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APPELLATE DIVISION.

OCTOBER 1ST, 1913.

FIELD v. RICHARDS.

Trespass—Cutting Timber—Damages—Injunction—Costs.

Appeal by the defendant from the judgment of MIDDLETON, J., 4 O.W.N. 1301.

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

J. E. Jones, for the defendant.

R. C. Levesconte, for the plaintiff.

THE COURT dismissed the appeal with costs.

OCTOBER 2ND, 1913.

OTTAWA AND GLOUCESTER ROAD CO. v. CITY OF OTTAWA.

Highway — Bridge — Liability for Maintenance and Repair — Road Company—Municipal Corporations, City, County, and Township—Right of Road Company to Abandon—General Road Companies Act — By-law — Agreement — Validating Statute.

Appeal by the defendants the Corporation of the City of Ottawa from the judgment of KELLY, J., 4 O.W.N. 1015.

The appeal was heard by MULOCK, C.J.EX., RIDDELL, SUTHERLAND, and LEITCH, JJ.

F. B. Proctor, for the appellants.
Grayson Smith, for the other defendants.
G. F. Henderson, K.C., for the plaintiffs.

THE COURT dismissed the appeal with costs.

OCTOBER 3RD, 1913.

TRUESDELL v. HOLDEN.

Malicious Prosecution—Reasonable and Probable Cause—Finding of Jury—Damages.

Appeal by the plaintiff from the judgment of MIDDLETON, J., 4 O.W.N. 1138, dismissing an action for malicious prosecution, notwithstanding the finding of the jury in favour of the plaintiff for $500 damages.

The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.
J. Birnie, K.C., for the plaintiff.
A. E. H. Creswicke, K.C., for the defendant.

THE COURT allowed the appeal with costs, and directed judgment to be entered for the plaintiff for $500 without costs.

HIGH COURT DIVISION.

KELLY, J., IN CHAMBERS. SEPTEMBER 29TH, 1913.

REX v. HAMILTON.

Municipal Corporation — County By-law Regulating Pedlars—Peddling on Boundary Line between Counties without License—Magistrate's Conviction—Jurisdiction—Municipal Act, 3 & 4 Geo. V. ch. 43, secs. 433, 436, 439.

Motion by the defendant to quash his conviction by a Justice of the Peace for the County of Huron for peddling and selling goods in the county, without a license, contrary to a county by-law.

J. G. Stanbury, for the defendant.
W. Proudfoot, K.C., for Albert Whiteside, the informant.

KELLY, J.:—An application to quash a conviction for peddling and selling goods in the county of Huron, contrary to a by-law of that county.

The only evidence taken on the investigation before the magistrate was that of the defendant, who admitted that, being a non-resident of the county of Huron, he did on the 5th August, 1913, go from place to place on the boundary road between the township of Tuckersmith (in the county of Huron) and the township of Hibbert (in the county of Perth) with a team of horses and a waggon drawing goods, etc., and that he did then on that boundary road sell goods, etc., and that he did not then hold a license from the County of Huron as required by the by-law of that county relating to the licensing and regulation of hawkers, pedlars, etc.

Under the authority of sub-sec. 14 of sec. 583 of the Consolidated Municipal Act, 1903 (3 Edw. VII. ch. 19), the Municipal Council of the County of Huron, in 1906, passed a by-law (which was amended in 1913) requiring all hawkers, pedlars, and petty chapmen, and other persons carrying on petty trades within the county, to procure, in the manner therein provided, a license before exercising such occupation or calling.

The statute R.S.O. 1897 ch. 3, sec. 16, sets forth that the county of Huron shall consist of the townships, towns, and villages therein enumerated.

The defendant's contention is, that the boundary road on which he sold the goods is not within the county of Huron, and that, therefore, he did not offend against the by-law.

There is nothing in the Municipal Act, as it stood prior to the passing of the Act of 1913 (to which reference is made below), expressly or by inference making a boundary road such as this a part of the county, or which would have the effect of extending the operations of the by-law over it. It, therefore, becomes necessary to consider the effect of the Municipal Act of 1913, 3 & 4 Geo. V. ch. 43. By sec. 433 of that Act it is enacted that, unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act; and sec. 439 declares that the councils of the local municipalities between which they run shall have

joint jurisdiction over all boundary lines, whether or not they form also county boundary lines, which have not been assumed by the council of the county, etc.

The informant contends that sec. 433 enlarges the jurisdiction of the County of Huron over the boundary road in question in such manner and to such extent as to make the by-law applicable to this road, and so constitute the acts of the defendant, for which the conviction was made, a breach of that by-law.

I am of opinion that that contention cannot prevail. It has not been shewn that the county council has taken any steps to obtain for itself alone control and jurisdiction over this road, such as by assuming it as a county road under the provisions of sec. 446, sub-sec. 3, in which event it would have acquired the jurisdiction conferred by sec. 436, sub-sec. 1 (a), consequent upon which the soil and freehold would have become vested in the corporation of the municipality (sec. 433). In the absence of some such action on the part of the county, I do not think that, under the circumstances as they appear, the Act of 1913 has the effect of extending the limits of the county of Huron so as to make the by-law operative over the road in question. If the effect of sec. 439 is to confer joint jurisdiction on the two counties, then joint action on their part would become necessary; but it is not shewn that there is in existence any by-law of the county of Perth dealing with the licensing or regulation of hawkers, etc.

The only conclusion I can arrive at is, that the defendant was not liable to conviction for selling as he did.

The conviction should, therefore, be quashed with costs, but with a protection order to the magistrate.

MIDDLETON, J. SEPTEMBER 30TH, 1913.

BIRD v. HUSSEY-FERRIER MEAT CO.

Company—Contract Made by Individual—Evidence to Establish Agency for Company—Failure to Shew Ratification—Authority of Director—Absence of Holding out—Apparent Authority—Liability of Individual—Novation.

Action for a declaration that the defendant William C. Ferrier, in purchasing land and a butcher's business from the plaintiff, acted as agent for the defendant comany and held the pro-

perty purchased as trustee for the company, and for an account and payment by the company of the amount which should be found due upon the agreement of sale and purchase.

J. McEwen, for the plaintiff.
V. McNamara, for the defendant company.
J. L. O'Flynn, for the defendant William C. Ferrier.

MIDDLETON, J.:—The defendant company is incorporated, under the Ontario statute, for the purpose of carrying on a wholesale and retail business as a dealer in live stock, meats, produce, etc. Its affairs were carried on with extreme laxity. The charter was dated the 3rd April, 1911, and the usual organisation meetings were held early in May. Mr. Hussey was elected president, Mr. A. B. Ferrier, vice-president; and these two, with Mr. Robinson and Mr. Drury, were elected directors. These four gentlemen practically constitute the company.

Although the company at once went into business and had substantial transactions, no directors' meeting appears to have been held until the 30th July, 1912, when a meeting was held to pass a formal resolution relating to a bank advance.

In the meantime it had been arranged between the directors of the company that the active management of the business should be divided between the different directors, Mr. A. B. Ferrier being placed in charge of that part of the business centering around Thessalon: the object of the company being to establish a series of stores in Sault Ste. Marie, Thessalon, and other western towns, and to obtain, if possible, practically the control of the entire retail butcher's business of the district.

The plaintiff was carrying on business in Nesterville, a village near Thessalon. Mr. W. C. Ferrier had been employed by the company; and Mr. A. B. Ferrier, in pursuance of the general policy of the directors, instructed Mr. W. C. Ferrier to negotiate with Bird for the purchase of his business. Ferrier undertook the negotiation, and finally arrived at an agreement, dated the 4th June, 1912, by which he agreed to purchase the lands used in connection with the plaintiff's butcher business for $1,500, payable $250 at the time of the execution of the agreement, $50 in thirty days, and the balance in monthly instalments of $20 with interest at 8 per cent. This agreement was entered into by Ferrier in his own name, and is under seal. Although the agreement relates solely to the lands, the intention was to purchase the entire business.

Ferrier, at the time of the execution of this agreement, paid $5 of his own money. This was afterwards refunded to him by the company, and the company paid the first two instalments, amounting to $300; and Ferrier took possession on behalf of the company.

Subsequently an agreement was made, dated the 13th June, 1912, between Ferrier and the company, by which Ferrier was employed to take charge of this particular business at Nesterville, upon a salary. Contemporaneously, a document was drawn, bearing date the 13th June, 1912, reciting the agreement of the company to take over Ferrier's agreement with Bird and undertaking to indemnify him with respect thereto.

Some evidence was given at the hearing indicating that a copy of this agreement had been signed; but, as it was not produced, and the evidence was unsatisfactory, I am unable to find that it ever was executed.

The business was carried on by Ferrier on behalf of the company for some months; and during that time payments were regularly made of the monthly instalments as they fell due; the last payment being that falling due in October.

A fire then took place, which destroyed the building and contents; and, on Bird looking to the company to continue the payments, it repudiated the entire transaction; taking the position that Mr. A. B. Ferrier had no authority to enter into the arrangement made.

It appears that Mr. A. B. Ferrier entirely misrepresented to his co-directors the agreement that he had entered into. They understood that he had purchased the business and fixtures for $300 and had rented the premises at $20 per month.

Under these circumstances it is impossible to find any ratification on the part of the company by anything that was done; and the case must be determined upon other grounds.

The plaintiff relies upon the judgment of Garrow, J.A., in National Malleable Castings Co. v. Smiths' Falls Malleable Castings Co., 14 O.L.R. 22, where it is said (p. 28): "The board of directors would certainly, I think, have had power to bind the company by entering into such an agreement. And if the board could lawfully have done so, they could also, I think, have authorised the manager to do so for the company. And, in the total absence of bad faith or notice, the plaintiffs were entitled to assume that he had been duly clothed with the real authority which he was ostensibly exercising in entering into the contract in question."

This does not mean that the manager of a company is presumed to have authority to enter into any contract intra vires of the directors, but was spoken of the contract there in question—a mercantile contract for the manufacture of goods. The distinction is well shewn in Cartmell's Case, L.R. 9 Ch. 691, where the principle is confined to cases "of an individual or body corporate, carrying on business in the ordinary way, by the agency of persons apparently authorised by him or them, and acting with his or their knowledge. The case differs in no respect from the ordinary one of dealings at a shop or counting-house; the customer is not called upon to prove the character or authority of the shopman or clerk with whom he deals; if he is acting without or contrary to the authority conferred upon him by his employers, it is their own fault." And it is further said that "the plaintiffs could only know that the directors had power to appoint persons to perform the duties they appeared to be doing; and they had a right to assume that they were duly and properly appointed."

The Court in that case refused to extend the application of the principle to a matter outside of the ordinary dealings of the company, although the transaction was one clearly within the authority of the directors.

But there is another and more fundamental difficulty in the plaintiff's way. In this case there was no holding out, and there is no room for the application of the principle relating to apparent authority; for the contract was not with the company but with W. C. Ferrier; and, when the plaintiff alleges that Ferrier was acting as agent for the company, and seeks to hold the company liable upon a contract entered into with the agent, he must establish an agency in fact. He has failed to do so; and he cannot, therefore, enlarge the obligation of W. C. Ferrier upon which he was content to rely when he made the agreement in question.

W. C. Ferrier remains liable upon that agreement. He could only be relieved by something amounting to a novation. This is not established.

Judgment will, therefore, be for the plaintiff against W. C. Ferrier for the amount due, with costs; and the action as to the company will be dismissed without costs.

MIDDLETON, J., IN CHAMBERS. OCTOBER 1ST, 1913.

LANGE v. TORONTO AND YORK RADIAL R.W. CO.

Discovery—Examination of Servant of Defendant Railway Company—Rule 327—Injury to Passenger on Street-car—Examination of Conductor—Adequate Discovery—Application for Examination of another Servant of Company—Grounds for.

Appeal by the defendants from an order of the Senior Registrar, sitting for the Master in Chambers, dated the 24th September, 1913, directing the examination of John Break a servant of the defendant company, for discovery, at the instance of the plaintiff, notwithstanding the prior examination of one Thomas Walker, also an employee of the defendants.

Featherston Aylesworth, for the defendants.
A. W. Burk, for the plaintiff.

MIDDLETON, J.:—Rule 327 (new Rules, 1913) precludes the examination of a second officer or servant of a corporation without leave. This action is an ordinary accident case. The plaintiff alleges that she was injured by the premature starting of a street-car. The conductor of the car has been examined for discovery. He was present at the time of the accident, and has answered satisfactorily all questions put to him, and has given a clear and intelligible account of what took place.

It appears that Break happened to be near the car at the same time, and he also saw the occurrence. He was not in charge of the car, nor was he in any way concerned with its operation. He was merely an eye-witness of the accident. There is no suggestion that the discovery afforded by the examination already had is not adequate, and does not completely disclose to the plaintiff the case she will have to meet. Under these circumstances, I can see no justification for the further examination.

In my view, leave should not be granted to have a second examination unless for some reason the examination already had has failed to give to the party seeking it the discovery to which he is entitled. It is not enough to establish that the person whose examination is sought may be a most important witness at the trial.

The appeal will, therefore, be allowed, with costs here and below to the defendants in the cause in any event.

LATCHFORD, J., IN CHAMBERS. OCTOBER 1ST, 1913.

EVERLY v. DUNKLEY.

Costs—Scale of—Action Brought in High Court—Jurisdiction of County Court—Amount Awarded by Judgment—Amount Claimed—Set-off—Rule 649.

Appeal by the plaintiff from the ruling of the Local Registrar at Chatham, upon taxation of the plaintiff's costs, as to the scale of costs.

Shirley Denison, K.C., for the plaintiff.
H. S. White, for the defendant.

LATCHFORD, J.:—Ths is an appeal from the ruling of the Local Registrar at Chatham determining that the plaintiff is entitled only to County Court costs under the judgment as settled by counsel for the parties, and—though never formally entered—used upon the appeal to a Divisional Court, reported (1912), 27 O.L.R. 414, and that his taxation must proceed accordingly; the defendants to be entitled to tax their costs as between solicitor and client on the former High Court scale, with right of set-off and allowance as provided by Con. Rule 1132 of the Rules of 1897, now Con. Rule 649.

The judgment declared the plaintiff to be "entitled to recover from the defendants $422.09, being $542.17, the amount sued for, and interest on $416.92 from the 15th April, 1912, to the date of the judgment, less $125.25 paid by the defendant Dunkley for funeral expenses and doctor's bills."

I think the learned Registrar erred. He evidently treated the amount awarded by the judgment as the test of whether the action was within or in excess of the jurisdiction of the County Court. There are indeed many cases where that is the test. But there are many others in which it is not. This case is one where the amount of the judgment is not conclusive as to the proper jurisdiction. The sum claimed exceeded $500. The set-off of $125.25 allowed by the trial Judge was not pleaded. It was not assented to by the parties so that in law it constituted a payment. In the absence of such an assent, "a plaintiff"—to use the language of Middleton, J., in the late case of Caldwell v. Hughes (1913), 4 O.W.N. 1192—"having a claim against which

a defendant may, if he pleases, set up a set-off, must sue in the superior Court; for he cannot compel the defendant to set up his claim by way of set-off, and he cannot, by voluntarily admitting a right to set-off, confer jurisdiction upon the inferior Court."

The appeal is allowed with costs.

KELLY, J. OCTOBER 1ST, 1913.

COOPER v. JACK CANUCK PUBLISHING CO.

Libel—Pleading—Statement of Claim—Cause of Action—Application of Defamatory Words to Particular Person—Parties—Joinder of Plaintiffs — Rule 66 — Embarrassment—Particulars.

Motion by the defendants to strike out the statement of claim in an action for libel on two grounds: (1) that it disclosed no cause of action; (2) for misjoinder of parties.

A. R. Hassard, for the defendants.
J. G. Farmer, K.C., for the plaintiffs.

KELLY, J.:—On neither ground do I think that the defendants are entitled to succeed. Without reviewing the authorities or discussing fully their effect or application here, I am of opinion that the first ground of the present application is met by such cases as Le Fanu v. Malcomson (1848), 1 H.L.C. 637, and Albrecht v. Burkholder (1889), 18 O.R. 287. In the former of these Lord Campbell (at pp. 667 and 668) says: "The first objection is that this libel applies to a class of persons, and that therefore an individual cannot apply it to himself. Now, I am of opinion that that is contrary to all reason, and is not supported by any authority. It may well happen that the singular number is used; and where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applies to him is, in point of fact, justified in making such complaint. That is clearly a reasonable principle, because, whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is

known to belong, if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated.'' Albrecht v. Burkholder is to the same effect.

The defendants' second ground is that there is misjoinder of parties. Holding as I have held above, and it not appearing that the joinder of the plaintiffs will embarrass or delay the trial of the action, I am of opinion that under Rule 66 (Con. Rules of 1913) the plaintiffs are not improperly joined.

The defendants ask, in the alternative, that portions of paragraph 3 of the statement of claim be struck out as irrelevant and embarrassing. The portions objected to are sufficiently connected with the other published statements in respect of which the action is brought, and they should remain as part of the record. It is difficult to see how they can cause embarrassment or interfere with the proper trial of the action.

The application for particulars of the name of the Controller referred to in paragraph 3 of the statement of claim is also refused. Disclosure of the name of the person whom the author and the publisher of the article complained of, or one or other of them, had in mind, is, or should be, within the power of the defendants or some one of them. The defendants are not, therefore, in that respect, prejudicially affected in making their defence.

The motion is dismissed with costs.

MIDDLETON, J. OCTOBER 1ST, 1913.

RE BLACK AND TOWN OF ORILLIA.

Municipal Corporations—Bonus for Promotion of Manufactures —Municipal Act, 1903, *sec.* 591(12)(*e*)—*''Industry already Established elsewhere in the Province''—Meaning of ''Established''—Business Carried on for Ten Months in Rented Premises.*

Motion by a ratepayer of the Town of Orillia to quash by-law No. 569, being a by-law to raise by way of debentures the sum of $25,000, to be lent to the C. N. W. Shoe Company Limited, as a bonus to assist them in establishing and operating a boot and shoe factory at Orillia.

W. A. Boys, K.C., for the applicant.
D. Inglis Grant, for the town corporation.

MIDDLETON, J.:—The only substantial objection to the by-law is the statement that it violates sec. 591(12) (e) of the Municipal Act, 1903, because it grants a bonus to an "industry already established" in London.

The company in question was incorporated in December, 1912, or January, 1913. Negotiations took place between the officers of the company and members of the Municipal Council of the City of London, looking to the establishment of the company at London and the granting of a bonus by that municipality. The Municipal Council of London was entirely favourable to the granting of a bonus; and, relying upon this, a factory was rented in London, and the business of the company has been carried on in London since December, 1912, about forty-five men being employed.

When the by-law was submitted to the London ratepayers in January, 1913, the ratepayers rejected it. Legislation was then sought enabling the council to pass the by-law against the will of the ratepayers. This was refused. The company then entered into negotiations with representatives of Orillia, looking to the granting of a bonus by that municipality.

The earliest letter produced is one of the 21st May, 1913, wherein the president of the company speaks of his desire to move from London, so that the company might be in a position to handle a much larger business, as "in our present premises we find it impossible to attend to the business which we can secure." These negotiations finally resulted in the submission of the by-law in question to the ratepayers of Orillia on the 21st July. The by-law was then carried by a majority of fifty-five, and on the following day, the 22nd July, a by-law was passed by the company "to sanction the removal of this company's factory from London, Ontario, to the town of Orillia, Ontario."

It is contended on behalf of the company that its business was not "established" in London within the meaning of the statute, because, although the business is carried on there, it is carried on in rented premises in a way that indicates that its location in London was of a temporary character, pending completion of the contemplated arrangement for a bonus from that municipality, and that, this arrangement having fallen through, the company ought to be at liberty to move its business to any municipality ready to grant the desired bonus.

Mr. Grant argued with great force that the word "estab-

lished'' should be given its dictionary meaning of ''set up on a secure and permanent basis,'' and ought not to be construed as equivalent to ''carried on.''

After considering the matter as carefully as I can, and bearing in mind the history and object of the legislation, I am unable to give effect to Mr. Grant's contention, notwithstanding the sympathy I have for his clients, arising from the circumstances above set out. The restriction upon the bonusing power had its origin in 63 Vict. ch. 36, sec. 9, sub-secs. (d) and (e); and the word in question is found in both these sub-sections in that Act and in the present statute. The amendments since made all indicate the policy of the Legislature, and that its intention was to prohibit one municipality from offering a bonus to an industry which was being carried on in another municipality.

I do not think I can read into the legislation the interpretation of the word ''established'' suggested by Mr. Grant. Apart from the difficulty incident to so doing, the suggested meaning appears to me inadmissible, particularly with reference to sub-sec. (d), and the word must have the same meaning throughout the two sub-sections. Little assistance can be found in any of the American cases, as there the context is different.

The fact that the business of the company has been carried on in London for now almost ten months amounts to an ''establishment'' in that city, within any meaning that can fairly be given to that word. The location in London may not be permanent, but it is in no sense transitory in its nature.

The by-law must, I think, be quashed. I do not think it is a case for costs, particularly in view of the failure of other objections.

MIDDLETON, J. OCTOBER 1ST, 1913.

CITY OF TORONTO v. DELAPLANTE.

Municipal Corporations — Regulation of Buildings — ''Garages to be Used for Hire or Gain''—Garage to be Used by Tenants of Apartment House—Municipal Act, 1903, sec. 541a, sub-sec. (c)—City By-law.

Action by the city corporation for an injunction to restrain the defendant from erecting ''a garage to be used for hire or gain,'' and to direct the pulling down of so much of the building as had already been erected. The plaintiffs alleged that the de-

fendant's building was being erected in violation of by-law No. 6061, passed under the authority of sub-sec. (c) of sec. 541*a* of the Municipal Act, 1903, and its various amendments, authorising the councils of cities "to prohibit . . . the location on certain streets, to be named in the by-law, of . . . garages to be used for hire or gain." The by-law followed the wording of the statute.

Irving S. Fairty, for the plaintiffs.
C. S. MacInnes, K.C., for the defendant.

MIDDLETON, J.:—I have come to the conclusion that the garage in question is not a garage to be used for hire, or gain, within the meaning of the statute. The scheme of the owner is the construction of a garage to be used by the tenants of an apartment house. He has done a good deal to complicate the case by the agreements which he has made. In essence he is doing nothing more than leasing sections of this garage to the tenants of the apartment house. This is not the thing that is prohibited by the statute, which is aimed rather at a livery where an automobile may be kept by any transient or traveller.

A garage which is rented yields, no doubt, to the landlord an income. The renting of a garage is not prohibited. The prohibition applies to the erection of a garage which is to be used for hire or gain; and I think this indicates a use of the garage quite different from the occupation and use of it by a tenant under a lease.

This being my view, the action fails, and I need not consider the other important and difficult matters discussed upon the hearing.

MIDDLETON, J. OCTOBER 1ST, 1913.

SULLIVAN v. DORÉ.

Landlord and Tenant—Alterations in Demised Premises Made by Tenant—Waste—Breach of Covenant—Forfeiture—Absence of Proper Notice—Action—Failure of—Relief against Forfeiture—Terms—Restoration of Premises—Costs.

Action by the executors of John Sullivan, deceased, for forfeiture of a lease made by the deceased and for damages.

The action was tried before MIDDLETON, J., without a jury, at Hamilton, on the 17th June, 1913.

S. F. Washington, K.C., for the plaintiffs.

G. Lynch-Staunton, K.C., and E. F. Lazier, for the defendants.

MIDDLETON, J.:—In this action, unfortunately, the bitterness of the dispute and the difficulty of the solution are quite out of proportion to the subject-matter involved.

The late John Sullivan carried on a livery business in the premises in question at the corner of Cannon and McNab streets, Hamilton. On the 15th January, 1912, he sold the business to the defendant Doré for $3,500, agreeing to lease to him the premises for five years, with the privilege of extending the term for a further period of five years. In pursuance of this arrangement, the lease in question, dated the 15th January, 1913, was executed. This lease contains statutory covenants to repair, reasonable wear and tear and damage by lightning, fire, and tempest only excepted, and that the lessor may enter and view the state of repair, and that the lessee will repair according to notice in writing, reasonable wear and tear, etc., only excepted. Sullivan died on the 6th February following. The plaintiffs in this action are his executors.

The building was old and in bad repair. Doré desired to make in it alterations enabling him, in his view, the better to conduct the business carried on. No doubt, he spoke to Mrs. Sullivan with reference thereto, but I find against his contention that she assented to the making of the changes. Nevertheless, he made the changes, acting, I think, in good faith in regarding them as matters of little importance, and thinking that no objection would be taken on the part of the lessors.

The insurance premium upon the premises has been raised $5 per annum. The lessors attribute this to the structural changes. The evidence of the agent shews that the change was really by reason of the change of occupancy, the risk being regarded as greater when a tenant is in occupation than when the owner is in occupation. Restoration of the wall by the closing of the opening complained of would not bring about a restoration of the former insurance rate. Nevertheless, this, I think, is the real cause of the whole trouble; and this action has been brought for the forfeiture of the lease and for damages.

I do not think that there has been a proper notice under the statute to enable the landlord to enforce the forfeiture, if forfeiture there has been; and upon this ground I think the action would fail.

What has been done in this case was such a change as falls within the principle laid down in Hyman v. Rose, [1912] A.C. 623, and is a mere alteration for the purpose of making the building suitable for the trade carried on. Having regard to its age and condition, the building has not been so materially altered as to constitute waste or a breach of the covenant involving forfeiture.

I think that the landlord has the right, under the covenant, to have the building restored at the end of the term to the same plight and condition in which it was at the time of the demise. The case already referred to indicates that relief should be granted from any forfeiture upon deposit of a sufficient sum to secure the restoration of the building at the end of the lease to its former condition. In my view, $200 would be ample in this case; and, although I am bound to dismiss the action upon the technical ground that no formal notice under the statute has been given, I suggest to the parties the desirability of consenting to a judgment relieving from forfeiture upon deposit of this sum, or upon security being given, to that amount, for the restoration of the buildings. This will prevent further unprofitable litigation.

The decision of the House of Lords in Hyman v. Rose must be taken to modify to some extent what was said by the Divisional Court in Holman v. Knox, 25 O.L.R. 588.

In any event of the case, I do not think that costs should be awarded, partly owing to the fact that both parties are, I think, in the wrong, and partly owing to the confused state of the law.

KELLY, J., IN CHAMBERS. OCTOBER 3RD, 1913.

WOLSELEY TOOL AND MOTOR CAR CO. v. HUMPHRIES.

Writ of Summons—Service out of the Jurisdiction—Rule 25(e) —Contract—Place of Payment—Inference.

Appeal by the defendant from an order of HOLMESTED, Senior Registrar, sitting for the Master in Chambers, refusing to set aside the service of the writ of summons upon the defendant in Vancouver, British Columbia, and the order permitting the service to be made.

Featherston Aylesworth, for the defendant.

A. McLean Macdonell, K.C., for the plaintiffs.

KELLY, J.:—This appeal fails. It is well-established that leave to serve out of the jurisdiction a writ of summons, or notice in lieu of a writ, is properly granted where, either expressly or by implication, the contract or a part of it is to be performed within the jurisdiction, and there is a breach of it, or of that part of it, within the jurisdiction (Rule 25(e) of the Con. Rules 1913).

Thompson v. Palmer, [1893] 2 Q.B. 80 (C.A.), is authority for the proposition that, if a proper inference from the contract is that payment is to be made within the jurisdiction, then non-payment is a breach within the jurisdiction.

The contract here expressly provides for payment of the price of the auto-cars in Toronto, and I think the fair and reasonable inference to be drawn from the contract and the surrounding circumstances is, that any other payments contemplated by the contract are likewise to be made here. This term and the effect of this deduction from the contract and surrounding circumstances are not negatived by the fact stated by the defendant that the plaintiffs accepted payment for the auto-cars by their sight drafts on the defendant, through the bank at Vancouver, which he paid there.

Part of the claim sued upon is for freight upon the cars delivered to the defendant under the contract. These items are so connected with the payments contemplated by the contract that I think that the two cannot be dissociated, at least in so far as they are involved in this application.

It is not made clear—and perhaps it is not material—whether what the defendant paid in Vancouver was the price of the cars plus bank charges on the drafts, thus netting to the plaintiffs in Toronto the price agreed upon, just as if payment were made in Toronto, or whether what he paid was the agreed-upon price without adding these bank charges.

The appeal is dismissed with costs.

MIDDLETON, J. OCTOBER 3RD, 1913.

*RE NORDHEIMER.

Will—Marriage Settlements—Construction—Land and Residence Settled on Testator's Son — Application to, of Hotchpot Clause in Will—"Moneys, Property, or Interests"—Bequest of Sum on Condition of Maintenance of Residence and Grounds—Operation of Hotchpot Clauses in Settlements—Contrary Direction in Will—Credit for Full Fund Brought into Settlement—Time of Ascertainment of Amount Settled—Date of Settlement—Deduction from Sums Set apart—Strict Settlement—Fulfilment of Condition—Duty of Executors—Taxes and Insurance.

Motion upon originating notice by the trustees under the will of Samuel Nordheimer, deceased, and under several marriage settlements, for an order determining certain questions arising upon the construction of the will and settlements.

D. W. Saunders, K.C., for the trustees.

I. F. Hellmuth, K.C., for Roy Nordheimer.

A. W. Anglin, K.C., for Mrs. Cambie.

Travers Lewis, K.C., for Mrs. Houston.

Christopher C. Robinson, for the remaining daughters of the testator.

H. S. Osler, K.C., for the Official Guardian, representing issue born and that may be born entitled under the marriage settlements of Mrs. Cambie and Mrs. Houston.

MIDDLETON, J.:—Samuel Nordheimer died on the 29th June, 1912, leaving him surviving his widow (who died on the 14th November, 1912), seven daughters, and one son, all of whom are of age.

Upon the marriage of Mr. Nordheimer, a settlement was made, dated the 15th November, 1871, by which the property known as Glen Edyth and certain personal property were conveyed to trustees. Under this settlement the land has passed to the son in tail, and the entail has now been barred. The personal estate, on default of appointment, has passed to the children in equal shares. The land which passed to Mr. Roy Nordheimer is now of very great value. The share of each child in the settled personal estate is approximately $20,000.

*To be reported in the Ontario Law Reports.

During the lifetime of the testator, three of his daughters married. In the cases of two, marriage settlements were made. In the case of the third there was no settlement.

The first settlement was that executed upon the marriage of Mrs. Cambie, and is dated the 9th October, 1907. The property settled was of about the value of $50,000; the settlement by a recital is said to be on account of the prospective interest of the daughter in the estate of her father. The property consists of a dwelling-house and of certain securities set forth in a schedule, values being attached in each case. The total of the securities amounted to $37,000, this being the par value. The trustees have the right, with the consent of the daughter, to convert into money and re-invest.

The income derived from the fund, up to $1,500 per annum, is to be paid to the daughter; then certain premiums on life insurance policies are to be paid, and the balance of the income is to be accumulated. The settler then covenants to give to his daughter "such share and interest in his residuary estate as shall be equal to the share of his other daughters under his said will," with the proviso that the daughter "shall not take any share in said residuary estate of the party of the first part without bringing the value of the lands hereby conveyed to the trustees (and which are hereby valued for such purpose at $14,000) and the stocks, bonds, and securities . . . into hotchpot, and accounting for the same accordingly, unless the said party of the first part shall by his said will direct to the contrary."

Some time after the marriage of Mrs. Houston, by deed of the 1st April, 1910, a trust fund was settled for the benefit of the daughter, her husband, and issue. This settlement differs from the former settlement in that the whole income goes to the daughter for life, and there is no provision for accumulation. There is in the settlement a similar covenant on the part of the testator.

The proviso is very different. It reads that the daughter "shall not take any share in the said residuary estate of the party of the first part without bringing into hotchpot the value of the stocks, bonds, and securities . . . and any securities substituted therefor as of the date of the death of the party of the first part, and accounting for the same accordingly, unless the said party of the first part shall by his said will direct to the contrary."

The testator made his will on the 9th July, 1908. He subsequently made codicils dated the 10th August, 1911, 11th June, 1912, 17th June, 1912, and 27th June, 1912.

The will first provides for the residence of the testator's widow at Glen Edyth and for its upkeep during her lifetime. None of these provisions are now material, save as they may incidentally throw light upon the meaning of the whole will.

By clause 15 provision is made for the raising of the sum of $100,000 for each of the daughters of the testator, and $200,000 for the son.

By clause 16 provision is made for the charging against these sums of any moneys which any of the children might receive under the testator's marriage settlement, or which they had received under their marriage settlements; and by clause 18 a provision is made for the distribution of the residue of the estate between his children in such a way that the son should receive twice as much as each daughter.

The several questions which arise upon the will and settlements depend mainly upon the true meaning of these three clauses. . . .

The first question arises in respect of the son's position, in view of the fact that Glen Edyth is given to him by virtue of the original marriage settlement. Is this a property which he must bring into hotchpot under clause 16? If it is, its value far exceeds the $200,000 therein mentioned.

The clause in question reads: "16. I hereby declare that the moneys, property, or interests which any of my children shall receive or be entitled to under the marriage settlement (between myself and my wife, dated the 15th November, 1871, and of which William Henry Boulton and William Cameron Chewett were the original trustees, and of which the present trustees are Melfort Boulton and Nicol Kingsmill), or pursuant to any of the terms thereof, or any moneys, property, or interests which any of my children shall receive or be entitled to under any settlement made or to be made upon the marriage of any of them, shall be brought into hotchpot in adjusting the amounts so to be set apart; it being my intention that the provision made in the preceding paragraph for my said children shall be supplemental to the provision which they or any or some of them may receive under any such settlement, to the intent that the amount received from any such settlement and the amount to be received under this my will shall make up the said amount of $100,000 for each of my daughters, and $200,000 for my son."

I have come to the conclusion that the testator in this clause was not referring to the Glen Edyth property at all, and that

full effect can be given to the words used—"moneys, property, or interests"—by treating them as referring to the personal property which was covered by the settlement. By the settlement this family residence was treated as a thing apart, and entailed. The other property settled was left subject to the power of appointment given to the testator's widow. The whole scheme of the testator's will is that the son shall have this ancestral residence, to be kept up and maintained, and that he shall have a double portion for the purpose of keeping it up and maintaining it. What the testator desired to have credited upon the portions set apart for the different children was, in the first place, any sum settled on the marriage of that child, and in the second place any sum which the child might receive under the power of appointment contained in his own marriage settlement. In effect, his desire was to neutralise in this way the power of discrimination given to the widow under the settlement.

This view is much fortified by clause 22, which provides as follows: "The bequest of $200,000 to my son, being twice the amount left to each of my daughters, is made upon the condition that, after he comes into possession and ownership of the Glen Edyth property, he shall keep up and maintain the house with sufficient grounds about it, not less than ten acres, as a gentleman's residence; and that, in default of his doing this, he shall only receive an equal share with my daughters, and that the additional $100,000 so forfeited, and which but for this provision he would be entitled to under the fifteenth paragraph of this my will, shall become part of my residuary estate."

This clause could have no operation if the descent of Glen Edyth to the son wiped out and more than wiped out the fund to be provided for its maintenance.

The next question arises under the two settlements above referred to, upon the marriage of Mrs. Cambie and Mrs. Houston. These settlements contain the hotchpot clauses above quoted; each of these clauses being operative only "if the testator does not by his will direct to the contrary."

I think clause 16 of the will, above quoted, is a direction to the contrary, and is the controlling and operative provision, superseding the hotchpot clauses in the settlement. The sums received by the children under the testator's marriage settlement, and the sums settled upon the two daughters, are to be brought into hotchpot and treated as part of the $100,000 and $200,000 to be raised and settled under clause 15.

Then the question is raised, upon what basis are these settled

amounts to be brought in? In each case the daughter receives less than the fund. Mrs. Cambie has $1,500 per annum only; Mrs. Houston has the income only. Are they to give credit for the present value of the life estate, or are they to give credit for the full fund brought into settlement?

I think the latter. In the clauses of his will in question the testator is speaking of funds to be settled. He is speaking in general terms of the sums which his children have received in settlement; and I think that his idea manifestly is that the sums which he has already settled upon any daughter, her husband, and issue, is to be regarded as an amount received on account of the $100,000 which by the will is to be settled.

The next question raised is as to the time when the amount settled is to be ascertained; is it at the date of settlement or at the date of the testator's death? Part of the property in each case consists of stock. It is said that this stock has very largely increased in value.

The conclusion at which I have arrived is that the date of the settlement is the date which governs. . . .

[Reference to Thornton on Gifts and Advancements, ed. of 1893, pp. 605, 606; Kircudbright v. Kircudbright (1802), 8 Ves. 51; In re Willoughby, [1911] 2 Ch. 581; In re Rees, 17 C.B. 701; In re Dallmeyer, [1896] 1 Ch. 372; In re Lambert, [1897] 2 Ch. 169.]

The question is then raised whether the settled sums and the sums apportioned under the testator's settlement are to be deducted from the lump sums mentioned in clause 15 of the will or from the residuary shares under clause 18. I think clause 16 makes it plain that these amounts are to be deducted from the sums set apart under clause 15.

Under clause 15, I think, it is the duty of the trustees to hold the sums dealt with by that section, during the lifetime of the children, paying them the income. The period fixed for distribution is now past; but this does not justify the trustees in paying over the shares of the daughters to them. These shares are to be held free from the control of the husbands of the daughters when they marry, and are to be deemed separate estate and are not to be anticipated. Upon the marriage of any of the daughters a proper settlement—which I understand to be what is called in the English conveyancing books "a strict settlement"— is to be made to carry out that intention. Put shortly, such a settlement will secure the income to the daughter and the corpus to any issue of her marriage.

As to the residuary estate to be divided under clause 18, one-third of the residuary share will be payable at once to the daughter, and the remaining two-thirds will be held for the daughter, to be settled upon her marriage, as already indicated.

The share of the son is similarly dealt with. Under clause 15 he has a life interest in the $200,000 fund, and he would take immediately and absolutely a one-third interest in his double portion of the residuary estate; the remaining two-thirds being held in trust.

I do not understand that I am now asked to determine whether under the will the son is absolutely entitled to the whole share to be held as indicated.

I am, however, asked to determine the effect of clause 22. I think it is the duty of the executors, before paying to the son the income from the additional $100,000 given him under clause 15, to ascertain from time to time whether he is fulfilling the obligation imposed upon him by the will of keeping up Glen Edyth as a gentleman's residence.

A question is asked with reference to taxes and insurance. There does not appear to be any dispute about this. The son is ready to assume and pay the taxes from the date of his mother's death. This is, I think, the extent of his obligation.

Costs to all parties will come out of the estate.

MIDDLETON, J., IN CHAMBERS. OCTOBER 4TH, 1913.

MARTIN v. McLEOD.

Venue—Change of—County Court Action—Transfer to District Court—Application of one Defendant—Judgment in County Court against the other Defendant—Effect of—Practice.

Appeal by the defendant J. T. McLeod from an order of DENTON, Jun. Co. C.J., refusing to change the venue from Toronto to North Bay and to transfer the action from the County Court of the County of York to the District Court of the District of Nipissing.

J. H. Craig, for the defendant J. T. McLeod.
R. G. Agnew, for the plaintiff.

MIDDLETON, J.:—Upon the material the action is one which ought to be tried at North Bay, and this was the view entertained

by the learned County Court Judge; in fact, he had made the order sought, but rescinded it upon his attention being drawn to the decision of my brother Riddell in Berthold & Jennings Lumber Co. v. Holton Lumber Co., 4 O.W.N. 523; thinking that the effect of this decision was to preclude the making of the order sought because judgment had been signed against the defendant Ada Cameron for default.

I have had the opportunity of discussing the matter with my learned brother, and he agrees with me that his decision has no application to this case, and that the fact that judgment has been signed against one defendant does not deprive the other defendant of the right to have the trial at the place which is most convenient. The real effect of the decision in the case referred to is, that what there took place amounted to such an attornment to the local jurisdiction as to preclude the motion.

Upon the papers being transmitted, all subsequent proceedings are to be carried on in the Court to which the action is transferred automatically, by reason of the change of the place of trial. The action upon the transfer will become an action in the District Court of the District of Nipissing.

The appeal will, therefore, be allowed, and the order made; costs being in the cause.

NOTE.—In transmitting the papers to North Bay, the clerk of the County Court ought to include a copy of the judgment already signed, so that the true state of the cause may appear in the North Bay office.

MIDDLETON, J., IN CHAMBERS. OCTOBER 4TH, 1913.

REX v. JUNG LEE.

Criminal Law—Keeping Common Gaming House—Magistrate's Conviction—Summary Jurisdiction — Criminal Code, secs. 228, 773(*f*), 774, 781—*Amending Act,* 1909—*Evidence to Shew Offence—Code, sec.* 226—*Failure to Shew Keeping of Bank or Gain to Accused—Presumption—Secs.* 985, 986—*Warrant—Wilful Obstruction.*

Motion by the defendant to quash a conviction made by S. J. Dempsey, Police Magistrate at Cochrane, for unlawfully keeping a common gaming house.

G. F. McFarland, for the defendant.
W. M. Willoughby, for the magistrate.

MIDDLETON, J.:—The only evidence taken was that of the Chief of Police, who, on the night in question, went to the laundry operated by the accused, and found twenty-five men in the room, playing cards at a table upon which there was money. There were also cards necessary for playing fan-tan, and dice. The door was locked, no demand was made for admission; but, when one of the men inside came out, the Chief entered and made the arrest.

The conviction is attacked upon the grounds: first, that the magistrate proceeded to try without giving the accused his election to go before a jury; and, secondly, that there was no evidence to shew the offence.

The case of Rex v. Honan, 26 O.L.R. 484, is conclusive against the first contention.

Where a person is charged with keeping a disorderly house, as defined by sec. 228 of the Criminal Code, he may be proceeded against by indictment under that section, in which case he is liable to one year's imprisonment; and he may be proceeded against summarily under sec. 773(f), in which case he is liable, under sec. 781, to six months' imprisonment, or a fine not exceeding $100, or both. The jurisdiction to proceed summarily for such an offence is made absolute by sec. 774. Throughout I am speaking of the sections as amended in 1909.

By sec. 226 a common gaming house is defined as a place kept by any person for gain to which persons resort for the purpose of playing any game of chance, or where a bank is kept by one or more of the players exclusive of the others.

The evidence in this case does not shew that a bank was kept or that there was any gain to the accused; and the conviction must, therefore, be quashed, unless the evidence is aided by the presumption found in secs. 985 and 986.

Section 985 creates the presumption only where the premises are entered under a warrant or order, and there was no warrant or order in this case.

Section 986 applies only if the constable is wilfully prevented from, or obstructed or delayed in, entering the premises. There was no prevention or obstruction here, within the meaning of sec. 986. The door of the room was locked, but the Code cannot and does not intend to create a presumption merely because a constable on attempting to enter premises finds the door locked.

The presumption is created when something active is done, amounting to a wilful obstruction or prevention.

Upon the ground of the absence of evidence, the conviction cannot be sustained, and must be quashed. There will be an order for protection; and no costs are awarded.

DAVID DICK & SONS LIMITED v. STANDARD UNDERGROUND CABLE CO.—MIDDLETON, J.—SEPT. 30.

Contract — Breach — Delay — Damages — Counterclaim — Interest—Costs—Third Parties.]—Action by a contracting company to recover damages for non-delivery of steel to complete their work on a contract and for loss on other contracts. The defendants counterclaimed for $33,197.75, moneys alleged to have been paid by the defendants on the plaintiffs' account in connection with the completion of the work under the contract. The Hamilton Bridge Works Limited were brought in as third parties. The trial was before MIDDLETON, J., without a jury, at Hamilton and Toronto. At the trial all the questions in issue between the plaintiffs and defendants were disposed of, except that relating to the liability of the defendants owing to the delay in the supply of steel necessary for the construction work. MIDDLETON, J., said that, after considering the matter very carefully, he could see no reason for discrediting the evidence given on behalf of the third parties, shewing that the delay in the furnishing of the steel was to be attributed to the action of the general manager of the plaintiffs; and, in the light of this evidence, the plaintiffs could not recover. Action dismissed. The plaintiffs' damages assessed provisionally at $1,000. Leave reserved to apply in this action with respect to any sums which the defendants may be called upon to pay to lien-holders not included in the sum of $15,701.14, paid by the defendants, over and above the contract-price, to complete the contract. Judgment for the defendants upon their counterclaim for $15,701.14 with interest from the time the money was paid. The defendants to have the costs of both action and counterclaim against the plaintiffs. The issue between the defendants and the third parties may be spoken to. J. L. Counsell, for the plaintiffs. D. L. McCarthy, K.C., and G. H. Levy, for the defendants. I. F. Hellmuth, K.C., and E. H. Ambrose, for the third parties.

RE BOTTOMLEY AND ANCIENT ORDER OF UNITED WORKMEN—MIDDLETON, J., IN CHAMBERS—OCT. 1.

Life Insurance—Insurance Moneys Payable to "Wife" of Insured—Death of Wife—Remarriage of Insured—Claim of Second Wife on Death of Insured.]—Motion by the widow of an insured deceased for payment out of insurance moneys paid into Court by the insurance company. By the policy, the insured directed the money to be paid to his wife. The wife died, and the insured married again. Judgment was reserved upon the motion pending the decision of the Appellate Division in Re Lloyd and Ancient Order of United Workmen, which was given on the 15th September, 1913; see ante 5. That decision makes it plain that the claim of the second wife, the widow, must succeed. It was conceded that $70, which had been paid by the children of the deceased for premiums, should be refunded to them. The order should so provide. Following the decision in Re Lloyd and Ancient Order of United Workmen, there should be no costs. A. J. Thomson, for the applicant. J. M. Ferguson, for the children of the deceased.