any instrument of transfer.

I think the plaintiffs are entitled to judgment for possession and to an order directing the defendant to execute an assignment or transfer of the license of the plaintiff company, or whom they may appoint, the form of which may be settled by the Local Master, and to an injunction restraining the defendant from dealing with the license and from violating his covenant as contained in the lease of the 31st December, -906, so far as it relates to the license, or doing any act which would be a breach of that covenant. The plaintiffs are also entitled to payment out of Court of the moneys now paid in, and to judgment for occupation rent at the same rate weekly until possession is actually given, and for such proportion of the taxes as may accrue up to the same date. The exact amount of the occupation rent and of taxes and proportion of the license fee to which the defendant is entitled, on the transfer of the license as provided

in the lease, may be ascertained by the Local Master, and the latter item should be credited on the amount payable by the defendant. I am not obliged to give double value, and I do not do so, as I cannot hold in this case that the defendant was "conscious that he had no right to retain possession:" Swinfen v. Bacon, 6 H. & N. 846; and see the view of the learned County Court Judge on the application before him.

There will be a reference to the Local Master for the purposes I have indicated, if the parties cannot agree on the amount.

The defendant should pay the costs of the action and of his counterclaim.

The defendant can have a stay of 20 days, which stay should (and if I had the power I would so direct), on the defendant filing with the Local Master an undertaking to pay, pending any appeal, the weekly amount fixed in the order of the Divisional Court dated the 3rd day of October, 1912, on the terms stated therein, and so long as he does so pay, include a stay of the injunction granted.

KELLY, J. JANUARY 24TH, 1913.

INDEPENDENT CASH MUTUAL FIRE INSURANCE CO. v. WINTERBORN.

Principal and Agent—Agent of Insurance Company—Breach of Duty—Negligence—Interim Fire Insurance Receipt—Issue of—Failure to Communicate to Insurance Company—Liability—Damages.

Action against a former agent of the plaintiffs to recover the sum of $660.64 and interest, in the circumstances stated below.

E. G. Porter, K.C., and W. Carnew, for the plaintiffs.
T. A. O'Rourke, for the defendant.

KELLY, J.:—The head-office of the plaintiff company is in Toronto. The defendant is an insurance agent residing in Trenton. At the time of the trial, he had twelve years' experience as such agent. In May, 1909, he was appointed by the plaintiffs then agent at Trenton; and . . . they then forwarded to him supplies such as forms, stationery, etc., and also an agency agreement in duplicate, one copy of which was to be signed by

the defendant and returned to the plaintiffs, and the other to be retained by him. This agreement was not signed by the defendant; he denies that it ever reached him. From that time, however, he acted as the plaintiffs' agent; and he received from them blank forms of interim receipts . . .

In January and February, 1910, some correspondence passed between the parties with regard to the issue of insurance on grain separators; and the plaintiffs made it clear to the defendant . . . that they would not entertain proposals for that class of risk.

On the 9th August, 1910, Jeffery & Dainard applied to the defendant for an insurance of $600 on their grain separator and attachments; and the defendant then issued to them an interim receipt on the printed form supplied to him by the plaintiffs. The premium for this insurance for one year from the 9th August, 1910, was therein stated to be $18. Of this amount, $8 was at that time paid by Jeffery & Dainard to the defendant. He says that on that date he took from them a written application for the insurance, and that without delay he forwarded it by post to the plaintiffs' head office. This communication, if sent, never reached the plaintiffs. On the 8th November, 1910, Jeffery & Dainard paid to the defendant $10, the balance of the yearly premium, and he endorsed a receipt therefor on the official printed interim receipt.

From the time when, as the defendant says, he forwarded the application to the plaintiffs, until May, 1911, no further communications passed between the plaintiffs and the defendant with reference to the insurance.

On the 19th May, 1911, the articles insured were destroyed by fire, and the insured applied to the plaintiffs, through the defendant, for a settlement of their loss. On being communicated with, the plaintiffs for the first time learned that the defendant had issued an interim receipt and accepted the premium from Jeffery & Dainard. . . .

About the end of 1911 . . . Jeffery & Dainard brought an action against the plaintiffs to recover the amount of their insurance—$600—and the plaintiffs paid them in settlement that sum and $17.64 costs of action.

The plaintiffs have brought the present action to recover from the defendant $660.64 and interest, that is, the $617.64 paid to Jeffery & Dainard, $25 the plaintiffs' costs of defending Jeffery & Dainard's action, and the $18 premium received by the defendant and not accounted for.

With the knowledge that the plaintiffs would not issue in-

surance on the class of property offered by the insured, and being familiar with his duties as agent, the defendant accepted the application and the premium, and issued an interim receipt on the form intrusted to him by the plaintiffs. In view of the evident carelessness of the defendant and the plaintiffs' denial of the receipt of the application, I find difficulty in accepting the statement that the application was sent to the plaintiffs. . . .

A suggestion was made that the interim receipt was valid for thirty days only from the time of its issue. The blank in the printed form at the foot of the receipt, which is intended to limit the time for which it would afford protection to the insured, was not filled in; and Jeffery & Dainard may well have thought that there was no question of limiting the time, especially as the defendant treated the insurance as being in force, and accepted the balance of the premium months after the application was made.

On the 1st June, 1911, the defendant wrote to the plaintiffs, expressing regret that "carelessness and absence of method on my part, principally owing to the pressure of other and outside business, have caused you so much trouble and me so much anxiety." And, later on, he says: "As to the premium, that was paid, at least to me; and if it was not paid to you, which, I think, under the circumstances, was quite likely, that was my fault, and not that of Jeffery & Dainard, and it is still owing by me to you." . . .

It is clear to me that the defendant acted negligently and carelessly and without due regard to the interests of his principals, the plaintiffs, to such an extent as to render him liable.

As to the effect of the issue of the interim receipt, reference may be made to Stoness v. Anglo-American Insurance Co., 3 O.W.N. 494, 886.

The question of the liability of an insurance agent is considered in 22 Cyc. 1437, where it is stated that the agent must respond in damages for any breach of duty arising out of his relations as agent which has resulted in injury to the company; and in support of that proposition is cited Connecticut Fire Insurance Co. v. Kavanagh, [1892] A.C. 473.

If the agent violates instructions as to the class of risks which he is to insure, and thereby renders the company liable for a loss on a risk which would not have been accepted had the instructions been observed, the agent will be liable to the company for the amount of loss which it has been compelled to pay on account of such risk: 22 Cyc. 1437, 1438.

But the plaintiffs could have avoided incurring the costs of the action brought by Jeffery & Dainard . . .

Judgment will be in favour of the plaintiffs for $600 and interest thereon from the 10th January, 1912, and also for the $18 premium received by the defendant and not accounted for, and interest thereon from the 8th November, 1910, and the costs of this action.

KELLY, J. JANUARY 24TH, 1913.

RE QUAY.

Will—Construction—Legacy Payable in Instalments—Inconsistent Provisions.

Application by Ralph Ira Dwight Quay, a son of William Quay, deceased, for an order, under Con. Rule 938, determining certain questions arising upon the construction of the following clause in the will of the deceased: "I hereby direct my executors to give to my son Ralph Ira Dwight Quay, D.D.S., the sum of $25,000 as follows, namely, $6,000 within three months after my decease and $600 every six months thereafter for fifteen years. Should he marry, he shall receive $5,000 of above $25,000 and the balance at the end of fifteen years after my decease."

The following questions were submitted:—

1. Whether the clause providing for the payment of $5,000 to Ralph Ira Dwight Quay in the event of his marriage was effective and capable of being enforced.

2. Whether, after payment of the $5,000, Ralph Ira Dwight Quay was still entitled to receive from the estate of William Qauy the semi-annual payment of $600.

3. Whether, under the clause in question, Ralph Ira Dwight Quay was entitled to receive in all the sum of $25,000 or the sum of $24,400.

H. A. Ward, for the applicant.

J. M. Kilbourn, for the executor and two beneficiaries.

J. D. Montgomery, for Frederick Quay.

KELLY, J.:—I answer the questions as follows:—

1. The legatee is entitled on his marriage to receive $5,000, if at that time there be unpaid to him (out of the $25,000) that

sum; if, however, the payments made to him before his marriage reduce the unpaid balance of the $25,000 to less than $5,000, he will be entitled on his marriage to receive such balance.

2. After such payment to the legatee on his marriage, the semi-annual payments of $600 each shall cease until the end of fifteen years from the testator's death, when the unpaid balance of the $25,000 shall be payable.

3. The intention of the testator in the paragraph under consideration was to benefit this legatee to the extent of $25,000; this amount is not cut down by the later words of that paragraph, dealing with the mode of payment.

Subsequent provisions of the will relate to the disposition of this bequest (and bequests to other beneficiaries) on the happening of certain contingencies; the above conclusions are subject to whatever effect these later provisions may have on this bequest, if any of these contingencies arise.

Costs of the application will be payable out of the estate; those of the executor as between solicitor and client.

SCULLY v. ONTARIO JOCKEY CLUB—MASTER IN CHAMBERS—JAN. 23.

Security for Costs—Non-payment of Costs of Former Action—Con. Rule 1198(d)—"For the Same Cause"—Proof of Identity.]—Motion by the defendant George M. Hendrie, under Con. Rule 1198(d), for an order requiring the plaintiff to give security for the costs of this action, on the ground that, so far as the applicant was concerned, this action was "for the same cause" as a previous action by the same plaintiff against J. M. Madigan, George M. Hendrie, J. F. Monck, and W. P. Fraser, which had been dismissed with costs, and the costs of which had not been paid. This new action was against the Ontario Jockey Club, Joseph E. Seagram, E. H. Duhaine, and George M. Hendrie. The wrongs complained of in the former action took place on the 12th August, 1911; those of which the plaintiff now complained occurred on the 23rd September, 1912. The Master said that these facts, together with the fact that the defendant Hendrie was the only defendant common to both actions, shewed prima facie that Con. Rule 1198(d) could not be applied. Strict proof of the identity of the claim in a second action is required to give effect to Con. Rule 1198(d): Lucas v. Cruickshank, 13 P.R. 31. Reference to Bynnter v. Dunne (1883), 16 Ir. C.L.R. 380, 383,

and May v. Werden, 17 P.R. 530. Motion dismissed, with costs to the plaintiff in the cause, without prejudice to any application to the Court as in McCabe v. Bank of Ireland, 14 App. Cas. 415. C. F. Ritchie, for the applicant. J. P. MacGregor, for the plaintiff.

PHILLIPS v. LAWSON—MASTER IN CHAMBERS—JAN. 23.

Discovery—Production of Documents—Impeaching Affidavit of Documents—Examination for Discovery—Relevancy of Documents—Further and Better Affidavit.]—Motion by the plaintiff for an order requiring one or more of the defendants to make further and better affidavits on production of documents. Two of the defendants were further examined for discovery after the decision of the Master, ante 390; and the present action was based on the examination of the defendant Lawson, which had not been completed, but had been adjourned sine die. The Master said that the only grounds on which an affidavit on production could be impeached were set out in Ramsay v. Toronto R.W. Co., ante 420. Counsel for the plaintiff contended that Lawson's examination entitled the plaintiff to the production of various documents relevant to the case; and the Master considered that the only point for present consideration was, whether these documents or some of them should appear in Lawson's affidavit. The Master set out the facts at some length; he referred to Blake v. Albion Life Assurance Co., 4 C.P.D. 941; Bray's Digest of the Law of Discovery, ed. of 1904, sec. 6, p. 2, and ed. of 1885, p. 18; and said that, without passing on the other affidavits at present, he thought that the defendant Lawson should make a further affidavit. Order accordingly. Costs of the motion to the plaintiff in any event. J. P. MacGregor, for the plaintiff. C. A. Moss, for the defendants.

WILSON v. SUBURBAN ESTATE CO.—MASTER IN CHAMBERS—JAN. 23.

Discovery—Examination of Plaintiff—General Questions—Relevancy.]—Motion by the defendants for an order requiring the plaintiff Wilson to attend for further examination for discovery and answer questions which he had declined to answer upon his original examination. The action was for damages

for false representations made by the defendants and their agents, whereby the plaintiffs (a brother and sister) were induced to pay $550 for two lots in Port McNicol, on the 7th December, 1911. Upon his examination, the plaintiff Wilson, on the advice of counsel, refused to answer general questions as to what the defendants' agent said to him, offering to tell what representations were made by the agent or agents and the defendants. On the motion, counsel for the plaintiffs argued that the plaintiff Wilson was not obliged to disclose his evidence, and could not be examined in such a way as to lay a foundation for impeaching his credibility at the trial; citing Bray's Digest of the Law of Discovery, p. 455 et seq.; Coyle v. Coyle, 19 P.R. 97. The Master said that these authorities did not bear the interpretation sought to be given to them; and the plaintiff Wilson ought to give some answer to the questions put to him, speaking to the best of his recollection, which was all he could be asked to give. Order made requiring the plaintiff Wilson to attend again, at his own expense, for examination, if required. Costs of the motion and of the abative examination to the defendants in any event. Grayson Smith, for the defendants. J. P. MacGregor, for the plaintiffs.

LOVELAND v. MCNAIRNEY—KELLY, J.—JAN. 23.

Injunction—Receiver—Endorsement on Writ of Summons—Amendment.]—Motion for an injunction and a receiver and for leave to amend the endorsement on the writ of summons. The learned Judge said that, on the merits, the plaintiffs were not, in his judgment, entitled to a receiver on an injunction, and their application failed. In this view, there was no reason for amending the endorsement. Motion dismissed with costs. J. T. White, for the plaintiffs. R. M. McKay, for the defendant.

FARAH v. CAPITAL MANUFACTURING CO.—KELLY, J.—JAN. 23.

Fraud and Misrepresentation—Sale of Shares—Agreement—Lease—Rescission—Return of Moneys Paid.]—Action by Kalil Farah and Sadie Farah, husband and wife, against the above-named company and the five directors of the company individually, for the rescission of an agreement and lease, the return of money paid by the plaintiffs for shares in the com-

pany, etc., upon the ground of misrepresentations made by the defendant Brethour, the managing director of the company. The learned Judge finds that representations were made by Brethour, on which the plaintiffs relied, as to the character and financial condition of the business carried on by the company; that these representations were false, to the knowledge of Brethour, and were made for the purpose and with the intention of inducing the plaintiffs, and did induce them, to enter into the agreement. The learned Judge said that he had some doubt as to the extent of the knowledge of the other directors of Brethour's conduct towards the plaintiffs, and to what extent they were parties to it; and, so far as their personal liability for a return of the money was concerned, he gave them the benefit of that doubt. But the defendant company was bound by what Brethour did: Hilo Manufacturing Co. v. Williamson, 28 Times L.R. 164. Judgment for the plaintiffs for payment by the defendant company and the defendant Brethour to the plaintiff Kalil Farah of $2,500 paid for 50 shares of stock and interest thereon from the 12th December, 1911, and cancelling the subscription for these shares; for rescission of the agreement and of the lease; for cancellation of the certificate for 130 shares of the stock; for recovery by the plaintiff Sadie Farah of the premises referred to, and payment to her by the defendant company and the defendant Brethour for use and occupation thereof, at the rate of $166.60 per month from the 15th November, 1911, for the upper part of the premises until delivery of possession, and at the rate of $50 per month for the other part of the premises intended to be leased, from the 15th November, 1911, until the 1st May, 1912, and thereafter and until delivery of possession at the rate of $60 per month. Plaintiffs to have costs of the action against all the defendants. W. L. Scott, for the plaintiffs. R. V. Sinclair, K.C., for the defendants.

PALLANDT v. FLYNN—BRITTON, J.—JAN. 24.

Interpleader—Facts not Admitted—Order Directing Trial of Issue—Con. Rule 1111*—Parties—Plaintiff in Issue—Security Required from Claimant—Practice.*]—Appeal by the Canadian Bank of Commerce from an interpleader order made by the Master in Chambers. The execution debtor was the owner of certain shares of stock in the McIntyre Porcupine Mines Limited. The execution creditor directed the Sheriff of To-

ronto to seize and sell this stock. The Canadian Bank of Commerce claimed the stock by assignment or pledge of it by Flynn (the executing debtor) to the bank, in the regular course of banking. The Master directed an issue between the execution creditor and the claimants. The appeal was upon the following grounds: (1) that there ought not to have been an issue directed, as, upon the undisputed facts, these shares were the property of the bank as against the execution creditor, and it should have been so declared; (2) that, if an issue should be tried, the execution creditor should be plaintiff in that issue, and not the claimants; and (3) that the bank, being in possession, should not be required to give security as ordered. BRITTON, J., said that the execution creditor was unquestionably entitled to have her claim tried. It did not appear that there were any facts which should be in dispute, and yet there was no formal admission by counsel for the execution creditor of the allegations of the claimants. Con. Rule 1111 would, if the facts were not in dispute, permit the Judge to dispose of the question of law without directing an issue; but that could not be done upon the material before him. If the parties consented, a special case might be stated for an Appellate Division; and that would be a satisfactory way of determining the matter. It made practically no difference who was plaintiff in the issue. If there was any difference, it was in the claimants' favour, as, having the conduct of the case, the trial need not be delayed. Upon the argument, the learned Judge had some doubt about the reasonableness of compelling the bank to pay $8,000 into Court, or to give security as ordered; but further consideration had satisfied him that the Master had followed the usual and settled practice, and that he should not interfere. Appeal dismissed; costs in the cause in the interpleader proceedings. R. C. H. Cassels, for the bank. J. Jennings, for the execution creditor. R. J. Maclennan, for the Sheriff of Toronto.

MARTIN v. COUNTY OF MIDDLESEX—SUTHERLAND, J.—JAN. 24.

Highway—Improvement—Work Done by County Corporation—Interference with Watercourse—Defective Work—Ditches—Injury to Land by Flooding—Remedy—Action—Arbitration—Damages.]—An action for damages for the flooding of the plaintiff's lands by reason of the defendants' negligence, as alleged, and for a mandatory order to the defendants to open

up the natural watercourse as heretofore, and for an injunction restraining the defendants from raising the highway or closing up the watercourse. SUTHERLAND, J., after setting out the facts at length, said that the work of construction done by the defendants, the county corporation, under a by-law passed pursuant to the Public Highways Improvement Act, 7 Edw. VII. ch. 16, was defective in two ways, namely, that the road was not carried to a sufficient height east of the cove, and that the ditch on the north side should not have been left as it was. The defendants undertook to close up the cave through which the waters of the natural watercourse ran. In these circumstances, they were required to take the very greatest precaution. While the course they followed appeared to be a reasonable one, and was, no doubt, undertaken in good faith, it nevertheless was defective, and the injury sustained by the plaintiff flowed from these defects. The learned Judge also considered that the plaintiff's claim was properly made the subject of an action, instead of an arbitration under the Act: McGarvey v. Town of Strathroy, 10 A.R. 631; Arthur v. Grand Trunk R.W. Co., 22 A.R. 89; Derinzy v. City of Ottawa, 15 A.R. 712. Judgment for the plaintiff for $700 damages with costs of the action. P. H. Bartlett, for the plaintiff. J. C. Elliott and W. D. Moss, for the defendants.

MOODIE v. HAWKINS—MASTER IN CHAMBERS—JAN. 24.

Discovery—Examination of Plaintiff—Relevancy of Questions—Company—Directors—Misfeasance—Status of Plaintiff—Information Obtained from Solicitor.]—Motion by the defendants for an order requiring the plaintiff to attend for further examination for discovery and to answer certain questions which he refused to answer upon his original examination. The action was brought by a person alleging himself to be a shareholder of the Dominion Power and Transmission Company, suing on behalf of himself and all other shareholders except the eleven individual defendants, against the latter, as directors of the company, for misfeasance in office. The company was also made a defendant. The defendants denied all the plaintiff's allegations, and also his right and status to maintain the action. The first question not answered was (11), "How did you become a shareholder in that company?" The Master held that the plaintiff was not bound to answer this, as it was not relevant to the issues raised by the pleadings. And so with questions

45, 68, 69, 100, 101, 102, 112. In answer to question 51, the plaintiff declined (apart from counsel's advice) to state what knowledge he had obtained since the action began, because it was got from his solicitor. The Master said that here the plaintiff was wrong, unless the information was obtained by the solicitor on the plaintiff's instructions and for the purposes of this action. That was not made clear. For all that appeared, the solicitor might have told the plaintiff very important matters that he had become aware of long before this action was commenced. This point was, therefore, open to further inquiry, if the defendants so desired. Order made permitting the defendants, if so advised, to take out another appointment in the usual way and have further examination and pursue question 51 if they desire to do so. Motion otherwise dismissed, with costs to the plaintiff in the cause. R. C. H. Cassels, for the defendants. A. M. Stewart, for the plaintiff.

WALL v. DOMINION CANNERS CO.—MASTER IN CHAMBERS—JAN. 25.

Pleading — Statement of Claim — Motion to Strike out Portion — Irrelevancy — Embarrassment.]—Motion by the defendant company to reopen the order pronounced upon a motion made by the defendant company in October, 1912, for particulars, etc., of the statement of claim. See ante p. 214. Re-argument was permitted, and was confined to that part of paragraph 6 referred to in the note, at p. 215, near the bottom of the page. The Master said that he had reconsidered the matter in the light of what he said in Canavan v. Harris, 8 O.W.R. 325. That, however, was to be read in connection with the facts of the case, as laid down in the judgment in Quinn v. Leathem, [1901] A.C. at p. 506. There was no reason to qualify what was said in the Canavan case, at p. 326. The part of paragraph 6 now in question was not material in the sense of allowing discovery to the extent feared or anticipated by the defendant company; and there was no reason for a change of opinion on that ground, especially as the defendants had acted on the previous decision and obtained the particulars thereby directed. The Master, therefore, refused to vary his order; but gave leave to the plaintiff company to appeal. In the event of an appeal, costs of this motion to be to the plaintiff in any event, and costs of the appeal to be costs to the plaintiff only in the appeal. F. R. MacKelcan, for the defendant company. Frank McCarthy, for the plaintiff.