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COURT OF APPEAL.

JANUARY 15TH, 1913.

*CITY OF TORONTO v. FOSS.

Municipal Corporations — Prevention of Use of Buildings as "Stores" or "Manufactories"—Municipal Act, 1903, *sec.* 541*a*—*By-law—Ladies' Tailoring Business.*

Appeal by the plaintiffs from the order of a Divisional Court, 27 O.L.R. 264, ante 150, reversing the judgment of MIDDLETON, J., and holding that a building in Avenue road, in the city of Toronto, occupied by the defendant and used as his dwelling-house and also for the purposes of a ladies' tailoring business, was not a "manufactory" or a "store," within the meaning of a by-law of the plaintiffs, passed pursuant to sec. 541a of the Municipal Act, 1903, as enacted by 4 Edw. VII. ch. 22, sec. 19.

The appeal was heard by GARROW, MACLAREN, MEREDITH, MAGEE, and HODGINS, JJ.A.

G. R. Geary, K.C., for the plaintiffs.

Grayson Smith, for the defendant.

The judgment of the Court was delivered by MEREDITH, J. A.:—The onus of proving that the defendant carries on business in violation of the provisions of the by-law is upon the plaintiffs; and I cannot think that they have proved it. . . .

If the defendant's house could in any sense be deemed a shop or store, its better description would, I have no doubt, be a shop, because it is unquestionably used to some extent as a workshop; but as a shop it is not within the by-law or the legislation; it can be brought, if at all, within them, only as

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a manufactory or a store; and I am unable to consider that this dwelling-house has been proved to be either.

I cannot think that in ordinary conversation it would ever be described as either a factory or a store; and these words are to be given their ordinary meaning. . . . At the most, it would, I think, be said that the defendant used his house as a ladies' tailor shop; and the by-law prohibits only "butcher shops" . . .

I would dismiss the appeal.

JANUARY 15TH, 1913.

*RE TOWNSHIP OF TURNBERRY AND NORTH HURON TELEPHONE CO.

Assessment and Taxes—Telephone Company—"All Branch and Party Lines"—Assessment Act, sec. 14, sub-sec. 3—Questions of Fact—Meaning of Terms not in Common Use—Absence of Evidence—Stated Case.

Case submitted by the Lieutenant-Governor in Council, under sec. 14 of the Assessment Act, for the opinion of the Court.

The case was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and MIDDLETON, J.

W. Proudfoot, K.C., for the telephone company.

No one appeared for the Crown or for the township corporation.

The judgment of the Court was delivered by MEREDITH, J. A.:—The right answer to all the questions submitted depends altogether upon the meaning of the words "all branch and party lines," contained in sub-sec. 3 of sec. 14 of the Assessment Act; and what that meaning is, is a question of fact, which ought to be determined, as all questions of fact should be, upon evidence; and, as no evidence of any kind has been submitted to this Court upon the subject, we are, in my judgment, not qualified or able to give anything like a judicial answer to the questions submitted.

The Assessment Act gives no interpretation of the words, nor any substantial clue to the meaning with which they were

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used in the sub-section I have mentioned. The words have no defined legal meaning, but were used to convey a technical meaning in connection with telephone equipment; and, therefore, their meaning must be proved by witnesses competent to explain that meaning, before anything like a proper adjudication upon the subject can be made. If they were words of common import, the Courts would take judicial notice of their meaning; but in such a case it would not be necessary to ask this Court to declare that meaning; it would be much simpler to find it out by consulting the dictionaries, if one could not tell without having recourse to them.

It is very probable that not one in an hundred persons has ever heard of "party lines" in regard to the telephone—in another sense they are quite familiar; and it is also quite possible that none of us ever heard the expression used in that connection before this case was brought into this Court; how then is it possible for us to give anything like a judicial answer to the question without proper and sufficient evidence upon which to base our judgment, just as in regard to any other question of fact? All of which questions must, if properly dealt with, be dealt with only on the weight of evidence. . . .

Upon all questions of fact, such as this, the danger lies not in a Judge's or juryman's ignorance of the fact, but in his ignorance of such ignorance, or in that little knowledge the danger of which has made it the subject of one of the commonest of proverbs. In matters of common knowledge and everyday experience, Judges and juries alike should make use of such of it as they possess. But in regard to other facts, justice should be, as she is depicted, blind to everything but the evidence properly adduced. If a Judge or juryman profess to have any personal knowledge, on any such question, that knowledge should be acted upon only when giving in evidence; no Judge or juryman has in this respect any right to assume any higher or easier position than that of any other witness; it is his duty to be sworn and submit to examination as such a witness, subject to have his knowledge tested by cross-examination and to have his testimony contradicted by other witnesses, just as any other witness and his testimony are.

Judges are supposed to know the meaning of words of the English language; but when that is too much supposition they are at liberty to consult the dictionaries, probably upon the excuse of refreshing their memory; but it is said that dictionaries are not reliable guides as to the meaning of statutory words, as often, necessarily so, they must be not reliable guides as to tech-

nical terms. Lord Coleridge, C.J., observed, in the case of The Queen v. Peters, 16 Q.B.D. 636, at p. 641, that he was quite aware "that dictionaries are not to be taken as authoritative exponents of the meaning of words used in Acts of Parliament." In this case, however, the dictionaries give no light; it is the case of the use of common words to describe something new, of a technical character, about which this Court has no knowledge nor any evidence. . . .

In my opinion, the only proper answer to give to the questions is, that they are all questions of fact which can be properly determined only upon competent evidence, of which there is none.

JANUARY 15TH, 1913.

*RE TOWN OF FORT FRANCES AND ASSESSMENT OF A. S. W.

Assessment and Taxes—Appeal to Court of Revision—Time for—Assessment Acts and Amendments—Act respecting Municipal Institutions in Territorial Districts—Appeals from Court of Revision—Appeal by Person Assessed—Appeal by Opposing Ratepayer—Forum—District Court Judge—Ontario Railway and Municipal Board—Conflict—Construction of Statutes.

Questions referred, under the Assessment Act, by the Lieutenant-Governor in Council to a Judge of the Court of Appeal, and referred by a Judge to the Court.

The questions arose out of the provisions of various statutes by which rights of appeal are given from the judgment of a Court of Revision to a District Court Judge and also to the Ontario Railway and Municipal Board.

The case was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

J. Bicknell, K.C., for the Corporation of the Town of Fort Frances.

No one appeared for the individuals interested.

The judgment of the majority of the Court was delivered by MACLAREN, J.A.:—Upon the facts contained in the state-

*To be reported in the Ontario Law Reports.

ment of the Judge of the District Court of the Provisional Judicial District of Rainy River, referred by an order in council approved by His Honour the Lieutenant-Governor on the 10th day of July, A.D. 1912, to a Judge of this Court, and by him referred to the full Court for hearing and adjudication, this Court is of opinion:—

1. That the time for appealing to the Court of Revision against the assessment in this matter was one month after the time fixed for returning the assessment roll: R.S.O. 1897 ch. 225, sec. 43, amended by 4 Edw. VII. ch. 24, sec. 5(2).

2. That the right of a ratepayer to appeal from the decision of the Court of Revision to the District Court Judge has not been taken away or interfered with by the appeal to the Ontario Railway and Municipal Board given to a person assessed for over $10,000, but not to the adverse party in such appeal: 5 Edw. VII. ch. 24, sec. 1, amending R.S.O. 1897 ch. 225, sec. 45, giving an appeal from the Court of Revision to the District Court Judge; 5 Edw. VII. ch. 24, sec. 3, amended by 6 Edw. VII. ch. 31, secs. 51, 52, and 10 Edw. VII. ch. 88, sec. 18.

3. That, notwithstanding such appeal to said Board by the person assessed in this matter, it was the duty of the District Court Judge to hear and dispose of the appeal properly brought before him by the ratepayer.

The decision of the said Board not having been brought before this Court by appeal or otherwise, no opinion is expressed regarding it.

MEREDITH, J.A. (dissenting), was of opinion, for reasons stated in writing, that, whether this case came within the provisions of the general enactment respecting the assessment of property in this Province for the purpose of municipal taxation, or within those of the special enactment respecting the establishment of municipal institutions in territorial districts, upon that subject, the proceedings before the District Court Judge, after the appeal to the Railway and Municipal Board, were wholly unwarranted, as well as objectionable from every proper point of view.

Questions answered as stated by MACLAREN, J.A.

*RICE LEWIS & SON LIMITED v. GEORGE RATHBONE LIMITED.

Mechanics' Liens—Claims of Material-men—Abandonment of Work by Contractor—Completion of Work by Owner—Payment in Excess of Contract-price—Liability of Owner for Percentage of Contract-price—Mechanics' Lien Act, secs. 6, 10, 11, 12, 15—Construction of Statute.

Appeal by lien-holders, in a proceeding to enforce a mechanics' lien, from the judgment of J. A. C. Cameron, an Official Referee, holding that the appellants were not entitled to any amount whatever upon the taking of the accounts as between the owner (the defendant Harvey), the contractors (the defendants George Rathbone Limited), and the lien-holders.

The claims were for materials furnished to the contractors for the erection of three brick houses. Before the completion of the contract, the contractors abandoned the work, and the owner was compelled to pay a sum exceeding the contract-price to complete the houses; and the Referee held that, in the circumstances, the appellants' liens could not be enforced as against the owner.

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

F. E. Hodgins, K.C., for the lien-holders, the appellants.

I. F. Hellmuth, K.C., and F. J. Dunbar, for the defendant Harvey, the respondent.

MEREDITH, J.A.:—When rightly understood, the case of Russell v. French, 28 O.R. 215, seems to me to have been well decided; and, when the facts of this case are rightly understood, the question involved in it is easily solved, even without the aid of that case.

Under the Act "twenty per cent." is to be deducted from "any payment to be made" on the contract: sec. 12; and the amount of such deduction is to be retained for the benefit of lien-holders.

Under the contract in question, eighty per cent. of the value of the work done, to be estimated at contract-prices, was to be paid, from time to time, on progress certificates, by the owner to the contractor; and a very considerable sum became thus pay-

*To be reported in the Ontario Law Reports.

able to him; which, if it had not been paid, he could have recovered in an action, except as to "twenty per cent." of it, which the Act required the owner to retain for the benefit of others who were putting their labour and building materials into his building, and might have liens for them.

To the extent, then, of twenty per cent. on these payments, at least, I would have thought it obvious that the owner is liable to lien-holders; and if, over and above the amount of these progress certificates, any sum ever became payable by the owner to the contractor, twenty per cent. of that also is available to lien-holders.

How is there any way of escape from that conclusion? And why should there be? If the Act opens such a way—if the owner's contentions be right—it would not be an Act for the benefit of lien-holders, but would be an Act for the relief of owners against their contracts to pay. In this the Act puts no additional liability on the owner; it accepts his own obligation, contracted by himself, to pay, as the basis of lien-holders' rights, and provides merely that out of the amounts he has bound himself, and has become liable, to pay, unconditionally, to his contractor, he shall retain twenty per cent. for lien-holders.

There is nothing harsh or unjust to him in that; it would be harsh and unjust if the Act enabled him, for his own benefit only, to disregard his own contract to pay. Nor is it unreasonable that he should be made a trustee of a reasonable portion of the money he ought otherwise to pay to the contractor, retained for the one purpose of preventing sub-contractors and others putting work and material into the building, which is his, from being "done out" of their pay for it by the contractor.

All this accords with every one of the provisions of the Act respecting lien-holders; such twenty per cent. is to be deducted and retained from "payments to be made by him in respect of the contract:" sec. 12; is "limited to the amount owing to the contractor:" sec. 11; is not out of any "greater sum than the sum payable by the owner to the contractor:" sec. 10; and is "limited, however, in amount to the sum justly due to the person entitled to the lien, and to the sum justly owing . . . by the owner:" sec. 6.

Different considerations would apply if there had been no contract to pay except on fulfillment of the contract on the contractor's part.

The Act, thus understood, creates no hardship on the owner; if he choose to pay when he is under no obligation to pay, he pays at his own risk as to the ultimate result; if he retains

twenty per cent. out of every payment he has made himself liable for his contract, he does that which the Act requires and is as well off as if the Act had never been passed; whilst, if he fail to do as the Act requires, if he do not retain the twenty per cent. for lien-holders, he runs the risk of having to pay over again—a very reasonable penalty for defiance of the plain law of the land. As it is, the Referee has given to the owner, to secure him against the default of his contractor, not only the twenty per cent. which, by his contract, in agreeing to pay eighty per cent. only, he had retained for that purpose; but also the twenty per cent. of which the Act made him trustee for lien-holders; an obviously, I would have thought, erroneous result; reached perhaps by reason of not quite grasping all the facts and circumstances of the case.

But, driven to the last ditch, the respondent contends that the provisions of sec. 15 of the Act, respecting liens for wages, are inconsistent with this view, and ought to prevent effect being given to it; because there express provision is made that the twenty per cent. shall apply to contracts not completely fulfilled, and shall be calculated on the value of the work and materials, having regard to the contract-price, if any; and shall not be applied, in case of default in completing the contract, to the completion of the contract or to damage for non-completion, "as against a wage-earner claiming a lien." A contention, however, in my opinion, of no sort of conclusive effect when applied to an enactment made up of different provisions enacted at different times, and as to this particular section an enactment prepared doubtless with the mind much more intently set on making a sure and most favourable provision for the earners of wages—whose liens would generally be comparatively very small —than upon just how this provision might fit in with the rest of the Act, or affect it. It seems to me quite certain, however that may be, that there was no intention, in adding that section, to affect the other provisions of the Act respecting liens for things other than wages.

But the contention loses entirely any weight which it might otherwise have, when it is observed that this section covers cases in which there are no progress certificates, in which there may be nothing ever payable by the owner to the contractor except the ultimate balance, if any; and so it goes far beyond any of the provisions of the Act in favour of other lien-holders.

The judgment of Rose, J., in the case of Russell v. French, shews plainly that the ruling in that case was based upon the same grounds as those upon which I have based my opinion in

this case; and, if there be anything decided or said to the contrary in the cases of Farrell v. Gallagher, 23 O.L.R. 130, and McManus v. Rothschild, 25 O.L.R. 138, it ought, I think, for reasons which seem to me to be obvious, to be overruled.

I would allow the appeal; and refer the matter back to the Official Referee.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred; MAGEE, J.A., stating reasons in writing.

Appeal allowed with costs.

JANUARY 15TH, 1913.

*REX v. MITCHELL.

*REX v. WEST.

Criminal Law—Perjury—Tribunal before which Offence Committed—Registrar under Manhood Suffrage Act—Irregularity of Apportionment—Tribunal de Facto—"Judicial Proceeding"—Criminal Code, sec. 171.

Crown case reserved by the Junior Judge of the County Court of the County of Kent, before whom the defendants were tried on charges of perjury and found "not guilty."

The case was heard by GARROW, MACLAREN, MEREDITH, MAGEE, and HODGINS, JJ.A.

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

R. L. Bracken, for the defendants.

MACLAREN, J.A.:—These two defendants were tried in the County Court Judge's Criminal Court for the County of Kent, on a charge of perjury committed before one W. G. Merritt, acting as Registrar under the Manhood Suffrage Act for the Dominion Election of 1911.

The learned Junior County Court Judge found them both "not guilty," on the ground of alleged irregularities in the appointment of Mr. Merritt as such Registrar; but, at the request of the prosecution, granted a reserved case, and submitted five questions for the consideration of this Court, adding that,

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if the contention of the Crown as to the law is correct, he would, upon the facts proved, find both the accused guilty.

I am of the opinion that it is not necessary for us to answer any of the first three questions, which relate to the proceedings taken by the County Court Judge for the filling up of the vacancies caused by the absence of three members of the statutory Board of Registrars, and alleged irregularities and non-observance of the Manhood Suffrage Act.

The fourth question is as follows: "Were the proceedings before the said W. G. Merritt, as said Registrar, judicial proceedings as defined by sec. 171 of the Criminal Code of Canada?"

The "judicial proceeding" in which perjury may be committed is defined in sec. 171 as a proceeding which is held "before any person acting as a Court, Justice, or tribunal having power to hold such judicial proceeding, whether duly constituted or not, and whether the proceeding was duly instituted or not before such Court or person so as to authorise it or him to hold such proceeding, and although such proceeding was held in a wrong place or was otherwise invalid."

The words "judicial proceeding" in the foregoing section were interpreted by the Supreme Court in a case of Drew v. The King, 33 S.C.R. 228, in which a Justice of the Peace appointed for a group of counties sat in a case which, according to the provincial Act creating the offence, could be tried only by a Justice residing in the county in which the offence was committed, whereas the Justice who tried the case and administered the oath actually resided in another county of the group. It was admitted that he had no jurisdiction, and was not a tribunal de jure; but, because he was a tribunal de facto, and was exercising judicial functions, the Court held that it was a "judicial proceeding," and that the accused was rightly convicted of perjury.

Following this decision, as we must do, the fourth question above-quoted should be answered in the affirmative; and the County Court Judge should have found the defendants guilty.

MEREDITH and HODGINS, JJ.A., each gave reasons in writing for the same conclusion.

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

Judgment accordingly.

JANUARY 15TH, 1912.

*KENNEDY v. KENNEDY.

Will—Construction—Gift for Maintenance of Residence—Perpetuity—Intestacy—Trust—Discretion of Trustees—Bona Fides—Power to Sell Lands—Conveyance Free from Charge of Annuity—Charge on Proceeds of Sale—Deed Poll—Setting aside.

Appeal by the defendant James H. Kennedy from the judgment of TEETZEL, J., 26 O.L.R. 105, 3 O.W.N. 924.

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

E. D. Armour, K.C., for the appellant.

J. Bicknell, K.C., for David, Robert, and Joseph H. Kennedy.

A. J. Russell Snow, K.C., for Madeline Kennedy.

W. A. Proudfoot, for E. W. J. Owens.

T. P. Galt, K.C., for Georgie Peake.

GARROW, J.A. (after setting out the facts):—The residuary clause . . . has already given rise to more than one action, with the result that one of the defences now raised is estoppel by res judicata.

In Kennedy v. Kennedy, 13 O.W.R. 984, the first of these actions, the plaintiff was a son of the testator, and was the devisee of the Foxwell estate. . . . He claimed to be a pecuniary legatee within the meaning of the residuary clause, owing to his failure to obtain the Foxwell estate devised to him. He also asked that the will might be interpreted and the rights of all parties declared. But all that was adjudged and determined by Riddell, J., was, that the then plaintiff had no right at that time to interfere with the estate; and the action was dismissed without construing the will.

Under these circumstances, it is clear that no estoppel arises by reason of the judgment in that action.

In Kennedy v. Kennedy, 24 O.L.R. 183, the plaintiff was a pecuniary legatee, but not one of the next of kin. And what was determined by Latchford, J., was, that the bequest in the residuary clause to pecuniary legatees was void under the rule against perpetuities, and that the plaintiff could not, for that reason, maintain the action. The plaintiff also sought to set up a claim apparently obtained after action brought, as the as-

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signee of one of the next of kin, under which she would have been entitled to attack the whole clause. This was refused, but the judgment was also stated to be without prejudice to any subsequent action. That judgment was simply affirmed by the Divisional Court.

In Foxwell v. Kennedy, 24 O.L.R. 189, the status of the plaintiff was precisely that of the plaintiff in the Kennedy v. Kennedy case next before-mentioned; and Teetzel, J., simply followed pro forma the judgment of Latchford, J., which the Divisional Court affirmed.

In one of the cases referred to by the learned counsel for the appellant, Badar Bee v. Habib Merican Noordin, [1909] A.C. 615, Lord Macnaghten, at p. 619, says: "The result is that it appears that the point raised by this appeal has already been adjudicated upon . . . There is here, as there was in the case of Peareth v. Marriott, 22 Ch.D. 182, to which Mr. Levett referred, a decree inter partes on the very same subject." That could not truthfully be said here. The "very same subject" might have been determined in the first, and only in the first, of the three actions to which I have referred, but was deliberately and intentionally not dealt with. See also Moss v. Anglo-Egyptian Navigation Co., L.R. 1 Ch. 108, at p. 115; Barrs v. Jackson, 1 Y. & C. Ch. 585, and the remarks upon it of Lord Selborne in Regina v. Hutchings, 6 Q.B.D. 304. . . .

The appellant complains of Mr. Justice Teetzel's construction of the residuary clause, and contends that, by virtue of the clause and of the deed poll, he is entitled to the whole of the residuary estate, subject only to the plaintiff's annuity, and to any other charges upon the estate, if any should exist.

The rule of construction, in cases arising under this well-known rule of law, as well as of statutory provision, is well-established, that, in considering a case in which the rule is involved, it is not after-events which should be looked at, but the situation at the beginning, that is, at the death of the testator. In other words, one must be able then to see that the event which is to bring about a final distribution is certain to fall within the period prescribed; if it does not, the gift is void; and the fact that subsequently the event did actually happen within the time is of no consequence.

But, before further considering the legal aspect, it is proper, I think, first to try to find, if possible, what the testator really meant. . . . And this meaning is to be derived from the words of the will itself, in the light of the surrounding circumstances. The Court is at liberty to put itself as nearly as possible in the

position of the testator at the time he made the will, and to consider all the material facts and circumstances known to him. And all the facts and circumstances respecting persons or property to which the will relates are legitimate, and may even be necessary, evidence to enable the meaning and application of the testator's words to be understood, though not for the purpose of altering or adding to them. See the cases collected in Beale's Rules of Legal Interpretation, 3rd ed., pp. 526 et seq. These latter words are highly important, for the question is not what the testator meant, as distinguished from what his words express; but simply, what is the meaning of his words in the light of the surrounding circumstances?

The mere language of the clause does not seem to be very obscure. The testator gives the whole of his residuary estate, amounting, it is said, to something over $100,000, to the three named executors and trustees in trust: (1) to sell and get in; (2) to apply the proceeds, including the principal as well as the interest, if any, in their discretion or in the discretion of a majority of them, so far as it will go, in maintaining and keeping up the residence; and (3), in case a sale should from any cause become necessary and should take place, to divide what then remained in equal proportions among the pecuniary legatees named in the will. One apparent obscurity may be whether the plaintiff as an annuitant only would be a "pecuniary legatee," within the meaning of that term in the clause, which should, I think, be resolved in the affirmative, there being no contrary intention indicated in the will, which contains more than one other bequest to which the term "pecuniary" could not apply. See Jaskin v. Rogers, L.R. 2 Eq. 284, at p. 291, where the general rule is stated. A minor obscurity is perhaps involved in the nature and extent of the "maintenance and keeping up" which the testator intended. But, even as to this, the testator has supplied a guide by the use of the words "in the manner in which it has been heretofore kept up and maintained." But, by no reasonable interpretation that I can conceive of, could the direction to maintain and keep up be stretched so as to include not merely the house and premises but also the inmates, which is the contention of the appellant; in other words, he contends that he and his family are entitled to their living expenses, as well as to the maintenance and up-keeping of the premises, at the expense of the residuary estate. When the testator intended to give personal maintenance, as in the case of the two granddaughters, he was careful to say so. What is one of the really mysterious things in this very extraordinary clause is, that so large a sum

should have been devoted to such a comparatively trifling purpose, a purpose for which the interest alone, upon any reasonable investment of the principal, one would think, would have been ample.

And this expenditure was to continue, without any limit as to time being stated, except such as is contained in the words "if for any reason it should be necessary that the said residence should be sold and disposed of", upon the happening of which event, if it ever happened, the balance then remaining was directed to go to the pecuniary legatees. That event, a sale, was therefore clearly made the point for the determination not only of the prior interest whatever it is, but for the commencement of the subsequent interests upon the final distribution. If, when it arrived, the whole fund had been expended, the pecuniary legatees would, of course, get nothing, for the whole might, under the terms of the bequest, be expended for the single purpose of maintaining and keeping up the residence. What was to happen if it should not become necessary to sell is in no way mentioned, nor in the slightest degree throughout the will indicated. The testator appears to have had but the one event or possibility in mind, and that evidently not one which he anticipated was certain ever to happen, for he says, "If it should become necessary to sell." Necessary for whom? Primarily in a will these words would imply, necessary for the executors to sell in order properly to administer the estate. But it is not shewn that there were debts or prior charges of any kind which could reasonably have induced the testator to believe that such a necessity would ever arise. The words, however, are perhaps capable of the construction that the necessity might come from James's circumstances also, after the decease of the testator. If he sold, as of course he might, the two granddaughters would still be entitled in respect of their charges upon the property for board, maintenance, and residence, but in case of a sale are given no other special consideration over the other pecuniary legatees. This then is the language of the will, and whatever doubt there may be in applying it to the circumstances is not caused by any difficulty in understanding the words, for they are perfectly plain.

Primâ facie the words mean a provision, indefinite as to time, for the maintenance and up-keeping of the property devised to James, determinable only upon an event which may occur at any time, however remote, or may never occur, and in the meantime the large fund in question is to be tied up, except for the paltry sum which, in the reasonable exercise of their discretion, the

trustees are empowered to expend from time to time for that purpose.

Two other periods may be, and are, suggested for the determination of the period of maintenance so as to bring it within the rule; one the lifetime of the trustees and the survivor of them; the other, the life of James, the devisee for whose benefit the provision in question primarily enures. It is undoubtedly the rule that a trustee cannot delegate to another a discretion vested in him alone. The same would, of course, be true of a body of trustees consisting of two or more. A testator or settlor could certainly so express a discretion with respect to the trust property as to make it exercisable only by the named trustee or trustees and by no one else. But that, in my opinion, has not been done in this case. The words of the bequest are "I give devise and bequeath to my executor executrices and trustees aforesaid to be used and employed by them in their discretion or in the discretion of a majority of them . . . with full power and authority to them to make sales," etc. . . .

[Reference to In re Smith, Eastick v. Smith, [1904] 1 Ch. 139; Crawford v. Fenshaw, [1891] 2 Ch. 261; the Trustee Act, 1 Geo. V. ch. 26, sec. 4, sub-sec. (6).]

Nor am I able to derive from the language any evidence of an intention to confine the benefit to the life of the devisee James, or of him and the two granddaughters, or of any of the three. The great fault, as it seems to me, of both the suggested constructions, is, that they ignore the circumstance, clearly defined by the testator himself, that the final distribution should only take place upon a sale by some one.

In the Divisional Court, in the cases before referred to in 24 O.L.R. 183 and 189, the conclusion was arrived at that the bequests to the pecuniary legatees were void because of the remoteness and uncertainty of the event upon which they were to become entitled. If that was a correct conclusion in those cases, it is also the proper conclusion here; and, after much consideration, I am not prepared to say it is not, much as I would prefer to uphold the clause, if, consistent with legal principles, it could be done.

A testator must express himself in language which is capable of being understood and applied to the subject-matter, and he must keep within the rules of law which regulate the power of disposition. If he fails in either particular, and in this case he, in my opinion, does, in one or the other and probably in both, the bequest is void.

Under these circumstances, the deed poll executed in his own favour by the appellant is of no effect and should have been so declared as a necessary corollary from the judgment.

Whether, in any event, it could have been upheld need not be considered, for it certainly falls with the construction applied by Teetzel, J., with which I now concur.

Administration of the estate by the Court is asked; and, considering all the circumstances, and especially the large amount of litigation which has already taken place over this will, which it is very desirable should not be longer continued, I think the request should have been and should now be granted, and the appellant should be ordered to bring into Court the proceeds of the recent sale to the Suydam Realty Company Limited, to abide the further order of the Court. Subsequent dispositions of the residuary estate will, of course, take place only under the direction of the Court.

The plaintiff is, of course, entitled, under the terms of the will, to a charge in respect of his annuity upon the residuary estate, which I understand is ample for that purpose.

I do not disturb the order as to costs made by Teetzel, J.; and the costs of the appeal of all parties may also, under the circumstances, be paid out of the residuary estate.

Further directions and the subsequent costs should, I think, be reserved.

MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, J.A., dissented, being of opinion, for reasons given in writing, that the appeal should be allowed.

Judgment below varied as stated by GARROW, J.A.

JANUARY 15TH, 1913.

*RE GIBSON AND CITY OF TORONTO.

Municipal Corporations — Expropriation of Land — Compensation — Award — Damages for Depriving Land-owner of Contingent Advantages — Character of Street — Residential Street — By-law — Commercial Buildings to be Erected in Future — Remoteness — Elements of Damage.

Appeal by James Robert Gibson from the award of P. H. Drayton, K.C., Official Arbitrator for the City of Toronto, in re-

*To be reported in the Ontario Law Reports.

spect of the expropriation by the city corporation of the southerly seventeen feet of block A, plan 1307, on the north side of St. Clair avenue, Toronto, whereby he allowed the appellant $1,328.50 as compensation for the land taken and for injury to the rest of the appellant's land.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

G. F. Shepley, K.C., and J. S. Fullerton, K.C., for the appellant.

G. R. Geary, K.C., for the city corporation.

MACLAREN, J.A.:—This is an appeal by the owner of a certain lot on the north side of St. Clair avenue, in Toronto, from the award of the Official Arbitrator as to the compensation to which the owner is entitled for the taking of the southerly 17 feet of his lot for the widening of St. Clair avenue by a by-law passed on the 23rd June, 1911.

The owner claimed that the arbitrator should take into account the damage suffered by him by being deprived of the advantage of erecting commercial buildings on these 17 feet in connection with the adjoining land south of the dwelling-house erected on the lot in question.

The arbitrator held that he was precluded from taking this into consideration by the fact that the city council had, on the 18th August, 1910, passed a by-law declaring that part of St. Clair avenue to be a residential street, and prohibiting the erection of any building within 17 feet of the north or south lines of the street.

In the reasons for his award he says: "The real reason for the passing of this by-law is found in the evidence of Mr. Forman (the City Assessment Commissioner) given in these proceedings, viz., that, it being the intention of the city at a later date to expropriate 17 feet for the purpose of widening St. Clair avenue, it was deemed expedient to prevent buildings in the meantime being placed on this 17 feet, thereby increasing the amount of compensation which would have to be paid to the owners when their land was taken under the expropriating by-law. There is no doubt that the by-law must be repealed and will be." As a matter of fact the by-law was repealed on the 24th June, 1912.

The arbitrator bases his conclusion, as to the above effect of this by-law, upon a dictum of Meredith, C.J., in a case of Toronto R. W. Co. v. City of Toronto, 12 O.L.R. 532. I am unable,

however, to find anything in this case to justify the decision arrived at by the arbitrator. On the other hand, it was the duty of the arbitrator to have taken into account the probability, or, as he puts it, the certainty, of the by-law being repealed in the near future. Even apart from what he states was the reason for its being passed, the evidence shews that, from the rapidly changing nature of that part of the city, it was only a question of a short time when that part of St. Clair avenue would cease to be a purely residential neighbourhood, and such a by-law would require to be amended or repealed; and this is a matter which, the authorities shew, the arbitrator should take into account. Even when it is contingent or uncertain, it is an element which he should take into his consideration—or, as put in one of the cases, when they are "reasonably fair contingencies." For illustration of these rules see Hilcoat v. Archbishop of Canterbury, 10 C.B. 327; Re City and South London R.W. Co. and St. Mary's Woolnoth, [1903] 2 K.B. 728, [1905] A.C. 1; Ossalinsky v. Manchester, approved in Re Lucas and Chesterfield, [1908] 1 K.B. 16; Browne and Allan on Compensation, 2nd ed., p. 102; Cripps on Compensation, 5th ed., p. 117.

It would, indeed, be a gross abuse of the powers conferred upon the city corporation, if it should be able to use such powers to depreciate the value of property which it was about to acquire.

It was also urged on behalf of the city corporation that, even if the by-law of the 23rd June, 1911, were not an insuperable obstacle in the way of the appellant, the possibility of his being able to use the land in question for stores at some future date is too remote to found a claim for compensation upon. Some of the expert witnesses speak of its being likely to be profitably used for such a purpose "in the near future;" another says in "eighteen months at the very latest;" while others speak more or less indefinitely as to the prospects. The authorities above-cited shew that a much more remote period, and even greater contingencies, are proper matters for arbitrators to weigh and take into account.

The appeal in this case should, consequently, be allowed, and the award referred back to the arbitrator that he may take the foregoing matters into account, with the right to hear further evidence if he considers the same to be necessary or desirable.

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

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

Appeal allowed with costs.

JANUARY 15TH, 1913.

*REX v. BACHRACK *et al.*

Criminal Law—Conspiracy to Procure Abortion—Form of Indictment—Criminal Code, secs. 303, 552—*Conspiracy to Do an Act beyond Jurisdiction of Courts of Province—Evidence—Admissibility.*

Crown case reserved by DENTON, Jun. J. of the County Court of the County of York, before whom and a jury the defendants Julius Bachrack and Emmanuel Bachrack were found "guilty" on an indictment for conspiracy to procure an abortion, the other defendant, John Willis, being found "not guilty."

The first three questions stated by the Judge were as follows:—

(1) Was I right in overruling the demurrer and holding the indictment good?

(2) Was I right in admitting evidence of the agreement to go to the United States for the purpose of having an operation performed?

(3) Was I right in admitting the evidence (as restricted) of Dr. Mullen as to acts and declarations of the accused?

The case was heard by GARROW, MACLAREN, MEREDITH, MAGEE, and HODGINS, JJ.A.

H. H. Dewart, K.C., for the defendants.

E. Bayly, K.C., for the Crown.

The judgment of the Court was delivered by MEREDITH, J.A.:—The objections made here to this conviction, technical as well as substantial, seem to me to be quite without weight.

The form of the indictment is, in my opinion, quite sufficient; it charges the prisoners with having conspired to commit "an indictable offence," "the crime of abortion;" and the law makes very plain what the indictable crime of abortion is: see sec. 303 of the Criminal Code.

"Every count of an indictment shall contain, and shall be sufficient if it contains, in substance, a statement that the accused has committed some indictable offence therein specified."

"Such statement may be made in popular language without any technical averments or any allegation of matter not essential to be proved."

*To be reported in the Ontario Law Reports.

"Such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence, or in any words sufficient to give the accused notice of the offence with which he is charged."

These are the provisions of the Criminal Code, sec. 552, expressing the modern reasonable and sensible rule as to pleading; and, under it, the objection to the form of the proceeding seems to me to be plainly untenable; as I think it would also have been under earlier methods: see The Queen v. Rowlands and others, 17 Q.B. 671.

Then, in regard to matters of substance, it was contended for the prisoners that they were charged with conspiracy to do an act beyond the jurisdiction of the Courts of this Province; and that that was no crime; or, if that were not so, then all evidence of attempts to commit, and of the commission of the act, beyond such jurisdiction, was irrelevant, and so had been wrongly admitted, to the prisoners' prejudice.

But this contention I am unable to consider right in fact, in law, or in logic.

The jury have found, upon evidence quite sufficient to warrant the finding, that the prisoners conspired to procure the abortion in this Province.

If that had not been so, the question would have arisen whether a conspiracy to do a wrong, or commit that which would be a crime if committed in the country where the conspiracy was hatched, could not be there punished if the act were to be done in some other country.

The law would be lame if it were powerless to reach conspirators so long as they took care to agree to carry into effect their wrong beyond the borders of the country in which they conspired to do the wrong. It must be borne in mind always that the crime of conspiracy may be complete without anything whatever having been done to carry it out. And the cases, as far as they go, are against the contention for the prisoners; these cases were dealt with in the case of Regina v. Connolly and McGreevy, 25 O.R. 151, to some exent, and were all, as far as I know, referred to and discussed on the argument here; see also Commonwealth v. Coles, 8 Phila. (Pa.) 450; and Ex p. Rogers, 10 Tex. App. 655, referred to in the Cyclopædia of Law and Practice, vol. 8, p. 687. But it will be time enough to consider the interesting question when it has to be considered.

The latter part of the contention I am now dealing with seems to me to disregard the fact that, if the law were as con-

tended for, there would yet be two things to be proved: (1) a conspiracy to do the act; and (2) to do it within the jurisdiction; and so the evidence as to what took place without the jurisdiction might be the best of evidence for the Crown on the first question; as well as helpful to the prisoners on the question of the place where the thing was to be done. The prisoners wholly denied any conspiracy to procure an abortion; what took place in the State of New York was the strongest kind of evidence that they were guilty of such a conspiracy; and the prosecution, giving it for that purpose, had to take the chances of its effect as to the place where the wrong was to be done; chances which, in view of what was proved to have taken place in this Province, might confidently be taken. There was evidence upon which any jury might find that the prisoners had conspired to procure the abortion in Toronto, but, finding it difficult, if not impossible, to succeed in their nefarious design there, went further afield.

Beside this, the things proved were all part of the one criminal plan; and I know of no reason why the whole story may not be told, although it involves other crimes, or things which are not crimes. If one set out to commit murder and arson, or the murder of more than one person, and does it, may not the whole story be told in evidence?

So too in regard to the last point—evidence of what took place after the abortion—it was all part performance of the one conspiracy; the care of the woman immediately after the criminal act was necessary for the fulfilment of their design to do the wrong and escape detection and punishment.

I would answer the first three questions in the affirmative, and confirm the conviction.

JANUARY 15TH, 1913.

RE WADDINGTON AND TORONTO AND YORK RADIAL R.W. CO.

Street Railways—Agreements with Municipality—Construction—Restriction as to Switches—Right to Carry Freight—Powers of Ontario Railway and Municipal Board.

Appeal by the Corporation of the Town of North Toronto and the City of Toronto from paragraphs 1 and 2 of an order

of the Ontario Railway and Municipal Board of the 2nd October, 1911, declaring that the railway company had the right, under the agreement of the 6th April, 1894, between the Corporation of the County of York and the Metropolitan Railway Company, to construct and put in and maintain such switches and turn-outs as might be necessary for operating their line, carrying freight, etc., and that the Board had the right to make such an order.

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

I. F. Hellmuth, K.C., and T. A. Gibson, for the appellants.

C. A. Moss, for the railway company.

R. McKay, KC., for Waddington and Winter.

The judgment of the Court was delivered by MEREDITH, J.A.:—The substantial, and the only substantial, questions involved in this appeal are: (1) whether there is any power in the Railway Board to permit the railway company to enlarge their switches and increase them against the will of the appellants; and (2) whether the railway company has a general right to carry freight.

The first question was dealt with by the Chairman of the Board as if depending upon a proper interpretation of the several agreements made between the company and the Corporation of the County of York; and I purpose so dealing with it in the first place, because, if his interpretation was right, as I think it was, it will be unnecessary to discuss other questions.

Then, as to the first point. In the earliest agreement there was a plain restriction as to the number and length of switches; but afterwards, from time to time, there were extensions of the railways so that it has become quite a different and more extensive undertaking than that originally provided for; and so one is not surprised to find in a subsequent agreement—that of the 28th June, 1889—an enlargement of the company's rights respecting switches; it is there provided that "the company may alter the location of or extend culverts, switches, and turn-outs as may be found necessary from time to time for the efficient and economical working of their said railway or tramway."

The agreement of the 17th December, 1889, in no way restricts these additional rights, but relates to switches of another character—branching into other highways and to the company's power-house.

It is true that under the agreement of the 20th October, 1890, the restriction as to number and length of the switches was again imposed, but only as to the addition to the railway provided for in that agreement.

But again in the last of the agreements—dated the 6th April, 1894—general power was again conferred upon the company in these words: "The company for the purpose of operating its railway may . . . construct, put in, and maintain such culverts, switches, and turn-outs as may from time to time be found necessary for the operating of the company's line of railway on Yonge street . . . and the company may from time to time alter the location of such culverts, switches, or turn-outs."

These words seem to extend again the company's right so as to overcome the restriction contained in the agreement of the 20th October, 1890, and to put the company on the same footing in regard to all switches throughout the whole length of the line; but it is contended that that is not so—that these words ought to be held to apply only to the addition to the road provided for in that agreement.

But why so? The words are general: "for the operation of the company's line on Yonge street;" not only a part of that line, the part provided for in the agreement of the 6th April, 1894. And no reason has been suggested why the same right should not apply to all parts of the railway; why there should be any difference in regard to the portion provided for by that agreement. The agreement of the 6th April, 1894, dealt with the whole road, not only in that respect, but also several respects; there can be no reasonable contention that it is altogether restricted to the part of the railway provided for in it.

I have no doubt the Chairman was quite right in his interpretation of the agreements in this respect; and the question was one within his jurisdiction.

On the other point, the appellants' contention is, that these agreements deprive the company of the right to carry freight.

But there is really no substantial weight in that contention. On the contrary, the agreements fully recognise that right, the first of them, that of the 25th June, 1884, reciting that the company was empowered by legislation "to take, transport, and carry passengers and freight."

The agreement of the 28th June, 1889, and that of the 6th April, 1894, each, contain a provision that the company shall carry certain freight at certain rates to be fixed as therein pro-

vided; thus not only recognising the power of the company to carry freight, but requiring them, in certain events, to do so.

To imply from these provisions an obligation on the part of the company to carry no other freights, or an abandonment of their legislative rights in that respect, or an attempt to transfer the power in that respect to the municipal corporation, would be entirely unwarranted; they, obviously I would have thought, gave, as far as the company had power to give, a right to compel them, as therein provided, to exercise the right to carry freight.

And so I find nothing in the agreements purporting to restrict the right which the Board has expressed its intention to exercise regarding switches or freight; and so I agree with the Chairman of the Board in his interpretation of the agreements in this respect; and, that being so, it is unnecessary to consider any other question of law which was, or might have been raised, before the Board; merely finding nothing in the agreements staying the hands of the Board; without considering what would be the effect of such an agreement if it in fact existed.

The Board properly constituted can now go on and deal with the questions of fact properly arising upon the application before them; as, from the Chairman's certificate, it now appears it was intended to do.

Appeal dismissed.

JANUARY 15TH, 1913.

MACDONELL v. DAVIES.

Landlord and Tenant—Lease—Construction—Right of Tenant to Renewal or Payment for Improvements—Option of Landlord—"Ground Rent."

Appeal by the defendant from the judgment of LATCHFORD, J., at the trial, in favour of the plaintiff's claim and dismissing the defendant's counterclaim.

The plaintiff claimed to recover possession of certain lands and $4,600 damages for the defendant's use and occupation thereof after the 3rd September, 1910, and also damages for deprivation of possession.

The defendant claimed the right to a renewal of his lease, and, if necessary, reformation thereof.

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

E. D. Armour, K.C., and M. H. Ludwig, K.C., for the defendant.

G. H. Watson, K.C., for the plaintiff.

The judgment of the Court was delivered by MEREDITH, J.A.:—However one-sided the writing may be, if the right of renewal appertained to the lessor only, it cannot be extended to the lessee also; it is not now the time for making, but is the time for interpreting only, the agreement between the parties evidenced by the lease in question; but, if the writing be ambiguous, the extraordinary one-sided character of the agreement, as contended for by the respondent, may well be taken into consideration and easily turn the scale against that contention.

The term of 21 years certain, and the provision for re-entry at its expiration, and the other provisions of the lease, are all subject to the agreement, contained in it, for the renewal of it "forever," in like terms of 21 years.

For the plaintiff it is contended that this right of renewal pertains to him only; and that, although he can have a renewal only in the event of his declining to pay to the lessee the value of the building on the demised property, yet the lessee has no right of renewal whatever, but must yield up possession of everything without compensation if the lessor so chooses at the end of any of the terms of 21 years; in other words, that, if the lessor give the notice which the lease provides for giving, he must renew or pay compensation; but that, if he do not give such notice, he may have the property back again without payment of anything for any buildings or improvements, though the lessee had been bound to expend, and had expended, thousands of dollars in such improvements.

Of course, the parties were legally competent to make such an extraordinary one-sided bargain; but one can hardly imagine a lessee in his sober senses doing so; and I cannot think the words which the parties used to evidence their bargain by any means compel us to consider that they did.

There is much, no doubt, in the writing that looks that way, but the governing words seems to me to be "renewable forever;" it is true that they are preceded by the words "which said lease shall be;" but it seems to me that these words may be as well applied to the lease itself as to renewal leases; I can imagine no reason why they should not be made by the parties so applicable, and cogent reasons why they should be are obvious; and it will be

observed that, where a renewal lease is plainly meant, it is described as the "said renewal lease," "the further lease," and "renewal term," and also that in these clauses of the lease "this present demise" is mentioned, to which the words "which said lease" might have literal reference; and I can have no doubt that they were meant to have actual reference to the lease in which they appeared, as well as to every renewal of it. It seems impossible to believe that the parties meant that, if the landlord required a valuation, he must pay for the buildings and improvements; but that, if he did not, he could take them without giving any kind of compensation.

The conduct of the parties was quite in accord with the view I have taken, and entirely inconsistent with the present contention of the landlord, until the matter came into the hands of the landlord's solicitors, with a view to an arbitration under the lease, when the uncertain words of the lease were seized upon to gain for the landlord the extraordinary advantage sought in this action and given effect to at the trial.

The result is, that the effect of this loosely drawn lease is, that it was a demise for 21 years renewable forever in like terms, but determinable by the lessor only at the end of any of these terms, in manner provided for in the lease, including payment for improvements as therein provided; also subject, at the option of the lessor only, to a reconsideration of the question of the amount of the rent, in the same manner and at the same time as the valuation of the improvements; the parties to be bound by the amount of the new rent if the lessor did not elect to pay for the improvements and take back the land.

There is, as I have said, a good deal that literally favours the interpretation of the trial Judge; but there is, I think, more to support the interpretation I have considered right, which is also favoured by the fact that the rent is described as a ground rent.

Appeal allowed.

JANUARY 15TH, 1913.

REX v. RYAN.

Criminal Law—Bribery—Counselling and Procuring Bribery of Peace Officer—No Evidence of Bribery or Attempt to Bribe—Discharge of Accused—Criminal Code, sec. 1018.

Crown case reserved by LATCHFORD, J.

The defendant was charged under the Criminal Code with

counselling and procuring another to bribe a peace officer, and was convicted. The question raised was, whether there was evidence to support the conviction.

The case was heard by GARROW, MACLAREN, MEREDITH, MAGEE, and HODGINS, JJ.A.

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

E. Bayly, K.C., for the Crown.

The judgment of the Court was delivered by MEREDITH, J.A.:—The defendant was convicted of having counselled and procured the bribery of a peace officer; but there was no evidence of the peace officer having been bribed, nor indeed of any attempt to bribe him having been made; so how can the conviction stand?

On the other count there was a verdict of "not guilty;" and no case has been reserved as to it, so nothing further need be said as to it.

I would answer the second question in the negative; and direct that the defendant be discharged: see the Criminal Code, sec. 1018. The disgraceful conduct of the defendant would be no excuse for his conviction, except as the law provides.

JANUARY 15TH, 1913.

COOPER v. LONDON STREET R.W. CO.

Street Railways—Injury to Person Crossing Track after Alighting from Car—Negligence—Excessive Speed—Contributory Negligence—Findings of Jury—Evidence—Rules and Practice of another Company—Nonsuit.

Appeal by the defendants from the judgment of a Divisional Court dismissing the defendants' appeal from the judgment of the trial Judge, upon the findings of a jury, in favour of the plaintiff, for the recovery of $1,000 and costs, in an action for damages for personal injuries alleged to have been sustained by the plaintiff owing to the negligence of the defendants' servants.

The plaintiff, an elderly woman, alighted from a street-car of the defendants, and, in attempting to cross the road behind that car, was struck by another car travelling in the opposite direction, and, as she alleged, at an excessive speed.

The appeal was heard by GARROW, MACLAREN, MEREDITH, MAGEE, and HODGINS, JJ.A.

I. F. Hellmuth, K.C., for the defendants.

Sir George C. Gibbons, K.C., and G. S. Gibbons, for the plaintiff.

MEREDITH, J.A.:—The appellants' one contention here is, that the plaintiff should have been nonsuited at the trial; a new trial is not sought.

There are just two questions raised: whether there was any evidence adduced at the trial upon which reasonable men could find, as the jury did find, (1) that the defendants were guilty of negligence, and (2) that the plaintiff was not also so guilty.

In my opinion, there was evidence, upon each point, which precluded a nonsuit; that is, that each finding is supported by reasonable evidence, or, as before put, evidence upon which reasonable men might find, as the jury did, in the plaintiff's favour on each of these questions.

It was contended for the plaintiff that, although there might be a nonsuit for want of reasonable evidence of negligence on the defendants' part in a case where there is such a want of evidence, there never can be a nonsuit, or dismissal of the action without a verdict, on a question of contributory negligence, because the onus of proof in such a case is upon the defendants; but that contention must, in my opinion, be held, in these days, to be erroneous; and that in all cases in which there is no reasonable evidence upon which the jury could find in the plaintiff's favour the case should be withdrawn from them and the action dismissed. Why not? Why make any difference? It is just as much no legal evidence whether the onus is the one or the other way; a verdict must be supported by some legal evidence, no matter upon whom the onus of proof may be or which way the finding may be; and, if there be no legal evidence on one side, no matter which, there is nothing upon which a jury can pass, and so the case should be withdrawn from them. It is not necessary, in my opinion, in these days, to go through the form of directing them to find a verdict; and it has always seemed to me to be illogical, from all points of view, that they should be so directed; if there be any evidence, the verdict should be theirs; if there be no evidence, the judgment should be the Court's as a matter of law. But, if the technical ground upon which the respondent relies were applicable in any case now, why should such a nonsuit not be applicable to this case; the proof of more than negligence only is essential to the plaintiff's success; proof that such negligence was the cause of the injury; then the

plaintiff gives no reasonable evidence of that, but proves that negligence contributed by her together with negligence contributed by the defendants was the cause, and that without both the accident would not have happened?

On the question of negligence the extremity of each contention is erroneous; a railway company is not free from all restraint in regard to the rate of speed of its cars; nor is it at all within the power of any jury to lay down the law in that respect.

A railway company operating on a public highway, must—apart from legislative rights or restrictions—run its cars with reasonable care for the rights of others using the highway. What is such care is not to be measured by what the company may say it should be; nor is it to be measured by the length of the jury's foot. It is a thing quite capable of proof, and is to be determined—just as any other question of fact is to be determined—upon competent evidence adduced at the trial.

Then was there any competent evidence adduced at the trial upon which the jury could find that the plaintiff's injury was caused by the defendants imprudently running the car by which the plaintiff was struck at too great a speed at the place of the accident and under the circumstances existing there at the time of it?

I think there was. It is not disputed that a moving car approaching a car stopped to let down passengers ought to approach and pass it with more care than would be needed if both were moving, in order to avoid especially just such accidents as that which is the subject-matter of this action. And that is proved by the conduct of the driver of the car with which the plaintiff came in collision; he said that on approaching the car which had stopped he cut off the power from his own car. Then the evidence of the shopkeeper, extracted in cross-examination, was, that this car was running at an unusually high rate of speed, under the circumstances existing at the time, so much so as to attract his attention, and that in all the long time he had seen cars so passing his shop only in a very few instances had they gone as fast. There was in this, I think, enough evidence to go to the jury; that is, there was evidence upon which reasonable men might find that the rate of speed was excessive, and beyond what even the defendants deemed proper; and there was also evidence upon which they might find that, if the speed had been less, the collision would not have occurred, or, if it had occurred, it would have been harmless—merely brushing the plaintiff aside; this was sworn to by one of the witnesses. I do

not take into consideration the evidence as to the rules or practice of another railway company; that was not, in my opinion, evidence; the question is not what any one individual or company may do; but what prudent individuals or companies generally do.

So, too, on the question of contributory negligence; the circumstances were peculiar. The plaintiff, a very old woman, was deaf; the weather was unpropitious—a storm in her face; another car was following up that from which she alighted; and the jury might well, upon the evidence, have found that her attention was absorbed in it, and in her desire to cross before it could come down upon her; all of which a jury might find to be quite natural, and such as would apply to an ordinarily prudent person under the same circumstances. Cars were not constantly passing in the opposite direction on the other track; indeed, one might cross hundreds of times in the same manner without meeting one. I would not have been able to find as the jury have found on this question; but, equally, I am unable to say that there was no evidence upon which reasonable men could find as they found. On this ground, also, the contentions on each side went quite too far; it is not, on the one side, the actual state of mind of the plaintiff at the time that is essential; nor, on the other, that circumstances not thought about by the defendants are not to be taken into account; all the circumstances, however brought about, may be taken into consideration; and the question is, what would persons of ordinary prudence do in such circumstances.

Accidents such as this are likely to happen unless perhaps considerably more care than the ordinary person takes is taken. Not only should the passenger be more than ordinarily careful in crossing the other track after alighting from a car and passing close behind it; but also conductors, as well as motormen, should be more than usually alert to prevent accidents so happening. The companies should remember that, when they use the public highway as discharging and receiving stations for their passengers, they, as well as the passenger, should have some care that the alighting and discharge and boarding are made with some reasonable regard to saving the passenger from the danger incident to one on foot in a horse road traversed by a railway as well as ordinary traffic.

I would dismiss the appeal.

GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A., agreed in the result.

Appeal dismissed with costs.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. DECEMBER 30TH, 1912.

*RE STINSON AND COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

Physicians and Surgeons—College Council—Inquiry into Alleged Misconduct of Registered Practitioner—Ontario Medical Act, R.S.O. 1897 *ch.* 176, *secs.* 33, 35, 36—10 *Edw. VII. ch.* 77—*Order of Council for Erasure of Name from Register—Appeal to Divisional Court—Authority of Previous Decision—*2 *Geo. V. ch.* 17, *sec.* 10(4)—*Proceedings before Committee and Council—"Ascertain the Facts"—Duty of Committee—Findings of Fact—Duty of Council—Decision upon Facts Found—Credibility of Witnesses—Report of Committee—Council "May" Act upon—Further Inquiry by Council through Committee—Restoration of Name—Costs.*

Appeal by Dr. Albert W. Stinson from an order of the Council of the College of Physicians and Surgeons of Ontario, made under sec. 33 of the Ontario Medical Act, R.S.O. 1897 ch. 176, directing that the name of the appellant should be erased from the College register. The appeal was taken under sec. 36.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

I. F. Hellmuth, K.C., and Hall, for the appellant.

D. L. McCarthy, K.C., for the College Council.

RIDDELL, J.:— . . . Some of the objections are the same as those urged against the inquiry proceeding at all, and these have been disposed of by the judgment of a Divisional Court on a former application in the same matter: 22 O.L.R. 627. By the provisions of (1912) 2 Geo. V. ch. 17, sec. 10(4), if it applies, we cannot depart from that decision "without the concurrence of the Divisional Court and the Judges thereof by whom the decision was given." . . . It is argued that the statute . . . does not alter the law under which we have held that as a final court of appeal we are not bound by the decision of any other Divisional Court. The former legislation is to be found in the Ontario Judicature Act, sec. 81(2). . . . This Divisional Court in Canadian Bank of Commerce v. Perram, 31 O.R. 116, held that this section did not apply to a

*To be reported in the Ontario Law Reports.

Divisional Court sitting in appeal from an inferior Court, and, therefore, being the final appellate Court. The decision was followed by us in a number of cases from Mercier v. Campbell, 14 O.L.R. 639, to McManus v. Rothschild, 25 O.L.R. 138. . . .

By reason of the course I pursue, I do not think it necessary now to decide whether we are bound by the new Act to follow the Divisional Court which gave a decision in this matter on a previous occasion, unless that Court or the Judges concur.

In view of the very great importance of this case . . . I have thought it proper that I should again consider the points disposed of by myself on the previous motion; and, having given them full and careful consideration, I can see no reason whatever for receding from that decision in any particular; and I have nothing to add to what is contained in the report of the Divisional Court decision and my own (22 O.L.R. 627.) . . .

[The learned Judge then set out at length the proceedings before the committee of the Council and the Council itself in the case of the appellant, and disposed unfavourably to the appellant of various objections taken in the notice of appeal.]

The Act now in force is R.S.O. 1897 ch. 176, as amended by (1910) 10 Edw. VII. ch. 77; and the sections which require attention are 33, 35, and 36. . . .

It seems to me that there can be no doubt as to the meaning of the statute in most respects. For this case:—

(1) Upon the application of any four registered medical practitioners an inquiry is to be made into the case of any person alleged to be liable to have his name erased for infamous or disgraceful conduct in a professional respect.

(2) This inquiry is "caused to be made" by the Council, as the Act formerly stood—not made by the Council itself.

(3) A standing committee is to be maintained to make such inquiries.

(4) The Council "shall . . . ascertain the facts of such case by" this committee.

(5) And may act upon a written report of the committee.

(6) The Council, "on proof of such infamous or disgraceful conduct," shall cause the name of such person to be erased from the register.

There is no doubt that 1, 2, and 3 were duly performed.

But when we come to the remaining three, there is a great difference.

The Council is to cause inquiry to be made into the case and "ascertain the facts of such case" by the committee. The ex-

pression "the facts of the case" does not or may not mean an opinion as to the culpability of the conduct of a medical man; but must mean at least the conduct itself—the facts upon which an opinion is to be founded.

It has long been well settled that where a statute gives power to a smaller body, as a board of directors, to do any particular act for the larger body, the company, etc., the larger body, is incapable of doing that act: Rex v. Westwood, 4 Bli. N.S. 213, 4 B. & C. 781, 799 (Dom. Proc.); Hampton v. Price's Patent Candle Co., 24 W.R. 754; York Tramways Co. v. Willows, 8 Q.B.D. at p. 689, per Manisty, J.; at p. 695, per Coleridge, C.J.; Stephenson v. Vokes, 27 O.R. 691. No body but the committee can "ascertain the facts"—and this does not mean "take the evidence of witnesses from which the facts may be ascertained." "Ascertain" must mean "decide upon:" Regina v. Inhabitants of Heyop, 8 Q.B. 547, at p. 559; "make certain," "fix," "settle," "determine," "establish."

Brown v. Lyddy, 11 Hun 451, 456, Russell v. Hart, 87 N.Y. 19, State v. Boyd (1891), 48 N.W. Repr. 739 (Nebr. S.C.), and Branstein v. Accidental, etc., Insurance Co., 31 L.J.Q.B. at p. 24, may also be looked at.

I search in vain for any finding of fact by the committee; there is a mass of evidence from which a finding may be made; but . . . that finding depends on the credit to be attached to the witnesses.

It was, to my mind, the plain duty of the committee to pass upon the credibility of the witnesses; and, upon such evidence as they believed, find, "ascertain," the facts. . . .

There can be no kind of doubt, I venture to think, that there has been no ascertaining of facts by the statutory body charged with that duty; and there was nothing upon which the Council could validly act.

As to what is to be found, "ascertained," by the committee, I think they should find specifically all the facts which will enable any tribunal charged with that duty to determine whether the conduct complained of and found comes within the statute.

The provision as to a written report is curious. It is not, "The Council may act upon a report of the committee," or even "The Council may act upon a written report of the committee," but "A written report of the committee may be acted upon by the Council." . . . What is meant may well be only that the Council need not require a report orally with all the committee present, etc., but may accept and act upon a written report. . . . As at present advised, I think this is the meaning. In

view of the mandatory provisions of sec. 33, I do not think that the Council has an option to act or not to act when the committee have ascertained the facts—the "may" does not refer to a discretion left to the Council to act or not to act, but to act, if so inclined, upon a written report, instead of requiring the committee to attend in person and report in that way.

But, a report being made—at least a report in writing—the Council still has duties before the order is made to erase the name of the alleged offender from the register. This can be done only "on proof . . . of such infamous or disgraceful conduct." That— so far as it is a matter of opinion—must, in my view, be a question for the Council. Upon the facts as found by the committee the Council must decide whether the facts so found—and, therefore, for the Council proved—are such as to shew that the accused has been guilty of infamous or disgraceful conduct in a professional respect. I see no provision for an appeal from the findings of the committee to the Council on the facts of the case—that is something outside the function of the Council altogether. Their sole duty is to direct their minds to the question of applying the facts—not to disputing them.

Neither an ascertaining of the facts nor a report of the same having been made by the committee, the resolution of the Council cannot stand so as to cause an effective erasure of the name of Dr. Stinson from the register.

We now turn to sec. 36 for guidance as to the cause to pursue. . . .

On this appeal we may: (1) order restoration of the name of Dr. Stinson to the register; or (2) confirm the erasure; or (3) order further inquiry by the (a) committee or (b) Council into the facts of the case—as well as dispose of the costs. . . .

The only "further inquiry by the . . . Council" which the Council could make would be: (1) an inquiry from the committee as to the facts of the case found by them; or (2) an inquiry by the Council by means of a committee, the standing committee: sec. 35(1), (2). Had the committee which sat to hear the evidence remained in office, I see no difficulty or impropriety in an order that the Council should make further inquiry into the facts of the case by requiring that committee to make a report of the facts of the case upon which the Council could legally act. But the members who sat to hear the case are not now on the committee—they are functi—the personnel is entirely changed; and no finding by the members of the former committee would be now a finding by the committee: D'Arcy v. Tamar Kit Hill and Callington R.W. Co., L.R. 2 Ex. 158; In re

State of Wyoming Syndicate, [1901] 2 Ch. 431, 432; In re Haycraft Gold Reduction and Mining Co., [1900] 2 Ch. 230, 235; Bosanquet v. Shortridge, 4 Ex. 698, 699; In re George Newman & Co., [1895] 1 Ch. 674, 686.

The committee which heard the evidence cannot now sit at all. The only inquiry that can be ordered to be made by the Council is an inquiry by the Council in the ordinary way, i.e., by the committee—and that should now be ordered.

The power given the Court to order further inquiry by the committtee is, I think, intended to cover irregularities or worse at the hearing, the committee having remained intact.

It seems to me that the three courses which the Court may pursue are mutually exclusive—we are not expressly given the power to restore the name during the pendency of further inquiry where further inquiry is directed, as we are (by means of an "and") given the power to deal with the costs whatever we do.

Even if we had that power, I do not think it should be exercised. . . .

As to the costs, all the proceedings in the way of taking evidence, etc., have been rendered useless by the error of the committee. The appellant should have those paid by the Council. The costs of the appeal, I should hold, should also be paid to the appellant but for the manner in which the appeal was brought before us. . . . Except counsel fee to leading counsel, I think the appellant should have no costs of the appeal. These costs directed to be paid to the appellant may be set off against any other costs ordered in the previous proceedings to be paid by him, if any remain unpaid.

The order will be that the Council make further inquiry into the facts of the case; costs as above.

FALCONBRIDGE, C.J., agreed in the result.

BRITTON, J., for reasons stated in writing, was of opinion that the appeal should be allowed with costs to the appellant; that against such costs should be allowed and set off pro tanto any costs owed by the appellant to the respondents; that the name of the appellant should be restored to the register; that no direction should be given to the Council as to any other or further proceedings, but the judgment should not prejudice the Council as to any other proceedings they may take; and that the Council should be at liberty to take such further or other proceedings under the statute as they may deem best.

Order as stated by RIDDELL, J.

DIVISIONAL COURT. JANUARY 11TH, 1913.

RE CORKETT.

Surrogate Courts—Audit of Executors' Accounts—Sums Paid for Maintenance of Legatee under Will—Allowance under Order of High Court—Findings of Surrogate Court Judge —Persona Designata—Appeal by Legatee—Discretion—Acceptance of Sums Allowed.

An appeal by William George Corkett from an order of the Judge of the Surrogate Court of the County of Peel.

The appeal was (by consent) heard by a Divisional Court composed of BRITTON and SUTHERLAND, JJ.

B. F. Justin, K.C., for William George Corkett.

R. G. Agnew, for Margaret J. Kee.

E. C. Cattanach, for the infant.

Featherston Aylesworth, for the executors.

SUTHERLAND, J.:—One George Corkett made his will dated the 24th February, 1902, and codicil thereto on the same date, and died on the 4th March, 1902. Letters probate were issued on the 4th April, 1902. There is a provision in the will with respect to the support and maintenance of certain devisees and legatees. One of these, William George Corkett, on the 1st May, 1911, launched a motion for an order declaring him entitled to such support and maintenance, and in his notice of motion asked that the executors and trustees be authorised and directed to pay to him out of the estate from time to time such sums as might be necessary for his support and maintenance from the 1st July, 1910, until he arrived at the age of twenty-five years.

The application came on for hearing before Falconbridge, C.J., on the 5th October, 1911, and an order was made that out of the income of the estate in the hands of the executors there should be paid to the applicant $600 forthwith and $100 per month until the 17th February, 1912, for his support and maintenance. On this latter day this maintenance was to cease, on his then attaining the age of twenty-five years.

In the year 1912, the executors, under Con. Rule 938, made an application for an order "declaring the construction and interpretation of certain clauses of the will." The motion was heard by Clute, J., and on the 28th February, 1912, he gave judgment (3 O.W.N. 761), from which I quote in part as follows: "I am

also of opinion that the children Margaret and William George are entitled to what is a fair allowance for their maintenance, whether that maintenance, support, and education be upon the premises or not. In case the parties differ as to what a reasonable sum would be, the Surrogate Court may adjust that matter in settling the accounts of the executors."

An appeal was taken from that judgment to a Divisional Court, and on the 22nd April, 1912, a judgment (3 O.W.N. 1134) was delivered by it, varying in some respects the judgment of Clute, J., but substantially, in paragraph 4, repeating and affirming that part thereof just quoted as to maintenance.

The executors petitioned the Judge of the Surrogate Court of the County of Peel to audit, take, and pass their accounts, and fix their compensation. A hearing followed before the Surrogate Court Judge, in which evidence was taken at some considerable length with respect to the question of maintenance. On the 3rd July, 1912, the Surrogate Court Judge made an order which, besides dealing with the question of the audit and the fixing of the compensation of the executors, contained the following clauses:—

"And I find and declare that William George Corkett applied to the Court for an allowance for maintenance, and that on the 5th day of October, A.D. 1911, an order was made by the Chief Justice of the King's Bench, allowing him $600 to be paid forthwith and $100 a month for four months. And I find that the said amounts were duly paid to him or on his behalf as and for his maintenance.

"And I find that the said sums so paid were and are a reasonable amount to be allowed to the said William George Corkett for his maintenance, and that he is not entitled to be allowed any further amount for such maintenance.

"I further find that Margaret Jennie Kee consented before me to waive any further claim for maintenance in the event of no further amount being allowed to the said William George Corkett; and I, therefore, find that the said Margaret Jennie Kee is not entitled to any further allowance for such maintenance."

From this order William George Corkett appeals, and in his notice of motion, after setting out that he had previously received various sums on account of maintenance, prior to the order of the 15th October, 1911, already referred to, and that at the time of the making of such order it was understood "that an application would be made on behalf of the executors for construction of the will of the said George Corkett, deceased, on the ques-

tion of maintenance, upon the said William George Corkett, attaining the age of twenty-five years, in the event of his living to attain that age," he goes on further to allege that the "learned Judge of the Surrogate Court erred in refusing to admit evidence as to the facts in connection with the application on which the order of the 15th October, 1911, was made," and also "in holding that the amount of the maintenance to which the said William George Corkett was entitled was in any way fixed or intended by the parties or by the Court to be fixed by said order." And, further, that the order of the Divisional Court is binding "apart from whether the said order of the 15th October, 1911, assumes to fix such maintenance or otherwise;" and that, upon the evidence, the amounts as fixed by the order of the 15th October, 1911, were not reasonably sufficient to pay his necessary expenses of maintenance; and a reasonable sum should now be allowed.

Upon the application it was contended on the part of those opposing that no appeal could lie, as the Surrogate Court Judge was persona designata; and, further, that the order of Falconbridge, C.J., was a consent order and intended to cover all past unpaid maintenance and all future maintenance. Contradictory affidavits and statements were filed and made. When the motion came on for hearing before a Divisional Court, over which Falconbridge, C.J., was presiding, it appeared to him, after some discussion, that it was inadvisable for him to take part, under the circumstances, and he accordingly withdrew. By consent of all parties, it was agreed to go on with the appeal before the two remaining members of the Court.

When it is considered that allowances for maintenance had previously been made to the applicant before the launching of his motion in 1911, and that in the notice of that motion he asked for support and maintenance from the 1st July, 1910, until he arrived at the age of twenty-five years, colour is lent to the contention that the order made by Falconbridge, C.J., was intended to cover all claims for maintenance which had not thus far been paid, and in addition future maintenance. On the other hand, one must suppose that the parties now opposing this application must have had in mind the said order when the motion was made before Clute, J., for a construction of the will, and when his judgment was formally drawn, including that portion hereinbefore quoted, which suggests that in case the parties cannot agree on the question of maintenance it might be adjusted in the Surrogate Court, when the accounts of the execu-

tors were being dealt with. The same applies to the order of the Divisional Court.

These orders seem clearly to leave that question open to be dealt with by the Surrogate Court Judge on passing the accounts. All parties seem to have gone before him in that way and under these orders. I think, therefore, that the matter is properly before us by way of appeal from the order of the Surrogate Court Judge. In the light of the previous allowances for maintenance and of the sums allowed under the order of Falconbridge, C.J., and of the evidence taken before him at considerable length, the Surrogate Court Judge has come to the conclusion that the sums so paid were and are a reasonable amount to be allowed to the applicant for his maintenance, and that he should not be allowed any further amount for that purpose.

I am unable to see that he has not exercised a reasonable discretion in the matter and was not warranted in so disposing of the matter.

I think his order should be affirmed and the appeal dismissed; but, under the circumstances, without costs so far as the appellant is concerned. Those resisting the appeal will have their costs out of the estate; the executors as between solicitor and client.

BRITTON, J.:—I agree that the appeal of William George Corkett should be dismissed. In my opinion, he accepted such sums as were paid on account of maintenance, so that, at the time of his application to the Chief Justice of the King's Bench, he intended—or must be considered as having intended—to accept the sum allowed for maintenance from the 1st July, 1910, until he arrived at the age of twenty-five years, as in full for all maintenance.

The appeal should be dismissed without costs as to the appellant. The respondents should get their costs out of the estate.

DIVISIONAL COURT. JANUARY 13TH, 1913.

MITCHELL v. HEINTZMAN.

Negligence—Injury to Person by Motor Car on Highway—Motor Vehicles Act, sec. 7—Onus—Question for Jury—Evidence as to Defendant Having Insured against Accident—Admission of—No Substantial Wrong or Miscarriage—Address of Counsel to Jury—Damages—Excess—Consent to Reduction—New Trial.

Appeal by the defendant from the judgment of BOYD, C., in favour of the plaintiff, on a general verdict of a jury for $1,000, in an action for damages for personal injuries sustained by the plaintiff by being struck, upon a public street in the city of Toronto, by a motor vehicle owned by the defendant.

The appeal was heard by CLUTE, SUTHERLAND, and KELLY, JJ.

T. N. Phelan, for the defendant.

J. P. MacGregor, for the plaintiff.

The judgment of the Court was delivered by CLUTE, J.:—On the 15th January, 1912, at about 11 o'clock at night, the plaintiff and one Simpson were returning home from a social club, walking up the west side of Yonge street, and crossed the street to take the car near the intersection of Shuter street with Yonge.

The plaintiff states in his evidence that, while he and his friend were standing looking down Yonge street, the Yonge street car came first and then the College car, and he (the plaintiff) stepped out as the car was coming to a stop and was knocked down by the defendant's automobile. The witness Simpson, who was with the plaintiff, says that they crossed over to get a car at Shuter street, and were scarcely come to a standstill, just enough to see that there was a car, and the plaintiff said, "There is a Yonge street car," which he was to take, "and a College car, which was suitable for me;" that a motor car came up Yonge street just when the plaintiff stepped out on Yonge street, and knocked him down. Simpson says he saw it just when it was opposite the College car, and shouted "Look out!" but by that time the plaintiff was knocked down. The College car was immediately behind the Yonge car. It was

just back far enough to be safe. As to speed, he says that the motor car came all of a sudden, so fast that he had just time to shout "Look out!"

The plaintiff was hit on the left thigh and knocked over, his left shoulder hitting the pavement. He was laid up for some five weeks, and then returned to his work, and received the same pay as he had received before the accident. For some days he spat blood. He complains that he still suffers from the effect of the injury, being unable to lift any heavy weight, and his doctor confirms this, and says that he is uncertain as to how long this weakness of the arm may continue. A doctor called for the defence states that, as far as he could see, the plaintiff has fully recovered. The question is one for the jury.

Section 7 of the Motor Vehicles Act declares that any person who drives recklessly or negligently or at a speed or in a manner dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highways, is guilty of an offence under the Act, irrespective of the clause regulating speed. Upon a careful reading of the evidence, it is quite clear that the case is not one which could have been withdrawn from the consideration of the jury, notwithstanding the question of the onus of proof, which in this case, under sec. 7 of the Act, was upon the defendant. Upon this point the charge was in favour of the defendant, as no special reference was made thereto. I see no objection to the charge read in connection with the evidence.

The principle objection argued was, that, under the authority of Loughead v. Collingwood Shipbuilding Co., 16 O.L.R. 64, there should be a new trial, upon the ground that evidence was submitted to the jury in proof of insurance carried by the defendant against accident; and that counsel in his address to the jury was allowed to emphasise the fact that the action was not being defended by the defendant, but by a certain insurance company. Affidavits were offered on both sides by counsel who attended the trial as to what took place. These were not received, but the usual practice was followed, permitting counsel to state what had occurred, and reference was also made to the Chancellor as to what took place.

As to the admission of evidence, there is nothing appearing upon the notes which would warrant a new trial, under the authority relied on. All that we can find as to the admission of evidence is at pp. 4, 46, and 71. On p. 4, during the examination of the plaintiff, he was asked:—

"Q. Did you ever have any other doctor examine you? A. I had. Dr. Wallace Scott came over and examined me.

"Q. Did you send for him? A. No, sir.

"Q. Do you know how he came to come? A. I think he told me that the insurance company had sent him there.

"Q. You don't know that for a fact? A. I don't know that for a fact.

"Mr. Phelan: I object to that evidence

"His Lordship: No, that is not evidence."

On the cross-examination of Dr. Wallace Scott, called by the defence, he was asked:—

"Q. When did Mitchell send for you? A. He did not send for me.

"Q. How did you come to go there? What was your authority for going there? On what representation did you make this examination? A. Am I to be spoken to in this way, my Lord?

"His Lordship: Q. You are asked how you came to be there?

"Mr. Phelan: He will take the consequences of telling him, my Lord.

"His Lordship: And I take the consequence of telling him to answer.

"Mr. MacGregor: Q. He did not send for you? A. No.

"Q. Who sent for you? A. I went in response to a telephone or a letter from Mr. Hull. Mr. Hull is connected with the Travelers Insurance Company.

"His Lordship: Q. You were sent on behalf of the Travelers Insurance Company? A. Yes.

"Mr. Phelan: I now take the objection that your Lordship should dispense with the jury, under the authorities.

"His Lordship: We will get the authorities later. The jury is dealing with it now, and they want the facts of the case.

"Mr. MacGregor: Q. Doctor, it was in answer to those directions that you were permitted to examine Mitchell? A. It was."

At p. 71, Dr. Cook was recalled by the plaintiff in reply, and Mr. MacGregor in his question used this expression: "Q. Dr. Scott, who was called a moment ago by the defence, and who examined Mr. Mitchell on behalf of the insurance company," etc., etc.

This is all that appears on the notes with reference to the evidence. There is no statement that any insurance company was the real defendant, or that Dr. Scott made the examination at the instance of the defence; for all that appears, the plaintiff may have been examined with reference to his own insurance.

The jury could not, I think, from this infer that the Travelers Insurance Company was the real defendant.

Mr. MacGregor argued that his questions were put in order to shew that Dr. Wallace Scott was not a disinterested witness, but was sent by an insurance company to examine as to the extent of the injuries the plaintiff had received, and so might be biassed in favour of his employer. I think he had the right to do this, carrying the questions no further than was necessary for that purpose, and without intimation to the jury that the insurance company was the real defendant.

Then as to what occurred in the address of Mr. MacGregor to the jury, the note is this: "Mr. MacGregor then addressed the jury. During the course of his address, Mr. Phelan protested against Mr. MacGregor saying anything to the jury about Mr. Heintzman not being the defendant, but the insurance company, and asked that the reporter make a note of his objections. His Lordship: Mr. MacGregor, you had better not place much emphasis upon that. Mr. MacGregor: I accept your Lordship's ruling." And nothing further was said with reference to it.

On reference to the Chancellor, we find that he does not recollect distinctly what Mr. MacGregor said to the jury; and counsel do not agree. The Chancellor, however, was not of opinion that any substantial wrong or miscarriage had been occasioned by the reception of the evidence relating to the insurance company, or, as far as he heard, by what counsel said. We think this case distinguishable upon the facts from Lougheed v. Collingwood Shipbuilding Co., and that a new trial should not be granted upon this ground.

A further question is that of the damages, which, the defendant contends, are excessive. Upon a careful reading of the evidence, we think this ground is well taken; and, unless the plaintiff will consent to have the damages reduced to $800, there should be a new trial. If he consents to such reduction, the appeal will in other respects be dismissed without costs. If the plaintiff does not consent, the costs of the former trial and of this appeal should be costs in the cause.

BRITTON, J., IN CHAMBERS. JANUARY 16TH, 1913.

REX v. BROUSE.

Criminal Law—Inspection and Sale Act—Violation of Fruit Packing Provisions—Police Magistrate's Conviction—Plea of "Guilty"—Motion to Quash Conviction—Objections to Information not Taken before Magistrate—Information and Conviction Disclosing more than one Offence.

Motion to quash a conviction of the defendant, John A. Brouse, made by George O'Keefe, Police Magistrate for the City of Ottawa, on the 16th December, 1912, for the offence of violating the Inspection and Sale Act.

The motion was heard at Ottawa on the 11th January, 1913.

Gordon S. Henderson, for the defendant.

W. J. Code, for the Department of Agriculture.

J. A. Ritchie, for the Crown.

BRITTON, J.:—On the 11th December, 1912, one Charles M. Snow, fruit inspector, laid an information against the defendant for that he did, at the city of Ottawa, on or about the 30th day of October, 1912, unlawfully offer, expose, or have in his possession for sale, ten barrels of apples packed contrary to the provisions of sec. 321 of the Inspection and Sale Act, R.S.C. 1906 ch. 99.

Upon this information, the accused appeared before the Police Magistrate on the 16th December. The information was before the Police Magistrate; and the accused, upon being charged, pleaded "guilty," whereupon the Police Magistrate imposed a fine of $20 and costs, fixing the costs at $2, ordering payment forthwith, and, in default, one week in gaol. The formal conviction, made on the same day, followed the information, and is, "that John A. Brouse, on or about the 30th day of October, 1912, at the city of Ottawa, did unlawfully offer, expose, or have in his possession for sale, ten barrels of apples packed contrary to the provisions of section 321 of the Inspection and Sale Act."

The objections to the conviction are: (1) that neither the information nor the conviction discloses any offence mentioned in sec. 321 of said Act; (2) or, as that section, taken as a whole, creates several offences, then the information and conviction in

this case are bad, as they contain more offences than one; and (3) that the information did not conform to the provisions of sec. 321, and was not sufficiently definite to enable the accused to plead thereto; and, therefore, the plea of "guilty" entered by the accused was inoperative and of no effect.

Upon the construction I am bound to put upon sec. 321, the information does not state an offence.

The offence charged is that of offering for sale, or exposing for sale, or having in his possession for sale, fruit (apples) packed contrary to the provisions of sec. 321 of the Inspection and Sale Act. After the prohibition contained in sec. 321, the rest of that section states the circumstances under which the offence may be committed. It mentions the acts which, if committed, will be proof of the offence.

With a statement such as there is—alleging an offence—it is too late, after a plea of guilty, to object. If the objection had been taken before the Police Magistrate, and before the plea of "guilty" was recorded, the information could, if necessary, have been amended. Section 321 creates at most three offences: (1) to sell, offer to sell, expose for sale, or have in possession for sale, packed fruit in closed packages, unless the packages are packed as provided in the Act; (2) if marked "Fancy Quality," it is an offence, unless the fruit is as described in the sub-section; if marked "No. 1 Quality," it is an offence unless the fruit is as described in the sub-section; if marked "No. 2 Quality," it is an offence unless the fruit is as described in the sub-section; (3) it is an offence if the faced or shewn surface of fruit packed gives a false representation of the contents of the package.

The information, according to this division of the section, discloses the first offence named—if it can be said that the section creates more than one—and I think the information discloses only one offence, and so is not open to the objection taken.

This falls within the decision in Rex v. Macdonald, 6 Can. Crim. Cas. 1, where the offence is only one, but which may be committed in one of several ways.

I have considered in disposing of this case the following, which I cite without further comment: Criminal Code, secs. 724, 852; Rex v. James, 6 Can. Crim. Cas. 159; Regina v. Hazen, 20 A.R. 633; Regina v. Alward, 25 O.R. 519.

The motion will be dismissed with costs.

SUTHERLAND, J. JANUARY 17TH, 1913.

RE GOLD AND ROWE.

Deed—Construction—Grant "in Fee Simple"—Habendum—Bar of Entail—Act respecting Short Forms of Conveyances—Act respecting Assurances of Estates Tail.

Application by Mary T. Gold, the vendor, under the Vendors and Purchasers Act, 10 Edw. VII. ch. 58, for a declaration that a deed of the 8th December, 1906, from W. S. Gold to his wife, the applicant, was sufficient to bar the entail created by the will of David L. Reed.

J. A. McEvoy, for the vendor.
Eric N. Armour, for the purchaser, Frederick T. Rowe.

SUTHERLAND, J.:—One David L. Reed was the owner of the property in question, and died on the 27th September, 1887, having previously made his last will and testament, dated the 30th September, 1885, wherein he devised and bequeathed the said lands to his grandson "William Scott Gold and the heirs of his body." Letters probate were duly issued on the 7th October, 1887.

On the 8th December, 1906, the said devisee, W. S. Gold, by deed under the Act respecting Short Forms of Conveyances, did grant unto the said party of the second part (in fee simple) the said lands. The grantee was his wife, Mary T. Gold. The habendum in the said deed is as follows: "To have and to hold unto the said party of the second part, her heirs and assigns, to and for her and their sole and only use forever."

The vendor contends that the said deed was a sufficient one to bar the entail.

The contention of the purchaser, on the other hand, is, that R.S.O. 1897 ch. 122, an Act respecting Assurances of Estates Tail, sec. 29, applies, and that the disposition of the lands under this Act by a tenant in tail could only be effected by some one of the assurances (not being a will) by which such tenant in tail could, before the Ontario Judicature Act, 1881, have made the disposition, if his estate were an estate at law in fee simple absolute. He argues that the words "in fee simple," following the grant in the deed as indicated, before 1881, would be ineffective without the use of the word "heirs" to pass the fee; and, consequently, the deed in question cannot be said properly to bar the entail.

It seems to me that, apart from the possible effect of the habendum in the deed, this contention would be correct; but I think the habendum clearly aids in so construing the deed as to give effect to the contention of the vendor that the entail has been effectively barred.

If we treat the words "in fee simple" as entirely ineffective, and so as though eliminated from the deed, then we have a simple grant by the tenant in tail to his wife, the party of the second part in the deed.

In Norton on Deeds, 1906, p. 290, it is said that the mere mention of the grantee's name in the premises does not give him any estate inconsistent with the estate limited by the habendum, whatever that estate may be. And at p. 229: "The office of the habendum is properly to determine what estate or interest is granted by the deed, though this may be performed and sometimes is performed in the premises. In which cases the habendum may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to, the estate granted in the premises."

I think, therefore, it is clear that the habendum explains the estate the grantor intended to convey, and it shews that the intention of the grantor was to grant an estate at law in fee simple absolute.

On the other hand, the very use of the words "in fee simple," though ineffective to carry such an estate under the statute applicable to it, is suggestive of the estate intended by the grantor to be conveyed, and the habendum is consistent therewith and explanatory thereof.

The purchaser must, I think, therefore, accept the deed as sufficient to bar the entail.

No costs are asked, and there will be no order as to costs.

KELLY, J., IN CHAMBERS. JANUARY 18TH, 1913.

RE OAG AND ORDER OF CANADIAN HOME CIRCLES.

Death—Presumption—2 Geo. V. ch. 33, sec. 165—Evidence—Insurance Moneys.

Application, under sec. 165 of 2 Geo. V. ch. 33, for a declaration as to the presumption of the death of Benjamin Charlton Oag.

W. T. McMullen, for the applicant.
J. E. Jones, for the society.

KELLY, J.:—A certificate (No. 14177) for $1,000 in the Order of Canadian Home Circles was issued to Benjamin Charlton Oag. His sister, Margaret Gunn, of Houghton Centre, in Ontario, is the beneficiary named therein. She is the only living member of his family; his step-mother, however, lives in Toronto.

From the time of his father's death in 1889, the insured made his home with his sister, and, from about 1891 until 1904, he was in the habit of taking employment during the summer months sailing on the lakes, but spent every winter, except one, during that time, at his sister's home.

In the spring of 1904, he went as usual to his employment on the water, and in that season was employed on the vessel "Oregon" on the Great Lakes. At the close of navigation in the fall of 1904, he received his discharge from the vessel at Chicago, and for a day or two in December, 1904, he was a guest at the Atlas Hotel in that city. This was the last trace that has been obtained of him, for since that month neither his sister nor her husband nor other friends of his nor those who knew him in his employment, have heard anything of him.

His step-mother says that she has heard nothing of his whereabouts for the past eight years.

In addition to inquiries having been made for him amongst those who might be expected to know something of him, advertisements have been inserted in newspapers in Chicago and in Springfield, Massachusetts, asking information about him; and the Chicago city directories have been consulted; but none of these efforts have brought any results.

In Hagerman v. Strong, 8 U.C.R. 291, it is said at p. 295: "The principle itself (that is, the principle of law as to the presumption of death) is founded upon the necessity of taking some measure of time as a rule in such cases, in order that it may not be forever uncertain at what time an absent person, of whom nothing has been heard, may be concluded to be no longer living. Seven years has been adopted as a reasonable period; the meaning of which I take to be that the law considers it possible that a person who has left his domicile and gone abroad, may be still living, though nothing has been heard of him or from him for seven years; but does not consider it, morally speaking, possible that he should live longer without evidence being in some manner afforded of his existence."

In Halsbury's Laws of England, vol. 13, p. 500, sec. 692, it is laid down that "as to death, on the other hand, there exists an important presumption, for if it is proved that for a period of seven years no news of the person has been received by those who would naturally hear of him if he were alive, and that such inquiries and searches as the circumstances naturally suggest have been made, there arises a legal presumption that he is dead."

Reference may be also made to Willyams v. Scottish Widows and Orphans Life Assurance Society, 4 Times L.R. 489; Phipson on Evidence, 5th ed., p. 644, and cases there cited.

The evidence before me warrants the making of an order declaring the presumption to be that Benjamin Charlton Oag is dead.

Costs of the application will be payable out of the insurance moneys.

ST. CLAIR v. STAIR—MASTER IN CHAMBERS—JAN. 10.

Libel—Security for Costs—Libel and Slander Act, 1909, *sec. 12—Affidavit in Support of Motion—Cross-examination on—Scope of—Good Faith—Justification—Discovery.*]—A motion was made by the defendants Rogers and the "Jack Canuck" Publishing Company, in an action for libel and for conspiracy to defame, for security for costs, under the Libel and Slander Act, 9 Edw. VII. ch. 40, sec. 12, on the affidavit of the defendant Rogers, who was also the president of the defendant company. The plaintiff cross-examined the defendant Rogers on this affidavit at great length; and on the 11th December that defendant was ordered to attend for further examination and answer questions which he had so far refused to answer. He did so attend, and the plaintiff again moved for an order for re-examination. The Master said that, in view of what was held in Greenhow v. Wesley, 1 O.W.N. 1001, and Duval v. O'Beirne, 3 O.W.N. 573, it might have been better to have had a fuller statement of the grounds for the publication complained of. No objection was taken, however, to its sufficiency prima facie; but it was attempted to disprove the allegation of good faith by shewing that the defendant Rogers and the defendant company were acting as the hired agents of their co-defendant Stair, and that the information of detectives and others admittedly received by them did not justify their statements, but rather shewed not merely a want of good faith, but a deliberate intention to villify the plaintiff and a conspiracy to effect the ruin of his reputation.

It was conceded that the determination of the present motion must depend upon whether the plaintiff was or was not entitled to full discovery on all the allegations in the affidavit of the defendant Rogers. It was suggested that no cross-examination should have been allowed. The Master said that the practice seemed to be otherwise, though perhaps never carried so far as in the present case. He referred to the language of the Chancellor in Swain v. Mail Printing Co., 16 P.R. 132, at p. 135, and said that it was decisive against the present application. He also referred to Bennett v. Empire Printing and Publishing Co., 16 P.R. 63, 68, and Southwick v. Hare, 15 P.R. 222. "The good faith of the defendants cannot be tried on any interlocutory motion. It is pre-eminently a question for the jury at the trial —so, too, as regards the contemplated justification. Nothing bearing on its success can be usefully considered at present. . . . As the motion for security has yet to be dealt with, it is not advisable to say more than that the present motion should not be granted, as full disclosure has been made so far as it can usefully be made at this stage. The costs of the motion, in the special circumstances, will be reserved until the main motion is Young, K.C., and A. R. Hassard, for the defendants Rogers and the company.

RICHARDS v. LAMBERT—LATCHFORD, J.—JAN. 13.

Damages—Reference—Report—Appeal—Account—Items.]—Appeal by the defendants from the report of the Master at Sandwich upon a reference directed by BOYD, C.; and motion by the plaintiff for judgment on further directions and costs. The plaintiff, as the only shareholder in the Regal Motor Car Company of Canada Limited, other than the four individual defendants, sued the latter and the company and the Regal Motor Car Company of Detroit for damages for diversion of the assets of the company and other wrongs. The Master found the defendants indebted to the plaintiff in the sum of $12,130.72. LATCHFORD, J., said that the questions in issue were questions of fact, upon which there had been much contradictory evidence; and he was unable to say that the Master was wrong except as to two items amounting together to $496.52, which should be deducted from the amount found due to the plaintiff, reducing it to $11,634.20. With this variation, appeal dismissed with costs. Judgment for the plaintiff for $11,634.20 with costs of action and reference. A. R. Bartlet, for the defendants. J. H. Rodd, for the plaintiff.

FISCHER v. ANDERSON—MASTER IN CHAMBERS—JAN. 14.

Security for Costs—Præcipe Order—One Plaintiff in Jurisdiction—Order Set aside—Leave to Move for Security after Pleadings Delivered.]—Motion by the plaintiffs to set aside an order, obtained by the defendant on præcipe, requiring the plaintiffs to give security for the defendant's costs of the action. The claim endorsed on the writ of summons was for an injunction restraining the defendant from infringing the patented rights of the plaintiffs and for damages. By another endorsement it appeared that the plaintiff Fischer was patentee, and the plaintiffs George H. Lees & Co. licensees, and that Fischer resided in the United States of America, and the other plaintiffs in Ontario. The Master said that the order, at the present stage of the action (before pleadings), was at least premature: McConnell v. Wakeford, 13 P.R. 455, 457; Smith v. Silverthorne, 15 P.R. 197. Order made setting aside the præcipe order, with costs to the plaintiffs in any event, without prejudice to a motion for security thereafter, if the defendant should be advised to move. When the case is developed on the pleadings, such a motion may be successful: Holmested and Langton's Jud. Act, 3rd ed., p. 1426; Irving v. Smith, 12 P.R. 29. J. F. Edgar, for the plaintiffs. J. E. Jones, for the defendant.

PLAYFAIR v. CORMACK AND STEELE—MASTER IN CHAMBERS—JAN. 15.

Discovery—Examinaton of Defendant—Scope of Inquiry—Dealings in Company-shares—Restriction to Pleading.]—Motion by the plaintiffs for an order requiring the defendant Steele to attend for re-examination for discovery and to answer certain questions which, on the advice of counsel, he refused to answer when examined by counsel for the plaintiffs. The action was to recover from the two defendants the sum of $4,263.57 as a balance due to the plaintiffs as brokers in respect of transactions in the stock of the Swastika Mining Company, between the 23rd May, 1911, and the 29th February, 1912. The defendants severed in their defences, and each asserted that the other was liable. The questions which the defendant Steele refused to answer related, first, to an inquiry whether he had any documents which had passed between the plaintiffs and himself relating to Swastika stock. He also refused to say whether he was the largest shareholder in the Swastika Mining Company

or whether in May, 1911, he was secretary-treasurer. Broadly, the refusal was to answer questions which did not relate to dealings between Steele and the plaintiffs in regard to the particular stock mentioned in the statement of claim. The Master said that, in his view of the law and the practice, this position was too unqualified; and he was of opinion that the questions objected to should be answered. Reference to Bray's Digest of the Law of Discovery (1904), p. 3, para. 10, where it is said that a party is required to answer questions which *may*, not which *must*, assist the examining party. Order made requiring the defendant Steele to attend for further examination at his own expense; costs of the motion to the plaintiffs in the cause. Harcourt Ferguson, for the plaintiffs. W. D. McPherson, K.C., for the defendant Steele.

POLSON IRON WORKS LIMITED v. MAIN—MASTER IN CHAMBERS—JAN. 16.

Pleading—Counterclaim—Con. Rule 254—New Defendants by Counterclaim—Company—Directors—Misfeasance—Wrongful Dismissal—Amendment.]—Motion by John B. Miller, made a defendant to the counterclaim of the original defendant, Main, to strike out paragraphs 25 and 26 of the counterclaim and to strike out the name of Miller from the counterclaim; and motion by the defendants the executors of F. B. Polson, deceased, to strike out paragraphs 2 to 23 and paragraphs 25 and 26 of the counterclaim. The motions were made under Con. Rule 254. Paragraphs 25 and 26 alleged misfeasance by F. B. Polson and Miller as officers and directors of the plaintiff company, and claimed an account of their dealing with the company's assets and repayment to the company. The Master said that this was, in substance, an action on behalf of the company's shareholders and for their benefit; and that these two paragraphs could not stand: Stroud v. Lawson, [1898] 2 Q.B. 380; and this might involve the striking out of the name of Miller as a defendant to the counterclaim. The counterclaim for wrongful dismissal, as alleged in paragraphs 21 and 22, must be confined to the plaintiff company, in the same way as paragraph 27, counterclaiming for the cancellation of the defendant's subscription for $25,000 of the plaintiff company's stock. The motion of the executors of F. B. Polson was entitled to prevail to this extent—the defendant must amend to shew, if he can, something that will entitle him

to make his claims against Polson and Miller personally a ground of liability on the part of the company to him for their alleged wrongful dealings with him, or to make a claim against them in the alternative, as in Bennett v. McIlwraith, [1896] 2 Q.B. 464. It was not contended on the argument that either of these claims did appear at present sufficiently, if at all. The defendant should amend within a week as advised. If this was not done, the counterclaim, except as against the plaintiff company, as in paragraphs 19 and 27, must be struck out. The costs of these motions should be to the moving parties in any event, together with all costs lost or occasioned thereby, as in Hunter v. Boyd, 6 O.L.R. 639. Frank McCarthy, for Miller. C. A. Moss, for the executors of Polson. R. McKay, K.C., for the defendant, Main.