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TEETZEL, J. FEBRUARY 10TH, 1909.

CHAMBERS.

RE O'NEILL AND DUNCAN LITHOGRAPHING CO.

Master and Servant Act—Order of Police Magistrate for Payment of Wages—Right of Appeal to County Court Judge—Jurisdiction of Magistrate to Consider Defence of Failure of Consideration for Wages by Reason of Negligence of Servant—Jurisdiction of Judge on Appeal to Consider same Defence—Prohibition.

Motion by O'Neill to prohibit the junior Judge of the County Count of Wentworth from taking any further proceedings on an appeal from an order of the police magistrate at Hamilton directing the Duncan Lithographing Company to pay O'Neill $25, being two weeks' wages, made under sec. 11 of the Act respecting Master and Servant, R. S. O. 1897 ch. 157.

A. M. Lewis, Hamilton, for applicant

E. H. Ambrose, Hamilton, for the company.

TEETZEL, J.:—The objections relied upon are: (1) that sec. 18 of ch. 157, R. S. O. 1897, does not apply to police magistrates, but to one or more justices of the peace, and that consequently an appeal does not lie thereunder from the order of the police magistrate; (2) that the magistrate had no jurisdiction to hear the defence urged by the master, viz., that in consequence of the servant's negligence there was a total failure of consideration, and the master derived no benefit from such services.

Under secs. 27 and 30 of the Act respecting police magistrates, R. S. O. 1897 ch. 87, a police magistrate is ex of-

ficio a justice of the peace for the district for which he has been appointed, and has full power to do alone whatever is authorised by any statute in force in Ontario relating to matters within the legislative authority of the province to be done by two or more justices of the peace. The police magistrate, therefore, had jurisdiction under sec. 11 of ch. 157, and the provision in sec. 18 of that chapter for appeals manifestly contemplates an appeal lying from the order of the police magistrate made by him within his jurisdiction as a justice or justices under that Act.

I also think it is perfectly clear that under sec. 11 it was the duty of the magistrate to hear any legal defence which might be set up by the master, and to give effect to the same if established.

It was the duty of the magistrate under that section to direct payment to the servant of any "wages found to be due," and in ascertaining the amount found to be due it must certainly be his duty to adjudicate upon any legal defence to the claim. If there is a legal defence to the whole claim, it would follow that nothing could be found to be due.

Now, the defence set up on the material before me is that in the course of the employment of the servant in respect to which he was claiming the wages, he negligently destroyed material of the defendants to the value of $60, and for that reason the master refused to pay his claim for wages, amounting to $25; and it is alleged in the affidavit of Mr. Henderson that by reason of the servant's negligence there was a total failure of consideration, and that the master received no benefit whatever from the servant's services; and in the same affidavit it also appears that upon the hearing before the magistrate he refused to allow the servant to be cross-examined as to the negligence in performing the work, and refused to permit the master to give any evidence touching the defence set up, expressing the view that over such a matter he had no jurisdiction.

In Irving v. Morrison, 27 C. P. 242, which was an action by an architect for his fees for services in planning and superintending the erection of the defendant's house, it was held that the defendant was entitled to deduct from the amount which the plaintiff could otherwise claim any loss which defendant had sustained by plaintiff's negligence in certifying for too much for contractors who afterwards failed, in consequence of which defendant was compelled

to have the work done by others at a much higher price. At p. 248, Hagarty, C.J., says: "It is always open in actions like this, as I understand the law, to prove, under 'never indebted,' either a total failure of consideration, by the defendant having through the plaintiff's default derived no benefit whatever from his services, or a partial failure in mitigation of damages." And at p. 249: "The law would be very defective if a defendant were driven to cross-action for negligence instead of getting the substantial benefit of his defence, as we propose to give him here. Circuity of action ought not to be favoured."

This case was approved of in Badgeley v. Dickson, 13 A. R. at p. 500. On the authority of the above case, therefore, I think it is clear that the magistrate had jurisdiction to entertain and give effect to the defence if proven, and that on appeal the learned County Court Judge had the like jurisdiction.

The motion will therefore be dismissed with costs.

FEBRUARY 11TH, 1909.

C.A.

MILLIGAN v. GRAND TRUNK R. W. CO. . .

Appeal to Supreme Court of Canada—Leave to Appeal—Supreme Court Act, R. S. C. 1906 ch. 139, sec. 48 (e)—Extension of Time for Appealing under sec. 71—Application after Expiry of 60 Days—Jurisdiction of Court of Appeal Amount Involved not Exceeding $1,000—Absence of Special Circumstances—Refusal of Leave.

Motion by defendants for leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal, 12 O. W. R. 967, and to extend the time for bringing the appeal, the defendants having attempted to appeal without leave, and their appeal having been quashed by the Supreme Court of Canada. The security on the proposed appeal had been approved by an order of MACLAREN, J.A., 12 O. W. R. 1103.

The present motion was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

W. Nesbitt, K.C., for defendants.

G. F. Henderson, K.C., for plaintiff.

MOSS, C.J.O.:—The defendants moved under sec. 48 (e) of the Supreme Court Act, R. S. C. 1906 ch. 139, for special leave to appeal to the Supreme Court, and under sec. 71 of the same Act to extend the time for bringing the appeal. A similar motion was at the same time made on behalf of the defendants in a case of Irving v. Grimsby Park Co. (post). The respective respondents, among other answers to the applications, raised the objection that, inasmuch as these were cases in which no appeal to the Supreme Court lay as of right, and as the 60 days within which an appeal is required to be brought, as enacted by sec. 69 of the Supreme Court Act, had expired, this Court had no jurisdiction to entertain the motions. In other words, unless the application is brought within 60 days from the signing or entry or pronouncing of the judgment sought to be appealed from, it cannot be entertained.

As far as I am aware, this is the first time that the question has been raised, although numerous applications have been heard and several have been allowed under almost precisely similar circumstances. And, unless it is plainly apparent that the provisions of the Act prohibit us from so doing, we ought to adhere to the practice which has prevailed up to this time. But, so far from it being apparent that the Court is without jurisdiction, the contrary appears to be the case. The power to act under sec. 71 is unquestionable in the ordinary case of a judgment pronounced by this Court upon an appeal in which the subject matter leaves no question as to the right to entertain it. And so when, under sec. 76 (9) of the Judicature Act, as enacted by 4 Edw. VII. ch. 11, sec. 2, this Court, in the exercise of its discretion, has allowed a further appeal to it from a Divisional Court.

Nor does there appear to be any good reason for treating differently a case in which under sec. 76 (a) leave has been given to appeal directly to this Court instead of to a Divisional Court. An order to that effect having been made, the case is in this Court in precisely the same position as if here under either of the other ways. It could have found its way here by means of the other channels, and being here is dealt with as any other case properly before the Court.

Sub-head (e) of sec. 48 of the Supreme Court Act is intended to enable this Court to place any case in which it has given final judgment in the same position as regards an appeal to the Supreme Court as cases following under sub-heads (a), (b), (c), and (d). When a case does not come

within any of these 4 sub-heads, it only needs the application by the Court of the power given by the 5th sub-head to group it with them. There is nothing in sec. 48 imposing a time limit within which the leave must be applied for or granted. For that, reference must be made to sec. 69, the effect of which, but for the proviso "except as otherwise provided," would probably be to compel the leave to be at least applied for within the 60 days. But then comes the power not possessed by the Supreme Court, but given by sec. 71 to the Court appealed from or a Judge thereof, to allow an appeal although not brought within the 60 days. Again, there is no time limit imposed, and it is left to the Court or Judge to be governed by such special circumstances as may be presented, having regard to what, in view of all the facts, including the lapse of time, may be fair and just to the respondent.

It follows from these conclusions that there is no obstruction to our entertaining the application in this case, even if it be out of time, as suggested. The case came to this Court by way of appeal from a Divisional Court. The matter in controversy was the sum of $1,000, exclusive of costs, and so fell within sub-head (b) of sec. 76 of the Judicature Act, as enacted by 4 Edw. VII. ch. 11, sec. 2, and was therefore properly before this Court.

Unfortunately for the defendants, the Supreme Court has held that the matter in controversy on the appeal to that Court does not *exceed* $1,000, exclusive of costs, and therefore it does not come under sub-head (c) of sec. 48 of the Supreme Court Act, and it is necessary to obtain leave under sub-head. (e).

If this branch of the motion should be granted, there would be no difficulty in acting under sec. 71.

But, although I differed from the majority of the Court as to the disposition of the appeal, I am unable to say, consistently with our decisions in other cases, that there are in this case any special reasons for treating it as exceptional or any special circumstances which should take it out of the general rule that litigation in a case involving no more than the amount here involved should cease with the rendering of judgment in this Court.

As has been pointed out in other cases, the mere fact of a difference of opinion amongst the members of the Court is not in itself a sufficient reason: see Lovell v. Lovell, 13 O. L. R. 587, 9 O. W. R. 227. And no other special cir-

cumstance that should weigh with us has been presented.

The application must, therefore, be refused.

OSLER, J.A., gave reasons in writing for the same conclusion.

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

MEREDITH, J.A., dissenting, was of opinion, for reasons stated in writing, that leave should be granted and the time be extended.

FEBRUARY 11TH, 1909.

C.A.

IRVING v. GRIMSBY PARK CO.

Appeal to Supreme Court of Canada — Leave to Appeal — Supreme Court Act, R. S. C. 1906 ch. 139, sec. 48 (e)— Extension of Time for Appealing under sec. 71—Application after Expiry of 60 Days — Jurisdiction of Court of Appeal—Amount Involved not Exceeding $1,000—Absence of Special Circumstances—Refusal of Leave.

Motion by defendants for leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal, 11 O. W. R. 748, in favour of plaintiff upon an appeal directly from the judgment at the trial, and to extend the time for bringing the appeal, the defendants having launched an appeal without leave, and their appeal having been quashed by the Supreme Court of Canada.

The present motion was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

G. F. Shepley, K.C., for defendants.

G. H. Kilmer, K.C., for plaintiff.

MOSS, C.J.O.:—I have in Milligan v. Toronto R. W. Co., ante, dealt with the objections as to the want of power in the Court to entertain the motion.

After consideration, I am of opinion that the application should not be granted.

The case came before this Court by way of appeal from the trial Judge's decision. That this was done per incuriam appears to follow from the subsequent action of the Supreme Court.

The plaintiff was not responsible for this, and should not be made to suffer for it. When the Supreme Court raised the objection, there was the defendants' opportunity to ask a suspension of action until application might be made to this Court under secs. 48 and 71 of the Supreme Court Act. But this course was not adopted. The consequence is that to grant the application now would be to further delay the final disposition of the case until the May sittings of the Court.

Besides, the Supreme Court deprived the plaintiff of his costs of the abortive appeal. Yet it is now asked that he be compelled to again undergo further expense and submit to further delay.

Care should be taken not to respond too readily to the desire of defeated appellants to be permitted to carry on the litigation, notwithstanding the general limitation prescribed by the statutes. Nor should we be too much influenced to assist the prolongation by the fact that, acting under a mistaken impression, the parties seeking leave have already incurred expense which will be thrown away. Perhaps, if the regular course had been adopted, both parties might have been spared much unnecessary expense.

The case being one in which an appeal does not lie as of right to the Supreme Court, the defendants have reached the ordinary limit. They might, and perhaps should, have first taken an appeal to a Divisional Court, but, whatever the result might have been there, the ultimate appeal was to this Court according to the general rule.

Under the circumstances, I am disposed to let it rest there.

The motion must be refused.

OSLER, J.A., gave reasons in writing for the same conclusion.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissenting, was of opinion, for reasons stated in writing, that leave to appeal should be granted and the time be extended.

FEBRUARY 12TH, 1909.

DIVISIONAL COURT.

GRAHAM v. RUDDELL.

Trespass to Land—Division Fence—Dispute as to Boundaries—Finding of County Court Judge—Appeal—Consent of Parties to Court Disposing of Appeal as Arbitrators—Costs.

Appeal by defendant from judgment of Judge of County Court of Halton in favour of plaintiff in an action for trespass and a mandatory injunction to compel defendant to move a fence built by him as part of the line fence between the respective farms of plaintiff and defendant.

H. Guthrie, K.C., for defendant.

J. W. Elliott, K.C., for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., ANGLIN, J., CLUTE, J.), was delivered by

FALCONBRIDGE, C.J.:—The matter in dispute between the parties is of trifling value, and they have agreed that the question should be disposed of by the Court as arbitrators.

We direct and award that the survey line run northerly from the elm tree by J. Hutcheon, P.L.S., and being 50 feet south-easterly from the off-set line, as shewn on the plan (exhibit 1), shall be the true boundary line between the parties, and that the defendant shall proceed, at his own expense, with all convenient dispatch, to erect a fence upon said line, such fence to be built and erected to the satisfaction of the fence-viewers in case the parties differ about the same; that such fence shall be so erected within 6 months from this date, in which case this appeal is dismissed without costs. If the said fence is not so erected as aforesaid, this appeal is dismissed with costs.

FEBRUARY 13TH, 1909.

DIVISIONAL COURT.

BEARDMORE v. CITY OF TORONTO.

SMITH v. CITY OF LONDON.

Pleading—Statement of Claim—Motion to Strike out—Rule 261—Reasonable Cause of Action—Action not Frivolous or Vexatious—Dismissal of Action or Stay of Proceedings—Municipal Corporation—Contract with Hydro-Electric Power Commission—Action to Declare Invalid—Statutes—Orders in Council—Parties—Fiat of Attorney-General—Fraud and Misrepresentation — Amendment — Ultra Vires—Discretion — Appeal—Order in Chambers—Rule 1278.

Appeal by the defendants in both actions from orders of LATCHFORD, J., 13 O. W. R. 198, 207, dismissing their motions to strike out the statements of claim in these actions as frivolous and vexatious and disclosing no reasonable causes of action, pursuant to Rule 261, or staying the actions until the plaintiffs should have added as co-defendants the Hydro-Electric Power Commission.

J. S. Fullerton, K.C., and F. R. MacKelcan, for defendants the Corporation of the City of Toronto.

E. E. A. DuVernet, K.C., for defendants the Corporation of the City of London.

E. F. B. Johnston, K.C., and H. O'Brien, K.C., for plaintiff Beardmore.

J. M. McEvoy, London, for plaintiff Smith.

The judgment of the Court (ANGLIN, MAGEE, and CLUTE, JJ.), was delivered by

ANGLIN, J.:—In each action it is sought to have declared ultra vires a contract made, or about to be made, by the municipal coporation with the power commission, on the ground that such contracts can be validly entered into by municipalities only with the assent of the electors, and that there is material variation between the contract at-

tacked and the proposition submitted to the electorate in each case in the form of a by-law which received their approval; and for consequential relief.

In the action against the Corporation of the City of Toronto a statement of claim has been delivered, but no further proceedings have yet been taken. In this statement of claim the constitutionality of a section of the Act respecting the Hydro-Electric Power Commission, which provides that "without the consent of the Attorney-General no action shall be brought against the commission or against any member thereof for anything done or omitted in the exercise of his office," is attacked.

In the action against the Corporation of the City of London, the statement of defence has been delivered and the reply thereto, and in the reply the plaintiff Smith impugns the validity of the several statutes passed by the legislature respecting the Hydro-Electric Power Commission, in the years 1906-7-8.

It does not seem necessary upon the present motions to consider the constitutional questions raised by the plaintiffs, and the Court deems it inexpedient to express any view upon these questions or upon the right of the Court to entertain them.

While the motions before Mr. Justice Latchford were pending, the plaintiffs made application to the acting Attorney-General for a fiat in a each case, permitting the joinder of the commission as a defendant. In the memorandum of Sir James Whitney refusing the plaintiffs' applications, the following paragraph is found: "Apart from the question of fraud, the plaintiffs' contention in each case rests upon the view that the municipal council had not the power under the statute to finally enter into contracts with the Hydro-Electric Power Commission without submitting the terms of them to the ratepayers. I have personal knowledge that this was not the intention of the legislature, and I cannot divest myself of that knowledge. It may be that at its next session, which cannot now be long delayed, the legislature may make a declaration on the subject."

In view of this statement, the Court suggested to counsel for plaintiffs that, inasmuch as the legislature is called for 16th February instant (Tuesday next), it might be well to allow these appeals to stand until it is known whether legislation will be passed such as is indicated by the acting

Attorney-General. It was pointed out that by such legislation the main objections of the plaintiffs to the contracts which they attack might be entirely overcome, and it was further suggested that, out of courtesy to the legislature, it might be proper to await its action. Counsel, however, declined to assent to this course being taken, and insisted that the plaintiffs' actions should not be longer stayed by the pending motions, unless, in the view of the Court, the defendants are entitled to such stay as a matter of strict right. In view of this attitude of counsel, the Court is of opinion that it should not withhold judgment upon the defendants' appeals.

It has been settled by numerous authorities that a pleading should not be struck out upon summary application under Rule 261, unless it is, upon mere perusal, obviously unsustainable—not merely demurrable, but plainly and incontrovertibly bad and insufficient—unless, indeed, the Court is satisfied, in the case of a statement of claim, that the plaintiff clearly disclosed no cause of action at all. So far from this being the case with regard to the statements of claim now before the Court, they appear to disclose causes of action substantial in character (Scott v. Patterson, 17 O. L. R. 270, 12 O. W. R. 637), and such that it would be quite unjustifiable summarily to terminate the plaintiffs' rights and prevent them from further prosecuting their actions by orders interlocutory in character and such as might preclude their obtaining, in respect of the important questions which they raise, the opinion of such an appellate tribunal as the Supreme Court of Canada, or the Judicial Committee of the Privy Council, to one or other of which they would be entitled to carry their cases in due course upon appeal from judgments disposing of them after trial. Upon this short ground, and without further discussing questions upon which it would not be proper to prejudice the rights of either party by any premature expression of opinion, the present appeals, so far as they ask an application of the provisions of Rule 261 to these actions, should be dismissed.

Upon the other branch of their appeals the defendants urge that judgment declaratory of the invalidity of the contracts in question must necessarily affect the rights and the position of the Hydro-Electric Power Commission, who are parties to such contracts, and that the Commission is

therefore a necessary and indispensable party to each action.

For the purposes of the present motions, the allegations in the statements of claim must be assumed to be true. In the statement of claim in the action against the Corporation of the City of Toronto it is impliedly alleged that the contract, although executed, has not yet been delivered by the defendants. There is not such an allegation in the London case. Counsel stated that by inadvertence there were omitted from the statements of claim in each action allegations that an order in council had not yet been passed expressly declaring that the agreement should be binding upon the commission, and that for lack of such an order the contract is not binding in either case upon the commission, because of a provision to that effect contained in clause 12 thereof. (See 8 Edw. VII. ch. 22, schedule B., clause 12.) As amendment would, no doubt, be allowed to the statement of claim, enabling the plaintiff in each case to raise this issue, the present motions should be dealt with as if such amendment had been made.

In order to determine whether the power commission has or has not contractual rights which might be affected by judgments declaring the contracts void, it would probably be necessary to have the facts established, whether there has or has not been delivery of the contract in the case of the City of Toronto, and, in each case, whether or not there has been a declaration by order in council that the contract is binding. If there has been no delivery of the Toronto contract, although it has been signed by both parties, it is, of course, not binding upon either. If there has been no order in council passed declaring either contract binding upon the commission, its obligations, and probably also its rights, are at most contingent. Whatever may be done towards validating these contracts by legislation, the Court should, I think, assume that, pending litigation in which the power of the municipalities to make the contracts is questioned, the Lieutenant-Governor would not by orders in council declare them binding upon the commission; and that, in the event of the Courts declaring them to be ultra vires of the municipal corporations, such orders in council would not thereafter be passed.

Assuming the allegations in the statement of claim in the action against the Corporation of the City of Toronto to be true, the commission is probably not a necessary

party to the action against that corporation, if, indeed, it would be a proper party. If there has been no order in council declaring either contract binding upon the commission, it is questionable whether that body should be regarded as a party which ought to be brought before the Court in either action.

But, assuming that contracts do exist which should be dealt with as binding upon both the municipalities and the commission, the present appeals should not, in my opinion, succeed. For the appellants reliance was mainly placed upon two decisions of the former Court of Chancery in this province—Atlantic and Pacific Telegraph Co. v. Dominion Telegraph Co., 27 Gr. 592, and Jones v. Imperial Bank of Canada, 23 Gr. 262. Both decisions rest upon the case of Hare v. London and North Western R. W. Co., 1 J. & H. 253, in which Vice-Chancellor Wood said: "If I allowed the suit to proceed, in the absence of the other companies, any decree which I might make would not bind them, and the defendants might become liable in damages for obeying the orders of the Court." In none of these 3 cases does there appear to have been any difficulty in bringing before the Court the parties upon whose presence the defendants insisted. The fact entirely distinguishes them from the present case, and it is quite probable that, having regard to the principles upon which the discretion now vested in the Court, as to the addition of parties, should be exercised, in the same state of facts as existed in these cases orders would now be made, as a matter of discretion, staying proceedings in the actions until the required parties have been brought in. It should further be observed that these are all decisions of a single Judge, and are not binding upon this Court. They were rendered in the days when demurrers and pleas in abatement prevailed. Actions were then often defeated by misjoinder or nonjoinder of parties. The effect of the Judicature Acts was to abolish demurrers for want of parties: Werderman v. Société Générale D'Electricité, 19 Ch. D. 246. For the demurrer was substituted the right to move the Court that the proper and necessary parties should be added, and "it is of the essence of the procedure since the Judicature Act to take care that an action shall not be defeated by the non-joinder of right parties:" Van Gelder, Apsimon, & Co. v. Sowerby Bridge United District Flour Society, 44 Ch. D. 374, 394.

It has been said that the Judicature Rules have not altered the legal principles with regard to parties to actions or the right of a defendant to insist on certain parties being before the Court. This statement is, no doubt, correct sub modo. Where it is practicable to bring before the Court parties who ought to be joined, the plaintiff will still be required to add them, and his proceedings will be stayed until he does so. To this extent the rights of a defendant are the same as before the Judicature Act. But the Court, upon an application to add parties deemed necessary, has now a discretionary power to grant or to refuse the order; and it is expressly empowered to "deal with the matter in controversy so far as regards the rights and interests of the parties before it:" Rule 206 (1). It is pointed out by Lord Esher in Robinson v. Geisel, [1894] 2 Q. B. 685, that the circumstances which would warrant the Court in refusing to order the joinder as a defendant of a party who ought under ordinary circumstances to be so joined, are "that to do otherwise would defeat the power of the Court to deal with the rights and interests of the parties actually before it:" p. 688. The learned Judge continues: "It seems to me that if it is apparent that every effort has been made to find the co-contractor, the Court may say that it would be contrary to the spirit of Order XVI., r. 11, that the determination of the plaintiff's rights should be put off indefinitely. I am the more convinced that this is the right course to take, because it by no means defeats the right of the defendant against his co-contractor, though it may possibly put him to greater inconvenience than if the action had been tried against all jointly." Kay, L.J., uses these words: "Is it right or fair that where the plaintiff has done all he can to bring in all the persons who ought to be joined as defendants, his action should be stayed for an indefinite time until he is able to find them all? In my opinion, it would be unjust . . . unless there is some rigid rule of law that obliges him to have all the defendants before the Court before he can proceed against any of them. The rule seems to me to be directed to this—that where pleas of abatement were abolished there should be a large discretion in the Court to permit the action to go on, so that the rights of the parties before the Court may be determined even though all parties to the action are not before it. The Court below in its discretion allowed this action to go on; and certainly this Court, with its present knowledge of the

facts of the case, ought to take the same course." A. L. Smith, L.J., also expressed the view that for good reason the Court might refuse to insist on a person who ought to be a party being brought before it as a defendant. Likewise in Roberts v. Holland, [1893] 1 Q. B. 665, Wills, J., says: "It can never have been intended that where . . . no person can be added as a plaintiff without his own consent in writing, the nonjoinder of a party as plaintiff is to be fatal to the action. It is a matter of discretion, which is to be exercised by the Court or a Judge, as may appear to be best." And Charles, J., says: "Where it is sought to join as co-plaintiffs 5 tenants in common, who cannot be joined without their own consent in writing . . . there is a discretion to stay the action in order that their consent may be obtained, if such a course appears advisable, or, if not, to allow the action to proceed."

In Norris v. Beazley, 2 C. P. D. 80, Denman, J., said: "I think there may be cases where, though a person is not within the scope of the plaintiff's attack in the first instance, he ought to be introduced as a defendant to enable the Court to settle all the questions involved in the action. I am quite clear, however, that the Court ought not to bring in any person as defendant against whom the plaintiff does not desire to proceed, unless a very strong case is made out, shewing that in the particular case justice cannot be done without his being brought in." Coleridge, C.J., said: "The defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and it (the rule for adding parties) was never intended to apply where the person to be added as a defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any. It seems to me that this application is answered, and that it was not intended that persons in the position of this company should be added as defendants, merely for the convenience of another defendant, between whom and the company there may be questions which will afterwards have to be settled."

In Leduc & Co. v. Ward, 54 L. T. N. S. 214, the discretion of the Court to require or to refuse to require that a person against whom the plaintiff does not desire to proceed shall be added as a party at the instance of the defendant, is again affirmed. Lord Coleridge said: "I think that a rule, which enacts in terms that the nonjoinder of parties

will not defeat the plaintiff's action, clearly abolishes the effect of the old plea in abatement, and, to my mind, it is quite plain that what is intended is that the plaintiff has a right to add parties as defendants, but that the defendant has no corresponding right unless he can shew that not doing so will prevent the Court from effectually doing justice." Hawkins, J., said that the applicants' counsel had failed to satisfy him "that this is a case in which such discretion ought to be exercised in favour of his clients."

From these and many more authorities which might be cited, it is clear that there is now a discretion in the Court to determine whether or not, upon the particular facts of each case brought before it, an order should be made requiring the plaintiff, in invitum, to add as defendants parties not before the Court. Where, without such addition, some relief can be given the plaintiff, and the effect of requiring him to add parties would be to entirely defeat his action, the discretion of the Court should be exercised by refusing the order.

It is pointed out on behalf of the appellants that our Rule 206 (1) differs from the corresponding English Rule—Order XVI., r. 11—in that, whereas our Rule reads, "An action shall not be defeated by reason of the misjoinder of parties," the English Rule provides that "no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties," and the omission from our Rule of the words "or nonjoinder" is relied upon as rendering the cases upon the English Rule dealing with nonjoinder inapplicable. As pointed out in Leduc & Co. v. Ward, 54 L. T. N. S. 214, the Rule under the original English Judicature Act of 1875 was in the same terms as our present Rule, and the words "or nonjoinder" were inserted when the English Act of 1883 was passed. In 1879 Lord Penzance in Kendall v. Hamilton, 4 App. Cas. 504, at p. 531, said: "That Act abolished all the old forms of action; it abolished all the old technical forms of procedure, and established a new procedure for the enforcement indiscriminately of both legal and equitable rights, which is independent of all the old rules of law on that subject. Particularly it did away with all objections and defences arising out of the misjoinder or nonjoinder of parties, either plaintiff or defendant. Since that Act no such thing as a plea in abatement is possible. The nonjoinder of any party under any circumstances has ceased to be an answer, objection, or de-

fence to the action. In such a case the action goes on, and 'the Court or a Judge may, on such terms as appear to be just, order that the name of any party who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, shall be added.'"

In Leduc & Co. v. Ward, Coleridge, C.J., quotes this language of Lord Penzance with approval, adding these words: "Now that is the rule upon which Lord Penzance delivered that judgment, and Lord Cairns says nothing in contradiction to it." Norris v. Beazley, 2 C. P. D. 80, above referred to, was decided in the year 1877. It is reasonably clear, therefore, that under the English Rule of 1875 misjoinder was deemed to include nonjoinder, and, indeed, it would hardly be possible to give the Rule any other construction, in view of the words which immediately follow, viz., "and the Court may deal with the matter in controversy so far as regards the rights and interests of the parties before it,"—Con. Rule 206 (1)—language which refers clearly to the absence of proper parties, and, therefore, to nonjoinder—language which would be quite inappropriate unless misjoinder were deemed to include nonjoinder. Messieurs Holmested and Langton in their valuable work on the Judicature Act (3rd ed.), at p. 306, point out that the other sub-clauses, which are alike in the English and the Ontario Rules, also indicate that misjoinder includes nonjoinder, and in Carter v. Clarkson, 15 P. R. 379, at p. 380, Galt, C.J., speaking of our own Rule, says: "The rule applies not only to the nonjoinder, but to the improper joinder, of a party as defendant."

I think it abundantly clear upon these authorities that under our Rule 206 misjoinder must be deemed to include nonjoinder. That being the case, the authorities upon the English Rule are applicable, and upon them there can be no doubt that it is now discretionary with the Court to proceed or to refuse to proceed with the action in the absence of parties who, the defendants contend, ought to be before it.

In the exercise of this discretion, cases in which rights of property of the absent party might be affected should perhaps be distinguished from cases in which he would only be commercially affected by a judgment against the defendant. Lord Justice Lindley in Moser v. Marsden, [1892]

1 Ch. at p. 490, says: "Counsel for the applicant grounded his argument on the allegation that Montfort's interest would be affected by the decision in this action. It is true that his interest may be affected commercially by a judgment against the defendant, but can it be said that it would be legally affected? Can we stretch the Rule so far as to say that whenever a person would be incidentally affected by a judgment, he may be added as a defendant . . . I can understand the application of the Rule where the property of a third party is affected. He may well say, 'I am not to be deprived of my property in my absence.' But this case does not come up to that." But see Con. Rule 202.

In the present cases the interests represented by the Hydro-Electric Power Commission may be commercially affected by a judgment in favour of the plaintiffs. Those interests cannot be legally affected. Neither will the commission be deprived of any property in its absence.

The plaintiff in each case has done all in his power to bring in the commission as a defendant. It refuses to consent to be joined, and the present defendants insist that it cannot be joined without the fiat of the Attorney-General, under sec. 23 of 7 Edw. VII. ch. 19. These defendants strenuously and successfully opposed the plaintiffs' application for such a fiat. Assuming the validity of the legislation requiring this fiat, and its applicability to the present cases—points which the plaintiffs contest, but upon which we deem it inexpedient to express an opinion—its effect is to draw the Hydro-Electric Power Commission from the jurisdiction of this Court.

Although co-contractors are regarded as parties whom a defendant is ordinarily entitled to require a plaintiff to join, in Wilson, Sons, & Co. v. Balcarres Brook Steamship Co., [1893] 1 Q. B. 422, it was held that where a co-contractor is out of the jurisdiction, it is not necessary to the continuance of the action that he should be joined as a defendant. The commission may be regarded as placed without the jurisdiction of this Court. A defendant moving to stay for nonjoinder of another party as defendant should shew that the latter is within the jurisdiction: McArthur v. Hovel, 1 Cab. & E. 550; and that he can be brought before the Court: Drage v. Hartopp, 28 Ch. D. 414.

Assuming the validity and applicability of this legislation, the commission cannot be added as a party defendant without the fiat of the Attorney-General. It is, therefore,

in much the same position as a person who is sought to be added as a plaintiff in an action and who may not be so added without his consent, and, as Wills, J., said in Roberts v. Holland, "it could never have been intended that where no person can be added as a plaintiff without his own consent in writing, the nonjoinder of a party as plaintiff is to be fatal to the action."

Although adding a defendant against the wishes of the plaintiff "is not a case of making a person a plaintiff against his will, it certainly is the case of making a person a plaintiff in respect of a defendant as to whom he does not desire to be plaintiff without his consent:" per Coleridge, C.J., in Norris v. Beazley, 2 C. P. D. at p. 83.

Unless the present plaintiffs are to be allowed to proceed with their actions without joining the commission as a defendant, whatever rights they may have, if any, against the defendants before the Court will be in effect denied them. Any judgment which may be pronounced in their favour cannot legally affect the rights, contractual or other, of the commission, which is not a party to these actions. Indirectly and commercially it may be affected, but not legally, and not in the sense of interfering with its property. The Court has a discretion to act or to refuse to act upon the application to stay proceedings until the desired party is added. It may, and in such cases as the present I think it should, deal with the matter in controversy so far as regards the rights and interests of the parties before it, as directed by Rule 206. To do otherwise, would be in effect to defeat the action of the plaintiffs by reason of nonjoinder of parties—the very thing which this Rule was intended to prevent. Where, as here, through no fault of their own, the plaintiffs are unable to bring before the Court parties who, if binding contracts exist, are admittedly proper parties, and parties who ought to be joined, if it is reasonably possible to join them, they should not, because of their inability, be prevented at this stage from further proceeding with their actions. At the same time it should be left open to the defendants to raise this objection for want of parties by their pleadings if so advised, in order that it may be dealt with by the judgments which dispose of the merits of the actions at the trials: Con. Rule 205. The orders upon these interlocutory applications should not conclude them upon their right to insist that

no judgment should be pronounced against them in the absence of the Hydro-Electric Power Commission.

If the matter were finally concluded against the plaintiffs upon the present motion, as already pointed out, it may well be that their actions would be snuffed out by interlocutory orders, as to which there may be only limited rights of appeal. By leaving the matter open to be dealt with in the judgments at the trials, there is no reason why this question, with the other questions involved in these important actions, should not be carried on appeal to the Supreme Court of Canada or to the Judicial Committee of the Privy Council. That risk the plaintiffs must assume.

For these reasons, and because I do not think that we should interfere with the discretion exercised by my brother Latchford, I would dismiss the appeals of the defendants from his orders. The costs will be costs in the cause. The orders of this Court may, if the defendants so desire, contain provisions safeguarding their rights to raise the questions dealt with in this judgment by their pleadings, and to have them disposed of by the trial Judges when dealing with the merits of these actions, unfettered by the disposition of the present motions.

Attention should perhaps be directed to the fact that it is open to grave doubt whether the defendants could have maintained their appeals to this Court as of right. The applications before my brother Latchford, though made in Court, should, under the practice, have been made before a Judge in Chambers, and the orders appealed from should have issued as Chambers orders. From any order pronounced by a Judge in Chambers which does not finally dispose of the action, an appeal does not lie without special leave: Rule 1278.

CARTWRIGHT, MASTER. FEBRUARY 15TH, 1909.

CHAMBERS.

CLEMENTS v. OLIVER.

Discovery—Examination of Defendant—Action for Slander and Penalty under Dominion Statute—Questions Put to Defendant—Relevancy—Pleading.

This was an action for slander and to recover from defendant the penal sum of $500 as provided by sec. 35 of

ch. 26 of 7 & 8 Edw. VII. (D.), as appeared from the indorsement on the writ of summons.

In the statement of claim it was alleged that the plaintiff was a candidate for re-election to the House of Commons in October last, and that during the campaign the defendant on 3 different specified occasions stated of the plaintiff as follows: "H. S. Clements was in a poker game with some other men, and there was $84 (or $80) up on stake (or in the pot). The police came to raid the place, and they all got out. They hid the money in a drawer, and Clements was the first one got back, and he got the money, and has it yet, or 'scooped the money' or 'got away with the boodle.'"

The defendant denied publication on all the 3 occasions, denied the innuendo "that the plaintiff had improperly and feloniously stolen the said money," and said that the words did not refer to the plaintiff, and that the innuendo as above did not put the true construction of the words used by the defendant, in their material and ordinary signification.

Defendant, on his examination for discovery, refused to answer certain questions, and the plaintiff now moved to compel him to do so.

C. C. Robinson, for plaintiff.

J. M. Ferguson, for defendant.

THE MASTER:—Defendant admits that on the first occasion he said something about plaintiff being in a poker game with some other men, but refuses to answer if any sum was mentioned as being up on stake. This should be answered, and, as he admitted that on one of the other occasions he spoke of $80, there does not seem to be any reason for not doing so earlier.

Defendant refused to tell what he did say on this first occassion. He must do this, because, if the words spoken were to the same effect as those alleged, or might be so considered by the jury, plaintiff could recover, or at least have them submitted to the jury.

Defendant was asked whether on the second occasion he had produced a paper to one Stewart, in any way referring to this matter. He refused to answer, but he must do so, as it may be very material to plaintiff's case to know what that paper said, if any was shewn by defendant. It might be so especially on the claim to recover the penalty.

Defendant refused to answer if there were any other occasions on which he used such words as are complained of. I do not think he need answer a "fishing interrogation" of this nature.

Defendant refused to say if he had heard any reports such as those he admits having stated to persons about the plaintiff, e.g., "that there were some $80 which Clements had charge of that were not forthcoming after the game broke up." He must answer these questions, as they may be relevant both as to malice and damages.

Defendant admits having been asked by plaintiff over the telephone about this matter before action, and he must answer fully all questions the answers to which may assist the plaintiff's case by way of admissions. He need not answer as to any similar statements made during the prior election of 1904. That is not in issue, and cannot be relevant.

Defendant was asked if he had made certain statements to one Marshall. He said he had no recollection of speaking to him at all. He refused to answer if he had made any such statements as are complained of to him. If he considers that his first answer implies a denial of these following questions, he can say so if asked again.

He refused to say if he has ever made any correction or withdrawal of these statements. He must do so, as it may be very material as to malice, and consequently to damages also.

Defendant was finally asked what meaning the word "swipe" has, and whether he has ever heard it, and what he meant by saying (as he admits he did) that Clements had not accounted for the money—or what the ordinary sense would be of the words he admits he did use.

As he denies the innuendo, and as plaintiff is prima facie entitled to succeed if he can prove the uttering of words to the same effect as those set out in the statement of claim, I think the defendant must answer all such questions.

He will therefore attend at his own expense for further examination.

Paragraphs 8 and 9 of the statement of defence give the defendant's account of what he did say. As long as they are part of the record, they are matters for discovery. But it may be that they offend against the decision in Rassum v. Budge, [1893] 1 Q. B. Plaintiff, however, may have been

well advised in allowing them to stand, as being perhaps an admission in substance of the slander charged.

Costs of this motion to plaintiff in any event.

FEBRUARY 15TH, 1909.

DIVISIONAL COURT.

MEYERS v. CROWN BANK OF CANADA.

Cheque—Conversion of—Fraud—Forgery—Findings of Trial Judge on Conflicting Evidence—Appeal—Joint Tort-feasors—Banks.

Appeal by defendants from judgment of CLUTE, J., in favour of plaintiff in an action to recover $600 for the alleged conversion of a cheque for that amount drawn by Helpert Bros. upon the defendants the Imperial Bank of Canada, dated 20th February, 1908, and payable to the order of the plaintiff, by the name of "Mrs. B. Cohen." On the date of the cheque the plaintiff was the widow of the late B. Cohen. She alleged that the cheque was stolen from her, and that the indorsement "B. Cohen" thereon was a forgery.

F. Arnoldi, K.C., for defendants the Crown Bank of Canada and defendant Adolph Myer.

D. D. Grierson, for defendants the Imperial Bank of Canada.

L. F. Heyd, K.C., for plaintiff.

The judgment of the Court (MEREDITH, C.J., BRITTON, J., TEETZEL, J.), was delivered by

BRITTON, J.:—The facts, as found by the trial Judge, or which are not in dispute in this action, are that the plaintiff, a person of about 35 years of age, was the widow of B. Cohen. She had 3 children, and kept a grocery at 149 York street, in Toronto. She had money in the hands of her brothers, a firm of dealers in junk carrying on business at 169 York street. There was some question as to whether this money belonged to plaintiff or her children. I think it makes no difference in this action. It was argued that the ownership affected the question of plaintiff's credibility,

and possibly the credibility of her daughter Annie, who was an important witness for her mother at the trial.

The plaintiff received this cheque on the day of its date, namely, 20th February, 1908. It was brought to the plaintiff by Annie. On 23rd February plaintiff got married to one Samuel Meyers or Margolis, as he was called. I will speak of him as Margolis. Her acquaintance with Margolis began about 3 weeks before the marriage. There was no introduction. Margolis just walked into the store of plaintiff "to buy some stuff." She knew Margolis only by the name of "Meyer." Apparently marriage was talked of almost immediately after the first acquaintance, and very soon after it was the defendant Adolph Myer who had conversation with the plaintiff to help the matter on. Plaintiff said to Myer, "I won't get married to him." Myer said: "You get married; he is a nice man, he is my cousin; I knew him from the time he was born; you get married to him." That apparently, according to plaintiff, settled the matter with her, because in about a week, viz., on Sunday 16th February, the plaintiff had her engagement party, and on Sunday 23rd the wedding took place. The cheque was certainly obtained by plaintiff between the engagement party and the marriage.

On the Thursday after the marriage, 27th February, this cheque was cashed by the Crown Bank at the Agnes street branch. The money was handed over to the plaintiff's husband, Margolis, the manager of the bank having been satisfied of the indorsement of the plaintiff by the fact that Margolis was introduced by the defendant Myer, with whom the manager was acquainted, and who indorsed the cheque.

On that night Margolis did not stay at plaintiff's house, but he did on Friday night and Saturday night following. On Sunday evening plaintiff and her husband went for a walk, and called upon plaintiff's sister, one Mrs. Shapirs. Margolis left plaintiff there, pretending that he wanted to go to the home of defendant Myer to get clothes, and he, Margolis, did not return. Plaintiff has not seen him since. On Monday morning, the plaintiff says, seeing that her husband had not returned, she went to her trunk and saw that the cheque in question and $100 in cash were gone, were stolen, as she says; she immediately gave notice to her brother, and, finding that the indorsement was forged and the money obtained from the bank, she seeks to recover in this action.

The defence is that the plaintiff gave the cheque to her husband, Margolis, and that the indorsement upon it was her own, or that her name was placed upon the cheque with her consent and authority, and that, whether her name was forged or not, she knew that the cheque had been presented by Margolis and that he obtained the money; that she herself had received this money from Margolis and had it in her hands, either as her own or having the custody of it for her husband, or for her husband and herself; and that, if she lost money by the fraud or theft of her husband, that does not give her any right to recover in this action.

There is direct conflict of testimony. Apparently there is wilful and corrupt perjury on one side or the other. Either the witnesses who were called for the defence, and who say they saw the cheque in the hands of Margolis, and saw it there in the presence of the plaintiff, and saw money which must, if seen, have been money received for the cheque, testified untruly, or the plaintiff, having obtained the cheque in anticipation of her marriage, and having got married and having lost her husband and her money, is now fraudulently and by falsehood attempting to make the defendants pay.

The action was tried without a jury. The learned trial Judge came to the conclusion that he could not rely upon witnesses for the defence, and he did believe the plaintiff in the main and essential part of her story. After a careful reading of the evidence, I cannot say that the learned Judge was wrong. If called upon, merely upon reading the evidence, to say which side is right, perhaps I should incline, with doubt and hesitancy, to the side of the defendants, but the learned Judge heard the witnesses testify, he saw their demeanour, and was better able to test their credibility than any person from merely reading the evidence can be.

The case is either a conspiracy on the part of Margolis and Myer to defraud this woman of her money and an attempt by Myer to clear himself and Margolis by false evidence of his own and witnesses whom he has procured, or it is an attempt on the part of the plaintiff, assisted by her brother Helpert, she having lost the money and been betrayed by Margolis, to recover this money from the defendants.

The undisputed facts may have assisted the learned Judge in determining the truth. The plaintiff, who was considerably older than Margolis, was anxious to marry, probably in

part for the sake of getting a business partner, possibly for other reasons. Margolis, a stranger, only 22 or 23 years of age, it is said, although he is called 27 in the marriage license, became acquainted with her, and, with apparently no motive to marry unless he could make something out of it, stipulated, as it is said, for money as a consideration for the marriage. If the defendant Myer is to be believed, the bargain was made that for money, either $1,000 or $800 or some other sum, Margolis agreed to marry, and he wanted cash down. It is undisputed that, without having, so far as is seen, any immediate use for the money, the plaintiff got a cheque from Helpert Bros. for $600. This cheque came into Margolis's possession, and he obtained the money upon it from the Crown Bank on 27th February.

As above stated, the motive of the plaintiff in pursuing the bank is as strong as the motive of Adolph Myer in resisting, if he really assisted Margolis to defraud the plaintiff. If the witnesses who testified on behalf of the defendants told the truth when speaking of seeing the cheque with Margolis and of seeing the money being put in a satchel or pocket-book which was kept by the plaintiff, but within the reach of the husband, then the plaintiff should not recover. On the other hand, there are discrepancies in the statements of the different witnesses for the defence. There are many contradictions in the evidence of witnesses for the defendants. There may not be more in this by way of contradiction in details as to hours, days, persons present, things said, in connection with some particular transaction, than often is found in contested cases.

If upon reading the evidence I should come to a different conclusion from that of the trial Judge, who shall say that it is more likely to be the right conclusion? Another Judge might well say the trial Judge was right. The trial Judge was quite within his right and it was for him wholly to believe some witnesses and to disbelieve others.

The plaintiff has very much at stake as a result of this. The defendant Myer has a good deal at stake, because of the part he took in this transaction. The evidence on the part of the defendants was in the main given by those who were relations of and friendly to the defendant Myer.

Another trial would not be likely to assist in getting at the real truth, and there would be no finality in law-suits if new trials were granted merely because of a feeling that, upon contradiction of witnesses, the trial Judge had erred

in believing one witness or set of witnesses in preference to to another or another set.

On the argument I felt strongly impressed with the view than an inference must be drawn from all the facts that this plaintiff obtained the cheque, at the particular time she did obtain it, for the sole purpose of handing it over or of handing the money over to the man she intended to marry. Further consideration leads me to think that this is not an inference I am bound to draw, and it is only one of the many facts in the mind of the trial Judge when he came to his decision.

The learned Judge has found that the cheque was stolen, and that the plaintiff's name was forged in the indorsement upon it. As Margolis got the cheque cashed by the Crown Bank, there was conversion of it by Margolis.

The plaintiff sues the 3 defendants, and charges them jointly with the conversion of the cheque. They are charged as joint tort-feasors.

The cheque was drawn by a customer of the Imperial Bank, and, assuming that the indorsement was written by plaintiff, was paid in due course and charged to the drawer. The Imperial Bank acted not in concert or collusion with any other defendant, but upon what they say was a guaranty by the Crown Bank that the indorsement of the plaintiff was genuine.

It may be that in law the Imperial Bank would be liable to the plaintiff for handing the cheque over to the drawers, but, if so, it was the act of that bank alone.

There is no evidence of any joint conversion on the part of the Imperial Bank with the other defendants.

There was evidence of the defendant Myer and of the Crown Bank acting together. Upon the evidence as accepted, Margolis, who is not sued, and the defendant Myer, procured the Crown Bank to do just what the bank did, viz., to accept the cheque and hand the money for it to Margolis, but the Imperial Bank stand in a different position.

The definition of joint wrong-doers as given in Salmond's Law of Torts, p. 69, is as follows: "Persons are to be deemed joint wrong-doers, within the meaning of this rule, whenever they are responsible for the same tort, that is to say, whenever the law for any reason imputes the commission of the same wrongful act to two or more persons at once."

The matter is important, having regard to the rule that "no wilful wrong-doer who has been made liable in damages

has any right of contribution or indemnity against any other person who is a joint wrong-doer with him."

The action should be dismissed as against the Imperial Bank without costs.

As to the other defendants, the appeal should be dismissed with costs.

CARTWRIGHT, MASTER. FEBRUARY 16TH, 1909.

CHAMBERS.

LINDSAY v. CURRIE.

Discovery—Examination of Defendants—One Defendant out of Jurisdiction — Examination on Commission — Another Defendant a Member of House of Commons—Examination during Session—Convenience of Member.

Motion by plaintiff for order for examination of defendants for discovery.

J. H. Spence, for plaintiff.

F. E. Hodgins, K.C., for defendants.

THE MASTER:—One of the defendants is resident out of the jurisdiction and must be examined on commission.

The other is a member of the House of Commons, which is now in session. It was suggested that he was, therefore, free from attendance for this purpose. It does not, however, seem that the decision in Cox v. Prior, 18 P. R. 492, has ever been questioned, and a similar order should be made in this case.

It was submitted that the rules of the House had been altered since 1899, and that this defendant would be prejudicially affected by being required to attend for examination. By R. S. C. 1906 ch. 10, sec. 35, a deduction of $15 a day is made from the sessional indemnity of $2,500 for every day beyond 15 on which the member does not attend a sitting of the House. By having the examination on a Saturday, this penalty can easily be avoided, and the plaintiff is quite willing to have the matter arranged to suit the reasonable convenience of the defendant.

The costs of this motion will be in the cause as usual.

In Todd v. Labrosse, on 3rd or 4th March, 1908, Anglin, J., refused to postpone a trial, upon the facts given in 11 O. W. R. 525.

ANGLIN, J. FEBRUARY 16TH, 1909.

CHAMBERS.

REX EX REL. SHARPE v. BECK.

Municipal Elections—Deputy Reeve of Town—6 Edw. VII. ch. 35, sec. 1 (a)—Number of Qualified Voters on List Entitling Town to Deputy Reeve — Names Occurring More than Once—Question of Right to Deputy Reeve not Open on Proceeding to Set aside Election—Relator Voting at Election—Property Qualification of Deputy Reeve Elect — Freehold Property under Contract for Sale — "Actual Occupation"—Municipal Act, 1903, sec. 76 (f) —Exclusive Unqualified Right to Possession.

Appeal by relator from order of Master in Chambers, ante 457.

T. G. Blain, Brampton, for the relator.

B. F. Justin, K.C., for the respondent.

ANGLIN, J., dismissed the appeal with costs.

BOYD, C. FEBRUARY 16TH, 1909.

TRIAL.

TRUSTS AND GUARANTEE CO. v. MUNRO.

Company—Winding-up — Moneys Paid out to Creditor by Company after Service of Notice of Motion for Winding-up Order—Action by Liquidator to Recover—Dominion Winding-up Act—Trust Moneys—Breach of Trust—Managing Director—Restoration—Fraud on Creditors.

Action by the liquidators of the Hamilton Manufacturing Co. to recover from the defendants a sum of $1,340 and interest paid by the company to the defendant William Hamilton, as trustee for his co-defendants, after notice of motion for winding-up order had been served on the company, in

repayment of $1,340 advanced to the company, of which he was managing director, out of the trust moneys in his hands belonging to his co-defendants.

J. Bicknell, K.C., for plaintiffs.

G. H. Watson, K.C., and D. W. Dumble, K.C., for defendant.

BOYD, C.:—"Creditors" in the Winding-up Act includes all persons having any claim against the company, present or future, certain, ascertained, or contingent, for liquidated or unliquidated damages: R. S. C. 1906 ch. 144, sec. 2 (j). By sec. 5 the winding-up shall be deemed to begin at the time of the service of the notice of presentation of the petition for winding-up. By sec. 20, from the time of the making of the order the company shall cease to carry on its business, except for the purpose of winding-up. By sec. 99, every payment made within 30 days next before the commencement of winding-up by a company unable to meet its engagements in full to a person knowing such inability shall be void, and the amount paid may be recovered by the liquidator.

William Hamilton was managing director of the Hamilton Manufacturing Co., now insolvent, and was also a trustee of moneys belonging to his co-defendants as beneficiaries.

On solicitation of the bank, the said Hamilton deposited trust moneys to the extent of $1,340 to the credit of the company, in October, 1905, in order to strengthen the financial condition of the company. This money was withdrawn for the purposes of the company, and interest was allowed on the amount deposited by the trustee, up to the date of the payment now impeached.

The company became involved, and on 6th December, 1906, after notice of the presentation of a petition for winding-up had been served, made the payment impeached, in amount equal to the said $1,340 and interest, to the said managing director and trustee. The payment was made out of the assets of the company collected in the course of its business.

Granted that trust moneys were brought into the company, and that the company is affected with knowledge that it was a breach of trust, and that, while the monys remained identifiable, they could be followed and recovered, yet that trust element was dissipated when the moneys were paid out here and there in the prosecution of the company's business,

and were no longer capable of being "ear-marked." With the disappearance of the trust element, the company became simply a debtor of the trustee, and he was simply a creditor of the company.

When the payment now impeached was made, the company was incapable of doing business, the moneys in its hands or power were moneys of the body of creditors, and for the company to apply part for the payment of a claim of its own manager, growing out of a breach of trust on his part, was unfair to the whole body of creditors, and a payment forbidden by the express terms of the Act. The policy of the Winding-up Act is to secure for all creditors the equal distribution of assets, and in this aspect its scope is much beyond the Statute of Elizabeth—now carried into R. S. O. 1897 ch. 334. Without any express provision, a transaction which involves unfair preference of one creditor is contrary to the spirit and meaning of the insolvency legislation: Marks v. Feldon, L. R. 5 Q. B. 279. This is an a fortiori case as being a payment by the company to its own manager, and made after proceedings in insolvency had actually begun.

Section 99 of the Winding-up Act appears to exclude questions of intent and to make the fact of payment of the assets of the company to a creditor within the period enough to avoid it. The English cases cited are distinguishable both with regard to the words of the particular statute and in that the person making payment was himself the person guilty of breach of trust and acting with a view to repair it rather than to give a preference to a creditor. The relation in this case between the company and Hamilton was that of debtor and creditor, though the relation, no doubt, between Hamilton and the beneficiaries was that of trustee and cestui que trust, as well as that of debtor and creditor. I think that to give effect to the defence would be to read something into the statute which is not in the section and to minimise its salutary effect in a public point of view. If companies were to be at liberty to borrow trust money and use it as floating capital of the company, and then, when financial troubles thickened, were to be able, under guise of repairing the breach of trust, to restore, out of current funds, principal and interest to the beneficiaries (even though infants) as preferential claimants, it would go to imperil financial credit and frustrate, to my mind, the scheme of the Act.

Holding these views, I give judgment in favour of the plaintiff, and order that the money received be repaid by the defendants; as to William Hamilton, judgment for the whole; as to the beneficiaries, for such share as has been received by them, in case it is received from or paid by the trustee. Liquidators' costs to be paid out of the assets, if no costs levied from the trustee.

TEETZEL, J. FEBRUARY 17TH, 1909.

CHAMBERS.

REX v. BUTTERFIELD.

Liquor License Act—Conviction for Selling Intoxicating Liquors without License—Proof that Liquor Sold Intoxicating—Criminal Code, sec. 786—Objection that Accused not Allowed to Make Full Answer and Defence—Cross-examination of Witnesses for Prosecution—Discrediting Witnesses—Irrelevant Questions—Refusal to Answer Sustained by Magistrate.

Motion by defendant to quash a conviction under the Liquor License Act whereby the defendant was found guilty of selling intoxicating liquor without the license required by law.

J. Haverson, K.C., for the defendant.

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

TEETZEL, J.:—The objections relied upon were: (1) that the evidence did not shew that the liquer sold was intoxicating; (2) that the accused was not allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel, as was his right under sec. 786 of the Criminal Code.

Upon the argument I refused to give effect to the first objection.

As to the second objection, it appears that the charge preferred against the accused was with reference to an alleged sale between the hours of 2 and 6 o'clock in the afternoon of 24th September last, and 3 witnesses were called to prove the charge, and each of them located the time as between those hours.

It was stated in argument by counsel that another charge was made against the accused for unlawfully selling in the forenoon of the same day, and that similar charges had been preferred against the keepers of other hotels during the forenoon and afternoon of the same day.

Upon cross-examination, Mr. Haverson, counsel for the accused, asked each of the witnesses whether they had been in the hotel of the accused during the forenoon of 24th September, and whether they had been in one of the other hotels that forenoon or that afternoon. Upon objection being taken by counsel for the prosecution, the magistrate ruled that the witnesses were not bound to answer either of the questions indicated.

In support of the objection, Mr. Haverson relied upon Regina v. Sproule, 14 O. R. 375, wherein a conviction was quashed on the ground that the justices refused to allow the cross-examination of a witness with reference to his communication with one of the justices trying the case, and in refusing to allow the justice to be sworn as a witness. The proposed cross-examination and examination in that case were touching matters which, if proven, would disqualify the justice from sitting in the case; and the Divisional Court was of the opinion that the questions, being pertinent and relative to the status or question of disqualification of a member of the tribunal, were material and should have been permitted.

It is to be noted that Regina v. Sproule was not followed in Regina v. Brown, 16 O. R. 41, in which the view was expressed by Armour, C.J., at p. 46, as follows: "True it is that by our law a person so charged 'shall be admitted to make his full answer and defence thereto,' but this does not permit his making a countercharge against the Judge that he has a disqualifying interest in his prosecution. Regina v. Sproule, 14 O. R. 375, is opposed to this my view, but, there being no appeal from our decision, we must give our independent judgment upon the matter."

In my view, the questions proposed to be asked in this case were irrelevant, and, if answered by the witnesses, could not have been contradicted by the accused; nor could it be said upon the record here that the questions were proper for the purpose of discrediting the witnesses.

The answer to the objection is well expressed in Spenceley v. De Willott, 7 East at p. 110: "The Court were all

decidedly of opinion that it was not competent to counsel on cross-examination to question the witness concerning a fact wholly irrelevant to the matter in issue, if answered affirmatively, for the purpose of discrediting him; if he answered in the negative, by calling other witnesses to disprove what he said. That in this case, whatever contracts the witness might have entered into with other persons for other loans, they could not be evidence of the contract made with the defendant, unless the witness had first said that he had made the same contract with the defendant as he had made with those persons; which he had not said. They observed, that the rule had been laid down again and again, that upon cross-examination to try the credit of a witness, only general questions could be put, and he could not be asked as to any collateral and independent fact merely with a view to contradict him afterwards by calling another witness. The danger of such a practice would be obvious; besides the inconvenience of trying as many collateral issues as one of the parties chose to introduce, and which the other could not be prepared to meet."

See also Tolman v. Johnstone, 2 F. & F. 66; Roscoe's Nisi Prius Evidence, 18th ed., p. 178; Phipson, 4th ed., p. 465.

The motion will therefore be dismissed with costs.

ANGLIN, J. FEBRUARY 17TH, 1909.

WEEKLY COURT.

WESNER v. TREMBLAY.

Mechanics' Liens—Sale of Land Affected to Realise Liens—Reference—Master's Report—Right of Appeal to High Court—Distribution of Proceeds of Sale—Costs of Plaintiffs of Opposing Appeal from Judgment Declaring Liens—Costs of Plaintiffs of Sale Proceedings—Costs of other Lien-holders—Priority—Provincial Taxes under Supplementary Revenue Act—Mechanics' Lien Act—Costs of Appeal.

Appeal by plaintiffs from report of local Master at Chatham, made pursuant to a judgment of the Judge of the County Court of Kent in a mechanic's lien action.

J. M. Ferguson, for plaintiffs.

J. M. Pike, K.C., for defendants J. A. Tremblay and B. Hallard, and for the claimant Crawford.

W. E. Middleton, K.C., for the claimants MacEwen Brothers.

ANGLIN, J.:—The learned Judge who tried the action found the amounts of the liens and incumbrances to which the several parties are entitled. He directed payment of the amounts due to the lien-holders with interest and costs, aggregating $5,864.16, and in default ordered a sale of the lands with the approbation of the Master at Chatham, and directed that the proceeds of the sale should be applied in payment of the liens and incumbrances so found, "as the said Master shall direct, with subsequent interest and subsequent costs to be computed and taxed by the said Master." From this judgment the defendants appealed unsuccessfully to a Divisional Court, the appeal being dismissed with costs.

The Master took the view that the plaintiffs are not entitled to any charge upon the property for the costs of this appeal, and he also held that he could only allow to them, in connection with the sale proceedings which were taken before him, their actual disbursements: sec. 35, sub-sec. 6, R. S. O. 1897 ch. 153. He also directed that the costs not only of the plaintiffs, but also of the other lien-holders, MacEwen Brothers, should be paid in priority to the judgment debts of both for principal and interest; and that, out of the purchase moneys, the sum of $144.46 should be paid to the Ontario government, on account of taxes under the Supplementary Revenue Act. The moneys realised from the sale fell short of being sufficient to satisfy the claims of the two lien-holders.

The plaintiffs appeal from the Master's report in respect of all these matters, contending: (1) that they should have been allowed to add to the costs upon the judgment their costs of opposing the defendants' appeal to the Divisional Court; (2) that the Master should have allowed them not merely their disbursements, but also their solicitors' costs upon the sale of proceedings before him; (3) that MacEwen Brothers should not have been given priority for their costs over the plaintiffs' debt, but should merely have been allowed to add their costs to the amount of their claim and to receive a dividend upon their claim and costs together; and (4) that the purchaser should be required to take the

property subject to the Ontario government tax, and that this should not be paid out of the purchase money.

Mr. Middleton questioned the right of appeal from the Master's report in a mechanic's lien action. But by sec. 31 of the Act, as pointed out by Mr. Ferguson, the ordinary procedure of the High Court applies to this action, "excepting where the same is covered by the Act." There is nothing in the statute which deprives a party to a mechanic's lien proceeding of the right of appeal from a Master's report in such actions, which parties to all other actions in the High Court possess. I, therefore, think this right exists.

It is admitted that with the addition of costs of the appeal and solicitors' costs of the sale proceedings, the total amount of costs of the plaintiffs and other successful lien-holders would not exceed 25 per cent. of the judgment recovered: sec. 41. In my opinion, the Master should have added to the amount allowed to the plaintiffs for costs the costs of the appeal to the Divisional Court, which they successfully opposed. They incurred these costs in supporting the judgment upholding the liens, and, having been given such costs, they are entitled as to them to be placed in the same position as with respect to the costs incurred in obtaining the original judgment itself.

As to the costs incurred upon the sale proceedings, these were, in my opinion, awarded to the plaintiffs by the paragraph of the judgment which directed the Master to compute and tax subsequent interest and subsequent costs. The Master himself being the "officer with whose approbation the lands are sold," is, by sub-sec. 6 of sec. 35, authorised, without the authority of a judgment, only to allow to the person conducting the sale (in this case the plaintiffs) his actual disbursements incurred in connection therewith. But the Judge or officer trying the lien action has the same powers as to giving and refusing costs as a Judge of the High Court, subject to the limitation that the total amount awarded to the plaintiffs and successful lien-holders shall not exceed 25 per cent. of the amount of the judgment besides actual disbursements. I think, therefore, that, under the judgment, the Master should have taxed to the plaintiffs their costs in connection with the sale proceedings. The appeal upon these two items will accordingly be allowed.

As to the right of MacEwen Brothers to be paid their costs in priority to the amount of the plaintiffs' lien, other than for costs, the statute provides that the costs allowed "shall be apportioned and borne in such proportion as the Judge or other officer who tries the action may direct:" sec. 41. The Judge has directed that the moneys realised shall be applied towards payment of the several claims set out in the first and third schedules to his judgment "as the said Master shall direct." I would have no doubt of the power of the Judge or officer trying the action to direct that the costs of all the successful lien-holders should be paid in priority to the judgment debt other than for costs of any of them. There may be some question as to his power to delegate this right to the Master. This question, however, was not raised by the appellants. The fifth clause of form 13 to the Act, read in conjunction with sub-sec. 6 of sec. 35, appears to contemplate that the Master shall deal with this matter as he has been directed to do and as he has done in this action. The disposition and apportionment of the costs made by the Master is, in my opinion, authorised by sec. 35, sub-sec. 6, and the judgment entered in this action. I therefore think the plaintiffs' appeal from the Master's report upon this point cannot succeed.

As to the payment of $144.46 to the Ontario government for taxes out of the proceeds of the sale, the position appears to be that the Master conducted the sale under the impression that there was no such charge or incumbrance upon the land, and the purchaser bought in the like belief. The existence of this claim for taxes was discovered later. The statute certainly appears to contemplate that only the estate or interest of the owner shall be the subject of the lien. The priority of the government tax over any lien cannot be questioned. The proper course would, therefore, appear to have been to sell subject to this tax, and it may be that, as a matter of strict law, the purchaser would only acquire the estate or interest of the owner, being that which is covered by the lien, and would therefore take subject to the payment of the tax. But I am satisfied that the Court would not allow a purchaser from it to be put in any unfair position. Had the existence of the tax been known to the officer conducting the sale, it would no doubt have been communicated to the purchaser, and there could be little question that the purchase price would have been abated to the extent of the tax. The only effect which

could be given to the objection taken on behalf of the plaintiffs would be to set aside the sale and to direct that the property should be again offered for sale. This would involve a great deal of expense and inconvenience, probably a loss to the lien-holders greater than the amount of the tax, and I think the proper course is to affirm what the Master has done in directing that the government tax shall be paid out of the proceeds of the sale, before satisfying the liens of the plaintiffs and MacEwen Brothers. The Court is, in my opinion, bound to protect its purchaser to this extent. The appeal upon this point should therefore be dismissed.

The plaintiffs should have one-half of their costs of this appeal paid to them by the defendants and the claimant Crawford, and the amount so to be paid may be added to the costs allowed by the Master's report. The plaintiffs should pay to the claimants MacEwen Brothers their costs of the appeal.

RIDDELL, J. FEBRUARY 17TH, 1909.

TRIAL.

CHEW v. CASWELL.

Timber—Claim for Services in Sawing Logs—Adjustment of Amount—Lien on Logs—Destruction by Fire—Continuation of Lien as against Insurance Moneys Representing Value of Logs — Interest of Lienor—Advances by Bank to Owners of Logs—Rights of Bank.

Action to recover the amount due to the plaintiff for sawing logs under a contract with the defendants Caswell & Co., and to enforce a lien upon insurance moneys representing the value of the logs sawn, for the amount of plaintiff's claim.

J. Bicknell, K.C., and A. Bicknell, for plaintiff.

E. F. B. Johnston, K.C., for defendants the Traders Bank of Canada.

G. Grant, for defendants Caswell & Co.

RIDDELL, J.:—Caswell & Co., lumbermen, were customers of the Traders Bank; they took out a timber license in the

name of the bank, the bank advancing them the money to carry on their timbering operations. The lumbermen took out a considerable amount of rather inferior small logs, and, with the knowledge of the bank, the plaintiffs proceeded, under contract with Caswell & Co., to saw these logs into lumber. The bank did not till afterwards know the exact terms of the contract of sawing, but knew that the sawing was being done by the plaintiff. The sawing was not paid for; the logs being converted into lumber, the lumber lay in the yard of the plaintiff until 1st July, 1908, when it was burned. The bank did not know as a fact that the sawing was not being paid for, simply because the matter never was considered—had the matter ever come up or occurred to the bank manager, he would have known that this was the case, and he had at all times the means of knowledge if he cared to make use of them.

Insurance policies had been taken out upon this lumber by Caswell & Co.; and, as the bank were still largely the creditors of the lumbermen, the "loss" was made payable to the bank. The insurance was "on sawn lumber, owned by the assured or held in trust or on commission, or sold but not now delivered, now piled, or that during the continuance of this insurance may be piled, in Chew's yard, situate at Sturgeon Bay, formerly known as Tanner Bros.' yard."

When the fire took place, the lumber was all in the plaintiff's yard, and the plaintiff claimed out of the insurance money an amount equal to the contract price of the sawing. This the bank disputed; and the present action followed.

The insurance companies have paid money into Court; and other proceedings have taken place unnecessary to refer to.

The defendants Caswell & Co. set up that the sawing was not well done, and that some of the logs were lost through the negligence of the plaintiff. Both these claims I find against on the evidence. A reduction of $300 should be made in the plaintiff's claim, in that he did not load; the claim of Caswell & Co. for material admittedly converted by the plaintiff, the parties have, in a business-like and common sense way, adjusted by setting off another small claim the plaintiff has against them. The plaintiff's claim for sawing as so reduced by $300 must be allowed.

Then as regards the right as against the bank. That a lien existed in favour of the plaintiff is clear, and indeed

is not disputed, but it is contended by the bank that the destruction of the goods destroyed the lien, and that the bank may consequently hold the whole amount of the insurance money as against the plaintiff. For this proposition is cited the case of United States v. Barney, 19 Am. & Eng. Encyc. of Law & Equity, 2nd ed., p. 34. In the text the case is cited only for the proposition that the lien expires when the property upon which it exists is destroyed—that of course must be so; no lien can attach if there be no property upon which it can attach. But the case being looked at, 3 Hughes (U. S.) 545, it is said incidentally that "it is apparent that there can be no lien where the property is annihilated or the possession parted with voluntarily and without fraud," citing Chapman v. Daley, 2 Vern: 117, and Ex p. Shank, 1 Atk. 234. The decision, however, is only that a claim of lien cannot be enforced to stop the passage of the United States' mail in a stage coach drawn by the horses upon which the lien is claimed. And I can find no authority suggesting that the rule contended for exists in law.

On principle, I do not think that the position of the bank can be maintained.

The insurance was upon the lumber, and covered the interests of all who had an insurable interest, at the least. That a lienor has such an interest is undoubted: Joyce on Insurance, secs. 1001, 1002. Had the insurance money been payable directly to the lumbermen, I think it not doubtful that they would have had it in their "hands bound by a trust in favour of the" plaintiff "to the extent of" his "interest in the subject matter of the insurance:" Imperial Bank of Canada v. Hinnegan, 5 O. W. R. 247, at p. 249. And I am unable to see that the circumstance that the money is made payable to the bank makes any difference.

The case of Johnson v. Campbell, 120 Mass. 449, is in some respects not unlike the present. There a consignee, who had made advances upon goods consigned to him, had effected an insurance for the benefit of the consignor; a fire took place, and the question arose as to whether the same lien existed upon the insurance money as upon the goods, and it was held that "when the goods were destroyed by fire the amount recovered upon their loss was substituted in their place and was held subject to the same lien." It is true that the insurance in this case was in the name of the factor himself, but the principle is not affected.

As to the position of third parties in the case of a lien, Hudson v. Granger, 5 B. & Ald. 27, may be looked at.

It would be an unfortunate result if the bank were to be allowed by reason of a fire to take the benefit of the plaintiff's work without paying for it; and I am glad that the law, as I read it, does not compel me to give the bank that advantage.

The pleadings will be amended by inserting the plaintiff's proper name, by adding in the reply a claim of the plaintiff against Caswell & Co. on an open account; then judgment will go setting off the claim so added against the claim for logs and lumber set out in the 6th paragraph of the pleading of Caswell & Co., and in other respects dismissing the counterclaim with costs, declaring that the plaintiff is entitled, as against the defendants Caswell & Co., to the sum of $5,962.30 and interest from the teste of the writ, and costs of action, claim, and counterclaim. As against the bank, the plaintiff is entitled to a declaration that he has a lien to the said amount upon the insurance money, to an order that the same be paid to him out of the money in Court, and that the bank shall pay the costs of the action, not including the costs of the counterclaim.

Were the proper conclusion that, the statute being given its full literal effect, the logs were the property of the bank (R. S. O. 1897 ch. 32, secs. 3 et seq.), the conclusion would follow that the contract for sawing made by Caswell & Co. should be held as so made as agents of the bank, and that the bank should be held personally liable for the amount of the claim, but I am unable to hold that, as between all the parties to this action, the logs were not the property of Caswell & Co.

BOYD, C. FEBRUARY 17TH, 1909.

TRIAL.

BRETT v. TORONTO R. W. CO.

Way—Private Lane in City—Surveys Act, R. S. O. 1897 ch. 181, sec. 39, not Applicable—Trespass—Tracks Laid and Cars Run by Street Railway Company—Consent of City Engineer—Mistakes—Damages for Permanent Injury to Private Property.

Action for an injunction and damages in respect of trespass to land.

E. V. O'Sullivan, for plaintiff.

Britton Osler, for defendants.

BOYD, C.:—The case was argued on the assumption that the locus in quo was within the scope of sec. 39 of the Surveys Act, R. S. O. 1897 ch. 181, which provides that allowances for roads, streets, and commons, in cities, etc., which have been laid out by private owners on plans thereof, and with reference to which lots have been sold, shall be public highways, streets, and commons. This is a somewhat new provision, first introduced by the Surveyors Act of 1887, 50 Vict. ch. 25, sec. 62. In my opinion, it does not apply to the place now in question, which is a lane, 14 feet wide, at the rear of the plaintiff's lot, over which the defendants have made their track and run their cars without her permission. A lane is not within the meaning of the words "roads, streets, or commons," nor is it within the purview of the section. That sufficiently appears by contrasting it with sec. 44 of the Act of 1887 (now sec. 20 of the present Act), in which provision is made for surveys by the authority of the executive government, and it enacts that in every city, etc., all allowances for any road, street, lane, or common laid out in the original survey shall be public highways and commons, and all posts, etc., placed in the original survey to designate any allowance for a road, street, lane, lot, or common, shall be the true boundaries of the road, street, lane, lot, and common.

The Act itself distinguishes between road and street, which may be regarded as synonymous, and lane, a narrow way which is less and other than a street in the city. This

is also a distinction observed colloquially, and the legislation is not of that character as interfering with private lanes which should be enlarged by liberal interpretation. This view of the Act appears to be recognised as correct in Re Morton, 6 A. R. at pp. 330, 334, and 335.

It was under a mistaken impression that this was a public lane that the city engineer sanctioned the construction of the railway track on this narrow strip of land. Failing public or municipal ownership of this lane, the whole proceeding was unwarranted and an invasion of the plaintiff's rights.

Even if the defendants are co-owners of some lots adjoining this lane, they have no right to use it for their tracks to the prejudice of others, such as the plaintiff, who are disturbed by the continual user of the lane by the defendants' cars. Evidence was given of damage, and I would assess it at $200, subject to a reference if either party desires. Costs to follow. If a reference, the Master will dispose of the costs.

I fix this amount as representing the permanent depreciation of the value of the lot by reason of the tracks, instead of proceeding by injunction—as both agreed to this as the better course. This judgment is also without prejudice to litigation as to reservation of one foot along the lane mentioned in the pleadings.

ANGLIN, J. FEBRUARY 18TH, 1909.

CHAMBERS.

REX EX REL. BLACK v. CAMPBELL.

Municipal Elections—Voters' List—Municipal Act, 1903, sec. 148—"Last List of Voters Certified by the Judge and Delivered or Transmitted to the Clerk of the Peace under the Voters' Lists Act"—Certifying of Lists of 1909—Time—Completion on Sunday—Delivery to Clerk of Peace after Opening of Polls—Commencement of Election on Nomination Day—Necessity for Certification and Delivery before that Day—"Last List" the List for 1908—Election Void because Proper List not Used—Saving Clause, sec. 204, not Applicable.

Motion by the relator, under secs. 219 et seq. of the Consolidated Municipal Act, to unseat the mayor and council-

lors of the city of St. Catharines, returned at the annual election for 1909.

The ground upon which the motion was based was that the proper list of voters was not used at the election, as prescribed by sec. 148 of the statute.

The motion was returnable before the Master in Chambers, but by consent was heard by ANGLIN, J., along with a motion in the Weekly Court in Martin v. City of St. Catharines, noted post.

W. N. Tilley and A. C. Kingstone, St. Catharines, for the relator.

A. W. Marquis, St. Catharines, for the respondent Campbell.

C. H. Connor, St. Catharines, for the other respondents.

ANGLIN, J.:—Counsel for the relator stated that his client did not intend to press the applications as against the respondent Campbell, the mayor of the city, who was declared elected by acclamation. As to him, therefore, the application will be dismissed with costs.

The material facts and dates upon which must depend the determination of the validity of the election of the municipal councillors appear from the material to be as follows:—

The voters' lists were finally revised by Judge Carman on 22nd December, 1908. The 3 copies of the revised list were handed to him by the clerk, pursuant to sec. 22 of the Voters' Lists Act, 7 Edw. VII. ch. 4, for certification on 29th December, but the clerk did not on that day hand to the Judge the original list revised by him. The Judge required this original list for the purpose of satisfying himself as to the correctness of the 3 copies. He did not obtain it from the clerk until Saturday 2nd January, 1909, when, according to the clerk's evidence, the Judge said to him, "Now, I will have to go over this list with the one you gave me, and I will have to work this afternoon and to-night to have it completed by Sunday." On the Sunday morning the clerk attended the Judge at his house, in response to a telephone call. The Judge had been unable to satisfy himself as to 6 names which appeared upon the 3 copies of the list handed to him by the clerk and which he could not find upon the list of appeals. The clerk explained to him that these 6 names had been placed on the roll by order of the

Court of Revision. The Judge was of the opinion that they were wrongly on the list, because their right had not been passed upon by himself in hearing appeals from the Court of Revision. He, accordingly, on Sunday 3rd January, struck these 6 names off the copies of the list furnished by the clerk. The clerk says the Judge "did not hand him the lists until Sunday. He certified to them some time between Saturday noon and Sunday. They were finished on Sunday, that is the truth of it." The certificate of the Judge attached to the 3 copies of the list is dated 2nd January, 1909. The clerk had already prepared and handed to the deputy returning officers for the several polling subdivisions, copies of the lists which he had submitted to the Judge for signature on 29th December. He gave these copies to the deputy returning officers on the Saturday evening, and at that time, he says, the lists had not been certified by the Judge. The copies given the deputy returning officers contained the 6 names which the Judge struck off the list on the Sunday. Otherwise they were correct copies of the lists as finally certified by the Judge. On Saturday evening the clerk struck two names off the copy of the voters' list given to one of the deputy returning officers. On Monday morning, before the polls opened, he appears to have attended at each of the polling places, except that at Western Hill, and to have struck from the several lists at these respective polling places the names removed by the Judge on the Sunday. The list for the Western Hill polling place contained only one such name, that of Mr. Bowman. The clerk had notified Mr. Bowman not to vote, and had received his promise that he would not vote. He did not correct the list at the Western Hill poll until some time during the day—he says it might have been in the afternoon. The copy of the list which should have been delivered or transmitted to the Clerk of the Peace under secs. 21 and 22 of the Voters' Lists Act, was not placed in his hands until 10 o'clock on Monday 4th January, when it was handed to him by Judge Carman. The nomination for municipal councillors took place on 28th December, 1908, and the polls for the election were opened from 9 o'clock in the morning until 5 o'clock in the afternoon of 4th January, 1909.

Section 148 of the Consolidated Municipal Act, 1903, reads as follows: "Subject to the provisions of the next following 3 sections, the proper list of voters to be used at

an election shall be the first and second parts of the last list of voters certified by the Judge and delivered or transmitted to the clerk of the peace under the Voters' Lists Act."

The relator contends that under this provision, having regard to the facts above stated, the proper list of voters to be used at the municipal election in St. Catharines held on 4th January last was the list prepared for the year 1908, because that was in effect "the last list of voters certified by the Judge and delivered or transmitted to the Clerk of the Peace under the Voters' Lists Act."

The materiality of the issue thus raised is apparent from the fact that in the Court of Revision held by Judge Carman on 22nd December there were some 200 changes made in the voters' list, and it was stated at Bar, without contradiction, that there were 300 names upon the voters' list for 1909 which were not upon the list for 1908.

From the evidence it is reasonably clear that, although the certificate of the Judge attached to the copies of the list bears date 2nd January, the copies were not finally approved by the Judge and certified by him Sunday 3rd January, and that they were on that day so certified, and one certified copy handed to the clerk of the municipality, pursuant to secs. 21 and 22 of the Voters' Lists Act. If what was done by the Judge on Sunday 3rd January is to be regarded as purely ministerial, upon the authorities its validity is perhaps not open to question. But if, on that day, he discharged judicial functions in regard to those lists, what he did of that character would be void. It is open to grave question whether the lists upon which the municipal elections in St. Catharines was held were, at any time prior to the close of the polls, or are now, legally certified lists. This point was not raised at Bar, and, in the view which I have taken of other aspects of this case, it is unnecessary to determine it.

Assuming that the list was validly certified by the Judge, was it the proper list of voters to be used at the municipal election? Mr. Tilley argued that the election commences with the nomination, and that the list to be used must be a list that has been certified by the Judge and delivered or transmitted to the Clerk of the Peace before the time at which nomination takes place. There is a great deal to be said in support of this contention. The electorate should, as pointed out in the East Durham Case, 1 Ont. Elec. Cas. 489, at p. 493, know beforehand who the authorised electors

are. Mr. Tilley's argument was that between the day of nomination and the day of polling each elector should be able to ascertain by inquiry at the office of the Clerk of the Peace, or of the clerk of the municipality, or from the County Court Judge, each of whom is supposed to have a certified copy of the voters' list in his possession, whether or not his name is upon the list of voters to be used at the election. I incline to think that this contention is sound, and that it is quite probable that the proper list to be used at the election is the last list of voters which has been certified by the Judge and delivered or transmitted to the Clerk of the Peace prior to the time of nomination. Section 23 of the statute appears to put it almost beyond doubt that the list to be used must be completed before nomination day, because, even in the case of a person dying after revision, the Judge is permitted to strike his name from the certified list only "before the day of nomination." It would appear from this provision that it was intended that the list to be used at the election should be complete and not subject to alteration after the time of nomination.

The statute in terms enacts that the list to be used shall be "the last list of voters certified by the Judge and delivered or transmitted to the Clerk of the Peace." This language is plain and unequivocal. The conjunction "and" may be contrasted with the conjunction "or" to be found in the third line of sec. 151. I think it is incontrovertible that, even though a list has been validly certified by the Judge, if it has not been delivered or transmitted to the Clerk of the Peace, at all events before the opening of the poll on polling day, it cannot be "the proper list of voters to be used at the election." Section 151, in my opinion, has no bearing upon the matter, because there was a list of voters certified by the Judge and transmitted to the Clerk of the Peace for the preceding year, and this list was, in my opinion, the last list of voters so certified and delivered, and, therefore, the proper list of voters to be used at the election.

It is true that the use of this list would have disfranchised a considerable number of persons whose names appear on the list for 1909, without any fault on their part. But that cannot be helped. The Voters' Lists Act apparently does not make it imperative upon the Judge to have the list of voters for the year prepared in time to permit of the municipal election in January being held upon it. The assessment roll

was returned on 7th October. Section 7 of the Voters' Lists Act, relied upon by Mr. Connor, directs that within 30 days after the return of the roll the clerk shall make out an alphabetical list of voters, shall cause 200 copies of the list to be printed in pamphlet form, and shall post up and deliver the copies as directed by sec. 9; that complaints against the list may be made within 30 days after such posting; and that the lists shall be finally revised, corrected, and certified by the Judge within one month after the day for making complaints. Under these provisions the Judge was not required finally to certify the list for the city of St. Catharines until 5th January, 1909. It is therefore manifest that it was not contemplated by the legislature that the voters' list for 1909 should necessarily be used at the municipal election for that year; hence the provision made by sec. 148, that "the proper list to be used . . . shall be the last list of voters certified by the Judge and delivered or transmitted to the Clerk of the Peace"—pointing clearly in this case to the list of the preceding year.

In my opinion, the list used was not the proper list, and the election held upon it cannot be supported.

It was argued that the use of the wrong list is merely a non-compliance with the provisions of the Act as to the taking of the poll or an irregularity which should be held to be cured by the provisions of sec. 204. In my opinion, this case does not come within sec. 204. The foundation of a contested election under the Municipal Act is the voters' list. As provided by sec. 165, his right to vote depends upon the elector's name being entered upon the voters' list. If an election is held upon a list which is not a voters' list or is not the proper voters' list to be used, it is not, in my opinion, an election conducted in accordance with the principles laid down in the Act.

But, if sec. 204 did apply, it would be, I think, impossible to say that "it appears" to the Court "that such non-compliance, mistake, or irregularity did not affect the result of the election." It was argued that the applicant must shew that the irregularity did affect the result of the election. This would involve treating the statute as if it read, "if it does not appear . . . that such non-compliance, mistake, or irregularity did affect the result of the election." Although some of the cases appear to lend colour to this view of the provisions of sec. 204, I can find no justification for so altering its plain language. The burden is upon the

applicant to establish the non-compliance, mistake, or irregularity; but, when that is shewn, the burden rests upon the person upholding the election to make "it appear . . . that such non-compliance, mistake, or irregularity did not affect the result of the election:" Re Hickey and Town of Orillia, 17 O. L. R. 317, 330-1, 12 O. W. R. 68, 433, 650.

For these reasons, I am of opinion that the election of the municipal council of the city of St. Catharines must be set aside, and that an order should issue for the holding of a new election. The respondents, other than the mayor, must pay to the relator his costs of this motion.

ANGLIN, J. FEBRUARY 18TH, 1909.

WEEKLY COURT.

MARTIN v. CITY OF ST. CATHARINES.

Municipal Corporations—Injunction to Restrain Council from Passing By-law—Illegality of Election of Councillors—Powers of de Facto Council—Impropriety of Acting when Election Attacked — Refusal of Injunction—Costs.

Motion by plaintiff to continue an injunction granted by the local Judge at St. Catharines restraining the defendants and their city council from proceeding with the third reading of a by-law to reduce the number of liquor licenses in the city, upon the ground of the illegality of the election of the mayor and councillors. See Rex ex rel. Black v. Campbell, ante.

W. N. Tilley, for plaintiff.

C. H. Connor, St. Catharines, for defendants.

ANGLIN, J.:—In view of the disposition of the motion to unseat the city councillors, it is unnecessary, in disposing of this motion, to say more than that the injunction sought has now become unnecessary. With the consent of the parties, the motion may be turned into a motion for judgment.

Upon the argument I expressed grave doubt whether the Court should enjoin the acts of a de facto council, though the legality of the election is questioned in pending proceedings. Further consideration has satisfied me that this view is correct. At the same time, the impropriety of municipal councillors seeking to force through such important legislation as a license reduction by-law while the validity of their election is seriously questioned in pending proceedings, and when there would in all probability be time to pass the by-law after the determination of such proceedings, if determined in their favour, seems to me not open to question.

For these reasons, I think that, while the plaintiff's action should be dismissed, it should be dismissed without costs. If both parties consent, this disposition may now be made of the matter. If not, either party refusing to consent may have the case taken down to trial to dispose of the question of costs, because that alone is now in issue, but he will do so at the peril of being mulcted in the entire costs of the action.

LATCHFORD, J. FEBRUARY 18TH, 1909.

WEEKLY COURT.

McCARTHY v. McCARTHY.

(TWO ACTIONS.)

Account—Claims and Cross-claims—Legacy—Conversion of Shares in Company — Insurance Policies—Reference to Master — Evidence — Report — Interest—Costs—Counterclaim.

Appeal by plaintiff from reports of local Master at Ottawa.

O. E. Culbert, Ottawa, for plaintiff.

H. Fisher, Ottawa, and P. K. Halpin, Prescott, for defendant.

LATCHFORD, J.:—These actions are between the same persons. One was begun on 19th March, 1906, and is called

in the proceedings "action No. 1." The other begun 30th May, 1906, is called "action No. 2." After the actions were instituted, the original defendant died, and they have been revived against his widow and executrix.

Upon the consent of all parties, both actions were referred for trial to the Master at Ottawa pursuant to sec. 29 of the Arbitration Act, R. S. O. 1897 ch. 62. The judgments of reference were made on different dates by different Judges, but are otherwise in identical terms. They provide "that the question of costs shall be disposed of by the Master, and that the party by whom any amount shall be found due pay to the party by whom such amount shall be found due the amount which the Master shall find to be payable."

The Master made his report in each case on 21st September, 1908.

In action No. 1 he finds the plaintiff entitled to recover from the defendant the legacy of $1,000 which he claimed, with interest at 6 per cent. from 28th June, 1899. This finding is, however, expressly made subject to a second finding that having taken an account of all the dealings and transactions between the plaintiff and defendant mentioned in the pleadings, the plaintiff is indebted to the defendant in the sum of $2,194.84. This amount is stated to be identical with what the Master by his report of even date in the second action found due by plaintiff to defendant in respect of the matters in question in action No. 2, and awards costs to the defendant.

By the report in action No. 2 the plaintiff is found not to be entitled to recover from the defendant the value of the 63 shares in the capital stock of J. McCarthy & Sons Limited, nor any amount, by way of damages, for the conversion or retention of such shares, or of the policies of insurance which the plaintiff alleged in his statement of claim the defendant had converted to his own use. The learned Master further finds, upon taking the accounts (including an account of the legacy referred to in his report on action No. 1), that the plaintiff is indebted to the defendant in the second action in the sum of $2,194.84, and awards costs to the defendant. He also finds that upon payment to the defendant of that sum, and her costs in both actions, the plaintiff is entitled to have transferred to him the 63 shares and the policies of insurance. These in the meantime the defendant is entitled to have assigned to her by the registrar of the Court at Ottawa, to whom they had

been transferred by order of Teetzel, J., dated 5th November, 1906.

The plaintiff appeals against both reports. The appeal upon the sceond action was argued first and may be considered first. It is objected that the Master had no power or authority to incorporate in his report in the sceond action the plaintiff's claim in action No. 1. That claim, it is alleged, was not dealt with in the pleadings or evidence in action No. 2, and the Master's action is tantamount to a consolidation of the two actions, a proceeding said to be contrary to the rules of practice.

Action No. 1 was, it is argued, against the original defendant as executor of his deceased brother. But in form, at least, if not in substance, it was against D. J. McCarthy personally.

Action No. 2 was in form and substance against the original defendant personally. Both actions as revived are against the same defendant in the same capacity; that is, as executrix of the defendant in the original actions. In both actions the original defendant set up—as I think he had a right to do—the same counterclaim. As allowed by the Master that counterclaim exceeded the amount claimed in the first action; and, in view of that fact and circumstances disclosed in the evidence, some of which I shall advert to later, the learned Master properly held, I consider, that the first action wholly failed, and was right in dismissing it with costs.

The Master charged against the plaintiff in the second action the balance of the counterclaim remaining after credit had been given to the plaintiff for the legacy of $1,000, originally due to him, but satisfied, as the Master found, by the payments made by the defendant to or on behalf of the plaintiff. It was, in my opinion, open to the Master, under the terms of the reference for trial, to settle and adjust between the parties the matters in dispute between them in both actions; and, unless the Master was wrong in regard to the question of the conversion of the shares, and in his allowance of certain disputed items, his findings are not, I think, open to question. There is no rule of practice of which I am aware forbidding what he has done. Moreover, to hold the plaintiff entitled to recover $1,000 from the defendant, when, upon the findings, he owes her—if that $1,000 is not taken into account—no less than $3,194, is a manifest injustice. If, therefore, the account of the de-

fendant against the plaintiff is properly more than his claim against her, his appeal in the first action should be dismissed.

The principal dispute in action No. 2 is whether the original defendant converted to his own use the 63 shares in the capital stock of the McCarthy Company, and whether the defendant wrongfully retains certain paid-up policies of insurance on the life of the plaintiff, amounting to $5,000.

Certificates representing 63 shares in the capital stock of J. McCarthy & Sons Limited were assigned by the plaintiff to his brother D. J. McCarthy in July, 1895. The shares represented the interest of the plaintiff in the estate of his deceased father, a brewer at Prescott. The plaintiff at the time was in financial difficulties, and his brother came to his rescue. The Master finds—and the evidence, especially the letters of the plaintiff, are conclusive upon the point—that the assignment of the shares was made to secure the general indebtedness of the plaintiff to his brother.

The assignments of the several share certificates Nos. 1 to 13 were written by the hand of the plaintiff. Though absolute in form, the assignments were intended as security only. New certificates, Nos. 21, 22, and 23, were filled in by the plaintiff himself on 26th July, 1895, and duly signed and sealed, declaring D. J. McCarthy to be the owner of the 63 shares. They were not removed from the book in which they were bound up with the forms of unissued certificates and receipt counterfoils for certificates issued and delivered. On the counterfoils of certificates 21, 22, and 23, D. J. McCarthy formally acknowledged receiving them from the company. He was thereupon entered in the books of the company as their owner. All that was done up to this time had been done with the concurrence and even co-operation of the plaintiff. Nothing that happened was inconsistent in any way with what had been arranged between the parties. The form of the transfers, absolute in its terms, rendered necessary the entry on the books of the company of the transferee as the owner of the shares.

He understood and the plaintiff recognised, as appears by the plaintiff's letter, written months afterwards, on 18th November, 1895, that the shares were held as security and not absolutely. Again on 16th March, 1896, the plaintiff writes to his brother (exhibit No. 116) referring to the shares as "held as security for advances made by you." The shares have never been parted with by the defendant, who is ready

to transfer them to the plaintiff as soon as the plaintiff pays her the amount of his indebtedness.

In addition to the issue of new certificates and the entry of the defendant as their owner in the books of the company, the plaintiff relies upon the fact that in the statutory returns to the Provincial Secretary for 1895 and subsequent years, he was not mentioned as a shareholder. A complete answer to this is that the plaintiff was not a shareholder. It would have been improper and even criminal to return under oath D. J. McCarthy or his estate as the owner of 63 shares less than he or his estate really held. It would have been equally improper to make a return shewing W. C. McCarthy to be the owner of the 63 shares which he had transferred to his brother. The utmost that could be expected was that the return should state, as the fact was, that D. J. McCarthy, or his estate, held 63 shares "as security." The statute does not require that information to be stated, and the omission to state it is, in my opinion, no evidence of conversion.

After the annual meeting of 1896 the plaintiff does not appear to have received notice of the annual meetings of the company, nor was he formally notified of the dividends, amounting in all to $1,638, declared upon the 63 shares in 1896, 1897, 1898, and 1899. He was present, however, at the meeting at which the first dividend was declared. The dividend on that occasion was paid to D. J. McCarthy, as were the dividends in the three succeeding years; but the plaintiff's account has been credited with all these dividends.

The plaintiff contends, upon the authority of the unreported case of McMullen v. Ritchie, referred to in Toronto General Trusts Corporation v. Central Ontario R. W. Co., 7 O. L. R. 660, at p. 667, 3 O. W. R. 520, that the circumstances mentioned established a conversion of the 63 shares. But the facts which were held in McMullen v. Ritchie to establish a conversion were entirely different from the facts in the case before me. Certain unregistered bonds and coupons delivered as security by the defendant were pledged by the plaintiffs for advances to themselves personally, and were registered at the head office of the Central Ontario Railway Company by the plaintiffs in their own names, as absolute owners thereof, under the terms of a certain mortgage, and were otherwise treated by the McMullens as their absolute property. The registration of the bonds effected

such a change in their character that it was rightly held to amount to a conversion.

But nothing has happened in the present case in any way changing the character of the shares. This the plaintiff recognised as late as 21st February, 1905, when he wrote to his brother as follows: "You hold $6,300 of my stock, in addition to the $1,000 due me under John's will, as security for what I owe you" (exhibit 47). This letter was written with full knowledge of all the facts. The learned Master was, I think, right in finding that there was no conversion of the 63 shares.

There is no evidence whatever to sustain the plaintiff's contention that the defendant wrongfully retains from him the two paid-up policies in the Canada Life Assurance Co. The policies were assigned by the estate of John Ryan to D. J. McCarthy when he paid the estate its claim against the plaintiff. Until such advances are paid, the executrix of D. J. McCarthy is entitled to hold the policies. The Master has determined the amount of the advances made, and the amount of the credits to which the plaintiff is entitled. I have gone carefully over the evidence and the accounts, and I see no reason for questioning any of the items as found.

It is strongly urged by the plaintiff that he should not be held liable for the interest. The Master has computed the interest without rests: McCarthy v. McCarthy, 12 O. W. R. 1123; and there seems to me no valid reason why interest should not be charged against the plaintiff. Interest has been allowed him on his legacy of $1,000. I am quite unable to allow the appeals of the plaintiff on any ground. They should be dismissed with costs. The reports of the Master are confirmed, and judgment in each action should be entered accordingly.

RIDDELL, J. FEBRUARY 18TH, 1909.

TRIAL.

SEXTON v. GRAND TRUNK R. W. CO.

Railway—Animals Killed on Track—Intersection of Railway with Highway—Cows Driven by Boy of Ten Years—Railway Act, R. S. C. 1906 ch. 37, secs. 294, 294 (3)—"Competent Person" — Negligence — Failure of Servants of Railway Company to Give Warning of Approach of Train —Evidence—Findings of Jury—Motion for Nonsuit.

Action for damages for the loss by plaintiff of 4 cows killed by a railway train of defendants at a highway crossing.

J. M. Godfrey, for plaintiff.

W. E. Foster, for defendants.

RIDDELL, J.:—This is a case tried before me with a jury at the Toronto assizes. The facts are very simple.

The plaintiff, who is a farmer residing in the township of Scarborough, on 25th July last, about the time that the morning train going east was expected, sent his son, a lad of 10, to take 14 cows along a public highway, across the line of railway, to a field south of the track. The train came along and killed 4 of the cows, the train travelling at the usual speed and at the usual time.

Four questions were submitted to the jury, which questions I here set out with the answers:—

1. Were the cows killed through the negligence of any one? Ans. Yes.

2. If so, what was the negligence? Answer fully. Ans. In not blowing whistle and ringing the bell at the proper time. We also believe the engineer could have stopped his train in time to have avoided the accident.

3. Damages, if any? Ans. $200.

4. Was the lad a "competent person?" Ans. Yes.

A motion for nonsuit had been made at the close of the plaintiff's case, and reserved; this motion was again made at the close of the whole case, and again reserved. I now proceed to dispose of the case.

There was evidence upon which the jury might find that the accident was caused by the neglect of the defendants'

servants to give the statutory signals, but none to justify the second alleged act of negligence—there was no evidence upon which the jury could find that the engineer could have stopped the train after seeing the cows. This is immaterial, however, as there is quite sufficient in the first finding of negligence to support a verdict for the plaintiff, if he is otherwise entitled to such verdict. Under the practice I have nothing to do with the weight of evidence.

The damages are such as are justified by the evidence, at least under my charge, permitting as I did the jury to give such damages as they thought fair for loss of profits which would take place before the plaintiff could replace his cows—the cows that were killed were milch cows, the milk from which the plaintiff was selling.

The whole question I have now to determine is, whether I should have granted a nonsuit, and whether, notwithstanding the finding of the jury in answer to the last question, the defendants are not entitled to a nonsuit, or, more correctly speaking, to a verdict.

The argument for the defendants is based upon R. S. C. 1906 ch. 37, sec. 294 and sec. 294 (3): "No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail level, unless they are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway. . . . 3. If the horses, sheep, swine or other cattle of any person which are at large contrary to the provisions of this section, are killed or injured by any train, at such point of intersection, he shall not have any right of action against any company in respect of the same being killed or injured."

The express words of the statute, as well as the history of the legislation and decisions, make it abundantly clear that the bare fact of the cattle being at large without being in charge of some competent person, as required by the statute, would deprive the owner of all right to recover, even though the accident was caused by the negligence of the railway; the legislation was introduced for the safety of the public, and not simply to advantage the railway company.

It is argued that the decisions are such that I must hold as a matter of law that the lad here was not a "competent" person within the Act; and Mr. Foster, in the very careful and comprehensive argument put in, cites a number of

authorities which, he contends, put this beyond dispute. I have not been able to agree with this contention.

The first of the statutes was that of 1857, 20 Vict. ch. 12, sec. 16: "No horses, sheep, or swine or other cattle, shall be permitted to be at large upon any highway within a half mile of the intersection of any highway with any railway on grade, unless the same respectively shall be in charge of some person or persons to prevent their loitering or stopping on such highway at such intersection with any railway . . . and no person any of whose cattle so at large shall be killed by any train at such point of intersection, shall have any cause of action against any railway company in respect of the same being so killed." . . .

[Reference to cases decided under that statute: Simpson v. Great Western R. W. Co., 17 U. C. R. 57; Ferris v. Grand Trunk R. W. Co., 16 U. C. R. 474; Thompson v. Grand Trunk R. W. Co., 18 U. C. R. 92.]

This case (the Thompson case) is no authority for the proposition that a boy of 14 or of 10 years of age is not quite competent to take charge of cows. And the second of the grounds upon which the judgment is put, namely, that the plaintiff was guilty of contributory negligence in sending his horses in charge of a boy, without bridle or means of control, after dark, has likewise no application to the present case. It is usual to have horses haltered, but not cows. . . .

[Reference to Cooley v. Grand Trunk R. W. Co., 18 U. C. R. 96.]

In this case also the facts shewed that the horses were not under control.

Then came the consolidation in 1859, the C. S. C. ch. 66; secs. 147 and 149 of which contained the provisions which I have set out, almost totidem verbis. . . .

[Reference to cases decided under that statute: McGee v. Great Western R. W. Co., 23 U. C. R. 298; Markham v. Great Western R. W. Co., 25 U. C. R. 572.]

The new Dominion Act of 1888, 51 Vict. ch. 29, sec. 271, contains in sub-secs. (1) and (3) the same provisions. Under that statute Thompson v. Grand Trunk R. W. Co., 22 A. R. 453, was decided. (The case of Duncan v. Canadian Pacific R. W. Co., 21 O. R. 355, does not seem to be in point.) The Thompson case is much relied on by the defendants here. Mr. Justice Osler, in giving the judgment of the Court of Appeal in that case, a County Court case, said: "I cannot

see that under the circumstances the fact that the animals were cows and not horses, as in the above case, makes any difference." But my learned brother is not saying that there is no difference in cows and horses in respect of the proper manner of handling and managing them—he goes on to say, "The point is, that they were left unattended." . . Mr. Justice Osler . . . (further) says (p. 460): "The boy left some of the cattle standing on the road while he went to recover the one which had run off in a direction where no danger was to be anticipated. How can he be said to have been in charge of the others, within the meaning of the Act? He had got so far away from them that it was impossible for him to prevent them from reaching the track and loitering upon it or to drive them off it when he saw them there before the train could arrive at the point of intersection. As was said in the Thompson case (18 U. C. R. 92), the boy foolishly took it for granted that they would stand still on the road, but they went on, as they were very likely to do, toward the crossing." And it was under these circumstances that the words referred to above were made use of by the learned Judge. After using the words already mentioned, he goes on to say: "The servant's plain duty was to have driven those which had not escaped, up the road into the field, before going after the heifer. The others were at large on the highway. His attention was withdrawn from them, and while he was absent, and thus unable to control their movements, they cannot, in my opinion, be said to have been in charge of any one, within the meaning and for the purpose of the Act." It will be seen that the facts of that case led the Court to hold that the cows were not "in charge."

The Railway Act of 1903 made a slight change, 3 Edw. VII. ch. 58, sec. 237; and this is brought forward in the revision in the form set out in the early part of this judgment.

I find nothing to shew that it must be held as a matter of law that these cattle were not in charge of a competent person. The boy swore that, had the whistle blown or the bell rung, he could and would have got the cattle over the track in time; the jury saw fit to believe him; and, while I might not have found in the same way had I been trying the case, I cannot say that his story was incredible. The cows were being driven in the manner in which cows are usually driven in this country; and the same precautions which should be taken in the case of horses would be ludicrous in

the case of cows; our farmers do not put halters or bridles on cows, and I can find no authority which compels me to say that they should. I should require express authority.

The statement of Hagarty, J., in the Markham case, I think appeals to common sense, viz., "If animals usually driven, viz., oxen . . . have to approach or cross a railway, we should naturally consider them as in charge when the person or persons driving them could readily head them off or turn them, if necessary, from the track." There is nothing to shew that the 10-year old boy could not have done this—the jury have seen fit to believe his own account of his capacity, and I have no right to interfere with their finding.

I think the plaintiff must have judgment for $200 and costs on the proper scale.

I have not thought it necessary to refer to the other legislation in the matter, as no advantage seems to be derivable from a consideration of these statutes; I have, however, read all the Acts in pari materia.

ANGLIN, J. FEBRUARY 19TH, 1909.

CHAMBERS.

CLEGGE v. GRAND TRUNK R. W. CO.

Writ of Summons—Service out of the Jurisdiction — Rule 162 (e), (g)—Railway—Carriage of Goods—Contract—Connecting Lines—Necessary or Proper Party—Agency—Partnership—Place of Contract—Place of Performance.

Appeal by plaintiff from an order of the local Judge at Stratford setting aside service of the writ of summons and statement of claim in this action upon the defendants the Toledo, St. Louis, and Western R. R. Co.

W. E. Middleton, K.C., for plaintiff.

R. C. H. Cassels, for defendants the Toledo, St. Louis, and Western Railroad Co.

ANGLIN, J.:—The plaintiff sues to recover damages for failure to deliver at Ogden, in the State of Utah, certain household goods given by him to the defendants the Grand Trunk R. W. Co., on 4th June, 1907, for carriage from

Stratford to Ogden, for which the plaintiff paid to the Grand Trunk R. W. Co. the sum of $38.50.

The statement of claim alleges:—

"4. That by the terms of the contract entered into by the Grand Trunk Railway Company of Canada and the plaintiff on the 4th day of June, 1907, the said company agreed to send the plaintiff's goods from Stratford to Ogden, Utah, by the following route; Stratford to Detroit by the Grand Trunk Railway, Detroit to Toledo by the Detroit and Toledo Shore Line Railroad, from Toledo to St. Louis by the Toledo, St. Louis, and Western, from St. Louis to Ogden by the Union Pacific and Chicago Rock Island and Pacific.

. . . .

"9. That the defendants the Grand Trunk Railway Company of Canada and the Toledo, St. Louis, and Western Railroad are the joint owners of the Detroit and Toledo Shore Line Railroad, and are now operating the same for the mutual benefit of the partnership."

The plaintiff further alleges non-delivery of the goods and failure on the part of the Grand Trunk Railway Company to locate them. There is no other material allegation in the plaintiff's pleading.

The local Judge held that this pleading disclosed no cause of action against the defendants the Toledo, St. Louis, and Western R. R. Co., and that any cause of action against that company which the plaintiff might contend he has disclosed, must be such that he cannot be permitted to serve his writ out of the jurisdiction.

Mr. Middleton contended that upon the proper construction of the statement of claim it alleged a contract made by the Grand Trunk R. W. Co., on their own behalf and also as agents for their connecting lines, including the Toledo, St. Louis, and Western R. R. Co. He further contended that, by implication, loss of the plaintiff's goods upon the Detroit and Toledo Shore Line Railroad is alleged, and that it is also alleged that this line of railway is owned and operated by the Grand Trunk R. W. Co. and the Toledo, St. Louis, and Western R. R. Co. as partners; that the contract alleged should be taken to have been made on behalf of this partnership, and that, therefore, the Toledo, St. Louis, and Western R. R. Co. is a proper or necessary party to the action against the Grand Trunk R. W. Co., and might properly be served out of the jurisdiction under the provisions of Rule 162 (g).

The purport of the contract sued upon is stated in the fourth paragraph of the statement of claim above quoted. It is not set up as a contract entered into by the Grand Trunk R. W. Co. as agents for the Toledo, St. Louis, and Western R. R. Co. On the contrary, it is pleaded as a contract made by the Grand Trunk R. W. Co., and involves, not an allegation that the Grand Trunk entered into such contract as agents for the connecting lines, but rather that they undertook to make contracts with the connecting lines whereby they would be enabled to fulfil their own contract to carry the plaintiff's goods from Stratford to their destination. As pointed out by the local Judge, such a contract would not establish privity between the plaintiff and the Toledo, St. Louis, and Western R. R. Co., and the plaintiff would have no cause of action for its breach against that company. Although a partnership between the Toledo, St. Louis, and Western R. R. Co. is alleged in paragraph 9, it is not alleged that the goods were lost upon the line of railway said to be operated by such partnership, and it is not alleged that the Grand Trunk R. W. Co. made the contract as agent for the partnership or as a member of such partnership, but rather that the contract was made with the plaintiff by the Grand Trunk R. W. Co. on their own behalf. From every point of view, therefore, I agree with the view of the learned Judge that the statement of claim does not disclose any cause of action against the Toledo, St. Louis, and Western R. R. Co. In the absence of an allegation in the statement of claim that the Grand Trunk R. W. Co. contracted as agents for their co-defendants—that the plaintiff intends to allege—such agency will not be presumed. Without such an allegation a cause of action against the Toledo, St. Louis, and Western R. R. Co. is not disclosed; and upon the allegations in the statement of claim the present motion must be disposed of.

In the absence of a contract made by the Grand Trunk R. W. Co. on behalf of the partnership and binding upon the partnership, consisting of the Grand Trunk R. W. Co. and the Toledo, St. Louis, and Western R. R. Co., I cannot see how the latter can be held to be a proper or necessary party to the plaintiff's action against the Grand Trunk R. W. Co., so as to bring the case within clause (g) of Rule 162. Again, if any contract was made by the Grand Trunk R. W. Co. on behalf of the Toledo, St. Louis, and Western R. R. Co., that contract was not broken in Ontario, nor was it to be performed within Ontario. The case is, there-

fore, not brought within clause (e) of Rule 162, which permits service out of the jurisdiction in an action "founded on a breach within Ontario of a contract, wherever made, which is to be performed within Ontario."

For these reasons, I think the order of the local Judge must be sustained, and this appeal dismissed with costs.

ANGLIN, J. FEBRUARY 20TH, 1909.

CHAMBERS.

BLAYBOROUGH v. BRANTFORD GAS CO.

Fatal Accidents Act—Death of Adopted Child—Construction of Statute—Right of Action not Given—Summary Dismissal of Action—Rule 261.

Motion by defendants, under Rule 261, to strike out the statement of claim in this action, on the ground that it disclosed no cause of action against them.

C. S. MacInnes, K.C., for defendants.

W. J. McCarthy, for plaintiff.

ANGLIN, J.:—The action is brought by the plaintiff on behalf of himself and his wife, Charlotte Blayborough, to recover damages for the death of their adopted son.

The defendants contend that the death of an adopted son, though caused by negligence, gives no cause of action to the persons whose adopted child was killed. Any right of action to recover compensation for the death of persons killed by negligence is purely statutory, and the statute (the Fatal Accidents Act, R. S. O. 1897 ch. 166, sec. 3) provides that the action shall be "for the benefit of the wife, husband, parent, and child of the person whose death has been so caused." "Parent" is defined (by sec. 1) to "include father, mother, grandfather, grandmother, stepfather, and stepmother." It does not include persons whose adopted child has been killed. Even the mother of an illegitimate child is not within its terms: Gibson v. Midland R. W. Co., 2 O. R. 658; Dickinson v. North Eastern R. W. Co., 2 H. & C. 735. "The law of England, strictly speaking, knows nothing

of adoption, and does not recognise any rights, claims or duties arising out of such a relation, except as arising out of an express or implied contract:" Eversley on Domestic Relations, 3rd ed., p. 174. This statute, creating a new cause of action, "must be strictly followed, and it is only those named in the statute as persons entitled to bring the action who can bring it. . . . The Courts will not, by any liberality in the construction of the language of the Act, extend it to cases, or for the benefit of persons, not coming within its precise terms:" McHugh v. Grand Trunk R. W. Co., 2 O. L. R. 600, 602, 606.

In my opinion, the statement of claim in this action discloses no cause of action against the defendants, and should be struck out under the provisions of Rule 261. It follows that the action must be dismissed, and with costs, if, in the circumstances, the defendants ask costs.