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COURT OF APPEAL.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

NOBLE v. NOBLE.

Limitation of Actions—Recovery of Land—Possession—Evidence of Tenancy—Registered Discharge of Mortgage—Legal Effect of—New Starting-point—Registry Act—Purchaser Claiming under Mortgagee—Stranger to Estate Obtaining Discharge.

Appeal by the defendant from the judgment of a Divisional Court reversing the judgment at the trial of MULOCK, C.J.Ex.D. The action was brought to recover possession of land in Brantford, and the defence was the Statute of Limitations. The case is reported in 25 O.L.R. 379, where the facts are set forth.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

M. K. Cowan, K.C., for the defendant.
W. S. Brewster, K.C., for the plaintiff.

GARROW, J.A.:—The case naturally divides into two branches; the first as to the nature and terms of the occupancy of the land by the defendant and her late husband, and the second as to the legal effect of the registered discharge of mortgage.

Upon the first branch Mulock, C.J., held that the occupancy began as a tenancy at will, which was never afterwards interrupted or changed, and that at the end of ten years from the end of the first year of the tenancy the statutory bar against the plaintiff was complete.

And upon the second branch, that the discharge of mortgage and registration did not have the effect contended for, of giving a new right of entry or starting point under the Statute.

I agree with Mulock, C.J., upon both branches.

As to the first, in so far as it depends upon facts concerning which there was conflicting evidence, the finding of the trial Judge should not upon general principles, have been disturbed.

But, apart from that, I am with deference quite unable to see in the evidence as a whole any circumstance which would justify the inference drawn by the Divisional Court that the tenancy at will originally existing was ever put an end to, or a new tenancy of any kind created: see, in addition to the cases referred to by the learned Chancellor, McCowan v. Armstrong, 3 O.L.R. 100.

The second branch seems to largely depend upon the proper construction of the Registry Act, now 10 Edw. VII. ch. 60, sec. 62, as amended by 1 Geo. v. ch. 17, sec. 31, which provides that a certificate of discharge shall when registered be (1) a discharge of the mortgage; (2) as valid and effectual in law as a release and (3) as a conveyance to the mortgagor his heirs or assigns of the original estate of the mortgagor.

The plain object intended to be attained is merely by a short and simple form to discharge from the title the encumbrance created by the mortgage, which, in equity at least, was never considered as more or other than a charge, the beneficial ownership remaining in the mortgagor.

The language does not say that the certificate is a release or is a conveyance, but it shall, of course for the purpose intended, have the effect of a release, and a conveyance. Such being the clear purpose, it seems to me that the proper construction is that placed upon similar language by Street, J., in Brown v. McLean, 18 O.R. 533, at page 535, as "merely replacing the mortgagee's estate in the person best entitled to it, without allowing it to affect the real rights of any person."

Nor can it make any difference in the proper construction, that the question arises in such a case as this, where the estate to be benefited is one acquired under the Limitations Act. At the time of the registration of the discharge the plaintiff's title had, under the provisions of sec. 16 of that Act, now 10 Edw. VII. ch. 34, if I am right as to the first branch, been extinguished for over four years, during which the defendant and those claiming under her late husband had been the statutory owners of the equity of redemption. Statutes of limitation have been called beneficial statutes inasmuch as they are "Acts of peace,"

and the rule of strict construction does not apply to them. That does not, of course, mean that the Court should assist an imperfect title set up under the Statute, or overlook fraud or dishonesty where they are elements in the statutory title attempted to be made out. Nothing of the kind, however, appears in this case, for I find it impossible to doubt upon the whole circumstances appearing in evidence, that what the plaintiff now desires to do is to recall, for a reason not avowed, an apparently not unreasonable bounty intended by him for the benefit of his son, now dead. This does not, of course, prevent him from standing upon his legal rights, if any, but on the other hand the statutory title, if any, acquired by the defendant is not the proper subject of prejudice because it was so acquired, but should stand upon the same footing as any other title recognised by the law.

In so far as "land" is concerned (interpreted in sec. 2(c)) the whole estate is prima facie affected by an opposing possession, exceptions however, being made in favour of future estates, disabilities, mortgagees, concealed fraud, etc. But none of the exceptions can, as I read them, be made to reasonably include such a case as this, where the plaintiff's estate had been absolutely extinguished. How would it be if the plaintiff had obtained the discharge before the expiry of the ten years need not now be determined. That was the situation in Henderson v. Henderson, 23 A.R. 577, in which the question was considered by Maclennan, J.A., who arrived at the conclusion that the registration of the certificate of discharge gave a new starting point or right of entry. Burton, J.A., agreed, but the other members of the Court, Hagarty, C.J., and Osler, J.A., declined to express an opinion upon the point which, in the view they took of the facts, was not necessary.

In the following year a somewhat similar point was considered in the English Court of Appeal, in Thornton v. France, [1897] 2 Q.B. 143, in which the authority of Doe d. Baddeley v. Massey, 17 Q.B. 373, the case upon which Maclennan, J.A., mainly relied, was somewhat shaken, and was certainly not followed, but distinguished. In the Baddeley v. Massey case it is said, page 382, that the construction there maintained was necessary for the protection of mortgagees. And if the fact is as stated by Chitty, L.J., at page 157 of Thornton v. France, that the mortgagee in Baddeley v. Massey joined in the conveyance with the mortgagor, for the purpose of recovering the money due on the mortgage, and of conveying the legal estate to the purchaser, the conclusion that the purchaser was, under the

circumstances, a person claiming under the mortgage, as well as the mortgagor, was not perhaps unreasonable. In Thornton v. France the mortgage, it is worth noting, was after what I may call the adverse possession had commenced, and it was held that time was running against both mortgagor and mortgagee; in other words that the giving of the mortgage, under such circumstances, did not affect the operation of the statute.

[Reference to Heath v. Pugh, 6 Q.B.D. 345, in which the whole subject is very fully considered in the Court of Appeal by Lord Selborne, L.C., afterwards affirmed in the House of Lords, 7 A.C. 235; Ludbrook v. Ludbrook, [1901] 2 K.B. 96, and Cameron v. Walker, 19 O.R. 212.]

But all these cases differ widely from the present. When the plaintiff here obtained the discharge, he was a stranger to the estate, and had, therefore, no estate or interest to be enlarged by paying off the mortgage and obtaining a statutory discharge. He might, of course, as in Ludbrook v. Ludbrook, have taken an assignment of the mortgage, for he was under no obligation to the defendant to pay it, and in that way have fully protected himself to the extent of the payment. He may even yet, upon the principle applied in Brown v. McLean, be able in another action to establish a lien to the extent of the payment. With that, however, we have here nothing to do, for although leave was sought at the trial to set up such a claim, the application was, quite properly at that stage, disallowed.

Upon the whole, I am of the opinion that the appeal should be allowed with costs and the judgment at the trial restored.

MACLAREN, J.A.:—I agree.

MAGEE, J.A., also concurred in the result, giving reasons in writing.

MEREDITH, J.A., dissented from the opinion of the majority of the Court, giving reasons in writing.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

McDOUGALL v. GRAND TRUNK R.W. CO.

Railway—Alighting from Train while in Motion—Negligence—Contributory Negligence—Conflict of Evidence—Absence of Pullman Ticket—Trespasser—Reasonable Action—Emergency.

Appeal by the defendants from the judgment in an action tried by Meredith, C.J., and a jury. The plaintiff was a passenger from Toronto to Weston, where, on descending from the train, he fell and was run over by the rear car and lost an arm. The jury awarded him $2,500.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

D. L. McCarthy, K.C., for the defendants.

F. E. Hodgins, K.C., and A. C. Heighington, for the plaintiff.

MACLAREN, J.A.:—The chief dispute was whether the vestibule doors at the rear of the day car, in which the plaintiff and a friend were riding, were open or closed while the train was standing at the Weston station. It was assumed throughout, that if these doors were closed it would be negligence on the part of the company. The conductor and the brakesman of the train swore that they had remained open as usual from Toronto, and were only closed after the train started from Weston. Plaintiff and his companion, Gidney, swore that they were in the rear seat of the rear day car, that when "Weston" was called out, and the train was slowing down they arose and went into the rear vestibule, and finding all the doors closed, Gidney tried first to open the doors at the rear of the day car, and finding them "stuck" he next tried those at the front of the first Pullman with a like result. He then rushed into the Pullman car followed by the plaintiff, and passing the porter hurried into the rear vestibule, reaching it just as the train was starting. Gidney opened these vestibule doors and descended safely to the ground east of the station platform. Plaintiff following him closely tried to do the same, but stumbled and fell under the rear car near the eastern end of the platform with the result stated.

The learned Chief Justice, with the acquiescence of counsel, submitted only two questions to the jury, reserving to himself the decision of the other points in the case. The two questions and the answers of the jury were: "(1) Were the trap doors down and the vestibule doors closed between the car upon which the plaintiff was a passenger and the Pullman car in rear of it, when the train came to a stop at Weston? A. Yes. (2) At what sum do you assess the plaintiff's damages? A. $2,500."

Meredith, C.J., thereupon held that the plaintiff had acted reasonably in what he did, and that there was nothing in the rate at which the train was proceeding to make it manifestly dangerous for him to attempt to get off the way he did, and entered up judgment for $2,500. The evidence was that the train was going at the rate of three or four miles an hour when the plaintiff fell. The finding of the Chief Justice as to the danger is quite in accord with the principles laid down by this Court in Keith v. Ottawa and New York R.W. Co., 5 O.L.R. 116, which is some respects is similar to this case, and the correctness of his decision on this point was not challenged by the defendants either in their reasons of appeal or the oral argument before us.

Counsel for the defendants, however, claimed that on the evidence the jury should not have found that the rear vestibule and trap-doors of the day car in which plaintiff was riding were closed during the time the train was standing at Weston station. On the one hand they had the conductor and brakesman (two interested witnesses) swearing they were not; while on the other they had the plaintiff and Gidney (only one of them interested) swearing the opposite, and giving particulars of Gidney having actually tried to open them before the train started. They believed the latter, as it was their privilege to do, and no sufficient reason has been given to us to interfere with their verdict on this point.

While the counsel for the defendants as just stated did not criticise the holding of the trial Judge as to the speed of the train not making it manifestly dangerous or negligent for the plaintiff to attempt to alight, he did urge very strongly that, as the plaintiff had only a first class ticket he had no right to enter the Pullman at all, that he was a mere trespasser to whom the Company owed no duty (probably the first time on record in which such a claim was put forward), and that the vestibule and trap doors being closed, there was not only no invitation to him to alight that way, but an express prohibition to attempt it.

I do not think the fact of the plaintiff being only a first class passenger has anything to do with the present case. A first class, or even a second class passenger, may have a right under certain circumstances to pass through a Pullman car in embarking upon, or alighting from, or in simply passing through a train. The question is, did he act reasonably? It may be noted here that there is no evidence that the plaintiff knew this car was a Pullman until he had got some distance inside and saw the berths made up, and by that time he was much nearer the exit in the rear and would know that he could reach it much sooner than that in front, if such a thought as turning back had then occurred to him.

Bearing in mind that the only point on which there was a conflict of evidence has been disposed of by the verdict of the jury, what are the proved facts that are material to the case? The plaintiff after the brakesman called out "Weston" as the train was slowing down, went to the proper place for him to alight, no notice having been given to him to go elsewhere. Finding all the doors closed, his companion who was in front tried first to open the vestibule doors of the day car, and finding them "stuck," next tried those of the front of the Pullman with a like result. Then they started to go through the Pullman car. It was agreed that he could have turned back and gone to the front of the day car. He did not know that that was open to him any more than the place they had just tried. It was perhaps even more natural that they should continue to press on in the direction in which they had started, rather than retrace their steps. But plaintiff from his experience knew that the train stopped only one or two minutes, and he had now only some seconds to make his exit. A man who in such an emergency comes to a decision that may not be the wisest is not on that account necessarily negligent. It was quite natural that he should follow his friend where the way was apparently clear, and where the friend made his way out in safety. Although the defendants had negligently closed him in, it was his duty to make all reasonable efforts to get off, rather than to remain passive and then seek damages from the company for having carried him beyond his destination. The company having negligently closed his natural means of getting off the train, without notice to him, were guilty of negligence in starting the train before he had sufficient time to get off by the means he adopted, which under the circumstances was not a negligent or unreasonable or improper way or method, and the injury he sustained was the direct result of such negligence. I can find no sufficient ground for reversing the finding of the trial Judge.

The appeal in my opinion should be dismissed.

GARROW, J.A., and MAGEE, J.A., concurred in the result, the former giving reasons in writing, while MEREDITH, J.A., dissented from the opinion of the majority of the Court, giving written reasons.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

REINHARDT BREWERY, LIMITED v. NIPISSING COCA COLA BOTTLING WORKS.

Interpleader Issue—Evidence—Credibility—Onus—Bill of Sale —Possession—Holding out.

Appeal by the defendants from the judgment of a Divisional Court reversing in part the judgment at the trial of RIDDELL, J., in an interpleader issue between the parties.

The plaintiffs were execution creditors of one Abraham David, and under their execution had seized the goods in question while in the possession of the defendants.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and MIDDLETON, J.

C. H. Porter, and G. F. McFarland, for the defendants.

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

GARROW, J.A. . . . :—"In giving judgment, Riddell, J., said among other things: "Remembering that the onus is upon the plaintiffs to prove that the property is not the property of the defendants, I do not think there is sufficient before me to entitle me to find that the onus has been met . . . The case is full of suspicion" . . . etc. The learned Judge declined to place reliance upon the evidence of the Davids, of which family three members were called. The other witnesses upon both sides were evidently regarded as equally credible, at least nothing to the contrary is said.

No notes of the judgment delivered in the Divisional Court appear in the printed appeal book, but it is apparent from the formal judgment that the Court regarded the situation of the goods purchased from Zahalan as different from the other goods seized since it is only as to the latter that the appeal was allowed. As to the latter the Court must have been satisfied that the plaintiff had satisfied any onus originally resting upon him.

The case is certainly, as was said by Riddell, J., one of great suspicion. Discarding the evidence of the family of David, as I think must be done, there is the evidence of several witnesses, . . . all tending towards the same conclusion that not long before the organisation of the joint stock company, the execution debtor was in possession of the goods now in question, apparently as owner, that he was holding himself out as the proprietor of the business and the owner of the goods, and that upon their removal, he placed them in charge of the witness Comfort as his agent, that Comfort afterwards left because of interference by Albert David, and that the latter whom Comfort left in charge afterwards disclaimed the business, saying it belonged to his brother Abraham, and subsequently on an execution in the Division Court against the latter coming in, abandoned his former disclaimer, and claimed the business as his own.

The bill of sale under which the claimants alone pretend to make title is only from Rashada, and Albert Abraham is no party to it. And it follows that if the goods really belonged to Abraham, and not to Rashada his wife, or Albert his brother, the claimants never had any title to them.

Under all the circumstances I am wholly unconvinced that the Divisional Court erred in the conclusion arrived at. The case looks to me very much like an attempt by the three Davids to put the goods in such a position that the creditors of Abraham could not reach them. The judgment now appealed against thwarts that intention, and we are not, I think, called upon under the circumstances to be astute to find reasons for reversing it.

I would dismiss the appeal with costs.

MACLAREN, J.A., MAGEE, J.A., and MIDDLETON, J., concurred.

MEREDITH, J.A., dissented from the opinions of the majority of the Court, giving written reasons for his conclusions.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

REX v. MURRAY AND FAIRBAIRN.

Criminal Law—Two Defendants—Conviction of Both for Burglary—Appeal under sec. 1021 *of Code—Separate Consideration of Each Case—Conspiracy—Weight of Evidence—Possession of Stolen Money—'Verdict'—Legal Meaning of, Discussed—New Trial.*

Motion by the defendants, on consent of the Junior County Judge of Middlesex, who tried the case, under sec. 1021 of the Code, for a new trial.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

J. R. Cartwright, K.C., for the Crown.

P. H. Bartlett, for the defendants.

MACLAREN, J.A.:—The two appellants were tried together in the county Judge's Criminal Court at London before the Junior Judge, for burglary and theft, and were both convicted. He granted them leave under section 1021 of the Criminal Code to appeal to this Court for a new trial on the ground that the verdict was against the weight of evidence.

It was strongly argued on their behalf before us that if the conviction of either of the accused was against the weight of evidence, they should both have a new trial, and a dictum of Robinson, C.J., in Regina v. Fellowes, 19 U.C.R. at p. 54, was cited in support of this proposition. It is to be observed, however, that that was a case of conspiracy, as was also Regina v. Gompertz, 9 Q.B. 842, where Lord Denman, C.J., laid down the same rule. No authority was cited to us, nor have I found any for such a rule in a case of burglary like the present. If this had been a case of conspiracy it would have necessarily been applicable to them both. In my opinion the general rule is that laid down by Lord Kenyon, C.J., in Rex v. Mawbey, 6 T.R. (also a case of conspiracy), at p. 368, where he says that the Courts will grant or refuse a new trial according as it will tend to the administration of justice. I do not find anything in the law or in the facts of the present case to prevent the cases of these two appellants being considered separately, each on its own merits, and if the evidence warrants it, different conclusions being arrived at.

According to the evidence the Arva Mill, a short distance north of London, was broken into on the night of March 27th,

1912, the safe blown open and two small cheques and $178.15 in cash stolen. The empty cash-box was found in a field close to the road leading to London. Fairbairn gave evidence and said he was a pedler who had sold out his stock in Sarnia and Watford, and had beaten his way to London on a freight train arriving on Monday, March 26th, and that he slept in a barn in London West on Tuesday night, got two cups of tea at the house of the owner about 9 on Wednesday morning, having his own bread; that he met Murray for the first time in the public library; and that they were drinking in different hotels. When arrested on Wednesday afternoon he had $3.86 on his person. His story about his breakfast was corroborated and he was seen about 9 o'clock on his way to the city alone. The two prisoners were seen together several times during the day at hotels, a barber shop, etc. At one of the hotels Fairbairn put his hand into Murray's pocket and took out $115 in bills which were taken from him and delivered to the landlady for safekeeping. When arrested late in the afternoon Murray had $17 additional in bills and $22.42 in silver and coppers. When on his way to the police station he said several times that he had $18 when he came to London, but he was in a drunken condition when he said it. The denominations of the bills and the silver corresponded generally with that taken from the cash-box, but none of it was identified except two silver coins—one a ten cent. piece worn smooth, with a very small hole near the edge, and an English threepenny piece, both of which had lain in the mill cash-box for some weeks. Murray did not go into the witness-box nor produce any evidence as to where he had come from, or where he had got these two coins or any of the money, and there was no evidence of his having been in London until the day after the robbery. In my opinion he has made out no case for a new trial, and I think his appeal ought to be dismissed.

As to Fairbairn there is no evidence that the $3.86 found on him formed part of the money stolen, nor is there any evidence that he had ever seen Murray until the forenoon of the day after the burglary. It is difficult to accept his story as to his doings on the day in question, as a considerable part of it is inconsistent with the evidence of the other witnesses, but that may be due in part to the drunken condition in which he then was. He appears to have suffered a prejudice from his familiarity with Murray during the day after the burglary. No special reasons have been given for the granting of the leave to appeal, but it is probably on account of the weakness of the evidence against Fairbairn. On the whole, I am of opinion that a new trial should be granted to Fairbairn alone.

I am aware that in entertaining the appeal in this case we are giving to the word "verdict" in section 1021 of the Code a meaning that it does not usually bear. While the general dictionaries, both English and American, mention its use in the popular or philological sense as when one speaks of "the verdict of the people," yet they all, so far as I have seen, confine its legal meaning to the findings of a jury. The same may be said of the English Law Dictionaries, and also of the American so far as I know, except that of Rapalje & Lawrence, which defines it as "the opinion of a jury or of a Judge sitting as a jury on a question of fact." This last definition has been approved in Carlyle v. Carlyle, 31 Ill. App. 338. On the other hand some of the American Law Dictionaries not only define the word as the finding of a jury, but add that it is inapplicable to the findings of a Judge. Black's Law Dictionary says, "It never means the decision of a Court or a Referee or a Commissioner;" and Abbott's says, "The decision of a Judge or referee upon an issue of fact is not called a verdict, but a finding, or a finding of fact." In Bearce v. Bowker, 115 Mass. 129, Gray, C.J., says, "None but a jury can render a verdict;" Similar language is used in Otis v. Spence, 8 How. Pr. (N.Y.) 172; Kerner v. Petigo, 25 Kan. 652; McCullagh v. Allen, 10 Kan. 154; and Froman v. Patterson, 24 Pac. Rep. 692.

I do not know of any English statute in which the word has any other meaning than the finding of a jury, nor any Canadian statute where it can be otherwise construed, unless it be in this section 1021 of the Code, which we are now consideirng. Nor am I aware of its being used in any other sense by any English or Canadian Judge or legal writer except by the Master of the Rolls (Jessel), in Krehl v. Burrell, 10 Ch.D. 40, where in a civil case tried by him without a jury he says, "I give a verdict for the plaintiff, and reserve my judgment for a fortnight." This was said thirty-five years ago, but such use of the word does not appear to have been folllowed unless it be in the section which we are now construing (possibly because Jessel was more distinguished for his legal acumen than for his exact scholarship). It would have been much more satisfactory if Parliament had used unambiguous words that could not have given rise to the present difficulty. A further argument in favour of confining it to the verdict of a jury might be that in a case in which the Judge had sufficient doubts to justify him in allowing an appeal, he would ordinarily give the benefit of the doubt to the accused and not convict him. However, as this point was not taken by the Crown, we do not now pass upon it, but reserve the

right to do so hereafter in case Parliament should not see fit to change the language of the section, and it should come before us for decision.

LENNOX, J.:—I agree.

GARROW, MEREDITH, and MAGEE, JJ.A., also concurred in the result, MEREDITH, J.A., giving reasons in writing.

COURT OF APPEAL. NOVEMBER 19TH, 1912.

WOOLMAN v. CUMMER.

Negligence — Bicycle Accident — Evidence — Nonsuit—Onus — Trespass—New Trial—Res Ipsa Loquitur.

Appeal by the defendant against the judgment of a Divisional Court reversing a judgment of nonsuit at the trial before RIDDELL, J., and a jury, and directing a new trial.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and KELLY, J.

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

J. G. Farmer, K.C., for the plaintiff.

GARROW, J.A.:—On the 28th of September, 1911, the plaintiff, aged 55 years, was crossing a street in the City of Hamilton at about noon, when he was run into by a bicycle upon which the defendant was riding, and knocked down and very severely injured. At the time, the plaintiff was crossing the street diagonally, with his back somewhat turned towards the direction from which the defendant came. There was some evidence that the defendant saw the plaintiff immediately before the contact, and that he ordered him to get out of the way. There was no direct evidence by any eye-witness as to the speed at which the defendant was riding, but it was shewn by his examination for discovery put in by the plaintiff at the trial, at what time he left his place of business, the distance from there to the place of collision, and also the time at which the plaintiff left the place where he was employed, and the time which he probably consumed in arriving at the place of collision. In his examination for discovery, the defendant admitted striking the plaintiff and knocking him down.

Under these circumstances, Riddell, J., held that the plaintiff had not given any reasonable evidence of negligence, and upon this ground withdrew the case from the jury.

The Divisional Court was of a different opinion and directed a new trial, against which the defendant now appeals.

The judgments in the Divisional Court were, it is said, orally delivered, and all that appears in the appeal book is in the form of a note of what was said, from which it appears that the Court was of the opinion that enough had been shewn to place the onus upon the defendant, a conclusion with which I entirely agree.

The defendant was not approaching directly towards the plaintiff, but rather from the opposite direction. It was midday, and so far as appears, there was nothing to prevent the defendant from seeing the plaintiff. He was certainly in a better position to see the plaintiff than was the plaintiff to see him. The evidence indeed shews that the defendant did see the plaintiff before the actual collision, long enough at least to order him out of the way. These circumstances, even apart from the great violence of the collision, seem to me to call, and to call rather loudly I would have thought, for justification or excuse by the defendant rather than for more evidence from the plaintiff.

The facts, prima facie at least, indicate a case of trespass, in which the element of negligence is not a necessary ingredient: see Sadler v. South Staffordshire, etc., Co., 23 Q.B.D. 17. But even if it were otherwise, it is in my opinion a case clearly calling for the application of the maxim res ipsa loquitur.

I would dismiss the appeal with costs.

MACLAREN, and MAGEE, JJ.A., and KELLY, J., concurred.

MEREDITH, J.A., delivered a written judgment in which, after a full discussion of the evidence, he took the view that "the nonsuit was quite right," stating, however, that he thought the case was one in which a new trial might well be granted as an indulgence, and concluding as follows: "It is quite clear that the case has not been fully developed; that the plaintiff may possibly have a good cause of action; and he has unquestionably sustained a very serious injury; so that, though the mistrial is the fault of his advisers altogether, he may, I think, not unjustly be given another chance; but it ought to be on the usual terms only."

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. NOVEMBER 19TH, 1912.

FEE v. TISDALE.

Judgment Debtor—Examination of—Motion to Commit—Statute-barred Debt Due from Plaintiff—Money not in Defendant's Hands—Right of Judgment Creditor to Examine Debtor.

Appeal from the judgment of the Junior Judge of the County of York dismissing a motion to commit the defendant, or in the alternative for an order for her re-examination for not disclosing her property, or for having concealed or made away with the same, and insufficient answers upon her examination.

The appeal was heard by CLUTE, SUTHERLAND, and KELLY, JJ.

Grayson Smith, for the plaintiff.

A. B. Armstrong, for the defendant.

CLUTE, J.:—The plaintiff recovered judgment against the defendant for $412.40 for debt and $27.60 for costs. It does not appear that execution was placed in the sheriff's hands, or that there was a return nulla bona. An appointment, however, was obtained for her examination as to her estate and effects and her means of paying the debt in question. She attended and was examined. It would appear from the examination that the defendant and the plaintiff were two of a family of seven who were entitled to receive as the next of kin some $2,800 from a deceased brother, who had resided in or near Seattle. One J. G. Trenholme, of Seattle, had charge of the business. A portion of the money was paid over to the defendant and she paid out four shares, amounting to $1,600. The plaintiff's action was brought to recover his share. This never actually came to her hands. It is still in the hands of Trenholm, who has charge of the estate. The defendant's own share was paid to her. She states that the reason why she has not obtained the plaintiff's share from Trenholm and paid it over to him is because the plaintiff owes her and has owed her for many years an amount exceeding the share in question, and that the same is outlawed, and she thinks she is entitled to retain this money under her control, that at all events she is not bound to assist him by bringing it to Canada, it still being in the hands of Trenholm.

[Reference to the defendant's examination, as to which the judgment proceeds:]

On reading the examination it leads one to think that the defendant stated the exact facts of the case. It further appears that the money had never come to her hands or under her control. —That there is a debt due from the plaintiff to the defendant—that a right of action therefor is barred by the statute. She could not successfully plead this debt due her as a set-off against the plaintiff's claim. This could be met by the statute: Pollock on Torts, 5th ed., 685.

Mr. Smith relied upon the case of McKinnon v. Crowe, 17 P.R. 291. I think that case quite distinguishable from the present. There the judgment debtor, hearing the judgment had gone, or was about to go, against her, turned all the property she had into money and sent it to a friend in a foreign country, where it remained, and upon her examination she refused, or professed to be unable, to give any information as to where it was. After she had ample opportunity to become aware of its position and had done nothing towards satisfying the plaintiff's claim, an order was made for her committal to gaol for three months. Here the case is quite different. This money never came to the hands of the defendant, although a judgment for the same has been recovered against her. It still remains in the hands of the person who had the division of the estate, with the view of inducing the plaintiff to sign a discharge and so authorize the person holding the money to pay over the same to the defendant, whom the plaintiff owes as her two brothers had done.

His Honour Judge Denton dismissed the motion, and in doing so we think he was right.

The answers of the defendant were frank and full, giving all the information she had and the reasons for her act. See Herdman v. Fewster, [1901] 1 Ch. 447. The objection by defendant's counsel that it did not appear that an execution had been placed in the sheriff's hands and nulla bona returned, relying upon Ontario Bank v. Trowern, 13 P.R. 422, is not, we think, well taken inasmuch as a judgment creditor is primâ facie entitled to issue an appointment for the examination of his judgment debtor; and, upon a motion to commit the latter for refusal to be sworn, it is for him to shew affirmatively that the issue of the appointment was an abuse of the process of the Court: Grant v. Cook, 17 P.R. 362.

Under all the facts in this case, this motion should be dismissed with costs.

SUTHERLAND, J.:—I agree.

KELLY, J.:—I agree.

DIVISIONAL COURT. NOVEMBER 20TH, 1912.

RICHARDS v. COLLINS.

Assessment and Taxes—Tax Sale—Indian Lands—Indian Act, R.S.C. 1906 *ch.* 81, *secs.* 58, 59, 60—*Approval of Tax-Deed by Superintendent-General—Invalidity of Tax Sale—Ontario Assessment Act, R.S.O.* 1897, *ch.* 224, *sec.* 209—*Lien of Purchaser for Improvements—*4 *Edw. VII. ch.* 23, *sec.* 176 (1)—*Act not Retroactive—R.S.O.* 1897, *ch.* 119, *sec.* 30—36 *Vict. ch.* 22, *sec.* 1—*Application of Principles of Equity —Prayer for Further Relief—Adoption by Court of Statutory Rule—Possession—Costs of Reference.*

Appeal by the defendant from the judgment of BOYD, C., ante 1479, where the facts are fully set out, and cross-appeal by the plaintiffs.

The appeals were heard by FALCONBRIDGE, C.J.K.B., RIDDELL, and LENNOX, JJ.

A. G. Murray, for the defendant.

F. E. Titus, for the plaintiffs.

RIDDELL, J.:—This is an appeal from the judgment of the Chancellor, 1912, 3 O.W.N. 1479: the plaintiffs also cross-appealing. Upon the argument, we dismissed the defendant's appeal, entirely agreeing with the Chancellor's view of the law. The plaintiffs' cross-appeal is as follows:—

The defendant counterclaimed for $400 for improvements and for money expended for taxes and statute labour, for an account to take the same, and for an order declaring a lien on the lands for such amount. The formal judgment declared that the defendant "is entitled to . . . a lien upon the lands . . . for the amount of the purchase money paid by him . . . and interest . . . and for taxes and statute labour paid or performed by him, and for the value of any improvements made by the defendant upon the said lands . . . before this action was commenced and for the costs of his counterclaim . . . after deducting . . . the rents and profits received . . . or which might have been received . . . ." and it is referred to the Master at North Bay to determine the amount, leaving the costs of the reference in the discretion of the Master. The plaintiffs contend that this is not justified by the law.

The judgment is said to be based on the Act of 1904, 4 Edw. VII. ch. 23, sec. 176 (1), considered in Sutherland v. Suther-

land, 22 O.W.R. 299: but this Act did not come into force till 1st January, 1905—see sec. 229. And this is not a mere matter of procedure or practice, but of substantive rights. I therefore think the statute is not retroactive.

We must see how the law stood when the rights of the plaintiffs accrued, which may for the purposes of this action be considered as 1901 or 1902, at any rate before January, 1905. The statute then in force was R.S.O. (1897), ch. 224, sec. 212, but that applies only when the sale "is invalid by reason of uncertain and insufficient designation or description"—which is not the case here. We may, however, apply the statute R.S.O. 1897 ch. 119, sec. 30, if necessary. This comes from (1873), 36 Vict. ch. 22, sec. 1.

"In every case in which any person has made or may make lasting improvements on any land under the belief that the land was his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of such land is enhanced by such improvements. . . ."

This statute very much extends the application of the principle of remuneration by the true owner of the land to one who under a mistake of title has made permanent improvements upon it—the former Act going as far back as 1819, 59 Geo. III. ch. 14, by sec. 3 providing for the case of mistake in boundaries occasioned by unskilful surveys, which were by no means uncommon in those days of dense forest, deep morasses, and cheap whiskey. This statute is in substance repeated as R.S.O. 1897 ch. 119, sec. 31.

The relief granted by sec. 30 however is much more restricted than that given by the Act of 1904. But I think in the present instance we are entitled to go beyond sec. 30 in aid of the defendant.

It is a well recognised principle of equity: "He who seeks equity must do equity." In many instances this contains a pun on the word "equity," and means nothing more than: "He who seeks the assistance of a Court of Equity must, in the matter in which he so asks assistance, do what is just as a term of receiving such assistance." "Equity" means "Chancery" in one instance, and "Right" or "Fair Dealing" in the other.

Accordingly while a plaintiff asserting a legal right in a common law Court would receive justice according to the common law, however harsh or unjust the law might be—yet if he required the assistance of the Court of Chancery to obtain his rights according to the common law, he would—or might—not be assisted unless he did what was just in the matter toward the defendant.

This case was represented, on the argument, as a simple case of ejectment—and it might well be a simple action in ejectment. Had it been such, I think we would have had great, if not insuperable, difficulty in giving the defendant any relief beyond what the statute, sec. 30, gives him—and that is why one of us said on the argument that had he been solicitor for the plaintiff, he would have brought the action in that way. There could on the facts have been no defence at law, the deed under which the defendant claims being void at law as well as in equity. The action however is not a simple ejectment, as it might have been. The statement of claim sets out the facts as in ejectment, indeed, but in the prayer, in addition to possession, etc., a claim is made for "5. Such further relief as the nature of the case may require." This is ambiguous, and might mean only relief as at the common law, or it might mean equitable relief. We accordingly look at the judgment the plaintiffs have taken out and are insisting upon holding. Clause 2 of the judgment declares "that the sale for taxes . . . and the deed . . . made to the said defendant . . . are and each of them is invalid, and that the same should be set aside and vacated and doth order and adjudge the same accordingly." No appeal is taken by the plaintiffs against this clause, but on the contrary they attend to support it in this Court. This relief the plaintiffs asked for and received could not have been granted by a Common Law Court, but the plaintiffs must have come into equity for it.

They cannot now be allowed to change their position: and they have come into a Court of Equity for equitable relief not grantable in a Common Law Court.

They must therefore do equity. Paul v. Ferguson (1868), 14 Gr. 230, is directly in point. The head note reads: "Where the Court is called upon to set aside a tax sale which is equally void at law and in equity the Court does so, if at all, only on such terms as are equitable." At p. 232 the Chancellor (Van Koughnet) speaking of putting the machinery of the Court in motion to aid a harsh legal right, says that in certain cases this will not be done, and continues thus: "and when the Court in its discretion does interfere, it does so only on such terms as it deems equitable . . . . The Court says 'You need not have come here at all. The deed is void at law and here, and cannot be enforced against you in any tribunal; but if you wish for your own purposes to have your title cleared of the cloud which this deed casts upon it, we will aid you only on terms.' " It is not at all necessary to cite other cases to establish the prin-

ciple, but if desired the many cases may be looked at referred to in Story's Equity Jurisprudence, 2nd Eng. ed. sec. 64(e); Snell, 16th ed. p. 14 (6); Josiah W. Smith's Manual of Equity Jurisprudence, 14th ed., p. 30 IX; and notes in the several works.

What is equitable in this case; fair play? justice? I can find nothing inequitable, but on the contrary what is wholly equitable, in the statutory rule laid down in 1904. The Legislature in definite and unmistakable terms have said what they thought was fair—with that commendable tenderness for vested rights which characterizes a responsible and representative Parliament, they have refrained from making the statute retrospective, but there is no reason why the Court, untrammelled by authority, should not adopt the statutory rule as its own. I think, therefore, this ground of appeal without merit.

He is also complained of by the plaintiffs that the judgment contains no order for possession—that is the fault of the plaintiffs themselves so far as appears—they take out an order and judgment which should be such as satisfies them. If there be any omission, e.g. if the trial Judge has not passed upon any matter which it is thought should be passed upon, the matter should be brought to his attention before being made a ground of appeal. There can be no objection to the judgment containing an order for possession, not however to be made effective "until the expiration of one month thereafter, nor until the plaintiff has paid into the Court for the defendant the amount" for which the defendant is declared to have a lien: 4 Edw. VII. ch. 23, sec. 176(2) first clause. It is also objected that the judgment should not have left the costs of the reference in the discretion of the Master, and R.S.O. 1897 ch. 224, sec. 217 (1), (2), is cited in support of that proposition.

This section was repeated as of 1st January, 1905, by 4 Edw. VII. ch. 23, sec. 228, Schedule M. first item. What is provided for in this sec. 217 (1), (2), is practice and procedure, and not substantive right—and accordingly the section must go; but it is found repeated in the new Act, sec. 181. Sub-sec. 2 provides that "if on the trial it is found that such notice (i.e. a notice which the defendant is by sub-sec. 1 authorised to give at the time of appearing") or (adding other cases) the Judge shall not certify, and the defendant shall not be entitled to the costs of the defence, but shall pay costs to the plaintiff . . . ."

The prerequisite for the application of this section is that, on the trial, it must be found that such notice was not given. The Chancellor did not so find; he was not asked to so find: there was no scrap of evidence offered upon which he could so

find—the plaintiffs claiming some right following such a finding, the onus was upon them to establish the fact and they failed to do so. De non apparentibus et de non existentibus eadem est ratio. It is of no avail for counsel to tell us on the argument that no such notice was served—that is not evidence, and we do not even have an affidavit of the fact, if it is one.

In any event, the plaintiffs have been awarded the costs of the action—the statute does not compel the Court to award all costs of reference, etc. to the plaintiff—the word used is "costs." The defendant is literally ordered to (I use the words of the statute) "pay costs to the plaintiffs"—and in my view, awarding the costs of the action to the plaintiffs as has been done, sufficiently complies with the statute, without awarding also the costs of a reference which, it is possible, may be caused or rendered necessary by the unreasonable demands or conduct of the plaintiffs themselves.

Both appeal and (with the trifling modification spoken of) the cross-appeal fail; both must be dismissed. And as success has been divided, there should be no costs of the appeal or cross-appeal.

Of course we express no opinion as to the effect (if any) of any action by the Superintendent General under the provisions of the Indian Act, R.S.C. (1906), ch. 81.

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

LENNOX, J.:—I agree in the result.

MIDDLETON, J. NOVEMBER 21ST, 1912.

SCULLY v. ONTARIO JOCKEY CLUB.

Practice—Parties—Persons Having the Same Interest in one Cause or Matter—Suing One of a Number of Persons on behalf of all—Con. Rule 201—*Con. Rule* 200—*Action for Trespass.*

Motion for an order under Con. Rule 201, appointing the defendant Seagram to represent all the members of the Canadian Racing Association.

J. P. McGregor, for the plaintiff.
C. F. Ritchie, for the defendants.

MIDDLETON, J.:—The action is brought by a "bookmaker," who alleges that he was ejected from the grounds of the Hamilton Jockey Club by a private detective employed by the Canadian Racing Association; which is a voluntary association that had undertaken to police the grounds of the club during a race meeting. The plaintiff charges that this ejecting was a trespass and assault, and he claims damages for it.

I think the motion is entirely misconceived. Rule 201 can only be invoked where the right of the class to be represented depends upon the construction of an instrument. It is probable that the application intended to refer to Rule 200, which sanctions the making of an order authorizing any party to defend an action on behalf of all "numerous parties having the same interest."

It is quite impossible to say that all the members of the Canadian Racing Association have the same interest. The plaintiff seeks to make them responsible for what he charges to be a tortious act committed at the instance of Seagram. The interest of the other members would be to cast upon Seagram the responsibility for any tortious act committed by or for him, and he would not be a fitting representative to defend them. Of course, if Seagram's act was not tortious, then this action will fail, and the class will need no protection.

If the plaintiff is correct in thinking that he has been injured by a body of tort feasors, as he swears, he must either content himself by suing those whom he selects from this body, or must give each an opportunity of defending himself.

No case has gone so far as to justify an order such as sought, where the action is really a common-law action for trespass.

Temperton v. Russell, [1893] 1 Q.B. 435, has been much qualified by what was said in Bedford v. Ellis, [1901] A.C. 1; but it is as yet an unheard-of thing that a pecuniary verdict should pass against a person without his being in fact sued.

Motion dismissed, with costs to defendant in any event.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 21ST, 1912.

J. J. GIBBONS, LTD. v. BERLINER GRAMAPHONE CO. LIMITED.

Writ of Summons—Service out of Jurisdiction—Order Allowing Service—Con. Rule 162(*e*), (*h*)—*Place of Contract—Assets in Ontario—Place where Payment to be Made—Situs of Debt—Jurisdiction of Foreign Court—Exercise of Discretion by Court.*

Appeal from an order made by George S. Holmested, Esq., K.C., sitting for the Master in Chambers, on the 11th November, 1912, dismissing an application of the defendant to set aside an order made by the Master in Chambers on September 20th, 1912, permitting the issue and service of a writ of summons out of Ontario.

R. C. H. Cassels, for the defendant.
J. F. Boland, for the plaintiff.

MIDDLETON, J.:—The appellant contends, not only that the case is not one falling within the provisions of Rule 162, but that as in the exercise of discretion the plaintiff ought not to be permitted to sue within Ontario.

The plaintiff seeks to bring this action within the terms of sub-section (e) and of sub-section (h) of Rule 162. It is said that the action is founded on a breach within Ontario of a contract which is to be performed within Ontario; and in the second place it is said that the defendant has assets within Ontario of the value of more than two hundred dollars which may be rendered liable to the satisfaction of the judgment.

The action is founded upon a verbal agreement made in Montreal, subsequently confirmed by writing. The plaintiff's letter of June 6th states, "We hereby confirm your verbal agreement with our Mr. Tedman." This verbal agreement was made in Montreal.

According to the law of Quebec, if no place of payment is expressly or impliedly indicated by the contract, payment must be made at the domicile of the debtor. There was no term, express or implied, for payment elsewhere; and payments under this contract are, therefore, to be made in Montreal.

It is not enough that payment or performance of the contract might be well made within Ontario. The rule as it now stands

does not differ widely in meaning from the former rule, which contained the words, "according to its terms." These words were probably omitted so as to make the rule apply to implied as well as express terms of contracts. The theory of the rule is that the stipulation requiring performance within the jurisdiction amounts to an attornment to the local jurisdiction of our Court: Comber v. Loyland, [1898] A.C. 524.

More difficult is the question as to the application of clause (h). The defendant company carries on business at Montreal. It has customers throughout Canada. Customers in Ontario are indebted to it. No doubt much more than two hundred dollars was owing at the date of the bringing of this action. The contracts with the debtors call for monthly settlement. If the litigation runs its normal course the property which the company had at the bringing of the action will have disappeared long before judgment can be recovered. These debts will, no doubt, be replaced by other debts; but the company has no fixed or tangible assets within the province.

Apart from authority, I would have thought that the fiction by which the situs of a debt is the residence of the debtor ought not to be imported into the consideration of this rule, which would be abundantly satisfied if confined in operation to cases where the debtor has assets which can be reached under the ordinary writs of execution. But I am precluded from so holding by the case of Kemerer v. Watterson, 20 O.L.R. 451, where Meredith, C.J., has given the wider meaning to the rule. I have, therefore, to consider the question whether as a matter of discretion the order should be made.

Accepting the principles laid down in Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A.C. 670, as a guide, the normal course is to require resort to the domicile of the defendant, particularly in the case of contracts entered into at the domicile and to be there performed. No doubt the jurisdiction of our Courts to entertain an action where the writ is served abroad is to be determined by our Courts upon the terms of Rule 162. The question whether this rule in any particular case transcends the limits fixed by comity and amounts to an assertion of extra-territorial jurisdiction entitled to international recognition, is one for the foreign Court whose assistance is invoked to enforce our judgment.

Nevertheless, the more recent cases seem to indicate that in the exercise of discretion in permitting an action to proceed the Court ought to have regard to somewhat the same principle.

[Reference to Société Générale de Paris v. Dreyfus Bros.,

29 Ch. D. 239, 37 Ch. D. 215; Logan v. Bank of Scotland, [1906] 1 K. B. 141; Egbert v. Short, [1907] 2 Ch. 205; Norton v. Norton, [1908] 1 Ch. 471.]

It is, I think, a sound exercise of discretion to hold that where the defendant is resident in Montreal, and where the Quebec Court is certainly a convenient forum, and the contract was made in Quebec and is to be interpreted according to the laws of Quebec, and the defendant's assets were all substantially within that Province, the plaintiffs should be compelled to resort to the Courts of that Province for their remedy, when our Courts only acquire jurisdiction by the mere accident of residence within Ontario of a debtor to the defendant.

The order will, therefore, go, staying all proceedings in this action upon the service made in Quebec, until after the conclusion of any action which the plaintiff may bring in that Province.

KELLY, J., IN CHAMBERS. NOVEMBER 25TH, 1912.

REX v. COOK.

Intoxicating Liquors—Liquor License Act—Conviction—Motion to Quash—"Street"—"Public Place"—Hotel—Ejusdem Generis—2 Geo. V. ch. 55, sec. 13.

Motion by the defendant for an order quashing a conviction for being found upon a street and in a public place, in an intoxicated condition owing to the drinking of liquor in a municipality in which what is known as a local option by-law was in force.

J. Haverson, K.C., for the defendant.
M. C. Cameron, for the magistrates.

KELLY, J.:—Two of the grounds relied upon in support of the motion are: (1) that the information shews no offence under the statute, and, (2) that the accused was not found in an intoxicated condition upon a street or in a public place.

The form of information as returned is that the accused "between June 30th and July 30th, 1912, at Lions Head did unlawfully, was intoxicated contrary to the provisions of the Liquor License Act, upon a street or in a public place in the Township of Eastnor." It bears upon its face evidence of hav-

ing been amended, and it is clear that as first drawn it read, "was intoxicated contrary to section eighty-six of the Liquor License Act," and that the amendment made was by striking out the words "section eighty-six" and substituting therefor the words "the provisions," and by adding after the words "Liquor License Act," the words, "upon a street or in a public place in the Township of Eastnor."

From the appearance of the document the conclusion might be reached that the amendment was made after the accused had pleaded "not guilty." If the only objection to the conviction were that it does not shew an offence, I should feel disposed to quash the conviction on that ground; but I do not rest my judgment upon that, but on the other ground mentioned.

Three different forms of conviction have been returned, one being "that said John H. Cook was intoxicated on a street and in a public place in the Township of Eastnor on July 8th, 1912," another: "That said defendant did get intoxicated in the Williams hotel in the Township of Eastnor on July 8th, 1912," and the third: "That the said J. H. Cook on the 8th day of July, 1912, in the Township of Eastnor in the county of Bruce was found upon a street and in a public place at Lions Head in the Township of Eastnor in the said county in an intoxicated condition owing to the drinking of liquor contrary to the Ontario Liquor License Act and amendments thereto, there being then in force in the municipality of the township of Eastnor a by-law passed by the municipality of Eastnor under section 141 of the Liquor License Act commonly known as the local option by-law."

While there is quite sufficient evidence that the accused was intoxicated, there is no evidence that he was found intoxicated on a street or in a public place, unless effect be given to the contention set up on behalf of the magistrates that the Williams hotel in Lions Head, in which the accused was intoxicated, is a public place.

The intention of the amendment to the Liquor License Act made in 1912, 2 Geo. V. ch. 55, sec. 13, was to protect the public from being met by the sight of intoxicated persons on streets, and in public places of a character similar to streets, where the public generally have a right to be; and in making use of the words "any public place," it was no doubt intended that it should apply to a place ejusdem generis with a street, and not to a place such as the hotel in question.

The words used in the judgment of the Divisional Court in Regina v. Bell, 25 O.R. 272 (at p. 273), are apt to this case, viz.:

"To be within its provisions an offence must have been committed in a public place such as a street, square, park or other open place." Another case which is strikingly like the present one is Case v. Story, L.R. 4 Ex. 319. That was a case where a hackney carriage driver, standing on the premises of a railway company by their leave, for the purpose of accommodating passengers by their trains, was requested by a party to drive him, and refused; and it was contended that he was bound to do so under the statute which provides that every carriage . . . which shall be used for the purpose of standing or plying for hire in any public street or road in any place within a distance of five miles from the general Post Office in the City of London . . . shall be obliged and compellable to go with any person desirous of hiring such hackney carriage.

Kelly, C.B., in his judgment, at page 323, says: "We have to consider the subsequent words of the definition 'in a public street or road.' It is clear to me that railway stations are not either public streets or public roads. They are private property; and although it is true they are places of public resort, that does not of itself make them public places. The public only resort there upon railway business, and the railway company might exclude them at any moment they liked, except when a train was actually arriving or departing. For the proper carrying on of their business they must necessarily open their premises, which are, nevertheless, private, and in no possible manner capable of being described as public streets or roads." And at page 324, when referring to the contention of counsel that "place" is a large term, he says: "We must take it as only meaning a place ejusdem generis with a street."

A perusal of the report of Curtis v. Embery (1872), L.R. 7 Ex. 369, is helpful in arriving at the meaning to be given to "a public place." There Bramwell, B., in defining the meaning of "road" which was referred to in the statute then under consideration, and which was used in giving the interpretation of the word "street" used in that statute, said that it "must be a road over which the public have rights."

"Public place" in section 13 above, especially when taken in connection with the word "street" which precedes it, must mean a place over which the public have rights as over a street, and not a place where, as a hotel, persons are permitted to go for accommodation such as a hotel affords.

I am unable to agree with the contentions set up that the hallway and rooms of the hotel, where alone the accused was found intoxicated at the time in question, is a public place within the

meaning and intention of section 13 of the amending Act, and the conviction on that ground alone, apart from any others, must be quashed with costs.

Though giving protection to the magistrates, I must draw attention to the loose and unsatisfactory manner in which the papers in this case, such as the information and conviction and amended convictions, were prepared.

McNALLY v. ANDERSON—MASTER IN CHAMBERS—NOV. 18.

Pleading—Dower Action—Irrelevant Statements in Defence —9 Edw. VII. ch. 39, sec. 24—Mortgaged Land.]—Motion by the plaintiff to strike out certain paragraphs of the statement of defence as irrelevant in an action for dower out of certain land in the Town of Aylmer. The statement of defence alleged that the plaintiff's husband gave $500 for the land in question, $350 of said $500 being paid by a mortgage back to other parties, and that such mortgage remained unpaid during all the time that McNally owned the land. The Master said that this if true might be a valid defence to the plaintiff's claim under Re Auger, 26 O.L.R. 402. Then followed six other paragraphs with allegations as to the condition of the lands at the time when McNally bought them, and going into their subsequent history, also stating that the defendant had always been willing to have dower allotted to the plaintiff as the said lots were on 22nd October, 1911, the day of the death of plaintiff's husband, "on condition that the same be allotted in such a manner as not to give her any share in the improvements placed on" one part of the land. Paragraph 9 alleged that the defendant had tried unsuccessfully to ascertain the plaintiff's age, but the defendant believed her to be of the age of 65 years, and on that basis had offered to pay $75 in satisfaction of her claim and to bring same into Court accordingly. The paragraphs containing these allegations were moved against as irrelevant. The Master said that the proceedings in dower are now regulated by 9 Edw. VII. ch. 39, which shews that the only issue between the parties must be whether the plaintiff is entitled to dower or not. If she is found to be entitled then the proceedings are governed by sec. 24 of the Act, unless some settlement is reached, but there is no power to oblige a doweress to accept a sum in gross, or an annuity in lieu of dower, against her will. It must therefore follow that the paragraphs attacked are irrelevant and must be struck out with costs to the plaintiff in the cause. E. C. Cattanach, for the plaintiff. F. S. Mearns, for the defendant.

CANADIAN WESTINGHOUSE CO. v. WATER COMMISSIONERS FOR CITY OF LONDON—MASTER IN CHAMBERS—NOV. 19.

Pleading—Particulars—Counterclaim — Leave to Rejoin — Examination for Discovery.]—Motion by defendants for particulars of reply and for leave thereafter to rejoin thereto, and that plaintiffs plead to defendants' counterclaim. The facts as set out in the pleadings are as follows. By agreement made in April, 1910, plaintiffs undertook to do certain work for the commissioners to their satisfaction and that of their electrical engineer for the time being—the work to be completed in six months—for which plaintiffs were to be paid $25,145—that such payment was conditional as to amount on the certificate of the engineer, whose decision as to any question arising on the agreement was to be final—that if the works in question were not completed by 28th October, 1910, the plaintiffs were to deduct from the contract price $100 a day as liquidated damages until the final completion of the contract—and that by reason thereof, instead of plaintiffs being entitled to $5,500 and interest from 1st March, 1911, as set out in the statement of claim, they have been overpaid and defendants counterclaim for this though not stating any amount. It is also said that no certificate has been given by the engineer. The reply joins "issue to the allegations contained in the statement of defence and puts the defendants to the proof thereof." It further says that the delay in completion of their contract was caused by "failure of defendants to do the preliminary work required" for that purpose—that the refusal of the engineer to give the necessary certificate was fraudulent and from collusion with the defendants—that defendants suffered no damage by the delay in the completion of the work and in any case "by their action" waived their right to enforce the above mentioned penalty or to insist on the engineer's certificate. Particulars are asked as to the preliminary work referred to in the reply—of the fraud and collusive refusal of the engineer to give his certificate, and of the acts whereby the defendants waived their right to require such certificate, or enforce the penalty of $100 a day. The Master, after stating the facts as above, said that the issues between the parties seemed sufficiently set out in the pleadings, even if the statement of defence, as well as the reply are somewhat unusual in form, and that it scarcely seemed necessary to make the reply a formal defence to the defendants' counterclaim, but it could be done if thought safer to do so. As to the particulars, he said that they could probably be obtained on examina-

tion for discovery of the defendants' engineer, who would seem to be the proper person for that purpose: see Smith v. Clarke, 12 P.R. 217. If sufficient information is not had on discovery the motion can be renewed. If not renewed the costs of the motion will be in the cause. E. C. Cattanach, for the defendants. F. Aylesworth, for the plaintiffs.

PRUDHOMME v. LABELLE—SUTHERLAND, J.—NOV. 20.

Sale of Land—Agreement—Assignment—Default—Notice of Cancellation.]—Action for a declaration that the defendant Damase Labelle is the owner of certain lands, and that Onesime Labelle is a bare trustee of the legal estate therein for him, and that a certain agreement dated November 1st, 1910, for the sale of said lands, between the said Damase Labelle and one Elie Gendron, and the assignment thereof by the said Gendron to the plaintiff, are valid and binding upon the defendants, and that the plaintiff is entitled to the benefit thereof. It was admitted during the progress of the suit that there is now no question as to Damase Labelle being the beneficial owner of the lands. The learned trial Judge finds, however, after a full discussion of the evidence, which was very confused and contradictory, that before the action was commenced the contract between Labelle and Gendron was at an end, and that under the circumstances the relief asked for by the plaintiff cannot be granted. Action dismissed with costs. M. J. Gorman, K.C., for the plaintiff. J. U. Vincent, K.C., for the defendant.

RE WOODS. BROWN v. CARTER—RIDDELL, J.—NOV. 20.

Administration—Next of kin—Matter of Pedigree—Hearsay—Declarations Admitted—Costs.]—Action for a declaration that Sarah Cascadden, known before her marriage as Sarah Woods, the mother of the plaintiff, was the lawful daughter of Harvey and Penelope Woods, and that the plaintiff is the lawful daughter of Sarah Cascadden and one of the heirs at law and next of kin of Edward Woods. A question of pedigree being involved, the learned trial Judge said that by one of the well-established rules of evidence, hearsay evidence would be admitted, referring to the authorities as to the declarations admitted in this case under the rule. His conclusion was that

Penelope Woods, the putative mother, did say that she had taken Sarah to bring her up, etc., that it was well known in the family that she was not one of the family, but an outsider, and on the evidence called for the defence he must find that she was not the daughter of Penelope Woods, although her position was made as pleasant for her as possible and her want of kinship to her putative relations was not unnecessarily flaunted. Mrs. Amanda Brown, her daughter, claimed to be a next of kin of Edward Woods; the administrator of Edward Woods's estate denied this. RIDDELL, J., says: "I thought it proper to make an order at the trial that the administrator should represent all persons who have an interest in disputing Mrs. Brown's kinship. And I find in favour of the defendant. As to costs, I do not consider that I should make the real next of kin pay the costs of one who makes the claim to be of them and fails: but I think under all the circumstances I may direct that there shall be no costs except that the defendant shall have his costs between solicitor and client out of the estate." V. A. Sinclair, for the plaintiff. W. H. Barnum, for the defendant.

APPELBE v. DOUGLAS—FALCONBRIDGE, C.J.K.B.—NOV. 21.

Landlord and Tenant—Alleged Obstruction and Nuisance—Costs.]—Action by plaintiff, landlord of certain premises in the City of Windsor, for an injunction restraining defendant, the lessee of the premises, from depositing boxes, papers and other articles upon parts of the premises, from burning same, etc., and for forfeiture of the lease. The learned Chief Justice said that perusal of the evidence confirmed the opinion which he formed when hearing the case, that plaintiff had proved no substantial wrong or grievance calling for the interference of the Court either by way of injunction, damages, or forfeiture of lease. The alleged obstruction and nuisance had caused no visible and substantial, or pecuniary damage to plaintiff's property. The defendant had not always acted with due consideration of the plaintiff's feelings, if not of his rights, and the action was accordingly dismissed without costs. J. H. Rodd, for the plaintiff. J. Sale, for the defendant.

BARTRUM, HARVEY & CO. v. SCOTT—MIDDLETON, J.—NOV. 21.

Motion for Judgment—Costs of Action—Parties Agree that Judge should Determine Question.]—Motion for judgment upon pleadings and affidavit. Upon the return of the motion, both

counsel agreed that the learned Judge should determine the question of the costs of the action, there being now nothing other than the costs between the parties. After reviewing the facts bearing on the case, MIDDLETON, J., said that in his view both parties were wrong, and the proper disposition of the action was to make no order as to the costs. A. C. McMaster, for the plaintiffs. J. J. Drew, K.C., for the defendant.

PHILLIPS v. LAWSON—MASTER IN CHAMBERS—NOV. 21.

Discovery—Motions for Further Examination of Parties—Information and Belief—Solicitor and Client—Privilege.]—Motions by both parties for further examination for discovery. The Master said that it was quite clear that the defendant's motion must succeed. He was entitled to examine the plaintiff as to his information and belief, as well as in respect of his knowledge, so far as such enquiry is relevant to the issues in the action. It is no answer to say that the defendant knows himself. "It is no objection to an application for particulars that the applicant must know the true facts of the case better than his opponent. He is entitled to know the outline of the case that his adversary is going to make against him, which may be something very different from the true facts of the case;" Odgers on Pleading, 5th ed. p. 178. This principle applies to examination for discovery under our practice. As to the plaintiff's motion the Master said that it would seem from defendant's depositions that he was to submit to further examination if his alleged clients who are joined as defendants, would waive their claim to privilege as to his evidence. This he (the Master) assumed they had declined to do. The defendant is however the one and the only one who signed the document which has resulted in this action, be it an option or an agreement to buy. He is therefore clearly the primary and main defendant, acting either for himself or for his fellow adventurers, and that being so, it would seem that he cannot set up privilege. The point is one that does not often arise. [Reference to Bray on Discovery, pp. 429 (n), and the cases there cited of Chant v. Brown (1849), 7 Hare 88, per Wigram, V.-C., and Lewis v. Pennington, 29 L.J. Ch. 672, per Romilly, M.R.] The Master said that in the state of the authorities as applied to the issues in the pleadings, and the undoubted fact of the signature of the defendant as the one of the parties, if not the only party, contracting with the plaintiff, he thought he should re-attend

for examination, and answer all questions as to facts within his own knowledge, etc., unless he had some other valid objection. In Lewis v. Pennington, supra, the solicitors claiming privilege were joint defendants with their client, a judgment debtor who had assigned to them all his assets as security for advances made to them. It was held they could not claim privilege as to facts acquired by them as such transferees, though they might have acquired them previously as solicitors. The costs of the motions to be in the cause. J. P. MacGregor, for the plaintiff. C. A. Moss, for the defendant.

PIGDEN v. PIGDEN—KELLY, J.—NOV. 22.

Deed of Land—Action to Set Aside—Duress and Undue Influence—Want of Parties—Refusal of Costs.]—Action by a father 80 years of age against his daughter to have cancelled a deed of some property made by the plaintiff's wife one month before her death, to the defendant, and for a declaration that he is the owner of the lands, etc. The plaintiff alleged that the property though standing in his wife's name was really his, and that the defendant obtained the conveyance from her mother through duress, and undue influence. At the close of the plaintiff's case a motion for nonsuit was made, both for want of parties and on the evidence. KELLY, J., granted the nonsuit, but without costs, for the reason that the evidence reveals lack of consideration on the part of the defendant towards her father, and a harshness of treatment which is hard to understand. E. J. Butler, for the plaintiff. E. G. Porter, K.C., for the defendant.

HUDSON v. SMITH'S FALLS ELECTRIC POWER CO.—MASTER IN CHAMBERS—NOV. 22.

Parties—Third Party Notice—Motion to Set Aside—Ex Parte Order—Lapse of Time—Time for Service—Extension.]—Motion by third party for an order setting aside order giving leave to the defendants to serve third party notice. This action was begun on 18th June, 1910. Statement of claim was delivered on 6th November, 1911, and statement of defence on 21st November, 1911. This delay is accounted for by the very serious condition of the female plaintiff. On 11th October, 1912, the usual order was made ex parte allowing the defendant company to issue

a third party notice claiming indemnity from the Bell Telephone Co. On 1st November the defendant moved for an order for directions, all parties being represented. On application of the third party that motion was enlarged until 5th November, "but trial not to be delayed." On 5th November an order was made according to the entry in the Master's book as follows: "Order that third party plead in a week and that case go to trial at sittings at Perth on 25th inst. unless otherwise ordered meantime—5 days' notice of trial between defendant and third party." All parties were represented on that motion, and no appeal was taken from that decision. On 12th November an order was made for delivery of particulars of claim of defendant against the third party in 3 days on application of the third party. The Master, after stating the above facts, proceeds: "Nothing further was done until this day when a motion was made as follows: something quite new in my experience: for an order setting aside the order giving leave to the defendants to serve third party notice herein, and setting aside said notice and all proceedings subsequent thereto, and for an order postponing the trial of this action and for an order giving leave to the third parties to appeal from the order for directions made herein on the 5th day of November, 1912, notwithstanding that the time for appealing therefrom has elapsed, . . . Mr. Cassels (who appears now for the first time in the case) argued strenuously that the order, owing to the lapse of time, should not have been made ex parte in this case, nor in any case if I understand him correctly. With this as an abstract proposition I do not agree. The decision in Swale v. Canadian Pacific R.W. Co., 25 O.L.R. 492, and the explanation by Riddell, J., in that case, of the case of Parent v. Cook, 2 O.L.R. 709, 3 O.L.R. 350 (see judgment of Riddell, J., at p. 500 and onward), seem adverse to Mr. Cassels' view. But in any case it was open to the third party to have taken this and any other objection to the order itself, in the motion for directions made (after an enlargement at its request) on 5th November. That was the usual and proper time to object to the order. Then there would have been ample time for an appeal by any dissatisfied party. As the trial comes on at the beginning of next week this can no longer be done. Always bearing in mind the provisions of Con. Rule 312 (perhaps the most beneficial of the whole series) I would have acceded to a postponement if only the defendant and third party were in the case. Here, however, the interests of the plaintiffs, if not paramount, are not lightly to be prejudiced, as they must be if the trial were at this late date postponed to meet the view of the third party. The blame for any possible inconvenience or loss

to that corporation cannot be imputed to either of the other parties. The motion so far as it asks for a postponement of the trial of the third party issue will be referred to the trial Judge—and as to the rest of it, it will be dismissed with costs to plaintiff, payable forthwith and fixed at $20, and to defendants as against the third party in any event in the third party issue. R. C. H. Cassels, for the third party. F. Aylesworth, for the defendants. F. McCarthy, for the plaintiff.

FUMERTON v. RICHARDSON—MASTER IN CHAMBERS—NOV. 23.

Change of Venue—Influence of Plaintiff's Counsel—Fair Trial.]—Motion by the defendants other than Gormley to change the venue from Milton to Whitby. The action was brought by a resident of Saskatchewan claiming damages against the defendants for alleged deceit and breach of warranty on a sale by defendant Gormley, alleged to have been the agent of his co-defendants, of a horse to plaintiff in Saskatchewan. Milton was named as the place of trial in the statement of claim delivered on 19th October. Joinder of issue was delivered on 1st November, and jury notice next day. The motion to change the venue was made on the usual ground of preponderance of convenience. The Master said that he did not think the motion could succeed, in the first place, as being made too late, especially as a speedy trial is very important for the plaintiff, and in addition to this, perusal of the pleadings shews that the only issues are as to the alleged misrepresentation and warranty and the character of the horse in question. All that can be found only in Saskatchewan (to which a commission has been issued to take evidence on behalf of all parties) except the evidence of the defendants themselves and of the plaintiff who is said to be on his way for the trial or to have made arrangements to do so. It was also urged in the affidavit in support of the motion that plaintiff's counsel had such influence in the county of Halton that a fair trial could not be had. This ground however was not pressed on the argument, and it was only noticed by the Master in order to refer to the cases of Oakville v. Andrew, 2 O.W.R. 608, and Brown v. Hazell, ib. 784, where analogous objections were not given effect to. In any case it would only afford ground for applying at the trial to dispense with the jury. Motion dismissed with costs to the plaintiff in the cause as against the moving defendants. D. D. Grierson, for the defendants other than Gormley. W. Douglas, for the defendant Gormley. W. Laidlaw, K.C., for the plaintiff.

SCULLY v. MADIGAN—DIVISIONAL COURT—NOV. 23.

Action, Cause of—Conspiracy—Bookmaker — Exclusion of, from Racetrack—Interference with Business.]—Appeal by the plaintiff from the judgment of KELLY, J., of June 12th, 1912, dismissing the action with costs. The plaintiff, a bookmaker resident in Toronto, brought action against the defendants, officers and members of the Canadian Racing Association, who, he alleges, wrongfully excluded him from the race-tracks controlled by them, and asked for a declaration that their action was without lawful excuse, for an injunction restraining them from continuing to exclude him, for damages, etc. At the trial, this action was dismissed with costs. The appeal was heard by CLUTE, RIDDELL, and SUTHERLAND, JJ., and was dismissed with costs, Clute and Riddell, JJ., delivering written judgments in which they went with great fulness into the law and facts in the case. The judgment of Mr. Justice Clute concludes as follows: "It appears then from the evidence, and the findings of the trial Judge, that the defendants were authorized by the various jockey clubs to represent them in the Canadian Racing Association; that the action taken by them which resulted in the expulsion of the plaintiff from the Hamilton racing course was reasonable, proper, and necessary for the good government of the race course during its meeting, that the action of Monk was in his representative capacity as Vice-President of the Hamilton Jockey Club, that he had a right to do as he did, and that the defendants, so far from doing any wrong, simply discharged their duty in the representations which they made in regard to the plaintiff's conduct at the Fort Erie races. Upon the facts and authorities it is clear, I think, that the action of the plaintiff fails, and this appeal should be dismissed with costs. D. L. McCarthy, K.C., for the plaintiff. M. H. Ludwig, K.C., for the defendants.

HAWKES v. WHALEY ROYCE—MIDDLETON, J.—NOV. 25.

Interim Injunction—Infringement of Copyright—Damages —Costs.]—Motion for an interim injunction restraining the infringement of the plaintiff's copyright by the sale of Otto Langey's Violin Tutor. The validity of the copyright is attacked. MIDDLETON, J., said that the amount of damages cannot be large, and that he thought the balance of convenience indicated that no interim order should be made. "The amount of damages before a trial can be had must be very small. An

injunction interfering with the sale could only be granted upon an undertaking to answer as to damages if the claim is shewn to be unfounded. It would be difficult to assess these damages upon any satisfactory basis. The motion will therefore be adjourned to the hearing, without any interim order, and the question of costs will be left to the trial Judge. Even if the plaintiff succeeds in the action, the trial Judge may think that the motion for an interim injunction was not warranted by the circumstances." H. E. Rose, K.C., for the plaintiff. W. B. Raymond, for the defendants.

RE WINDATT AND THE GEORGIAN BAY AND SEABOARD RAILWAY CO.—MIDDLETON, J.—NOV. 25.

Arbitration and Award—Misconduct of Arbitrators—Costs.] —Motions by each party to set aside the award made by the three arbitrators, dated June 25th, 1912. Both parties attacked the award upon the ground of the misconduct of the arbitrators, consisting of ex parte interviews looking towards the bringing about of an adjustment of the rights of the parties in a somewhat difficult situation. MIDDLETON, J., said that it was conceded by counsel that in view of what took place the award cannot stand: and he had, therefore, no course open to him but to set aside the award, but as each party had attacked the award, and neither had attempted to support it, no costs would be awarded. Counsel for the land-owner requested that some provision should be made respecting the costs of the arbitration. Counsel for the railway objected, on the ground that there was no jurisdiction. The learned Judge said that he had come to the conclusion that he had no jurisdiction, and, even if he had, he would not, under the circumstances, make any order, but would simply leave the parties to their legal rights. The judgment proceeds: "There is no doubt that I have jurisdiction over the costs of proceedings in the High Court, but I can find nothing upon which to found any jurisdiction over the costs of the proceedings before the arbitrators. I am referred to Pattullo v. Orangeville, 31 O.R. 192, as shewing that I have authority. That case does not establish this, because the motion there was under the provisions of the Municipal Act, where authority is expressly given to the Judge to vary the award; and this is what was done by the Chief Justice. The whole arbitration concerns the value of a small parcel of land. The award is thirteen hundred dollars, which is much more than the amount really in dispute. The

evidence taken before the arbitrators covers nearly three hundred pages. If the award is wrong, an appeal will lie, but both parties elect to set aside the award; though there was certainly no moral misconduct on the part of the third arbitrator, who in his desire to end an unreasonably expensive litigation, may have technically erred. N. W. Rowell, K.C., for Windatt. Shirley Denison, K.C., for the Railway Co.

DAVISON v. THOMPSON—MASTER IN CHAMBERS—NOV. 25.

Discovery—Further Production—Not Relevant to Issue.]—Motion by the defendant for further production by the plaintiff and further examination for discovery. The Master, after stating the nature of the production, etc., required, said that he was unable to see how what is asked for is relevant to the issues on the pleadings, and dismissed the motion with costs to the plaintiff in the cause. W. M. Hall, for the defendant. J. T. White, for the plaintiff.