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CHANGE OF VENUE ON DEFENDANT'S APPLICATION.

As appears from the cases collected in a previous article (*a*), Sir Matthew Cameron's view (*b*), that the Judicature Act has accorded to the plaintiff the clear right of selecting the place of trial, is now established.

By the same decisions and those therein cited, the following general procedure governing a defendant's application to displace the plaintiff's right is also established, instead of those "most unsatisfactory" (*c*), ever changing rules as to the place where the cause of action arose and as to preponderance of convenience and expense, which made it so difficult to deduce from the decided cases the principles guiding our courts in disposing of such applications:

A decision respecting change of venue, in either High Court or County Court actions (*d*), no longer turns on the mere fact of where the cause of action arose (*e*). That fact is, however, taken into account somewhat in determining the balance of convenience and expense; the consideration of expense being embraced in the investigation of the question of convenience (*g*), as thus explained by Boyd, C. (*h*). "The facts in each case are to be considered, but it is a safe general rule that the venue will not be changed unless the defendant shews that some serious injury and injustice to his case will arise by trying it where the plaintiff proposes to have it tried. . . . . The question of injury is one of degree, in which the elements of expense and convenience are to be considered."

(*a*) 37 C.L.J. 831.

(*b*) *Davis* v. *Murray*, 9 P.R., at p. 227.

(*c*) *McArthur* v. *Michigan Central R. W. Co.*, 15 P.R. 77.

(*d*) *Hicks* v. *Mills*, judgment of Chancery Divisional Court, in March, 1898, affirming Master in Chambers and Street, J.'s orders (unreported).

(*e*) *Walton* v. *Wideman*, 10 P.R. 228; *Halliday* v. *Township of Stanley*, 16 P.R. 493; *Berlin Piano Co.* v. *Truaisch*, 15 P.R., at p. 71.

(*g*) *Davis* v. *Murray*, ubi sup.

(*h*) *Dowie* v. *Partle*, 15 P.R. 313.

Ferguson, J., also says (*h*): "The difference in the expense in the ordinary case of change of place of trial is chiefly the difference in the amount of the disbursements. This is what is commonly called the balance of convenience, though the balance of convenience may embrace other matters.

"Preponderance" being, as above noted, a relative term, the practice is well settled (*i*), that not merely a manifest (*j*), considerable (*k*), or great (*l*), but nothing short of a very great or overwhelming (*m*), preponderance must be made to appear in favour of the place of trial proposed by a defendant seeking to change the venue on that ground.

And, as above noted, in the determination of the question of preponderance, although the element of convenience apart from expense sometimes appears as the chief factor (*n*), the matter of expense is generally the more influential (*o*).

It remains to further collect the cases, with a view to more specific definition of the practice followed in investigating this ground of preponderance of convenience and expense; and, in order, also, to obtain a statement of the way our courts deal with the only other ground which now ordinarily furnishes sufficient reason for granting a defendant's application for change of venue, namely, that a fair or impartial trial cannot be had at the place selected by the plaintiff (*p*). Remembering Armour, C.J.'s, opinion (*q*), that the English authorities on the question of changing venue are not at all applicable here, owing to the circumstances in England being entirely different, care will be taken to cite such English cases only as have been expressly followed here.

(*h*) *Fogg* v. *Fogg*, 12 P.R., at p. 251.

(*i*) Per Maclennan, J.A., *Campbell* v. *Doherty*, 18 P.R., at p. 245.

(*j*) *Moor* v. *Boyd*, 3 P.R. 374.

(*k*) *Standard Pipe Co.* v. *Town of Fort William*, 16 P.R. 404.

(*l*) *Brethour* v. *Brooke*, 16 P.R. 205.

(*m*) *Peer* v. *North-West Transportation Co.*, 14 P.R. 381; *Berlin Piano Co.* v. *Truaisch*, ubi sup.; *Halliday* v. *Township of Stanley*, ubi sup.; *Campbell* v. *Doherty*, 18 P.R. 243.

(*n*) *Brethour* v. *Brooke*, ubi sup.

(*o*) *Davis* v. *Partlo*, ubi sup.; *Berlin Piano Co.* v. *Truaisch*, ubi sup.; *Campbell* v. *Doherty*, ubi sup.

(*p*) *Davis* v. *Murray*, ubi sup.

(*q*) *Greey* v. *Siddall*, 12 P.R., at p. 560.

When determining the relative convenience and expense of a trial at the places named by the opposing parties, in cases where a defendant complains that he will suffer injustice by reason of being put to undue and disproportionate inconvenience and expense if the trial is had at the place selected by the plaintiff, the main question arising is that of the number of the witnesses to be called, and the accessibility of the proposed venues to the places of residence of such witnesses.

What is the scope of this inquiry? In *Crombie* v. *Bell*, 3 Ch. Cham. R. 195, the plaintiff's affidavit in reply to that of defendant in support of a motion to change the venue alleged that the plaintiff had witnesses in Toronto and elsewhere whose evidence was material and necessary, and named the witnesses. The plaintiff was cross-examined on this affidavit before a special examiner, and was asked whether the persons named were present when a certain agreement (which was the foundation of the suit) was made. The plaintiff declined to answer the questions, on the ground that he was not bound to disclose the evidence he expected his witnesses to give at the hearing of the cause. The examiner ruled in favour of the objection. In the course of his judgment dismissing an appeal from the examiner's ruling, Mowat, V.-C., stated: "I think the more convenient and reasonable rule to lay down will be that such a question is not under the circumstances admissible. Without holding that under no possible circumstances such a question can be put, I think it safest in the case before me to hold that the question could not be put."

In accord with the views of the learned judge who decided *Crombie* v. *Bell* is the guarded opinion contained in obiter dicta by Boyd, C., when disposing of an appeal on the question of change of venue in the later case of *Arpin* v. *Guinane*, 12 P.R. 364. On the application before the Master in Chambers to change the place of trial in above-named action from Cornwall to Toronto, the defendant swore that he had twenty-seven witnesses in Toronto, and one in Aurora; while the plaintiff swore to twenty-six witnesses, all in Montreal. The Master directed the plaintiff and defendant to file further affidavits disclosing the names of their witnesses and the nature of their evidence, in order that he might determine whether or not they were material; and, deciding upon such further affidavits that some of the evidence proposed to b

adduced for the plaintiff could not be relevant, determined that the preponderance of convenience was in favour of Toronto as the place of trial, and changed the venue accordingly. Boyd, C., did not consider that he should reverse the conclusion the Master had formed upon the material; but, in dismissing the appeal from the Master's order, said: "It is not needful to determine whether an affidavit to disclose the names and evidence to be given was a proper direction, because both parties agreed to that by making the affidavit and not appealing from the direction. As at present advised, I should doubt the propriety of adopting it as a test in dealing with the place of trial. It is opposed to *Crombie* v. *Bell*, 3 Ch. Cham. R. 195; and there appear to be good reasons for not requiring a discovery of this sort, which could not be obtained in a direct application for discovery of your opponent's case and evidence."

As illustrating the conformity of Chamber practice to the recommendations of Boyd, C., and Mowat, V.-C., there might be noted the judgment in *Shorey* v. *Gough* (*r*); where the present Master in Chambers held that a defendant's counsel was right in refusing to allow the defendant to answer on cross-examination on his affidavit in support of a motion to change the venue, any questions respecting the points to be proved by the witnesses referred to in the affidavit.

Thus it is not the practice for the court or a judge to inquire at this stage as to what can be proved by alleged witnesses and to pronounce as to its materiality. This limitation of the right of discovery on the enquiry respecting witnesses strikingly exemplifies Hawkins, J.'s comment that: "The court or judge refusing to make an order to change the venue cannot have before them all the circumstances. They cannot try the action. They can only deal with the necessarily imperfect materials before them" (*s*).

It being sufficient for the preliminary object of inducing the court to order a change of venue that a party shall pledge his oath to his statement of the number of witnesses he intends to call at the trial, it is found in many cases, as Boyd, C., observes (*t*), that "where the defendant swears to a certain number of witnesses, the

(*r*) Judgment dated Nov. 10th, 1893 (unreported).

(*s*) *Willey* v. *Great Northern R. W. Co.* (1891) 2 Q.B., at p. 207.

(*t*) *McArthur* v. *Michigan Central R. W. Co.*, 15 P.R., at p. 78.

plaintiff makes a counter-affidavit shewing a larger number in another place, and when the trial comes off the witnesses do not materialize, to use the common phrase, or else are called for no reason except that they have been named as witnesses at an earlier stage."

Hence, such a sceptical attitude of the court as that expressed in Armour, C.J.'s remark (*u*), that "these statements about the witnesses are generally not reliable. The party that swears last swears to the most witnesses"—and the difficulty of deciding upon the contradictory affidavits so as to do justice between the parties.

In a case where he did not consider that it really mattered a straw, so far as expense went, at which of the places named the action was tried, and where the considerations in favour of leaving the venue where the plaintiff had laid it were that the case would be sooner tried there, and the value to be attached to the legal right of the plaintiff to lay the venue where he pleases. Boyd, C., met this difficulty of deciding upon the contradictory affidavits by refusing (*v*), to interfere at all, and leaving it to the trial judge to apportion the costs if it appeared to him that the plaintiff's choice of a place of trial had put the defendant to an undue and disproportionate expense.

The same consideration of a speedier trial of the action at the place named by the plaintiff and also those of a possible need of a view by the jury and of the cause of action having arisen in the county in which the plaintiff had laid the venue, are noticed in MacMahon, J.'s judgment (*w*), on an appeal from the order of the Master in Chambers refusing to change the venue from Pembroke to Toronto in a County Court action for damages for breach of contract; where the plaintiff swore to eight witnesses, seven of whom resided in Pembroke, and one at Port Arthur; while the defendant, in his affidavit, claimed to have sixteen witnesses, all of them residing in Toronto.

In discussing the appeal, MacMahon, J., said in part: "I follow the Chancellor in *McArthur* v. *Michigan Central R.W. Co.*, 15 P. R. 77, by leaving the trial judge to apportion the costs if he sees fit." Armour, C.J., delivering the judgment of the Queen's

(*u*) *Greey* v. *Siddall*, 12 P.R., at p. 559.

(*v*) *McArthur* v. *Michigan Central R. W. Co.*, ubi sup.

(*w*) *McAllister* v. *Cole*, 16 P.R., at p. 108.

Bench Divisional Court in the same case also said in part: "We think that the decision of the Master in Chambers, affirmed by the Judge in Chambers, was right."

The circumstance that the cause of action arose in the county to which the defendant sought to change the venue and that a view of the locus in quo by the jury might be necessary, favoured the defendant's motion to change the venue from Sarnia to Goderich in a subsequent action (*x*), for damages for injuries substained while driving along a highway out of repair. On that motion, the defendants' officers swore that the defendants would require at the trial twelve witnesses, eleven of whom lived in the township of Stanley; while the plaintiff, a resident of Sarnia, claimed to have nine witnesses, seven being residents of Sarnia, and two of the township of Stanley. The plaintiff also swore that she did not believe she could have a fair trial in the county of Huron, and that she had not sufficiently recovered from her injuries to travel to Goderich, but that she could without risk to herself be carried to the court house at Sarnia to give evidence on her own behalf. The Master in Chambers refused to change the venue, holding (*y*) that: "the question is really one of expense after all, and the judge at the trial can arrange that matter in disposing of the costs, as was done in *McArthur* v. *Michigan Central R.W. Co.*, 15 P.R., 77." Rose, J., on appeal, affirmed (*z*) the Master's order; and Falconbridge, J., when pronouncing the judgment of the Divisional Court dismissing an appeal from Rose, J., made it clear (*a*) that the appeal was decided "altogether apart from the question of the plaintiff's physical disability, and from the suggestion that as fair a trial cannot be had in Huron as in London."

Before passing from the case of *Halliday* v. *Township of Stanley*, it might be noted that the judgment of the Divisional Court decided another point in the practice governing the enquiry respecting witnesses.

Relative to the appellants' request for leave to read on the appeal further affidavits as to witnesses, and to the appellants' suggestion that when the autumn assizes came on the plaintiff would

(*x*) *Halliday* v. *Township of Stanley*, ubi sup.

(*y*) Judgment dated 2nd March, 1895 (unreported).

(*z*) Judgment dated 8th March 1895 (unreported).

(*a*) 16 P.R., at p. 495.

have recovered and be able to attend at Goderich, Falconbridge, J., said (*b*): "I take it to be unquestionable that we must deal with this appeal on the facts as they were exhibited to the learned Master and to the learned Judge, whose decision is under review, and that we ought not to look at new material or listen to suggestions of possible changes in the physical condition of the plaintiff, unless it might be in a proper case, to allow a new substantive application to be made."

More extended are the applications of the practice laid down in *McArthur* v. *Michigan Central R.W. Co.*, made in two very recent decisions of the Master in Chambers. Thus, in the absence of any such considerations bolstering up the value to be attached to the legal right of the plaintiff to lay the venue where he pleases as are specially mentioned in *McArthur* v. *Michigan C.R.W. Co.* and *McAlister* v. *Cole*, or the possibly important fact that four of the nine witnesses sworn to be necessary to the case of the injured plaintiff in *Halliday* v. *Township of Stanley* were medical men in active practice, the Master held (*c*): "As to the number of witnesses necessary, if the defence set up that the plaintiff accepted the sum of $72 in full of all claims between the parties is a good one, the number of witnesses on either side will be not more than one or two. However, both parties claim to have ten and eleven witnesses, respectively. I am unable to see how that number will be required; and would, therefore, in refusing the application, leave it to the trial judge to apportion the costs as may be proper, if it shall appear that the wrong place was selected—as was done in *McArthur* v. *Michigan Central R.W. Co.*, 15 P.R. 77."

And the same method of securing that justice be done as between the parties by providing for the subsequent apportionment of the costs in the light of the full circumstances was adopted in *Kelly* v. *Gilbert*; where the Master in Chambers made an order changing the venue from Chatham to Brockville, under the following circumstances: The defendant, in his affidavit in support of the motion, swore to three witnesses at Ogdensburg, New York (twelve miles from Brockville), two witnesses at Gananoque, and six at Brockville. In reply, the plaintiff's solicitor swore that the defen-

(*b*) Ibid.

(*c*) *Delahey* v. *McDonald*, judgment dated March 27, 1902 (unreported).

dant had not entered any appearance to the writ, nor filed any statement of defence, and that although he, the solicitor, was unable to advise upon the plaintiff's evidence or to state what witnesses it might be necessary for the plaintiff to call at the trial until served with the statement of defence, yet so far as at present informed it would be necessary for the plaintiff to call as witnesses several persons residing in Chatham and elsewhere "at a great distance from" Brockville; and the plaintiff's solicitor swore that he verily believed the plaintiff's costs in producing his witnesses at Brockville would be as great, if not greater, than the defendant's costs in producing his witnesses at Chatham.

The Master's order (*d*) contained a clause providing that "the question of the additional costs, if any, to the plaintiff for witnesses by reason of changing the said place of trial be reserved, to be disposed of by the trial judge; if not so disposed of the said costs to be costs in the cause."

Boyd, C.'s, decision in *M cArthur* v. *Michigan Central R.W. Co.* seems, therefore, to have been regarded as pretty generally applicable to the solution of the difficulty of deciding whether or not it is proper to change the venue in any case where there does not appear to be much difference in the expense and convenience of a trial at the two proposed venues, according to sworn contradictory statements; the correctness of which, however much it may be doubted, cannot, as we have seen, be fully tested on any such preliminary proceeding as an application for change of venue.

Other methods for solving the difficulty are sometimes adopted by the court. In one case (*e*) the Master in Chambers, after careful analysis of the material, held that "while the witnesses sworn to by plaintiff as residing in Hamilton are not necessary whatever," those for the defendant were material, and granted the defendant's motion to change the venue from Stratford to Walkerton. Rose, J., on appeal (*f*), reversed the Master's order, with costs to the plaintiff in any event; but the Chancery Divisional Court (Boyd, C., Ferguson, J., and Meredith, J.,) required (*g*), as a condition of leaving the venue at Stratford, that the plaintiff should undertake

(*d*) Order dated 30th May, 1902 (unreported).

(*e*) *Burk* v. *Smith*, judgment dated June 2, 1898 (unreported).

(*f*) Order dated June 7, 1898 (unreported).

(*g*) Order dated June 13, 1898 (unreported).

"to pay to defendant any additional expense in witness fees that may be found to have been occasioned by reason of the trial taking place at Stratford, instead of Walkerton."

On another occasion (*h*) the Master in Chambers said: "I find it very difficult to believe that the number of witnesses defendant . . states he will require at the trial herein will be subpœned as witnesses, but I am not prepared to hold that he will not require a considerable number of them. If the plaintiff company would make admissions which the defendants would accept, I think that the trial might proceed at Toronto, or, if the parties would agree to a reference to take the accounts between them, to be held where the trial judge would order after disposing of the questions of liability, then the trial should take place here. But, in default of agreement as to above, the venue should be changed to Ottawa.

As a result of plaintiff's making admissions and agreeing to a reference and undertaking to pay such witness fees as trial Judge should direct in consequence of the trial being had at Toronto instead of Ottawa, the application was refused, with costs to be costs in the cause.

Finally, when the affidavit of the defendant in support of his motion to change the venue in a libel action, (*i*) "fully and plainly" set out that a trial at Port Arthur would cause to defendants an extra expense of $900 for witness fees for 15 witnesses, while the affidavit of the plaintiff was not of such a precise character, and on cross-examination very little light was shed on what the plaintiff intended to prove by his 30 or 40 unnamed witnesses, it not being alleged that the defendants would not be able to meet such sum as might be recovered in the action, and upon the defendants submitting to pay into court any sum that might be reasonable, in order to secure to plaintiff, in the event of his ultimate success, any additional costs of witnesses incurred by reason of the trial being held at North Bay, Mr. Cartwright, sitting for the Master in Chambers, made an order changing the place of trial to North Bay, upon the defendant paying $1,000 into court, within ten days, to stand as security for the extra costs, as agreed on the argument.

(*h*) *Dominion Brewery Co.* v. *Gilmour.* Judgment dated Feb. 10, 1898 (unreported).

(*i*) *Conmee* v. *Klock*, judgment dated March 7th, 1897 (unreported).

Such expedients, however, are availed of only as a last resort. Although a party is not bound to disclose, either in his material on a venue motion or in the course of cross-examination thereon, the nature of the evidence to be given at the trial by each named witness of his, the practice is to accept nothing less than sufficient sworn statements as prima facie conclusive for the present object; and he must state definitely the number and place of residence of the witnesses he intends to call with reference to each bona fide issue raised by the pleadings in the action.

There are numerous cases illustrating how closely such statements as to witnesses are scrutinized by the Court. For instance, when a plaintiff's counsel urged (*j*) that the plaintiff did not intend to call any witnesses at the trial, since the action was one that could be tried upon the record without any evidence, Ferguson, J., after noting that the case had not been set down by way of motion for judgment, said: "From the pleadings, as read before me, I do not see how the plaintiff can get on at the trial without some evidence."

And where a defendant's affidavit in support of a motion for change of venue (*k*) stated that the defendant had sixteen necessary and material witnesses whom he intended to call at the trial, and on cross-examination on that affidavit swore that eight of those sixteen witnesses were grain men and millers who were to give evidence as to the grade and quality of certain wheat in question, MacMahon, J., held: "The defendant cannot possibly require eight witnesses to give evidence as to the grade of the wheat, particularly when one considers that the defendant admits in his letter on the 7th April that he obtained a sample of the wheat from the agent of the C.P.R. Co. at Pembroke, and then he, as a grain dealer, pronounced his opinion upon the question of grade shortly after the wheat was delivered to the plaintiff, and there is no denial whatever by the defendant of the accuracy or truth of the statements therein contained."

Hence, although it was held in an English case (*l*) that it is not, in itself, a sufficient objection to an affidavit in support of a motion for change of venue that it is made by the solicitor in the

(*j*) *Brethour* v. *Brooke*, 15 P.R., at p. 206.

(*k*) *McAllister* v. *Cole*, 16 P.R., at p. 108.

(*l*) *Biddall* v. *Smith*, 2 D.P.C. 219.

cause, and not by the defendant, since, if a party to an action is too ill to attend before a commissioner to make an affidavit, the proper person to make it is the solicitor (*m*), yet the proper course (*n*) is for the party himself, if he be in the province (*nn*), to pledge his oath to a statement respecting witnesses; and that duty may not be delegated to such a confidential agent as a book-keeper; whose affidavit, filed as a substitute for a plaintiff's, and stating that the maker had "a full knowledge of the matters in question in this action," was quite recently rejected (*o*) by the Master in Chambers. Needless to say, this does not apply to corporations.

Further, it is preferable that the party to the action should speak of his own knowledge. Mr. Cartwright, sitting for the Master in Chambers, adversely commented on the fact that "the defendant does not appear to have spoken of his own knowledge, but to have relied on the statements given by his solicitors as to what witnesses would be material and what they could prove" (*p*).

If a party does not speak of his own knowledge, he must state the source of his information and belief. Following *In re J. L. Young Manufacturing Co.* (1900) 2 Ch. 753, the Master in Chambers declined (*q*) to admit as evidence on a motion for change of venue the affidavit of a defendant company's manager that "I am advised and believe the defendants cannot successfully proceed to the trial of this action without a physical examination of the plaintiff" . .

When, on the pending appeal to the Court of Appeal in *Morrison* v. *G.T.R. Co.*, it was urged by counsel that the decision in *In re Young* applied only to proceedings that were final, and not merely interloctutory in their nature, Osler, J.A., stated (*r*) it to be a standing rule that an affidavit shall disclose the source of information and belief.

(*m*) *Williams* v. *Higgs*, 6 M. & W. 133; 8 D.P.C. 165; 9 L.J. Ex. 59; 4 Jur. 73.

(*n*) *Delahey* v. *McDonald*. Judgment dated May 27, 1902 (unreported).

(*nn*) *Hood* v. *Cronkrite*, 4 P.R., at p. 278.

(*o*) *Delahey* v. *Macdonald*.

(*p*) *Mason* v. *Van Alstine*, judgment dated June 10, 1897 (unreported).

(*q*) *Witty* v. *London Street R. W. Co.* Judgment dated March 4, 1901 (unreported).

(*r*) Appeal argued May 16, 1902.

On the point as to residence of witnesses the material is likewise closely scrutinized. Ferguson, J., held (*s*) that where there was no material shewing the number of witnesses to be called by a party and the place of residence of such witnesses, the presumption shall be that all such party's witnesses reside at the place proposed by the opposite party for the trial of the action, or relatively nearer to such last-named place. That decision of Ferguson, J., has been regarded and followed by the Master in Chambers as laying down the general principle to govern (*t*).

The following remarks of the Master in Chambers in two of his judgments will shew how strict the practice is in this regard: "I am quite certain that the plaintiff must have witnesses in Hamilton as to the defendant's claim, and I think it would have been only fair for him to have stated the number, instead of shielding himself under the latter part of the 13th clause, added, apparently, as an afterthought, namely, 'and that outside of the defendant's claim for wages he and myself are the only necessary witnesses residing in the City of Hamilton' (*u*). I am of opinion that the venue should be changed to Sarnia, especially as the plaintiffs do not state that they do not intend to call any witnesses from Petrolia. The affidavit opposing the motion merely states: 'As I am at present advised and verily believe, the plaintiffs do not propose to call any witness who resides in Petrolia'" (*v*).

Further, the affidavits filed on a defendant's motion to change the place of trial should state definitely the issues upon which the witnesses of known residence and sworn to be necessary are to be called. Such a requirement is suggested by Street, J.'s, adverse comment on the absence of those affidavits (*w*) And such issues must be prima facie pertinent and bona fide; for, in a case, (*x*), where a defendant, in support of his application, swore to twenty-one witnesses as necessary and material, while upon the argument counsel admitted that the greater number of these witnesses were men

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(*s*) *Brethour* v. *Brooke*, ubi sup.

(*t*) *Canada Accident Insurance Co.* v. *Brown*, judgment dated April 29, 1893 (unreported); *C.P.R. Co.* v. *Chatham*, judgment dated March 6, 1893 (unreported).

(*u*) *Burke* v. *McInerney*, judgment dated May 10, 1892, (unreported).

(*v*) *Comet Cycle Co.* v. *Palmer*, judgment dated May 1, 1893 (unreported).

(*w*) *Madigan* v. *Ferland*, 17 P.R., at p. 126.

(*x*) *Rogers* v. *Devitt*, (unreported).

who had sold to defendant the cordwood in question in the action and that they were to prove that defendant had not paid them for such wood, the Master in Chambers refused to change the venue, saying: "It appears to me that the issues raised by the pleadings are legal ones, and that the evidence of these witnesses will not be at all necessary. The defendant, no doubt, will swear to the facts and the onus would be on the defendant to prove that he had paid these parties—but, in my opinion, this is not one of the questions to be decided in the action. If these witnesses are not called, then I am of opinion that the plaintiff will require as many witnesses who live in Toronto as the defendant will require."

In another case, (*y*) one for recovery of two promissory notes made by defendants in favour of plaintiff; where the defendants denied the making of the notes and set up satisfaction, and counter-claimed for damages sustained by them by reason of the engine in question, and for which the originals of the notes sued on were alleged to have been given, not being as represented, the Master in Chambers dismissed the defendants' application for change of venue, holding that the counter-claim, as to which witnesses were sworn to be necessary, "was raised more for delay than for any other purpose,"—it appearing from the cross-examination of the defendant that for almost six years after the sale of the engine the defendants made no objection whatever to the engine, but paid some of the notes and renewed others, and traded the engine away for another.

The number and residence of the witnesses to be called on the issues in the action being ascertained as satisfactorily as may be on a mere preliminary proceeding, Rose, J., stated (*z*) the result of the authorities to be that "it is not permitted to enter into an enquiry as to the personal inconvenience of the witnesses, as no certainty can be had in any such investigation." Subsequently, (*a*), the last named learned Judge followed the same principle even in a case where: "It may be that the attendance at the trial of some of the officials of the plaintiff company may cause great inconvenience and loss; indeed, for aught we know, may cause temporarily a suspension of business operations."

(*y*) *Peterson* v. *Comden*, judgment dated Dec. 1, 1893 (unreported).

(*z*) *Berlin Piano Co.* v. *Truaish*, 15 P.R., at p. 70.

(*a*) *Standard Pipe Co.* v. *Town of Fort William*, 17 P.R. 404.

Of course, it will be noted that it is personal inconvenience of witnesses that will not be enquired into, for Ferguson, J., held (*b*) that the circumstance that two of a defendant's witnesses were public officers whose absence would be a public inconvenience if they were required to attend at the place of trial named by plaintiff, was a circumstance to be considered in determining the preponderance of convenience.

So much for the practice followed in investigating what is usually the main matter to be decided on a defendant's application to change the venue on the ground of preponderance of convenience and expense.

Another argument as to convenience and expense open to a defendant, and sometimes very prominent, is that it will be necessary for the jury to have a view. Armour, C.J., noted, (*c*), the importance of the fact that the trial judge might consider it necessary to have a view of the mill (which was much nearer to the place of trial proposed by defendant than to that selected by plaintiffs) in an action upon a contract to refit the defendant's mill with a roller system; and Boyd, C., later said, (*d*), in dismissing an appeal from the order of the Master in Chambers changing venue in an action brought to have it declared that the plaintiff was entitled to the use as a roadway of a certain strip of land: "It may be, also, that a view of the locus in quo by the jury will be found necessary, and in that case difficulty might be experienced in having the view in a county outside of the assize county."

Indeed, it is submitted that the fact of the need of a view of the locus in quo for the furtherance of justice, if clearly established, in itself furnishes sufficient reason for granting a defendant's application to change the venue, if undue and disproportionate expense would otherwise be caused to defendant; as it did in an old English action (*e*) upon a covenant in a lease of certain silk mills and a stream of water belonging thereto, the breaches alleged being a diversion of the water from the mills, and the failure to keep up the water to its former level.

In that action, the point was thus definitely and broadly decided: The grounds of the defendant's motion were that the

(*b*) *Fogg* v. *Fogg*, 12 P.R. 249.
(*c*) *Gray* v. *Siddall*, 12 P.R. 557.
(*d*) *Odell* v. *Mulholland*, 14 P.R., at p. 181.
(*e*) *Hadinott* v. *Cox*, 8 East., at p. 268.

greater number of the defendant's witnesses lived in the country, where the premises were situated, and that a view would be necessary. In answer, the plaintiff filed affidavits stating that more of his witnesses lived in London, where the venue was laid, than in the country, and that it would be less expensive to plaintiff to try the action where the defendant suggested than where the venue was laid. In addition, counsel for plaintiff attempted to shew that the cause might be as well tried with the aid of a map as by a view. The court, however, "considering that a view would be desirable in this case for the furtherance of justice, made the rule absolute, on the defendant's undertaking to have a view, and to admit the lease."

But the argument that a view is proper to be had must stand the test of a close enquiry.

Thus, it was not strong enough to cause the Master in Chambers to grant the defendant's application for change of venue in an action against a township for damages sustained by the plaintiff by reason of an accident caused by plaintiff's falling into a hole on a street in an unincorporated village ; on which motion both the clerk of the township and its solicitor stated on oath that it would be of the utmost importance that the jury should be allowed to inspect the spot and the highway, while the plaintiff's solicitor, in answer, swore that the place of the accident was seven miles from St. Thomas and that even if the venue was changed to that city, from London, the place where the injury occurred was not then in the same condition as when the injury was sustained, and that a personal view of the spot would make no difference and throw no additional light upon the evidence even if the jury were directed to inspect the same, since the evidence could be easily understood and made perfectly clear to the jury without a personal inspection of the spot, especially if, as he intended to do, a diagram were placed before the jury at the trial (*f*).

So, also, will the venue be changed in such a case as where the subject matter of the litigation is in the nature of a fixture which should be inspected and cannot be forwarded to the place of trial selected by the plaintiff without so unduly increasing the expense as to cause injustice to defendant.

(*f*) *Flood* v. *Township of Southwold*, judgment dated September 14th, 1892, (unreported).

An action (*g*) was brought on an agreement for the lease of a heavy machine (weighing 800 pounds) run by steam and situated in the defendant's factory, within forty yards of the Hamilton court house. The defendants set up that the machine could not do the work for which it was leased, and counter-claimed to have the agreement for a lease cancelled and for a return of the money originally paid by defendants, and for damages for expenses incurred in endeavoring to work the defective machine, which was said to have been constantly breaking down. In support of the defendant's motion to change the venue from Toronto to Hamilton, it was sworn that the defendants could not safely proceed to trial without the evidence of from 7 to 10 persons residing in Hamilton, and that it would be necessary for the judge or jury to have an inspection of the machine in question in order to comprehend the expert evidence necessary to be given in the action, the defendants' expert evidence being given by commission. In opposition to the motion, the plaintiffs shewed that they would require two witnesses at Montreal, two from Quebec, one from Boston, and a number (at least six) from Toronto. In addition, it was said that the plaintiffs would require to bring several manufacturers from Montreal and Quebec, in order to rebut the evidence of the defendants. In the course of his judgment changing the venue, after noting the great weight of the machine and its proximity to the Hamilton court house, the Master in Chambers said: "The greater number of the plaintiff's witnesses are clearly expert; and, although the case of *Nicholson* v. *Linton*, 12 P.R., 223, (where the venue was changed) is scarcely applicable to the circumstances here, yet I am of opinion that where it is shewn, as done here, that the judge or jury may require a view of the machine in question, it is proper that the venue should be placed so that object may be attained."

Again, although the Master in Chambers found that "the preponderance of convenience in favour of one place over the other is not great," in an action to recover under a contract for the supply of electric plant; where the Master considered the main issue in the action to be as to the completion of the contract as agreed, the venue was changed, in view of the fact that it might be necessary

(*g*) *Shoe Wire Grip Co.* v. *McPherson*, judgment dated March 25, 1893, (unreported).

for the plant to be seen by the trial Judge and the expert witnesses (*h*).

But no weight is given to the argument where the subject matter of the litigation can, if necessary, be forwarded to the place of trial selected by the plaintiff without undue expense. When refusing to change the venue in an action for damages for injuries occasioned to plaintiff by the breaking of a swing on the defendants' pleasure grounds, occupied at the time by an excursion party, of whom plaintiff was one, the Master in Chambers remarked (*i*): "There can be very little necessity for an inspection of the swing at the place of the accident. If need be, the swing itself can be readily produced, shewing the break."

Similarly slight was the attention paid by the Master in Chambers to the claim of the need of a view urged in support of a defendant's motion to change the venue in a very recent action (*j*), to recover for furniture sold and delivered; where the defendant's defence was that the furniture was poorly built and arrived in a damaged condition.

Lastly, the closeness of this investigation of the alleged necessity for a view—equally as scrutinizing as that respecting witnesses—is seen in the following (*k*):

"As to the necessity of a view by the jury, that does not arise on the pleadings. The defendant states in his affidavit that one of his defences is that the plaintiffs were never prepared to deliver to him the whole of the machinery and plant agreed for, and that he believes that it will be found upon inspection thereof that the whole of the machinery and plant so agreed for is not and never was in Hespeler. Upon this statement, he contends that it may be necessary for the jury to have a view. I do not agree to this contention upon this or any other statement of the defendant in his affidavit or defence."

Other arguments may be advanced in support of a defendant's motion to change the venue on the ground of preponderance of convenience and expense.

(*h*) *Edison* v. *Gilman*, judgment dated Sept. 27, 1892 (unreported).

(*i*) *Riddell* v. *Clark*, judgment dated Jan. 22, 1894 (unreported).

(*j*) *Canada Furniture Manufacturers* v. *Kearns*, order dated March 6, 1902 (unreported).

(*k*) *Reliance* v. *Arnold*, judgment of Master in Chambers dated Oct. 20, 1892 (unreported).

The fact of the cause of action having arisen in the county to which it is sought to change the venue is often urged; but the following shews how little weight is ordinarily given to that argument: When refusing to change the venue in a case (*l*) where the main point relied upon by the defendant was that as to the cause of action, the late Mr. Dalton said: "It appears that the number of witnesses to be called by either party is about equal. Prior to the Common Law Procedure Act, the place in which the cause of action arose was a very material matter in deciding upon a change of venue; but that Act specially extended the facilities of suitors by its provisions with respect to transitory actions. So that now, although the place where the cause of action arose is a circumstance in these applications, it is merely a circumstance, and if allowed to have much weight would have the effect of making many actions local which the Act intended to be transitory." Rose, J., thus comments on the foregoing remarks of Mr. Dalton, when citing them with approval (*m*): "If these remarks were warranted by the change under the C.L.P. Act, the provisions of the Judicature Act extend the 'facilities' even much further than before;" and Cameron, J.'s opinion was that "before the coming into force of the Judicature Act of 1881, the place where the cause of action arose had a much more important bearing on the question of change of venue than it has now" (*n*).

The decisions shewing the rise and fall of a contrary view of the effect of the Judicature Act are collected in the previous article already referred to.

The place where the cause of action arose becomes an important matter, however, when such place happens to be within the county where the parties to the action reside; for in such a case, sub-sec. (b), sec. 1, Consolidated Rule 529 requires a plaintiff to name the county town of that county as the place of trial. Unless the plaintiff shews a very strong reason (*o*) for having laid the venue elsewhere, a defendant's application to change it will be

(*l*) *Gwatkin* v. *Evans*, reported 6 P.R. in a note, at p. 255.

(*m*) *Walton* v. *Wideman*, 10 P.R., at p. 230.

(*n*) *Davis* v. *Murray*, 9 P.R., at p. 231.

(*o*) *Pollard* v. *Wright*, 16 P.R. 505.

granted as, of course, with costs of the application to the defendant in any event of the action (*p*).

Another argument as to convenience open to a defendant moving for change of venue is that the change sought will permit of several pending actions between the same parties being tried together. Concerning this, the Master in Chambers says (*q*): "The venue in the present action is laid at Toronto, and the defendants Dickinson now move to change it from Toronto to North Bay, in order that all the (three) actions may be tried together. The number of witnesses sworn to as being at North Bay equals the number of those at Toronto, so that if it were the only question between the parties there would be no very good reason for changing the venue. But, as the other actions are to be tried at North Bay, and the result of this present action must be awaited before final judgment can be given in the others, in my opinion the venue should be changed to enable the parties to have all the actions tried together."

The probability of a speedier trial of an action at the place suggested by a defendant is also sometimes found to be a consideration influencing the Court in changing venue. The Master in Chambers notes (*r*) the fact that "the delays in Toronto are great, while at Sandwich there are none to speak of," as one of his reasons for changing the venue from Toronto to Sandwich.

But this matter of the delay of the trial more frequently enters into a defendant's application for change of venue as an argument against a change. After the defendant has shewn a preponderance of convenience and expense in favour of the place of trial he suggests, he has often to meet the objection that the result of changing the venue would be to delay the trial. In an action (*s*) where Boyd, C., held that there was "a plain enough case of exceeding preponderance of convenience in favour of Hamilton," that learned judge remarks: "The only thing that influences me against the application is the delay of the trial till the spring, the Hamilton autumn sittings being over, but I shall not regard this,

(*p*) *Warren* v. *Singleton*, order of Master in Chambers, dated March 20, 1902 (unreported).

(*q*) *Caverhill* v. *Dickinson*, judgment dated May 22, 1898 (unreported).

(*r*) *Edison* v. *Gilman*, judgment dated September 27, 1892 (unreported).

(*s*) *Servos* v. *Servos*, 11 P.R. 135.

as the plaintiff has also delayed, and thereby missed two sittings at Hamilton." And the Master in Chambers, when refusing to change the place of trial, said in one action (*t*): "Should the venue be changed, it would have the effect of throwing the plaintiffs over—unless the Judge of the County of Middlesex chose to hear the case at a time other than the regular sittings. Such a term cannot or should not be imposed where the parties are not in default." In another action (*u*) the Master thus speaks: "The extra expense, in my opinion, over and above the expense of a trial at London will not amount to $15, possibly not more than $10, and certainly not sufficient to prevent the plaintiffs' right to have the action tried at once."

This objection that delay will result from a change of venue will, of course, be carefully investigated; and it must appear that the delay will be unreasonable and detrimental to the plaintiff's interests. In the course of his judgment granting a defendant's motion to change the place of trial; which was opposed on the ground, amongst others, that "a postponement of the trial will be a hardship on the plaintiff," the Master in Chambers says (*v*): "As to this latter objection, there is no evidence that an adjournment from the 9th January to 20th February, or even, say, two months, will work any hardship on the plaintiff." But on another occasion the Master held (*w*): "Upon the whole, I do not think the reasons assigned by the defendant are sufficient to warrant me in postponing the trial against the plaintiff's wish for at least six months."

The great weight given to the clearly established fact that a change of venue will result in unreasonably delaying the trial of the action, to the detriment of the plaintiff's cause, appears from the following: It was shewn upon a defendant's motion to change the venue from London to St. Thomas, that the St. Thomas sittings were over, and that if the venue were changed the plaintiff would have to wait (from September) until the next spring sittings to get his action tried at St. Thomas, while the London assizes com-

(*t*) *Carter* v. *Hodgins*, judgment dated November 29, 1895 (unreported).

(*u*) *Grantham* v. *Scott*, judgment dated September 30 1892 (unreported).

(*v*) *Rae* v. *Rae*, judgment dated January 4 1899 (unreported).

(*w*) *Reliance* v. *Arnold*, judgment dated October 20, 1892 (unreported).

menced on October 3. Although the preponderance of convenience was found to be "slightly in favour of the change" on the question of witnesses, and the cause of action arose in the county of Elgin, and a view of the locus in quo was sworn to be "of the utmost importance," the Master in Chambers refused to change the venue; saying in part (*x*): "Considering the delay of the trial against the plaintiff's wishes, and for no very apparent good reason, I am of opinion that the preponderance is not sufficiently great to grant the order asked for."

Two classes of actions governed by special considerations with respect to change of venue may here be noted, namely, alimony actions, and other actions between husband and wife.

Concerning the latter class, Boyd C., stated (when deciding a defendant wife's motion to change the venue in an action brought by her husband to enforce an alleged charge upon the wife's property for money advanced towards the purchase): "I think, too, that in a case between husband and wife the wife ought to be leniently dealt with" (*y*).

In alimony actions, on the other hand, the leniency is towards the husband; because, as Ferguson, J., pointed out (*z*), the rule is to impose on the defendant in such cases the burden of advancing and paying all the disbursements on both sides in any event of the action. Consequently, the last-named learned judge changed the venue on the husband's application; when the difference in expense in favour of the venue proposed by the husband was not sufficient to warrant a change in an ordinaay case. Ferguson, J.'s decision was recently followed by the Master in Chambers (*a*)

Special, too, is the practice governing the choice of a place of trial where cross-actions are consolidated. As was said by the late Mr. Dalton (*b*): "This case seems far removed from that rule which attributes so much influence to the mere will of the plaintiff as to the place of trial;" and he directed that the place of

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(*x*) *Flood* v. *Township of Southwold*, judgment dated September 17, 1892 (unreported).

(*y*) *Servos* v. *Servos*, 11 P.R. at p. 138.

(*z*) *Fogg* v. *Fogg*, 12 P.R., at p. 251.

(*a*) *Rae* v. *Rae*, ubi sup.

(*b*) *Gonee* v. *Leitch*, 11 P.R. 255.

trial should be where the balance of convenience required. The course of the present Master in Chambers conforms to Mr. Dalton's (*c*).

Before proceeding to a brief consideration of the practice followed on a defendant's motion based upon the other leading ground, namely, that a fair or impartial trial cannot be had at the place of trial selected by the plaintiff, attention might be called to two decision of Boyd, C. (*d*), which seem to shew that, even after the defendant has met the requirements of the decisions respecting preponderance of convenience, and established "a plain enough case of exceeding preponderance of convenience in favour of" the place of trial he suggests, the plaintiff may retain the place of trial he has chosen by paying into Court or by undertaking to pay to defendant such a sum as shall meet the additional expenses of the defendant of trying the case there. The first of above-mentioned decisions has since been cited by the Master in Chambers when refusing a defendant's motion to change the venue; where the plaintiffs, in addition to shewing that unreasonable delay would result from a change offered to deposit $50 to meet any additional expenses of the witnesses (*e*).

In a leading case on the subject (*f*), the late Mr. Dalton followed Chief Baron Pollock in holding that "all other considerations must give way to that of a fair trial."

The heavy onus resting upon a defendant setting up that consideration appears from the following words of Moore, J. (*g*), since cited approvingly by Chief Justice Richards (*h*): "It would at all times require a very strong and clear case to induce me to say that a fair trial could not be had in any county in Ireland. I would be slow to say that if a man were interested in a matter of a political and exciting description he would therefore neglect his duty."

(*c*) *Canadian Accident* v. *Brown*, judgment dated April 24, 1893 (unreported).

(*d*) *Serzos* v. *Serzos*, ubi sup; *Brigham* v. *McKenzie*, 10 P.R. 406.

(*e*) *Canadian Bank of Commerce* v. *Scott*, judgment dated April 7, 1892 (unreported).

(*f*) *Roche* v. *Patrick*, 5 P.R. 210.

(*g*) *Rex* v. *Harris*, 3 Burr., 1330.

(*h*) *Moore* v. *Boyd*, 3 P.R., at p. 384.

There is the authority of those two last named learned judges, (*i*) and of Lefroy, C.J. (*j*), for saying that affidavits stating that their makers verily *believe* a fair trial cannot be had are insufficient.

Hence, in one of the latest cases, the Master in Chambers attributed slight weight to such a sworn statement by the solicitor for one of the parties as the following; which is a pretty good sample of the material usually filed in support of the allegation that a fair trial cannot be had: "That the defendant, as I am informed and verily believe, is a man of wide influence in the county in which he resides; and, in my belief, a fair trial of this action could not be had at the town of Perth before a jury selected from the county of Lanark" (*k*).

Boyd, C.'s disapproval of "the evil" of "trying to forecast the course of events at the trial" (*l*) seems to have been regarded as directed rather to that branch of a motion for change of venue relating to the question of preponderance of convenience; and the practice in investigating the argument that a fair trial cannot be had appears to proceed on the assumption that "it is necessary to look at the probabilities," (*m*) and enquire thoroughly.

On the general question of what must be shewn by a defendant in order to induce the Court to order a change of venue on the ground that the defendant cannot obtain a fair trial at the place of trial selected by the plaintiff, as compared with the circumstances necessary to be shewn in the affidavits where the ground is urged merely in support of the plaintiff's legal right to lay the venue where he chooses, the judgment of Cameron, J., in *Davis* v. *Murray*, ubi sup, is so particularly instructive that one ventures to quote very freely.

In that action, the local judge at Pembroke had changed the venue from Kingston to Pembroke, on the defendant's application. After stating that "upon the question of mere preponderance of convenience, I think the learned local judge should have discharged the defendant's application," the learned appellate judge

(*i*) *Moore* v. *Boyd*, ubi sup; *Rex* v. *Harris*, ubi sup.

(*j*) *Dowling* v. *Sadlier*, 3 Ir. C. L. Rep., pp. 606, 608.

(*k*) *Clark* v. *Hughes*, order dated March 6, 1902 (unreported).

(*l*) *McArthur* v. *M.C.A.R.*, ubi sup.

(*m*) *Roche* v. *Patrick*, ubi sup.

proceeds to consider the plaintiff's objection—urged in answer to the original motion—that a fair trial could not be had at Pembroke; and based upon the following reasons: That the defendant had been engaged in a large business as a general store-keeper, cattle buyer, grain buyer, and lumber merchant in the town of Pembroke, and had for many years been actively engaged in politics, and had during the past ten or fifteen years been engaged in five political contests in the county of Renfrew, and was then the sitting member for the north riding of that county. That his extensive commercial relations with the people of the county, the fact that large numbers of them were indebted to the defendant and looked to him as the purchaser of their cattle, grain, and produce, and the further fact that, as the local member, he was annually entrusted by the Government with the actual expenditure of the grants of colonization money in the riding amounting to several thousands of dollars, all tended to render the defendant very popular among that class of the community from which the jury panels were drawn—so much so, that no jury could be empanelled at Pembroke that did not compose a number of defendant's friends and customers. Both the plaintiff and his solicitor swore to the foregoing state of facts.

In allowing the appeal, his Lordship said, in part: "When it was shewn, in addition, by the plaintiff that the right he had to select the place of trial was not, as Wills, J., puts it in *Church* v. *Barnett*, exercised capriciously, but upon a grave apprehension that, from the influential position and business connections of the defendant in the county, the plaintiff, a stranger, could not obtain a fair trial if he laid the venue in Renfrew, it is difficult in the absence of the views of the learned Judge to understand upon what reasoning he arrived at the conclusion that the plaintiff should be deprived of his right of selection. It is not necessary to determine whether, if the defendant had been suing the plaintiff and laid the venue in Renfrew, the facts shewn would be sufficient to deprive him of his right to have the trial take place there. I should require to know something more of the country, whether sparsely settled, and the position of the defendant's stores, with regard to the more populous portions; extent and nature of the employment of farmers and their teams; the manner in which the colonization money said to pass through the defendant's hands for distribution, that is, what power he can exercise in selecting the points of

expenditure, before determining whether the chance of the defendant getting a fair trial could be so imperilled as to warrant the deprivation of the plaintiff in that case of a right. But when the circumstances shewn in the affidavits are only advanced in support of, and not against, an existing right, the preponderance of convenience and expense . . . would have to be far greater than it possibly can be in this case to warrant a change in the place of trial against the will of the plaintiff, and thereby subject him to the risk of the influence, to his prejudice, of the defendant in the country of Renfrew—as the plaintiff and his solicitor apprehend it, whether their apprehension is fully supported by the facts or not."

"For my own part, I can easily understand how the position of the defendant charged with an act (assault) which, if the plaintiff's view of it can be sustained in evidence, would reflect some discredit upon the county, coupled with an extensive business connection, making him the creditor of a great many, together with his influence over sections by the power to expend public money therein, might seriously interfere with the *due and unprejudiced* trial of the plaintiff's case; and that being so, whether the defendant's position would really affect the *fair* trial of the action or not, quite sufficient, in my judgment, is presented to prevent a judge from subjecting the plaintiff to the risk of being so prejudiced, by ordering a change to be made in the place of trial."

Having traced the course of our courts in dealing with the substantial part of a defendant's application for change of venue, on the ground either of preponderance of convenience, or that a fair or impartial trial cannot be had, there is yet to consider the practice defining the time for the bringing of such a motion, and the opportunities for appeal in case of dissatisfaction with the judgment of the court of first instance.

It seems that the application is irregular if made before appearance has been entered. In support of an application to Draper, C.J., for change of venue on behalf of a defendant in an old case, (*n*), there was filed an affidavit by a solicitor describing himself as "attorney for the above-named defendants." The learned judge discharged the summons with costs, on the ground that no sufficient affidavit had been filed to sustain it; since, there being no appearance, the defendant had no attorney *in the cause*, and no

(*n*) *Hood* v. *Cronkrite*, 4 P.R., 279.

one on whom service could be made to bind defendant—and, in the course of his judgment, says: "But I find no case in which an application to change the venue has been entertained before appearance; . . . and I am inclined to think the application irregular, because made before appearance entered."

No subsequent decision on the point has been found in our reports; but, when the preliminary objection that no appearance had been entered was raised by the plaintiff on a defendant's motion to change the venue in a pending action, (*o*), the Master-in-Chambers expressed a similar opinion to that contained in the above quoted obiter dicta of Draper, C.J. The motion, however, was disposed of on other grounds.

Again, on the subject of the time for a defendant's moving to change the venue, Cotten, L.J., said (*p*), (in answer to the plaintiff's preliminary objection that the motion was made at the wrong time; since issue had not been joined): "It is said that the pleadings are not closed, and that the application is, therefore, premature. If the pleadings had not disclosed the issues which would have to be tried, I should have thought the objection a very formidable one, because such an order ought not to be made till the judge has an opportunity of seeing what the issues are, and judging from their nature whether the case ought to be tried with a jury or without a jury, or where it ought to be tried."

On the other hand, a defendant must be careful not to unduly delay; for, in the words of Baggallay, L.J., (*q*): "An application to change the venue in an action just going to be tried is, generally speaking, too late. The delay is, in itself, a sufficient reason for refusing the application."

Mr. Winchester, then sitting for the Master in Chambers, dismissed a motion for change of venue, with leave to defendant to serve short notice of motion returnable before the trial judge, by way of appeal from the order, or by way of substantial motion to change the place of trial. Armour, J., entertained the motion and, reversing the order, changed the venue. On appeal, the Divisional Court held that an application for change of venue should not be made at the trial, that it was too late, after the Assizes had begun, to consider the question of the balance of convenience

(*o*) *Kelly* v. *Gilbert*, order dated (unreported).
(*p*) *Powell* v. *Cobb*, 29 Ch. D., at p. 494.
(*q*) *Phillips* v. *Beale*, 26 Ch. D., at p. 622.

and therefore, while the Court did not see fit, under the circumstances, to restore the venue, they varied Armour, J.'s order, by making the costs of the day at Sarnia, and of the several motions to change the venue, costs to plaintiff in any event of the action (*r*).

But, according to a judgment subsequently delivered by the last named learned judge on behalf of the Queen's Bench Divisional Court (*s*) it is not necessary for a court of first instance, from which an appeal on the question of change of venue lies to a Judge in Chambers, to make the special reservation mentioned in the above quoted case ; because the Judge may, if he so desires, treat an application by way of appeal as one for a substantive order.

The remarks of Meredith, C.J., however, would seem to shew that it is the practice of a Divisional Court—the appellate tribunal in case of a Judge in Chambers' decision on the question of change of venue (*t*)—to regard such an appeal solely in the light of an appeal from the exercise of a judicial discretion ; which, as Osler, J.A., has said "this question of changing the venue is to a great extent . . . as it always has been (*u*)."

Various decisions (*v*) shew the general agreement of our practice with the English cases, which require special circumstances to be shewn by an appellant seeking to set aside a judge's order on the question of change of venue, made in the exercise of a judicial discretion.

The difficulty of reversing such an order, on appeal, is fully appreciated on reading the opinion expressed by the Master of the Rolls when refusing to interfere with an order changing the place of trial in the English action referred to by Chief Justice Meredith (*w*). "It was a question of judicial discretion, and it ought not to be over-ruled unless an absolutely clear case were made out against it."

(*r*) *Sarnia A.I.M. Co.* v. *Perdue*, 11 P.R. 224.

(*s*) *Mulligan* v. *Sills*, 13 P.R. 352.

(*t*) *Bull* v. *North British Can. L. & I. Co.*, 11 P.R. 83.

(*u*) *Peer* v. *N. W. T. Co.*, ubi sup. 14 P.R. 381.

(*v*) *Peer* v. *N. W. T. Co.*, ubi sub ; *Standard Pipe Co.* v. *Fort William*, 16 P.R. 454.

(*w*) *Moss* v. *Bradburn*, 32 W.R. 368 ; *Ruston* v. *Tobin*, 10 Ch. D. 558.

ALEXANDER MACGREGOR.

The Lieutenant-Governor on the 10th ult. appointed forty-six barristers of Ontario as King's Counsel. There were eight other barristers holding public positions connected with the administration of justice appointed at the same time. The list appears in another place ; many good, some bad and some indifferent.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] JACKSON *v.* GRAND TRUNK R. W. Co. [May 6.

Negligence—Railway Co.—Sparks from engine—Evidence—Findings of jury—Defective construction.

Fire was discovered on J.'s farm a short time after a train of the Grand Trunk Railway had passed it drawn by two engines, one having a long, and the other a short, or medium, smoke box. In an action against the company for damages it was proved that the former was perfectly constructed. Two witnesses considered the other defective, but nine men experienced in the construction of engines, swore that a longer smoke box would have been unsuited to the size of the engine. The jury found that the fire was caused by sparks from one engine and they believed it was from that with the short smoke box; and that the use of the said box constituted negligence in the company which had not taken the proper means to prevent emission of sparks.

Held, affirming the judgment of the Court of Appeal, 2 O.L.R. 689, that the latter finding was not justified by the evidence and the verdict for plaintiff at the trial was properly set aside.

Robinson, K.C., and *Montgomery*, for appellant. *Nesbitt*, K.C., and *Rose*, for respondent.

Ex. C.] THE KING *v.* ALGOMA CENTRAL RY. Co. [May 6.

Custom's duties—Duties on goods—Foreign built ship—Statute.

A foreign built ship owned in Canada, which has been given a certificate from a British Consul and comes into Canada for the purpose of being registered as a Canadian ship is liable to duty under sec. 4 of the Customs Tariff Act, 1897.

A taxing Act is not to be construed differently from any other.

Judgment of the Exchequer Court, 7 Ex. C.R. 239, reversed.

Newcombe, K.C., for appellant. *Nesbitt*, K.C., and *Rose*, for respondent.

Ont.] BROPHY *v.* N. A. LIFE ASSURANCE CO. [May 6.

Life insurance — Wager policy — Endowment — Action for cancellation — Return of premiums.

If the beneficiary of a life insurance policy has no interest in the life of the insured, but has effected the insurance for his own benefit and pays all premiums himself, the policy is a wagering policy and void under 14 Geo. III., c. 48, s. 1 (Imp.).

The Act applies to an endowment as well as to an all life policy. Judgment of the Court of Appeal, 2 O.L.R. 539, affirmed.

In an action by the company for cancellation of the policy under said Act a return of the premiums paid will not be made a condition of obtaining cancellation. Judgment of the Court of Appeal reversed.

O'Connell and *Butler*, for appellant. *Kerr*, K.C., and *Patterson*, for respondent.

Ont.] [May 6.

COLLINS BAY RAFTING CO. *v.* NEW YORK & OTTAWA CO.

Contract—Divisibility—Completion.

By a contract to remove spans from a wrecked bridge in the St. Lawrence the contractors agreed "to remove both spans of the wrecked bridge and put them ashore for the sum of $25,000. We to be paid $5,000 as soon as one span is removed from the channel and another $5,000 as soon as one span is put ashore and the balance as soon as the work is completed. . . . It being understood and agreed that we push the work with all reasonable despatch, but if we fail to complete work this season we are to have the right to complete it next season."

Held, reversing the judgment of the Court of Appeal, TASCHEREAU and DAVIES, JJ., dissenting, that the contract was divisible and the contractors having removed one span from the channel and put it ashore were entitled to the two payments of $5,000 each notwithstanding the whole work was not completed in the second season.

Walkem, K.C., and *Shepley*, K.C., for appellants. *Aylesworth*, K.C., and *J. A. C. Cameron*, for respondent.

Province of Ontario.

COURT OF APPEAL.

Maclennan, J.A.] [May 27.

PEOPLE'S BUILDING AND LOAN ASSOCIATION *v.* STANLEY.

Appeal—Leave—Order striking out jury notice—Powers of judge in chambers—Conflicting decisions.

In an action of covenant upon two mortgages, the defence was that the defendant had been induced to execute them by false and fraudulent representations. The defendant filed and served a jury notice, which was struck out by a judge in chambers, whose order was affirmed by a Divisional Court. A motion by the defendant for leave to appeal to the Court of Appeal was refused.

Held, that the order sought to be appealed against involved no question of law or practice on which there had been conflicting decisions or opinions by the High Court, or by judges thereof: R.S.O. c. 51, s. 77, sub-s. 4, cl. *c*.

The power of a judge in chambers to strike out a jury notice has never been doubted.

Saunders, for plaintiffs. *Bartram*, for defendant.

Full Court.] REX *v.* RICE. [May 29.

Criminal law — Murder — Prosecution of unlawful purpose — Common design of two or more persons — Criminal Code, s. 61 (2) — Evidence — Judge's charge — Finding of jury — Verdict — Mistrial.

The prisoner was indicted for the wilful murder of a constable. The evidence shewed that the prisoner and two other men were being tried for burglary, and during the trial were being conveyed in a cab from the court house to the gaol, in the lawful custody of two constables; that the prisoner and the other two accused men were handcuffed together on the back seat, and the two constables were seated opposite; that a parcel containing at least two revolvers was thrown into the cab by an unknown person; that the prisoner and at least one, and perhaps both, of the other two, each obtained and armed himself with a revolver, whereupon a struggle ensued in which one constable was shot and killed by one of those whom he had in custody.

The trial judge told the jury to consider whether the prisoner fired the fatal shot, and if they thought his was not the hand that did so, or if they thought there was sufficient reasonable doubt, to give the prisoner the benefit of it, they were to pass to the consideration of the second branch

of the case, as to which his charge was in part as follows: "When men go out with a common intent to commit a felony, and in the pursuit of that unlawful purpose death ensues, it may or may not be murder on the part of those who do not actually strike the fatal blow. . . . Where all the parties proceed with the intention to commit an unlawful act and with the resolution or determination to overcome all opposition by force, if by reason of such resolution one of the party is guilty of homicide, his companions would be liable to the penalty which he has incurred. . . . There is no evidence on which you could convict the prisoner of conspiracy up to the time the parcel was placed in the cab. . . . There is no evidence of conspiracy or common design up to the moment the parcel is thrown into the cab; yet if, at that moment, before the shot was fired that killed the constable, the three men resolved to escape from the lawful custody they were in, then each would be responsible for the acts of the other."

After retiring to consider their verdict, the jury returned into court and stated that they wished to know definitely what the judge had said on the subject of conspiracy or collusion, and he said: "I told you, gentlemen, there was no evidence upon which you could find that there was a conspiracy or collusion between the three men up to the time the parcel was thrown into the cab, . . . yet if, at that moment, or at any time up to the time of the shooting of the constable, the three men resolved to escape from the lawful custody they were in, then each would be responsible for the acts of the other, and if you find that between the throwing of the parcel and the shooting of the constable there was such a resolution, even although one of the other men fired the shot, the prisoner can be convicted of murder."

The jury came into court again, and said that they had agreed on their verdict. The clerk asked them whether they found the prisoner guilty or not guilty. The foreman answered: "On the first count we disagree." The clerk: "How do you find on the second count?" The foreman: "On the second count we find the prisoner guilty." The verdict was recorded, with the consent of the jury given in the usual way, as follows: "The jury find the prisoner guilty. They are unable to agree as to whether the prisoner fired the shot which killed William Boyd."

Held, 1. Upon the evidence, that immediately upon the parcel being thrown into the cab, the prisoner and at least one of the other men armed themselves with the revolvers and formed the common intention of, by the use thereof, prosecuting the unlawful purpose of escaping from lawful custody and of assisting each other therein, and that the shooting by one of them of the constable was an offence committed by one of them in the prosecution of such common purpose, and that the commission thereof was or ought to have been known to be a possible consequence of the prosecution of such common purpose: Crim. Code, s. 61 (2); each of them was, therefore, a party to such offence, and the offence, being murder in

the actual perpetrator thereof, was murder in the prisoner, even if he were not the actual perpetrator thereof, and he was properly found guilty by the jury of that offence, the evidence fully warranting their verdict.

2. There was nothing in the charge, nor in the subsequent instruction to the jury, both of which must be read together, of which the prisoner could properly complain.

3. The finding of the jury was a proper one, and there was no mistrial. The foreman of the jury, in speaking of "counts," was referring to the two branches of the case; but their verdict was that recorded on the back of the indictment and acknowledged by them.

Robinette, for prisoner. *Cartwright*, K.C., and *Ford*, for Crown.

Full Court.] CENTAUR CYCLE CO. *v.* HILL. [May 30.

Appeal—Court of Appeal—Order of judge removing stay of execution—Rule 827—Discretion—Grounds for removal.

An appeal lies to the Court of Appeal from an order of a judge thereof, in chambers, under Rule 827, directing that the execution of the judgment appealed from shall not be stayed pending the appeal.

Such an order is not a purely discretionary one; a proper case must be made out for allowing the respondent to enforce what has not yet become a final judgment, the appeal being a step in the cause.

A judge in chambers having ordered the removal of the stay, his order was reversed by the Court, where the appeal appeared to be prosecuted in good faith and on substantial grounds, and the effect of an execution would practically be to close up the appellant's business.

Middleton, for plaintiffs. *C. W. Kerr*, for Hill. *Raney*, for Love.

HIGH COURT OF JUSTICE.

Falconbridge, C.J.K.B., Britton, J.] [April 17.

MCCLURE *v.* TOWNSHIP OF BROOKE.

Drainage referee—Official referee—Drains—Damages—Reference—Leave to appeal.

An official referee is only official in the sense of being an officer of the Court.

The drainage referee being an officer of the Court with all the necessary powers is an official referee for the purposes and within the meaning of the Arbitration Act, and an action for damages in connection with the construction of drains may be referred to him. Judgment of MEREDITH, C.J.C.P., reversed.

Leave to appeal to the Court of Appeal from the judgment of the Divisional Court, was granted on the ground that the judgment involved the status, jurisdiction and authority of a judicial officer.

Watson, K.C., for plaintiffs. *J. H. Moss*, for defendants.

Divisional Court.] [May 17.

O'HEARN *v.* TOWN OF PORT ARTHUR.

Street railways—Negligence—Collision—Contributory negligence.

The plaintiff, who was driving a horse and waggon very slowly along a street on the left side of a car track, turned to the right to cross the track, and the waggon was struck by a car which had been coming behind at what was held to have been a reasonable rate of speed. The plaintiff said that one hundred feet from the point at which he had tried to cross he looked back and that no car was to be seen, and he did not look again before trying to cross:—

Held, that it was his duty to have looked, and that his not having done so constituted contributory negligence on his part, which disentitled him to recover damages. *Danger London Street R.W. Co.* (1899) 30 O.R. 493, applied.

Judgment of BRITTON, J., reversed.

Per BOYD, C.:—A driver of a vehicle moving along a street in which cars are running, and who knows when and where he intends to cross the car tracks, is bound to be vigilant to see before crossing that no car is coming behind him. A greater burden in this regard rests on the driver than on the motorman, who is not to be kept in a state of nervousness and apprehension lest someone may at any moment cross in front of the moving car.

Rowell, for defendants. *J. H. Moss*, for plaintiff.

Trial—Falconbridge, C.J.K.B.] [May 26.

TOWN *v.* ARCHER.

Surgeon—Malpractice—Limitation of actions—Ontario Medical Act—Termination of services—Trial—Dispensing with jury—Finding of judge on evidence.

An action against surgeons for malpractice was held to be barred by s. 41 of the Ontario Medical Act, R.S.O. 1897, c. 176, not having been commenced within one year from the date when, in the matter complained of, the defendants' professional services terminated, although the plaintiff had twice visited the defendants at their offices within the year, the Court finding that on these occasions she did not go as a patient, but as a person with a

grievance, she having previously consulted another surgeon, and also a solicitor.

Actions of malpractice are now more properly tried without a jury.

Upon the evidence, it was held, also, that the plaintiff, upon whom the burden rested, had failed to make out a case of negligent malpractice; and the action was dismissed.

Paterson, K.C., and *Sharpe*, for plaintiff. *Aylesworth*, K.C., *J. H. Moss* and *Harris*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Townshend, J.] THE KING *v.* TREADWELL. [Jan. 10.

Criminal law—Code ss. 242, 785—Inflicting grevious bodily harm—Offence held sufficiently stated in warrant omitting word "unlawfully"—Use of disjunctive "or"—Effect of.

Under the provisions of the Criminal Code s. 242 everyone is guilty of an indictible offence and liable to three years' imprisonment who "unlawfully wounds or inflicts any grievous bodily harm upon any other person, etc."

Held, 1. The words of the Code describes two separate offences, viz., "unlawfully wounding," and "inflicting grievious bodily harm," and that the use of the disjunctive "or" was intended to cover either of the two separate offences or to admit of two modes of stating either kind of offence.

2. A warrant which set out that defendant at H., on a day named, inflicted grievous bodily harm on J.G., omitting the word "unlawfully" properly stated the offence for which defendant was convicted, and that his application for his discharge on the ground that the warrant did not disclose on its face any offence for which he could be detained must be dismissed.

3. (Without expressing any opinion on this point) that in view of the decision on the previous point it was unnecessary to deal with the objection raised on the part of the Crown to the right of the Court to review on habeas corpus proceedings, a conviction under s. 785 of the Criminal Code, on the ground that such review was refused in *The Queen* v. *Burke*, 1 Can. Crim. Cas. 539.

Power, for prisoner. *Knight*, representing the Attorney-General, for the Crown.

Note.—On Jan. 28, 1902, the motion was renewed before the full Court (WEATHERBE, RITCHIE and MEAGHER, JJ., and GRAHAM, E.J.,) and on Feb. 22 following, WEATHERBE, J., announced that the Court being equally divided both on the preliminary point and on the merits no order would be made.

Full Court.] THE KING *v.* ROBERTSON. [May 6.

Municipal corporation—Performance of work for town—Effect of, in disqualifying party to be elected or serve as mayor or councillor.

Under the provisions of the Towns Incorporation Act R.S.N.S., c. 71, ss., 54, 56, no person is qualified to be elected or to hold office as mayor or councillor who "directly or indirectly by himself or with any other person as a partner or otherwise enters into or is directly or indirectly interested in any contract express or implied for the supply of any goods or materials or for the performance of any work or labour to or for the town."

Among the officials appointed by the Town of W. was an inspector for the purpose of enforcing and carrying out the provisions of the Canada Temperance Act. The inspector received as salary one-half the net proceeds of fines imposed after paying expenses and was authorized by resolution of the Town Council to engage his own solicitor whose fees were not to exceed a fixed amount in each case. Defendant, who was elected Mayor of the town, had been previously engaged by the inspector for the purpose of prosecuting cases under the Act, and at the time of his election there was due him a small sum for services rendered as such prosecutor, which was passed by the Council and paid after the election.

Held, that defendant was a person directly or indirectly interested in a contract for the performance of work for the town within the meaning of the Act and was thereby disqualified from holding office.

Mellish and *Power*, for Crown. *W. B. A. Ritchie*, K C., for defendant

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Full Court.] THE KING *v.* MCDONALD. [May 6.

Canada Temperance Act—Motion to quash convictions dismissed—Matter held not properly before Court in absence of writ of certiorari and proper return thereto

An application to quash two convictions for violations of the Canada Temperance Act was made upon reading an affidavit of the defendant, and an order made by a judge of the Court for a return of papers and the return thereto. The order and return were made in connection with a previous application of the defendant for his discharge from imprisonment under habeas corpus proceedings.

Held, 1. Dismissing the application with costs, that there being no writ of certiorari and no proper return thereto, the matter was not properly before the Court, and the Court had no jurisdiction to quash the motion to quash the convictions.

2. The mere fact of the papers referred to being found on the files of the Court was not sufficient to constitute a cause in Court in respect to which the application to quash the convictions could be made.

Semble, that a writ which required the sending up of papers in two distinct suits would be liable to attack on the ground of multifariousness.

Russell, K.C., and *Power*, for motion. *W. B. A. Ritchie*, K.C., and *S. G. Robertson*, contra.

Full Court.] THE KING *v.* TOWNSHEND. [May 6.

Fisheries Act—Conviction for violation sustained—Judgment of County Court on appeal from Stipendiary held binding so as to preclude Stipendiary from stating case.

Defendant was convicted before a Stipendiary Magistrate for violation of certain regulations made under the Fisheries Act, R.S.C., c. 96, s. 17, and an appeal was taken to the County Court for District No. 3, where the conviction was affirmed. No appeal was taken from the judgment in the County Court, but the Stipendiary Magistrate was applied to to state a case for the opinion of this Court, with the view of questioning the valdity of the conviction, which he did.

Held, quashing the case so stated, that with the judgment of the County Court standing in the way defendant was precluded from asking the Stipendiary Magistrate to state a case for the purpose of attacking the conviction in this Court.

Held, that the judgment in the County Court in the identical case was binding as between the parties, and upon the Stipendiary Magistrate, and that the matter was therefore res adjudicata and one in which the Magistrate could not be asked to state a case.

Harrington, K.C., in support of appeal. *Mathers*, contra.

Full Court.] CUMBERLAND *v.* MCDONALD. [May 6.

Relief of the poor—Expenses necessarily incurred—Proceedings to recover—Notice—Statement of claim—Reduction of amount—Condition imposed as to.

In an action by the poor district of one county against the Treasurer of another county to recover expenses incurred in and about the removal of a pauper pursuant to an order for removal, and of the relief an examination of the pauper previous to such removal the order for removal was impeached on the ground that it did not shew on its face that the pauper was examined previous to such removal.

Held, 1. Following *King* v. *Tavistock*, 3 D. & R. 431, that this was unnecessary.

2. Defendant having had notice of the amount claimed should have pleaded if he considered the amount excessive.

3. A statement of claim was good which set out the following particulars, viz., the application to plaintiff district for relief, that the pauper had

no settlement there, examination of the pauper under oath, transmission to defendant of copies of the depositions, neglect to remove, the making of the order for removal, the amount of expenses necessarily incurred, demand for payment and refusal.

4. Nevertheless, as the amount claimed appeared to be excessive, that the order for judgment for plaintiffs should be conditioned upon an undertaking on the part of plaintiffs to reduce the amount.

S. Macdonnell, K.C., for appellant. *Townshend*, K.C., for respondent.

Full Court.] STEPHEN *v.* THOMPSON. [May 6.

Practice and procedure—Trial—Witness residing in other province—Application for commission to examine—Discretion of judge to refuse not interfered with—Estoppel.

During the progress of the trial and after a number of witnesses on behalf of plaintiffs had been examined, defendants' counsel applied for a commission for the examination of a witness who was absent in British Columbia, and for a postponement of the trial. The witness in question was a son of one of the defendants who was aware of his absence, but the fact was not brought to the attention of defendants' counsel until the day on which the trial was commenced. The learned trial judge having refused both the commission and the postponement,

Held, that there was no reason for interfering with his discretion on these points.

After the commission applied for had been refused plaintiffs' counsel offered to agree to an adjournment for a reasonable time, to be fixed by the Court, to enable defendants to produce the witness should they desire to do so, and the case was adjourned from the 8th of January to the 17th of February. On the latter day, the case being called, defendants' counsel stated that he had no further evidence to offer and judgment was given for plaintiffs.

Held, that defendants having accepted the offer made on behalf of plaintiffs and obtained an adjournment of the case were not in a position to revert back to their original rights and claim a review of the judgment.

D. McNeil and *W. F. O'Connor*, for appellants. *Henry*, for respondents.

Full Court.] [May 6.

ANGLO-NEWFOUNDLAND FISH CO. *v.* SMITH.

Contract—Sale of goods—Condition as to quality—Failure to deliver—Damages.

Plaintiffs offered to buy a quantity of fish from defendants at a price of twenty-five cents per quintal above the Halifax price provided the fish were so cleaned or prepared for market as to leave "little if any blood or black

spot." Defendants replied guaranteeing to furnish the quantity of fish required at the price specified and prepared as required by plaintiffs "with one exception, that it is impossible for us to take all black skin from the napes of fish." Plaintiffs in reply stated that the condition which defendants wished to except was the most important requisite, that it was done in the case of all fish caught and cured in Iceland and other places mentioned, and that for this one reason fish from those countries sold at a fair price when fish not so prepared could not be sold at all. Defendants failed to make any immediate reply to this letter and plaintiffs wrote again asking whether defendants had decided to supply the cargo in the condition plaintiffs would like to have it as per their previous letter. Defendants thereupon wrote: "We will furnish any quantity of fish that you want suitable for any market at the price you offered." They added: "I will do my best in regard to removing the black skin as you stated in your previous letter." To this letter plaintiffs replied stating that they would take a cargo of 2,500 quintals "according to previous arrangements as to quality and price." Defendants failed to deliver the fish as required and plaintiffs claimed damages.

Held, per WEATHERBE and MEAGHER, JJ., affirming the judgment of TOWNSHEND, J., that notwithstanding the words "I will do my best," there was a completed contract upon which plaintiffs were entitled to recover.

GRAHAM, E.J., and RITCHIE, J., dissented.

W. B. A. Ritchie, K.C., and *Jas. McDonald*, for appellants. *Harrington*, K.C., and *Russell*, K.C., for respondents.

Full Court.] MERRITT *v.* COPPER CROWN MINING CO. [May 6.

Foreign corporation—Action by shareholder to compel inspection of books, etc.—Jurisdiction of Court in such case—Foreign statute—Proof of—Rules of construction—Statutory provisions for protection of public—No individual right of action to enforce.

Defendant company was a body corporate incorporated under the laws of West Virginia in the United States, but having its principal place of business, offices and works at Pictou in the Province of Nova Scotia. Plaintiff, a shareholder in the company residing in the United States, claimed a mandamus, or in the alternative an injunction, commanding the company to permit defendant to inspect the register of shareholders and other books of the company and commanding the company to furnish plaintiff with lists of the stockholders, and commanding the company to comply with the provisions of provincial statutes by which the company was required to file in public offices of the province a copy of its charter or act of incorporation, by-laws, etc.

Held, that plaintiff was entitled to maintain an action in the courts of the Province to enforce the performance of duties imposed upon the com-

pany in relation to its shareholders and that the non-residence of the plaintiff was no bar to such action.

Held, that there is no distinction between a foreign and a domestic corporation in respect to the relief asked for in such case and notwithstanding the rule not to interfere in the internal management of the affairs of the company the Court has power to compel the inspection of books in proper cases.

Held, that proof of a foreign statute by admission is as effective as proof by an expert in hæc verba.

Held, that in the absence of proof to the contrary it will be assumed that the rules of construction in the foreign state are the same as in this province.

Held, that there is no individual right of action to enforce compliance with provisions of the statutes of the province intended for the protection of the public, and that to this extent the decree appealed from must be varied.

Mellish, K.C., for appellant. *Borden* and *A. J. Chisholm*, for respondent.

Full Court.] BARTLETT *v.* NOVA SCOTIA STEEL CO. [May 6.

Mines and minerals—Action for removal of ore—Boundary line in lease—Controlled by fixed monument—Plan—Copy put in by one party without restriction may be used by other to prove measurements, etc.

In an action brought by plaintiff to recover damages for the mining and removal of iron ore claimed by plaintiff under a lease from the Crown, judgment was given in favour of the defendant company on the ground that in order to recover it was necessary for plaintiff to establish the south line of land originally granted to G. The starting point in plaintiff's lease was a marked stone located a given distance fram a marked maple tree "on the South line of lands originally granted, etc." There being evidence to shew the actual starting point of plaintiff's lease.

Held, following *Fielding* v. *Mort*, 6 R. & G. 339, 14 S.C. R. 254, that the trial judge erred in holding that plaintiff could not recover unless he established the South line of the land granted to G. as such line if shewn to be in a different place from the marked tree would be rejected as falsa demonstratio.

Held, that a copy of a plan from the Crown Lands Office as to which one of plaintiff's witnesses was cross examined, and which was put in by defendant's counsel, without restriction, as part of his general evidence, was in for all purposes to which plaintiff might apply it, and was properly used for the purpose of proving measurements made on the ground.

W. B. A. Ritchie, K.C., for appellant. *Fraser*, K.C., for respondent.

Full Court.] NASS *v.* OVERSEERS OF THE POOR. [May 6.

Overseers of the poor—Liability for support of pauper chargeable to district —"Expenses necessarily incurred" — Notice — Effect of—Held to include infant child not specially mentioned.

Defendants declined to pay expenses incurred by plaintiff in connection with the support and maintenance of C. and her infant child, paupers chargeable to the district, on the ground that the paupers in question had been placed with D. by the overseers and that they were removed by plaintiff from the house where they had been placed to his own house without the knowledge and consent of the overseers.

Held, assuming this to be the case and that plaintiff had acted improperly in connection with the removal of the paupers he was under no obligation to support them any longer than he choose to do, that the paupers remained chargeable to the district, and that defendants after notice from plaintiff must remove the paupers and provide for them, or pay all charges thereafter necessarily incurred for their support.

Held, 1. The care of C. while ill and confined to bed, charges for medical attendance, and expenses of burial were all necessary expenses for which plaintiff was entitled to recover.

2. "Medical attendance" was an expense necessarily incurred for which plaintiff was entitled to recover, although he had not actually paid the bill, such attendance having been furnished at plaintiff's request and on his responsibility.

3. The notice given by plaintiff to the overseers to provide for C. must be held to apply to and include her infant child, who to defendant's knowledge was living with her, although the child was not specifically mentioned in the notice.

MCDONALD, C.J., dissented.

Jas. A. McLean, K.C., for appellants. *Wade*, K.C., for respondent.

Province of Manitoba.

KING'S BENCH.

Richards, J.] WINTERS *v.* MCKINSTRY. [April 16.

Mortgage and mortgagee—Sale under power in mortgage—Service of notice —Fraudulent sale — Constructive notice — Solicitor's knowledge when imputed to client—Purchaser for value without notice.

The plaintiff was the owner of the land in question, subject to a mortgage to the defendant McK. to secure $140 and interest which fell due on 1st December, 1900, and lived on it until January, 1901. He then moved away and, after remaining a short time at his father's house, left the

province and did not return until the following August. The mortgage money being unpaid, the mortgagee took proceedings under the power of sale in the mortgage, served the required notice by posting it up on the house on the land, and advertised a sale by auction for April 9, 1901. Before the sale McK. arranged with one D. to bid at the sale for the land in the name of D. but in reality for McK. himself. This arrangement was carried out, and the land was knocked down to D. for $195, although it was worth, as the judge found, at least $800. McK. then executed a deed of the land to D. purporting to be made in pursuance of the power of sale and on the same day D. executed a quit claim deed to McK.'s wife. These deeds were prepared by McK.'s solicitor on his instructions, and no money passed either from or to D. except that he was paid $5. The deeds were both registered on 11th April. On or before that day an agreement was made between McK. and the defendant B., through her husband acting as her agent, for the exchange of the land in question for a piece of property in the village of Dauphin. This exchange was carried out on April 11, by the execution and delivery of quit claim deeds prepared by the same solicitor. No inquiries were made as to the title or the sale proceedings by B. or her husband. The plaintiff's claim in this action was for a declaration that the alleged mortgage sale was void and that the three deeds of his land should be set aside and for an order requiring the defendant B. to reconvey to him or to execute a discharge of the mortgage on payment of the amount due thereon, or, in the alternative for damages against McK.

The trial judge found as a fact that the alleged mortgage sale to D. and the deed to McK.'s wife were made in pursuance of a fraudulent scheme by McK. to acquire the absolute ownership of the land for much less than it was worth, but the defendant B. claimed that he was entitled to rely on the defence of being an innocent purchaser for value without notice.

Four grounds against this were urged as follows: (*a*) That the service of the notice of sale, not having been personal, was not valid, as the house was not the place where plaintiff was living at the time. (*b*) That the solicitor who acted for B. in the exchange of lands was the same solicitor who acted for McK. in carrying out the fraudulent scheme, and, therefore, that she was affected with notice of whatever he knew. (*c*) That B. only got a quit claim deed of the property, and could only take what interest the wife of McK. had in the land, and therefore stood in no better position than D. or McK.'s wife neither of whom could, as against the plaintiff, claim to be an innocent purchaser for value without notice. (*d*) That the fact that B. was offered title through the wife of the mortgagee so soon after the mortgage sale was in itself notice of fraud, or at any rate should have put her on injury.

Held, 1. The first ground was untenable because, although the plaintiff had left the house, it was his usual place of abode within the meaning of the Act.

2. B. was not affected with notice of what the solicitor knew because it was something that he was interested in not telling and he was not employed by B. to examine the title for her. The rule as to a client being affected with notice of what his solicitor knows arises only from the presumption that, as it is his duty to tell the client everything pertinent that he knows, he will do so, and this presumption is rebutted when it would clearly be against the solicitor's interest to tell.

3. Under our registry laws there is nothing in the third objection.

4. The circumstances constituted sufficient notice to B. to put her on inquiry and prevent her from relying on the defence that she was an innocent purchaser for value without notice.

Semble, such a power of sale could not be exercised by a quit claim deed or by a deed exchanging the land for other land. *Smith* v. *Speers*, 22 O. R. 286, not followed.

B. was held to be entitled to be placed in the position of an assignee of the mortgage from plaintiff to McK. and an order was made for judgment in the plaintiff's favour subject to his paying off the mortgage within six months, and for foreclosure against him in case of default. No costs of the sale proceedings or of this action to be added to the mortgage debt or paid by the plaintiff. McK. to pay costs of the action to the plaintiff and to defendant B. No other costs to be payable by or to any of the parties.

E. Anderson, for plaintiff. *D. A. Macdonald*, for McKinstry. *A. E. Wilkes*, for Barker.

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Richards, J.] MURRAY *v.* SMITH. [May 5.

Vendor and purchaser - Misrepresentation — Secret profit paid to purchaser's agent by vendor — Rescission.

In Sept., 1900, the defendant, an immigrant, recently arrived in Manitoba, went to Dauphin bearing a letter of introduction from the Immigration Commission at Winnipeg to Charles Tomlin, an official stationed at Dauphin, whose duties were to help immigrants to get settled to the best advantage and give them the benefit of his experience and knowledge of the country and of the prices of land. On defendant's arrival he was met by Tomlin who invited his confidence and promised to act in his best interests in the purchase of a farm. Defendant placed full reliance in Tomlin and on his advice entered into an agreement for the purchase of a farm belonging to plaintiff for the sum of $1,850, paying $250 cash and covenanting to pay the balance out of the proceeds of the future crops to be raised from the land with interest at eight per cent. per annum. Tomlin received from the plaintiff the sum of fifty dollars out of the cash paid by defendant, but this was not found out by defendant until the trial of this action. The plaintiff's price for the land, as quoted to Tomlin when he first spoke to the plaintiff about getting a farm for defendant, was only $1,800. The plaintiff also represented to defendant that

there were on the farm about 80 acres under cultivation, all summer-fallowed and ready for wheat, and defendant in signing the agreement of purchase relied on that representation and did not measure the area of the cultivated land, but he soon afterwards discovered that such area only contained about 58 acres. He complained to plaintiff of the shortage and asked to have the sale cancelled but plaintiff refused to cancel or make any allowance. Defendant then spoke to Tomlin about the matter and the latter told him that he had consulted a lawyer and had been advised that defendant's only remedy was to stay on the land and crop it and claim compensation afterwards. Relying on this advice, and believing that he had no right to cancel the agreement and get back his deposit, defendant cropped the cultivated land in 1901, but refused to deliver any part of the crop to plaintiff who then brought this action for the cancellation of the agreement for non performance of the defendant's covenants and to have the deposit declared forfeited in accordance with a proviso therein.

Held, without deciding whether defendant was entitled to rescind on account of the misrepresentations as to the area of the cultivated land or not, that he was so entitled on discovery of the collusions between the plaintiff and Tomlin and the secret payment of the $50 to the latter, and that he was also entitled on that ground to recover the deposit. *Panama, etc., Co.* v *India Rubber, etc., Co.*, L.R. 10 Chy. 515, followed. It was contended by plaintiff, on the authority of *Campbell* v. *Fleming*, 1 A. & E. 40, that defendant, having elected not to repudiate his bargain on learning the truth as to the area of cultivation by remaining in occupation for over a year and raising crops on the lands, had precluded himself from seeking to rescind on the subsequent discovery of the secret payment to Tomlin, but that case was distinguished on the ground that here the collusive payment to Tomlin was a matter of a kind altogether different from the misrepresentation as to area. Judgment refusing the cancellation on plaintiff's application, but allowing it on defendant's request, and ordering repayment to defendant of the $250 deposit and delivery of possession of the premises within one week after the payment of the $250 and costs. All amendments necessary to be allowed. Plaintiff to pay defendant's costs of the action on the King's Bench scale.

Bradshaw and *Wilkes*, for plaintiff. *Munson*, K.C., and *Hudson*, for defendant.

Bain, J.] BLACKWOOD *v.* PERCIVAL. [May 12.

Principal and surety—Release of surety by giving time to principal debtor King's Bench Act, s. 39, sub-s. 14.

The defendant and C. were joint makers of a promissory note for $3,500 in favour of B. who indorsed the note to the plaintiffs and received the proceeds of the discount of same by the latter at a bank. As between themselves the defendant and B. and C. had agreed that each should pay

one-third of the amount of the note, but this was not known to the plaintiff until about the time the note fell due. At that time, Nov., 1897, the defendant paid one-third of the amount due on the note and the plaintiffs took a note for $2,000 from B. who also paid in cash the difference between that sum and the remaining two-thirds of the original note which the plaintiff then took up and held. B. did not pay the note for $2,000 when due and the plaintiff accepted from him several successive renewal notes for the same amount extending over a period of nearly twelve months, but none of these were paid. This action was commenced in Feb., 1900, to recover from defendant the balance due on the original note. The plaintiff had received the note for $2,000 from B. so that they might discount it at a bank for the purpose of providing funds to take up the original note and there was no agreement that B.'s note for $2,000 was to be taken in discharge of the other note; and, if the liability of the defendant upon it was the ordinary liability of the maker of a promissory note to the holder of it, nothing that the plaintiff had done had extinguished that liability. The defendant, however, contended that under the circumstances his liability to the plaintiffs for the $2,000 was only that of a surety for B. and C. as to the balance of their shares of the unpaid amount, and that the plaintiffs, by giving time to B. and C., had discharged him from that liability.

Sub-s. 14 of s. 39 of "The King's Bench Act," 58 & 59 Vict., c. 60, provides that in such a case such defence "shall be allowed in so far only as it shall be shewn that the surety has thereby been prejudiced," and the defendant claimed that by the giving of such time he had been prejudiced to an amount exceeding the plaintiffs' claim by being thereby induced to alter his position with relation to B. and C. in that he had paid to each of them a large sum of money on the settlement of the affairs of a partnership that to the knowledge of the plaintiffs had existed between the defendant and B. and C., and had handed over and released to B. a large quantity of goods.

The only evidence in support of this defence was that of the defendant himself who said that, when he and B. and C. met in Nov., 1897, B. and C. represented to him that the note in question and all other liabilities in connection with the partnership business had been paid and that he, the defendant, owed them $1,630 on the settlement of the accounts; and that, having absolute confidence in them, he accepted their word and paid them that amount; also that at the same time he and B. agreed to release C. from "all obligations which may have been incurred and exist" in respect of their partnership agreement. Defendant did not explain why, if all these obligations had been settled, a release was considered necessary.

Held, without deciding whether the knowledge of the true relation between the defendant and B. and C., acquired by the plaintiff about the time the note sued on fell due, had the effect of changing the apparent liability of the defendant on the note to that of a surety only for the pay-

ment of the shares of B. and C., or whether, if it had that effect, what took place between the plaintiff and B. amounted to a binding agreement to give him and C., or either of them, time for the payment of their shares, that it was not shewn that the defendant had been prejudiced by such giving of time. The onus of proving this rested on the defendant and he had to shew that he had suffered pecuniary loss or damage as the reasonably direct and natural result of the plaintiffs having given the extension of time; but his evidence failed to shew this to any extent, as he had paid the money and executed the release on the strength of the statements made to him by B. and C. and not in reliance on anything the plaintiff had done or omitted to do.

Judgment for the plaintiff for the full amount of the $2,000 and interest and costs of the action.

Wilson and *Elliott*, for plaintiff. *Howell*, K.C., and *Hough*, K.C., for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] WATERLAND *v.* CITY OF GREENWOOD. [NOV. 15, 1901.

Verdict indefinite—May be construed from the circumstances of the case—Jury—Discharge—Recalling and amending verdict—Effect of—New trial—Parties bound by conduct of trial—Non-direction.

In an action for damages caused by water being backed up on to plaintiff's premises, the jury did not answer the questions put, but answered, "We have not answered exactly in the form of the question. We find that the construction and grading of the street across Boundary Creek caused the plaintiff damage in the sum of $3,000," without stating that the grading was done by defendants. It appeared that the dispute at the trial narrowed down to whether it was the grading of the street by defendant or the grading of an alley by one Fletcher that caused the damage. On the verdict, judgment was entered for plaintiff by WALKEM, J.

Held, on appeal, that from the circumstances of the case, the verdict would support the judgment.

Where counsel at the trial abstains from asking the judge to submit a point to the jury, a new trial will not be granted on the ground of non-direction as to that point.

After judgment was pronounced and the jury was discharged, at the direction of the Court, the jury was recalled and asked certain questions as to the meaning of the verdict, and the verdict was amended accordingly.

Held, that whatever was done after the discharge of the jury was a nullity. Appeal dismissed and new trial refused.

Bodwell, K.C., for appellant. *Davis*, K.C. (*W. A. Macdonald*, K.C., with him), for respondent.

Full Court.] McKELVEY *v.* LE ROI MINING COMPANY. [April 22.

Mines (Metalliferous) Inspection Act—Accident to miner caused by falling cage—Bulkhead—Statutory duty of owner to maintain—Practice.

Action for damages for personal injuries sustained by plaintiff, a miner, while working at the bottom of a shaft in the Le Roi mine. The cage or skip used for lowering and hoisting men fell and broke through the bulkhead or cage platform at the 800-foot level, and struck the plaintiff while working a few feet below.

Held, affirming McCOLL, C. J., that the cage or skip used for lowering and hoisting men is not "falling material" within the meaning of that term as used in r. 20 of s. 25 of the Metalliferous Mines Inspection Act, and the amendment of 1899 (c. 49, s. 12,) does not create any duty on the mine owner to provide protection from a falling cage.

A. H. MacNeill, K.C., for plaintiff. *C. R. Hamilton* for defendant.

Book Reviews.

Practical Legislation. The composition and language of Acts of Parliament and business documents, by Lord Thring, K.C.B., late Parliamentary Counsel: George N. Morang & Company, Limited, publishers.

In 1877 Lord Thring, then Sir Henry Thring, wrote the original of this treatise for the instruction of draftsmen in the office of the Parliamentary Counsel. The book was published by Her Majesty's Stationery Office, and passed out of print. A copy of it exists in the library at Osgoode Hall, from which more than one treasured manuscript copy has been made. Lord Thring is a master of the English language. He is a prince amongst draftsmen, a worthy successor of a long line beginning with Stephen Langton, whose hand penned the immortal phrases of Magna Charta. That keystone of English liberty says "No free man shall be taken or imprisoned, or be disseised of his freehold or liberties, or free customs, or be outlawed, or exiled, or any otherwise damaged, nor will we pass upon him, nor send upon him, but by lawful judgment of his peers, or by the law of the land." In that stipulation a master draftsman stated that supremacy of the fixed principles of the law over the will and power of the monarch, which has rendered the fanatical devotion of the English lawyers to their common law so justifiable.

In later years the mastery of English was lost by draftsmen. Here is a ridiculous instance of the lost art, 'Every dog found trespassing on inclosed land unaccompanied by the registered owner of such dog or other

person, who shall, on being asked, give his true name and address, may be then and there destroyed by such occupier or by his orders."

In 1850 Lord Thring, then Mr. Henry Thring, first drafted an important Bill to be introduced into Parliament. It was a Colonial Bill framed for Sir William Molesworth, probably one of the best qualified men who ever filled the office of Colonial Secretary, to which position he was called in Lord Aberdeen's Government, 1853. That Bill marked a departure in the expression of Acts of Parliament, ensuring clearness and lucidity of statement, from which past Parliamentary draftsmen had for years far wandered. In 1861 Thring was appointed Counsel to the Home Office, an office subsequently converted into the office of Parliamentary Counsel, and for years of his useful life he has been occupied in drafting Bills, many of which adorn the English Statute Book. He has enjoyed the intimate friendship of Gladstone, Bright, Disraeli, Derby, Cardwell, Cairns and Herschell. The Companies Act, 1862; the Reform Bill, of 1867; the Irish Church Act, of 1869: the Ballot Act, of 1872; the Supreme Court of Judicature Act, 1873; the Home Rule Bill, of 1886; and the Army Act were the work of his pen. His last work of draftsmanship, we believe, was the Copyright Bill, of 1900.

His style of composition is not merely a model for the Parliamentary draftsman, but is a model for every description of business composition. In these memorable words he enunciated for Mr. Gladstone the disestablishment of the Irish Church: "On and after the first day of January one thousand eight hundred and seventy-one the said union created by Act of Parliament between the Churches of England and Ireland shall be dissolved, and the said Church of Ireland, hereinafter referred to as 'the said Church' shall cease to be established by law." This model sentence completed the enactment. The whole of the remainder of the Act is comprised of clauses dealing with disendowment and the formation of a new Church body.

In his eighty-four year, with all the advantages of his great experience, he has remodelled his treatise, and the result is before us now. It is not possible to write in too high terms of the charm which the reading of this book gives to the reader. The highest printers' art has been lent to its production. Paper, printing, binding is the work of Canadian craftsmen. The product is an entire departure from the style of law books usually produced upon this continent.

It is interesting to know that the task of rewriting the work was undertaken by Lord Thring at the instance of Mr. Morang, who in 1900 read a copy of the original edition, and successfully urged Lord Thring to prepare a new edition to be brought out in its present form.

We commend this work as a guide to every one engaged in any description of legal or business composition.

KING'S COUNSEL—ONTARIO.

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UNITED STATES DECISIONS.

NOVEL LITIGATION.—There is often something refreshing and breezy in legal matters from the prairie country. The following comes from Iowa: "Mary Christiansen has secured a verdict for $6,000 in her breach of promise suit against a dead man. She sued the estate of Frank Crum, who died last summer, for $7,000, claiming that he had postponed the date of their marriage and finally died before the new date fell without wedding her. It was proven conclusively that he intended to marry her." This was a case of contract with a vengeance, not "blighted affection" and such like, but a cold estimate of the value of a dead man, raising a proper feeling of indignation that he should "shuffle off this mortal coil" without dividing up with his would-be partner in life. Possibly in that country it may be that by virtue of the contract, and a liberal rendering of the equitable maxim that what is agreed to be done should be considered as done, she had become a "widow in equity"—or possibly there is in vogue there some new species of inchoate right of dower. To the poor lone widow the verdict might aptly be described as a "crum of comfort," or in legal parlance "the equitable widow's mite."