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COURT OF APPEAL.

OCTOBER 29TH, 1910.

*TOMS v. TORONTO R. W. CO.

Damages—Personal Injuries—Traumatic Neurasthenia—"Railway Shock"—Jury.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., in favour of the plaintiff, upon the findings of a jury, in an action for damages for injury sustained by the plaintiff by the negligent operation of a car of the defendants in which he was a passenger on the 7th October, 1908. The negligence was admitted. The jury assessed the damages at $1,500.

The only question upon the appeal was whether there could be a recovery in respect of injuries of a nervous origin.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.

D. L. McCarthy, K.C., for the defendants, contended that there could be no recovery, and that the question of damages should have been submitted to the jury as in Henderson v. Canada Atlantic R. W. Co., 25 A. R. 437, affirmed 29 S. C. R. 632.

C. A. Masten, K.C., and M. C. Cameron, for the plaintiff.

GARROW, J.A.:—In his charge the Chief Justice said: "I was requested to put a question to you to separate the injuries as between the physical and the nervous injury. I declined to do that for one reason, a very sufficient one, among others, that the question of physical injury is one of very doubtful meaning. There

* This case will be reported in the Ontario Law Reports.

was not any great physical injury, in the sense that there were any bones broken or any great bruising or abrasion of the surface, but there may be a physical injury of a serious nature which is not indicated by any external mark. So, therefore, I leave the whole question to you to say what damages he ought to recover for the injury, if you think he has sustained any."

Mr. McCarthy's objection is not, I think, well founded. In the Henderson case this Court, if not with reluctance, at least without enthusiasm, followed, without, in my opinion, any intention of extending, the principle of law declared in the case in the Privy Council of Victorian Railways Commissioners v. Coultas, 13 App. Cas. 222. In that case the medical testimony was to the effect that the plaintiff had received a severe shock from the fright, for she was not touched, and that the illness from which she afterwards suffered was the consequence of the fright, and that the shock would be a natural consequence of the fright; the question was not submitted to or passed upon by the jury, but was reserved for the opinion of the full Court. And what was actually determined was that "damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot, *under such circumstances,* be considered a consequence which in the ordinary course of things would flow from the negligence of the gate-keeper:" see p. 225.

In the Henderson case, as in the Coultas case, there was no actual impact, that is, no contact with the defendants' engine. What happened was that the plaintiff's horses were frightened by the engine and ran away, thus injuring themselves, the carriage, harness, and the plaintiff. The plaintiff recovered for the injury to the horses, carriage, and harness, and also $400 in respect of the shock to himself caused by "blow or blows," but failed to recover a further sum of $600 assessed by the jury as due "in respect of personal injury resulting *exclusively* from mental shock." No objection was apparently taken at the trial by counsel for the plaintiff to the mode in which the questions were submitted to the jury. And it was with the question thus presented that this Court was called upon to deal, and in doing so felt constrained by the decision in the Coultas case to disallow the item of $600 in respect of the personal injury "resulting *exclusively* from mental shock," all the other items of damages, including the $400 for the shock caused by "blow or blows," having been allowed.

The Coultas case, as the decision of an ultimate court of appeal, is still, of course, a binding authority in this province, although it is impossible not to feel that the situation is not satisfactory, and that the decision is to be applied with careful discrimination, when

we find that the Courts, both in England and Ireland, refuse to follow it: see Dulieu v. White & Sons, [1901] 2 K. B. 669; Bell v. Great Northern R. W. Co., 26 L. R. Ir. 428; Yates v. South Kirkby Co., [1910] 2 K. B. 538; Eaves v. Blaginclydach Co., [1909] 2 K. B. 73. No one can object to the general principle enunciated at p. 225, that the "damages must be the natural and reasonable result of the defendants' act; such a consequence as in the ordinary course of things would flow from the act." But the stumbling block, or, if I may say so without disrespect, the vice of the decision, appears to be in treating as a question of law that which appears to be essentially one of fact, to be determined, like other questions of fact, upon competent evidence, namely, what are the natural and reasonable consequences such as ordinarily flow from such acts as that of the defendants? This aspect of the question is very reasonably dealt with by Palles, C.B., in Bell v. Great Northern R. W. Co., 26 L. R. Ir. at p. 442. . . .

[Reference to Fitzpatrick v. Great Western R. W. Co., 12 U. C. R. 645; Lynch v. Knight, 9 H. L. C. 577, 598.]

The Henderson case was followed in Geiger v. Grand Trunk R. W. Co., 10 O. L. R. 511. . . .

This case, however, is essentially different in its facts from the Coultas case, the Henderson case, and the Geiger case. In all three the question arose with respect to the use by the plaintiffs of a highway. In this case the plaintiff, in addition to his other rights, was a passenger on the defendants' railway, and had, therefore, contractual rights. The defendants were bound by their contract to carry him safely, and they did not carry him safely, but, on the contrary, the car in which he was sitting was negligently allowed to come into collision with an engine on the railway crossing, whereby the plaintiff, an elderly man (aged 68), was violently thrown from his seat over to the back of the next seat in front of him. He managed to get off the car without assistance and walked away a short distance, and then, as he says, "collapsed," and for the time could go no further. Eventually he managed to get to the warehouse where he was employed as a bookkeeper, but was quite unable to work, and was obliged to go to his home and to bed, where he remained off and on for several weeks under a physician's care.

Subsequently the condition of traumatic neuresthenia developed, as the result, it is said, of the shock of the collision, from which, it is alleged, he was still suffering at the time of the trial. . . .

The shock in this case was not primarily mental at all, but physical—the ordinary "railway shock" with which the Courts have had to deal in many cases. . . .

Appeal dismissed with costs.

Moss, C.J.O., Maclaren and Magee, JJ.A., concurred.

Magee, J.A., to give reasons later.

October 29th, 1910.

*STRATI v. TORONTO CONSTRUCTION CO.

Dismissal of Action—Order at Trial—Default in Payment of Costs of Day—Appeal — Extension of Time — Jurisdiction of Divisional Court.

Appeal by the defendants from the order of a Divisional Court, 1 O. W. N. 1000, allowing the plaintiff's appeal from the judgment of Latchford, J., at the trial, whereby the action was dismissed, and extending the time for payment of costs of the day, upon default in payment whereof the dismissal of the action was based.

The appeal was heard by Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A.

Grayson Smith, for the defendants.

H. S. White, for the plaintiff.

Moss, C.J.O.:—The defendants were put to no serious prejudice by reason of the order of the Divisional Court from which this appeal has been taken. The plaintiff and his solicitor were struggling to comply with the terms of the order pronounced at the trial by Latchford, J., but, owing to an unfortunate omission on the part of the bank to which funds had been sent, the costs which were to be paid on or before noon on the 18th May, 1910, were not tendered to the defendants' solicitors until 12.40 in the afternoon of that day. The tender was not accepted, the defendants' solicitor contending that the time had elapsed, and the action was out of Court. It was not so entirely out of Court that it was not subject to the power of the Court or a Judge, under Con. Rule 353,

* This case will be reported in the Ontario Law Reports.

to extend the time for appealing from the order, and to the power of the Court, upon appeal, to rescind or vary the order. Upon application to Middleton, J., the time for appealing was extended (1 O. W. N. 877); and the Divisional Court entertained the appeal and made the order now in appeal. That Court might have refused to entertain the appeal, either on the ground that the plaintiff, by acting under the order to the extent to which he had done, had waived his right to appeal, or that by his delay the plaintiff had forfeited all right to an extension of time.

These objections were matters for the consideration of the Divisional Court, but, notwithstanding them, it decided, in the exercise of its discretion, that the appeal should be heard.

It is not correct to say that the action was out of Court. The result of the various decisions, some of which, however, do not seem to be quite in accord with the general trend, appears to be that in a case like the present the action was not, by reason of the lapse of time for performing the condition, out of Court for all purposes. It was out of Court to the extent of disabling the plaintiff from taking any step in the action other than towards procuring an extension of time for performance of the condition, or, failing that, for an extension of time for appealing from the order. The order was not in any sense a dismissal of the action upon the merits, though the effect would be the same in case of non-compliance with the condition.

Then as to the order made by the Divisional Court. It was made in virtue of its discretionary power. It is no more than doing what is authorised by Con. Rule 353, and the defendants do not suffer serious prejudice.

The slip which led to the money being tendered forty minutes after the time appointed by the order, as varied by the trial Judge's direction, seems not to have been due to intentional neglect.

The order appealed from should be allowed to stand, with such extension of time as may be necessary to enable the plaintiff now to pay the costs, say within twenty-four hours from the issue of the certificate of this Court.

The costs of the appeal must be borne by the defendants.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

MEREDITH, J.A., dissented, being of opinion that the Divisional Court had no power to make the order appealed against.

OCTOBER 29TH, 1910.

*REX v. TRAPNELL.

Criminal Law—Assisting Prisoners to Escape—Lunatics Acquitted on Charges of Murder — Detention in Provincial Asylum—Criminal Code, sec. 192—Order of Lieutenant-Governor of Province—Lawful Custody under Sentence of Imprisonment for Less than Life—Evidence to Support Conviction—Accomplice—Corroboration.

Case reserved by the Junior Judge of the County Court of Wentworth upon the conviction of the defendant in the County Court Judge's Criminal Court upon a charge of assisting two men to escape from the Hamilton Asylum for the Insane, where they were confined under the order of the Lieutenant-Governor of the province after being tried and acquitted upon charges of murder, upon findings by juries of insanity.

The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

M. J. O'Reilly, K.C., for the defendant.

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

The judgment of the Court was delivered by MEREDITH, J.A.:—It is essential to ascertain, in the first place, the character of the custody in which the men who escaped were held. They were confined in that which is called the criminal house of the Provincial Asylum at Hamilton, upon an order of the Lieutenant-Governor of the province, made under sec. 969 of the Criminal Code; so that their custody must have been as criminals; otherwise the enactment would be ultra vires: civil rights and the establishment, maintenance, and management of asylums are exclusively provincial matters.

But it is said that these men had been acquitted, and how then could they be detained except as lunatics simply? It is true that they were, in a sense, acquitted by the juries by which they were tried; but the acquittal was a part only of the verdicts; they were special verdicts under sec. 966 of the Criminal Code, the full import of which was that each had committed the crime with which he was charged, but was insane at the time, and on that ground only

* This case will be reported in the Ontario Law Reports.

was acquitted. If they had been found not guilty of the commission of the crime, they would have been entitled to their discharge out of custody; the Criminal Code makes no provision for detention in such a case. It is to be observed, too, that the provisions of the Criminal Code under which these men were tried and are imprisoned do not apply to those who are insane at the time of trial, but only to those who are then so sane as to be capable of defending themselves; other like provisions are contained in the Criminal Code respecting those who are so insane as to be incapable of conducting their defences, and also as to those who have become insane after sentence; all are, generally speaking, made subject to the order of the Lieutenant-Governor of the province.

It therefore seems to me that these men were in custody under the criminal law of the Dominion, by reason of the crimes which they had committed; and no one can doubt the power of Parliament to impose such a penalty even upon one who has the excuse of insanity for his misdeed; though it has been held that such legislation would be ultra vires in some of the United States of America. . . .

[Reference to The King v. Ireland, [1910] 1 K. B. 654.]

These men were, therefore, in my opinion, in lawful custody, under a sentence of imprisonment for crime; and so their escape was one coming within the provisions of the Criminal Code respecting escapes and rescues. That, at the trial, it was agreed, on all hands, otherwise, cannot alter the fact, if such it be; nor warrant this Court in treating the case as if it really were such an one as counsel were agreed that it was.

The case seems to me to come under sec. 192 of the Criminal Code; the men were in lawful custody under a sentence of imprisonment for less than life. The order at the trial of each was that he be kept in strict custody until the pleasure of the Lieutenant-Governor should be known; the order of the Lieutenant-Governor was that he be conveyed to and detained in the Provincial Asylum at Hamilton. These things surely amount to a sentence of imprisonment, and none the less so because "indeterminate." It is less than imprisonment for life, because, although it may last for life, yet it may be shorter a day, a month, a year or years.

Upon the other point in the case, whether there was any evidence to support the conviction, little need be said: there being so little to support Mr. O'Reilly's contention in this respect. There was the positive testimony of the witness who is said to have been an accomplice, corroborated, very much, by the testimony of the police constable, and to some extent by circumstances surrounding

the escape. The learned Judge who tried the case was very well aware of the reasons for, as a matter of fact, requiring corroboration of the story of an accomplice; so that, if there had been less evidence than there is, this point would fail: see Rex v. Frank, 21 O. L. R. 196.

I would answer such questions as are material and proper in accordance with the views I have expressed.

OCTOBER 29TH, 1910.

*REX v. MUMA.

Criminal Law—Indictment for Rape—Verdict of Common Assault—Competency—Evidence as to Unchastity of Complainant—Denial by Complainant—New Trial—Right of Crown—Stated Case.

On an indictment for rape the defendant was tried before RIDDELL, J., and a jury at Toronto. The jury found a verdict of "common assault."

At the request of the defendant, the Judge reserved for the consideration of the Court of Appeal the question: "Had the jury power to find a verdict of common assault upon this indictment for rape?"

The complainant, on cross-examination, was asked whether, before the date of the alleged crime, she had not been living with her future husband as his wife, which she denied. The Judge allowed the defence to bring witnesses to prove that she had done so. At the request of the Crown, the Judge reserved the question: "Was I right in admitting this evidence?"

A third question reserved was whether, in the event of the first question being answered in the negative, there should be a new trial.

The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

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

No one appeared for the defendant.

MOSS, C.J.O.:—The accused was not represented by counsel upon the argument of this case, but subsequently a written argu-

* This case will be reported in the Ontario Law Reports.

ment was submitted on his behalf. The answer to much that is said is that the questions for the opinion of the Court are not whether, in view of what, according to the evidence, undoubtedly occurred on the occasion of the alleged rape, the learned trial Judge did right in leaving it to the jury to pass upon the question of common assault, or whether, upon the evidence, the verdict of common assault which the jury found was a verdict which they should have found.

So far as the verdict is concerned, the sole question submitted is, "Had the jury power to find a verdict of common assault upon this indictment for rape?" . . .

The abolition of the distinction between felony and misdemeanour, by sec. 14 of the Criminal Code, and the provisions of other sections of the Code, remove the objections which formerly appeared to exist. The first question should be answered in the affirmative. It may be also pointed out that the form of the indictment in this case goes far towards enabling the jury to find a verdict of common assault, for it contains a charge of assault as well as one of rape. . . .

The evidence referred to in paragraph 4 of the case was inadmissible, in the circumstances, and should have been rejected.

The effect of the answers to questions 1 and 2 being that the conviction for common assault stands against the prisoner, the necessity for answering the third question does not arise. The Court is asked to answer it only in the event of the answer to the first question being in the negative, and it has been answered in the affirmative.

MACLAREN, J.A., gave reasons in writing for the same conclusions.

GARROW and MAGEE, JJ.A., also concurred.

MEREDITH, J.A., for reasons stated in writing, agreed that the first question should be answered in the affirmative and the second in the negative; but, as to the third question, was of opinion that the Crown was entitled to a new trial.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. OCTOBER 28TH, 1910.

MURPHY v. DUNLOP.

Carrier — Licensed Baggage Transfer Agent — Loss of Trunk—Negligence—Contributory Negligence.

An appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Carleton dismissing the plaintiff's action to recover the value of a trunk and its contents which the defendant, as a licensed transfer agent, received from the plaintiff for delivery at the union station of the Canadian Pacific Railway Company at Ottawa, for which he was paid the fee demanded.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

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

A. C. Hill, for the defendant.

The judgment of the Court was delivered by TEETZEL, J.:— The defendant was informed that the plaintiff intended to take the train due to leave at 1.55 p.m., and that the trunk was to be taken with her on that train. The defendant placed the trunk on a platform of the station adjoining an open yard between the station and the highway, about twenty minutes before the train was due, and left it there, without putting any one in charge, and without having made any effort to place it in the baggage room, and without directing the attention of the baggageman or any employee of the railway company to the fact that the owner intended to send it on the 1.55 train.

The plaintiff was prevented by illness from leaving Ottawa on the day the trunk was delivered to the defendant, and took no steps to ascertain whether her trunk was safely at the station until the forenoon of the next day, when she learned that it was not at the station; and no trace of it has since been discovered.

There was evidence that the trunk was where the defendant had left it some time after the 1.55 train had left the station. The learned Judge was of the opinion that the defendant was guilty of negligence, but, as the trunk was shewn to have been on the platform after the departure of the train which the plaintiff intended to take, and which the defendant expected she would take, he was of opinion that the plaintiff had suffered no damage by reason of the defendant's negligence, but that her loss was the consequence of her own negligence in either not notifying the de-

fendant that she was not able to take the 1.55 train or not sending for her trunk when she found she was unable to take that train.

I think the evidence fully justifies the finding that the defendant was guilty of negligence in the performance of his duty to the plaintiff as a common carrier, but, with great respect, I am unable to agree with the view that the plaintiff was also guilty of any negligence. The plaintiff had a right to assume that, in the absence of herself or some one on her behalf to receive the trunk, the defendant would discharge his duty either by placing the trunk in care of some one at the station whose duty it was to look after baggage, or by depositing it in the baggage room provided by the company for receiving baggage.

In Degg v. Midland R. W. Co., 1 H. & N. 781, Baron Bramwell says: "There is no absolute or intrinsic negligence. It is always relative to some circumstance of time, place, or persons." And also, "There can be no action except in respect of a duty infringed, and no man by his wrongful act can impose a duty." So here the wrongful act of the defendant cannot be invoked to impose a duty on the plaintiff to exercise greater care than she would be required to exercise on the assumption that the defendant had properly discharged his duty; and while, no doubt, she would not have suffered the loss if she had taken the precaution of sending for her trunk as soon as she discovered she could not take the 1.55 train, she was not, I think, bound to adopt any such precautionary course, in the absence of knowledge that the trunk had been by the defendant negligently exposed to the risk of loss. In other words, there is not, in my opinion, any absence of such care on the part of the plaintiff as it was her duty to use, and consequently she cannot be charged with an act of negligence.

I think the evidence warrants the conclusion that the trunk was lost solely through the negligence of the defendant.

The learned Judge fixed the plaintiff's damages at $180, and I would therefore allow the appeal with costs and direct judgment to be entered in favour of the plaintiff for $180 with costs.

RIDDELL, J.

OCTOBER 29TH, 1910.

SMITH v. SMITH.

Will—Construction—Devise — Mistake in Description of Land—General Words of Devise—Declaration that Land Owned by Testator Passed by Will.

Motion by the plaintiff for judgment on the pleadings in an action for the construction of the will of Leonard Smith, and a declaration that certain land passed thereby.

M. Grant, for the plaintiff.

F. W. Harcourt, K.C., Official Guardian, for the defendants.

RIDDELL, J.:—The sole question in this case is the effect, if any, of a paragraph in the will of the late Leonard Smith.

The will, after revoking all previous testamentary dispositions and directing all debts, etc., to be paid, proceeds thus: "I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say:" Then follows a devise to J. S. for life of 100 acres, S. E. ½ of lot 2, con. 13 of the township of Lobo, with remainder to two grandsons named; then a devise to B. S. for life of the S. E. ¼ of lot 3, con. 12, Lobo, with remainder to G. S. Then follows the devise in question: "I give devise and bequeath to my grandson M. S., son of J. S., the S. W. 50 acres of lot one, con. 12, Lobo, absolutely, subject to the payment of $40 per annum for the support of my wife during the term of her natural life." A provision is made for the support of the wife. Then—"I give devise and bequeath to my three grandsons, G., M., and R., equally, all the remainder of my estate and personal property, to be sold and equally divided between them"—then a provision for the use by the wife for her life of the household furniture and household effects; and then: "All the residue of my estate, not hereinbefore disposed of, I give devise and bequeath unto my three grandsons before mentioned."

The testator did own 50 acres of lot 1 in the 12th concession of Lobo, but not the S. W. 50 acres. His deed runs "the south-westerly half of the north-westerly half, otherwise known as the north-west quarter . . . ;" and he never at any time owned any other part of lot 1. It is perfectly apparent that the testator intended to devise the 50 acres he did own; and the whole question is, has he succeeded in doing so?

The concession roads in Lobo do not run quite east and west, but N. 45° 10′ E., i.e., practically half between N. and E. or N. E.

On the plan A B C D is lot 1 in the 12th concession, and A E F G the portion owned by the testator; this might, with some propriety, be called the N. W. ¼, but by no stretch of the use of language be called the S. W. ¼, which is D K L C.

In Re Clement, ante 127, I considered a matter not unlike the present, and came to the conclusion that the law in Ontario was that, where a testator had used language efficient to pass the disputed land if the wrong description were deleted, the devise was effective and the wrong description falsa demontratio.

Here the testator has used such words in the beginning of the will—"I give devise and bequeath all my real and personal estate

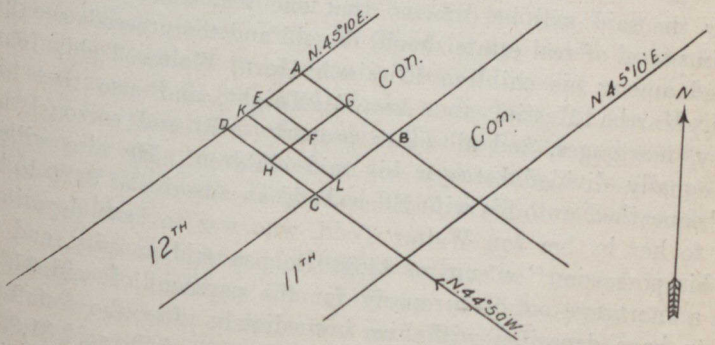
of which I may die possessed in the manner following, that is to say . . . ." Unless, then, the presence of the residuary clause (or clauses) makes a difference, the devise here is good. It does not appear that there was no residuary clause in Doe Lowry v. Grant, 7 U. C. R. 125, Hickey v. Hickey, 20 O. R. 371, or Doyle v. Nagle, 24 A. R. 162; while it appears that there was not a residuary clause in Re Harkin, 7 O. W. R. 840; and the defective devise was not helped by the absence of a residuary devise in Re Bain and Leslie, 25 O. R. 136.

And there can be no doubt that, if the attempted devise were incapable of taking effect, the land would fall into the residue: R. S. O. 1897 ch. 128, sec. 27, "unless a contrary intention appears by the will." Whatever interpretation be put upon the last clause, I think that this devise is not one "incapable of taking effect," for reasons which are set out in Re Clement. And I am unable upon principle to distinguish the case of a devise of this character followed by a residuary clause and one which is not. The rules laid down in Re Clement do not at all depend upon the leaning of the Courts against intestacy.

I am, therefore, of opinion that the devise is good to pass the land actually owned by the testator.

Costs of all parties out of the land devised—they may be declared a charge thereon.

PLAN.



SUTHERLAND, J. NOVEMBER 3RD, 1910.

RE TODD.

Will—Construction—Distribution of Estate—Vested Interests—Mortgage—Discharge—Payment into Court.

Application by Walter Todd the younger, under Con. Rule 938, for an order declaring the construction of the will of Walter Todd the elder, deceased, for the appointment of new trustees under the will to receive certain mortgage moneys, and for the distribution of the same, and a direction as to a discharge of the mortgage.

M. Grant, for the applicant.

W. Proudfoot, K.C., for certain beneficiaries.

SUTHERLAND, J.:—The testator died in or about the month of December, 1879, leaving him surviving his widow, Ellen Todd, and the following children, namely, Elizabeth Horn, John Todd, Martha Mastin, Ann McKnight, and the applicant, Walter Todd, and having duly made his last will and testament dated the 2nd December, 1879, wherein he appointed James Dundas, Walter Todd (the applicant), and John Todd, to be the executors thereof, of whom the only one now surviving is the applicant.

By the said will he directed that one year after his death a certain parcel of real estate should be sold and the proceeds equally divided among his children Elizabeth Horn, Walter Todd, John Todd, Martha Mastin, and Ann McKnight, and also that his money, mortgages, and all other property, real and personal, be also equally divided between his said children. He also willed and bequeathed unto his wife Ellen Todd an annuity of $120 to be paid to her by her son Walter Todd, who was to have deposited "in his possession" a sum of $1,800 to pay said annuity, and to give a mortgage on his property for the payment of said $120, and to have deposited with him immediately after the testator's death money and other securities to the amount of the said $1,800. After the death of the testator the said $1,800 were deposited with the plaintiff, and he gave security for the due payment of the annuity, on certain real estate, to his brother John Todd and his mother, Ellen Todd, and this mortgage is still in force.

There is the further clause in the will which is the subject of investigation upon this motion: "And at the death of my wife.

Ellen Todd, the said sum of $1,800 to be equally divided between my said above mentioned children."

The widow, Ellen Todd, died on the 21st October, 1908.

Martha Mastin, one of the testator's children, died on or about the 11th September, 1885, and Elizabeth Horn, another of the children, died between the death of the testator and that of the widow, Ellen Todd. Since her death also, namely, on or about the 21st April, 1909, John Todd also died intestate, and letters of administration to his estate have been granted to Walter Todd. On the 30th May, 1909, another of the children—Ann McKnight—died. Martha Mastin left her surviving at her death six children, . . . Elizabeth Horn left her surviving the following children, . . . (three). John Todd left him surviving the following children, . . . (eight). Ann McKnight left no children her surviving.

The main question to be determined on this application is, whether the children of Elizabeth Horn and Martha Mastin now take the shares which their respective parents would have taken in case they had lived until after the death of their mother, the annuitant, Ellen Todd.

I think it clear upon the wording of the will that each of the testator's children named therein took thereunder at his death a vested interest in the said sum of $1,800 which was to become available upon the death of the annuitant.

It is said that the applicant, Walter Todd, is in very poor health, and it is difficult for him to now transact business. It is suggested that his son Peter R. Todd be appointed to assist him in what is necessary to be done in order to receive and distribute the said sum of $1,800, and obtain a discharge of the mortgage given by the plaintiff as aforesaid. The applicant and last surviving executor were represented on the application, as well as all the children of Elizabeth Horn and John Todd, and three of the Mastin children.

It is said that Ann McKnight was at the time of her death an inmate of the Bruce County House of Refuge, and that, previous to her decease, an order was made by the County Court Judge of that county, vesting all her property in the Treasurer of the County of Bruce to secure the payment of her maintenance, under the statute in that behalf. The County of Bruce is also represented by counsel who appears for other parties as well. All parties interested are said to be of the full age of twenty-one years.

It is suggested that Walter Todd be appointed to represent the heirs of John Todd, and the estate of Ann McKnight, and that

Peter R. Mastin, one of the sons of Martha Mastin, be appointed to represent the children of Elizabeth Horn.

The applicant is anxious to pay the above mentioned sum of $1,800 so that it may be available for distribution among the proper parties, and to obtain a discharge of the mortgage referred to.

I think that, under all the circumstances, the proper course to take will be to direct, and I do direct, that, after deducting from said $1,800 the costs of all parties to this application, the balance be divided into five equal parts to which the following heirs shall be entitled: one of the said one-fifth parts to belong in equal shares to the heirs of John Todd; another in equal shares to the heirs of Martha Mastin; another in equal shares to the heirs of Elizabeth Horn; and one-fifth to the heirs of Ann McKnight, subject to the claim, if any, of the County of Bruce thereto under the terms of the order of the County Court Judge above mentioned.

I direct that the balance of the $1,800, with such proper interest, if any, as may have accrued due thereon, be paid into Court by the applicant to the credit of this cause, and that thereupon the applicant, as administrator of John Todd, the last surviving mortgagee under the mortgage, be authorised and empowered to execute a discharge of the mortgage in favour of himself personally as mortgagor.

KLINE BROS. & CO. v. DOMINION FIRE INSURANCE CO.—MASTER IN CHAMBERS—OCT. 28.

Discovery—Affidavit on Production—Company — Examination for Discovery.]—Motion by the defendants for a further affidavit on production from the plaintiffs. The Master said that, if the plaintiffs were not an incorporated company, the motion would be disposed of by adjourning it until after examination for discovery. But, under Perrins Limited v. Algoma Tube Works Limited, 8 O. L. R. 64, this is not allowable without the plaintiffs' consent. The Master, however, thought that there was sufficient ground from the pleadings and documents produced to justify an order for a further affidavit if an examination for discovery were resisted. The plaintiffs to signify their election. R. S. Cassels, for the defendants. Frank McCarthy, for the plaintiffs.

LANG v. WILLIAMS—DIVISIONAL COURT—OCT. 28.

Damages—Reference — Report—Appeal—Further Directions—Costs.]—An appeal by the plaintiffs from the order of FALCONBRIDGE, C.J.K.B., 1 O. W. N. 1052, dismissing an appeal from the report of an Official Referee. THE COURT (MEREDITH, C.J.C.P., SUTHERLAND and MIDDLETON, JJ.), allowed the appeal in part, and varied the report of the Referee by deducting from the amount of damages allowed for the Glasgow shipment of 4,029 barrels, 25 cents per barrel, amounting to $1,007.25, and by reducing the damages allowed for the New York shipment to $2,025.50. In other respects appeal dismissed. No costs of appeal. By consent of counsel, judgment on further directions for the plaintiffs for $2,607 and for the defendants on their counterclaim for $11,403.25. No costs of action or counterclaim. H. T. Beck, for the plaintiffs. J. A. Worrell, K.C., for the defendants.

STILWELL v. TOWNSHIP OF HOUGHTON—BRITTON, J.—OCT. 29.

Highway—Nonrepair—Injury to Traveller—Negligence—Condition of Township Road—Cause of Injury.]—Action for damages for injury to the plaintiff's person and property, caused, as he alleged, by reason of a highway in the township of Houghton being out of repair. On the 12th January, 1910, about dusk, the plaintiff was upon a load of hay, which was being drawn by a team of horses upon a pair of bob-sleighs. The horses were driven by one Vanderberg. When the team reached a point in the highway where there was a ridge running diagonally across the road, the front "bob" crossed the ridge, but the rear one, upon striking the ridge, slewed or slid to the west. The plaintiff's allegation was that the rear "bob" slid to such an extent that the west runner went off the travelled part of the road and upon the grade on the west side, and, by reason of this steep descent on the road, the plaintiff was thrown from the load and injured. The complaint was that the road was improperly constructed, in that the travelled portion was too narrow, and on each side was a deep ditch, not guarded on the west side. The learned Judge finds, upon the evidence, that the load was upset upon the travelled road, and that the rear sleigh did not go so far to the west as to reach the grade, which, had it gone that far, would have caused it to overturn. He says that there is nothing unreasonable, in the circumstances, in believing that the load upset from no more apparent cause than the

mere slewing of the sleigh upon a comparatively level road. The ridge was not a dangerous obstruction in the highway. It could not be said that a travelled road, even if more used than this was, in a township, even more thickly populated and more highly assessed than this, of only 14 feet in width, was so narrow as to render the township corporation liable. The learned Judge assesses the damages of the plaintiff at $300, for the purpose of avoiding a new trial if a higher Court should be of opinion that the defendants are liable. He is of opinion that they are not liable, and dismisses the action with costs. Charles Millar and J. Carruthers, for the plaintiff. V. A. Sinclair, for the defendants.

MILLER v. PARK—TEETZEL, J., IN CHAMBERS—NOV. 1.

Jury Notice—Striking out before Trial—Discretion.]—Motion by the plaintiff to strike out the jury notice filed and served by the defendants. The action was to recover possession of land, upon default in payment of rent. The only issues to be tried were, whether any rent was in arrear for non-payment of which the plaintiff would be entitled to possession, and whether the defendants were entitled to any notice or demand of possession, and, if so, whether it was given or made. The learned Judge said that, having regard to well-settled trial practice in this province, this case was plainly one the issues in which no Judge of the High Court would try with a jury, and therefore it falls within one of the classes indicated by Britton, J., in Hurdman v. Gall Lumber Co., 14 O. W. R. 143, for the exercise of the discretion of a Judge in Chambers in favour of ordering the jury notice to be struck out. Order accordingly. Costs in the cause to the plaintiff only. A. J. Russell Snow, K.C., for the plaintiff. W. M. Hall, for the defendants.

RE REX v. HAMLINK—SUTHERLAND, J., IN CHAMBERS—NOV. 3.

Prohibition—County Court Judge—Appeals from Convictions—Costs.]—Motion by Derrick F. Hamlink for an order prohibiting one Baker, the informant, and the Judge and clerk of the County Court of Huron, from taking further proceedings upon certain orders made by the Judge dismissing the applicant's appeals from three convictions made against him on the 11th January, 1910, by the Police Magistrate for the Town of Goderich,

under the Act respecting Inspection and Sale of Certain Staple Commodities, R. S. C. 1906 ch. 85, sec. 321, whereby the applicant was found guilty in each case of a violation of the Act, and sentenced to pay a fine and costs. The three appeals were dismissed with costs, and the costs of the three appeals were taxed by the clerk at sums aggregating $161.90. Sutherland, J., said that, if called upon to do so, and if he had power to do so, he would hold that the County Court Judge had sufficiently extended the time for the hearing and decision of the appeals, and was still seized of the matter at the time he gave judgment; that it was the duty of the Judge himself to fix the amount of the costs when finally disposing of the appeals: Regina v. McIntosh, 28 O. R. 603. Prohibition is a remedy that should be sparingly applied and only in a plain case: Re Cummings and County of Carleton, 25 O. R. 607, 26 O. R. 1; In re Grass v. Allan, 26 U. C. R. 123. It is not clear that this is a case for prohibition. Motion enlarged for ten days, during which the informant may apply to the County Court Judge to amend the orders by himself fixing the amount of costs. If that is done, the motion will be dismissed without costs, unless either party desires to speak to the question of costs, in which case there is leave to do so. W. Proudfoot, K.C., for the applicant. Frank McCarthy, for the informant.

COUNTY COURT OF HURON.

DOYLE, Co.C.J. SEPTEMBER 13TH, 1910.

RE NORTH HURON TELEPHONE CO. AND TOWNSHIP OF TURNBERRY.

RE WROXETER RURAL TELEPHONE CO. AND TOWNSHIP OF TURNBERRY.

Assessment and Taxes—Rural Telephone Companies—Exemption —Assessment Act, sec. 14 (2), (3).

Appeals by the companies against their assessment by the township municipality, on the ground that they are exempt from taxation under sub-sec. 3 of sec. 14 of the Assessment Act, 4 Edw. VII. ch. 23, as being "party" lines not exceeding twenty-five miles in length.

Sub-section 2 of sec. 14 provides: "Every telephone company shall be assessed in every township for one ground circuit (being a single wire for carrying a message) or metallic circuit (being two wires for carrying a message), as the case may be, placed or strung on the poles or other structures operated or used by

the company in the township and in use on the 31st day of December next preceding the assessment, at the rate of $135 per mile, and, in case any line of poles or other structures carries more than one ground circuit or metallic circuit, at the rate of $750 per mile for each additional ground circuit or metallic circuit, as the case may be, placed or strung on the 31st day of December next preceding the assessment."

Sub-section 3: "In the computation of the length of said telephone wires and additional wires for assessment in a township as aforesaid, the wires placed or strung within the area of any police village, and the wires of all branch and party lines, which do not exceed twenty-five miles in length, shall not be included."

Richard Vanstone, for the appellants.

Dudley Holmes, for the township corporation.

DOYLE, Co.C.J.:—If the contention of the appellants prevailed, they would escape taxation entirely.

Now, the general rule is that all property in the province is liable to taxation: Weir on Assessment, p. 27. It is argued by counsel for the appellants that, if it were intended by law that rural telephone companies should be treated differently from other telephone companies in the matter of assessment, it is for the legislature to say so, and that it has not said so.

I do not find any special legislation about rural telephone companies, but I think the Assessment Act is broad enough to include the property of rural as well as other telephone companies, and that it does so include them.

The appellant companies were created by charters of their own, and are independent companies. They do not form any part of the Bell system; they simply purchase certain privileges from that company, namely, the right to send messages over that company's lines at certain points.

I think the lines in question here come under sub-sec. 2 of sec. 14, which says, "Every telephone company shall be assessed," etc. There is no "branch" line in question here. The lines are trunk lines, having no branches, as far as the evidence disclosed. And as to "party" lines, the only lines that can be so called are the short lines which lead from the trunk line to the houses, or from an office of the company directly to a house; such lines are not to be computed unless the total length of all such branch and party lines together exceeds twenty-five miles in a township.

I am of opinion that the appellants have been properly assessed, and I dismiss the appeals with costs.