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COURT OF APPEAL.

MOSS, C.J.O., IN CHAMBERS. MAY 9TH, 1912.

RE TOWN OF STEELTON AND CANADIAN PACIFIC R.W. CO.

Assessment and Taxes—Railway Company—Assessment Act, 1904, secs. 44, 45—Construction—Actual Assessment—Quinquennial Assessment.

Case stated by the Lieutenant-Governor in Council, under sec. 77 of the Assessment Act, for the opinion of a Judge of the Court of Appeal.

Angus MacMurchy, K.C., for the railway company.
D. L. McCarthy, K.C., for the town corporation.

MOSS, C.J.O.:—The question raised is as to the proper meaning and effect of sec. 45 of the Assessment Act, 1904, in relation to the assessment of the real property of steam railway companies.

The provisions of the Act dealing with the subject are secs. 44 and 45, under the heading "Railways."

Sub-section (1) of sec. 44 makes provision for every steam railway company transmitting annually to the clerk of the municipality in which any part of the roadway or other real property of the company is situated, a statement shewing in detail the various kinds of real property, whether occupied, in use, or vacant, belonging to the company, and the assessable value thereof. And the statement is to be communicated by the clerk of the municipality to the assessor.

Sub-section (2) prescribes the mode to be adopted by the assessor in assessing the various descriptions of land and property specified in the statement.

Sub-section (3) makes it the duty of the assessor to deliver or transmit by post to the company a notice of the total amount at which he has assessed the land and property, shewing the amount for each description of property mentioned in the statement of the company. The company's statement and the assessor's notice are to be held to be the assessment return and notice of assessment required by secs. 18 and 46 of the Act to be made and given in the case of other assessments.

Sub-section (4) declares that a railway company assessed under this section shall be exempt from assessment in any other manner for municipal purposes except for local improvements.

Then follows sec. 45, which declares that, when an assessment has been made under the provisions of sec. 44, the amount thereof in the roll as finally revised and corrected for *that* year shall be the amount for which the company shall be assessed for the next following four years in respect of the land and property included in such assessment; with a provision for reducing in any year the fixed amount, by deducting the value of any land or property which has ceased to belong to the company, and for making a further assessment of any additional land or property of the company not included in such assessment.

The material statements of the case are: that in the year 1905 the lands of the Canadian Pacific Railway Company in the town of Steelton were assessed at $15,500 for the year 1906; that the assessment continued at the same amount annually until 1911, when the amount thereof was increased to $25,936 for 1912; that in 1910 the assessor, after consultation with the mayor, concluded, under a mistaken idea as to the effect of sec. 45 of the Act, that he could not make an increase in the company's assessment until 1911; and, therefore, assessed the property for 1911 at the same amount as in the preceding year; that the assessment made in the years 1906 to 1910, inclusive, were made without any inspection or valuation of the lands by the assessor; that the annual statements of the company's property in Steelton were duly furnished by the company, as required by sec. 44 of the Act, in the years 1906 and 1910, inclusive; that the company have paid the taxes for 1911, under the assessment made in 1910.

Upon these facts, the Judge of the District Court of the District of Algoma held, upon appeal by the company from the

decision of the Court of Revision confirming the assessment of the land and property at the sum of $25,936, that the assessor was at liberty to assess in 1911 for 1912 for an amount greater than the amount of the assessment in 1910 for 1911.

The question submitted is, whether the judgment is right. I am of opinion that the learned Judge's conclusion is right.

There is, no doubt, much plausibility in the argument presented on behalf of the company, that what is provided for is quinquennial assessment, and that the amount of the assessment of which the company are notified upon the termination of a quinquennial period fixes the amount for the next following 4 years.

But, taking sec. 45 in connection with sec. 44, it is apparent that the assessment which is to stand for the next following four years is an actual assessment made in compliance with and following the directions of sec. 44. That is what sec. 45 says in effect. The essential elements of an assessment, so far as the assessor is concerned, are that, upon receipt of the statement called for by sub-sec. (1), he shall proceed to assess by placing values upon the various kinds of land and property, in accordance with the principles declared by sub-sec. (2); and, having in this manner arrived at and ascertained the total amount, deliver or transmit a notice to the company of the particulars specified in sub-sec. (3). This is an assessment calling for inspection and examination of the land and property, and the exercise of judgment with regard to their values. Such an assessment being made, the amount thereof in the roll as finally revised and corrected for that year, i.e., the year in which such an assessment is made, is the amount that is to stand for the four following years.

I do not think that the mere formal receipt by the assessor of the annual statement, and the delivery or transmission of a notice to the company under sub-sec. (3), is an assessment that will bind either party to the amount thereof after the expiration of a quinquennial period. I see nothing to prevent the municipality and the company continuing the amount of an assessment made under sec. 44 beyond 5 years, and until another actual assessment is made. The effect of sec. 45 is to fix the amount for the four following years, at the expiration of which time either party is entitled to an actual assessment.

I think, therefore, that the formal proceedings taken by the assessor in 1910 were not such an assessment as fixed the amount for the four following years.

I answer the question in the affirmative.

I award no costs to or against either party.

MOSS, C.J.O., IN CHAMBERS. MAY 9TH, 1912.

DART v. TORONTO R.W. CO.

Appeal—Leave to Appeal to Court of Appeal from Order of Divisional Court Refusing to Dismiss Action, but Directing New Trial—Leave to Appeal Granted on Terms—Abandonment of New Trial—Payment of Costs.

Motion on behalf of the defendants for leave to appeal to the Court of Appeal from an order of a Divisional Court setting aside the judgment entered at the trial in favour of the plaintiff and directing a new trial.

D. L. McCarthy, K.C., for the defendants.
D. Inglis Grant, for the plaintiff.

MOSS, C.J.O.:—The plaintiff was driving in a sleigh along Wilton avenue going west, and, while crossing Church street at its intersection with Wilton avenue, his sleigh was struck by a trolley-car of the defendants coming south on Church street, and he was severely injured, and the sleigh completely demolished.

The plaintiff seeks to recover damages from the defendants, on the ground of negligence of the defendants' servants operating the car in approaching the crossing at an excessive rate of speed with the car not under proper control, without sounding the gong or giving any warning.

At the trial, the jury, in answer to questions, found the defendants guilty of negligence in these respects. But to another question, viz., "Could Dart, by the exercise of reasonable care, have avoided the accident?" they answered, "Yes, to a reasonable extent." And to the further question, "If Dart could have avoided the accident, in what did his want of reasonable care consist?" they answered, "By lack of judgment."

The jury assessed the damages at $800, for which sum judgment was entered in the plaintiff's favour. From this judgment the defendants appealed to a Divisional Court, upon the ground, as set forth in their notice of appeal, that, upon the findings of the jury, the defendants were entitled to judgment dismissing the action—the answers to the questions above set forth amounting to a sufficient finding of contributory negligence. They did not ask for a new trial.

The Divisional Court was of opinion that these answers were

so unsatisfactory that the judgment for the plaintiff could not be maintained; the Court did not deal with the question raised by the defendants that they were entitled to judgment; but, instead, directed a new trial. The defendants say that what they desire is a decision upon the question of their right to have the action dismissed, and they do not desire a new trial.

In this view of the case, the defendants have not obtained a pronouncement upon the question they raised. And, as that is all they seek, it seems proper to give them an opportunity of obtaining a decision one way or the other upon the point.

But, inasmuch as they repudiate any desire for a new trial, it is only reasonable that, as preliminary to accepting leave to appeal, they should undertake and agree to abandon the new trial, and agree that in the event of the Court deciding that theyn are not entitled to judgment in their favour, the judgment entered in favour of the plaintiff at the trial shall stand, and that they will pay the costs of the appeal to the Divisional Court. It would not be just to the plaintiff to permit the defendants to try the experiment of a further appeal while adhering to their new trial in case of non-success upon the appeal.

If the defendants accept these terms, an order for leave to appeal will issue; the costs of this motion to be in the appeal.

If not accepted within two weeks, the motion will stand dismissed with costs.

HIGH COURT OF JUSTICE.

MIDDLETON, J., IN CHAMBERS. MAY 3RD, 1912.

*KUULA v. MOOSE MOUNTAIN LIMITED.

Practice—Consolidation of Actions—Common Defendant—Distinct Claims of Different Plaintiffs for Damages Arising from Fire Set out by Defendant—Direction as to Trial.

Appeal by the defendants in the above-named action and three others brought against them by different plaintiffs, from an order of the Master in Chambers, ante 1085, refusing to consolidate the four actions or to stay proceedings in the other three pending the trial of the above-named action.

*To be reported in the Ontario Law Reports.

R. C. H. Cassels, for the defendants.

H. E. Rose, K.C., for the four plaintiffs.

MIDDLETON, J.:—It is said that on or about the 10th July, 1911, the defendants set out a fire upon their lands, which fire spread, and destroyed the premises of the several plaintiffs in these four actions. In each action the plaintiff presents his case in alternative ways. First, he charges that the fire set out on the defendants' premises spread to his; next, he charges that the fire was set out negligently; and, in the third place, that by reason of the negligence the fire was permitted to spread on the defendants' premises to the plaintiff's premises.

The Master, while refusing consolidation of the actions, has directed that they shall all be entered for trial at the same sittings of the Court; and at the trial the presiding Judge will, no doubt, make such arrangements as will prevent unnecessary repetition of evidence, in all the cases. But it is manifest that, if each plaintiff has to establish that the fire escaped from the defendants' premises to his premises by reason of the negligence of the defendants, the issue in each case, although similar, is quite distinct.

There is much confusion upon the subject of consolidation of actions, arising mainly from a loose and inaccurate use of the word "consolidation." . . .

[Reference to the remarks of Fletcher Moulton, L.J., in Lee v. Arthur (1909), 100 L.T.R. 61.]

Con. Rule 435 is intended to deal with the consolidation of actions in the strict sense of that term. The jurisdiction to stay actions probably exists quite apart from any statutory provision, as part of the inherent power of the Court over its own process; but this power is recognised and confirmed by sec. 57, sub-sec. 9, of the Judicature Act, R.S.O. 1897 ch. 51.

Con. Rule 435 provides that "actions may be consolidated by order of the Court or a Judge in the manner in use in the Superior Courts of Common Law, prior to the Ontario Judicature Act, 1881." . . . It was at one time supposed that it permitted consolidation only in the cases in which at common law consolidation would have been ordered prior to the Judicature Act. But this has been set at rest by the decision in the Court of Appeal in Martin v. Martin, [1897] 1 Q.B. 429. . . .

At common law, consolidation originally applied to the case where there were two actions between the same parties. There the actions were "consolidated," in the strict sense of the term.

At common law, also, a practice had grown up, not upon any statutory power, but entirely upon the inherent jurisdiction of the Court, of staying the trial of actions pending the determination of a test action. This frequently is somewhat loosely described as "consolidation." . . . See, for example, Colledge v. Pike (1887), 56 L.T.R. 124. . . .

In the Courts of Equity, consolidation, in either the strict sense or the modified sense, seems to have been unknown. The Court undoubtedly exercised its power to restrain abuse of its process, and it would not permit the prosecution of two suits for the same cause of action; but the reported instances differ widely from the cases at common law. . . . See cases collected in Daniell's Chancery Practice, 5th ed., p. 698. . . .

[Reference to Amos v. Chadwick, 4 Ch. D. 869, 9 Ch. D. 459; Saltash v. Jackman, 1 D. & L. 85; Lee v. Arthur, supra; Westbrook v. Australian Mail Co., 23 L.J.C.P. 42; Williams v. Township of Raleigh, 14 P.R. 50.]

The direction given by the learned Master in Chambers, I think, satisfactorily meets the case. Manifestly, damages will have to be assessed in the different cases; and it would be most unfair to direct the trial of the individual claims to be delayed when this would delay the recovery of final judgment. The circumstances prevent the imposition of the term invariably required: a stay will be granted only where the defendants consent to judgment—that is, a final judgment—in the event of their failing in the test action.

The appeal will be dismissed; costs to the plaintiffs in any event.

MIDDLETON, J. MAY 3RD, 1912.

PEARSON v. ADAMS.

Deed—Conveyance of Land—Building Restriction—"Detached Dwelling-house"—Apartment House—Authority of Previous Decision—Judicature Act, sec. 81.

Motion by the plaintiff for an interim injunction restraining the defendant from erecting an apartment house upon certain lands in Maynard Place, in the city of Toronto, in alleged breach of the provisions of a conveyance of the 18th April, 1888, which stipulated that the lands were "to be used only as a site for a detached brick or stone dwelling-house."

By consent of counsel, the motion was turned into a motion for judgment.

J. H. Cook, for the plaintiff.
J. M. Godfrey, for the defendant.

MIDDLETON, J.:—Apart from authority, binding upon me, I should have thought that an apartment house such as the defendant contemplates erecting could not be described as "a detached dwelling-house." I should have thought it clear that the building was in truth a series of separate dwellings, *attached*, and separated by the one main perpendicular wall and the two horizontal partitions. But this, as I understand the case of Re Robertson and Defoe, 25 O.L.R. 286, ante 431, is not the law here; and, yielding to the authority of that case, there is no alternative save to dismiss the action with costs. I do not think I should attempt to refine away that decision by making distinctions without any difference.

I think it better to adopt this course, and leave it to the plaintiff to take the case to a higher Court, rather than to adopt the alternative course of investigating the matter with such thoroughness as to enable me to say that I deem the decision referred to to be wrong. See sec. 81 of the Judicature Act.

This relieves me from considering the other matters argued by the defendant's counsel.

The attention of the parties is drawn to the very recent decision of Campbell v. Bainbridge (1911), 2 Scots L.T.R. 373.

MIDDLETON, J. MAY 3RD, 1912.

DEMERS v. NOVA SCOTIA SILVER COBALT MINING CO.

Master and Servant—Injury to Servant—Negligence of Fellow-servant—Workmen's Compensation for Injuries Act—Person not Intrusted with "Superintendence"—Findings of Jury—Evidence.

Action for damages for personal injuries sustained by the plaintiff whilst in the employment of the defendants, owing, as alleged, to the negligence of the defendants, or their servant.

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

A. G. Slaght, for the plaintiff.
J. W. Mahon, for the defendants.

MIDDLETON, J.:—The plaintiff, a carpenter in the employ of the defendants, was engaged upon work a mile or more distant from the defendants' boarding-house. The defendants supplied a team to drive men from the boarding-house to the work in the morning and back in the evening. On the 2nd November, 1911, while the plaintiff and a number of other workmen were being driven along the road, the plaintiff was thrown from the waggon, and sustained very severe injuries.

The jury have found, upon questions submitted to them, that the plaintiff was rightly upon the waggon—in fact, this was not disputed after the evidence was closed—and that the accident was occasioned by the reckless driving of the waggon by Walker, also an employee of the company. The company were not negligent in employing Walker, as he was undoubtedly competent.

At common law, the plaintiff cannot recover, because the negligence occasioning his injury was the negligence of a fellow-servant; and I do not think that the Workmen's Compensation for Injuries Act in any way improves his position, because the common law still prevails unless the fellow-servant is one who has superintendence intrusted to him, and the accident occurs while he is in the exercise of such superintendence.

The statute defines "superintendence" as meaning such general superintendence over workmen as is exercised by a foreman, or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour.

There is no dispute of fact concerning the position occupied by Walker. He was a teamster employed by the defendants, and was engaged in and about the same undertaking as that upon which the plaintiff worked. He was employed to draw material to the work, and upon two trips during the day he carried the men to and from the work. Upon these uncontradicted facts, I think it is clear that it cannot be said that he had superintendence within the statutory meaning.

As a matter of precaution, I explained the law to the jury, reading to them the statutory provisions found in the Workmen's Act, and asked them to determine as a question of fact whether Walker had superintendence intrusted to him, within the meaning of the statute. The jury first returned the answer, "We do not know;" but, after my further explaining the matter to them, they brought in the answer, "Yes."

The plaintiff's counsel was not satisfied with the way in which I presented the question to the jury, and thought that the question asked was not entirely apt. At his instance, I submitted

a further question, framed in accordance with his view: "Had Walker superintendence over the waggon and workmen while riding in the waggon?" To this the jury first answered: "Yes, over the team and waggon; as to the workmen we are not sure." After I had sent them back to consider further, they modified this answer so as to state that Walker had no superintendence over the workmen while riding in the waggon. This is in accordance with the evidence, and the only answer that could properly be given.

Under these circumstances, I very much regret that I am compelled to enter judgment for the defendants; but I do not think I should award costs, as the plaintiff was very seriously injured by the negligence of the driver.

RIDDELL, J. MAY 4TH, 1912.

*FIDELITY TRUST CO. v. BUCHNER.

Life Insurance — Benefit Certificate — Beneficiary — Adopted Daughter—Death of—Claim by Children of—Rules of Benefit Society—Classes of Beneficiaries—"Children by Legal Adoption"—Law of Ontario as to Adoption—1 Geo. V. ch. 35, sec. 3—Determination by Secretary of Society of Fact as to Adoption—"Other or Further Disposition"—Change of Beneficiary—4 Edw. VII. ch. 15—Indorsement in Favour of Beneficiary for Value—Validity—Evidence—Abandonment—Next Friend of Infants—Certificate Indorsed as Security for Advances—Reference as to Amount Advanced.

Issue as to the disposition of insurance moneys, tried without a jury at London.

W. G. R. Bartram, for the plaintiffs.
J. M. McEvoy, for the defendant.

RIDDELL, J.:—T. R. Rhoder . . . took out, on the 29th August, 1901, a certificate in the Royal Arcanum, whereby that organisation agreed "to pay . . . to Lucy Hendershot (adopted daughter) a sum not exceeding $1,500, in accordance with and under the laws governing said fund, upon satisfactory evidence of the death of said member . . . provided that said member is in good standing at the time of his death, and

*To be reported in the Ontario Law Reports.

provided also that this certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of the Order." . . .

Lucy, having been married to W. P. Hendershot, died in 1909, leaving her surviving four infant children and her husband. Thereafter, Rhoder made the following indorsement upon the certificate: "The within named beneficiary, Lucy Hendershot, having died, I direct that all benefits under the within certificate be paid to Urban A. Buchner, who for many years has advanced money to me and kept up the premiums, and who is a holder of this certificate for value. Witness my hand and seal this 6th day of July, 1909. Thomas R. Rhoder (L.S.)."

Rhoder died a widower and childless in 1911; a claim was made by Buchner that he was entitled to the amount of the insurance. A claim was, however, made on behalf of the children of the deceased "adopted daughter." The Royal Arcanum paid the money into Court. The Fidelity Trust Company took out letters of administration with the will annexed of the estate of the deceased Rhoder. Upon application, an interpleader order was made by the Master in Chambers. . . .

Every suggestion of amendment to the form of the issue was strenuously combatted by counsel for the plaintiff; and I must accordingly deal with the issue exactly as I find it.

In the issue the Fidelity Trust Company are plaintiffs, and Buchner defendant.

"The plaintiffs affirm and the defendant denies (1) that . . infant children of Lucy Hendershot . . . are the designated preferred beneficiaries of their grandfather . . . T. R. Rhoder by certificate . . . issued by . . . the Royal Arcanum . ; (2) that the plaintiffs, as next friend to the said infants, . . . are entitled to payment out of Court of the said sum; (3) that, in the alternative, . . . the plaintiffs, as administrators . . . of . . . T. R. Rhoder, are entitled to the said sum, notwithstanding the indorsement dated the 6th July, 1909, on the said certificate in favour of the said defendant, in that the said indorsement was not read to or by the said T. R. Rhoder, and was ignored and treated as null and void by both the said T. R. Rhoder and the said defendant until the death of the said T. R. Rhoder . . . And the defendant affirms and the plaintiffs deny: (1) that the said defendant is the owner of the . . . certificate and entitled to the proceeds . . . paid into Court by virtue of the fact that the said insurance certificate is personal property reduced into possession by the defendant and owned by him as an innocent purchaser for value and by virtue of

an indorsement upon the said certificate made by T. R. Rhoder to . . . Buchner for value; (2) that the defendant is entitled to the said sum paid into Court as the proceeds of the said certificate."

The claim on behalf of the infants is based upon the rules of the society. Section 332 says: "In the event of the death of all the beneficiaries designated . . . before the decease of such member, if he shall have made no other or further disposition thereof, as provided in the laws of the Order, the benefit shall be disposed of as provided in sec. 330 . . ." As sec. 326 provides that a certificate shall not be made payable to a creditor, or be held or assigned, in whole or in part, to secure or pay any debt which may be owing by the member; and sec. 327 provides that any assignment of a benefit certificate by a member shall be void: it is argued for the plaintiffs that the member has not made a disposition "as provided in the laws of the Order;" and consequently, by the provisions of sec. 332, sec. 330 applies. This is as follows: "If, at the time of the death of a member . . . , if any designation shall fail for illegality or otherwise, then the benefit shall be payable to the person or persons mentioned in class first, sec. No. 324, if living, in the . . . order of precedence by grades as therein mentioned, the persons living of each precedent grade taking in equal shares per capita, to the exclusion of all persons living of subsequent enumerated grades, except that in the distribution among persons of grade second the children of deceased children shall take by representation the share the parent would have received if living . . ." Section 324: "A benefit may be made payable to any one or more persons of any of the following classes only:—

"Class First.

"Grade 1st, member's wife.

"2nd, member's children and children of deceased children and member's children by legal adoption.

3rd, member's grandchildren." . . .

"In either of which cases no proof of dependency of the beneficiary designated shall be required; but, in case of adoption, proof of the legal adoption of the child or the parent designated as the beneficiary, satisfactory to the Supreme Secretary, must be furnished before the benefit certificate can be issued.

"Class Second.

"(1) To the affianced wife . . ."

If (a) the deceased Mrs. Hendershot was the member's child "by legal adoption" within the meaning of grade second or class first in sec. 324, (b) the member did not make any "other or

further disposition" of the certificate "as provided in the laws of the Order," and (c) if the provisions of the laws of the Order are to prevail, it is to my mind clear that the children are entitled to the money.

It is argued by the defendant that Lucy Hendershot was not a child "by legal adoption."

[Reference to Re Davis, 18 O.L.R. 384, at pp. 386, 387; Re Hutchinson, ante 933; Anon., 6 Gr. 632; Davis v. McCaffrey, 21 Gr. 554.]

Our statute (1 Geo. V. ch. 35, sec. 3) is derived from 12 Car. II. ch. 24, sec. 8, and carries the law no further than that statute. The effect of the statute is not (I speak with great deference) to take away any of the rights of the father, but to enable the father to take away the common law rights of others —it does not exclude the right of the father himself, but that of "all and every person or persons claiming the custody or tuition of such child or children as guardian in soccage or otherwise." And, accordingly, as Lord Esher says in Regina v. Barnardo, 23 Q.B.D. 305, at pp. 310, 311, "the parent of a child, whether father or mother, cannot get rid of his or her parental right irrevocably by such an agreement . . . As soon as the agreement was revoked, the authority to deal with the child would be at an end."

The statute is considered in Blackstone, vol. 1, p. 362; Co. Litt. 886, and Hargrave's notes: Eversley, 3rd ed., pp. 618, 619, 620, 622, 646, 743, 744; Simpson, 3rd ed., pp. 95, 105, 111, 113, 183, 184, 186, 188, sqq. And I do not find any case or text in which it has been thought that the statute applied except after death of the father.

The ordinary rule is, that there cannot be a guardian in the lifetime of the father: Ex p. Mountfort, 15 Ves. 445; Barry v. Barry, 1 Molloy 210; Davis v. McCaffrey, 21 Gr. at p. 562.

But, not to press that point, a deed under the statute has been called by Lord Eldon, L.C., "only a testamentary instrument in the form of a deed:" Ex p. Earl of Ilchester, 7 Ves. 348, at p. 367. Such a deed has been held, from within a few years of the passing of the statute, to be revocable even by a will. . . .

[Reference to Shaftesbury v. Hannam, Finch R. 323; Lecone v. Sheiras, 1 Vern. 442; Ex p. Earl of Ilchester, 7 Ves. at p. 367.]

I cannot find any intimation or suggestion of opinion as to the meaning and effect of the statute. See also 1 Cyc. 917. The English law is substantially the same as ours, and the decisions

there are of authority with us—and I am unable to recant the opinion expressed in Re Davis that the law of Ontario, strictly speaking, knows nothing of adoption. As the Chancellor has not decided to the contrary (in Re Hutchinson), I am at liberty to follow my own judgment.

It follows that in Ontario there can be no "legal adoption," in distinct and proper use of the words, as there can be in many of the States of the Union: 1 Cyc. 918. The Royal Arcanum is an organisation which covers many of the United States, as well as Canada, and its rules are made of general application.

No doubt, it was in view of the difficulty in framing any general rule as to "legal adoption," that the determination of the fact of "legal adoption" was left to the Supreme Secretary (sec. 324); and the provision was made that the proof of legal adoption was to be satisfactory to the Supreme Secretary. In my view, the Supreme Secretary was made the judge as to "legal adoption"—and particularly in a country where "legal adoption" has no meaning, in the proper use of the words. I think his decision is final. In our Province, I think that what the Supreme Secretary decides to be "legal adoption" is "legal adoption" for the purposes of the insurance, no statute or other law of the Province being violated.

As the benefit certificate cannot be issued until the Supreme Secretary is satisfied, it must be taken that he has decided that Lucy Hendershot was the adopted daughter, or, to use the words of the rules, "the child by legal adoption" of the member: Ancient Order of United Workmen of Quebec v. Turner, 44 S.C.R. 145.

(b) I think it equally clear that Rhoder made "no other or further disposition thereof as provided in the laws of the Order;" sec. 327 making an assignment void; and sec. 326 declaring that a certificate is not to be held or assigned to secure or pay any debt; and the provisions of sec. 333, permitting a change of beneficiary to be effected by surrender of certificate and payment of a small fee, not having been taken advantage of.

(c) The defendant appeals to the Act of 1904, 4 Edw. VII. ch. 15, sec. 7: but that has no application. It applies only in the case of preferred beneficiaries—husband, wife, children, grandchildren, or mother: R.S.O. 1897 ch. 203, sec. 159. And adopted children are no more "children" than are god-children; or than the "wife" in Crosby v. Ball, 4 O.L.R. 496, or Deere v. Beauvais, 7 Q.P.R. 48, was a wife.

The statute to apply is R.S.O. 1897 ch. 203, sec. 151(3). . . . This is applicable to the Royal Arcanum: sec. 147.

The Royal Arcanum is not a society incorporated under R.S.O. 1897 ch. 211, so as to be entitled to pay the insurance money "to the person or persons entitled under the rules thereof:" ch. 211, sec. 12. The incorporation was in Massachusetts, in 1877, under the provisions of the laws then in force. . . .

Its position is, therefore, in the view of our law, the same as that any other insurance company—e.g., that of the Catholic Order of Foresters in Gillie v. Young (1901), 1 O.L.R. 368. That case decides that the rules of the "Order" must give way to the provisions of the statute, so far as they are inconsistent therewith. Mingeaud v. Packer, 21 O.R. 267, 19 A.R. 290, and Re Harrison, 31 O.R. 314, may also be looked at.

If, then, the declaration indorsed on the certificate be valid, the plaintiffs must fail.

The grounds of attack upon the indorsement are, it will be seen, two in number: (a) that the indorsement was not read to or by Rhoder; and (b) that it was ignored and treated as null and void by both Rhoder and the defendant until the death of Rhoder.

As to (a), there is not the slightest evidence that Rhoder did not fully understand what he was signing; he has signed his name legibly; and nothing indicates illiteracy in any way: letters, indeed, are produced written by him shewing the reverse. The second ground is equally baseless—considerable testimony was given indicating that the policy was transferred rather by way of security for a loan or series of loans than the reverse; but nothing suggests, much less proves, that the transfer "was ignored" or "treated" as "null and void."

The above will dispose of the issues in the plaintiffs' claim: (1) the infants are not "the designated preferred beneficiaries of their grandfather . . . T. R. Rhoder," for the double reason that they are not "preferred beneficiaries" at all, within the meaning of the statute, T. R. Rhoder not having been their grandfather in a legal sense; and, second, he made a new beneficiary under the provisions of the law in that regard.

(2) "The plaintiffs, as next friend to the said infant children," are not "entitled to payment out of Court of the said sum" for several reasons. Assuming (what I by no means concede) that this company can be next friend at all (R.S.O. 1897 ch. 206, secs. 4, 5, 8; Nalder v. Hawkins, 2 M. & K. 248)—(a) the next friend is not entitled to the infants' money: Vano v. Canadian Coloured Cotton Mills Co., 21 O.L.R. 144); he is brought into Court simply to protect the infants' rights and guarantee the costs: Dyke v. Stephens, 30 Ch. D. at pp. 190, 191;

Smith v. Mason, 17 P.R. 444; and (b) the infants are not entitled to the money in any case.

(3) The plaintiffs basing their claim to the money specifically "in that the indorsement was not read, etc., and was ignored, etc.," they fail upon this issue as well.

This by no means disposes of the whole matter. The evidence convinces me that, while the transfer is absolute in form, it was in fact but security for advances already made and to be made. The defendant says that he advanced more than the amount paid into Court, and I think I should not order a reference unless the plaintiffs assume the responsibility of asking for one. The cross-examination of the defendant was not apparently directed to shewing that he had not advanced the amount he claimed.

If, within ten days from this date, the plaintiffs apply for an order of reference, such order may go, at their peril as to costs, referring it to the Master at London to determine the amount for which the certificate is security in the hands of the defendant. In that event, I shall reserve to myself the question of costs and further directions until after the Master shall have made his report. If such an order be not taken out by the plaintiffs, I now find all the issues in favour of the defendant, direct the plaintiffs to pay all the costs over which I have control, and order the payment out to the defendant of the amount paid into Court.

On the 9th May, 1912, RIDDELL, J., added the following:—

The plaintiffs accepting the reference offered in the judgment herein, an order will go referring it to the Master at London to inquire and report upon the amount for which the insurance certificate and the assignment thereof are security.

BRITTON, J. MAY 4TH, 1912.

MORAN v. BURROUGHS.

Negligence—Permitting Infant to Use Fire-arm—Injury to Playmate—Findings of Jury — Evidence — Contributory Negligence—Damages—Scale of Costs.

Action by James Moran and by his son John Adam Moran, for damages for injury to the latter, resulting, as it was alleged, from negligence on the part of the defendant in permitting his infant son, a boy of about twelve years of age, to have in his

possession a rifle and ammunition therefor upon the streets of Smith's Falls.

J. A. Hutcheson, K.C., for the plaintiffs.

H. A. Lavell, for the defendant.

BRITTON, J.:—The plaintiff John Adam Moran is also an infant, of about the same age as the son of the defendant. While the son of the defendant was using the rifle to shoot at a mark, and permitting the infant plaintiff and other boys to shoot the same rifle, the infant plaintiff John Adam Moran was shot, causing him to lose completely his left eye. I asked the jury to answer certain questions, which they did, finding negligence on the part of the defendant, which negligence occasioned the accident, and injury to the infant plaintiff; and the jury assessed the damages at $300.

I put the further questions: "Was the boy plaintiff guilty of contributory negligence, that is to say, could he, by the exercise of reasonable care, have avoided the accident; and, if so, what was the negligence of the boy plaintiff which you find?" The jury answered that the infant plaintiff could, by the exercise of reasonable care, have avoided the accident—that he should have walked behind instead of in front. That answer can only mean that the boy plaintiff, at the time the firing was going on, walked in front of the firing line. There was no evidence that the gun was intentionally fired at the time of the accident. Upon the undisputed evidence, the gun was accidentally discharged when being held by the son of the defendant, and while a struggle was going on for the possession of the gun, between the son of the defendant and another boy—not the plaintiff.

If there was any evidence of contributory negligence which should have been submitted to the jury, the defendant is entitled to the benefit of the jury's finding. I am of opinion that there was no evidence that would disentitle the plaintiff to recover merely by reason of contributory negligence. The presumption should stand that this infant plaintiff is not responsible for negligence. To disentitle the infant plaintiff to recover, it would require to be shewn that the injury was occasioned altogether by his own so-called negligence.

The jury assessed the damages at $300—quite too small an amount if the plaintiffs are entitled to recover at all. Upon the facts, any solicitor advising that there was liability would think

the case a proper one for the High Court. It is a case in which, in the exercise of my discretion, I should give the plaintiffs costs on the High Court scale. Judgment for the plaintiffs for $300 damages with costs, and no set-off of costs.

DIVISIONAL COURT. MAY 4TH, 1912.

REX v. PEMBER.

Municipal Corporations—Transient Traders By-law—Conviction for Offence against—Exhibiting Samples and Taking Orders—Evidence of Offence—Offering for Sale.

Appeal by the complainant from the order of MIDDLETON, J. ante 957, quashing a conviction made by the Police Magistrate for the City of Brantford, against the defendant, for unlawfully doing business in Brantford, on the 29th January, 1912, without first having obtained a license, contrary to a transient traders by-law of the city.

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

A. J. Wilkes, K.C., for the appellant.

J. Jennings, for the defendant.

BRITTON, J.:—It is a matter of complaint against the defendant that he advertised his going to Brantford in a way that indicated a clear intention of going with a stock of goods to be sold in Brantford. I do not think so. The advertisement stated that he would be at the Kerby House, in Brantford, on the day named, with the latest Parisian and American styles of ladies' hair goods shewn in the Dominion. He stated that "all hair and scalp troubles will be diagnosed free of charge," and he had "something to say for the comfort of bald men" about the "Pember ventilated light weight toupees worn and recommended by the medical profession." Nothing was said about selling the goods or offering them for sale in Brantford. In the meagre evidence given before the Police Magistrate no sale was proved.

The witness Mrs. Bush apparently had no personal knowledge of what she was called upon to prove. She had a strong suspicion that opposition to her in her business was coming

from the outside, and naturally she wanted something done to repel the invader. The defendant's admission, whatever it amounted to, was not made until after the conviction. What he said was—and no objection was made to considering that as evidence—that his going to Brantford was to exhibit samples, take orders for similar goods, and forward these orders, so that, if the orders were accepted, goods would be supplied from the factory outside of Brantford, by the employer of the defendant.

This, as I understand the evidence and business, is what commercial travellers, by the hundreds, are doing all over Ontario. I do not think that kind of business makes the commercial traveller a "transient trader," within the meaning of the Act or within the by-law of the City of Brantford.

In addition to the one argument addressed to us, counsel for the appellant handed in a carefully prepared argument in writing. I have read it with care, and I have consulted the cases cited; but I am unable to agree with the contention of the appellant.

To constitute the offence charged, the goods offered or sold must be goods in Brantford. I agree with the learned Judge appealed from.

The appeal should be dismissed with costs.

RIDDELL, J.:—The appeal should be dismissed, upon the short ground that before the magistrate there was no evidence, i.e., no legal evidence, of any offence. It is said that the magistrate disbelieved the defendant: that may be so—no tribunal is compelled to believe anybody, witness or party: Rex v. Van Norman (1909), 19 O.L.R. 447, at p. 449. But no tribunal can find the existence of any alleged fact proved simply because a witness or party who is not believed swears that it does not exist.

But, as it is desired to have a decision on the facts alleged, I would say that Mr. Wilkes, in his able and exhaustive argument, has entirely failed to convince my mind that the case followed by my learned brother, Rex v. St. Pierre (1902), 4 O.L.R. 76, is wrongly decided.

Nor am I able to draw any substantial distinction between that case and the present. To my mind, there is no difference in principle in taking orders for an article to be supplied from a distant city, whether what is produced to those from whom it is hoped to secure orders is a picture of the article, or a sample

of goods from the counterpart of which the article is to be made, or a sample of the article itself—in none of these cases are goods offered for sale.

The argument, when reduced to its lowest terms, was in reality based upon a supposed principle, dear to those concerned in raising revenue for municipalities, etc., that prima facie every one should be taxed for everything he does or leaves undone and on everything that he has.

But that is not the law yet. And the argument that "transient traders" should be held to include all who do any business in a municipality who do not pay taxes in and to the municipality must be addressed to the Legislature, not to the Court.

The appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—I agree in the result.

SUTHERLAND, J. MAY 6TH, 1912.

LEADLAY v. LEADLAY.

Will—Redemption Moneys Received by Executors — Loss on Realisation of Security—Apportionment between Capital and Income—Effect of Agreements—Amounts Advanced by Executors — Interest — "Legal Charges and Expenses"— Account.

Motion by the plaintiffs for judgment on the pleadings.

The plaintiffs were Mary I. Leadlay and Percy Leadlay, executrix and executor of the will of Edward Leadlay, deceased, Percy Leadlay, in his own right, and Gertrude Beemer and Annie Gertrude Parry, beneficiaries under the will; and the defendants were the other beneficiaries under the will.

The plaintiffs asked for a declaration as to what portion of the moneys received by the executors was principal or capital and what portion was income or revenue, and as to the effect of certain agreements.

C. Kappele, for the plaintiffs.

W. D. McPherson, K.C., for the defendants Ogden (except Charles E. Ogden).

R. G. Smythe, for the defendant Edward Leadlay.

E. C. Cattanach, for the infant plaintiffs.

SUTHERLAND, J. (after setting out the facts and referring to the will and the agreements and the proceedings in the redemption action of Saskatchewan Land and Homestead Co. v. Leadlay) :—It is clear from the will that, after payment of the annuity to the widow, the surplus income of the estate was intended to be divided annually among the children and grandchildren, as set out in paragraph 7 thereof.

The judgment of the Court of Appeal (in Saskatchewan Land and Homestead Co. v. Leadlay) was for redemption, and in pursuance thereof the Master found as follows:—

"(1) Balance of principal money due on the said mortgage, and of the moneys paid by the said defendants Leadlay under and upon the postponement agreement, and for the release of the equity of redemption, and of all proper allowances for taxes and other expenditures, including payments and expenses made or incurred in or about the care and sales of the mortgaged lands (the defendants Leadlay having accounted for lands sold as by said certificate is provided), and of all other principal moneys which the said defendants are entitled to recover under the said certificate of the Court of Appeal, together with interest thereon respectively at 6¼ per cent. per annum," etc.

The moneys received by the executors must be treated, I think, simply as received on a redemption of mortgaged lands.

The agreements referred to were, no doubt, entered into in good faith by the executors and in the interests of the estate. They are not questioned in this action by any of the parties; yet I do not see how they can be held to affect in any way the disposition of the moneys of the estate when they have come into the hands of the executors. It is conceded by every one that a considerable loss on the said security has occurred, and the question to be determined is, how and by what portions of the estate this is to be borne.

It is a case in which neither the capital nor the income should bear the entire loss: In re Moore (1885), 54 L.J. Ch. 432; In re Atkinson, [1904] 2 Ch. 160.

There will be a declaration that the amounts advanced from time to time by the executors, with 5 per cent. interest on the balances from time to time due, with annual rests, form a charge upon the money received by the executors, and that the net balance then remaining be apportioned between capital and income, upon the principle laid down in Re Cameron, 2 O.L.R. 756. The amount allowed for interest on the advances made by the estate will be income, as well as the amount allowed on

the apportionment. Reference also to In re Earl of Chesterfield Trust (1882), 24 Ch. D. 643; In re Hangler, Frowde v. Hangler, [1893] 1 Ch. 586. There will be a reference to the Master in Ordinary to take the account as indicated. The "legal charges and expenses" incurred by the executors previous to this action will be taken into account in determining the amount of the loss to be apportioned and before such apportionment is made. The costs of all parties to this action will be out of the estate, those of the executors as between solicitor and client.

RIDDELL, J. MAY 6TH, 1912.

MORGAN v. MORGAN.

Husband and Wife—Alimony—Settlement of Former Action—Agreement—Conveyance of Land and Chattels—Effect on New Action—Quantum of Alimony—Reference.

Action for alimony, tried at the London non-jury sittings.

T. G. Meredith, K.C., for the plaintiff.
J. M. McEvoy, for the defendant.

RIDDELL, J.:—The parties intermarried in 1875; in 1894, the plaintiff brought an action for alimony, which was settled by a written agreement. This provides that the plaintiff will "withdraw or settle" the action, and return to the defendant's home, on condition that he agree to support her properly and treat her in a fit and proper manner, pay all the costs of the action, and also convey to her an undivided one-half interest in certain land mentioned. It was further agreed that, in case she should be compelled to leave his home "for such just cause as would entitle her to obtain alimony" from him "for her support and maintenance while living separate and apart from him," she should "be entitled to obtain the custody and possession of all the infant children of the . . . parties."

A deed was made, reciting the pending action, "and whereas the said party of the second part has agreed with the said party of the first part to withdraw and settle the said suit or action in consideration of the said party of the first part conveying to her an undivided one-half interest in the lands hereinafter mentioned."

At the same time, a bill of sale was made by the defendant to the plaintiff of an undivided half interest in certain chattels. This bill of sale has recitals similar to those in the deed—although nothing is said in the written agreement as to the chattels. The bill of sale was not recorded; it contains, indeed, on its face, a stipulation that it is not to be recorded.

The defendant has remained in possession of the land and taken all the rents and profits; also of the chattels.

The plaintiff went back to live with the defendant; but he broke out again; his conduct is admittedly such as to justify the plaintiff leaving him; it is of a disgusting character, and I do not enlarge upon it.

An action for alimony was again brought, and came on for trial at the non-jury sittings at London.

The defence is based upon the agreement whereby the former action was to be withdrawn or settled.

Most of the argument was founded upon the hypothesis that the agreement was a sort of an arrangement for the wife's future support and maintenance by means of the lands and chattels conveyed to her. But that is not the case at all. There was an action pending; the defendant desired that it should be settled, and offered pecuniary inducements to the plaintiff in that view; the land and chattel interests were conveyed to her as part consideration of her settling the action and returning to the home of the plaintiff.

This is wholly different from a provision for maintenance in a separation deed, such as that in question in Gandy v. Gandy (1882), 7 P.D. 168—in which, moreover, there was a covenant not to sue for more—or that in Atwood v. Atwood (1893), 15 P.R. 425—and the like cases.

The effect of the arrangement, agreement, deed, etc., between the parties, was simply that the plaintiff withdrew her action, went back to live with the defendant as his wife, and he made an express covenant to do what the law held him bound to do, i.e., "to support and maintain" her "as his wife, and to treat her in a fit and proper manner as a wife should be treated." She became the owner of certain real and personal property—and, in view of the anticipated possibility of her being compelled to leave his home for such just cause as would entitle her to obtain alimony from him, for her support and maintenance, she was to have the children.

There is no provision here for future support and maintenance beyond that which is contained in his promise already implied by law; there is no suggestion that land or chattels

or both are to be for maintenance, etc.; no covenant not to sue for alimony; and it is clearly contemplated that she may receive alimony in case of future misconduct compelling her to leave his house.

The agreement then is not a bar to the action. But it is not wholly without effect. In considering the amount of alimony to be awarded, regard must be had not only to the station in life and position of the parties, but also to the amount and nature of the property of which each is possessed. In England a rule which is often followed—and, speaking generally, considered as a reasonable one—is to allot to the wife an annual payment equivalent to one-third the joint income. This will not as a rule be satisfactory in Ontario. In England, in most instances, those ordered to pay alimony are in circumstances of greater affluence than those in Ontario—and the relative amount supposed to be necessary for the support of a man and a woman widely differ in the two countries. The Court, nevertheless, in proceeding upon the sound principle of looking to what is just and reasonable, does not neglect to take into consideration the amount, yearly value, etc., of the property of both husband and wife.

In fixing the alimony, some attention will be paid to the fact that she has a half interest in the land and chattels. In the present action, of course, no order can be made (except on consent) that the husband is to pay to the wife half the rental of the property, and half the value of the chattels—but he must understand that at any time an action may be brought by the wife for a declaration of her rights and appropriate relief. I do not give any specific direction to the Master as to what effect to give to the condition of ownership and control of land and chattels; he will, however, in making his report give reasons for his decision.

There will be a reference to the Master at London to determine the amount of alimony to which the plaintiff is entitled, looking to what is just and reasonable under all the circumstances—the defendant will pay the costs of action and reference.

It may, perhaps, be assented to by all parties that the alimony be fixed at $300 per annum, the defendant also to pay to the plaintiff one-half the rent of the farm—I suggest this amount; and, if all parties agree, the judgment may go accordingly.

The defendant has bettered his condition substantially since the agreement; but that fact does not influence me.

FALCONBRIDGE, C.J.K.B. MAY 6TH, 1912.

HOOVER v. NUNN.

Lunatic — Deed — Conveyance of Land — Trust — Statute of Limitations—Action by Administrator of Lunatic's Estate —Inspector of Asylums—Costs.

Action by the administrator of the estate of Mary Augusta Hoover, deceased, to set aside a conveyance of land made by the deceased in 1870 and to vacate the registry thereof.

McGregor Young, K.C., and J. A. Murphy, for the plaintiff.
T. A. Snider, K.C., and S. E. Lindsay, for the defendants.

FALCONBRIDGE, C.J.:—Mary Augusta Hoover was born in 1845 or 1846. By patent from the Crown, dated the 17th November, 1851, she became owner of the north half of lot 3 in the 4th concession of Rainham. A deed dated the 6th April, 1870, and registered the 18th March, 1875, was executed by her, purporting to convey to her mother, Jane Walker, the said lands. Jane Walker, by her will bearing date the 2nd March, 1875, professed to devise the said lands, some of the defendants being beneficiaries under this will. Mrs. Walker died on the 21st March, 1887. Mary Augusta Hoover died on the 1st November, 1908, in the Asylum at Hamilton; and letters of administration of her estate were granted to the plaintiff, who is the eldest surviving uncle of the said Mary Augusta Hoover. The plaintiff brings this action, charging that the intestate was of unsound mind, and incapable of making a valid contract from 1869 to the time of her death, and claiming vacation of the registration of the deed to Jane Walker, and the vesting of the title of the said lot in the plaintiff as administrator.

Very clear evidence is given by Dr. T. T. S. Harrison, and others, of a condition of insanity existing from about the 16th November, 1869. Several cousins place it as far back as November, 1868; and the plaintiff from about the same time.

I find, on a review of the whole testimony, that Mary Augusta's insanity was not merely temporary, at least up to the date of the execution of the impeached deed; and, therefore, the burden is upon the defendants to shew that this deed was executed during a lucid interval: Attorney-General v. Parnther, 3 Bro. C.C. 441; Banks v. Goodfellow, L.R. 5 Q.B. 549, at p. 570; Russel v. Lefrançois, 8 S.C.R. 335.

The question would be, as stated by Pope, Law of Lunacy, 2nd ed., p. 262: "Was the alleged lunatic, at the date in question, capable of understanding the nature of the act she was performing?"

There is no direct evidence of any lucid interval. The plaintiff accompanied her mother (the grantee), not to Cayuga, their own county town, but to Goderich, a remote part of the Province, and there the deed was drawn in the office of a reputable firm of solicitors, both of whom are dead. One of them was the witness to the deed, and made the affidavit of execution.

I am asked, on the authority of Pope, p. 411, and Towart v. Sellers, 5 Dowl. P.C. 245, to hold that this is equivalent to the witness to the deed standing in the box and swearing that when she executed the deed she was sane. I decline so to hold. I know with what facility, in my own experience, decent solicitors and solicitors' clerks have acted as witnesses to deeds, and sworn that they "knew the said party," upon the faith of a mere introduction by an apparently respectable person.

I also disregard the formal statements in the discharges from the Asylum. They are on printed forms, and I do not think they are borne out by the material which should interpret them.

Therefore, I find that Mary Augusta Hoover never had a lucid interval from the 1st January, 1869, up to the end of her days—to the extent of being able to understand the nature of the execution of the deed. Mrs. Walker was, therefore, in possession of the lands under a void deed made by a lunatic; so that she was a trustee for her daughter; and the Statute of Limitations did not run against the lunatic or her representatives,

In 1887, after the death of the mother, the Inspector of Asylums entered into possession, taking out letters of administration of the will of Jane Walker, and he made five leases as administrator of the will annexed, and the consent of the Attorney-General for the time being was obtained, indicating to me that the Inspector was acting qua Inspector, and not as administrator. This would, I take it, in any event, be a possession by Mary Augusta Hoover before the expiry of the twenty years.

I give judgment setting aside the deed, and further as prayed in the statement of claim.

The defendant Nunn was authorised by the Court to defend the action on behalf of and for the benefit of all the beneficiaries

under the will of Jane Walker; and, therefore, he should have his costs as between solicitor and client out of the estate. He should not use this provision as ammunition further to attack this small estate. There is not much margin in it after debts due or paid by the plaintiff to the Asylum are deducted; and, if the defendant should appeal, the Court above may consider all the circumstances in dealing with the question of costs.

DIVISIONAL COURT. MAY 6TH, 1912.

FOXWELL v. KENNEDY.

Appeal to Divisional Court—Notice of Appeal—Untenable Grounds—Appeal Attempted to be Supported on other Grounds—Refusal of Leave to Amend—Con. Rules 312, 789*—Counterclaim—Sale of Land by Executor—Validity — Costs — Proceedings Taken to Harass and Embarrass Executor.*

Appeal by Robert Kennedy, a defendant by counterclaim, from the judgment of MEREDITH, C.J.C.P., in favour of James H. Kennedy, the counterclaiming defendant.

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

F. R. MacKelcan, for the appellant.

W. M. Douglas, K.C., for the Suydam Realty Company, defendants by counterclaim.

E. D. Armour, K.C., and A. D. Armour, for James H. Kennedy, plaintiff by counterclaim.

RIDDELL, J.:—In the counterclaim, James H. Kennedy is plaintiff; Gertrude Maud Foxwell, Madeline Kennedy, Robert Kennedy, David Kennedy, and the Suydam Realty Company are defendants. The claim sets out that James H. Kennedy is sole executor of the will of the late David Kennedy; that by the will James H. Kennedy was devised a residue of the estate of David Kennedy, consisting largely of unimproved lands, with power to sell, etc.; that he was thereafter entered in the land titles office as absolute owner in fee simple of all the lands of the estate, being all the lands sold to the Suydam Realty Company and others; that he, in September, 1910, contracted to sell certain lands, fully described, to the Suydam Realty Company;

that they accepted title on the 1st November, 1910, and asked for a short delay, which was granted; that, before the sale could be completed, and on the 12th November, Madeline Kennedy registered a caution, which was set aside on the 2nd December, 1910, at a cost to the plaintiff; that on the 12th November, 1910, Robert Kennedy filed a caution, which was removed on the 9th December, at a cost to the plaintiff; that Gertrude Maud Foxwell registered a caution on the 8th December, which still stands; that the succession duty amounts to $1,976.79, and the plaintiff has no funds to pay it; he claims interest from the Suydam Realty Company for the delay; and, if not, then from those who prevented the sale going through; he claims an order against the Suydam Realty Company to complete the sale and pay the balance of the purchase-money: he says that David Kennedy alleges that he, the executor, has no right to sell the land, and claims a lien thereon for an annuity left him by the said will; but that he (James), while admitting David's right to the annuity, claims the right to sell the land for the purposes of the estate, including paying David's annuity.

Robert Kennedy denies that the plaintiff is executor, and alleges that he has no right to sell the land; says that he (Robert) registered the caution to protect his own rights, and that the plaintiff has used the cash of the estate to pay his own solicitor, and to pay legacies, when he should have paid the succession duties.

To this there is a reply setting up an adjudication that Robert Kennedy had no interest in the land and an order vesting the lands in the plaintiff.

Madeline Kennedy denies the devise to the plaintiff; says that the entry of the plaintiff in the land titles office was by mistake and inadvertence; that the sale to the Suydam Realty Company is void; that she is entitled to a share in the proceeds of the sale of the land, and registered the caution to prevent a sale at a gross undervalue.

Upon this the plaintiff joins issue.

David Kennedy alleges that the lands belong to him and the other heirs at law of David Kennedy, deceased; that the sale is at a gross undervalue; that he has an annuity charged upon the lands, and the lands cannot be sold without his consent. He also sets up that the counterclaim should not be tried until the will be construed.

Upon this the plaintiff joins issue.

The Suydam Realty Company say that the plaintiff represented himself to be the owner in fee simple of the land; that

they did not accept title; that they are ready and willing to complete the purchase, and are not in default, but by reason of the delay they have been put to heavy loss.

Upon this the plaintiff joins issue.

All parties were represented by counsel at the trial before the Chief Justice of the Common Pleas.

Evidence was adduced shewing the facts as to title, cautions, etc.; and also the value of the lands.

After reserving judgment, the learned trial Judge made the following indorsement upon the record (we are informed that the learned Chief Justice made certain findings of fact at the time of the trial, but that for some reason the reporter did not take them down):—

"Upon my findings of fact, I direct that judgment be entered on the counterclaim as follows:—

"1. Declaring that the sale by the plaintiff to the Suydam Realty Company is not an improvident one or made at an undervalue.

"2. For specific performance by the last-named defendants of the agreement in the counterclaim mentioned.

"3. Ordering the defendants by counterclaim other than the defendants the Suydam Realty Company to pay to the plaintiff by counterclaim the costs of the counterclaim forthwith after taxation.

"4. And making no order as to costs between the plaintiff by counterclaim and the defendants the Suydam Realty Company."

Robert Kennedy (and he only) appeals.

The notice alleges as grounds: (1) that the judgment was contrary to evidence; (2) that no notice of trial was given him, and so he was taken by surprise, and failed to have his witnesses present; (3) that the plaintiff and the Suydam Realty Company are conspiring to defraud him and the other parties; (4) that the Chief Justice reserved judgment till an action now pending was tried, but that counsel for the plaintiff and the Suydam Realty Company attended the Chief Justice and made allegations (what, we are not told), and by consequence of these allegations the Chief Justice gave judgment; (5) that such delivery of judgment was irregular; (6) that the plaintiff and the Suydam Realty Company are conniving so that the said company can acquire the lands.

Perhaps a more extraordinary notice of motion never was filed (the present counsel is not responsible for it).

Upon the motion coming on for argument, no attempt was

made to support the motion on the grounds set out in the notice, nor was leave asked to amend the notice.

Con. Rule 789 provides: "Every notice of motion or appeal to a Divisional Court shall set out the grounds of the motion or appeal." "The Court . . . may, at any time, amend any defect or error in any proceeding; and all such amendments may be made as are necessary for the advancement of justice, determining the real matter in dispute . . :" Con. Rule 312. An amendment is not allowed in every case—and, while it is as of course in the ordinary case, it will not be made simply because a mistake has been made—and still less where no mistake has been made, but it is supposed that an opportunity will be afforded to hang an argument upon a different peg if the amendment be made.

From the notorious course of litigation in connection with this land, which is rapidly becoming and has indeed already become a scandal, it is perfectly plain that a number of the descendants of David Kennedy are acting together and in concert harmoniously to a common end, i.e., to embarrass the executor in his administration of the estate. And nothing we could do by allowing or directing an amendment to the present notice of motion, and giving judgment upon the new points, would be at all of advantage in putting an end to the litigation.

I, therefore, think we should simply dispose of the appeal upon the grounds set out in the notice of motion—and that the appeal should be dismissed with costs.

I have seen no reason to change the view formed during the argument, that, even if an amendment were allowed, the appeal could not succeed.

FALCONBRIDGE, C.J.:—I agree in dismissing the appeal with costs.

BRITTON, J.:—I cannot usefully add anything to what my brother Riddell has written. I agree in the result—that the appeal should be dismissed with costs.

MIDDLETON, J., IN CHAMBERS. MAY 7TH, 1912.

BROOM v. TOWN OF TORONTO JUNCTION.

Parties—Proposed Addition of Defendant—Improper Joinder—Limitation of Actions.

Appeal by the plaintiff from the order of the Master in Chambers, ante 1158, refusing to add A. J. Anderson as a party defendant.

The plaintiff, in person.
W. A. McMaster, for Anderson.

MIDDLETON, J.:—I think the judgment is correct, and ought to be affirmed. Mr. Anderson relies upon the Statute of Limitations. It appears to me that there is much to be said in favour of its application. Mr. Broom says that, with much research, he has been unable to find any case like this, and that he thinks the statute has no application. I do not think that this question should be determined upon an interlocutory application; and that there is sufficient reason for refusing the application when it appears that there is a substantial question as to the application of the Statute of Limitations which might be affected by the order.

It would be quite possible to protect Mr. Anderson as to this, by imposing a term that the action, as far as he is concerned, is not to be deemed to have been begun until the date of his addition as a party. But I do not think it is fair to add a party where the action has been pending so long and there have been so many interlocutory proceedings.

I find it impossible to understand the supposed cause of action; but it is clear that it differs altogether from the cause of action alleged against the other defendants, and that to add Anderson now would result in an improper joinder of parties.

Appeal dismissed with costs.

MIDDLETON, J., IN CHAMBERS. MAY 7TH, 1912.

HAWES GIBSON & CO. v. HAWES.

Evidence—Foreign Commission—Doubt as to Necessity for Evidence—Terms—Security for Costs—Alternative Order.

Appeal by the defendant from the order of the Master in Chambers, ante 1078.

F. R. MacKelcan, for the defendant.
H. D. Gamble, K.C., for the plaintiffs.

MIDDLETON, J.:—An application was made for a commission in this case before, and it was refused by a Divisional Court (ante 312), the majority of the Judges thinking that it had not been shewn to be necessary for the purposes of the record as it

then stood. Since then, the pleadings have been amended by both parties. The Master has taken the view that, upon this record, the applicant is entitled to the commission.

I have considered the record with much care, and have consulted one of the Judges sitting in the Divisional Court which heard the former application. I cannot satisfy myself that the commission is really necessary; but, at the same time, it is impossible to say with certainty that some necessity may not be revealed when the case actually comes to trial. I have, therefore, concluded to give to the plaintiffs their election between two courses; and in doing so I am much influenced by the fact that the action is in the name of an insolvent firm, being brought under the authority of the receiver at the instance of one or more creditors, against the wishes of another creditor or other creditors.

Under these circumstances, the plaintiffs may have the commission if they give security in the sum of $200, by bond or cash deposit of that amount, for the costs of the commission; the question of the necessity of the commission being reserved to the trial. Or, if the plaintiffs so elect, the order for commission will be vacated, and the motion will stand until after the facts are developed at the hearing, when, if the trial Judge finds that it is necessary to have a commission, the plaintiffs are to be at liberty to have the evidence sought taken under a commission, and the defendant must assent to the case then standing over for judgment until the evidence is received.

The precise terms of this alternative may be as finally settled in the case of Macdonald v. Sovereign Bank of Canada, ante 1006, where a similar order was made.

MIDDLETON, J., IN CHAMBERS. MAY 7TH, 1912.

BROWN v. ORDE.

Discovery—Examination of Plaintiff—Relevancy of Questions—Slander—Unfitness for Public Office—Innuendo—Questions as to Character and Standing.

Appeal by the plaintiff from an order of MACTAVISH, Local Judge at Ottawa, directing the plaintiff to attend and answer certain questions which he refused to answer upon his examination for discovery.

J. King, K.C., for the plaintiff.
H. M. Mowat, K.C., for the defendant.

MIDDLETON, J.:—The action is for slander. The plaintiff, a Controller of the City of Ottawa, complains that, whereas on the 10th November, 1911, upon the death of one James Davidson, Controller, he (the plaintiff) was appointed to fill the vacancy thus created, during the election campaign the defendant, at a meeting of the electors, spoke of the degradation of the civic government by the plaintiff's appointment to succeed Davidson, who stood head and shoulders above the other members. The innuendo alleges that this meant "that the plaintiff had neither the character, competency, capacity, ability, skill, nor knowledge properly to perform the duties of a member of the said Board of Control, or that the plaintiff had so misconducted himself that it was a public disgrace and insult to appoint him to the office of member of the Board of Control."

Upon the examination of the plaintiff for discovery, the defendant's counsel sought to examine him touching his character, competence, capacity, and ability. The plaintiff declined to answer any such questions; basing his refusal upon the ground that the words were spoken concerning him in his official capacity, and not in reference to his business capacity.

In the first place this is manifestly incorrect. The unfitness to occupy the public office, suggested by the alleged slander, arises from the general character and reputation and business standing of the plaintiff. In the second place, by the innuendo which I have quoted, the plaintiff has elected to bring his private character into the controversy; in fact, I do not see how he could do otherwise.

Upon this appeal the ground is entirely shifted; and I confess myself utterly unable to follow the learned argument presented by the plaintiff's counsel. He discarded entirely his own pleadings, and sought to treat the defendant's plea of fair comment as an attempt to justify; and then, so regarding the plea, sought to shew that the particulars furnished were not adequate.

It appears to me that this is dealing with something in no way in issue upon this motion. I have to take the pleadings and the supplementary particulars as they stand, and merely to determine whether the questions asked are relevant to the issues so raised. I cannot treat the motion as one attacking either the pleadings or the particulars. If these are insufficient for any reason, they must be attacked directly.

I think the questions were properly asked, and that the inquiry is entirely relevant to the issues raised.

The appeal must be dismissed with costs.

MIDDLETON, J., IN CHAMBERS. MAY 7TH, 1912.

RE RIDDELL.

Security for Costs—Claimant of Fund in Court—Residence out of the Jurisdiction—Real Actor.

An appeal by John Riddell from the refusal of the Master in Chambers to order the claimant Adelia Pray to give security for the costs of an issue with respect to certain moneys in Court.

C. A. Moss, for John Riddell.

T. N. Phelan, for Adelia Pray.

MIDDLETON, J.:—The fund in question is the proceeds of an insurance policy upon the life of the late James Riddell. By the original policy, the money was payable to his granddaughter, the claimant Adelia Pray. Subsequently, a new apportionment was made, by which the money was diverted to the claimant John Riddell. If Adelia Pray is the granddaughter of the assured, then the later apportionment is of no effect, because she would then be within the class of preferred beneficiaries, while the brother is outside of that class.

The real issue to be tried is the fact as to the relationship between Adelia Pray and James Riddell. It is said that she is not his grandchild, but was a child, by a former marriage, of the wife of John Riddell, son of James Riddell. She is resident out of the jurisdiction.

The case is governed entirely by Boyle v. McCabe, 24 O.L.R. 313. It is manifest that Adelia Pray is a real actor. She is a claimant upon the fund; and to succeed she must establish that she is a grandchild. It may be that the onus will shift when the document is produced in which the testator describes her as his grandchild; but this is not the test. If the insurance company had not paid the money into Court, and called upon her to prove her title, she would have had to sue. This shews that she is an actor, within the meaning of the rule established by the case referred to.

I recognise the hardship of the practice thus established, and would have preferred the view that, where the money is paid into Court, and those appearing to have claims upon it are brought before the Court for the purpose of establishing their claims or being for ever barred, security for costs should not be required; because the claim is not voluntarily put forth by

the claimant, and it is contrary to natural justice to call upon a claimant to establish his claim, and then impose terms which it must sometimes be impossible to comply with, and, by reason of the failure to comply, to bar the right.

This view, however, has not been adopted by decisions which are binding upon me.

The appeal will be allowed, and security ordered. Costs in the cause.

MIDDLETON, J. MAY 7TH, 1912.

*RE MATTHEW GUY CARRIAGE AND AUTOMOBILE CO.

Company—Winding-up—Directors—Misfeasance—Payment for Services as Workmen and Clerks—Companies Act, sec. 88.

An appeal by the directors of the company, in liquidation, from an order of the Master in Ordinary, dated the 1st April, 1912, upon the return of a misfeasance summons, whereby he directed the directors severally to repay certain sums received by them from the company in remuneration for services rendered.

F. S. Mearns, for certain directors.
W. S. McBrayne, for other directors.
G. H. Kilmer, K.C., for the liquidator.

MIDDLETON, J.:—After most careful consideration, I am unable to agree with the learned Master. I adhere to the views expressed in Eastmure's Case, 1 O.W.N. 863, as to the wide effect to be given to sec. 88 of the Companies Act, 7 Edw. VII. ch. 34; but I think this case entirely differs from any of the reported decisions, and falls quite outside the section.

The company was incorporated for the purpose, inter alia, of manufacturing automobiles. F. M. Guy was a practical mechanic, and worked at manual labour in the company's shop, receiving a weekly wage of $15. Daniels also worked, first in the factory and afterwards as a stenographer in the office, receiving the ordinary wage paid to those in like employment. Walter was employed as a painter and varnisher in the factory. Armstrong was the company's bookkeeper. All of these men had been employed by Matthew Guy, the original owner of the business, before it was taken over by the incorporated company; and a

*To be reported in the Ontario Law Reports.

formidable contention is made on behalf of these directors that it was part of the original understanding, upon the transfer of the business, that the company should assume the existing contracts with employees; but I prefer not to base my judgment upon this aspect of the case. . . .

There is much to be said in favour of the contention put forward by the appellants, that sec. 88 relates to the payment of the president or director for his services rendered in his official capacity, and that it was not intended to deal with payments made to him for services rendered in any other capacity. This seems to have been the view entertained by Mr. Justice Meredith in Mackenzie v. Maple Mountain Mining Co., 20 O.L.R. 615. . .

But I think that the Courts have adopted a wider view of the statute, and that it must be taken to apply to all cases in which a by-law is necessary for the payment, and to cover the remuneration of all officers of the company whose appointment should properly be made by by-law: Birney v. Toronto Milk Co., 5 O.L.R. 1. . . .

[Reference to that case and quotation from the judgment of Street, J.]

I have neither the right nor the inclination to narrow this statement of the law, when rightly understood; but, bearing in mind that it was spoken of an employment for which a by-law is necessary, and that the section itself does not prohibit the remuneration of a director, but merely renders invalid any by-law, I do not think that there is any warrant for extending the principle to cases in which the director has acted as a mere workman or clerk and has been remunerated at a rate not exceeding the value of the services rendered at the ordinary market-price.

I think that the principle applicable is analogous to that applied to ultra vires contracts, where the company has received the benefit. It cannot retain the benefit without paying a fair price. If the effect of the statute is somewhat larger than I have indicated, and renders invalid the contract of hiring, then the directors have, as servants of the company, in the discharge of the manual and clerical services which they have respectively rendered to the company, a right to receive a quantum meruit for those services. It is not suggested that they have received more than this. Therefore, they have not been guilty of misfeasance.

I do not find anything in the decided cases opposed to this view. . . .

[Reference to Eastmure's Case, supra; Burland v. Earle, [1902] A.C. at p. 101.]

I think the true intendment was, that, upon the taking over of these carriage works by the incorporated company, the former employees were intended to continue to render similar services and to draw the same remuneration as they had theretofore received. I do not put this as being part of the bargain, but as being the result of their continuation in the employment.

Re Morlock and Cline Limited, 23 O.L.R. 165, is very close to this case; and, as I had some doubt whether it might not be regarded as determining the point in a way opposed to my present view, I availed myself of the privilege of discussing it and Benor v. Canadian Mail Order Co., 10 O.W.R. 1091, with my brother Riddell; and he tells me that, in his view, these cases are not opposed to the opinion which I have formed. In the Benor case a by-law was clearly necessary, and in the Morlock case the distinction between cases in which a by-law is necessary and cases of the employment of a mere servant was not suggested.

For these reasons, I think the appeal succeeds, and should be allowed with costs here and below.

DIVISIONAL COURT. MAY 9TH, 1912.

MALOUF v. LABAD.

Company—Shares—Seizure and Sale under Execution—Illegality—Want of Proper Service of Notice—Execution Act, 9 Edw. VII. ch. 47, secs. 10, 11—Place of Head Office of Company—Place of Service—Situs of Shares—Collusion—Setting aside Sale.

Appeal by the defendants other than the defendant Varin (Sheriff) from the judgment of KELLY, J., ante 796.

The appeal was head by MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ.

E. Meek, K.C., for the appellants.

R. McKay, K.C., for the plaintiffs.

RIDDELL, J.:—In the view I take of this case, I do not think it necessary to consider the effect of the alleged collusion, etc.—but I would rest the judgment upon the simple ground that the stock was never legally seized.

In the application of a statute making exigible what was not exigible at the common law. we must attend to the exact wording of the statute; and, where the statute prescribes a

method of procedure, that method must be followed at least in substance: Goodwin v. Ottawa and Prescott R.W. Co., 22 U.C.R. 186.

There can be no doubt that the stock would not have been exigible at the common law: Morton v. Cowan, 25 O.R. 525. The first statute in Upper Canada is that of 1831, 2 Wm. IV. ch. 6; and the original of all the subsequent legislation is in 1849, 12 Vict. ch. 23. The statute now in force, and so often referred to in the course of the argument, i.e., the statute of 1909, 9 Edw. VII. ch. 47, sec. 11(1), is the same (with mere verbal differences) as the original Act of 1849, 12 Vict. ch. 23, sec. 2—it indeed makes a definite provision that the seizure shall be deemed to be made from the time of the service of writ and notice, which had been judicially decided as being the effect of the former statute: Hatch v. Rowland, 5 P.R. 223.

Sub-section (2) of sec. 11 appears for the first time in the statute of 1909; and I do not think it at all limits the effect or generality of sub-sec. 1, which contains the old law. But I think it is of the greatest importance as shewing what the old law was. If it were the law that the Sheriff could go outside of his county and serve a company, or could serve by sending a letter outside the county, there would be no necessity of any such provision—it is needed only if the Sheriff cannot find the company within his county, and cannot serve in any other way than within his county, and by a real "service," not by sending a letter.

The result is, I think, that the statute means that the Sheriff may seize: (1) if the company, i.e., the head office of the company, be within his county; or (2), if the company has within his bailiwick a place at which service of process may be made.

And this accords with the well-known limitation of the powers of a Sheriff. Like the vice-comes whose place he has taken, his authority is confined to the county of which he is Sheriff; if he executed a writ out of his county, he was a trespasser: Watson on Sheriffs, pp. 74, 121; Churchill on Sheriffs; Murfree on Sheriffs, sec. 114, and cases cited; Hothet v. Bessy, Sir T. Jones 214; State v. Harrell (1842), Geo. Dec. 130; Dederich v. Brandt (1896), 16 Ind. App. 264; Morrell v. Ingle (1879), 23 Kan. 32; Baker v. Casey (1869), 19 Mich. 220; Worboe v. Humboldt (1879), 14 Nev. 123, at p. 131; Jones v. State (1888), 26 Tex. App. 1, at p. 12; Re Tilton (1865), 19 Abb. Pr. 50.

I do not, of course, suggest that a Sheriff may not do any act out of his county which a private individual may do, as, e.g.,

serve a writ of summons, etc.; what is meant is, that he cannot act officially out of his county.

In none of the cases in our Courts in which the matter has come up was there a seizure by a Sheriff except when the head office of the company was in his bailiwick: Robinson v. Grange, 18 U.C.R. 260; Goodwin v. Ottawa and Prescott R.W. Co., 22 U.C.R. 186; In re Goodwin, 13 C.P. 254; Hatch v. Rowland, 5 P.R. 223; Brown v. Nelson, 10 P.R. 421; Morton v. Cowan, 25 O.R. 218; Brock v. Ruttan, 1 C.P. 218. In the first-named case, which was an action against the Sheriff of Brant for not seizing certain stock, Sir John Robinson, C.J., says: "As the plaintiff only attempted to prove that there were goods belonging to Banks (the debtor) by shewing that there was some stock in a building society in the county of Brant which might have been used to pay Banks's debt, although it was not stock standing in his name, it was incumbent on him to shew that the Sheriff had notice of this stock so situated in time to levy upon it; for, this not being, like goods, visible in the possession of the debtor, the Sheriff could not be presumed to have knowledge of it." This, of course, is not conclusive that the head office of the company must (before the amendment of 1909) have been within the bailiwick, as that point was not in question, but it is suggestive.

So, too, in Nickle v. Douglas (1874), 35 U.C.R. 126, when it was argued that stock in the Merchants Bank, whose chief place of business was Montreal, the stock being owned by a resident of Kingston, was exigible in Kingston by virtue of C.S.C. ch. 70 (the same as 12 Vict., in substance), the Court of Queen's Bench said (p. 143): "Although it was argued that the Sheriff could seize and sell the bank stock of a resident of this Province which he held in a bank in Quebec, the statutes, which were referred to for the purpose, by no means bear out that argument." This also is not conclusive, as the real point in the case was whether such stock could be assessed.

Nowhere, however, can I find any suggestion that the Sheriff's power in the case of stock is any greater than in the case of visible chattels.

The legislature, recognising the limitations of the Sheriff's power, and that the service by him required by the statute is an official service, have given him power to serve, not only when the company is within his bailiwck, but also when there is a place within his bailiwick where he can serve upon the company as though the company were there domiciled. But this is the whole extent of his power.

The company had its head office in Ottawa, but did most of its work in Montreal. Assuming that the appointment of

Mr. S. White as agent for service was wholly valid, he was not served. Service on MacFie was ineffective—delegatus non potest delegare. No other act was done by the Sheriff within his bailiwick; and I think the statute had not been complied with.

For this reason only, I think no valid seizure was made and no valid sale effected.

The appeal should be dismissed with costs.

MULOCK, C.J., and CLUTE, J., agreed in dismissing the appeal.

MACMAHON v. RAILWAY PASSENGERS ASSURANCE CO.—MASTER IN CHAMBERS—MAY 6.

Evidence—Foreign Commission—Anticipated Motion for—Suggested Term—Premature Application.]—The action was on a policy of life assurance. The assured died abroad, very shortly after the issue of the policy. The action being at issue, and the plaintiff, the sole executor of the deceased, being on his way to Europe and expecting to be at the place where the assured died, for a month or six weeks from the 20th May instant, and supposing that the defendants would probably ask for a commission to take evidence as to the death of the assured at the place where it occurred, moved for an order directing that, "if any commission is applied for and issued to take evidence . . . the said commission be executed at some time between the 20th day of May and the 30th day of June, 1912." The Master said that no precedent for such an order was cited, nor had he found any. The motion seemed premature, and to suggest a term that might be considered if the defendants should apply for such a commission; but, on the argument, their counsel was not prepared to say whether they would or not. Motion dismissed, with costs to the defendants in any event. H. E. Rose, K.C., for the plaintiff. Shirley Denison, K.C., for the defendants.

MACMAHON v. RAILWAY PASSENGERS ASSURANCE CO. (No. 2)—MASTER IN CHAMBERS—MAY 6.

Discovery—Examination of Plaintiff—Action on Life Insurance Policy—Issue as to Age of Assured—Production of Marriage Certificate—Relevancy—Affidavit on Production.]—In this action on a life insurance policy, one of the defences was that the age of the assured was incorrectly given. On the examination of the plaintiff for discovery, he was interrogated on this point, and was asked to produce the marriage certificate of his mother, the assured. No such document was mentioned in the plaintiff's affidavit on production, and his counsel objected to these questions as being an attempt to cross-examine on the affidavit on production. The plaintiff did not say whether he had it or not; but stated that he was informed that the marriage took place at Belleville, Ontario, in what year he could not say. He stated facts as to his own birth and that of his elder brother, which would agree with 1864 as the date of the marriage. He further stated that he had no record of his mother's age, and that all his inquiries on the point had been fruitless. He was then asked again as to the marriage certificate, and the objection of his counsel was again made and sustained by the examiner. The defendants moved for an order requiring the plaintiff to answer the questions, and to produce the marriage certificate therein referred to, and to make a further affidavit on production. The Master said that it was to be observed that the plaintiff had never admitted that he had at any time any marriage certificate of his parents. It was, therefore, clear that the motion, so far as it asked for a further affidavit, was made too soon. (The Master referred to Standard Trading Co. v. Seybold, 1 O.W.R. 650.) Counsel for the defendants stated that he was willing to accept the statement of the plaintiff's solicitors as to whether there was a marriage certificate in existence, and if the plaintiff had seen it or had had it in his possession. The Master said that the defendants were entitled to this, on the ground that the true age of the assured was in issue, and the production of the certificate *might* enable the defendants to obtain conclusive evidence on this point. (See Attorney-General v. Gaskell, 20 Ch. D. 528, cited in Bray, p. 112.) This was the more important as the plaintiff admitted that, a month before her death, his mother said, "I am about sixty-four." One of the conditions of the policy was that the assured was on the 11th April, 1911, not sixty-two. If the solicitors were not able to give this information, there must be further examination before the

trial. Success having been divided, costs of the motion to be costs in the cause. Shirley Denison, K.C., for the defendants. H. E. Rose, K.C., for the plaintiff.

MILLS v. FREEL—RIDDELL, J.—MAY 6.

Highway—Forced Road Substituted for Road Allowance—Right to Portion of Road Allowance in Lieu thereof.]—Action for a declaration that the plaintiffs were entitled to part of the 10th concession road allowance in the township of East Nissouri, in lieu of a forced road taken from the plaintiffs' land, for which no compensation was paid to the plaintiffs or their predecessors in title, and for an injunction and other relief. The learned Judge said that further consideration had not changed his opinion formed at the trial. Action dismissed with costs, including all costs over which the trial Judge has control. J. M. McEvoy, for the plaintiffs. E. Meredith, K.C., and W. R. Meredith, for the defendants.

GALLAGHER v. ONTARIO SEWER PIPE CO.—DIVISIONAL COURT—MAY 6.

Deed—Grant of "Sewer Pipe Clay"—Deposit on Land—Removal—Time—Depth of Deposit—Reformation of Deed—Agreement—Future Rights.]—Appeal by the plaintiff from the judgment of TEETZEL, J., ante 742. The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ. The Court dismissed the appeal with costs. C. W. Bell, for the plaintiff. J. A. Macintosh, for the defendants.

CHEESEWORTH v. DAVISON—DIVISIONAL COURT—MAY 7.

Contract—Mining Venture—Syndicate — Breach of Agreement—Return of Money Paid—Damages—False Representations.]—Appeal by the plaintiff from the judgment of SUTHERLAND, J., ante 606. The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ. The Court dismissed the appeal with costs. W. D. McPherson, K.C., for the plaintiff. J. T. White, for the defendant.

ROGERS v. WOOD—MASTER IN CHAMBERS—MAY 8.

Summary Judgment—Con. Rule 603—*Action against Directors of Company for Wages—Companies Act, sec.* 94—*Affidavit of Solicitor's Agent—Claim of Plaintiff.*]—Motion by the plaintiff for summary judgment under Con. Rule 603, as against all the defendants except Bennett. The action was against directors of a company for wages, the plaintiff having an unsatisfied judgment against the company, as in Lee v. Friedman, 20 O.L.R. 49, on the effect of 7 Edw. VII. ch. 34, sec. 94 (O.) The Master said that the judgment in that case made it plain that the action was maintainable in its present form, and that Herman v. Wilson, 32 O.R. 60, was decided on the pleadings and was not applicable. That, however, was not decisive of the present motion, to which two objections could be taken. First, the only affidavit in support of the motion was made by a member of the firm of solicitors who were agents for the plaintiff's solicitor. This recited the proceedings leading up to the present action, and alleged that the deponent had knowledge of the matters in question, and that the defendants were indebted to the plaintiff as claimed. Although this was stated in this positive way, it might be fairly assumed that the deponent, as to this last fact, was not speaking of his own knowledge. This would ordinarily be known only to the plaintiff or his solicitor—but not to that solicitor's agent. For the reasons given in Great West Life Assurance Co. v. Shields, 1 O.W.N. 393, the motion should not be granted. It also was at least doubtful whether Con. Rule 603 could be applied in cases of this kind. The judgment against the company was by default, and was not binding on these defendants, as stated by Britton, J., in Lee v. Friedman, 20 O.L.R. at p. 55. It appeared that these actions had always gone to trial, as, for instance, George v. Strong, 1 O.W.N. 350, as well as the Lee case. There was no trace of any motion such as the present in such actions. There was a question also as to the position of the plaintiff. His claim was for $300 out of the total of $826.40. It was alleged that he was not "a labourer, servant, or apprentice," but occupied the position of foreman or contractor. This could not be disposed of on affidavit evidence. Motion dismissed; costs in the cause; the trial to be expedited. Irving S. Fairty, for the plaintiff. Charles Henderson, J. M. Ferguson, and W. H. Price, for the responding defendants.

CONKLE v. FLANAGAN—MASTER IN CHAMBERS—MAY 9.

Venue—Change—County Court Action—Issues for Trial—Evidence—Convenience—Expense.]—Motion by the defendants for an order transferring the action from the County Court of the County of Wentworth to the County Court of the County of York, in the following circumstances. It was admitted that a verbal contract was made in March, 1912, at an interview between the two plaintiffs and the defendant Flanagan, at which no one else was present. It was then arranged that a boxing entertainment was to be given before the National Sporting Association Limited, at Toronto. The only issue was as to the amount which the plaintiffs were to receive out of the receipts. They claimed one-half of the gross receipts. The defendants said that they were to pay only fifty cents for every one who attended the entertainment. This sum had been paid. The plaintiffs sued for $334.50, alleging that the gross receipts were $1,338. This, while formally denied in the statement of defence, was not disputed in the two affidavits of the defendant Flanagan filed on this motion. The Master said that, whether this was so or not, the exact figures could be found on examination of the books of the association on discovery; and it should not be necessary to give oral evidence at the trial. The main issue was on the plaintiffs, who must satisfy the Court of the terms of the agreement as they presented them. It was argued that the defendants would have to give evidence of the terms on which such bouts are usually arranged by the managers of other similar associations in Toronto. But such evidence would not be admissible, as the plaintiffs were suing on an express agreement. Considering the short distance between Toronto and Hamilton, and the frequent communication, making it possible to have the trial at Hamilton, without the witnesses being absent from home a single night, the Master thought that it was not a case for obliging the plaintiffs to conduct the subsequent proceedings in the county of the defendants, instead of in their own. Motion dismissed; costs in the cause. If the trial Judge thinks fit, he can apportion the costs of the witnesses on application to him for that purpose. See Rice v. Marine Construction Co., 3 O. W.N. 1080, and cases cited. J. G. O'Donoghue, for the defendants. A. M. Lewis, for the plaintiffs.

RE PIPER—DIVISIONAL COURT—MAY 9.

Will—Construction—Part of Estate Undisposed of—Distribution as upon Intestacy—Residuary Clause—Intention—Evidence of Conveyancer — Rejection.] — Appeal by Rebecca Piper, widow of the testator, from the judgment of MIDDLETON, J., ante 912, construing the will of John Mill Piper. The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ. The Court dismissed the appeal with costs. W. E. Raney, K.C., for the appellant. I. F. Hellmuth, K.C., for David H. Piper and others. E. C. Cattanach, for the Official Guardian.

ADDITION AND CORRECTION.

In Mercantile Trust Co. v. Canada Steel Co., ante 980, add, in p. 982, after the reference to King v. Northern Navigation Co., 24 O.L.R. 643, ante 172, a reference to Pettigrew v. Grand Trunk R.W. Co., 2 O.W.N. 709.

In the same page, the 6th paragraph should read: "In the present case, as in that just mentioned, it is not the fact that the dangerous act," etc.
