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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. DECEMBER 7TH, 1915.

POWELL LUMBER AND DOOR CO. LIMITED v. HARTLEY.

Mechanics' Liens—Costs of Action to Enforce—Quantum—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 *ch.* 140, *sec.* 42—"*Judgment*"—*Taxation of Costs.*

Motion by the defendant Graham to vary the minutes of the judgment of this Court pronounced on the 4th November, 1915: see ante 132.

The motion was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

T. Hislop, for the applicant.

J. P. MacGregor, for Shannon, a lien-holder, contra.

RIDDELL, J., delivering the judgment of the Court, said that the Referee had allowed liens amounting in all to $1,421, and $355 costs. This Court on appeal reduced the amount of the liens to $874.75. The present motion was based on the provisions of sec. 42 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140: "The costs of the action, exclusive of actual disbursements awarded to the plaintiffs and successful lien-holders, shall not exceed in the aggregate twenty-five per cent. of the total amount awarded them by the judgment, and shall be apportioned and borne in such proportion as the Judge or officer who tries the action may direct."

"Judgment" in this section, RIDDELL, J., said, is clearly identical with "judgment" in sec. 37(3) *ad fin.*; and the form number 7 prescribed shews that the "amount awarded . . . by the judgment" is the amount for which a lien is declared.

The amount of the costs should, therefore, be reduced to $218.69 and disbursements. The amount should be determined by the Taxing Officer if the parties cannot agree, and inserted in the certificate of this Court; costs of taxation, if taxation is necessary, to be in the discretion of the Taxing Officer. The Taxing Officer will not allow any disbursements in connection with this appeal.

The applicant on this motion should have his costs, fixed at $10.

FIRST DIVISIONAL COURT. DECEMBER 7TH, 1915.

STREET v. MURRAY.

Fraud and Misrepresentation—Money Paid for Assignment of Interest in Patented Ivention — False Representations of Assignor's Agent—Rescission—Return of Money Paid—Damages for Detention.

Appeal by the defendant from the judgment of LENNOX, J., 8 O.W.N. 436.

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

R. S. Robertson, for the appellant.

W. M. Douglas, K.C., for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. DECEMBER 8TH, 1915.

*RE GARNHAM'S CONVICTION.

*RE RICHARDSON'S CONVICTION.

Municipal Corporations — Hawkers and Pedlars' By-law of County — Magistrate's Conviction — Sale of Coal Oil by Travelling Salesman—Order for Future Delivery—"Hawker" — Municipal Act, R.S.O. 1914, *ch.* 192, *sec.* 416 — *Amendment by* 5 *Geo. V. ch.* 34, *secs.* 32, 33.

Appeals by S. A. Garnham and A. E. Richardson from the

*This case and all others so marked to be reported in the Ontario Law Reports.

orders of MEREDITH, C.J.C.P., in Chambers, refusing to quash convictions of the appellants by the Police Magistrate for the City of Woodstock. See the reasons of the Chief Justice noted ante 117, reported in 34 O.L.R. 545. Leave to appeal was granted by SUTHERLAND, J.: see ante 172.

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

G. S. Gibbons, for the appellants.

W. Lawr, for the complainant, respondent.

RIDDELL, J., delivering a considered opinion, said that the evidence, when read in the light of the exhibits, shewed that the modus operandi, in making the sales of coal oil in respect of which the defendants were convicted, was to obtain from the purchaser an order on the Columbus Oil Company of Columbus, Ohio, to ship to the purchaser a named quantity of oil to be delivered at a place named in the order—cash on delivery. There was no evidence of sale beyond this, and nothing to indicate sale by sample or delivery from a tank car. This was not a sale within the meaning of sec. 416 of the Municipal Act, R.S.O. 1914 ch. 192, and consequently not an offence: Rex v. St. Pierre (1902), 4 O.L.R. 76; Rex v. Pember (1912), 3 O.W.N. 1216. The carrying of samples was neither proved nor suggested; and the amending Act of 1915, 5 Geo. V. ch. 34, secs. 32, 33, did not apply.

LATCHFORD, J., read an opinion to the same effect.

FALCONBRIDGE, C.J.K.B., and KELLY, J., concurred.

Appeal allowed with costs throughout.

FIRST DIVISIONAL COURT. DECEMBER 9TH, 1915.

GODKIN v. WATSON.

Executors and Administrators—Administrator's Account—Payment of Debts in Full—Presumption as to Assets—Identification of Assets of another Estate—Account—Reference—Judgment—Modification on Appeal—Costs.

Appeal by the defendant from so much of the judgment of KELLY, J., of the 30th June, 1915, in an action for an account, as made the defendant personally liable for the debt of the George Watson estate to the Robert Ford Lynn estate.

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

G. H. Watson, K.C., for the appellant.

J. A. Rowland, for the plaintiffs, respondents.

HODGINS, J.A., delivering the judgment of the Court, said that the amount found by the Surrogate Court Judge on the 14th February, 1910, as due by the estate of George Watson to the estate of Robert Ford Lynn—$5,439.41—could not be disputed except for mistake or fraud; and no evidence was led in that direction. There was sufficient, however, to shew that the appellant received a considerable amount of money from his father's estate, sworn by him for probate at $6,885.62, and that he paid debts of that estate in full. That being so, the presumption arose that the appellant had sufficient assets to pay all the debts; and he would have the right to recover from those to whom he so paid, their proportion overpaid, if he shewed that that presumption was incorrect: Chamberlen v. Clark (1883), 9 A.R. 273. The respondents were entitled to receive any assets which they could identify as belonging to the Lynn estate.

The judgment in appeal found the appellant liable personally for the $5,439.41, and gave him the privilege of shewing what had become of the assets of his father's estate to the extent of that amount. The judgment should be modified by declaring that the appellant is liable to pay the respondents the sum of $5,439.41, with interest from the 14th February, 1910; and, if the appellant so elects within two weeks, referring it to the Master in Ordinary to take an account of the dealings of the appellant with his father's estate to ascertain whether the appellant has or has not received that amount, and what amount he has received, and whether he is chargeable therewith and should pay the full amount of $5,439.41, having regard to the other debts of the estate, and having regard to its assets and liabilities, including that to the Lynn estate, at the date of his father's death. The Lynn estate indebtedness at that date is to be taken as established at $5,439.41. If the reference is taken, the appellant's liability is to be for the amount ascertained by the Master. The appellant is to receive credit for any assets of the Lynn estate in his hands or for which he is chargeable which he is able to transfer to the respondents, when so transferred.

In other respects the judgment should be affirmed. The reference should be at the appellant's expense; and there should be no costs of this appeal.

FIRST DIVISIONAL COURT. DECEMBER 9TH, 1915.

EGAN v. McARTHUR.

Will—Proof of Due Execution—Judgment of Surrogate Court—Appeal—New Trial—Right of Appeal—Value of Property Affected—Appointment of Administrator with Will Annexed—Costs.

Appeal by the plaintiff from the judgment of the Surrogate Court of the County of Essex: (1) declaring that the writing propounded by the plaintiff was not the last will and testament of Minard Wheeler, deceased, and that the deceased died intestate; and (2) directing that letters of administration be granted to a brother of the deceased, his next of kin.

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

J. H. Rodd, for the appellant.

D. L. McCarthy, K.C., for the defendant, respondent.

MAGEE, J.A., delivering the judgment of the Court, said that the plaintiff, who, as nominee of the two surviving children of the deceased, applied for letters of administration with the will annexed, appealed against both branches of the judgment; but on the argument of the appeal the finding that the brother was next of kin was not challenged, though it implied that the two children referred to were not next of kin. It was, however, pressed that the judgment against the sufficiency of the proof of the due execution of the will should not stand; and that, as it might have affected the decision to award administration to the brother, the latter also should be reconsidered.

The attestation of the will stated that it was signed by the testator and by the two subscribing witnesses, each in the presence of the others; and one of the witnesses, Mrs. Chamberlin, made the usual affidavit of due execution to lead grant of letters of administration with the will annexed.

At the trial, in June, 1915, the other subscribing witness, R. E. Cade, was called to prove the will, which was dated in July, 1905. He, though deposing to the signing by the testator and himself, could not say positively, though he thought, that Mrs. Chamberlin signed in his presence, and was present when he signed. Mrs. Chamberlin was not well, and was not a witness at the trial.

In the circumstances, the case should be remitted to the Surrogate Court for trial, so that the plaintiff might have an opportunity of offering additional evidence as to the execution of the will. If found to be duly executed, it should be open to the Judge of that Court to consider to whom he will grant administration.

Objection was taken, under sec. 34 of the Surrogate Courts Act to the appeal, on the ground that the value of the property to be affected by the judgment did not exceed $200, inasmuch as the only bequests possibly subsisting under the will at the testator's death amounted only to $65—the devise of realty to his wife having lapsed, as he had survived her, the will having made no disposition of residue, and no executor having been named. But the estate was shewn to be over $2,000; and, as the judgment and appeal concerned the person to whom administration of it was to be consigned, it must be taken to affect more than $200.

Costs of the appeal and of the former trial to be paid out of the estate.

FIRST DIVISIONAL COURT. DECEMBER 9TH, 1915.

*RE TORONTO AND YORK RADIAL R.W. CO. AND CITY OF TORONTO.

Street Railway — Agreements with Municipal Corporations — Right of Deviation and Extension of Lines—Approval of Plans—Order of Ontario Railway and Municipal Board—Jurisdiction—Franchise—Submission of Plans to Municipal Officials—Necessity for.

Appeal by the Corporation of the City of Toronto from an order of the Ontario Railway and Municipal Board allowing an application made by the railway company for the approval of certain plans of tracks by way of a deviation from its existing line along Yonge street in the city of Toronto, to a proposed station on land adjoining that street.

The application made to the Board was opposed by the city corporation on two grounds: (1) that the railway company had no franchise in respect of the street and adjoining land proposed to be used; (2) that, in any event, the consent of the city council was necessary.

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

G. R. Geary, K.C., and Irving S. Fairty, for the appellant corporation.

I. F. Hellmuth, K.C., and C. A. Moss, for the railway company, the respondent.

GARROW, J.A., in a considered opinion, referred to the Ontario statute of 1877 incorporating the Metropolitan Street Railway Company, 40 Vict. ch. 84; to a certain agreement dated the 26th June, 1884, made between the railway company and the Corporation of the County of York, validated by 56 Vict. ch. 94; to a further agreement validated by 60 Vict. ch. 93, and to secs. 6, 7, and 11 of that Act.

The learned Judge then said that the application failed upon a ground which was applicable whether the power asserted was to be regarded as specific or general, or even necessarily to be implied, viz., that, so far as appeared, no plan of the proposed deviation and extension was ever submitted to or approved by the municipal officials of either the county or the city.

Such a plan, so approved, is expressly made, by the terms of the agreement of June, 1884, the very basis of all the work to be afterwards undertaken upon the highway; and its production and approval cannot be dispensed with by the Board. It is not the case of a violated agreement under sec. 260(1) of the Ontario Railway Act, R.S.O. 1914 ch. 185; while, under sec. 105, sub-sec. 8, the Board is powerless to alter or affect the number or location of the tracks agreed on.

The case really falls within the principle applied in the judgment of the Judicial Committee of the Privy Council in Toronto and York Radial R.W. Co. v. City of Toronto (1913), 25 O.W.R. 315, affirming the judgment of the Court of Appeal in Re City of Toronto and Toronto and York Radial R.W. Co. (1913), 28 O.L.R. 180, and also by Falconbridge, J., in City of Toronto v. Metropolitan R.W. Co. (1900), 31 O.R. 367. In both these cases, the real question was, as here, primarily one of locality.

In this view, it was not necessary to pronounce any opinion upon the situation presented by the transfer of the portion of the highway in question by the Corporation of the County of York to the Corporation of the Township of York, nor the effect to be given, in the circumstances, to the confirmation contained in sec. 15 of 60 Vict. ch. 92.

The appeal should be allowed with costs.

MACLAREN, J.A., agreed in the result.

MAGEE, J.A., agreed with GARROW, J.A.

HODGINS, J.A., also agreed in the result, stating reasons in writing, which, at the end, he summarised as follows:—

(1) The Act of 1877, 40 Vict. ch. 84, does not incorporate the sections of C.S.C. ch. 66 relied on by the Board so as to enable the powers given to be now exercised except outside the present limits of the city.

(2) These limits are the limits existing when any application is made in which reliance has to be placed on the sections referred to for the right to exercise the desired powers.

(3) The rights of the respondent company are to be put in force only under any subject to the agreements which they from time to time make with the municipalities concerned; and the agreements define the rights with which the respondent company is clothed in the absence of express legislation.

(4) The municipalities concerned are those which have jurisdiction over the streets and highways in question when an agreement is actually made.

(5) The Corporation of the County of York had, on the date when the 1894 agreement became effective—the 25th October, 1896—lost jurisdiction over that portion of Yonge street in question, and the Corporation of the Township of York then possessed it.

(6) The township corporation was not shewn to have given any permission or agreement while it had such jurisdiction.

(7) That portion of Yonge street passed to the city corporation in 1908 unaffected by the provisions of the 1894 agreement.

(8) That agreement, even if it bound the city corporation, does not comprehend such a deflection as is allowed here, under any of its terms, nor under any that ought to be implied.

(9) The Board had no power, either under any agreement already made or under any statute, to make the order appealed from, giving the right to connect with terminals or with tracks and buildings on the lot in question for the accommodation of passengers and freight.

KELLY, J., agreed in the result, for reasons stated in writing.

Appeal allowed with costs.

FIRST DIVISIONAL COURT. DECEMBER 9TH, 1915.

*GOVENLOCK v. LONDON FREE PRESS CO. LIMITED.

Libel — Pleading — Defence — Admission — Justification — Failure to Prove Truth of Alleged Libel—Jury—Verdict—Improper Admission of Evidence—New Trial—Costs.

Appeal by the plaintiff from the judgment of MEREDITH, C.J.C.P., at the trial at London, dismissing an action for libel, upon the verdict of a jury.

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

R. S. Robertson and R. S. Hays, for the appellant.

J. M. McEvoy, for the defendants, respondents.

HODGINS, J.A., delivering the judgment of the Court, said that the writing complained of—published by the defendants in their newspaper—was to the effect that the plaintiff had been fined and suspended from the race-track at Seaforth for assaulting one Conley, the starter; and the innuendo was, that the plaintiff had been guilty of an unlawful assault and of an indictable offence and of improper conduct as a horseman. The important defence was expressed thus: "In so far as the said words consist of allegations of fact, they are true in substance and in fact, save that the plaintiff did not assault Mr. N. H. Conley, but was fined by him for irregularities on the race-track." This plea was treated at the trial as an ordinary plea of justification, the trial Judge ruling that the libel did not in fact allege that the plaintiff had assaulted the starter, but did allege that he was fined for assault. This ruling seemed to leave out of account the admission in the plea that the statement that the plaintiff was fined for assault was not true, and the allegation that what he was fined for was "irregularities on the race-track"—quite a different thing.

The evidence shewed that the assault was not committed by the plaintiff, though the fine was in fact recorded against the plaintiff, and afterwards removed. The plea, if treated as one of justification simply, was disproved when it was shewn that the starter intended to fine some other person. The mere recording against one individual of a fine intended for and pronounced against another, is not sufficient to establish it, if it had no real existence in intention.

The trial Judge accepted the evidence given that the plaintiff was not present when the assault took place and the fine was imposed; and the jury had found for the defendant in face of an admission and against evidence that the libel was untrue as to one part—a part clearly libellous in the circumstances—and the verdict could not stand: Lumsden v. Spectator Printing Co. (1913), 29 O.L.R. 293.

Evidence was improperly admitted of a previous fine of $25 imposed during the same day for irregularities on the track, which fine was withdrawn. The fact was irrelevant, having regard to the explicit terms of the article complained of as libellous.

The pleadings in an action for libel must define the issue which is being tried. Upon a plea of justification, the defendant is limited to proving the truth of his assertion, and should not be allowed, to the prejudice of the plaintiff, to adduce evidence which may raise a totally different issue. If the parties are not bound by the pleadings, confusion may be caused, and a general verdict for either party may mean a mistrial. See Brown v. Moyer (1893), 20 A.R. 509; Manitoba Free Press Co. v. Martin (1892), 21 S.C.R. 518; Jackes v. Mail Printing Co. (1915), 7 O.W.N. 677.

The judgment for the defendant should be vacated, and a new trial ordered; the defendant should pay the costs of the appeal; and the costs of the former trial should be dealt with by the Judge presiding at the new trial.

SECOND DIVISIONAL COURT. DECEMBER 9TH, 1915.

*BALL v. WABASH R.R. CO.

Trial—Findings of Jury—Negligence—Contributory Negligence—Injury to Servant of Railway Company—Conflicting Findings—New Trial—Rule 501(1).

Appeal by the defendants from the judgment of SUTHERLAND, J., 8 O.W.N. 544.

The action was for damages for injuries sustained by the plaintiff, a locomotive fireman employed by the defendants, by reason of their negligence in relation to the escape of steam from a valve. Questions were submitted to the jury, which, with

their answers, were as follows: (1) Were the injuries of the plaintiff caused by the negligence of the defendants? A. Yes. (2) If so, wherein did such negligence consist? A. In not seeing that the valve was properly closed? (3) Or were the plaintiff's injuries the result of his own negligence? A. No. (4) If so, wherein did such negligence consist? (Not answered.) (5) Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. Yes. (6) If so, what could he have done? A. By examining valve. The damages were assessed at $2,200.

The trial Judge, SUTHERLAND, J., thought the answers conflicting, and left the case for a new trial: Rule 501(1).

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

H. E. Rose, K.C., for the appellants.

A. A. Ingram, for the plaintiff, respondent.

FALCONBRIDGE, C.J.K.B., said that, in his opinion, there was evidence proper to be submitted to the jury on all branches of the case. The answers of the jury were plainly conflicting; and the case was one for the application of Rule 501(1), as the trial Judge ruled. The appeal should, therefore, be dismissed with costs.

LATCHFORD, J., was of the same opinion, for reasons stated in writing, in which he referred to St. Denis v. Baxter (1887-8), 13 O.R. 41, 15 A.R. 387; Kerry v. England, [1898] A.C. 742; Australasian Steam Navigation Co. v. Smith & Sons (1889), 14 App. Cas. 321.

KELLY, J., was of the same opinion, for reasons stated in writing.

RIDDELL, J., was of opinion, for reasons stated in writing, that the very highest position in which the answers of the jury could be put in favour of the plaintiff was to read them as though the jury said: "We find that this accident was caused by the negligence of the defendants, and it could have been avoided by the plaintiff exercising reasonable care—but we do not call the omission to use that reasonable care negligence on the part of the plaintiff." The appeal should be allowed and the action dismissed.

Appeal dismissed; RIDDELL, J., *dissenting.*

SECOND DIVISIONAL COURT. DECEMBER 10TH, 1915.

*LAVERE v. SMITH'S FALLS PUBLIC HOSPITAL.

Negligence — Injury to Patient in Hospital — Carelessness of Nurse — Public Charitable Institution — Corporate Body — Contract with Patient—Contract to Nurse—Liability—Respondeat Superior—Damages.

Appeal by the plaintiff from the judgment of BRITTON, J., 34 O.L.R. 216, 8 O.W.N. 548.

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

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

G. H. Watson, K.C., for the defendants, respondent.

RIDDELL, J., read an elaborate opinion, in which he stated that there was no possible doubt that the burn of which the plaintiff complained was caused by an overheated brick being placed against her foot when she was unconscious; that this was done by the nurse in charge; and that the act was improper. The sole question was, whether the defendants, an incorporated body conducting a public hospital, were liable for the act of the nurse.

The learned Judge made an exhaustive review of the cases, English, Irish, Scottish, American, and Canadian. He then said that from all the cases it was plain that once the "trust fund theory" was got rid of—and it was conceded that it had now no footing in our law—the case was reduced to the question, what did the defendants undertake to do? If only to supply a nurse, then supplying a nurse selected with due care is enough; if to nurse, then, the nurse doing that which the defendants undertook to do, they were responsible for her negligence, as in contract—respondeat superior. Here the contract expressly included the nursing of the plaintiff.

The plaintiff's damages should be assessed at $900.

The learned Judge added the following explanatory statements:—

(1) The Court proceeds on the ground of an express contract to nurse, and expresses no opinion as to the law in the ordinary case of a patient entering the hospital without such contract.

(2) While an implied contract would have the same effect as an express contract in the same terms, the Court expresses no opinion as to the contract implied from a patient entering a hospital.

(3) The Court expresses no opinion as to what the result would have been had the negligence occured in the operating theatre.

(4) None of the cases in any of the jurisdictions expresses any doubt that the nurse herself is liable for her own negligence in a civil action in tort; in some cases also criminally for an assault, simple or aggravated, and in fatal cases for manslaughter.

(5) There is no hardship in the present decision. The defendants can protect themselves as in Hall v. Lees, [1904] 2 K.B. 602, and in some of the American cases.

FALCONBRIDGE, C.J.K.B., and LATCHFORD and KELLY, JJ., agreed in the result, each reading a judgment.

Appeal allowed with costs; and judgment to be entered for the plaintiff for $900 *and costs.*

SECOND DIVISIONAL COURT. DECEMBER 10TH, 1915.

*WILLS v. FORD.

Contract—Brokers—Loan of Company-shares—Action for Return and Damages—Defence—Offer to Return and Refusal to Accept—Money Deposited with Lender as Security—Price of Shares—Rise in Value.

The plaintiff, a member of the Standard Stock Exchange, Toronto, being the holder of some shares of Dome Mines stock, the defendant Ford, also a member of the Exchange, on the 8th July, 1914, "borrowed" 400 shares at $9 per share, and on the 20th July, 1914, 350 shares at $9.50, i.e., he put up in the plaintiff's hands as security $3,600 and $3,325. Of the 750 shares, 500 were returned. The plaintiff, alleging that he had demanded the remainder and been refused, brought this action for the return of the 250 shares, an account, and special damages. The defendant Doucette, by an arrangement, had taken the defendant Ford's place in the contract.

At the trial, the action was dismissed by MEREDITH, C.J.C.P., and the plaintiff appealed.

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

H. H. Shaver, for the appellant.

No one appeared for the defendant Doucette, the respondent.

RIDDELL, J., delivering judgment, said that this was apparently a simple action in detinue, but a perusal of the evidence shewed that "borrowing" in stockbroking circles does not imply a return of the very stock certificates borrowed—the loan is repaid by the delivery of stock certificates of the same amount and kind. On such a borrowing, also, the borrower has the right to return the stock or any part of it at any time and demand the return to him of the amount of money paid by him as security or an aliquot part.

In substance, the defence to the action was an offer by the defendant and a refusal by the plaintiff.

So long as stock so lent is lower than the price at which it is lent, the lender will not be desirous of a return of his loan—but the borrower will wish to return the stock and get his money. That was what took place. Doucette asked the plaintiff several times to take up the stock; part of it was taken up; the stock has now gone up to $22. When the stock was low, the plaintiff was "jollying" the defendants "along"—he wanted to hold the money as long as he could. Doucette had the stock, and wanted to return it, but the plaintiff would not accept it. Accordingly, when the stock came up again to the price at which it was borrowed, the defendant sold it—that was in March or April, 1915.

The performance of the contract of Doucette (or Ford) to deliver the stock to the plaintiff, the plaintiff prevented; and he could have no damages for the non-delivery. He could not claim to be in a better position than if he had carried out his contract to receive the stock when the other party desired to return it. Then he would have had the stock, but he would have been obliged to repay the sum of money he had received; and this would be not less than the value of the stock he would receive. In such a case, no formal tender is necessary.

FALCONBRIDGE, C.J.K.B., concurred.

LATCHFORD, J., agreed in the result.

KELLY, J., also agreed in the result, for reasons stated in writing.

Appeal dismissed without costs.

FIRST DIVISIONAL COURT. DECEMBER 10TH, 1915.

PEPPIATT v. REEDER.

Damages—Deceit—Measure of Damages—Profits—Services—Reference—Appeal—Costs.

Appeal by the defendant from the order of MULOCK, C.J.Ex., ante 121.

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

J. J. Gray, for the appellant.

Edward Meek, K.C., for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. DECEMBER 11TH, 1915.

*BERLINER GRAMOPHONE CO. v. POLLOCK.

Patent for Invention—Validity—"Life of Patent"—Termination by Illegal Importation and Non-manufacture—Pleading—Action to Restrain Manufacturing or Selling in Breach of Contract—Defence—Amendment—Construction of Contract—Patent Act, R.S.C. 1906 *ch.* 69, *secs.* 23, 38(*b*).

Appeal by the plaintiff company from an order of BOYD, C., in Chambers, affirming an order of the Master in Chambers, granting leave to the defendant to set up a defence attacking the present validity of the plaintiff company's patent on the grounds of illegal importation and non-manufacture. The action was for an injunction restraining the defendant from manufacturing or selling talking-machines in breach of an agreement.

Leave to appeal was given by an order of MASTEN, J., in Chambers, ante 169.

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

R. C. H. Cassels, for the appellant company.

Casey Wood, for the defendant, respondent.

RIDDELL, J., delivering the judgment of the Court, referred to the agreement between the parties made in the month of March, 1910, and quoted clause 2, as follows: "Pollock agrees not to engage, either directly or indirectly, for himself or as agent or employee of any other person, firm, or corporation, in the manufacture or sale of disc talking-machines in Canada during the life of said letters patent No. 103332, with the exception of the sale of his present stock. . . ." The defendant contended that, by virtue of the acts of the plaintiff company set out in the proposed amended statement of defence, the "life" of the patent had gone, and the time during which the defendant was bound had expired.

In the absence of special circumstances, the "life" of any patent is "the term limited for the duration:" sec. 23 of the Patent Act, R.S.C. 1906 ch. 69. The mere occurrence of the circumstances set up in the proposed amended defence did not bring the "life" of the patent to an end, within the meaning of the contract. There might be no discovery of the facts; or, if such discovery should be made, no one might be sufficiently interested to dispute the continuance of the patent. Moreover, as to the alleged importation, at least, the patent might be in existence quoad any one but the importer: sec. 38(*b*).

It may well be that if a judgment in rem of a Court of competent jurisdiction were obtained declaring the patent void, the "life" would be considered to have come to an end—but there was nothing of that kind here.

Appeal allowed, with costs throughout.

SECOND DIVISIONAL COURT. DECEMBER 11TH, 1915.

RE HAMILTON.

Deed—Construction of Trust-deed Settling Share of Beneficiary under Will — Effect as to Restraint upon Anticipation—Judgment in Former Proceeding — Effect of — Reasons for Judgment—Master's Report not Appealed against—Binding Effect on Parties—Stay of Judgment.

Appeal by William Fortye Hamilton from the order of LENNOX, J., ante 144.

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

R. R. Hall, for the appellant.
B. D. Hall, for the Royal Trust Company, trustees.
J. A. Worrell, K.C., for Annie Seaborn Hill, respondent.

RIDDELL, J., delivering the judgment of the Court, said that the testator made a provision in his will for his daughter Annie Seaborn Hill. A question arose as to her power of anticipation, which was dealt with by the Chancellor in Re Hamilton (1912), 27 O.L.R. 445; and an appeal from his decision was dismissed by a Divisional Court of the Appellate Division (1913), 28 O.L.R. 534. A reference was had before the Master at Peterborough, who reported with a form of trust-deed settling the share of Mrs Hill. The deed was duly executed, and the report became absolute by lapse of time. Upon a new originating notice, LENNOX, J. (ante 144), ruled that the question of the power of Mrs. Hill in respect of anticipation of income was concluded by the judgment of the Chancellor as affirmed.

The judgment of the Chancellor as issued did not, however, carry out what seemed to have been the real effect of the reasons. The judgment as issued did not contain a declaration that Mrs. Hill was or was not restrained from anticipation. With the logical result of the reasons for judgment, the Court, upon this appeal, had nothing to do: the formal judgment was the judgment of the Court. Barber v. McCuaig (No. 2) (1900), 31 O.R. 593, distinguished. The only adjudication, then, was that of the Master, which was just as binding upon the Court, unless moved against, as a judgment of the Privy Council.

It was not material that the present appellant was not a party to the former proceedings. He might possibly complain if the position of Mrs. Hill was altered to his detriment by the deed; but there was nothing to prevent him from accepting the situation and adopting the existing state of her rights.

Looking at the provisions of the trust-deed as settled by the Master, it appears that the first thing that is done is to form a trust fund out of the seven items in schedule A, and this is to be reinvested (para. 3). Then the assets in schedule B are dealt with. These are to be turned into money and paid to Mrs. Hill "for her own use and benefit." This is subject to the previous paragraphs, and can dispose of items 8 and 9 only. By para. 5, the income of the trust fund is to be paid to Mrs. Hill for her life or that of her husband, and then the trust fund ceases to pay out its annual income. Para. 6 operates as a restraint on alienation of the trust funds.

The result is, that Mrs. Hill has "for her own use and benefit," first, the assets in schedule B, not mentioned in schedule A, and, secondly, the annual income of the trust fund formed by the assets in schedule A. The trustees remain seized of the assets in schedule A, and Mrs. Hill cannot dispose of them until her husband's death.

The appeal should be allowed; but the appellant should not be allowed costs, because he had omitted to furnish the Court with the necessary documents. The trustees to have their costs out of the fund; otherwise no costs of this appeal.

The judgment of the Court is not to issue for 30 days, in order to allow the respondent to apply, if so advised, for leave to appeal from the Master's report or take other proceedings to be relieved from the effect thereof and of her deed; if a motion is made or proceedings taken within the 30 days, there will be such a further stay as may be necessary.

HIGH COURT DIVISION.

CLUTE, J. NOVEMBER 24TH, 1915.

BOLTON v. TYNDALL.

Mortgage—Payment by Mortgagor to Solicitor—Failure of Solicitor to Pay over to Mortgagee—Validity of Payment—Authority of Solicitor—Agency—Evidence—Onus.

Action to recover the balance due upon a mortgage made by the defendant to the plaintiff, dated the 6th October, 1905.

The action was tried without a jury at Toronto.

C. W. Plaxton, for the plaintiff.

B. N. Davis, for the defendant.

CLUTE, J., delivering judgment orally after the trial, said the mortgage was prepared by Mr. Lobb, a solicitor, and was left in the vault in his office for safe-keeping. The interest was from time to time paid by the defendant to Mr. Lobb, and by him paid over to the plaintiff. The mortgage fell due in 1910; the defendant then paid $500 on account of the principal to Mr. Lobb, and that was paid over to the plaintiff; the time for payment of the balance was extended. Two payments were made by the

defendant to Mr. Lobb in 1913; and the amounts then paid were not paid over by Mr. Lobb to the plaintiff. One of these payments was made in response to a letter written by Lobb to the defendant, in which he said: "If you care to make a payment on account of the principal secured by the mortgage, Mr. Bolton will accept it now without notice or bonus; you will please let me know if you agree to do so."

The learned Judge said that he found nothing in this letter, nor in anything that was said between the plaintiff and Lobb, to indicate an intention on the part of the plaintiff to authorise Lobb to receive any moneys on account of the mortgage. On no occasion, either expressly or by implication, did the plaintiff authorise Lobb to collect the money for him. The onus was upon the defendant to satisfy the Court that the plaintiff, either by his course of dealing or by express authority, authorised Lobb to receive the money for him. In that the defendant had failed.

Judgment for the plaintiff for $1,000 and interest, with costs.

BOYD, C. DECEMBER 6TH, 1915.

ARMITAGE v. SCRASE.

Costs—Unsuccessful Defence to Action to Establish Will—Issues as to Due Execution and Forgery Raised by Defendants—Incidence of Costs.

ACTION by the widow of George W. Armitage, deceased, to establish a testamentary writing as his last will and testament.

The action was tried without a jury at St. Thomas.

J. B. Davidson, for the plaintiff.

W. K. Cameron, for the defendants.

THE CHANCELLOR referred to McAllister v. McMillan (1911), 25 O.L.R. 1, as to the disposition of costs in testamentary cases, as establishing: (1) that the next of kin can call for proof of a will per testes and cross-examine the witnesses called in support of the will without being subject to the payment of costs; and (2) that, if the surrounding conditions are such as to justify reasonably an investigation into the matter, the party who unsuccessfully litigates may rightly be relieved from the payment of costs (pp. 3 and 4).

In this case, the issues were: (1) whether the will was duly executed in accordance with the statute; (2) whether the document propounded was the true last will of the deceased—in effect involving an inquiry whether the document was a forgery. The due execution of the will in the presence of witnesses was well proved. Upon the second issue, many witnesses were examined, including several experts, and the trial lasted for three days and part of a fourth, with the result that the will was found to be an authentic instrument duly executed by the testator. There were some circumstances of suspicion, but nothing to warrant a charge of forgery and the great expense thereby occasioned.

In the circumstances, the most that could be done in favour of the defendants was to exempt them from paying costs.

Judgment declaring that the will was valid and should be admitted to probate, with costs to the plaintiff out of the estate, and no costs to be received or paid by the defendants.

RIDDELL, J., IN CHAMBERS. DECEMBER 7TH, 1915.

*RE OWEN SOUND LOCAL OPTION BY-LAW.

Municipal Corporations—Local Option By-Law—Petition for Submission of Repealing By-law — Liquor License Act, R.S.O. 1914 *ch.* 215, *sec.* 137(4)—*"Persons Qualified to Vote"—Ascertainment of Number on Voters' List—Evidence—Persons Signing Petition—Percentage—Mandamus to Council—Status of Applicant for—Officer of Corporation.*

Motion by Percy L. Greer for a mandamus to the Municipal Council of the Town of Owen Sound to prepare and submit to the electors on the next municipal polling-day a by-law for the repeal of the local option by-law now in force in the town.

James Haverson, K.C., for the applicant.
W. E. Raney, K.C., for the council.

RIDDELL, J., said that a petition was presented to the council, under the provisions of sec. 137(4) of the Liquor License Act, R.S.O. 1914 ch. 215, and filed with the Clerk on the 1st November, 1915, praying for the submission of the proposed by-law; it contained the names of 1,003 "persons appearing by the last

revised voters' list of the municipality to be qualified to vote at municipal elections;" there were some other names, but that was immaterial. The voters' list contained 4,337 names; but it was sworn and not contradicted that the names of many persons appeared more than once. The auditor of the town swore that the number of *persons* on the voters' list was only 3,625; and he must be believed.

It was argued for the respondents that there could be no inquiry of any kind as to the number of *persons*—all that could be looked at was the apparent number of *names*. That was not the correct interpretation of the Act. The petition was not signed by *names*, but by *persons;* and a sufficient number of *persons* must sign to make up at least 25 per cent. of the total number of *persons* appearing to be qualified to vote. Find out the number of *persons* who appear by the voters' list to be qualified to vote; and, if one-fourth of these *persons* sign the petition, the requirements of the statute are answered. That was the case here.

An objection was taken that the applicant was an officer or employee of the corporation; there was no force in that; the applicant did not give up his ordinary rights as a ratepayer by accepting office.

Mandamus granted with costs.

RIDDELL, J. DECEMBER 7TH, 1915.

MAPLE LEAF PORTLAND CEMENT CO. v. OWEN SOUND IRON WORKS CO.

Damages—Breach of Contract—Breach of Implied Condition or Warranty — Pleading — Judgment — Scope of Reference—Master's Report—Appeal.

Appeal by the defendant company from a report of the Master in Ordinary; and motion by the plaintiffs for judgment upon the report.

The appeal and motion were heard in the Weekly Court at Toronto.

W. N. Tilley, K.C., for the defendant company.

W. G. Thurston, K.C., for the plaintiffs.

RIDDELL, J., said that the action was brought on a written contract to supply an Emerick pulveriser and an Emerick separator; in para. 15 of the statement of claim the plaintiffs set out that, in addition to "the said contract," the defendants knew that the plaintiffs required the machinery for specific purposes, and relied upon the skill and judgment of the defendants, etc., and alleged "that the sale and purchase of the Emerick machinery carried or implied a condition or warranty that the machinery supplied would answer the particular purpose, which condition or warranty has not been fulfilled or complied with." The claim was: "3. Damages for the said breach or breaches of said contract and the said guaranty or warranty contained in said contract. 4. In the alternative, damages for the breach of the implied condition or warranty referred to or set out in the 15th paragraph of this statement of claim."

The plaintiffs, thus distinguishing the claim (1) on the contract and (2) on the implied condition or warranty, went down to trial. Judgment was given in their favour by KELLY, J., 4 O.W.N. 721; in the formal judgment the following language was used: "And this Court doth further order and adjudge that it be referred to the Master in Ordinary to ascertain and state the damages which the plaintiffs have sustained in respect of the breach of contract in the statement of claim alleged." The Appellate Division, 4 O.W.N. 1189, did not disturb this judgment. On the reference, the Master ruled that the plaintiffs might, under the judgment, prove damages not only for breach of the express contract but also for breach of the implied warranty set out in para. 15. From that ruling the defendants appealed.

The learned Judge said that he could find nothing in the written reasons of KELLY, J., or in the case as it was presented to the Appellate Division, to indicate that what was intended was anything more than damages for the *breach* of the *contract* set out in para. 2 of the statement of claim—the word was in the singular, and referred to the claim in para. 3 of the prayer.

The Master had proceeded on a wrong principle, and the matter must be referred back to him to deal with it on the principle above set out; the defendants to have their costs of this appeal in any event.

The plaintiffs' motion for judgment was refused with costs.

RIDDELL, J. DECEMBER 7TH, 1915.

RE TAYLOR.

Will — Construction — Devise — "Issue" — "In Fee" — Life Estate—Remainder—Rule in Shelley's Case.

Motion by the executors of George Taylor, deceased, for an order determining a question as to the proper construction of a paragraph of his will whereby he gave and devised unto his two daughters Marietta Weller and Jennie Campbell certain described land, "to have and to hold to the use of them the said Marietta Weller and Jennie Campbell for and during the terms of their natural lives as tenants in common and after their decease the undivided share of each to the use of their respective issues in fee so that the child or children of each will take his her or their mother's share but in case the said Jennie Campbell should die without issue then I give and devise her share thereof to the children of the said Marietta Weller alone share and share alike."

The motion was heard in the Weekly Court at Toronto.

R. S. Cassels, K.C., for the executors.

A. R. Clute, for the children of Marietta Weller.

RIDDELL, J., said that the sole question was, whether Marietta Weller took an estate in fee, in tail, or for life. Primâ facie, "issue" means "heirs of the body:" Roddy v. Fitzgerald (1855), 6 H.L.C. 823, at p. 872. Had the words been "in fee simple," instead of "in fee," the Court would be bound by King v. Evans (1895), 24 S.C.R. 356, to decide that the devisee took only a life estate. It would be to make too subtle a distinction—always to be avoided if possible—to hold that because the testator used the words "in fee," instead of "in fee simple," the meaning of the will was changed. If such a distinction was to be drawn, it should be by the Supreme Court of Canada or at least the Appellate Division of the Supreme Court of Ontario.

Order declaring that Marietta took only a life estate; costs out of the property in question.

RIDDELL, J. DECEMBER 7TH, 1915.

*RE DINGMAN.

Executors and Administrators—Charges and Expenses—Allowance by Surrogate Court Judge on Passing Accounts of Executor—Costs of Action Unsuccessfully Defended by Executor Allowed out of Estate—Appeal—Surrogate Courts Act, R.S.O. 1914 *ch.* 62, *secs.* 19, 34.

Appeal by Jane Coulson, under sec. 34 of the Surrogate Courts Act, R.S.O. 1914 ch. 62, from the allowance by the Judge of the Surrogate Court of the County of Hastings to the executor of the will of Jane Dingman, deceased, upon the passing of his accounts, of his costs of defending an action brought by the appellant and her husband against the executor, in which the executor was unsuccessful, and also the costs of the plaintiffs in that action, which was in the Supreme Court of Ontario, paid by the executor, as adjudged in that action.

The appeal was heard in the Weekly Court at Toronto.
E. G. Porter, for the appellant.
Gideon Grant, for the executor.

RIDDELL, J., delivering judgment upon the appeal, said that the judgment in the action against the executor was for the recovery of $1,000 from the estate of the deceased George Dingman, and "that the defendant"—i.e., the executor—"do pay to the plaintiffs their costs of this action forthwith after taxation thereof."

It is one of the disadvantages of an executor's position that if he defend an action brought against him as such executor and fail, he may be forced to pay the costs out of his own pocket: Macdonald v. Balfour (1893), 20 A.R. 404; but he is entitled to be allowed all reasonable expenses which have been incurred in the management of the estate, and these include the costs of an action reasonably defended. Of course, he could not be allowed the costs of improperly defending an action: Chambers v. Smith (1846), 2 Coll. 742; Smith v. Chambers (1847), 2 Ph. 221; but to disentitle him there must be something proved to shew the unreasonableness; and nothing was established here.

Reference to In re Beddoe, [1893] 1 Ch. 547, 558; In re Love (1885), 29 Ch. D. 348, 350.

The fact that there was no provision in the judgment in the action for the executor's costs was nihil ad rem. It is doubtful whether a direction in the judgment that the executor's costs should be paid out of the estate would be valid: see sec. 19 of the Surrogate Courts Act—but, in any case, these are not costs in the action. When allowed by the Surrogate Court Judge, they are allowed as "charges and expenses."

Appeal dismissed with costs.

CLUTE, J. DECEMBER 10TH, 1915.

TOWNSHIP OF EUPHRASIA v. TOWNSHIP OF ST. VINCENT.

Highway—Township-line—Deviation—Municipal Act, secs. 455, 458—*Evidence—Liability for Maintenance—Arrears—Demand—Future Maintenance—Joint Liability—Settlement of Proportions—Declaratory Judgment—Costs.*

Action by the Corporation of the Township of Euphrasia for a declaration that a deviation road had been opened through the township, in lieu of the town-line between it and St. Vincent, within the meaning of sec. 458 of the Municipal Act, R.S.O. 1914 ch. 192, and that the defendant corporation was equally responsible with the plaintiff corporation for the maintenance of the said road, and to recover the sum of $721.74, being half the amount expended by the plaintiff corporation in the maintenance and repair of the road from 1891 to 1914 inclusive.

The action was tried without a jury at Owen Sound.

W. D. Henry, for the plaintiff corporation.

W. H. Wright, for the defendant corporation.

CLUTE, J., read a judgment in which he reviewed the evidence, and said that no by-law appeared to have been passed formally assuming the deviation road, but in its improvement two slight deviations from where it was originally laid out were made, and for that purpose the Euphrasia council passed by-laws and procured deeds of conveyance, so that in the plainest possible way they had assumed the road as an existing highway.

The county council had also recognised it as a deviation under

the statute by directing the repair of a bridge and paying for it; for which they would be liable only if the road were a deviation for a town-line within the statute.

The defendant corporation had refused to contribute; and, after demand had been made, a petition was signed by some of the inhabitants and others asking the county council to direct that the town-line be opened. This the county council refused to do.

The finding should be that the road was a deviation within the meaning of the statute, and that the defendant corporation was responsible with the plaintiff corporation for its maintenance.

The defendant corporation should not be held liable for repairs prior to the demand made, shortly before action brought. Under the Municipal Act, sec. 455, where there is a joint liability there is joint jurisdiction for maintenance. The expenditure theretofore made was made at the sole instance of the plaintiff corporation; and it was not equitable that the defendant corporation should, at this distance of time, be called upon to pay these arrears.

There should be a declaration that the deviation road falls within sec. 458 of the Municipal Act, and that the two township corporations are liable hereafter for its maintenance in due proportion; if the councils fail to agree as to the proportion of the expense to be borne by the corporation, the same may be determined by arbitration under sec. 455.

Reference to Township of Fitzroy v. Township of Carleton (1905), 9 O.L.R. 686; County of Wentworth v. Township of West Flamborough (1911-2), 23 O.L.R. 583, 26 O.L.R. 199.

The plaintiff corporation to have the costs of the action.

MIDDLETON, J. DECEMBER 10TH, 1915.

*BURMAN v. ROSIN.

*ROSIN v. BURMAN.

Set-off—Mutual Debts—Right of Assignee of one—Debts Due and Payable before Assignment—Judicature Act, sec. 126—Conveyancing and Law of Property Act, sec. 49—Equity Prevailing over Right of Set-off—Date of Assignment—Date of Commencement of Action.

Summary application by Burman, upon originating notice, for an order determining the right to $95 paid into Court.

Burman sued Rosin for money due under a plumbing contract, and recovered judgment for $95. Rosin, upon another contract, had a judgment against Burman for $135. These contracts were both completed about March, 1915. On the 31st August, 1915, Burman assigned his claim against Rosin to one Kirkpatrick; and Kirkpatrick resisted Rosin's claim to set-off one demand pro tanto against the other.

G. T. Walsh, for Burman and Kirkpatrick, contended that there could not be a set-off to the prejudice of the assignee, because the transactions giving rise to the respective claims were in no way connected, and no right or claim to set off had been asserted before the assignment.

W. M. Mogan, for Rosin.

MIDDLETON, J., said that the claim to set off was entitled to prevail. The debts were both due and payable long before the assignment; both claims were disputed and were in litigation, and the exact amount due upon either had not been in any way ascertained; but this did not prevent these claims being mutual debts and as such liable to be set off: Judicature Act, R.S.O. 1914 ch. 56, sec. 126. The right of an assignee of a chose in action is subject to all equities which would have been entitled to priority over the right of the assignee under the law previously in force: Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, sec. 49. The right to set off mutual debts when there would have been set-off in a common law Court was such an equity—though it might well be regarded as a defence to the claim, a defence which would wipe out the claim and cause it to cease to exist as effectually as a release or payment: Jeffryes v. Agra and Masterman's Bank (1866), L.R. 2 Eq. 674, 680.

Set-off was allowed at law if the debt was due at the date of the writ, even though not payable till a future date—debitum in præsenti, solvendum in futuro: Christie v. Taunton Delmard Lane and Co., [1893] 2 Ch. 175, 183.

Reference also to Watson v. Mid Wales R.W. Co. (1867), L.R. 2 C.P. 593; Young v. Kitchin (1878), 3 Ex. D. 127; Government of Newfoundland v. Newfoundland R.W. Co. (1888), 13 App. Cas. 199, 213; Parsons v. Sovereign Bank of Canada, [1913] A.C. 160.

Nowhere can there be found any foundation for the suggestion now made that, where the debts are past due and the statute

gives the right of set-off, the assignee has any greater right than the assignor. The assignee simply has the same right as the assignor to refuse to set off where the claim is not due at the critical date—the date of the writ in the one case and the date of the assignment in the other—save where the equity described exists. Where there is a statutory right to set off, the assignee takes a claim against which there is a valid legal defence.

The set-off to be allowed, and the money to be paid to Rosin.

RIDDELL, J., IN CHAMBERS. DECEMBER 11TH, 1915.

*RE SOVEREEN MITT GLOVE AND ROBE CO. v. CAMERON.

Division Courts—Territorial Jurisdiction—Action for Price of Goods—Contract—Place of Payment—Place of Delivery—Agency Contract—Counterclaim—Judgment—Admission—Defendant not Appearing at Trial—Motion for Prohibition—Delay.

Motion by the defendant for prohibition to the Fourth Division Court in the County of Norfolk.

The action was brought in that Court by the plaintiffs, a company manufacturing mittens and other goods at Delhi, in the county of Norfolk, in the territory of the Fourth Division Court, to recover from the defendant $88.23, made up of $82.83, the balance of the value of goods sold and delivered to him, and $5.40 for interest. The defendant lived at Sudbury, in another county. He filed a dispute-note, in which he disputed the jurisdiction, admitted that the $82.83 was due, alleged a set-off of $132.25, and claimed $65 damages for wrongful dismissal. He did not appear at the trial, and judgment was given against him for the $82.83 and interest as claimed; it was said that his counterclaim was dismissed.

The judgment was given on the 21st July, 1915; the notice of motion for prohibition was not served until the 26th November; no application had been made to the Judge who heard the case in the Division Court, and no explanation of the delay was given.

C. M. Garvey, for the defendant.
W. H. Irving, for the plaintiffs.

RIDDELL, J., said that it was admitted that the defendant entered into a contract with the plaintiffs, dated at Delhi, whereby he agreed to become selling agent for them in Northern Ontario, receiving a commission of 8 per cent.; that he received quantities of goods from the plaintiffs; that, instead of receiving cash at all times, the usual practice was for him to order sufficient goods to cover his commission account; and a short time previous to his dismissal he had ordered and received a quantity of goods—those for the price of which the action was brought.

Where a defendant does not attend at the trial, and it is not made clearly to appear that any injustice will be done by allowing the judgment to stand, the Court ought not to grant a prohibition: Re Canadian Oil Companies v. McConnell (1912), 27 O.L.R. 549, at pp. 550. 551.

So far as the plaintiffs' claim was concerned, the defendant's own admission shewed that the amount was payable; as to the counterclaim, it was brought into the Court by the defendant himself, and, in any case, the Court had jurisdiction to try it.

The defendant contended that payment for the goods was to be made at Sudbury; but the place of payment is where the creditor is—the debtor must seek his creditor, and not vice versa. All the elements giving the cause of action must have occurred in the local jurisdiction of a Division Court foreign to the debtor's residence: Re Doolittle v. Electrical Maintenance and Construction Co. (1902), 3 O.L.R. 460; Re Taylor v. Reid (1906), 13 O.L.R. 205. Here this was so.

Even if it could be argued that the delivery was not at Delhi, that was a fact to be determined by the Judge in the lower Court; and not till he found that the delivery was elsewhere than in Delhi would his jurisdiction be ousted.

It was immaterial where the agency contract was executed—the contract sued on was the implied contract to pay for goods sold and delivered.

Motion dismissed with costs.

RIDDELL, J., IN CHAMBERS. DECEMBER 11TH, 1915.

*SHAW v. UNION TRUST CO. LIMITED.

Discovery—Examination of Officer of Defendant Company—Status of Shareholder as Plaintiff — Pleading — Cause of Action—Company—Breach of Contract—Acts of Majority of Shareholders — Ultra Vires or Fraudulent Conduct — Scope of Discovery.

Motion by the plaintiff for an order for the committal of the defendant J. M. McWhinney for contempt of Court in refusing (upon the advice of counsel) to answer certain questions upon his examination for discovery as an officer of the defendants the Union Trust Company Limited.

E. B. Ryckman, K.C., for the plaintiff.

G. H. Watson, K.C., and W. B. Raymond, for the defendants.

RIDDELL, J., said that the action was brought by Leslie M. Shaw, on behalf of himself and all other shareholders of the Blake Contracting Company other than the defendants, against the Union Trust Company Limited, the Blake Contracting Company, J. M. McWhinney, and others, for damages for breaches of trust and contract and for an injunction, an account, and other relief.

The real foundation for the refusal to answer was the contention that the plaintiff had no right to sue at all, and, therefore, no right to discovery.

It was decided in Rogers v. Lambert (1890), 24 Q.B.D. 373, that, whatever the state of the pleadings, a party is not allowed to compel answers which can be of no avail to advance his legal position. Questions concerning any matter which could not give, directly or indirectly, separately or in conjunction with something else, a cause of action, must be disallowed. This is the same in principle as the disallowance of examination upon matters which are alleged in the statement of claim, but can give a cause of action only if some other fact be first established: Evans v. Jaffray (1902), 3 O.L.R. 327; Bedell v. Ryckman (1903), 5 O.L.R. 670.

While there were in the statement of claim several more or less vague suggestions of direct dealing between the offending

companies, it was manifest that the real complaint was based upon an alleged breach by these companies of an agreement or agreements with the Blake Contracting Company. It was sufficiently alleged in the statement of claim that the plaintiff and those whom he represented were minority shareholders, and that the offending companies were majority shareholders—and in that case the plaintiff could sue only if the majority were shewn to have acted ultra vires the company or in fraud: Burland v. Earle, [1902] A.C. 83, 93. The facts alleged were sufficient to bring the acts of the defendants within the rule. See also Exeter and Crediton R.W. Co. v. Buller (1847), 5 Ry. Cas. 211; Normandy v. Ind Coope & Co., [1908] 1 Ch. 84; Alexander v. Automatic Telephone Co., [1900] 2 Ch. 56; Palmer's Company Precedents, 11th ed., pp. 1359 et seq.

The objection of the defendant McWhinney to answer questions, in the broad form in which it was made, could not be sustained.

No ruling was made as to the propriety of any particular question: if any objection shall be made, the examiner will rule, and another application may be made to the Court.

Order made requiring the defendant McWhinney to attend at his own expense and answer all proper questions then put to him; he is also to pay the costs of the application forthwith.

RIDDELL, J. DECEMBER 11TH, 1915.

*RE SOVEREIGN BANK OF CANADA.

*CLARK'S CASE.

Bank—Winding-up—Contributory — Double Liability — Shares Purchased for Infant—Ratification after Majority—Receipt of Dividends—Knowledge.

Appeal by Muriel I. Clark from the order of an Official Referee, upon a reference for the winding-up of the bank, confirming the placing of the name of the appellant upon the list of contributories; and alternative cross-appeal by the liquidator from the refusal of the Referee to place the name of A. D. Clark, Muriel I. Clark's father, upon the list of contributories in lieu of that of his daughter. The liability sought to be enforced was the double liability of shareholders of a bank.

Shares of the bank's stock were purchased by the father and placed in the name of the daughter while she was an infant. She was born on the 6th December, 1890. The liquidator relied on ratification after majority.

The appeal and cross-appeal were heard in the Weekly Court at Toronto.

George Kerr, for Muriel I. Clark.

Joseph Montgomery, for A. D. Clark.

J. W. Bain, K.C., and M. L. Gordon, for the liquidator.

RIDDELL, J., said that it was to his mind too clear for argument that receiving any part of the money made available by any proceeding, however irregular, was a ratification of that proceeding: Clarke v. Phinney (1896), 25 S.C.R. 635; Steen v. Steen (1907), 9 O.W.R. 65, 10 O.W.R. 720.

The act of Miss Clark in knowingly receiving money (dividends) to which she was entitled only if she was the rightful owner of the shares was a ratification by a person after attaining majority of the acts done in her name when she was an infant; and this was strengthened by the position taken before the Referee—that she did not repudiate the ownership of the stock.

Her appeal failed and should be dismissed with costs.

Cross-appeal dismissed without costs.

RE PAGE—MEREDITH, C.J.C.P.—DEC. 6.

Will—Construction—Summary Application—Parties—Heirs at Law and Next of Kin.]—Motion by the executors of the will of Thomas Page, deceased, for an order declaring the proper construction of his will in regard to certain questions propounded. MEREDITH, C.J.C.P., said that the parties who had notice of this motion, all of whom were represented and heard when it was made, had the utmost confidence that no one but them could by any possibility have any right to or interest in the estate in question; and maintained that position, though one of the questions asked in the notice of motion was, whether, if the legacy in question lapsed, the heirs at law or next of kin of the testator would have an interest in the estate; and though such persons were neither represented upon, nor had notice of, this motion—except such of them as were claiming under the

will, and so adversely to the interests of the others. It might be clear that there was no lapse, also that, if there were a lapse, other words of the will gave the legacy to one of the parties to this motion; but neither point was so clear that it should be determined, in fairness, adversely to the other heirs and next of kin behind their backs. If a question be deemed of sufficient importance to require an answer from the Court before the estate can be distributed, it must be of sufficient importance to give to all persons, having any substantial interest in it, an opportunity to disclaim or make claim respecting that in regard to which it is sought to have it adjudged that they have no right or interest. The motion must stand over until the other heirs and next of kin have had reasonable opportunity for being heard on it. G. Bray, for the executors. J. E. Terhune, for the residuary legatees. G. G. McPherson, K.C., for the adult heirs of James Page. F. W. Harcourt, K.C., for the infants.

WATSON v. MORGAN—MASTER IN CHAMBERS—DEC. 7.

Writ of Summons—Irregularity — Special Endorsement—Rule 33.]—Motion by the defendant to set aside the writ of summons and the service thereof for irregularity. The writ was endorsed in accordance with form 5, that is, in the form of a specially endorsed writ. The claim endorsed was for rescission of a contract for the purchase by the plaintiff from the defendant of a business and plant, and for the return of the money paid. There was a provision in the contract for a refund of the money, if the plaintiff was not satisfied, within a fixed time, not yet elapsed; but the Master was of opinion that, if the action were based upon that, it was premature, because the plaintiff was still in possession of the plant. If the claim was not based upon that, it was not a claim that could be the subject of a special endorsement, under any of the clauses of Rule 33. Order made setting aside the writ and service, with costs. G. T. Walsh, for the defendant. W. D. McPherson, K.C., for the plaintiff.

McINNIS v. PUBLIC SCHOOL BOARD OF SCHOOL SECTION 16 IN THE TOWNSHIP OF TAY—MIDDLETON, J.—DEC. 9.

Building Contract—Dismissal of Contractor—Justification—Forceable Removal from Premises—Rights of Building-owner—

Termination of License.]—The plaintiff sued to recover $15,000 damages from the defendant school board and its architect, the defendant Russell, for the wrongful dismissal of the plaintiff from his employment to erect a school-house. The action was tried without a jury at Toronto. MIDDLETON, J., read a judgment in which he discussed the evidence given before him, and stated his conclusion that the action failed because the plaintiff was himself guilty of a serious breach of the building contract, and his dismissal was abundantly justified. The building contract, the learned Judge said, amounted to a license from the owner to the builder to enter upon the lands for the purpose of erecting the building contracted for. As soon as the plaintiff refused to comply with his contract and undertook to hold possession of the lands for the purpose of erecting a different building, his right to occupy the lands came to an end, and the school board could resume possession of its own property and remove the contractor who by his breach of contract had forfeited the license under which alone he was in possession. Action dismissed with costs. J. M. Ferguson and J. T. Mulcahy, for the plaintiff. W. A. Finlayson, for the defendant school board. R. S. Robertson, for the defendant Russell.

RE MOORE—RIDDELL, J., IN CHAMBERS—DEC. 11.

Distribution of Estate—Intestate Succession—Absentee Next of Kin—Presumption of Death—Evidence.]—Motion by the administrators of the estate of W. H. Moore, deceased, for leave to pay into Court the share of an absentee. RIDDELL, J., said that the case was entirely covered by Re Ashman (1907), 15 O.L.R. 42, followed in Re Peacock (1915), ante 175; and the same order should be made as was made in Re Ashman. R. J. McLaughlin, K.C., for the administrators. B. N. Davis, for the next of kin.