THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING SEPTEMBER 10TH, 1904.)

VOL. IV. TORONTO, SEPTEMBER 15, 1904. NO. 3

ANGLIN, J. JULY 18TH, 1904.

WEEKLY COURT.

FALLER v. AYLEN.

Arbitration and Award—Patent Act of Canada—Appointment of Arbitrators—Deputy Commissioner of Patents—Review —Injunction — Powers of Court — Defendants Evading Service.

Motion by plaintiff to continue an injunction granted by one of the local Judges at Ottawa restraining defendants, arbitrators under the Patent Act of Canada, from proceeding to make an award. The statute, sec. 19, sub-sec. 3, reads: "If there are more than two conflicting applications" (which was this case) "and if the parties do not all unite in appointing three arbitrators, the commissioner, or the deputy commissioner, or person appointed to perform the duty of that officer, may appoint the three arbitrators for the purposes aforesaid."

The deputy commissioner caused notices to be sent out calling upon the three applicants, Faller, the American Machine Telephone Co., and Callender, to name arbitrators. The notice to Faller and the telephone company reached these claimants; that intended for Callender was alleged to have been misdirected and not to have reached him. Upon the telephone company intimating to the deputy commissioner that they could not in any event or under any circumstances unite with the other claimants in choosing a board of arbitrators, the deputy commissioner proceeded, without further notice to Callender, himself to appoint the defendants as the three arbitrators under the provisions of the statute. It was this act which was impugned by plaintiff as unlawful and beyond the power of the deputy commissioner, upon the ground that his right of appointment

could only arise upon failure of the applicants, after due notice to all (this Callender never had), to unite in appointing a board.

F. A. Magee, Ottawa, for plaintiff.

D. L. McCarthy, for defendants.

H. Fisher, Ottawa, for the American Machine Telephone Co.

ANGLIN, J.—The objection to the exercise of his statutory power by the deputy commissioner is not well taken. The Act confers this power "if the parties do not all unite." They had not in fact united. As to the sufficiency of the opportunities had by the applicants, or any of them, to unite in appointing three arbitrators, as to the adequacy of any notice given them, as to the necessity, the propriety, or the futility of giving any such notice (none being prescribed by the statute), and as to the character and quantum of evidence that the applicants have not united, or will not unite, in naming a board of arbitration, upon which he should act, in my opinion "the commissioner or the deputy commissioner or person appointed to perform the duty of that officer," is, by the statute, alone authorized to adjudicate and decide. His determination that the conditions exist in which he should proceed to exercise his power of appointment is not, I think, open to review upon motion for prohibition or injunction (Re Bell Telephone Co., 9 O. R. 339, 345; Re Bell Telephone Co., 7 O. R. 605, 614); assuming that this Court has jurisdiction to entertain such an application, which is open to grave question. (In re Bell Telephone Co., 9 O. R. 339, 346.) After the granting of the local Judge's order and before service upon them, the arbitrators had actually completed and published their award and are now functi officio. The injunction, if continued against them, would be inoperative because that had been accomplished which plaintiff sought to enjoin.

It is charged that defendants, knowing of the injunction, deliberately secluded themselves to avoid service of the order, and complete their arbitral functions. If the jurisdiction to enjoin existed, this would be a serious charge. It rests upon the affidavit of William Johnson, who is contradicted, upon most material allegations, by Mr. William Joseph Lynch, the chief clerk of the patent branch of the department of agriculture. The arbitrators upon oath severally deny knowledge that any order had been made enjoining them from proceeding. I cannot find that they wil-

fully disobeyed the order of the Court: Ex p. Langley, 13 Ch. D. 110.

Motion refused with costs to defendants in any event.

MACMAHON, J. JULY 20TH, 1904.

TRIAL.

ELGIN LOAN AND SAVINGS CO. v. LONDON GUARANTEE AND ACCIDENT CO.

Principal and Surety—Guarantee Policy—Fidelity of Manager of Loan Company—Misappropriation of Moneys—Release of Surety—Insufficient Audit—Change in Duties of Manager.

Action upon a guarantee policy issued in favour of the plaintiffs the Elgin Loan and Savings Co., whereby the defendants agreed to make good, to the extent of $2,500, any loss sustained by reason of the embezzlement of money by George Rowley, the manager of the loan company, during the continuance of the agreement of guarantee. Plaintiffs (the Elgin Loan and Savings Co., a Provincial corporation, the Elgin Loan and Savings Co. Limited, a Dominion corporation, and the London and Western Trusts Co., the liquidators of the two companies) alleged that Rowley during the continuance of the agreement embezzled large sums of money, the property of the Elgin Loan and Savings Co., and claimed $2,500. The defendants alleged that there was no proper audit of Rowley's accounts, as required by the terms of the policy, and that a change was made in the duties of Rowley without notice to defendants.

W. K. Cameron, St. Thomas, and C. F. Maxwell jun., St. Thomas, for plaintiffs.

J. B. Clarke, K.C., and T. W. Crothers, St. Thomas, for defendants.

MACMAHON, J.—The guarantee of defendants began in 1897, and was renewed from year to year, the last renewal receipt being dated 27th February, 1903. Rowley was manager of the Elgin Loan and Savings Co. from its formation in 1879 until its failure in June, 1903. There was no other employee of the company, and he kept the books, received and paid out all the moneys, and made the deposits in the bank. He began misappropriating the moneys in 1888, and kept a private ledger in which he entered the moneys misappropriated from the moneys received from the depositors; and he stated that in 1897 his defalcations amounted

to $50,000, and when the company went into liquidation his embezzlements amounted to $187,620. Rowley was implicitly trusted by the directors, and after beginning to embezzle he always objected to having an assistant in the office, telling the directors he was quite capable of doing all the business himself. He never went out to lunch, leaving a director in the office, for fear a depositor might come in with his pass-book, and the result might be the discovery of a defalcation. The private ledger kept by Rowley for his own purposes contained the correct accounts of the depositors whose moneys he had embezzled, and therefore corresponded with the depositors' pass-books, while the company's ledger contained the falsified accounts of these depositors. He was never for a moment absent from the office on any occasion while the books were being audited. The auditors had access to all the books in the company's office, and one of the questions was as to whether these alone enabled the auditors to make a thorough and systematic audit. One of the auditors of the Elgin Loan and Savings Co. testified that, while the books kept by Rowley were in perfect order, what struck him was that the auditors had to rely entirely on the cash book for the receipts of cash, as there were no deposit slips, and unless the auditors had the depositors' pass-books there was nothing to check by. This condition of affairs caused him to make inquiries, and he discussed with the president of the company the question of Rowley's receipts, and whether the auditors should go to the trouble of calling in the pass-books or sending out a slip to each customer shewing how his account stood in the books. To this the president replied that, as no company in St. Thomas had adopted that course, the auditors were only to be responsible for their audit from the cash book. The Loan Companies Act, R. S. O. 1897 ch. 205, sec. 92, requires that two or more auditors shall be chosen by the company's stockholders, who shall audit the books, accounts, and vouchers for the year then current. The guarantee policy contained this recital: "Whereas George Rowley, of St. Thomas, in the Province of Ontario, hereinafter called the employee, has been appointed manager in the service of the Elgin Loan and Savings Co., hereinafter called the employer, and has applied to the London Guarantee and Accident Co. Limited, hereinafter called the company, for the grant by them of this agreement; and whereas the employer has delivered to the company certain statements and a declaration setting forth, among other things, the duties and remuneration of the employee, the moneys to be intrusted to him, and the checks to be kept upon his accounts, and has

consented that such declaration, and each and every the statements therein referred to or contained, shall form the basis of the contract hereinafter expressed to be made, but this stipulation is hereby limited to such of said statements as are material to this contract. It was not contended that the application of Rowley contained any untrue statements. Defendants contended that the answers by the "employer" (the loan company) to the questions submitted and the declaration made by the president, which it was agreed should form the basis of the contract of guarantee, came under sec. 144 (1a) of the Insurance Act, R. S. O. 1897 ch. 203.

That can not be, because that sub-section applies only to the "application of the assured," and by the interpretation clause of the Insurance Act, sec. 2, sub-sec. 45, "the assured" means "the person whose property, life . . . fidelity, or insurable interest is insured." The statements and declaration sought to be brought by defendants under sub-sec. 1 (a) are those of the "employer," and defendants can rely only on such statements and declarations as are set out on the face or back of the contract. One of the statements alleged to be so set out in the recital is as to "the moneys to be intrusted to him and the checks to be kept on his accounts." In answer to question 6.—"Is he allowed to pay out of the cash in his hands any amounts on your account, and, if so, are those payments previously authorized and subsequently audited, and by whom?—said: "yes; handles all the cash; all withdrawals from the bank require the joint cheque of president and manager." "Q.—How often do you require him to pay over to you, and is he then allowed to retain a balance in hand? If so, how much? And do you see that he has that amount in his possession? A. All cash excepting very small amounts deposited in the bank daily. All cash and bank balances checked by the auditors." The evidence was that the president signed large numbers of cheques in the cheque book, which was left in Rowley's control, and in one instance referred to in the examination for discovery of John S. Moore, the manager of the liquidators, Rowley had on 30th October, 1896, drawn a cheque payable to Agnes A. Laidlaw for $22.50, and debited her in the company's ledger with $2,250, and the auditors, if they checked her account with the cash book, must have found $2,250 debited to her there, and a like sum on the counterfoil of the cheque book, but they could not have required the cheque, which had been returned from the bank, to be produced, or checked the entry in the cash book with the bank book, or the fraud would have been discovered. It is literally true that the moneys withdrawn from the bank required the joint

cheque of the president and the manager, but the moneys might as well have been withdrawn on the cheque of the manager alone, when the president signed large numbers of cheques in advance, to be issued by the manager without any supervision or inquiry as to whom or for what sums, or on what account, the cheques were made payable. The president knew that such a course when carried out was a complete check upon the manager, and that the statement would be so understood by the defendant company, that he, the president, supervised the withdrawal of the moneys from the bank and signed the cheques after being satisfied that the payment was for a proper amount and on a proper account. No assurance company would think of issuing a guarantee for the manager of a company if it were known that such a lax system as was disclosed at the trial prevailed. . . .

I must find that there was no proper checking by the auditors. One of them said there could be no proper checking of the cash without deposit slips or the pass-books; and in order to make a proper checking and so secure a satisfactory audit of the books, he felt the necessity of having the materials . . . essential to a thorough and proper audit: see the views expressed by Mr. Dicksee, F.C.A., on Auditing (2nd ed.) p. 142. . . .

The statements of the president of the Elgin Loan and Savings Co. were untrue, and were material to the contract; and the recital in the contract states that the stipulation is therein limited to such of said statements as are material to the contract, which is a sufficient compliance with sec. 141, sub-sec. 2, of the Act. See Village of London West v. London Guarantee Co., 26 O. R. 520; and judgment of Lindley, L.J., In re London and General Bank (No. 2), [1895] 2 Ch. at p. 682. What appears in the recital is not a setting out of the terms and conditions in full on the face of the contract, as required by sec. 144 (1) of the statute. But I have dealt with the statements and declaration of the president of the loan company for the purpose of shewing what is contained therein, and I have also considered the question as to the sufficiency of the audit, so that if, on appeal, the Court should reach another conclusion as to the effect of the recital, it would be possessed of a finding on the question of the audits.

A proviso in the contract was that: "This agreement is entered into on the condition that the business of the employer shall continue to be conducted and the duties . . . of the employee shall remain in accordance with the statements and

declaration hereinbefore referred to." The business of the "employer" and the duties of the employee were set out in the recitals to the agreement, and it was therefore not necessary that reference should be made in the proviso to the statements and declarations. In October, 1902, the Elgin Loan and Savings Company procured a Dominion charter, which enabled them to purchase stocks, but, as they had no license from the Province to carry on such a business, the company, in March, 1903, authorized Rowley to use the company's moneys in the purchase of stocks (principally Dominion Coal and Dominion Steel) in his own name, and they then took a mortgage from him on the equity in certain real estate he owned, and transferred the stocks as collateral to the loan, this being the method devised to circumvent what would otherwise have been considered an illegal act upon the part of the directors of the company. The equity in the real estate was insignificant, while the stocks transferred as collateral were for large sums.

There was a change of the business from that of a loan company to that of buying and selling stocks, which largely increased Rowley's duties and responsibilities, and withdrew him from his legitimate duties as manager of the loan company; and he (Rowley) stated that his defalcations largely increased during the two years preceding the failure of the loan company, and it may be that the change largely increased the opportunities for peculation. This change in the business of the company was contrary to the express terms of the guarantee, and rendered it impossible for the plaintiffs to recover on it. Judgment for defendants dismissing the action with costs.

ANGLIN, J. JULY 23RD, 1904.

CHAMBERS.

RE COHEN.

Extradition—Receiving Stolen Goods—Offence under Laws of Foreign State—Evidence before Extradition Commissioner—Evidence on Review by Habeas Corpus—Weight of Evidence—Guilty Knowledge of Accused—Inference from Conduct—Extradition Act, 1886—Interpretation Clause—Subsequent Treaty—"Receiving any Money, Valuable Security, or other Property"—Ejusdem Generis Rule—Construction of Treaty—Discharge of Prisoner.

Motion by Harris Cohen for a writ of habeas corpus and for his discharge from custody under a committal by the Judge of the County Court of Wentworth, acting as an

extradition commissioner, for extradition to the State of Illinois to answer a charge of "unlawfully receiving and having in his possession certain goods and chattels well knowing the same to have been theretofore stolen."

C. A. Masten, for the prisoner, contended: (1) That no offence was proven under the laws of the State of Illinois. (2) That the evidence did not warrant commitment. (3) That the offence charged was not included in the Extradition Act.

S. F. Washington, K.C., for private prosecutors.

ANGLIN, J.—I am not free to give effect to any personal opinion I may entertain in regard to the first point raised by Mr. Masten; In re Murphy, 22 A. R. 386, is in this Court conclusive authority against this objection.

(2) The learned commissioner rejected the deposition of one McCarthy, on the ground that, though duly authenticated, it is not a "deposition or statement" within sec. 10 of R. S. C. ch. 142, adding these words, "I reserve leave to Mr. Washington to renew his application to have it taken in evidence before any Court on further motion herein." Such an application as the present is the only further motion which could have been contemplated. I am clearly of opinion that upon motion for habeas corpus or for the discharge of the prisoner, I cannot receive or consider any evidence except that upon which the prisoner stands committed: In re Parker, 19 O. R. 612-619. I have to determine whether upon that evidence he is legally committed for extradition.

The testimony received by the commissioner was, in my opinion, "legal evidence tending to attach criminality to the accused." Into the weight of that evidence, or even its sufficiency to sustain the charge, I should not here inquire: In re Weir, 14 O. R. 389-396; Ex p. Feinberg, 4 Can. Crim. Cas. 270, 272-3.

The objection taken by counsel for the prisoner to the legality of the evidence before the commissioner was that, as to the guilty knowledge of the accused, it consisted solely of his silence upon hearing statements involving his guilt, made by the thief, McCarthy. As proof of the facts stated by McCarthy, this evidence is per se valueless; as an acknowledgment by the accused, to be inferred from his conduct or silence, of the accuracy of the assertions made, the evidence is admissible: Regina v. Smith, 18 Cox 470; Regina v. Cox, 1 F. & F. 90; Regina v. Mallory, 15 Cox 458. The weight to be attached to it is wholly for the commissioner.

There was competent evidence upon which a magistrate might, in his discretion, commit for trial, as affording probable cause for believing the accused to be guilty. Moreover, there was, in the facts which transpired at the time of the arrest of the defendant, as deposed to by the officers, other evidence from which the commissioner might not unreasonably infer the scienter of the accused.

(3) Finally, the learned counsel for the prisoner argues that the charge laid is not within the Extradition Act. The schedules to our Acts of 1886 (R. S. C. ch. 142) and of 1889 (52 Vict. ch. 36) do not mention this crime, but by the interpretation clauses of the earlier statute "extradition crime . . . in the application of this Act to the case of any extradition arrangement, means any crime described in such arrangement, whether comprised in said schedule or not." The later Act is "to make further provision," etc. The "extradition arrangement" of 1890 with the United States of America, though made four years after our Extradition Act of 1886 was enacted, must, in my opinion, be deemed to be covered by the interpretation clause of that statute, and in that arrangement is comprised a crime described as "receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained." Any offence within this description is therefore within the Extradition Act of Canada.

Counsel for the prisoner, however, maintains that the words "other property," applying the maxim "noscuntur a sociis," must be restricted to things of the same type as "money and securities for money," citing The Queen v. De Portugal, 55 L. J. Q. B. 567. . . . This case goes far to establish the applicability to proper cases in extradition proceedings of the strict rule of interpretation generally acted upon in construing criminal statutes. The fair and liberal spirit with which we are told we should approach the construction of a treaty, "not labouring with eager astuteness to find flaws or doubtful meanings in its words" (see Re Burley, 1 C. L. J. N. S. 49, and Regina v. Morton, 19 U. C. R. at p. 20), must not induce the Court to extend its operation to crime not specified or expressed. Numerous other cases of restricted construction of similar general words are collected in . . . Stroud's Jud. Dict., 2nd ed., pp. 1359-1366; Sutherland on Statutory Construction, pp. 351 et seq.; Maxwell on Interpretation of Statutes, 3rd ed., pp. 468 et seq.; Hardcastle's Statute Law, 3rd ed., pp. 190 et seq. . .

[Reference to Sandiman v. Breach, 7 B. & C. 96; Attorney-General v. Hamilton Street R. W. Co., 29 O. R. 49,

24 A. R. 170; Clark v. Gaskarth, 8 Taunt. 431; Casher v. Holmes, 2 B. & Ad. 592; Radnorshire v. Evans, 3 B. & S. 400; Re Stockport Schools, [1893] 2 Ch. 687; Read v. Ingham, 3 E. & B. 889; Willis v. Thorp, L. R. 10 Q. B. 383; Powell v. Boraston, 18 C. B. N. S. 175; Lowther v. Earl Radnor, 8 East 124; Fletcher v. Lord Sondes, 3 Bing. 501, 580.]

On the other hand, in numerous instances the Courts have seen fit to give generic words, following words more specific, a comprehensive meaning. The writers above named give many examples. . . .

[Reference to Regina v. Edmundson, 2 E. & E. 77; Regina v. Doubleday, 3 E. & E. 501; Young v. Grattridge, L. R. 4 Q. B. 166; Regina v. Shrewsbury, 3 B. & Ad. 216; Regina v. Payne, L. R. 1 C. C. R. 27; Regina v. Norris, Russ. & R. 69; Richmond Hill S. S. Co. v. Trinity House, [1896] 2 Q. B. 134.]

In Re Miller, 61 L. T. 367, North, J., says. "You do not use the word 'other' unless there is some relation between the classes of things." And in Leicester v. Brown, 41 W. R. 78, Pollock, B., advances as a reason for holding the generic word to be of comprehensive meaning, the absence of the word "other." Sir Peter Maxwell speaks of "the restricted meaning which primarily attaches to the general word in such circumstances (p. 475); while Lord Esher in Anderson v. Anderson, [1895] 1 Q. B. 749, 753, says: "Prima facie you are to give the words their larger meaning." . . .

As an instance of a notable modern application of an ejusdem generis construction by the highest Courts, indicating that in matters of a criminal character the pristine rigour of that principle of construction remains unimpaired, I would refer to Powell v. Kempton Park Race Course, [1897] 2 Q. B. 242, 257, 265-6, 275-6, 301, [1899] A. C. 143. The Supreme Court of Canada applied this rule recently in O'Dell v. Gregory, 24 S. C. R. 661. In a still later case, Farquharson v. Imperial Oil Co., 30 S. C. R. 188, . . . the Supreme Court refused to apply this canon of interpretation. . . .

Mr. Stroud . . . reaches this conclusion at p. 1360: "It is perhaps impossible to lay down any workable rule to determine which of these two interpretations the word should receive in any case not already covered by authority."

I have made an exhaustive search for some case in which the words "other property" have been interpreted following specific words in a statute, deed, or contract. There seems to be no such case in England or Ontario.

Seeking for other authority covering these very words, I find the following: Hall v. Barker, 74 Wis. 118, 127 . . . Grissell v. Housatonic R. R. Co., 54 Conn. 447 . . . People v. New York and Manhattan Beach R. W. Co., 81 N. Y. 565 . . . First National Bank of Joliet v. Adam, 138 Ill. 483. . . .

These are the only decisions I can find upon the interpretation of the words "other property," except when used in wills. So much do they depend upon the context and the object of the statutes or documents under discussion that, if binding as authorities, they would be by no means conclusive in the present instance.

It is an universal rule of construction that "all words of a written instrument shall, if possible, be given some effect, so that none will be void, superfluous, or redundant." Therefore general words must not be so restricted as to deprive them of all meaning. If the particular words preceding exhaust the type, the general words must receive a wider interpretation: Fenwick v. Schmalz, L. R. 3 C. P. 313, 315.

But can it be said that "money and valuable securities" comprise the entire genera or types of things to which they belong? . . .

[Reference to Rex v. Hill, Russ. & Ry. 190; Southcott v. Watson, 3 Atk. 232; Regina v. Yates, 1 Moody 170; Regina v. Tattock, 2 Q. B. D. 157, 163, 166; Barry v. Harding, 1 Jo. & La T. 475; Hopkins v. Abbott, L. R. 19 Eq. 222.]

It would . . . appear (from these cases) that there are several other things (and there may be more) of a like type, which would not be held to be covered by the words "money, valuable security," and, in their application to these, the words "other property" may have the full effect intended by the treaty-makers. I cannot, on the ground that the specific words are exhaustive, refuse to apply the ejusdem generis rule.

This rule of construction is spoken of by Mr. Hardcastle (3rd ed., p. 191) as a "mere presumption in the absence of other indication of intention."

If we take the entire treaty and by a wider inspection of its scope endeavour to learn the intention of the high contracting parties, which, if ascertainable by a consideration of the object of the treaty, its whole scope and tenor, or other reliable indicia, must certainly govern its construction, the difficulty of refusing to apply the rule under consideration is increased rather than lessened.

The purpose of this convention was to extend the scope of the existing extradition arrangements between Great

Britain and the United States. With this object it introduced into the schedule of extradition crimes certain offences not before included, and amongst them the offence described as "receiving any money, valuable security, or other property," etc. The expressed purpose of the convention has been attained whatever interpretation is given to the words "other property" in this particular clause.

"'Property' is the most comprehensive of all terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have:" per Langdale, M.R., in Jones v. Skinner, 5 L. J. Ch. 90.

In construing wills, only a very clear context, leaving no room to doubt the testator's intention to restrict its meaning, is permitted to deprive this word of its comprehensiveness: Robinson v. Webb, 17 Beav. 260; Mullaly v. Walsh, 3 L. R. Ir. 244; Gover v. Davis, 29 Beav. 222.

The nature of the subject dealt with does not admit of its widest signification, which would include real estate, etc., being here given to this word. How far is its comprehensiveness to be restricted?

It is, perhaps, difficult to conceive why the criminal receiving stolen money, valuable securities, and things of that type, should be extraditable rather than the receiver of other kinds of good or chattels. And yet every offence is not an extradition crime. The framers of the treaty, however, may well have regarded the dealer in stolen money and securities as a more dangerous kind of offender—a criminal usually on a larger scale—than the ordinary, commonplace receiver of stolen goods. We cannot attribute to the framers of this treaty ignorance or forgetfulness of a rule of construction so well established in the jurisprudence of both countries. . . .

[Reference to Thames and Mersey Marine Ins. Co. v. Hamilton, Fraser, & Co., 12 App. Cas. at p. 490.]

If Parliament is presumed to legislate in the light of decided cases, and legislative language is to be taken as intended to be construed by the established canons of interpretation; if ordinary persons are presumed to contract with a knowledge of the law bearing upon the language they employ; a fortiori should the representatives of sovereign states, making solemn treaties of such vast moment . . ., be credited with knowledge and recollection of the ordinary canons of construction, and of the fact that courts of justice are accustomed to presume that the application of such rules was contemplated when language within their purview is deliberately employed. Adapting the language of Lindley, M.R., "I cannot conceive why the

treaty-framers should have taken the trouble to specify in this section such special things as 'money' and 'valuable securities' except to shew the type of thing which they were referring to; and, in my opinion, 'other property' must be taken to mean other property of that type:" In re Stockport Schools, [1898] 2 Ch. 687, at p. 696. Had they meant the general words to be applied without restriction, they would have used only one compendious expression: Rex v. Wallis, 5 T. R. 379.

Notwithstanding the warning of an eminent Judge that "in denying to any word (or phrase) its known and natural meaning we ought to be quite sure that the intention was, in the particular case, not to give it that meaning" (Tisdell v. Combe, 7 A. & E. 796, per Denman, C.J.), the absence of any merit in the case of the prisoner, and the fact that I cannot say that I am absolutely certain that I am correctly interpreting this important treaty clause, I feel bound to give the prisoner the benefit of the best opinion I have been able to form.

I would, if a Divisional Court were sitting, gladly avail myself of the provision enabling me to refer this motion to it: Jud. Act. sec. 67 (1b). But no such Court will be held for two months.

Having, after the fullest reflection, though not without much hesitation, reached a conclusion that the offence with which Cohen is charged is not an extradition crime under the existing convention between Great Britain and the United States, I feel that I am bound to take the responsibility of granting the writ of habeas corpus for which he asks and of ordering his discharge from custody.

"So long as there is an extradition law under which a criminal whose extradition is sought has rights to be observed here, he is entitled to have those rights administered by our Courts:" per Osler, J., in Re Parker, 9 P. R. at p. 335.

OSLER, J.A. JULY 23RD, 1904.

CHAMBERS.

RE PANTON AND CRAMP STEEL CO. AND NATIONAL TRUST CO.

Company—Transfer of Shares—Refusal to Register—Temporary Closing of Transfer Books—Meeting of Shareholders—Mandamus—Absence of Statutory Authority.

Motion by Panton to compel the trust company to record a transfer to Panton of 4 shares of common stock in the steel company. The transfer was in order and would have

been recorded by the secretary of the trust company but for the instructions they received from the secretary of the steel company on the 21st July not to do so until after 30th July.

The motion was heard by OSLER, J.A., in Chambers, at the request of a Judge of the High Court.

F. Arnoldi, K.C., for applicant.

W. H. Blake, K.C., for the companies.

OSLER, J.A.—The instructions and the resolution of the steel company on which they were based were evidently given and passed under a misapprehension as to the company's legal right. The transfer being in order and the stock paid in in full, the company had no discretion to exercise in the matter, or option but to comply with the demand of the transferee to record the transfer. It may be convenient that for a brief period before the annual or a special meeting of shareholders transfers should not be recorded so as to avoid confusion, or rather perhaps some inconvenience in ascertaining who are shareholders entitled to be present or represented at the meeting, but the power to impose this restriction upon sellers and purchasers of shares has not been conferred upon the company, nor has any authority been referred to which might indicate that, in the absence of statutory authority, the company have any discretion in this respect. The trust company are still the general agents of the steel company for the purpose of recording transfers, under the terms of a somewhat formal and elaborate agreement, and the only reason assigned for passing the resolution resting upon a misapprehension of the legal rights of the steel company, the reservations mentioned in the agreement must be read as limited to instructions and reservations which they can legally impose, or in respect of rights which they could themselves exercise in reference to such a transfer as that in question.

Order made as asked. Costs of the applicant and of the trust company to be paid by the steel company.

ANGLIN, J. JULY 25TH, 1904.

CHAMBERS.

RE DEWAR AND DUMAS.

Landlord and Tenant—Overholding Tenant—Summary Proceeding to Recover Possession of Demised Premises—Overholding Tenants Act—Notice of Hearing—Appointment—Affidavit—Service—Irregularity — Waiver — Adjournment—Prohibition.

Motion by the tenant for prohibition to one of the junior Judges of the County Court of York to prohibit the issue

and enforcement of an order under the Overholding Tenants Act for delivery of possession by the tenant of the premises No. 220 Bleecker street, Toronto.

D. O. Cameron, for the tenant.

F. J. Roche, for the landlord.

ANGLIN, J.—It was objected by the tenant that the provisions of sec. 4 of the statute, requiring that to the notice in writing of the time and place fixed by the Judge for determining the landlord's right to an order for possession, to be served upon the tenant, "shall be annexed a copy of the Judge's appointment and of the affidavit on which the appointment was obtained and of the papers attached thereto," were not complied with. The notice was given on 6th June. The copy of the appointment was served on the same day, but apparently not annexed to the notice. The copy of the affidavit was not served at all prior to the return of the appointment on 10th June. On that day this objection to the proceedings was taken before the Judge of the County Court. Instead of issuing a new appointment and directing service of a fresh notice, etc., under sec. 4, the Judge adjourned the hearing of the case until 17th June, and directed that a copy of the affidavit be meantime served. This service was effected on 13th June. On 17th June, after some evidence had been taken, the matter was further adjourned to 24th June, when, after argument, an order in favour of the landlord was pronounced. The tenant was represented on 17th and 24th June by counsel, who cross-examined the landlord's witnesses and adduced evidence in answer.

If failure to serve a copy of the affidavit as required by sec. 4 were merely an irregularity, it was waived: Smith v. Smith, 17 N. S. Reps. 42. The County Court Judge is here exercising a statutory jurisdiction as persona designata. Section 5 gives him power to order a writ of possession to issue "if at the time and place so appointed the tenant, having been duly notified as above provided, fails to appear." In the absence of the tenant upon the return of the appointment, a strict compliance with the requirements of sec. 4 as to notice, etc., is essential as a condition precedent to the exercise of the power given by sec. 5. But, if the tenant appears at such time and place, the Judge shall, in a summary manner, hear the parties, etc. The contract between this provision for the case where the tenant attends and that made for the case of his non-appearance, indicates that it is only in the latter event that a strict compliance with the provision of sec. 4 is a pre-requisite of jurisdiction. Where the

tenant appears and takes advantage of an adjournment made for the express purpose of meeting his objection, and then takes the chance of an adjudication upon the merits by the County Court Judge, he has effectively waived what he has himself treated as merely the irregularity which it seems in fact to be. In the absence of an English or Ontario case in point, Smith v. Smith (supra), a decision of the Supreme Court of Nova Scotia, should be followed rather than the judgment of Dubuc, J., in Carley v. Bertrand, 5 Western Law Times 158, notwithstanding the closer similarity borne by the Manitoba statute to our own Act. Moreover, in view of In re Warbrick and Rutherford, 6 O. L. R. 430, 2 O. W. R. 961, it must be deemed doubtful whether prohibition should under any circumstances be granted before the writ of possession has actually issued.

Motion dismissed with costs.

ANGLIN, J. JULY 25TH, 1904.

CHAMBERS.

EDWARDS v. COOK.

Summary Judgment—Rule 616—Pleading Disclosing no Defence—Motion for Judgment — Refusal—Discretion—Appeal.

Appeal by plaintiff from order of Master in Chambers dismissing plaintiff's motion for judgment under Rule 616.

C. A. Moss, for plaintiff, contended that the statement of defence raised matters which disclosed no answer to his claim.

W. H. Blake, K.C., for defendant.

ANGLIN, J.—Rules 261 and 259 afford appropriate methods for disposing of such questions; and, in view of their provisions, Rule 616 was not intended and should not be used to fulfil this office. Mellor v. Sidebotham, 5 Ch. D. 342, referred to. The relief granted under Rule 616 is not a matter of right, but a matter for the exercise of judicial discretion: In re Wright, [1895] 2 Ch. 747, 750. That discretion the Master has exercised by refusing plaintiff's motion, and I should not interfere.

Appeal dismissed with costs to defendant in any event.

MEREDITH, C.J. JULY 25TH, 1904.

TRIAL.

RAMSAY v. REID.

Lunatic—Action Brought in Name of—Benefit of Lunatic's Executors—Payment into Court—Amendment.

After judgment delivered on 31st July, 1903 (2 O. W. R. 720),the official guardian made inquiry as to the mental condition of plaintiff.

MEREDITH, C.J.—The result of the inquiry establishes that plaintiff has not sufficient capacity to determine as to whether this suit should be brought, that he is in fact a person of unsound mind not so found by inquisition or judicial inquiry. The action was therefore improperly brought, as plaintiff could sue only through the medium of a next friend. Had that course been adopted, it would have been for the Court at the hearing to have determined whether the action was for the benefit of plaintiff. Looking at the result, as shewn by the bills of costs of the litigation, the plaintiff's amounting to $225 and defendants' to $160, it was not for plaintiff's benefit that the action should be brought.

Order made directing the executors to pay the fund in their hands into Court, subject to further order. An application may then be made for payment out of any costs by any of the parties, and also for payment out of any sum necessary to be paid out in the interests of plaintiff. An amendment of the record by adding parties will not be necessary. If any motion made for payment out, notice to be given to the persons who should be made defendants if the action were to go down for hearing again.

ANGLIN, J. JULY 28TH, 1904.

CHAMBERS.

REX v. WHITESIDES.

Criminal Law—Arrest under Justices' Warrant — Prisoner Found in Another County—Warrant not Indorsed by Justice of that County—Illegality of Arrest—Right to Discharge—Unlawful Caption — Legal Detention — Habeas Corpus—Reference to Divisional Court.

Upon the return of a writ of habeas corpus J. W. McCullough moved for the discharge of the prisoner, on the ground

that, upon the warrant of the convicting justices, who held commissions of the peace for the county of Durham, properly addressed to peace officers of that county, but not backed or indorsed by a justice of the peace for the county of Ontario, as provided by sec. 844 of the Criminal Code, the defendant was unlawfully arrested in the latter county, whence he was unlawfully conveyed to the gaol at Cobourg. This warrant the keeper of that gaol returned with the writ. It was not backed or indorsed by any justice of the peace for the county of Ontario. The fact of the prisoner's arrest at Oshawa, in Ontario county, was shewn by his own affidavit filed on the motion for the writ and was not controverted.

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

ANGLIN, J.—On behalf of the Crown, exception is taken to the use of the prisoner's affidavit. I think it is admissible. It does not contradict the return, even if that would be a sufficient reason for excluding it. See Regina v. Boyle, 4 P. R. 256; Paley on Convictions, 7th ed., p. 346. Section 4 of the Habeas Corpus Act, R. S. O. 1897 ch. 83, seems to put this beyond doubt.

Before the provision now made by sec. 844 of the Criminal Code for the backing of warrants issued after summary convictions, Mr. Justice Robertson, in Regina v. Jones, 8 C. L. T. Occ. N. 332, held that such a warrant of commitment in execution could not be backed by a justice of the peace for another county, and, upon habeas corpus, he ordered the discharge from the custody of the keeper of the gaol at Brantford of a prisoner arrested in Haldimand county, upon a warrant issued by the police magistrate for the county of Brant, and indorsed by a justice of the peace for the county of Haldimand. This authority would support the present application. It is very meagrely reported in the Canadian Law Times, and not elsewhere. I have seen the note book of the learned Judge, which contains the memorandum of this judgment upon which the note in the Law Times is founded. While not throwing further light upon the reasons for the conclusions reached, the learned Judge's notes of the argument make it quite apparent that the authorities in point were not cited to him, and the distinction between detention in execution under sentence for a criminal offence and detention under civil process was not called to his attention. Neither was the Attorney-General represented upon the motion.

That such an arrest is illegal, and may give to the defendant a right to redress in proper proceedings may for the present be assumed: Reid v. Maybee, 31 C. P. 392; South-

wick v. Hare, 24 O. R. 528; that it might be lawfully resisted may be granted: The Queen v. Crumpton, 5 Q. B. D. 341.

If the prisoner were detained under civil process, the illegality or irregularity of his original caption would afford ground for his discharge: Re Eggington, 2 E. & B. 717. But detention under criminal process for trial, and a fortiori in execution, is regarded very differently by the Courts. The right to habeas corpus and to discharge does not there depend upon the legality or illegality of the original caption, but upon the legality or illegality of the present detention. "A writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody, and if sufficient grounds for his detention by the government is shewn, he is not to be discharged for defects in the original arrest or commitment:" Nishimura Ekiu v. United States, 142 U. S. at p. 662.

In Rex v. Gordon, 1 B. & Ald. 572 n., a prisoner, arrested upon an invalid warrant of a justice of the peace, but for whose detention the same justice had subsequently issued a strictly regular warrant of detainer, which was returned with the writ of habeas corpus, was remanded to custody.

It is well established that if the return to the writ shews a good warrant under which the prisoner is presently in custody for a criminal offence, his prior arrest and detention under a defective process will not avail him upon motion for discharge: The Queen v. Richards, 5 Q. B. 926; Ex p. Cross, 2 H. & N. 354; In re Phipps, 11 W. R. 730; Southwick v. Hare, 24 O. R. 528. But the detention, under a second regular warrant, of a prisoner arrested under a prior illegal or defective process is not permitted in civil matters: In re Eggington (supra). Again in In re Scott, 9 B. & C. 446, a woman, apprehended at Brussels by an English police officer armed only with a warrant issued by the Lord Chief Justice Tenterden, and by such officer carried into England, without any extradition process, applied to Lord Tenterden for a habeas corpus and for her discharge. Her counsel conceded that a prisoner charged with felony will not be released on account of defects in his commitment, but urged that this rule should not extend to cases of misdemeanour, citing Attorney-General v. Cass, 11 Price 245. To him Lord Tenterden replied: "That was the case of an information for penalties, and rather in the nature of a civil proceeding to recover a debt than of a criminal one to punish an offence against the public. . . .

The question, therefore, is this, whether, if a person charged with a crime is found in this country, it is the duty

of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought and still continue to think that we cannot inquire into them." The writ was denied. A like disposition was made by the Circuit Court of Illinois of a petition for habeas corpus by a person accused of larceny and forgery, who had been arrested in Peru: Ex p. Ker, 18 Fed. Rep. 167. In Dow's case, 18 Penn. St. R. 27, the Supreme Court of Pennsylvania applied the same rule to the case of a citizen of that state arrested in Michigan without legal authority and carried into Pennsylvania.

See too Rex v. Marks, 3 East 1157, and Ex p. Krans, 1 B. & C. 248, cases of original caption without sufficient authority, in which discharge was refused. However illegal and unwarranted the original caption, if the prisoner is now rightly and properly detained, and the warrant returned to the writ of habeas corpus shews such lawful detention, the whole current of authority indicates that the Courts will not grant the discharge.

In Regina v. McHolme, 8 P. R. 452, the detention as well as the caption was illegal and unwarranted.

In all the cases cited the prisoners were in custody awaiting trial. But if a person not yet found guilty and by law presumed to be innocent should be held for trial by a competent Court, if in lawful custody within its jurisdiction, notwithstanding any illegality of his caption, the convict held in execution can certainly have no higher right to a discharge.

Being unable to agree with the decision in Regina v. Jones, and deeming the matter of sufficient importance to be considered in a higher Court, the proper course for me to take seems to be to exercise the power conferred by sec. 81 (2) of the Judicature Act. I accordingly refer this question to the Divisional Court.

As this course is somewhat unusual, I have put in writing my reasons for adopting it.

OSLER, J.A. JULY 28TH, 1904.

C.A.—CHAMBERS.

TABB v. GRAND TRUNK R. W. CO.

Appeal—Supreme Court of Canada—Extension of Time for Allowance of Security—Leave to Appeal Necessary but not Granted—Powers of Judge of Appeal.

Motion by defendants to extend the time for the allowance of the security proposed to be given upon an appeal

intended to be brought by defendants from the judgment of the Court of Appeal (3 O. W. R. 885) to the Supreme Court of Canada.

H. E. Rose, for defendants.

D'Arcy Tate, Hamilton, for plaintiff.

OSLER, J.A.—The defendants concede, and I think rightly, that the appeal is one which cannot be brought without leave, which they are unable to move for at present, neither the Court of Appeal nor the Supreme Court sitting in vacation. It appears to me that I have no jurisdiction to make such an order, or (which is much the same thing), if I have, that it is one which would be of no service to defendants and would give them no relief.

If defendants could appeal without leave, I might, under sec. 42 of the Supreme Court Act, "allow" the appeal, i.e., allow the security. That may be done by the Court or a Judge notwithstanding that the appeal is not brought within the time prescribed by sec. 40 of the Act (as amended). "Allowance" of the appeal has been said to involve the granting of leave to appeal, and that would seem to be necessarily so where such allowance is by a jurisdiction competent to grant leave. But, as a single Judge has no power to do that (60 & 61 Vict. ch. 24, sec. 1 (e)), neither has he power to "allow" the security on an appeal which without leave is not competent, and therefore not yet brought. No power has been conferred upon a single Judge, that I can find, to extend the time either for allowing the security or moving for leave to appeal to the Supreme Court in such a case as that, and the power of the full Court of Appeal or of the Supreme Court to grant leave or to allow the appeal, under the provisions above mentioned, does not depend upon the granting by a single Judge of an order to extend the time for doing either. That leave to appeal may be granted though not applied for until after the expiration of the time limited by sec. 40 for bringing the appeal, seems to have been decided in Bank of B. N. A. v. Walker, Coutlee's S. C. Dig. p. 111, and in Bank of Montreal v. Demers, 29 S. C. R. 435. See, however, Barrett v. Le Syndicat, 33 S. C. R. 667.

The motion must therefore be refused with costs.

Mr. Rose asked that if I found myself unable to grant his motion I would direct the issue of the judgment of this Court to be stayed until he had an opportunity of moving for leave to appeal. If I have power to do this, which I doubt, at all merely for any such reason as this, I do not think I ought to exercise it.

ANGLIN, J. JULY 29TH, 1904.

WEEKLY COURT.

HOPKINS v. ANDERSON.

Injunction—Interim Injunction—User of Right of Way—Balance of Convenience.

Motion by plaintiff for an interim injunction restraining defendant from using for other purposes certain land at Niagara Falls over which he had a right of way.

J. J. Foy, K.C., for plaintiff.

H. E. Rose, for defendant..

ANGLIN, J.—Plaintiff's claim involves the construction and possibly the reformation of the deed reserving the right of way in question. Even if he has established a prima facie case for the relief he asks in this action, his material is devoid of any suggestion of irreparable damage, and he has not made out a case for granting an interlocutory injunction upon considerations of comparative convenience. Any injury he may sustain before this action can be tried can be adequately compensated for by pecuniary damages. While the user of the way in dispute by defendant may cause plaintiff some annoyance, and may ultimately be proven to be a violation of plaintiff's legal rights, upon the evidence greater damage is likely to arise to defendant by granting the injunction, in the event of it turning out afterwards to have been wrongly granted, than to plaintiff from withholding it in the event of the legal right proving to be in his favour: Hamilton and Milton Road Co. v. Raspberry, 13 O. R. at p. 469. Motion adjourned to the trial.

ANGLIN, J. JULY 29TH, 1904.

WEEKLY COURT.

GOUINLOCK v. BAKER.

Partnership—Dissolution—Account—Construction of Articles—Division of Assets.

Appeal by defendant from report of Neil McLean, an official referee, to whom this action was referred for trial. Plaintiff sued for a declaration that his partnership with defendant in the profession and business of architects had been dissolved, and for an accounting.

E. F. B. Johnston, K.C., and J. E. Jones, for defendant.

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

ANGLIN, J.—The Referee held that upon the true construction of the partnership articles the partnership was for a definite term of three years ending on the 1st May, 1902; that the partnership continued at will beyond that term, and on 22nd May, 1902, was terminated by acts of the parties. Defendant contended (1) that the partnership was perpetual, subject only to dissolution by mutual consent. I am not inclined to agree with the interpretation put upon the partnership articles by the Referee. But, without determining that the interpretation was erroneous, I hold that, having regard to the credit which the Referee appears to have given to the testimony of plaintiff, and the somewhat unsatisfactory evidence of defendant as to the negotiations between himself and his partner, the conduct of the parties before and after 1st May, 1902, sufficiently evidences such a mutual consent to a termination of the partnership theretofore existing as under the articles would have wrought an immediate dissolution had the partnership not by tacit agreement been permitted to continue as a partnership at will pending efforts to arrive at a satisfactory understanding for its continuance for a further definite term upon a new basis. This partnership at will was terminated, as found by the Referee, on 22nd May, 1902. If necessary a decree of dissolution might be pronounced as prayed by defendant, and in such a judgment, having regard to all the circumstances, it would not be improper to order the dissolution to take effect as of 22nd May, 1902. Appeal dismissed on this ground.

(2) Upon the construction of clause 6 of the articles defendant should be charged with $1,300 instead of $2,000 in respect of the rebate to plaintiff provided for by this clause. Appeal allowed on this ground to this extent.

(3) The Referee was right in allowing to both parties remuneration for their work on the outstanding contracts of the firm which they respectively carried to completion for the benefit of the firm; but the Referee has in most instances erroneously charged several amounts allowed to plaintiff not against the partnership, but against the share of defendant. In the net result the share of plaintiff must be reduced by $553.30 and that of defendant increased by a like amount, upon this ground of appeal.

(4) As to the accounts in respect of the Alexandra apartments, the net partnership assets should be increased by $608.51, and the share of defendant therein by $304.25.

(5) The matters in respect of the Manufacturers' Life contract were satisfactorily dealt with by the Referee.

(6) As to the other contracts, the Referee was right in declining to treat them as partnership assets. Assuming that there was in each case a completed retainer of the firm before its dissolution, its employers would have become entitled to the services of the firm, not of its members as individuals, and certainly not of one member to the exclusion of the other. Gouinlock and Baker having by their own acts made it impossible to give the services bargained for, it is obvious that the employers could not be held to their contracts. The retainer of professional men depends almost entirely upon personal considerations. It is practically impossible therefore to place any value upon the goodwill of a professional business in regard to particular clients. It may be assumed that each client, if given the opportunity, will continue his relations with that member of the firm whose individuality induced him to retain it.

Defendant's appeal allowed to the extent of increasing his share of the partnership assets as found by the Referee, by $1,557.55. No costs of appeal.

The parties having agreed to accept as final the report of the Referee as varied on appeal, and to accept my disposition as to partnership property not covered by the report, the following further directions are given: (1) Plans and specifications of all buildings completed by either partner since dissolution shall remain the property of the partner superintending such completion. (2) Other plans and specifications shall be included in partnership assets and dealt with as hereinafter directed: (3) Uncollected amounts other than those appertaining to the Manufacturers' building, the Alexandra apartments, and the I. O. F. building, office furniture, plans and specifications as above, papers, books, and catalogues, shall be dealt with as follows: (a) If parties can agree to a division, such division shall be made. (b) If not, and parties can agree upon a person to make such division, it may be made in that way. (c) Failing any such agreement being arrived at within one month, all such assets shall be sold by the Referee to the highest bidder (both partners being at liberty to bid) after such notice to the partners and in such manner, in bulk or in parcels, as the Referee shall see fit to direct. (4) The Union Trust Co. account shall be charged $60 against plaintiff and $40 against defendant. (5) The money in the bank to the credit of the partnership to be paid to plaintiff.

ANGLIN, J. AUGUST 2ND, 1904.

TRIAL.

CLIPSHAM v. TOWN OF ORILLIA.

Municipal Corporations—Statute Authorizing Town to Erect and Operate Electrical Works—Imperative or Permissive—Damage to Lands by Erection of Dam—Temporary Structure for Supply of Material—Independent Contractor—Control by Corporation.

Action for damages for the flooding of plaintiff's farm in the years 1900, 1901, and 1902.

By 62 Vict. ch. 64 (O.) defendants were authorized to erect and operate works on the Ragged Rapids in the River Severn for generating and supplying electric power, and to sell and dispose thereof.

Under the authority of this legislation defendants on 1st August, 1899, entered into a contract with one Patriarche, whereby he agreed to erect and install an electrical power transmission plant at the place mentioned in accordance with specifications, to the satisfaction and under the direction of an engineer and clerk of the works to be appointed by defendants. The contractor agreed to afford to the engineer facilities for proper inspection of the works and materials, "all of which are to be under his control." By the general specifications it was provided that "the contractor will work under the direction of the engineer." Clause 8 of the general conditions provided that "the contractor only is to be responsible for the methods employed in construction; the engineer may approve of same only in so far as to facilitate the proper construction." The general specifications contained also this stipulation: "The dam to be of a thoroughly substantial and durable nature, so constructed, both as to design and its location, as to be capable of resisting the pressure of the highest flood water to which it will be subjected, and of delivering over its crest . . . the flood discharge of the river, without materially raising the lake level at the head of the rapids above the ordinary level for equal floods before the construction of the dam."

F. E. Hodgins, K.C., and T. E. Godson, Bracebridge, for plaintiff.

E. F. B. Johnston, K.C., and D. Inglis Grant, Orillia, for defendants.

ANGLIN, J.—The flooding of plaintiff's lands for the three years in question is abundantly proved. Upon the evidence I find that the flooding in 1900 and 1901 was caused by a temporary dam erected by the contractor at the head of Ragged Rapids, and that the damage so caused to plaintiff in 1900 amounted to $25, and in 1901 to $55.

In March, 1902, the main or permanent dam, at the foot of the rapids, was substantially completed. The temporary dam also remained at the head of the rapids. The flooding of plaintiff's lands in this year was more extensive. His loss on this account increased to $75. The flood lasted, moreover, about one week longer than in the two preceding years. The greater extent of the flooding in 1902 plaintiff does not attribute to the action of the permanent dam. He maintains, however, that for its duration for an additional week the permanent dam was responsible. Plaintiff failed to satisfy me that the permanent dam was a factor either in causing or in producing the flooding of his lands in 1902. But if, as he maintains, this dam retarded the flow of the flood waters, and so prolonged the submersion of his lands for one week, I must find that this occasioned no appreciable damage, because the flooding had already destroyed all prospect of that year's crop on the lands affected. That flooding was caused by the temporary dam. The permanent dam, therefore, in my opinion, caused no part of the injuries for which damages are claimed in this action. . . .

Defendants contend, and I must find that they have established, that this temporary dam was built and maintained by the contractor for the purpose of making the Severn River navigable from Sparrow Lake down to Ragged Rapids, in order to enable him to bring in his supplies and materials more cheaply and expeditiously. . . . The temporary dam was merely part of the means employed by the contractor for the transportation of his supplies. Its proximity to the main dam was merely accidental. It can no more be deemed part of the undertaking itself, or something incidental thereto, than could a tramway or waggon road constructed some miles away, upon which the contractor conveyed materials to the scene of his operations. It was no part of that which the municipality obtained statutory authority to construct. It was not part of that which the contractor was employed to erect, nor was it in any sense necessarily or properly incidental to the work he undertook. It was an independent structure, built by the contractor solely for his own convenience and to suit his own purposes.

It may be that, as to the work itself, the subject of the contract, and as to everything necessarily or properly incidental to its performance, the reservation of powers of supervision and control by the municipality, through its engineer and clerk of works, "destroyed the character of the contract as an independent contract:" Saunders v. City of Toronto, 26 A. R. at p. 267; Penny v. Wimbledon, [1898] 2 Q. B. 212, [1899] 2 Q. B. 72; so that the municipality could not, in an action properly framed, upon that ground escape responsibility for injuries sustained through improper or defective construction. But I know of no authority which, by reason of a reservation of control by the proprietor or his agents over the works themselves, extends the maxim respondeat superior to anything so distinctly collateral as the particular means employed by a contractor for the transportation of his supplies, over which the proprietor had no right to exercise any power of control, and which the contractor was not under any obligation to employ. This is not a case of imperfect or improper execution of the work contracted to be done; nor is it a case of endeavouring to shoulder upon a contractor responsibility for the discharge of a duty imposed upon defendants. . . .

In 1902 the situation was entirely changed. In March of that year, defendants dismissed the contractor, and took possession of the works at Ragged Rapids; the main dam was then practically completed. Before any damage by flooding occurred in 1902, a deputation of farmers from Sparrow Lake, representing plaintiff amongst others, waited upon defendants' town council, and requested the removal of the temporary dam. This was refused. Upon some members of the deputation intimating an intention themselves to destroy the temporary dam, they were threatened with being held responsible for any damage which its removal might occasion to defendants' property. Had the dam been then removed, the flooding complained of in 1902 would not have occurred. For the maintenance of the temporary dam in that year defendants, and they alone, are, in my opinion, responsible.

If this dam were part of the works expressly authorized by the empowering statute, or if it were necessarily, or even properly, to be regarded as incidental to the construction and maintenance of the works so authorized, in the absence of negligence or impropriety in its construction and maintenance (which must be assumed in this action, no such negligence or impropriety being alleged by plaintiff), that statute, if imperative and not merely permissive, would preclude plaintiff from obtaining any redress for injuries conse-

quent upon the exercise of powers so conferred: London, Brighton, and South Coast R. W. Co. v. Truman, 11 App. Cas. 45; Hammersmith R. W. Co. v. Brand, L. R. 4 H. L. 171; Canadian Pacific R. W. Co. v. Roy, [1902] A. C. 220. But, though the statute 62 Vict. ch. 64 should be regarded as imperative (a careful consideration of its purposes and terms rather leads me to the contrary conclusion), defendants' counsel, by his very forceful argument, has convinced me that the temporary dam was not at all a part of the works which it authorized, either expressly or by implication. If, when built and maintained by the contractor, it was not within the purview of his contract so as to impose liability for the injurious consequences which its construction entailed upon defendants, by reason of their right of control through their engineer over the undertaking itself, it did not, when it passed from the possession of the contractor into that of the defendants, so change its character as to become part of the works which the statute authorized and empowered them to construct. It remained a thing so collateral to the works which the Legislature empowered the defendants to undertake that, whether the statute be imperative or permissive . . . its protecting ægis cannot be extended to shield from liability those who continued to maintain the temporary dam. The very ground upon which defendants escape liability for the construction and maintenance of this dam by their contractor, precludes their claim of statutory immunity against responsibility for the injuries which they have caused by themselves subsequently maintaining it.

Having regard to the language of the statute—permissive in character—to the absence of all provision for compensation, to the fact that legislation was requisite to enable defendants as a municipal corporation to engage in such an undertaking, to the circumstances that the quantity of water to be dammed back, the amount of electrical supply to be created, the height and the immediate location of the dam or dams to be constructed, and the provision to be made for the escape of surplus water, are all left to the determination of defendants, to the provision enabling defendants to become vendors of surplus power at profitable prices, I strongly incline to the view that, according to its sound construction, this statute is permissive merely, and that "the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law rights of others:" Canadian Pacific R. W. Co. v. Parke, [1899] A. C. 535, 545. If so, though this temporary dam should be held to be part

of the undertaking authorized by the statute, its maintenance would only be lawful if without injury to others: Metropolitan Asylums Managers v. Hill, 6 App. Cas. at p. 203.

For the foregoing reasons judgment should be entered for plaintiff for $75 for damages sustained in the year 1902. Prior to its transfer to High Court, plaintiff is entitled to costs of this action upon the District Court tariff. Subsequent to such transfer, having regard to all the circumstances, especially to the fact that upon the determination of the questions involved in this action the rights of a number of other persons depend, I allow to plaintiff his general costs on the High Court scale, except costs incurred in his unsuccessful attempt to prove that the main dam caused or contributed to the injuries in respect of which this action was brought.

AUGUST 8TH, 1904.

DIVISIONAL COURT.

EVANS v. ROLLS.

Promissory Notes—Holder for Value—Notice—Executor.

Appeal by defendants from the refusal of their motion for a new trial in an action in the 10th Division Court in the County of York, in which plaintiff had recovered judgment against them for $143.55 with costs.

The action was on three promissory notes, two of them for $5 and $5.50 respectively, made by defendant Rolls individually, and the third for $144 made by him individually and also as executor of one Rolls; all of them were payable to the order of D. A. Robson, and were indorsed by him to plaintiff before their maturity.

W. Cook, for defendants.

G. Grant, for plaintiff.

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

MEREDITH, C.J.—It appears to be undisputed that something is still owing on these promissory notes; defendant Rolls in his testimony at the trial admitted this, but said that he did not know how much. The real dispute appears, however, to have been as to who should bear the loss of $49.80 which Rolls was entitled to receive as the balance coming to him on the transaction which resulted in the giving of the

$144 note, which he never received, and for which Robson gave him his (Robson's) cheque on the Sovereign Bank, which was dishonoured.

The appellants' contention is that Robson was the agent of plaintiff in the transaction, and that plaintiff should, therefore, bear the loss; and the latter contends that he is the holder for value of the note without notice, and therefore entitled to recover the full amount, though Robson could not.

The question is one of fact, which the Judge before whom the action was tried has found in favour of plaintiff, and we cannot see that his finding is wrong, and it may not therefore be disturbed.

We think the learned Judge was wrong in giving judgment against defendant Rolls as executor. There is nothing to shew that the transaction was one in which the Rolls estate was in any way interested, and even if it had been shewn that the transaction was one entirely for the benefit of the estate, the executor had no power to give a promissory note in his capacity of executor so as to bind the estate, even if he had been the sole executor, which he was not.

The judgment against defendant Rolls as executor must therefore be reversed and judgment must be entered dismissing the action against him as such executor without costs, and with that variation the judgment will be affirmed.

There will be no costs of the appeal to either party.

AUGUST 6TH, 1904.

MORTON v. GRAND TRUNK R. W. CO.

(TWO ACTIONS.)

Consolidation of Actions—Two Actions by Different Plaintiffs against same Defendants for one Cause—Tort—Fatal Injuries Act—Stay of Proceedings—Undertaking—Order.

Appeal by defendants from an order of FALCONBRIDGE, C.J., 3 O. W. R. 704, affirming order of Master in Chambers, ib. 640, dismissing their application for an order to stay or dismiss one of the actions, or consolidating them, or for such further or other order as might seem just under the circumstances.

D. L. McCarthy, for appellants.

J. D. Falconbridge, for plaintiff Aimée Florence Morton.

D'Arcy Tate, Hamilton, for plaintiff Maud Morton.

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

MEREDITH, C.J.—William Morton having been killed under circumstances which, according to the contention of the plaintiffs, entitle his surviving wife, parent, and child or children to an action under the provisions of R. S. O. 1897 ch. 166, an action was begun on 31st December, 1902, by Aimée Florence Morton, who claims to be the widow of the deceased, and Edward Morton and Clara L. Morton, the deceased's two children by her.

The statement of claim does not contain any particulars of the persons for whom and on whose behalf the action is brought, nor, as far as appears, have any such particulars been delivered. The action must, however, I think, be taken to be brought on behalf of the plaintiff Aimée Florence Morton, as the widow, and the plaintiffs Edward Morton and Clara L. Morton, as the children, of the deceased.

On 8th January, 1903, the second action was begun, in which the plaintiff is Maud Morton, who claims to be the widow of the deceased, and this action is brought, according to the allegations of the statement of claim (paragraph 8) for the benefit of herself and of Thelma Maud Morton, the infant child of herself and the deceased.

It seems to be not seriously disputed that the plaintiff Aimée Florence Morton was at one time the wife of the deceased, and that her two co-plaintiffs are the children of her marriage with him; and it is also not disputed that the claim of the plaintiff Maud Morton to be the widow of the deceased, and of Thelma Maud Morton to be his lawful child, depends upon the validity of a divorce which the deceased is said to have obtained from his first wife.

The Act provides that not more than one action shall lie for and in respect of the same subject matter of complaint (sec. 6), and it provides that if there be no executor or administrator of the deceased, or if there being such an executor or administrator, no action as in the Act mentioned is brought within six months after the death of the deceased by and in the name of his executor or administrator, the action "may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator," and that "every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were

brought by and in the name of such executor or administrator."

A person who sues, whether the executor or administrator, or one of the class for whose benefit the action may be brought, occupies, as it has been held, the position of a trustee or quasi trustee, for those on whose behalf the action is brought or may be brought, who are not named as plaintiffs to it.

Having regard to this provision, and that as to one action only lying in respect of the same subject matter of complaint, it appears to me to be reasonably clear that the case at bar is one in which under the old practice the appellants might have pleaded in abatement of the second the pendency of the first action, and that, now that pleading in abatement is abolished, the case is one for the application of the power of the Court to stay proceedings, a procedure which has been substituted for pleading in abatement.

Though the parties to the actions are not the same, both actions must necessarily be, as any judgment in either of them would also be, for the benefit of all who are entitled to damages under the Act, subject to this observation, that if the plaintiff in the second action should fail in establishing that she is the widow of the deceased, and therefore one of the class entitled to damages, as she sues alone, and the only other person for whose benefit she brings her action would in that event also not be entitled, her action would probably entirely fail.

Whether or not the plaintiff Aimée Florence Morton is one of the class, the other two plaintiffs in the first action are admittedly of it, they being children of the deceased, and their right not being affected by the divorce, if there has been a divorce and it is valid.

Whether or not, therefore, the plaintiff in the second action, and her child, are entitled to damages, their rights, I think, must be worked out in the first action, which, as I have said, is an action for the benefit of all.

The Act is defective in not making any express provision for a case such as this, where each of two persons claims to be the widow of the deceased, and a third to be his lawful child, the relation of widow and that of lawful child asserted in the second action being disputed by the plaintiffs in the first.

I do not think, however, that the powers of the Court, especially since the Judicature Act, are so restricted that it is not possible to provide on such an application as this, for the determination of all the matters which must be dealt with

before the rights of the parties are finally settled, and that without doing any injustice to any of them.

In order that the possibility of injustice to the plaintiff in the second action and her infant child may be avoided, it is, I think, competent for the Court to require the plaintiffs in the first action to undertake to bring to the notice of the Court the claims that have been made in the second action, in order that they may be passed upon at the trial.

The plaintiffs in the first action are, as I have said, trustees or quasi trustees for those entitled under the Act, and it would, I think, be a breach of trust on their part not to present for the consideration of the Court all the claims which have been made by persons claiming to have stood in such relation to the deceased as to be entitled to damages on account of his death; and the plaintiffs in the first action, as a condition of their being allowed to proceed with it, should be required to give an undertaking to do this, and to allow the plaintiff in the second action to appear by counsel and take part in the trial.

To permit the plaintiffs in the first action to proceed with it in entire disregard of the claims of the persons for whose benefit the second action is brought, which may turn out to be valid claims, would be, I think, to permit them to abuse the process of the Court, and the Court is not only entitled, but, I think, bound, to use its inherent power to prevent its procedure being so abused.

Without at all assuming to direct the course which the Judge before whom the action is tried may take, it would seem to me that it would be the most convenient and the best course first to determine without the aid of a jury the question of the validity of the alleged divorce and of the marriage with the deceased of the plaintiff in the second action; and, that question having been determined, to leave to the jury, or himself to try, any other issues of fact, and to assess the damages, and, to avoid the possibility of another trial becoming necessary, to assess contingently the damages of the plaintiff who is, in his view, unsuccessful in establishing her claim to be the widow of the deceased.

If the opinion I have expressed be not the correct one, I do not see what there would be to prevent one of three children of a deceased person, all admittedly entitled to damages, if any one of them is, from bringing an action claiming damages on his own behalf and omitting entirely in his pleadings or otherwise to bring to the notice of the Court the claims of the other two children; and the machinery of the

Court cannot surely be so ineffective that the Court would not in such a case have power to prevent the action from proceeding in the way in which it had been launched, and to enable the other children in some way to intervene in the action so that their claims might be included in it and dealt with at the trial.

The result is that, in my opinion, the appeal should be allowed, and the orders appealed from discharged, and for them an order should be substituted staying until further order all proceedings in the second action, and requiring the plaintiffs in the first action to give the undertaking which I have mentioned, and to stay their action until it is given; and the costs of the motion to the Master in Chambers, and of the appeal from it to the learned Chief Justice, and of this appeal, should be costs in the cause to the successful party.

In the event of the persons for whose benefit the second action is brought failing to establish their claims, they should have no costs; and in the event of their succeeding, unless the Judge at the trial otherwise orders, their costs, including the costs of the action, should be borne by the defendants.

The defendants also, as a condition of the relief which our order will give them, must give a similar undertaking to that which has been required of the plaintiffs in the first action.

It may be that what I desire to accomplish by the order I would make might be as well, if not better, attained by an order adding the plaintiff in the second action and her infant child as parties defendants to the first action; staying the second action and providing that the question whether the plaintiff in the second action is the widow of the deceased and her infant daughter his lawful child, should be tried before the other issues in the action, though not necessarily at a different time. Before the Judicature Act such an order was a common enough proceeding in the Court of Chancery, though it was an impossible one to be made in a common law Court, but since the Act it is difficult to see any good reason why the former Chancery procedure should not be made use of in such a case as this.

If the parties prefer such an order to that which I have indicated as the one I would make on this motion, such an order may go. I can see no possibility of prejudice to any one from the making of such an order, and I venture to hope that all parties interested will agree to its being made, but if they do not all agree, the defendants may, if they choose to do so, and the plaintiff in the second action consents, take out

the order in that form, and the costs in that event will be in the cause to the party or parties who are ultimately successful in the action, unless and except in so far as the trial Judge otherwise directs.

AUGUST 6TH, 1904.

DIVISIONAL COURT.

RE WOODALL.

Execution—Fi. Fa. Lands—Expiry of—Renewal—Life of Judgment.

Appeal by William David McPherson, the execution creditor, from an order of STREET, J., dated 19th January, 1904, whereby it was declared that the appellant had no lien or charge on the interest of the estate of Frederick Peter Woodall in the lands in question, "by virtue of the writ of execution in the hands of the sheriff of the city of Toronto against the lands of the said Frederick Peter Woodall, in an action in which the said William David McPherson is plaintiff and one David Pinal is, and the said Frederick Peter Woodall was, defendant, and in which the Union Trust Company, as administrators of the estate of the said Frederick Peter Woodall, deceased, have been added as defendants."

The appeal was heard by MEREDITH, C.J., MACMAHON, J., TEETZEL, J.

G. C. Campbell, for appellant.

H. C. Fowler, for the Union Trust Company.

W. W. Vickers, for J. Small, a creditor of the estate of F. P. Woodall.

MEREDITH, C.J.—My brother Street followed the decision of my late brother Ferguson in Neil v. Almond, 29 O. R. 63, and we are asked on this appeal to overrule that case.

The question for determination is a difficult one, but I have reached the conclusion that we cannot say that Neil v. Almond was not rightly decided.

The reasoning upon which the judgment in that case was founded, as I understand it, is that the judgment debt and costs become, by the placing of a writ of execution against lands in the hands of the sheriff, a sum of money secured by a lien or otherwise charged upon or payable out of the lands then owned by the judgment debtor in the county to the

sheriff of which the writ is directed, within the meaning of sec. 23 of the Real Property Limitation Act, R. S. O. ch. 133; that, although the execution has been kept alive by regular renewals of it, the writ cannot be enforced after the expiration of ten years from the time it was placed in the hands of the sheriff against such lands, unless there has in the meantime been either the part payment or acknowledgment mentioned in sec. 23; and that a proceeding to sell the land is a proceeding brought to recover the money out of the land, within the meaning of the section.

It was argued for the appellant that the execution was kept alive by the renewals of it, so that it continued to bind the lands of the execution debtor, and to warrant the taking of proceedings to realize by sale, after the expiration of the ten years, and that the execution might be kept perpetually alive by successive renewals of it, or that, at all events, it might be kept alive until the right to recover upon the judgment itself had become barred by the operation of the Statute of Limitations appliable to it, i.e., twenty years from its recovery.

It was not disputed by the respondents, as indeed it could not be, that, according to the decisions of the Courts of this Province, the remedy upon a judgment by action or scire facias, or by the proceedings which have been substituted for the writ of scire facias, is not barred until the expiration of twenty years from the recovery of the judgment; but it was contended that the lien which was created by the delivery of the writ of execution to the sheriff stood in no different position from a lien created by the execution debtor himself, and that at the expiry of ten years from the commencement of it the remedy for its enforcement was barred, unless there had been either acknowledgment or part payment.

After the best consideration I have been able to give to the matter, I have come to the conclusion that the contention of the respondents in this respect is well founded, and unless, therefore, the effect of the renewals was to give a new starting point for the running of the statute, at the time of each renewal, it follows that the last renewal, which occurred after the expiration of ten years from the time when the writ was delivered to the sheriff for execution, was ineffectual to keep alive the lien upon the lands of the execution debtor by that delivery.

If the appellant's contention were well founded, I see no escape from the conclusion that an execution against lands

issued before the period of twenty years from the recovery of the judgment had run, may be kept alive perpetually by successive renewals. Such a result cannot, I think, have been contemplated by the Legislature, and it seems to me more to adopt the view that, when the remedy upon the judgment becomes barred by the operation of the Statute of Limitations, the right to enforce an execution then current is barred also.

But, whether or not that is the correct view is immaterial, as far as the question which was determined in Neil v. Almond is concerned, viz., the question when the lien created by the delivery of the writ to the sheriff for execution became barred.

It has been settled by the decisions, both in this Province and in England, that the Statute of Limitations is an answer to an application for leave to issue execution on a judgment whenever it would be a bar to an action or proceeding by scire facias founded upon it: Caspar v. Keachie, 41 U. C. R. 599; Jay v. Johnstone, [1893] 1 Q. B. 24, 189; and cases there cited.

It is true that Con. Rule 872, in terms, places no limit upon the right of an execution creditor to keep alive a writ of execution by renewing it, but the Rule must, I think, be read subject to the provisions of sec. 23 of the Real Property Limitation Act; and, if that be so, it must also, I think, be read subject to the provisions of the Act, when the question is as to the right of the execution creditor to enforce his lien against the lands which are bound by his execution.

This view of the law works no hardship upon the execution creditor, for, although he has renewed his writ from time to time, he has otherwise lain by and has taken no steps to make his lien effective by realizing it.

It may be that rights in the land which is bound by such a lien have been acquired by innocent purchasers, who, although they may have had the means of discovering by search in the sheriff's office that the writ has been kept alive, may have failed to do so, and it may have been thought more just that an execution creditor who had so lain by should lose his lien than that the innocent purchaser should be bound to satisfy it.

The object of the Legislature was, I think, to prevent, after the expiry of the statutory period of ten years, the enforcement of the lien, unless in the meantime there had been

either part payment or acknowledgment, and to give effect to the contention of the appellant would, as it appears to me, be to add to the exceptions which are to be found in section 23, another, to the following effect, "and unless in the meantime where the lien has been created by the placing of a writ of execution against lands in the hands of the sheriff, the writ has been kept alive by renewals of it," or words of similar import.

It may also be pointed out that according to the provisions of sec. 23, the ten years are those "next after a present right to receive the same," i.e., the money, "accrued to some person capable of giving a discharge for or release of the same;" and how it can be said that the renewal of the writ conferred upon the execution creditor a new right to receive the amount of his judgment and costs, I cannot understand.

It is true that a judgment in scire facias, that the execution creditor is entitled to have execution, gives a new starting point for the reckoning of the statutory period: Farran v. Berresford, 10 Cl. & F. 319; Farrell v. Gleason, 11 Cl. & F. 702; and it may be that where an order for leave to issue execution is made, the same result will follow, but in these cases the foundation for the new right is the judicial declaration of it in the one case by the judgment in scire facias, and in the other by the order of the Court.

No such foundation exists in case of the renewal of the writ, which is the act not of the Court but of the execution creditor.

Stewart v. Rhodes, [1900] 1 Ch. 386, may be referred to as to the effect of an order for leave to issue execution.

I have assumed that the lands in question in this case were owned by the execution debtor at the time the writ was placed in the hands of the sheriff, or at all events for more than ten years before the last renewal was effected. If this be not so, the case may be spoken to again, but, subject to this, the appeal should, in my opinion, be dismissed with costs.

MacMahon, J., gave reasons in writing for the same conclusion.

Teetzel, J., concurred.

IDINGTON, J. AUGUST 18TH, 1904.

CHAMBERS.

TABB v. GRAND TRUNK R. W. CO.

Staying Proceedings—Judgment Affirmed by Court of Appeal—Proposed Appeal to Supreme Court of Canada—Necessity for Leave—Powers of Master in Chambers and Judge—Grounds for Exercise of Power.

Appeal by plaintiff from order of Master in Chambers staying proceedings on a judgment for plaintiff for $400 damages and costs (affirmed by the Court of Appeal, 3 O. W. R. 885), till such time as defendants could move for leave to appeal to the Supreme Court of Canada, unless the solicitors for plaintiff would undertake to return, if now paid them, the damages and costs, in the event of the judgment of the Court of Appeal being reversed.

There was no right of appeal to the Supreme Court without leave, and a Judge of the Court of Appeal had refused (ante 116) to extend the time for the allowance of the security upon the proposed appeal.

The defendants made a cross-motion for the same order as had been made by the Master in Chambers in the event of it being held that the Master had no power to make the order.

A. G. Slaght, for plaintiff.

H. E. Rose, for defendants.

IDINGTON, J.—There can be no doubt that the Master's powers are defined and limited by Rule 42. From the comprehensive powers given, that of "staying proceedings after verdict or on judgment after trial or hearing before a Judge" is excepted by clause 17 (d).

I suppose the powers given without regard to the exception would enable the Master in Chambers to make the order, but this express exception therefrom must, I assume, have escaped the learned Master's notice. The exception is so express and comprehensive that I have no doubt that the order appealed against exceeds the Master's jurisdiction and must be set aside. . . .

[Reference to Oppert v. Beaumont, 18 Q. B. D. 435; Holmested & Langton, p. 205.]

As to the right of the Court or a Judge to stay proceedings after judgment in the Court of Appeal upholding the verdict and judgment until such time as may enable defendants to apply to the Supreme Court or Court of Appeal for leave to appeal, I think possibly—either under the Judicature Act, 1895, or independently—such a power may exist; but I do not think this is a case where I should, if it exist, exercise it. I need not, therefore, determine exactly what power I may have despite Rule 843. . . . The language of this Rule and the existence of a number of Rules and statutory provisions elsewhere limiting its effect and specifically providing for a stay of proceedings to enable litigants to proceed safely to appeal, would seem to indicate that any reserve power beyond these Rules and statutory provisions, if it exist, must be exercised only upon the rarest occasions that might invoke the equitable jurisdiction of the Court to prevent its process being abused or made to work injustice.

No authority has been cited to me, nor can I find any, that would warrant me in making the order asked for, under the circumstances existing here.

The case of Hart v. Trusts and Guarantee Co. (not reported), to which I was referred, did not go so far as I am asked to go here. That only involved the costs, and seemed to be like that class of cases that Lord Herschell referred to in Hood Barrs v. Crossman, [1897] A. C. at p. 175. . . .

Brigham v. Smith, 3 Ch. Ch. 313, seems much more in point than anything else I have been able to find . . . I think I may here well adopt the language of the learned Referee there where he said: "I do not see how I can make an order to stay proceedings pending an appeal which is not, in the present position of the suit, open to the plaintiff, and which, for anything that appears at present, he may never obtain leave to bring."

Assuming the existence of a power to make such an order, it does not appear to me that there is in this case anything to call for the exercise of it. The amount of the judgment does not. There does not seem to be a doubtful question of law of such general importance as to call for such extraordinary interference. Negligence by defendants has been found, and the irresponsible sort of contributory negligence of a child has been passed upon by the tribunal that has to pass upon such facts as must determine the rights of the parties in any such case. Such a state of facts will probably not be permitted to exist in future.

The liability for this negligence might well be rested on the common law, even if the statute (as to fencing railways) is to be read as counsel contended it must since McKay v. Grand Trunk R. W. Co., 5 O. L. R. 313, 2 O. W. R. 57, 34 S. C. R. 81.

The Railway Act of 1903, I think, by its sec. 194, robs the nice question propounded by counsel for defendants, of whether fences are only to be kept up in townships and not in towns or cities, of any further general importance.

I might point out that under the authority of The Rediva, 5 P. D. 1, it is quite possible that the stay of execution in such a case rests with the Court of Appeal or a Judge thereof; and, if so, it has been passed upon by Mr. Justice Osler refusing to interfere.

I think the appeal must be allowed and the motion to stay execution be dismissed, and in each case of course with costs.

MACLAREN, J.A. AUGUST 23RD, 1904.

WEEKLY COURT.

RE SOLICITOR.

Solicitor—Costs—Taxation—Retainer — Negligence — Costs Paid by Client to Opposite Party in Litigation—Reimbursement by Solicitor—Account—Items.

Appeal by solicitor from report of Master at Brampton upon a taxation of solicitor's costs and taking accounts between solicitor and client.

The appeal was heard by MACLAREN, J.A., sitting for a Judge of the High Court.

D. O. Cameron, for solicitor.

S. H. Bradford, for client.

MACLAREN, J.A.—On the application of the client eight bills of costs were referred for taxation to the local Master at Brampton, who was to take the account between the parties. By consent of the parties all questions of retainer, carelessness, impropriety, and negligence in the conduct of the business to which the bills related, were referred to the

local Master to be determined by him, with power to make allowances therefor, with leave to the applicant to dispute the retainer of the solicitor, and his liability for all or any of the bills of costs delivered.

Of the eight bills one was a general one, which was taxed at $21.56, and another was for the defence of an action for slander brought against the applicant, which never came to trial, the costs being taxed at $68.27. The liability for these two bills was admitted.

The other bills were all connected with an action brought in the name of the applicant against a neighbour for trespass upon a small piece of land of trifling value, the line between their two farms being in dispute. The land in question contained 2 or 3 acres, worth in all from $25 to $50, and the six bills of costs of the solicitor in the litigation concerning it amounted to $1,149.34. The course of the litigation, as well as the disparity between the value of the land and the amount of money spent over it, may well be described as extraordinary.

At the trial the action was dismissed with costs, on the ground that plaintiff had not shewn where the true line between the two farms was, and because defendant had been in possession for years of the piece of land in question. Plaintiff moved in the Divisional Court for a new trial, and it was granted him on condition of his paying defendant's costs at the trial and in the Divisional Court. These were taxed at $177.65 and paid.

At the second trial the action was dismissed at the close of plaintiff's case, on the ground that plaintiff had not shewn title to his lot, the Judge also holding that the survey on behalf of plaintiff was defective and could not be upheld on account of the chain-bearer not having been sworn. On a second appeal to the Divisional Court this judgment was set aside with costs and a third trial ordered.

On the eve of the third trial the parties settled, plaintiff being allowed the land and $50 for his costs.

The six bills rendered by the solicitor in connection with this litigation were: (1) for the first trial; (2) for the first Divisional Court; (3) for the second trial; (4) for the second Divisional Court; (5) for preparation for the third trial; and (6) on an appeal from the taxation of defendant's bills against plaintiff. . . .

The writ in the trespass action was issued by a former partner of the solicitor whom the applicant consulted about the recovery of the land in question. On the reference the applicant denied that he gave any retainer for this action, and alleged that in any event it was only conditional on his not being liable for any costs, and contended that he should be relieved on the ground of negligence on the part of the solicitor. He also contended that he had a right on the same ground to be reimbursed for the costs paid defendant for the first trial and the first motion to the Divisional Court, and for interest paid to the bank and other persons.

After hearing the applicant and the solicitor and their witnesses, the Master found that the applicant conditionally retained the former partner of the solicitor to protect his interest in the land in dispute, but gave no instructions for the action, and would not have subsequently sanctioned or adopted the proceedings if he had been properly advised of the great risk and expense. He further found that the solicitor was, on account of negligence, not entitled to the costs of the first trial or of the first motion to the Divisional Court, and held that he should reimburse the applicant the $177.65 paid to defendant's solicitor, particularly as the payment was only made by the applicant on a representation by the solicitor that it was merely provisional and would be recouped to him in case of subsequent success. He disallowed most of the items of surcharge of the applicant, but allowed him $45.50 on account of delay in the payment of a mortgage.

The six bills connected with the trespass action were taxed by the Master at $464.79, making with the costs taxed in the slander action ($68.27) and the amount allowed on the general account ($21.56) a total due the solicitor of $554.62.

The transactions between the solicitor and the applicant included the discounting of a series of notes in the bank, the placing of a mortgage upon the applicant's farm, and the paying off an old mortgage, besides some minor matters. On adjusting the accounts the Master found that there was in the hands of the solicitor a balance of $815.27. Deducting from this his bills taxed at $554.62, and adding the $177.55 paid defendant's solicitor in the trespass action, a balance remained due to the applicant of $438.20, which the Master reported should be paid him by the solicitor, with the costs of the reference and taxation. . . . The solicitor . . . contends that the findings of the Master are

not sustained by the evidence with regard to retainer, negligence, bank discounts, and interest upon costs.

After a careful perusal of the testimony taken before the Master and of the evidence and proceedings at the two trials and an examination of the numerous exhibits filed on the reference, I have come to the conclusion that the findings on these points are in accordance with the evidence before him.

With regard to the reimbursement of the $177.65 paid to defendant's solicitor, it is contended by the appellant that the order of reference does not give the Master jurisdiction with respect to this. On the other hand it is urged on behalf of the client that the second paragraph of the order of reference, which was added by consent of the parties, gives such jurisdiction, and that it in effect referred the question to the Master as persona designata, and that consequently there is no appeal from his decision on this point.

I am of opinion that the terms of the order of reference are sufficiently wide to give the Master jurisdiction with respect to this item, and that his finding regarding it is authorized by the evidence. Consequently I do not find it necessary to pass upon the objection raised by the applicant.

With regard, however, to the $45.50 charged to the solicitor for interest upon the mortgage money, I do not find sufficient evidence to sustain it, and I am of opinion that it should be deducted from the amount ordered to be repaid.

The other objections to the report, in my opinion, fail.

The amount to be paid to the applicant should consequently be reduced to $392.70, and there should be no costs of the appeal to either party.

TEETZEL, J. SEPTEMBER 1ST, 1904.

TRIAL.

HARRIS v. GREENWOOD.

Promissory Note—Joint Note—Statute of Limitations—Payments by one Maker—Agency—Evidence of—Costs.

Action upon a joint promissory note made by W. W. Greenwood, deceased, and his wife, defendant Mary J. Greenwood. The defence chiefly relied upon was that of the Statute of Limitations, in reply to which plaintiff proved

several payments on account by W. W. Greenwood within six years of the commencement of the action, and plaintiff sought to establish that these payments were out of money to which defendant Mary J. Greenwood was entitled, and were made by her husband with her authority.

E. E. A. DuVernet and J. H. Ingersoll, St. Catharines, for plaintiff.

E. D. Armour, K.C., and A. W. Marquis, St. Catharines, for defendant Mary J. Greenwood.

TEETZEL, J.—In my opinion, the evidence falls short of establishing either that the payments or any of them were made out of the wife's money with her knowledge and consent, or that in making any of the payments the husband was acting as her agent. The fact (which I find) that the husband had general authority to collect certain assets belonging to the wife, and was allowed by her to apply the same either for his own benefit or hers as he saw fit, would not, I think, constitute him her agent so that by payments (out of the money so collected) on account of the note he could either continue or renew her liability upon a joint note which but for such payments would be barred by the Statute of Limitations. Payments made by one of two joint makers will not take the case out of the statute as against the other unless made expressly as his agent and by his authority: Creighton v. Allen, 26 U. C. R. 627. See also Paxton v. Smith, 18 O. R. 178. While the husband did make collections for the wife and did not account to her fully for the same, there is no evidence that any part of such collections was ever specifically applied by him upon the note. It is, however, clear that, if he did so apply the money, it was without her knowledge or express consent.

While this note was outstanding the husband caused to be conveyed to the wife several parcels of incumbered real estate, the equity of redemption in which would have been available in his hands to pay plaintiff, and, while I must dismiss the action as against defendant Mary J. Greenwood, I think, under the circumstances, it should be without costs.

TEETZEL, J. SEPTEMBER 6TH, 1904.

CHAMBERS.

RE KIRKBY AND CHURCHWARDENS OF ALL SAINTS, COLLINGWOOD.

Arbitration and Award—Validity of Submission—Powers of Churchwardens — Agreement with Rector — Arrears of Stipend—Interest—Moneys Expended by Rector on Repairs.

Motion by the Rev. L. H. Kirkby to enforce an award made pursuant to an agreement of reference between him and the churchwardens of All Saints church in the town of Collingwood, under which he was awarded: (1) $50 as the equivalent of interest on admitted arrears of stipend; (2) $1,500 in respect of repairs and improvements done at his expense to the rectory house and property, with interest at six per cent. from 27th March, 1900. The arbitrators' costs and expenses were directed to be paid by the churchwardens, and each party was to bear his own costs of the arbitration.

By an order of this Court, dated 31st October, 1902, upon application for a special case, the arbitrator was directed in making his award to state on the face thereof the view of the law on which he proceeded, and it was further ordered that either party should be at liberty to move to set the award aside on the ground of error in any such view of the law.

After reciting the agreement of reference and the above order, the arbitrator stated: "I proceed in making this award on the assumption that the churchwardens had power to bind the vestry of the parish of All Saints, Collingwood, in their dealings with the incumbent and in the submission to arbitration. If there were otherwise any doubt as to the power of the churchwardens, I find that the matter was concluded by the action of the vestry at a special meeting thereof held on 29th October, 1900."

He then proceeded to make certain findings of fact, and stated: "Finding, as I do, an express agreement binding upon the churchwardens and upon the vestry in the spring of 1900, upon a new consideration, to pay an arbitrated amount for these improvements and repairs, it is unnecessary for me to consider the Statute of Limitations or the canon law which the churchwardens so strongly urged as a defence."

The award was dated 30th January, 1903, and on 12th June, 1903, by another order of this Court, an application by the churchwardens for an order permitting them to apply to set aside the award, notwithstanding the lapse of six weeks from publication thereof, was dismissed, upon counsel for Mr. Kirkby "agreeing and undertaking that he will not hereafter allege personal liability upon the part of the said churchwardens in respect of the said award."

R. B. Henderson, for Mr. Kirkby.

W. E. Middleton, for the churchwardens.

TEETZEL, J.—Upon the motion before me, Mr. Middleton, among other objections, urged that the award should not be enforced by reason of the neglect or refusal of the arbitrator to state his view of the law, as required by the order first above recited.

I do not think it is necessary for me to decide whether the arbitrator has or has not faithfully observed this order, because I think, if he has not done so, any objection on that ground is overcome by the order of 12th June.

It was further contended by Mr. Middleton that the award was not enforceable because the church being a free pew church with no revenue except voluntary contributions, the churchwardens had no power as a corporation to bind their successors or the church property by any agreement with Mr. Kirkby or by the submission to arbitration.

In support of this contention, Daw v. Ackerill, 25 A. R. 37, was relied upon. That was an action by a rector to recover a balance of stipend, and it was held upon the particular facts of that case that plaintiff could not recover. . .

As respects the allowance of $50 for interest on arrears of stipend, the arbitrator does not find any facts from which I can distinguish Mr. Kirkby's rights to recover this sum from the judgment in Daw v. Ackerill.

As to the item of $1,500 and interest, I think there is a clear distinction, from the following findings of fact set forth by the arbitrator in his award: (1) that during his incumbency Mr. Kirkby expended a large amount of money in substantial improvements and repairs by which the rectory house and the property was very considerably enhanced in value, and which had not been repaid to him; (2) that the churchwardens and vestry were very anxious to get rid of Mr. Kirkby and to effect an exchange with another minister;

(3) that Mr. Kirkby refused to vacate and carry out the proposed exchange until it was agreed that his claim for repairs and improvements should be paid, the amount to be determined by arbitration, as provided in the submission agreement.

If the churchwardens as a corporation, with the approval of the vestry, have the power to make such an agreement as that found by the arbitrator, it seems to me Daw v. Ackerill can have no application. The agreement to pay what might be awarded was not in any sense provisional or dependent upon the goodwill offerings of the parish, as it was found to be as a fact in the Daw case, but it was an agreement to pay the sum awarded absolutely and without any limitation or condition.

Mr. Kirkby had expended his money for the benefit of the parish, and, although his vestry might successfully resist payment of any stipend to him, he had a right to remain in possession of the rectory and church indefinitely, for there was no suggestion of any legal ground for his deprivation or deposition.

The consideration of the money expended by Mr. Kirkby and his consent to vacate the parish at the request of his vestry and churchwardens was ample to support an agreement to pay him whatever an arbitrator might determine in respect of money so expended.

I think therefore that, assuming the churchwardens have the power to make such an agreement, the principle of such cases as Frontenac v. Kingston, 31 U. R. C. at 595-6, and Elderslie v. Paisley, 8 O. R. 270, applies, and that plaintiff is entitled to a judgment against the churchwardens as a corporation, notwithstanding there may be at present no property or fund out of which it can be satisfied.

Then, was it within the power of the churchwardens as a corporation to make the agreement found by the arbitrator to have been made, including the agreement to arbitrate?

By 47 Vict. ch. 89, it is enacted that "the churchwardens of any church in the diocese of Toronto . . . shall, whether they be churchwardens of pew or of free churches, besides possessing the powers and authorities conferred upon such churchwardens by any Act of the Legislature now in force, be a corporation with perpetual succession under the name of 'The Churchwardens of the Church of in the ' to represent the interests of the church of which they are so elected or appointed and of the members

thereof, and shall and may sue and be sued, answer and be answered unto, in all manner of suits, actions, and proceedings whatsoever, for and in respect of such churches and church yards and all matters and things appertaining thereto."

For many hundred years before this statute, churchwardens were a body corporate whose duties and rights included that of taking care of the goods, repairs, and ornaments of the church: Phillimore's Ecclesiastical Law, pp. 1054, 1465; Stutter v. Freston, 1 Str. 52.

They have only the custody of the church building under the minister. If he refuses access to the church, complaint must be made to higher authority: Phill. 1464.

As such corporation they have a special property in distinction to a mere charge, in the organ, bells, bell-ropes, books, vestments, ornaments, and all other goods and chattels belonging to the church which come to them by virtue of their office, and may prefer indictments and sue and be sued in respect of them as a corporation. See Phill. 1484; Prideaux's Churchwarden's Guide, 55, 423, et seq.; Jackson v. Adams, 2 Bing. N. C. 402; Morse v. Thorniley, 4 W. R. 514.

It is also in the power of churchwardens in their corporate capacity to make reasonable agreements beneficial to the parish and thereby to bind the parishioners and their successors as also succeeding churchwardens. . . .

[Martin v. Nutkin, 2 P. Wms. 266, Phill. 1484, Brooke's Churchwarden's Guide, pp. 105-108, referred to.]

That the agreement in question here must have been regarded by the churchwardens and vestry as of great value to the parish, I think is manifest from the following facts found by the arbitrator: "Mr. Kirkby had been incumbent of the rectory of All Saints church, Collingwood, for about twenty-one years, during the last three years of which period a strong feeling had developed against him in the parish, until by the spring of 1900 a very considerable majority both of the vestry and of the congregation were desirous of a change, and had been doing all in their power to bring this about, and had been agitating in that direction for some time previously. At the Easter vestry in 1898, the rector's stipend had been reduced from $900 to $200 per annum, and at the Easter vestry of 1899 a reduction to $1 per annum had been decided on by resolution of the vestry."

Under this most extraordinary state of affairs I must hold that an agreement by which the churchwardens were enabled without litigation or further injury to the well-being of the parish to obtain possession of the church and rectory and secure the incumbent they desired, must be treated as an agreement highly beneficial to the parish, and therefore an agreement the making of which was incidental to the corporate duties and powers of churchwardens, within the above authorities, and binding upon the churchwardens and their successors.

Let the award therefore be enforced under sec. 13 of the Arbitration Act, except as to the item of $50 for interest.

There will be no costs of this motion.

CARTWRIGHT, MASTER. SEPTEMBER 7TH, 1904.

CHAMBERS.

BANK OF HAMILTON v. ANDERSON.

Dismissal of Action—Default of Election under Order—Appeal—Extension of Time for Election after Default.

By order of 9th March, 1904 (3 O. W. R. 301), the plaintiffs (the bank and E. R. C. Clarkson) were directed to elect within one month which of the two should proceed with this action, making all necessary amendments consequent on such election; and that in default of such election and amendment "within one month from the date hereof this action be dismissed with costs."

On 28th March an appeal from this order was dismissed by MACMAHON, J. (ib. 389), whose decision was affirmed by a Divisional Court (ib. 709) on 3rd June. The month limited by the first order expired on 8th April. No extension of time was granted by either of the subsequent orders.

On June 29th H. E. Rose, for plaintiffs, moved to extend time for making their election.

G. H. Kilmer shewed cause and objected that the Master had no power to grant the motion, relying on the decision in Crown Corundum and Mica Co. v. Logan, 3 O. L. R. 434, 1 O. W. R. 107, 174.

THE MASTER.—Unless there is some essential difference between an order to dismiss for want of prosecution and the order made in this case, I think Mr. Kilmer's contention must prevail.

Now, I am unable to see any such difference. No doubt what was urged by the counsel for the plaintiffs before the Divisional Court puts the matter in a strong light; and the spirit of the Judicature Act is disregarded if "substantial justice is sacrificed to a wretched technicality." Here, however, the whole difficulty has arisen from the oversight of the solicitors, who could have obtained the necessary enlargement from Mr. Justice MacMahon or from the Divisional Court, had the matter been mentioned on either argument.

After all, the question is one of very little practical importance. It would have cost less to have begun a new action; and, as the Milton assizes are not earlier than the 7th November, there would have been and still is ample time to go to trial at those sittings.

Had there been any question of the intervention of the Statute of Limitations or any such state of facts as in Collinson v. Jeffery, [1896] 1 Ch. 644, I would feel much more difficulty in refusing what would seem reasonable, if there was any power to make the order asked for.

The motion must be dismissed with costs.

CARTWRIGHT, MASTER. SEPTEMBER 7TH, 1904.

CHAMBERS.

McBAIN v. WATERLOO MANUFACTURING CO.

Infant—Next Friend—Father out of Jurisdiction—Security for Costs—New Next Friend.

Motion by defendants to stay the action until the plaintiff should name a next friend in the jurisdiction or give security for costs. The plaintiff sued by his father as next friend; both resided in the Province of Quebec, as appeared by indorsement on the writ of summons.

D. L. McCarthy, for defendants.

J. E. Jones, for plaintiff.

THE MASTER referred to Topping v. Everest, 2 O. W. R. 744, and cases there cited, especially Scott v. Niagara Navigation Co., 15 P. R. 409, 455, and continued:

I think defendants are entitled to have their order. The next friend of an infant plaintiff stands in the same position as any other litigant. Any indulgence is given to the infant and not to the next friend.

In all the reported cases the next friend was resident within the jurisdiction. In such an event security for costs was always refused. But how can a resident out of the jurisdiction be said to be before the Court?

If, for any reason, the infant's father does not wish to give security, and no other person can be found in the jurisdiction willing to act, then, as was said in Taylor v. Wood, 14 P. R. at p. 456, the Court has power to appoint the official guardian to act as next friend in the case of commendable litigation. The only thing that looks the other way is the remark of Meredith, J., in Scott v. Niagara Navigation Co., 15 P. R. at p. 455. That, however, does not seem intended to be a positive expression of opinion on the point now under consideration. . . .

The order should go that some other next friend be appointed resident in Ontario, unless the father gives the usual security for costs.

The costs of this motion will be in the cause.