The
Ontario Weekly Notes

Vol. II. TORONTO, OCTOBER 26, 1910. No. 5.

COURT OF APPEAL.

OCTOBER 13TH, 1910.

RE TOWN OF SANDWICH AND SANDWICH WINDSOR AND AMHERSTBURG R. W. Co.

Street Railways — Construction of Incorporation Act and other Statutes—General Railway Act—Street Railway Act, 1883—By-law of Town—Right to Occupy Streets — License "Railway" or "Street Railway"—Franchise—Unconditional Right of Occupation—Ontario Railway and Municipal Board.

Appeal by the railway company from an order of the Ontario Railway and Municipal Board, made upon an application by the town corporation, complaining that proper service was not being furnished by the defendants, and asking that the agreement between the parties might be construed.

The Board considered it convenient to make what might be called an interim order construing the agreements, and retaining the rest of the application until the opinion of the Court of Appeal could be obtained upon the question of construction.

The appeal was heard on the 24th and 25th January, 1910, by MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

A. H. Clarke, K.C., for the appellants.

F. E. Hodgins, K.C., and F. L. Bastedo, for the town corporation.

GARROW, J.A.:—The Sandwich and Windsor Passenger Railway Co. was incorporated by (1872) 35 Vict. ch. 64 (O.), and was thereby (sec. 4) authorised to construct a railway from any part of the town of Sandwich to any part of the town of Windsor and to

continue the same to the village of Walkerville, and to use and occupy such of the streets and highways of any of such places as might be required for the purposes of the railway track, and to use, as motive power, animals or such other power as they might see fit; but the streets or highways of Sandwich and Windsor were not to be occupied unless by the permission of the municipal councils, expressed by by-law, "which shall regulate the same."

Under this Act of incorporation a railway was shortly afterwards constructed, operated by horse power, which power continued to be used down to the year 1891.

On the 18th November, 1874, the company mortgaged all its property to Campbell and McGregor; and Alfred J. Kennedy, claiming under them as assignee, on the 3rd March, 1880, obtained a final order of foreclosure. Afterwards Mr. Kennedy seems to have continued to operate the railway on his own account until the amending Act 50 Vict. ch. 80 (1887) was passed. By that statute, which is called "An Act to amend the Act incorporating the Sandwich and Windsor Railway Company," sec. 1 in the original Act, which named the original incorporators, is replaced by a new section (1) which says: "Section 1 . . is hereby repealed, and the following substituted in lieu thereof—Alfred J. Kennedy and such other persons as shall hereafter become shareholders of the said company are hereby constituted a body corporate and politic under the name of 'The Sandwich Windsor and Amherstburg Railway.'"

Section 4 provides that "the company is hereby authorised and empowered to extend, construct, maintain, and complete and operate its railway and the extensions pursuant to the provisions and powers contained in sec. 4 to the said Act." And authority was given to increase its capital and to extend the railway to the town of Amherstburg. Further amendments followed—in 1891, 54 Vict. ch. 94, and in 1893, 56 Vict. ch. 97. In sec. 11 of the latter, this is said: "The said railway is hereby declared to be and to have been since the date of the incorporation of the said company a railway within the meaning of the Railway Act of Ontario." . . Section 4 also enacts that "the several clauses of the Railway Act of Ontario and of any amendments thereto relating to plans and surveys, lands and their valuation, and municipalities taking stock, are hereby declared to have been and to be incorporated in the Act incorporating the company and the Act amending the same, and shall apply to the company except only in so far as they are inconsistent with the express enactments of this and the other Acts relating to the company."

And by sec. 6, sub-secs. 20, 21, 22, 23, and 24 of sec. 9 of the Railway Act of Ontario, as amended by 53 Vict. ch. 45, were also declared to be incorporated in and to form part of the Act.

Section 10 provides that where the railway is operated by electricity along a street, highway, or public place, that shall only be done subject to such agreement as may be made between the company and the municipality and under and subject to any by-law or by-laws of the council of the municipality passed in pursuance thereof.

By an agreement dated the 27th May, 1891, validated by by-law of the town, the railway company were (in advance of the last mentioned statute) authorised by the town to adopt electricity as the motive power upon certain conditions which in detail seem to be of no consequence on this appeal. And the railway is now and has been since the year 1891 operated by electricity.

No by-law or agreement authorising the company to use the streets and highways in the town of Sandwich at the time of the original construction of the railway was produced, but secondary evidence was given which, as held by the Board, justifies the inference that such a by-law was actually passed in the year 1872. There is nothing, however, to shew its exact terms, or whether it conferred a limited or a perpetual right. Under these circumstances, the Board held that the plaintiffs had not granted and had not power to grant a perpetual right to occupy the streets, and that what the company had was a mere license. The Board further held that the railway is a street railway, that when the company was incorporated as the Sandwich Windsor and Amherstburg Railway Company, in 1887, the Street Railway Act, 46 Vict. ch. 16, having been in force, sec. 18 of that Act, prohibiting a municipal council from granting to a street railway company a privilege for a longer period than twenty years, applied, and that, therefore, the company's right or franchise expires at the end of twenty years from the date of the by-law validating the agreement of the 27th May, 1891—that is, on the 15th December, 1912; and that in the meantime such agreement was binding on both parties. The Board also held that the statute before referred to, 56 Vict. ch. 97, which, by sec. 11, declared this to be a railway under the Ontario Railway Act, did not affect the town's rights, because the town were not parties to that legislation. And, as this question seems to stand at the threshold, I may as well say what I have to say about it at once.

When the first statute (35 Vict. ch. 64) in the series was passed, this province had no general Railway Act, and the reference in sec. 4 is, therefore, to the general Act of the late province of

Canada (C. S. C. ch. 66), the provisions of which as to acquiring and holding lands taken were incorporated. There was no definition in that general Act of the term "railway," and at that time no general legislation by the province upon the subject of street railways. In the petition recited in 35 Vict. ch. 64, reference is made to an earlier statute of the province of Canada, 29 Vict. ch. 84, by which certain persons had been incorporated as the Windsor and Sandwich Street Railway Company, which, it is said, had not been acted upon, and the prayer of the petition was that an Act might be passed to authorise the construction and operation of a similar railway under other direction and management. But the railway actually authorised by that statute is nowhere in the statute itself called a street railway. Then in the general Act to which I have referred, C. S. C. ch. 66, sec. 123, it is declared and enacted that all special Railway Acts shall be public Acts, a definition which has been continued in all the general railway legislation of the province ever since, and which, in my opinion, make it necessary to regard the statute 53 Vict. ch. 97 as a public Act, and therefore binding on all persons.

The learned Chairman of the Board in his judgment speaks of the Act of 1887 as if that Act, and not the Act of 1872, was the Act under which the company were incorporated. The legislation is certainly peculiar, but the point to be determined, I think, is, what did the legislature intend? Was the intention to create at that time a new corporate entity, or to give new life and vigour to the old, which, so far as appears, had not ceased to exist, although it had, through the foreclosure proceedings, lost its property? The latter is, in my opinion, the proper conclusion. The railway had then been in operation for many years, and it was, no doubt, considered desirable that its continued operation should be carried on without a break or interruption in the statutory title. The language of the statute itself really leaves no room for doubt as to the intention. And there can, I think, be no doubt about the legislative power to do as was done—that is to say, to amend and continue and even to enlarge the original Act under which the railway was first constructed, and under which it had been operated for so long. In 1872, as I have said, this province had no general Railway Act. The provisions of C. S. C. ch. 66 were evidently assumed to be in force, as, after Confederation, amendments to it were from time to time passed by the legislature. The first provincial general Act was R. S. O. 1877 ch. 165, which is called "The Railway Act of Ontario"—largely a compilation from C. S. C. ch. 66. And it was, doubtless, to that Act that the legislature referred in sec. 11 of the Act of 1893, before quoted, from which,

however imperfect or inexact in declaring a railway authorised by an Act passed in 1872 to have been always a railway within the meaning of the Act only passed in 1877, still leaves no room for doubt upon the main point, that the legislature at least in 1893 did not intend this railway to be regarded as a street railway, and so within the provisions of sec. 18 of the Street Railway Act passed in 1883.

For these reasons, I am of the opinion that the railway in question should be regarded as a railway within the meaning of the Railway Act of Ontario, and not as a street railway, and that the opinion of the Board that sec. 18 of the Street Railway Act of 1883 applies is erroneous.

Coming now to the question of franchise. By sec. 12 of C. S. C. ch. 66, it was provided that no railway should be carried along a highway unless leave had been obtained from the proper municipal authority. Similar language is found in R. S. O. 1877 ch. 165, sec. 21.

Under these provisions the permission to use the highway did not require to be conferred by by-law and might even be acquired by acquiescence. See Township of Pembroke v. Canada Central R. W. Co., 3 O. R. 503. And there was apparently no provision for a leave once given being afterwards recalled. The only difference between these provisions in the general Act and that contained in sec. 4 of the original Act of incorporation, 35 Vict. ch. 64, is that in the latter statute a by-law was expressly made necessary, and the municipal council in granting the permission might also "regulate." There is the same total absence of any express power of recall, which would not necessarily be included in the power to regulate, and no provision of any kind is made for such an event, such as is contained in the Street Railway Act, where the Municipal Council declines to renew.

There is no doubt, on the evidence, that permission to occupy the streets was granted by a by-law passed in the year 1873, in pursuance of which the railway was constructed, and under which, apparently without objection, it was operated for a great many years. And there is absolutely no evidence to indicate that the leave thus originally granted was in any way limited or conditional. So that upon the present material the conclusion, in my opinion, would be that it was unlimited and unconditional.

I would, however, much prefer not to pronounce finally upon the matter of the extent of the franchise. It is a highly important subject to both parties, and indeed may involve the rights of bondholders and others not represented before the Board or before us. The lost by-law, or a copy, may yet be recovered, or more satisfac-

tory evidence of its contents be obtained. There ought, one would think, to be members or officials of the municipal council of the year 1872 still alive and able to testify usefully on the subject. Moreover, I doubt very much if the question of franchise is properly involved in the present application. The agreement, and the only agreement, proved is that of March, 1891, which both parties admit, and which the Board has found is valid and still in force, and binding upon the parties, and the application must, under the circumstances, I think, be regarded as based upon that agreement, which is equally valid and equally binding whether the franchise is perpetual or expires in December, 1912, or is merely a yearly license, at least until the license is properly determined.

The Board, it must be remembered, is not a Court, but an administrative body having, in connection with its primary duty, power to construe the agreements which it is called on to enforce, but no general power such as the superior Courts possess of adjudicating upon questions of construction in the abstract.

For these reasons, I think the appeal should be allowed with costs, and the matter be remitted to the Board for further hearing upon the matters which the Board reserved to itself when disposing of the question of construction.

Since the foregoing judgment was prepared, a copy of the missing by-law, passed 24th July, 1873, was found in the vault of one of the solicitors who had acted for some of the parties interested. According to its terms the location of the railway, as made by the company, was authorised, unconditionally as to time, or otherwise, except that the company should undertake a run cars at least every hour upon every day, and at least from sunrise to sunset of each day, and should observe the rules and regulations prescribed by its charter, and by any by-laws of the council.

The copy of the by-law so found was, by direction of the Court, brought to the attention of the Railway Board, with a view to enabling that Board, if it deemed it advisable, to reconsider the matter in the light of the new evidence. Subsequently the Board intimated that it remained of the same opinion, notwithstanding the terms of the by-law.

Moss, C.J.O., and Maclaren, J.A., concurred.

Osler, J.A., retired from the Bench before judgment was given.

OCTOBER 13TH, 1910.

*HAMMOND v. BANK OF OTTAWA.

Company—Winding-up—Mortgage Made by Company when Insolvent—Action by Liquidator to Set aside — Existing Debt to Bank—Security—By-law—Authorisation — Ratification—Ontario Companies Act.

Appeal by the defendants from the judgment of SUTHERLAND, J., 1 O. W. N. 519, in an action by the liquidator of the New Ontario Brewing Co. Limited, setting aside, as unauthorised, a mortgage of land made by the company, to the defendants shortly before a winding-up order was made.

The trial Judge held that the mortgage was not open to attack under sec. 94 of the Winding-up Act; but that it was not properly authorised by the company, and should be set aside.

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

G. H. Kilmer, K.C., for the defendants.

J. M. Ferguson, for the plaintiff.

MOSS, C.J.O.:— . . . After the appeal was argued, we directed that the parties be at liberty, if so advised, to adduce further evidence bearing on the defence of pressure, and consideration, as set up in the third paragraph of the statement of defence, and both parties availed themselves of the privilege. This evidence is now before us, but in dealing with the appeal it may be convenient to first dispose of the branch of the case upon which the plaintiff succeeded at the trial.

For some time prior to and on the 8th December, 1908, the brewing company were indebted to the defendants to the amount of $6,000 for moneys advanced in the ordinary course of dealing with them. Frequent demands for payment had been made by the defendants upon the company, with the result that the company agreed to secure the amount by mortgage upon their lands. On the 8th December the directors met and passed a by-law undoubtedly with the intention and for the purpose of implementing the agreement. But, through some misconception, the by-law was so drawn as to contain much more than was necessary to express and give effect to the intention. The debt of the defendants at that

* This case will be reported in the Ontario Law Reports.

time being an outstanding liability of the company, and the intention and agreement being to mortgage their real property, sec. 78 of the Ontario Companies Act gave the directors ample powers to do so, and all that was needed was that they should act under the powers vested in them by that section. But the by-law as passed contains a recital that sec. 73 of the Ontario Companies Act authorises the directors of the company to borrow money for the purposes of the company. This assertion of the powers of the directors was of course wholly unnecessary, and was, besides, inapplicable, inasmuch as the directors were not about to borrow or give security for a present loan. but to secure by mortgage an existing liability. Putting aside this recital, the remainder of the by-law, though not very happily expressed, is not inapplicable in substance to the true purpose with which it was framed. It contains all that is necessary to authorise the preparation and execution by the president and secretary of a mortgage to secure the liability for $6,000.

Is the presence of the first recital sufficient to prevent the by-law from having effect and operation as authorising a mortgage under sec. 78? To so hold is to completely nullify the by-law; for by no construction can it be made to read as applying to any other transaction then on foot with the defendants requiring to be dealt with by by-law. The only transaction calling for action by the directors towards giving a security was the agreement to give a mortgage to secure the existing debt. Unless the statement contained in the by-law that the company have borrowed $6,000 from the defendants, is to be understood as meaning the previous advances and the liability for them, the statement is wholly untrue. So, also, with regard to the further statement that "the directors having borrowed the sum of $6,000 from the Bank of Ottawa upon the credit of the company," which precedes the authorisation to them to mortgage the company's property for securing the same.

There does not appear to be any good reason for giving to a recital in a by-law of the directors of a company any greater force or effect then is to be given to a recital in an Act of Parliament, and with regard to that it has been said that "a mere recital in an Act of Parliament either of fact or law is not conclusive; and we are at liberty to consider the fact or the law to be different from the statement of the recital." See Regina v. Houghton, 1 E. & B. 501, at p. 516. Here the first recital is true in law and in fact, but it has no relation to the actual transaction aimed at. And the other recitals are not untrue when taken in connection with the actual facts; but they would be if treated as applying to a transaction of borrowing under sec. 73. The company had borrowed $6,000 from the defendants, not at the time when the by-law was

being passed, but long previous thereto, and the directors (now deeming it necessary and expedient to give the defendants a mortgage to secure the $6,000) take steps for the purpose. Under sec. 78 the directors had power to do all that the by-law authorised, and it ought not to be considered that the failure to refer to all the powers enabling them to do the act should render it nugatory.

In the case of individuals possessing and exercising powers of appointment or sale it has been so held. See Kelly v. Imperial Loan Co., 11 A. R. 526, 11 S. C. R. 516, and cases there cited.

Further, there is to be borne in mind the principle that this objection would not be open to the company, and that in this respect the plaintiff occupies no higher position.

The defendants, having received a mortgage, apparently duly executed on behalf of the company, were entitled to assume that everything necessary to its valid execution had been regularly and properly done. There is a distinction between what directors have no power to do at all and what they have power to do provided certain conditions are complied with; and, whilst it is held that companies are not bound by acts of the former class, it is held that they may be bound by acts of the latter class in favour of all persons dealing with them bona fide without notice of irregularities of which they may be guilty: Lindley on Companies, 6th ed., p. 213. The instrument on its face appears to be proper and regular to effectuate the purpose for which it was agreed to be given, and there is nothing to shew that the defendants were aware of the co-called irregularities preceding its execution. Upon this branch of the case the learned trial Judge's conclusion should be reversed, and the instrument upheld.

Then comes the question upon which the learned trial Judge held in the defendants' favour. The mortgage having been made within three months next preceding the commencement of the winding-up, there is a presumption that it was made wtih intent to defraud the company's creditors. But the presumption is not a conclusive or irrebuttable presumption. It places upon persons whether creditors or not, to whom a mortgage is given within the prescribed limit of time, the onus of shewing the absence of intent to defraud the creditors of the company. So far as the sections of the Winding-up Act relating to voluntary and fraudulent conveyances and other dealings are concerned, the law remains as enunciated in the case of Lawson v. McGeoch, 20 A. R. 111. It was open to the defendants to overcome the statutory presumption of intent, and, as the authorities have settled, the intent of the debtor alone to defraud is not sufficient. It must be the conjoint intent of debtor and creditor; and the intent to prefer is in general

overcome when it is shewn that the giving of the mortgage or other security was not the mere voluntary act of the debtor.

The law in this respect is illustrated by the cases of McCrae v. White, 9 S. C. R. 22; Long v. Hancock, 12 S. C. R. 532; Molsons Bank v. Halter, 18 S. C. R. 88; and Kirby v. Rathbun Co., 22 O. R. 9. Decisions since the amendments to the Ontario Assignments and Preferences Act must be read in view of the difference in the enactments. See Webster v. Crickmore, 25 A. R. 464.

The learned trial Judge was of opinion, upon the evidence, that the defendants had sufficiently discharged the onus of rebutting the presumption of intent to defraud. This conclusion is greatly strengthened by the further evidence. The result of the whole testimony is that the mortgage was the outcome of repeated demands made upon the company by the defendants—who were dissatisfied with the state of the account—accompanied on more than one occasion by a threat of proceedings which were held in abeyance in consequence of the promise on behalf of the company that a mortgage would be given. . . .

The attack upon the mortgage fails, and the appeal should be allowed and the action dismissed, but the circumstances were such as to invite inquiry, and we may properly say that it is not a case in which any of the costs of the litigation should be awarded to either party.

The other members of the Court concurred; MEREDITH, J.A., to give reasons later.

OCTOBER 13TH, 1910.

*BARNETT v. GRAND TRUNK R. W. CO.

Railway—Collision—Injury to Person on Train—Licensee or Trespasser—Negligence—Findings of Jury—Plaintiff not a Trespasser as against Railway Company Responsible for Collision.

Appeal by the defendants from the judgment of a Divisional Court, 20 O. L. R. 390, 1 O. W. N. 491, setting aside the judgment for the defendants entered by MEREDITH, C.J.C.P., upon the findings of the jury, and directing judgment to be entered for the plaintiff for the damages assessed by the jury, acting upon a consent, given by the parties at the trial, to the Court determining any point necessary for the determination of the right of the parties not covered by the questions submitted.

* This case will be reported in the Ontario Law Reports.

The plaintiff, being upon a coach of the Pere Marquette Railway Company, not as a paying passenger, but getting a gratuitous lift, was injured by reason of a collision with a car of the defendants, caused by the negligence of the defendants.

The Divisional Court held that the plaintiff was a licensee, and entitled to recover damages against the defendants.

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

D. L. McCarthy, K.C., for the defendants.

J. F. Faulds and P. H. Bartlett, for the plaintiff.

Moss, C.J.O.:—Upon consideration, I am of opinion that the judgment of the Divisional Court should be sustained. While I do not desire to be understood as not agreeing with any of the grounds upon which that judgment proceeds, as set forth in the opinion of the Chancellor of Ontario, I am satisfied to rest my conclusion on the ground indicated by the Chancellor in dealing with the argument of the plaintiff's counsel that, even if the plaintiff was a trespasser, the defendants were liable.

Whatever may have been the true position of the plaintiff as far as the Pere Marquette Railway Company were concerned, he was not at the time a trespasser upon the rights of the defendants. For the time being the defendants had no right of occupation or passage upon the place at which the accident occurred. The act of suddenly and improperly projecting their cars upon the line over which the Pere Marquette Company's train was lawfully proceeding was due to the gross negligence of the defendants' servants and agents, and this was found to be the cause of the accident. Under these circumstances, I am unable to see how it is any answer to the plaintiff's claim to say that, because it may be that, if the Pere Marquette Company or their employees had known of his presence, they would have objected and perhaps taken steps to remove him, the defendants are not responsible for the injury they inflicted upon him.

It does not appear that as between the defendants and the Pere Marquette Co. there was an obligation upon the latter not to permit any but their own employees to be upon their train. They might, as the evidence shews their trainmen were in the habit of doing, allow others besides their own employees to be upon the same train under similar circumstances. There was nothing to absolve the defendants from the duty of exercising due care to avoid collision with the Pere Marquette train.

Injury to any person then upon the train arising from a failure to observe the duty—gross negligence in fact—should, I think, be considered as within the consequences fairly resulting from the defendants' default.

I think the appeal should be dismissed with costs.

GARROW, J.A., came to the same conclusion, for reasons stated in writing.

MACLAREN, J.A., and SUTHERLAND, J., also concurred.

MEREDITH, J.A., dissented, for reasons stated in writing. He was of opinion that the plaintiff was a mere trespasser, and that the defendants owed him no duty; that the appeal should be allowed and the action dismissed.

OCTOBER 13TH, 1910.

*FEDERAL LIFE ASSURANCE CO. v. SIDDALL.

Appeal—Right of Appeal to Court of Appeal—Amount in Controversy—Judicature Act, sec. 76 (b)—Mortgage Action—Costs—Motion to Quash Appeal—Practice—Leave to Appeal—Judicature Act, sec. 51.

Motion by the plaintiffs to quash the appeal of the defendant Robert H. Siddall from an order of a Divisional Court, 1 O. W. N. 796.

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

J. G. Farmer, for the plaintiffs.

W. M. Douglas, K.C., for the appellant.

MOSS, C.J.O.:—When a respondent seeks to invoke the power of the Court under sec. 51 of the Judicature Act, the proper practice is to move the Court to quash the appeal at the earliest moment after it has been lodged, as was done in the case of International Wrecking Co. v. Lobb, 12 P. R. 207, and other cases. This with a view to saving costs in the event of the motion succeeding.

Upon the motion coming on to be heard, the Court may, as it did in the case cited, direct the motion to stand for argument along

* This case will be reported in the Ontario Law Reports.

with the appeal. But it is equally proper, and sometimes more convenient and less expensive to the parties, to dispose of it when brought on pursuant to the notice. The same practice is observed by the Supreme Court of Canada under a provision similar in terms to sec. 51. See Cameron's Canada Supreme Court Practice, p. 227. And with regard to the practice in the Privy Council appeals, it is stated in Safford & Wheeler's Privy Council Practice, p. 724, that, "if an appeal is incompetent, the respondent should move on petition and not wait till the hearing."

Before the time for entering the appeal for hearing at the present sittings had elapsed, i.e., on the 10th August, the respondents served notice of motion to quash, returnable on the first day of the sittings.

The respondents' point is that the matter in controversy in the appeal does not amount to the sum or value of $1,000, exclusive of costs, within the meaning of sec. 76 (b) of the Judicature Act, as enacted by 4 Edw. VII. ch. 11, sec. 2.

It cannot be questioned that the word "costs," as employed in sec. 76 (b), means the costs incurred in the litigation.

A distinction is drawn between the amount awarded by the judgment and the costs of obtaining the judgment. In ascertaining whether a judgment is appealable under this provision, the costs must be excluded. According to the Judicial Committee, the same result follows, even where the words "exclusive of costs," or equivalent words, are not used. See Bank of New South Wales v. Owston, 4 App. Cas. 270, at p. 274. See also cases referred to by the Chief Justice of the Supreme Court of Canada in Labrosse v. Langlois, 41 S. C. R. 43, at p. 51.

Reference to the papers before the Divisional Court when pronouncing the order from which it is now sought to appeal shews clearly that the amount in controversy in the proposed appeal is less than the sum or value of $1,000, if the costs are excluded. Including the sum of $390.74 taxed costs, the amount adjudged against the defendant was $1,102.07, and adding subsequent interest, the amount payable by the defendant on the day fixed for payment, came to $1,191.32. Deducting the costs, there remains the sum of $800.58. The costs were incurred in establishing the claim before the Master under a special order of reference as to it, made after the Master had made his first report. And with regard to them the Divisional Court say there is no reason for interfering with their disposition below; the mortgagees acted in good faith, and, though they failed as to some items, were entitled to the general costs. See 1 O. W. N. at p. 799.

They form no part of the costs allowed to the plaintiffs in taking the accounts under the original judgment. None of the matters dealt with by the first report are now in question.

The defendant is, therefore, not entitled to appeal as of course to this Court.

In the alternative, it is asked on his behalf that leave to appeal be now given. But no special circumstances entitling the defendant to such relief have been shewn. The defendant has already had the benefit of the opinion of three tribunals.

The motion should be allowed and the appeal quashed with costs.

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

MEREDITH, J.A., was of opinion that no order should be made on the application to quash, for the reason that the defendant failed to set his appeal down for hearing as the Rules required, and it was therefore so far as his own power over it was concerned, out of Court. But he agreed that the proposed appeal did not lie.

OCTOBER 13TH, 1910.

REX v. JOHNSTON.

Criminal Law — Perjury — Authority of Acting Crown Timber Agent to Administer Oath—Crown Timber Act, secs. 11, 15—Interpretation Act, sec. 7 (20)—Public Lands Act, sec. 44.

Case stated by the Judge of the District Court of Rainy River, the principal question being stated at the instance of the Crown, after the acquittal of the defendant upon a charge of perjury.

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

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

No one appeared for the defendant.

MOSS, C.J.O.:—Upon the hearing of this stated case the defendant was not represented, although notice had been duly served upon him of the time and place fixed for argument.

The learned Judge granted the case at the instance of the Crown in order to obtain the opinion of the Court upon the following question:—

Has an acting Crown Timber Agent, not being a Commissioner or Notary Public, or Justice of the Peace, authority to administer an oath to a clerk of a lumber company who signs a return, as is required by R. S. O. 1897 ch. 32?

Two other questions relating to the manner and form of administering an oath were stated at the instance of counsel for the defendant.

As to the first question, sec. 15 of the Crown Timber Act, R. S. O. 1897 ch. 32, enacts as follows: "Every person obtaining a license shall at the expiration thereof make to the officer or agent granting the same, or to the Commissioner of Crown Lands, a return of the number and kind of trees cut . . . and the statement shall be sworn to by the holder of the license or his agent or by his foreman, before a Justice of the Peace. . . ."

The defendant, who was acting as clerk for the Fort Frances Lumber Co., the holders of a license to cut timber, and required to make the return or statement referred to in sec. 15, was admittedly an agent of the company qualified to swear to the truth of the statement; but, as the learned Judge found, the person who assumed to administer the oath was not a Commissioner appointed for taking affidavits or a Notary Public or a Justice of the Peace. He was the acting Crown Timber Agent at Fort Frances. No provision of the Crown Timber Act professes to authorise a person acting in the capacity of a Crown Timber agent, much less an acting agent, to administer oaths. The language of sec. 15. taken by itself, confines the authority to take the oath in question to one specified class, viz., Justices of the Peace. The class is possibly enlarged by reference to 7 Edw. VII. ch. 2, sec. 7, sub-sec. 20, formerly sub-sec. 19 of sec. 8 of the Interpretation Act, R. S. O. 1897 ch. 1. But the individual who professed to administer the oath in this matter was not one named in the Act authorising the oath to be taken, nor did he occupy any of the positions specified in the sub-section. The argument for the Crown receives no assistance from thi enactment.

It was, however, argued on behalf of the Crown that, as an agent of the Commissioner of Crown Lands, he was authorised by sec. 44 of the Public Lands Act, R. S. O. 1897 ch. 28, to administer the oath in question. The nature or form of his appointment does not appear, and there is nothing, except whatever may be inferred from the title of acting Crown Timber Agent, to shew what was his authority or by whom it was conferred. But it

seems plain that the provisions of sec. 44 relate to transactions under the Public Lands Act, and are not intended to apply to matters specially dealt with by the Crown Timber Act. The management of public lands and the dealing with Crown timber are governed by different statutes and are kept quite distinct and apart from one another. And, although it is true that each is in great measure dealt with through the department of Lands, Forests, and Mines, yet, as regards the transaction of business connected with or relating to lands and timber, they are conducted under different regulations.

It seems apparent from sec. 11 of the Crown Timber Act that it was not the intention of the legislature that sec. 44 of the Public Lands Act should apply as of course to the Crown Timber Act.

The first question should be answered in the negative.

As to the other questions, no facts bearing upon them are stated; and any answer to them would be of no practical importance. The matter is substantially covered by the Act 9 Edw. VII. ch. 43, secs. 14 and 15, which was not in force at the date of the taking of the statement in question here, but will govern for the future. Reference may also be made to the Act 2 Edw. VII. ch. 12, sec. 29.

MEREDITH, J.A., for reasons stated in writing, agreed that the accused was rightly acquitted, but preferred to base his opinion upon the want of any evidence shewing that an "acting Crown Timber Agent" had any authority to administer any oath.

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

OCTOBER 13TH, 1910.

CLAIRMONT v. OTTAWA ELECTRIC R. W. CO.

Street Railways — Injury to and Consequent Death of Person Thrown on Track by Vehicle — Negligence of Motorman — Failure to Let down Fender or Apply Brakes — Evidence — Findings of Jury—Damages — Fatal Accidents Act—Interest of Parents—Reasonable Expectation of Pecuniary Benefit — Quantum of Damages.

Appeal by the defendants from the judgment at the trial before BRITTON, J., and a jury, in favour of the plaintiffs for $1,500. The action was brought under the provisions of R. S. O. 1897 ch.

166, to recover damages resulting from the death of the son of the plaintiffs, one Thomas Edward Clairmont, who was run over by a car of the defendants and so injured that he died on the 4th July, 1908.

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

D. L. McCarthy, K.C., for the defendants.

R. J. Sims, for the plaintiffs.

GARROW, J.A.:—Two questions are presented on the appeal—one as to there being any reasonable evidence of negligence on the part of the defendants, the other as to the amount of damages.

The facts appear to be that the deceased, while crossing St. Patrick street, in the city of Ottawa, near midnight of the 3rd July, 1908, while somewhat intoxicated, was struck by a passing cab and knocked down, falling upon the defendants' track, where a few minutes later he was run over by a car. The jury found the defendants guilty of negligence in not tripping the fender and applying the brakes. That the motorman failed to use these appliances is not disputed, the excuse for the failure being that the motorman did not see the deceased until too late to use them with effect. This would probably be so in the case of the brake, if the evidence of the motorman as to the point at which he first saw the deceased, which was only when about ten feet away, is accepted, but not necessarily so in the case of the fender. I, however, agree with the contention of Mr. Sims that, although there is no express finding on the subject, it is now reasonably to be assumed that the jury considered, in answering as they did, that the motorman either saw or should have seen the object on the track at a greater distance than ten feet, sufficiently great indeed to use these appliances with useful effect. It was night, it is true, but, as the evidence abundantly shews, there were lights quite sufficient to have enabled the motorman to see, if he had been looking, which he admits he was not. And, when he did look, he was, as he says, so "rattled" that he did not even then drop the fender, which he could have done in a moment with a touch of his foot.

Upon the whole, I am of opinion that there was reasonable evidence of negligence on the part of the motorman, proper for the jury.

As to the other question, I do not feel disposed to interfere. It is always in such cases a most difficult thing to say with any

exactness what the actual pecuniary loss of the surviving relative is.

All that a Court can be expected to do is to deny an unfounded or check an extravagant claim. Unfounded the present claim is not, nor can I even say that the amount awarded is extravagant, although I may suspect that, if no accident had happened to the unfortunate deceased, his parents would probably never have received from him so large a total as $1,500. He was a young man, clever and industrious, as the evidence shews, and not quite twenty-one years old. His father is a working man, poor and old. The deceased was an only son. He used to work at carpenter work, and in the winter sometimes went to the lumber shanties. His wages when working at carpenter work would be from $1.75 to $2 per day. What he earned in the winter at the lumber camps is not, I think, stated. And whatever he earned he seems to have shared with his father and step-mother, the plaintiffs, and to have said, according to his step-mother's evidence, that he intended to take care of them. All this does not, of course, furnish material for anything like an exact calculation, but it has in it the necessary elements to justify the allowance by a jury of a substantial amount, and I find myself quite unable to say that $1,500 is clearly too much, or, in other words, unwarranted by the evidence.

The appeal should, I think, be dismissed with costs.

Moss, C.J.O., Maclaren and Magee, JJ.A., concurred.

Meredith, J.A., for reasons stated in writing, agreed that the finding of negligence could not be disturbed, but was of opinion that the amount of damages awarded was excessive, and that there should be a new assessment of damages.

HIGH COURT OF JUSTICE.

FALCONBRIDGE, C.J.K.B. OCTOBER 14TH, 1910.

RE CLAPPER.

Will — Construction—Gift to Charitable Institution — Misnomer —Application of Cy-près Doctrine—Residuary Gift—"Persons hereinbefore Named"—Individuals Actually Named as Legatees only Included.

Motion by Sanford Amey and David Hicks, executors of the will of George Jerry Clapper, deceased, under Con. Rule 938, for an order determining certain questions arising in the administration of the estate of the deceased as to the meaning and true construction of the will.

The will was dated the 4th December, 1909, and the testator died on the 18th June, 1910.

By the first paragraph of the will the testator gave to the "trustees of the White Church on the Morven circuit" $500, for the purpose of putting a basement under the church. By the next ten paragraphs he gave pecuniary legacies to different nieces, all of whom he named and described.

Paragraph 12 was as follows: "I direct my executors . . . to place the sum of $500 in the bank, the interest of which shall be paid yearly to the Methodist minister on the Morven circuit, to be applied on said minister's salary.

Paragraph 13: "I also direct my said executors . . to pay to the trustees of the cemetery at the White Church on the said Morven circuit the sum of $500, to be used by said trustees in the improvement of said cemetery. . . ."

Paragraph 14: "I also give to the Methodist Children's Orphans' Home at the city of Kingston . . . the sum of $500."

Paragraph 15: "Subject to the payment of my just debts, funeral and testamentary expenses, and the charges of proving and registering this my will, I give devise and bequeath all the rest and residue of my estate not hereinbefore disposed of to the *persons* hereinbefore named, to be divided equally among them, share and share alike."

It appeared that there was no such institution as the "Methodist Children's Orphans' Home" at the city of Kingston.

The questions submitted were as follows:—

1. To whom should the executors pay the legacy of $500 bequeathed to the "Methodist Children's Orphans' Home at the city of Kingston?"

2. Is the word "persons," as the same appears in paragraph 15, intended to include "the Methodist minister on the Morven circuit," "the trustees of the cemetery," and the "Methodist Children's Orphans' Home at the city of Kingston?"

3. Among whom should "the rest and residue" of the estate be divided?

W. S. Herrington, K.C., for the executors.

H. M. Deroche, K.C., for the infants.

M. R. Allison, for adult legatees.

W. F. Nickle, K.C., for the Kingston Orphans' Home and Widows' Friend Society.

U. M. Wilson, for the Rev. George McConnell.

FALCONBRIDGE, C.J.:—The answer which I give to the first question affords a good example of the application of the *cy-près* doctrine.

A clear charitable intention is expressed in the will. The mode as specified cannot be executed, but the intention will not be permitted to fail, because another mode can be substituted as near as possible to the mode specified by the testator.

The English cases are collected in Lord Halsbury's Laws of England, vol. 4, p. 190 et seq.

Some of the Canadian cases are: Edwards v. Smith, 25 Gr. 159; Gillies v. McConochie, 3 O. R. 203; Tyrrell v. Senior, 20 A. R. 156; Re Graham, 4 O. W. R. 90.

The answer to the first question is that the executors should pay the legacy of $500 bequeathed to "the Methodist Orphans' Home in the city of Kingston" to the Kingston Orphans' Home and Widows' Friend Society.

2nd. The word "persons," as the same appears in the residuary clause of the will, is not, in my opinion, intended to include "the Methodist minister on the Morven circuit," who is merely designated, nor the "trustees of the cemetery," nor "the Kingston Orphans' Home," the last mentioned charity particularly being a substituted one, which is not even named.

See Re Miles, 14 O. L. R. 241; Pharmaceutical Society v. London and P. S. Association, 5 App. Cas. 837. Corporation of Newcaster v. Attorney-General, 12 Cl. & F. 402; Willmott v. London R. C. Co., [1910] 1 Ch. 754.

3rd. The "rest and residue" should be divided among the beneficiaries other than those excepted by answer second.

The costs of all necessary parties (including the Official Guardian) are to be paid by the executors out of the estate, after taxation—those of the executors as between solicitor and client.

RIDDELL, J. OCTOBER 14TH, 1910.

*ROONEY v. PETRY.

Limitation of Actions — R. S. O. 1897 ch. 133, secs. 4, 5, 8 — Adverse Possession — Dispossession — Discontinuance of Possession — Exclusion of True Owner — Maintenance of Roof above Strip of Land Claimed—Acquisition of Title by Possession, Subject to Easements—Entries by True Owner Attributable to Easement of Access.

Action for damages for trespass to land and for an injunction. Counterclaim for a declaration of the defendant's title to the strip of land in dispute.

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

G. W. Mason, for the defendant.

RIDDELL, J.:—The plaintiff is, and since November, 1876, has continuously been, the owner of a parcel of land on the west side of North street, Toronto. The defendant is the owner of a parcel of land to the north thereof. Along the north line of the plaintiff's lot, runs a fence from the rear east towards North street, to about 40 ft. west of the street. There begins a house on the plaintiff's lot whose north face runs parallel to the dividing line between the properties, one foot south thereof, but the projecting roof at the north extends out to and over the dividing line. This house was built before 1876, and has been maintained in this position continuously since. It comes to within about 10 feet of the west line of North street; and a short fence in a line with the north face of the house runs east to the street. It is plain that the builder of the house (it is said the owner at that time of the plaintiff's land) did not desire to trespass upon his neighbour's rights, but built the house as near to the northern limit of his own land as possible consistently with the whole of his roof being within his limits. Before the house was built, the fence now at the rear and on the true line ran to the street line on the true line. . . . . No rights by way of prescription, etc., were acquired before the building of the house; nor were there even acts of trespass upon the property now the plaintiff's.

The defendant in 1909 built a concrete walk from the street along this strip to the north of the plaintiff's house, and claimed and continues to claim this foot strip as his own, i.e., from the

* This case will be reported in the Ontario Law Reports.

street to the west side of the plaintiff's house. That is the issue to be tried in this action. . . .

Ever since 1876 the plaintiff has had the north face of her house and the front fence attended to by painters, etc., and she has herself gone upon the strip in question as owner and considering it her own. She asked no permission so to do from the defendant or his predecessor in title, but acted as of right, not imagining that any one was claiming the strip adversely to her. She at the same time, also without leave, walked upon the adjoining land of the defendant.

Admittedly the plaintiff has, and always since 1876 has had, the paper title; and the only claim of the defendant must be under the statute. The defendant claims and attempts to prove that he and his predecessors had kept the strip in question as part of their lawn for many years, sometimes planting flowers close up to the north wall of the house. It is not disputed that the defendant would have a title to the strip by the statute, unless the acts of the plaintiff in leaving and maintaining the roof, or her entries, prevent such title accruing.

The statute relied upon is R. S. O. 1897 ch. 133, secs. 4, 8. With these must be read sec. 5, which shews that the ten years limited by sec. 4 begins when the plaintiff or her predecessor in title "has been dispossessed, or has discontinued" the possession admittedly, and, as I have found, proved to have been, once hers or theirs. . .

[Definitions of "adverse possession," "dispossession," "discontinuance of possession," etc., and reference to Banning on Limitation of Actions, 3rd ed. (1906), p. 84; Smith v. Lloyd, 9 Ex. 562; Seddon v. Smith, 36 L. T. N. S. 168; Rains v. Buxton, 14 Ch. D. 537, 539, 540; Leigh v. Jack, 5 Ex. D. 264; Marshall v. Taylor, [1895] 1 Ch. 641, 645.]

The possession to be relied upon by the claimant under the statute must be such as involves the exclusion of the true owner. . . . The plaintiff contends that the maintaining of the roof was such a circumstance as to prevent this exclusive possession; and refers to the maxim "cujus est solum ejus est usque ad cœlum" (Co. Litt. 4 (a))—the argument being that, if the defendant could be acquiring the fee in the soil, he would at the same time be acquiring the right to have the roof of the house removed; and at the end of ten years that right would become absolute. The defendant replies that this result does not follow—that all he acquired was subject to the right of the plaintiff to retain the roof. . . .

It seems clear that the title to land may be acquired by the claimant having exclusive possession of the surface, notwith-

standing that the true owner has possession of some space between the surface and the centre of the earth. . . .

[Reference to Midland R. W. Co. v. Wright, [1901] 1 Ch. 738; Canadian Pacific R. W. Co. v. Guthrie, 27 A. R. 64, 31 S. C. R. 155; Valliear v. Grand Trunk R. W. Co., 9 O. L. R. 363; Marshall v. Taylor, [1895] 1 Ch. 641; Norton v. London and North Western R. W. Co., 13 Ch. D. 268.]

I think these (the English cases) compel me to hold that the occupant of the surface of the soil may obtain a title to that surface while the true owner retains an easement therein, and that, subject to such easement, the statutory title is usque ad cœlum. . . .

That the right of a person to have his eaves or roof project over another's land is an easement, is, of course, elementary, and the power of acquiring such an easement by the statute has been admitted since Thomas v. Thomas, 2 C. M. & R. 34; Harvey v. Walters, L. R. 8 C. P. 162; Lemmon v. Webb, 3 Ch. D. 1, 18; . . . Corbett v. Hill, L. R. 9 Eq. 671.

I am, therefore, of the opinion that, unless the acts of the plaintiff have prevented the possession of the defendant from being exclusive . . . the defendant has made out his title, subject to the easement of the plaintiff to retain her roof . . . and another easement which will be mentioned later. . . .

[Reference to Leigh v. Jack, 5 Ex. D. 264; Norton v. London and North Western R. W. Co., 13 Ch. D. 268; Marshall v. Taylor, [1895] 1 Ch. 641, 645, 646, 648; Finlinson v. Porter, L. R. 10 Q. B. 188; Goodheart v. Hyett, 32 W. R. 165; Newcomen v. Coulson, 5 Ch. D. 133.]

All the acts done in the present case by the plaintiff in person or by agents in entering upon the land, etc., could be attributed to the easement of access, support, etc., necessary or proper in painting, etc., the north side of the house and fence, etc. So, too, that the right of projecting the roof over the land of another could be reserved is shewn by the case of Corbett v. Hill, L. R. 9 Eq. 671.

Unless I am to disregard the Marshall case, I think I must hold that the defendant's possession has not been interfered with by the plaintiff, and that, subject to the right of retaining the roof . . . and entry to paint, etc., the house and fence, the defendant has title to the strip of land. . . .

[Reference to Solling v. Broughton, [1893] A. C. 556; Randall v. Stevens, 2 E. & B. 641, 23 L. J. Q. B. 68.]

There will be a declaration that the defendant has acquired the fee in the strip of land in question, subject to easements of (1) the maintenance of the roof and (2) the right of entry and support, etc., for painting, etc., the north side of the house and front fence.

It is not a case for costs.

MORSON, JUN. Co.C.J. OCTOBER 17TH, 1910.

REX v. NASMITH CO. LIMITED.

Weights and Measures—Bread Sales Act, 1910—Weight of Loaf "Small Bread"—Portions Joined together—Conviction.

Appeal by the defendants from a conviction by R. E. Kingsford, one of the Police Magistrates for the City of Toronto, for selling ten loaves of bread not in loaves weighing twenty-four ounces or forty-eight ounces avoirdupois each, and in a weight exceeding twelve ounces, contrary to the Bread Sales Act, 10 Edw. VII. ch. 95 sec. 3 (O.), which is as follows: "Except as provided in sub-section 2, no person shall make bread for sale or sell or offer for sale bread except in loaves weighing twenty-four or forty-eight ounces avoirdupois. (2) Small bread may be made for sale, offered for sale and sold in any weight not exceeding twelve ounces avoirdupois."

The appeal was heard in the First Division Court in the County of York.

A. J. Russell Snow, K.C., for the appellants.

T. L. Monahan, for the prosecutor.

MORSON, JUN. Co.C.J.:—The material facts are not in dispute. The evidence shews clearly that the bread sold by the appellants was small bread as made by them, the mode of baking being by putting the dough in pans in detached portions, but which became joined in the process of baking, in such a manner as to be easily detached if sold separately.

The prosecution admitted there would have been on offence if the loaves had been sold detached. The only question, then, for determination is whether, under the Act as it now stands, "small bread," as made by the appellants, is not small bread if sold joined together. The Act has not defined what "small bread" is; it is, therefore, left entirely to each baker to make whatever

kind of small bread he likes, so long as it does not exceed twelve ounces in weight.

The appellants were, therefore, enabled to say, as they did without contradiction, that the bread in question was small bread, and it was not disputed that each separate portion if separated would weigh under the twelve ounces. These were substantially the facts before the Police Magistrate. He appears to have come to the conclusion that small bread must be sold in separate portions, otherwise it is not small bread, because, if allowed to be sold joined together, it would, to quote his own language, "give the opportunity to a dishonest baker of selling a customer as a loaf less than twenty-four ounces, which is exactly what the Act desires to prevent."

I am unable to agree with him; I fail to see what difference it makes whether the bread is joined together or not, any more than it would if it were buns or tea biscuits, so long as the Act does not require it, and the joining is not for the purpose of deceiving the public. The Magistrate does not say he thinks the joining was for that purpose; had he done so, it would not have been justified by the evidence, unless, of course, he absolutely disbelieved the appellants, which, on the uncontradicted evidence, he would not be justified in doing. I think, in his very commendable desire to give effect to what he considered the intention of the Act, he went further than the Act permitted. If the bread was small bread, as undoubtedly it was on the evidence, he should not hold it was not, because it was not separated when sold, when the Act does not require it. If the intention of the Act was that all small bread should only be sold in separate portions for the public protection, it has not so stated. But do the public need protection? It seems to me they can easily protect themselves by asking for the particular kind of bread they want; if they ask for a loaf only, the obvious intention of the Act was, that they should get the standard large or small loaf; and, if the baker sold them his small bread joined together as the standard loaf, it would be a fraud at common law, but not under the Bread Act as at present framed, because the bread so sold was, as in this case, small bread of the required weight when separated, the false representation that it was a standard loaf not changing its character. If any remedy is required, a simple one would be to enact that all bread must be sold by weight.

For the reasons, then, that I have stated, I have come to the conclusion that the Magistrate was wrong; and his conviction must be quashed without costs.

LATCHFORD, J., IN CHAMBERS. OCTOBER 17TH, 1910.

YOUNG v. TOWN OF GRAVENHURST.

Discovery — Examination of Officer or Servant of Defendant Municipal Corporation—Con. Rule 439a—Superintendent of Power and Light Works — Employment by Commissioners — Servant of Municipality—Municipal Light and Heat Act — Municipal Waterworks Act—Status of Commissioners.

Motion by plaintiff to commit J. T. Riddick for refusing to attend for examination as a servant or officer of the defendants, the Corporation of the Town of Gravenhurst, in an action for damages sustained by the plaintiff through the negligence of the defendants in permitting an electric wire, carrying a high voltage current, to hang where it did injury to the plaintiff; and, in the alternative, for an order directing Riddick to attend for examination as such officer or servant.

F. R. MacKelcan, for the plaintiff.

N. F. Davidson, K.C., for the defendants and Riddick.

LATCHFORD, J.:—It is alleged on behalf of the plaintiff that Riddick is the superintendent of the power and light department of the defendants, and the plaintiff produces a letter in which Riddick so styles himself.

The defendants say that Riddick is not their servant or officer, and does not fall within the scope of Con. Rule 439a, permitting the examination orally before trial, by any party adverse in interest, of an officer or servant of a corporation, touching the matters in question in the suit. They say that Riddick is an employee of the waterworks and electric light commission of the town, constituted by a by-law passed under the provisions of the Municipal Light and Heat Act, R. S. O. 1897 ch. 234, and the Municipal Waterworks Act, R. S. O. 1897 ch. 235; and refuse to allow Riddick to attend for examination unless the Court so orders.

A by-law of the defendants, passed on the 6th December, 1904, provides that for the year 1905 and each subsequent year two commissioners shall be elected, who, with the mayor for the time being, shall constitute a board of commissioners, exercising and enjoying all the power, rights, authorities, and immunities conferred upon the corporation by the Acts mentioned. Riddick is admittedly a servant of the board of commissioners so constituted.

Chapter 234, sec. 3, sub-sec. 1, empowers a municipality to manufacture and supply . . . electric . . . light . . . and for such purposes to construct . . hold, maintain, manage, and conduct any works which they may deem requisite. By sec. 7, the corporation shall construct and locate their gas and other works and all apparatus . . . therewith connected . . . so as not to endanger the public health or safety.

By ch. 235, sec. 40, sub-sec. 1, the council may, "before the commencement of the (water) works, or at any time while they are in course of construction, or after their completion, by by-law, assented to by the electors of the municipality, provide for the election of commissioners for such purpose."

By sub-sec. 2, upon the election of commissioners, all the powers, rights, authorities, or immunities which, under the Act, might have been exercised or enjoyed by the council and the officers of the corporation acting for the corporation, shall and may be exercised by the commissioners and the officers appointed by the commissioners, and the council thenceforth during the continuance of the board of commissioners shall have no authority in respect of such works.

By sec. 44, the council, in case the construction of works is intrusted to commissioners, may, by by-law approved by the electors, remove the commissioners and proceed with the works, &c.

The commissioners are not constituted a corporation by either ch. 234 or ch. 235. In this they differ from water commissioners incorporated by statute, as were the Ottawa Waterworks Commissioners and the Toronto Waterworks Commissioners.

The defendants' commissioners constitute, in my opinion, merely a department of their municipal work. The commissioners are in certain respects independent of the council; but it is upon the corporation that, by sec. 7 of ch. 234, is thrown the responsibility of keeping safe the appliances used in lighting the town. The liability, if any, here arose from neglect to safeguard the plaintiff.

Riddick was in charge of the defendants' electric appliances, though employed only by the commissioners and directly responsible only to them. He was, I think, a servant of the defendants, and as such liable to examination under Con. Rule 439a.

LATCHFORD, J. OCTOBER 17TH, 1910.

WATSON v. PHILLIPS.

Will—Construction—Devise to One for Life and to Issue after Decease—Life Estate with Remainder in Fee.

Motion by the plaintiff, Marilla Watson, for judgment upon the pleadings, and in default of appearance and pleading by certain defendants, in an action for a declaration that the plaintiff was the owner of an estate tail in the east half of lot 15, concession 12, in the township of Oro.

The plaintiff's grandfather by his last will and testament devised the land to her "during the term of her natural life, and to her issue after her decease."

By a subsequent clause of the will the testator provided that, in the event of his said granddaughter "dying without issue and without making a will," the land should be divided in equal shares among certain persons, who were parties defendant in this action. The other defendants were two infant children of the plaintiff, the executors of the deceased, and the Official Guardian, representing the unborn issue of the plaintiff.

The defendants other than the executors appeared to the writ, and were served with the statement of claim, asking for the declaration now moved for; but the only defence filed was that of the Official Guardian, who submitted his wards' rights to the Court.

J. T. Mulcahy, for the plaintiff.

J. R. Meredith, for the Official Guardian, representing the infant defendants.

LATCHFORD, J.:—The devise is not to the plaintiff and her issue, but to the plaintiff for life, and to her issue after her decease, with a gift over if the plaintiff dies without issue and without making a will. Her will need not appoint as to the lands. The mere fact of her making a will would prevent the gift over from operating. It has not been shewn that the plaintiff has made a will, nor would a will, if made, be material to the question to be determined. It is in evidence that Mrs. Watson has issue, though this again is a circumstance which may have no relevance here. The question as argued before me is whether the devise to the plaintiff for life, remainder to her issue after her death, with gift over, should she die without issue and without making a will, constitutes her tenant in tail or merely tenant for life of the lands devised.

Assuming, as most favourable to the plaintiff, that "without issue" means "without having had issue," and that the gift over cannot become operative, then does the devise to her for life, and after her death to her issue, constitute in her an estate tail or merely an estate for life?

If the plaintiff died without issue, or, what is here, I think, equivalent, without having had issue, and made a will disposing of the land, her devisee would undoubtedly take an estate in fee or such other estate as she chose to devise. But she has issue, and to that issue there is devised by the will an estate in remainder in fee. Can it be said that this enlarges upon her life estate? Venturing upon what Kekewich, J., in In re Birks, [1899] 1 Ch. 703, at p. 707, calls the somewhat hazardous task of construing this gift apart from authority, I am strongly inclined to the conclusion that the question must be answered in the negative. Nor does authority conflict with this view. . . .

[Reference to Trust and Loan Co. v. Fraser, 18 Gr. 19; Archer v. Urquhart, 22 O. R. 214; Reece v. Steel, 2 Sim. 233, 29 Rev. Rep. 88; Jesson v. Wright, 2 Bligh 1, 21 Rev. Rep. 1; Van Grutten v. Foxwell, [1897] A. C. 658, 672 et seq.; In re Dixon, [1903] 2 Ch. 458; Evans v. King, 21 A. R. 519, 525.]

In this case, the testator, I think, intended that the plaintiff should have only a life estate, with remainder to her children, if any, in fee. The words used do not, in my opinion, create in her an estate tail; and her application for judgment must be dismissed, with costs to the Official Guardian.

DIVISIONAL COURT. OCTOBER 17TH, 1910.

PITTSBURG-WESTMORELAND COAL CO. v. JAMIESON.

Guaranty—Construction—Limitation by Recital of Condition to one Year—Subsequent General Words.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., 1 O. W. N. 1102, dismissing an action upon a guaranty.

The appeal was heard by BOYD, C., RIDDELL and MIDDLETON, JJ.

M. H. Ludwig, for the plaintiffs.

A. G. MacKay, K.C., for the defendants.

BOYD, C.:—The rule is clearly stated in the note to Lord Arlington v. Merricke, 2 Wms. Saund. 411a, 415 (813): "When the time for which the sureties are to be liable is marked in the recital of the condition, it is not to be extended by any subsequent general words." The head-note in Sansom v. Bell, 2 Camp. 39, is misleading. Lord Ellenborough recognises this general rule, and distinguishes the case then in hand, upon the ground that the condition applied not only to the matters referred to in the recital, but also to "any other account thereafter to subsist between the parties." without any restriction.

The appeal should be dismissed with costs.

RIDDELL, J., concurred. He referred to Danby v. Coutts, 29 Ch. D. 500, as shewing that general words are not within the description of "clear words" which cannot be controlled by the recital.

MIDDLETON, J., also concurred.

DIVISIONAL COURT. OCTOBER 17TH, 1910.

POINT ABINO LAND CO. v. MICHENER.

Water and Watercourses—Building on Crib in Waters of Lake—Right of Owner of Share—Accretion—Right of Crown.

An appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., dismissing the action.

The plaintiffs were the owners of land on the shore of Lake Erie. The defendant erected a boat-house in the water some little distance from the shore, upon a solid crib filled in with stones and cement. After the lapse of some years this boat- house became surrounded on three sides by accretion to the shore. This action was brought to recover possession of the boat-house.

The appeal was heard by BOYD, C., RIDDELL and MIDDLETON, JJ.

A. C. Macdonell, K.C., and J. F. Gross, for the plaintiffs.

G. H. Pettit, for the defendant.

THE COURT held that, even assuming that the accretion belonged to the plaintiffs, this would not confer upon the plaintiffs

any title to the boat-house, which was built, not upon the accretion, but on land under the water, the title to which was in the Crown.

Appeal dismissed with costs, and judgment dismissing the action affirmed, but without prejudice to any other right of action the plaintiffs might have against the defendant.

DIVISIONAL COURT. OCTOBER 18TH, 1910.

*DAVIS v. WINN.

Costs—Summary Disposition—Master in Chambers—Jurisdiction—Consent of Parties — Appeal—Con. Rule 616 — Stay of Action—Satisfaction of Claim—Incidence of Costs—"Order Made by Consent"—"Judge of the High Court"—Judicature Act, sec. 72—Con. Rule 767—"Order as to Costs only."

Appeal by the plaintiff from the order of MIDDLETON, J., ante 47, allowing an appeal from an order of the Master in Chambers, and, it being admitted that there was no question for adjudication between the parties except that of costs, directing that the action be forever stayed, and making no order concerning the costs of the action or appeal.

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

John MacGregor, for the plaintiff.

W. E. Raney, K.C., for the defendant.

The judgment of the Court was delivered by RIDDELL, J.:—

. . . The plaintiff first contends that no appeal lay from the order of the Master in Chambers, relying upon sec. 72 of the Ontario Judicature Act. A Divisional Court in Re Solicitor, 18 C. L. T. Occ. N. 224, 261, decided that a Local Judge was within the words "High Court or any Judge thereof;" and we are bound by that decision. Had it not been for that decision, I should have thought that the statutory words should have been given their strict meaning, and that consequently a Local Judge was not a judicial officer whose decisions were intended to be governed by this section. Con. Rule 6 (a) does not assist, as that Rule is applicable in interpreting the Rules, and even in the Rules "a Judge

*This case will be reported in the Ontario Law Reports.

of the High Court" does not include a Local Judge or the Master in Chambers. I see no reason why the Master in Chambers should not be within the wording of sec. 72 if a Local Judge is; and we should follow the decision if it applies to the present case.

The order of the Master in Chambers is not "an order made by the consent of parties." Section 72 does not apply to an order made in invitum where jurisdiction is given by consent, even if the letter of the defendant's solicitors of the 26th August could be read as giving such consent; and, with much respect, I do not think it can. That letter, in my view, clearly referred to an application to dispose of the costs only, under the practice I have already spoken of, and not an application for any other relief. Payne v. Caughell, 24 A. R. 556, may be looked at on what is a consent order, although indeed there the consent given to found jurisdiction in the Divisional Court expressly reserved the right of appeal. It is unnecessary to consider whether such a Rule as 767 (2) would be effective as against sec. 72 of the statute, as no conflict can be found between them.

Nor is the order one "as to costs only," so as to read, "It is ordered that the motion herein made by the plaintiff is allowed, that is to say, the defendant is hereby ordered to pay . . . the costs . . ." The order has the same effect (assuming jurisdiction in the Master) as an indorsement by a trial Judge on the record, "I direct judgment to be entered for the plaintiff for the relief claimed in the statement of claim, and order the defendant to pay the costs." Turning to the notice of motion, we find . . it was "for the claim set out in the plaintiff's statement of claim, and for delivery of the papers therein mentioned," etc. The effect of the order would be to compel the defendant to convey to the plaintiff property of which he had already a conveyance from her testatrix, which would be obviously improper.

The application seems to have been made under Con. Rule 616; and, in my view, it is immaterial whether the Master in Chambers had or had not jurisdiction. He made an order not "as to costs only;" and such an order is appealable under Con. Rule 767 (1), unless some other Rule or some statute take away this right. No such Rule or statute exists; and I am of opinion that the appeal was properly heard by my brother Middleton. . .

The order of the Master in Chambers was wrong; and it is plain beyond controversy that the substantial order made by the learned Judge is the right one; and it is not complained of.

As to costs: it is not the practice of an appellate Court to interfere with the costs awarded by the Court appealed from, un-

less the order or judgment is set aside or is varied in some other respect.

Irrespectively, however, of that almost universal rule, I am of opinion that the plaintiff at least cannot complain of the order as to costs. . . . It is perfectly plain that the plaintiff had got all that he bargained for from Victoria Davis, i.e., a deed from her; that the omission to make the affidavit of execution was at his instance; and that any relief he could be entitled to is given by the Registry Act, R. S. O. 1897 ch. 136, secs. 47, 50, unless indeed the defendant forbade Mr. Mills to give up the deed, in which case the cause of action would not be for the execution by the defendant of a new conveyance, but the effective delivery of the old one.

Had the case gone on to trial, I think it should have been dismissed with costs; and I think, therefore, that the plaintiff has no ground of complaint in respect of the disposition of the costs made by the order appealed from.

The appeal should be dismissed with costs.

RIDDELL, J., IN CHAMBERS. OCTOBER 19TH, 1910.

RE BROOM AND GODWIN.

Landlord and Tenant—Overholding Tenants Act—"Legal Procedure in a Court of Law"—Interference with Tenant's Possession — Injunction — Jurisdiction of County Court Judge — Term of Tenancy—Construction of Receipt.

Motion by James Broom for an order prohibiting MORGAN, Junior Judge of the County Court of York, and others, from enforcing an order for possession made under the Overholding Tenants Act.

In May, 1910, the applicant began an action in the High Court of Justice against Godwin and wife for damages for breach of the covenant for quiet enjoyment contained in a lease of apartments made by them to him, and for an injunction, etc. On the 27th June the applicant delivered his statement of claim in that action, and upon the 30th June moved for an interim injunction restraining the defendants from interfering with his possession. The Court, upon "the defendants . . . undertaking not to inter-

fere with the right of the plaintiff in respect to the apartments in question . . . except by legal proceedings in a Court of law, until this action be tried," ordered that "the plaintiff shall not be further interfered with and proceeded against by the defendants . . otherwise than by proper and legal procedure in a Court of law, until this action is duly tried and disposed of."

On the 8th July, 1910, Godwin, as landlord, served on the applicant a notice claiming possession, and on the 14th July a further demand of possession, which stated that the Judge of the County Court of York had appointed the 19th July "for the purposes mentioned in the appointment," under the Overholding Tenants Act. The applicant attended and offered the evidence of himself and wife, and Godwin and his wife gave their evidence before the Junior Judge, who found in favour of Godwin, the landlord, and ordered a writ of possession to issue after two days, and ordered the applicant to pay $15 costs. A copy of the reasons given by the Junior Judge and a statement of defence in the High Court action were served upon the applicant on the 14th October.

Thereupon the applicant made this motion for prohibition until the action in the High Court should be determined, or for such other order as might be deemed right.

The applicant appeared in person.

No one appeared for the Godwins.

RIDDELL, J.:—It cannot be said that the acts of the landlord are in any sense in breach. The proceedings before the County Court Judge are "by legal procedure in a Court of law;" and the service of a demand for possession is not an interference with the tenant's possession: Ball v. Carlin, 11 O. W. R. 814, 816, 817.

It is, however, argued that the matter is beyond the jurisdiction of the Court below.

The tenancy is evidenced by a receipt signed by the landlord's agent: "Received from James Broom the sum of $15, being a first quarter's rent at the rate of $5 per month for the . . . rooms (mentioned) leased by him to me, including free water . . . rental to commence July 1, 1909, with the option of one year's tenancy at said rental, with quiet possession." The tenant swears that he exercised the option for a year's tenancy, but claims the right to a year's tenancy after the expiration of the quarter for which he paid rent. I do not think this is so; the expression "first quarter's rent" seems to indicate that, if the tenant exercised the right to a year's tenancy, the first quarter of the year would be that beginning on the 1st July, 1909. In that I agree with the learned County Court Judge. But it is not necessary that I should

pass upon this in the present proceeding—the matter, as I think, being in the jurisdiction of the Court below.

The law as it was before the amending Acts is found discussed in 33 C. L. J. 185; in that article are set out the cases theretofore. After these cases, however, came Moore v. Gillies, 28 O. R. 358, in which all the previous cases (amongst them Magann v. Bonner, 28 O. R. 37) were reviewed, and a Divisional Court held that a County Court Judge has now the power to decide whether the tenant wrongfully holds. By that decision I am bound, and I follow it.

Nor is the objection better founded that the matter in dispute is involved in the High Court action, begun before the overholding tenant proceedings were begun. There is nothing to prevent any landlord from applying for any remedy given him by statute or common law.

I cannot remove the proceedings, as no writ of possession has issued: R. S. O. 1897 ch. 171, sec. 6.

The motion must be dismissed, without prejudice to an application under sec. 6 at the proper time.

I cannot make an order giving time to the tenant, quia timet, as he calls it, to get another place.

There will be no costs, no one appearing to oppose the application.

RIDDELL, J., IN CHAMBERS. OCTOBER 20TH, 1910.

*RE CLEMENT.

Will—Devise of Land not Owned by Testator — Misdescription—Parol Evidence—Intention — Absence of General Words—Ineffective Devise—Intestacy.

Daniel Clement, deceased, by his will: (1) appointed executors; (2) directed his debts to be paid; (3) directed that his wife, M.C., should have the south-west quarter of lot 3 in the 4th concession of the township of North Dorchester, to have and to hold for and during the term of her natural life; (4) directed that after the death of his wife the said south-west quarter should be equally divided among his children, except his son John, and suggested that John should be given "first chance to buy the said land and

*This case will be reported in the Ontario Law Reports.

then pay the others off. But, in case such an arrangement cannot be effected, then my executors . . . shall sell the same and divide the proceeds equally among my children (John excepted)." (5) He also gave a specific legacy of an organ.

As a fact, the testator did not own the south-west quarter of lot 3 in the 4th, or any part of it. but he did own the south half of the north half of the lot. The executors found it necessary to sell the land to pay debts, and, the purchaser objecting to the title, an order was made under the Vendors and Purchasers Act declaring that the executors had power to sell, but directing the concurrence of the Official Guardian to be obtained. The land was sold, and, after payment of debts, there remained $1,258, which was paid into Court. The widow elected to take as her distributive share one-third of the moneys in Court.

The widow applied for an order declaring the construction of the will and for payment out of Court to her of her share of the moneys.

Casey Wood, for the applicant.

F. W. Harcourt, K.C., for the infants.

RIDDELL, J.:—While it is well decided and beyond question in Ontario that if by a will a testator devises land by a description which exactly fits land which he owned, no evidence can be given that he meant to devise some other or a greater amount of land (Lawrence v. Ketchum, 28 C. P. 406, 4 A. R. 92), the law is not quite so plain in cases in which the testator has no land exactly corresponding to the description, but has land whose description corresponds in part to the description in the devise.

There are two lines of cases in our Courts—and I do not need to go beyond our own Courts in the decision of this matter; in one line of cases it has been held that no extrinsic evidence can be given to explain and modify the devise; in the other, such evidence has been received.

In the former list appear: Summers v. Summers, 5 O. R. 110 . . . ; Hickey v. Stover, 11 O. R. 106 . . . ; Re Bain and Leslie, 25 O. R. 136 . . .

In the latter list are Doe Lowry v. Grant, 7 U. C. R. 125 . . ; Re Shaver, 6 O. R. 312 . . . ; Hickey v. Hickey, 20 O. R. 371 . . . ; Doyle v. Nagle, 24 A. R. 162 . . . ; Re Harkin, 7 O. W. R. 840; McFayden v. McFayden, 27 O. R. 598. . .

The principle underlying the decisions is that the powers of the Court in giving effect to what they may see upon the face of the will was the real intention of the testator, are not unlimited—"the

duty of the Judges is to ascertain the meaning of the words of the will," and "not to speculate upon the meaning of the words used by the testator which lets in the consideration what he intended to have done:" per Lord Westbury, 11 H. L. C. 375, at p. 388.

If, then, the testator has devised land which he did not own, with nothing more in the will to assist, although there is little (or no) doubt that thereby he intended to devise some land he did own, the latter land will not pass, and "there is a clear and well-defined rule of law which stands inexorably in the way of receiving evidence that that lot was intended: per Burton, J.A., in Doyle v. Nagle, 24 A. R. 162, at p. 165. But, if there be any words in the will which would be effective to dispose of the land actually owned by the testator, even if the wrong description were entirely omitted, the land passes, and the wrong description is but falsa demonstratio, which may be removed by evidence as a litent ambiguity. . . .

[Reference to Doe Lowry v. Grant, 7 U. C. R. 125; Doyle v. Nagle, 24 A. R. 162; Re Harkin, 7 O. W. R. 840.]

In the present will it is perfectly manifest that the testator intended to devise land which he owned—the very precise disposition of it proves that beyond question—but it is not enough in our law for a testator to intend to devise; he must use words which are in law effective to make a devise.

There will be a declaration that the testator died intestate in respect of the land in question; and the orders which follow from that declaration will issue . . . Costs of all parties out of the fund.

SIVEN v. TEMISKAMING MINING CO.—MASTER IN CHAMBERS —OCT. 13—LATCHFORD, J.—OCT. 14.

Pleading — Statement of Defence — Amendment—Workmen's Compensation for Injuries Act, sec. 9 — Statutory Limitation — Solicitor's Slip—Costs.]—Motion by the defendants for leave to amend the statement of defence by setting up that the action was barred by statutory limitation. The action was for damages for injury to the plaintiff by the negligence of the defendants, and the statement of claim alleged causes of action at common law and under the Workmen's Compensation for Injuries Act. It was, admitted that the accident from which the injury was sustained

occurred more than six months before the commencement of the action. The statement of defence omitted any reference to R. S. O. 1897 ch. 160, sec. 9 of which requires all actions thereunder to be "commenced within six months from the occurrence of the accident." The Master referred to Williams v. Leonard, 16 P. R. 544, 551, 17 P. R. 73, 26 S. C. R. 406; Hogaboom v. MacCulloch, 17 P. R. 377; Patterson v. Central Canada Loan Co., 17 P. R. 470; Muir v. Guinane, 10 O. L. R. 367, 370; and said that, the failure to plead the limitation being by reason of a solicitor's slip, the amendment should be allowed, on payment of costs (fixed at $20).—This was affirmed by LATCHFORD, J., the plaintiff's appeal from the Master's order being dismissed; costs in the cause. H. E. Rose, K.C., for the defendants. H. S. White, for the plaintiff.

UNION BANK OF CANADA v. TAYLOR—DIVISIONAL COURT—OCT. 13.

Trust—Land Conveyed to Trustee—Declaration in Aid of Execution—Evidence.]—Appeal by the defendants from the judgment of BRITTON, J., 1 O. W. N. 939. The Court (MULOCK, C.J. Ex.D., CLUTE and SUTHERLAND, JJ.), dismissed the appeal with costs. W. D. Hogg, K.C., for the defendants. Travers Lewis, K.C., for the plaintiffs.

GROH v. TURNER—RIDDELL, J.—OCT. 17.

Injunction—Trade Secrets — Motion for Interim Injunction Enlarged to Trial.]—Motion by the plaintiff for an interim injunction restraining the defendants from disposing of or disclosing to others the formulæ for certain proprietary medicines. The learned Judge said that, from an examination of the authorities, the law was not clear that the plaintiff should now have an interim injunction. Application enlarged before the trial Judge. Nothing said to be construed as an adjudication upon the merits as they may appear at the trial. The plaintiff may amend as advised. W. E. Raney, K.C., for the plaintiff. M. H. Ludwig, for the defendants.

GRAHAM v. DRIVER—DIVISIONAL COURT—OCT. 18.

Promissory Note — Procurement of Signatures of Makers by Fraud—Notice — Indemnity.]—Appeal by the defendants other than Fawcett from the judgment of TEETZEL, J., 1 O. W. N. 767, in favour of the plaintiffs; and appeal by the defendant Fawcett from the same judgment in favour of the other defendants as against him for indemnity. The Court (BOYD, C., RIDDELL and MIDDLETON, JJ.), allowed without costs the appeal of the defendants other than Fawcett, and dismissed the action as against them with costs; and allowed without costs the appeal of the defendant Fawcett, and dismissed without costs the claim for indemnity against him. Held, that, on the facts found, the paper sued on never became a note at all—the signatures to the document having been obtained by fraud, and the defendants not intending to sign a note: Foster v. MacKinnon, L. R. 4 C. P. 704. J. M. Godfrey, for the defendants other than Fawcett. R. G. Agnew, for the defendant Fawcett. W. A. J. Bell, K.C., for the plaintiffs.

HAZEL v. WILKES—DIVISIONAL COURT—OCT, 18.

Judgment—Foreclosure—Action to Set aside.]—Appeal by the plaintiff from the judgment of TEETZEL, J., 1 O. W. N. 1096. The Court (BOYD, C., RIDDELL and MIDDLETON, JJ.), dismissed the appeal without costs. W. S. Brewster, K.C., for the appellant. E. Sweet, for the defendants.

TURNER v. DOTY ENGINE WORKS CO.—MASTER IN CHAMBERS—OCT. 18.

Pleading—Statement of Defence — Irrelevancy — Embarrassment—Commission on Sale—Secret Agreement—Parties.]—After the order of the Master in Chambers, ante 74, the statement of defence was amended by striking out paragraphs 3 and 4 and substituting paragraphs 3 to 9, which the plaintiff moved to strike out as irrelevant, and therefore embarrassing. These paragraphs (condensed) were as follows: 3. The defendants are, and were at

the time the alleged sale was made to the American Good Roads Machinery Co., interested in and stockholders therein, of which the plaintiff was aware. 4. The negotiations for the sale were carried on with W., an officer and promoter of the American company, acting, as the plaintiff knew, as a trustee for that company. 5. The plaintiff, for the purposes of the sale, entered into a secret fraudulent agreement with W., whereby, in consideration of W. assisting the plaintiff in making the sale to the company, the plaintiff agreed to pay W. one-half of the commission. 6. The defendants and the American company were not aware of the secret agreement nor that W. was to receive a portion of the commission. 7. The plaintiff and W. in negotiating the sale agreed to pay $1,000 more for the property than it could have been purchased for, thereby causing the company and the defendants a loss of that sum. 8. In any event, the plaintiff cannot recover the one-half of the commission agreed to be paid to W., as, owing to the fraudulent agreement and breach of trust, that amount is the property of the American company and the defendants. 9. The agreement was a fraud on the "parties" referred to, and the plaintiff is, therefore, disentitled to recover anything by way of commission. The Master referred to Murray v. Epsom, [1897] 1 Ch. 35. Millington v. Loring, 6 Q. B. D. 190; Stratford Gas Co. v. Gordon, 14 P. R. 405; and said that the real issue was as to the right of the plaintiff to recover for his services in bringing about the sale; and the defence was that he had disentitled himself to any remuneration. The paragraphs attacked, except the 8th, set out the facts on which the defendants would rely at the trial to defeat the plaintiff's claim. The 8th paragraph was irrelevant, because it was no concern of the defendants what division or other disposition might be made of the commission, if the plaintiff was entitled to it; and it asked relief which could not be had in W.'s absence. Order made striking out paragraph 8. Motion dismissed as regards the other paragraphs. Costs in the cause. F. Erichsen Brown, for the plaintiff. W. Proudfoot, K.C., for the defendants.