THE

ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING JUNE 28TH, 1902.)

VOL. I. TORONTO, JULY 3, 1902. NO. 25.

JUNE 23RD, 1902.

DIVISIONAL COURT.

THOMPSON v. THOMPSON.

Evidence—Corroboration—Action on Note by a Deceased Person—Comparison of Signature with one on a Registered Mortgage.

Appeal by defendants from judgment of County Court of Peel in favour of plaintiff in an action upon a promissory note purporting to be made by the deceased person whose executors and executrix are the defendants in the action. The signature to the note was denied upon the pleadings. The plaintiff, being called as a witness, swore that the deceased had signed the note. A mortgage, also purporting to be made by deceased, was produced, with the county registrar's certificate of its due registration indorsed, but no evidence was given of any comparison of the two signatures. A nonsuit, upon the ground that there was no sufficient corroboration of plaintiff's claim, was moved for, but refused. The main question was whether the Judge was entitled to look at the signature to the mortgage for the purpose of comparing it with that to the note, and determining whether the latter was a genuine signature.

B. F. Justin, Brampton, for defendants.

E. G. Graham, Brampton, for plaintiff.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), held that the Judge was entitled to make the comparison, and that plaintiff's evidence was sufficiently corroborated under R. S. O. ch. 73, sec. 10.

FALCONBRIDGE, C.J., referred to Cobbett v. Kilminster, 4 F. & F. 490: King v. King, 30 U. R. C. 26; Thompson v. Bennett, 22 C. P. at p. 406.

Appeal dismissed with costs.

MACMAHON, J. JUNE 26TH, 1902.

CHAMBERS.

UNION BANK OF CANADA v. CUNNINGHAM.

Division Courts—Prohibition—Promissory Notes—Splitting Cause of Action—R. S. O. ch. 60, sec. 90 (1)—Omission by Judge to Take Down Evidence at Trial.

Motion by the defendant John Cunningham for an order prohibiting the plaintiffs from issuing execution from the 10th Division Court in the county of York, on a judgment recovered against him on the 12th June instant, for the amount of two promissory notes, one dated 1st April, 1901, payable in three months, for $79.01, and the other, dated 4th June, 1901, payable in one month, for $78.75, both notes being payable to the order of the defendants the Guelph Paving Company, at the Union Bank at Toronto.

J. G. O'Donoghue, for defendant.

D. W. Saunders, for plaintiffs.

MACMAHON, J.:—The defendant Cunningham resides at Guelph, and the other defendants carry on business there. Cunningham was personally served with a copy of the summons on the 14th May, under which he had twelve days to dispute the claim. On the 23rd May both defendants filed dispute notes, disputing the plaintiffs' claim and also the jurisdiction of the Court, claiming that the action should be tried at Guelph.

The amount being over $100, and payable by the contracts of the parties at Toronto, the action was brought at Toronto as being within sec. 90 of the Division Courts Act, R. S. O. ch. 60.

The certificate of the clerk of the Division Court shews that two letters from Cunningham to the plaintiffs' solicitors, dated 3rd July and 5th July, 1901, were put in at the trial, in which he asks a renewal of one of the notes, and says he hopes to pay the other in the course of a week.

It was urged by Mr. O'Donoghue that, there being two notes, there are two contracts, and therefore the claim is not "a contract" exceeding $100, and does not come within sec. 90, sub-sec. 1. There are two promissory notes, both by their terms payable in Toronto, and both may be sued in one action, and they form in the aggregate a sum exceeding $100. By the Interpretation Act, R. S. O. ch. 1, sec. 8, sub.-sec. 24, "Words importing the singular number . . . shall include more persons, parties or things of the same kind than one . . . and the converse."

Brazill v. Johns, 24 O. R. 209, does not apply here, that case not being within sec. 86 (now sec. 90) of the Act, because the note sued upon was for $99, and it was the interest alone which amounted to $23, which brought the claim over $100; and interest was not payable except as damages. There was not a contract to pay more than $99. In the present case there are two sums of money which Cunningham contracted to pay in Toronto, which being added together exceed $100, and therefore the case is within sec. 90, and the only way in which the defendant could have the place of trial changed was by an application to the Judge of the Court in Toronto on an affidavit containing the requirements prescribed by sub-sec. 4 of sec. 90.

The other point on which prohibition was moved was that the learned County Court Judge did not take down the evidence at the trial, as required by sec. 121.

The taking of the evidence is required for the purpose of appeal. And the omission to take the evidence would form no ground for prohibition. Nor would such omission invalidate the trial of the cause: Bank of Montreal v. Statten, 1 C. L. T. 66; Sullivan v. Francis, 18 A. R. 121.

The case is governed by Hill v. Hicks, 28 O. R. 390.

The motion must be refused with costs.

STREET, J. JUNE 26TH, 1902.

WEEKLY COURT.

MACDONELL v. CITY OF TORONTO.

Assessment and Taxes—Local Improvement—"Owner"—"Taxable Person"—Petition—Two-Thirds in Number of Owners—One-Half in Value of Real Property Benefited—Buildings—Land.

Special case. The plaintiff is the "owner," within sec. 668 of the Municipal Act, of a parcel of land in the city of Toronto, between Cecil and Baldwin streets. Nine persons, including plaintiff, are assessed as owners of property in the same block, fronting on Huron street, and "the city of Toronto" is on the roll in respect of two parcels in the same block, with the word "exempt" opposite the name. Six of the persons assessed as owners have petitioned the council for an asphalt pavement on Huron street between Cecil and Baldwin streets, as a local improvement under sec. 668 of the Municipal Act. The value of the lands and buildings of these six is, according to the roll, $14,553, while that of the lands and buildings of the three others, including the plaintiff, is $13,959, and the value of the vacant lots of the city is $3,060.

A. B. Aylesworth, K.C., and C. A. Moss, for the plaintiff.

J. S. Fullerton, K.C., and T. Caswell, for defendants.

STREET, J., held that, under these circumstances, the petition has been signed by two-thirds in number of the owners and one-half in value of the real property to be benefited. As to the proportion of value, the buildings must be taken into account as well as the lands; and the city is not to be regarded as an owner within sec. 668, not being a "taxable person," and being improperly mentioned in the roll, and should not be counted in reckoning the number of owners or in ascertaining the proportion of value.

Judgment for defendants with costs.

BRITTON, J. JUNE 18TH, 1902.

CHAMBERS.

RE CHAPMAN.

Will—Construction—Absolute Interest—Gift—Intestacy.

Motion under Rule 938 by the executors of the will of Parish Chapman, deceased, for an order declaring the true construction.

The will provided as follows: I give unto my sister-in-law Mary Ann Smith the sum of $500, said sum to be deposited in a bank, and she is to draw the interest of said $500 for her benefit during her natural life, and at her decease the said principal $500 is to be given to her eldest son Edward Chapman Smith to be used for his benefit during his natural life. 2nd. I give unto my beloved wife Jane Chapman all which may remain after the disposition of the aforesaid $500, consisting of all my real and personal property, consisting of my farm, including all implements, live and dead stock, all buildings and dwelling house, with all household furniture therein, useful and ornamental, also all moneys in bank or banks wherever they may be deposited, with the interest accruing thereto, and any and all mortgages and notes, with the interest thereon, that I hold or may hold at the time of my decease; and said executors hereinafter named shall immediately after my decease dispose of all the aforesaid property by sale and the proceeds or moneys arising from such sale shall safely be deposited where good security can be obtained and the interest of the same shall go to my beloved wife Jane Chapman for her sole benefit during her natural life. 3rd. And at the decease of my wife the portion given unto her shall be divided equally among the following persons: Albert Chapman, Parish Chapman, and George Chapman, sons of my brother John Chapman, John Cox, son of my sister Ann Cox, deceased, Ann Crosley, daughter of my sister

Eliza Jane Hookham, deceased; Robert Watson, Reuben Watson, Jesse Watson, and Agnes Watson, sons and daughter of my sister Sarah Jane Watson; and William Chapman, son of my brother Charles Chapman, deceased. All to be for their benefit during their natural lives.

J. J. Maclaren, K.C., for the executors, stated that he had been unable to find authority in point.

N. W. Rowell, for David Porkess, executor under the will of Jane Chapman, widow of the testator, and for the said David Porkess personally, cited Savage v. Tyers, L. R. 7 Ch. 356.

F. W. Harcourt, for the infants.

BRITTON, J.—The testator made his will on the 12th August, 1887, and he died on the 17th October following.

In addition to the presumption against intestacy as to any portion of the testator's estate, there is internal evidence in the will itself that this testator intended then, and by that will, to dispose of all he had. I quite concede what was argued by Mr. Rowell, that a Judge ought not, because of any difficulty or embarrassment that would or possibly could arise from declaring intestacy as to the corpus or any part of the estate, to hesitate to so declare. It is for me, if possible, to ascertain from this will what was the intention of the testator. Lord Cottenham said in Lassence v. Tierney, 1 Macn. & G. 551, cited in Hancock v. Watson, [1902] A. C. 22, that if the terms of the gift are ambiguous, you must seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will.

The testator here gives $500 to Ann Smith, but he limits the disposition of that so that in reality she gets for her own use absolutely only the interest upon it. At her death this $500 "is to be given to her eldest son Edward Chapman Smith." And this sum, not the interest alone, he can use "for his benefit during his natural life."

Then the testator gives to his wife Jane Chapman all that remains after the $500 is taken out, but he limits her for her own use absolutely to the interest only, and when the capital is no longer needed to earn interest for his wife he gives it all to the persons named, and *all* "for their benefit during their natural lives."

I can come to no other conclusion than that the testator intended to make and did make a careful selection of those named from the possible claimants upon his bounty. He intended to dispose of all his estate. He knew of those relatives of his who, if not mentioned, could, in the event

of intestacy, claim, and I think he intended, and by his will carried out his intention, of disposing of all absolutely by a payment over of the $500 after the death of Ann Smith and by a division of the rest after the death of Jane Chapman.

"A gift even of income to A. for life and then to B. indefinitely gives B. the absolute interest:" Clough v. Wynne, 2 Mad. 188; Theobald on Wills, 5th ed., p. 426. This seems to me a stronger case in favour of the persons named in the will.

The questions will be answered as follows:

(1) That portion of the corpus of the estate of Parish Chapman directed to be held by the executors in trust during the life of Jane Chapman is to be immediately divisible among the persons named in the 3rd paragraph of Parish Chapman's will and their representatives.

(2) Said persons and their representatives take an absolute interest in the said property.

(3) The sum of $500 in the first paragraph of the will mentioned is an absolute gift to Edward Chapman Smith, and upon the death of his mother the said Edward Chapman Smith shall be entitled to said sum absolutely.

(4) The said testator did not die intestate as to any of his property or estate.

(5) Costs of all parties out of the estate.

BRITTON, J. JUNE 27TH, 1902

CHAMBERS.

RE BURCH.

Will—Legacy—Period of Vesting—Direction to Distribute Estate—Discretion of Executors.

Application by the executors of the will of Peter Burch, under Rule 938, for an order declaring the construction of the will. The will was made on the 1st February, 1902, and the testator died on the 17th March following. Probate was granted to the executors. The clauses creating difficulty are the following: 2. "I give to my son John H. Burch $2,500, and to my daughter Charity Heaslip, wife of Matthias Heaslip, $2,500." 3. "It is my express will that no money so willed to my son John H. Burch shall be paid to him while his wife Addie Burch is living, and it is also my will that no money so willed to my daughter Charity Heaslip shall be paid to her while her husband Matthias Heaslip is living, unless through some misfortune they or either of them should become needy, when my executors

may pay them all, or such amounts as they may deem necessary for their comfortable support and maintenance." 8. "And it is also my will that all legacies mentioned in this my will shall be paid and satisfied not later than ten years after my decease, and it is especially my will that in case any dispute or disagreement arises between my legatees, or between my legatees and executors, such dispute shall be settled by arbitration in the usual way, without litigation in court of law." Apart from creditors and from donees of small specific bequests, the only persons interested in the estate are the two legatees above mentioned, and their brother Francis Oscar Burch, these three being residuary devisees. Francis Oscar was given $2,500 without limitation as to time of payment. All interested are of full age and consent to be bound by the order to be made.

C. H. Pettit, Welland, for executors.

E. E. A. DuVernet, for legatee.

BRITTON, J., held, referring to Re Wartmen, 22 O. R. 601, and Curtis v. Larkin, 5 Beav. 155, that the gifts of $2,500 each to John H. Burch and Charity Heaslip are immediate gifts to each, and are not made contingent by the testator's direction as to payment. The "vesting" was not suspended or postponed. Apart from the discretion given to the executors to pay in certain contingencies, they have the right to pay and should wind up the estate. The testator's direction to distribute the estate within ten years overrides the former expressed wish as to payment to the two legatees.

Order accordingly. Costs out of the estate.

German & Pettit, Welland, solicitors for executors.

Ingersoll & Kingstone, St. Catharines, solicitors for legatee.

JUNE 27TH, 1902.

DIVISIONAL COURT.

RE THURESSON, MACKENZIE v. THURESSON.

Mortgage—Release of Part of Land with Right of Way by Mortgagee—Effect of—Dedication—Release of Right of Way by Adjoining Owners.

Appeal by Edith B. E. Thuresson from a certificate of the Master in Ordinary to the effect that the claimants S. M. Abercrombie and E. C. Laird have removed the cloud on the title created by the instruments referred to in a former decision, reported 3 O. L. R. 271, and ante p. 4, and are now entitled to prove their claims under the mortgage of 15th October, 1887. The claimants produced in

the Master's Office, in pursuance of the leave given them by the former order, releases to them of any claims to a right of way over any part of block A., except the portion of it lying immediately north of the easterly 40 feet of lot 1, north of Queen street and west of Sorauren avenue in the city of Toronto. The releases were executed by Amelia M. Cowan, Samuel Clare, B. McQuillan, and the executors of Edward Hickson's will. The appellant is one of the persons interested in the estate of Eyre Thuresson. She gave evidence to shew that by reason of an alleged dedication by the owner of the equity of redemption to the public, and of user by the public, the whole of block A. had become and remained a public highway at the time of the part discharge executed by Samuel Clare, who then owned the mortgage in question, to the executors of Hickson, on 20th January, 1893, mentioned in the former decision; and that it has ever since been and still is a public highway.

J. D. Montgomery, for appellant. By reason of this part discharge, the rights of the public have intervened, and are no longer subject to the mortgage, and these rights cannot be taken away from the public and restored to the mortgagee by any act of any private person.

R. U. McPherson and J. E. Jones, for respective mortgagees.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) held that the effect of the instruments produced would be to vest in the present mortgagee, Miss Abercrombie, the rights which had been improperly released by Clare, under which she claimed to be entitled to prove; and the Master was right in holding that these instruments removed the cloud on the title created by the part discharge, and that they are entitled to prove under the mortgage. Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

McCREADY v. GANANOQUE WATER POWER CO.

Waters and Watercourses—Dam—Diversion of Waters—Riparian Proprietor—Order of Judge under R. S. O. 1877 ch. 114 (R. S. O. 1897 ch. 141)—Notice.

Appeal by defendants from judgment of LOUNT, J. Action for injunction restraining defendants, the owners of a water-power at the town of Gananoque, fed by Wiltsie creek and Gananoque river, from opening their dam and letting water flow down on plaintiffs' lands, and for damages. Up to 1900 defendants compensated plaintiffs for

damages suffered by them, but have refused to allow any compensation for the year 1900, and set up that the damage alleged to have been sustained is the result of the situation of plaintiffs' land, and that any payments made to present plaintiffs, or other riparian proprietors, were made for the sake of peace, and not intended as admission of any liability to pay same. The trial Judge held that defendants had not the right to cause water to flow on plaintiffs' lands other than the natural flow of Wiltsie creek, or to so control or manage the dam or outlet of Charleston lake as to cast more than the natural flow of water upon plaintiffs' lands, and granted a perpetual injunction, and awarded damages to plaintiffs.

G. H. Watson, K.C., for defendants.

R. T. Walkem, K.C., for plaintiffs.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

GARROW, J.A.—By the order of the Judge of the County Court of Leeds and Grenville, made in 1886, under R. S. O. 1877 ch. 114 (R. S. O. 1897 ch. 141), without notice to plaintiffs, the defendants were given permission to build a dam at Charleston lake outlet, the top of which shall be four feet above the level of an old dam. Fearing a flood, in June, 1900, the defendants opened the dam gates, and removed several of the top logs, and released a quantity of water into Wiltsie creek, which overflowed on plaintiffs' lands. The defendants, in my opinion, were not justified in doing this under the order of the Judge. The plaintiffs were not parties to the proceedings upon which the order was obtained, and the defendants had no right whatever to cause a discharge of the water into the creek to the injury of plaintiffs. The damages were properly assessed, but there is no evidence to shew that the trespass will be continued or was done maliciously, and an injunction is not necessary: Ellis v. Clemens, 21 O. R. p. 231-2.

Appeal allowed as to injunction; otherwise dismissed with costs.

Walkem & Walkem, Kingston, solicitors for plaintiffs.

E. H. Britton, Kingston, solicitor for defendants.

JUNE 28TH, 1902.

C. A.

McGARR v. TOWN OF PRESCOTT.

Municipal Corporation—Highway—Non-repair—Sidewalk—Damages.

Appeal by defendants from judgment of FERGUSON J., ante p. 53.

J. B. Clarke, K.C., for defendants.

J. A. Hutcheson, Brockville, for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J. A. (after agreeing with the trial Judge in all his findings):—I cannot avoid thinking that the amount at which the damages have been assessed is too liberal an allowance, considering the nature of the injuries—a sprained ankle and an affection of the sciatic nerve—no doubt, a severe and painful one, arising some time after the accident, and attributed, whether rightly or wrongly, to it, but from the effect of which the plaintiff may expect to recover at no very distant time. Taking everything into consideration, an award of $900 would more nearly meet the justice of the case.

Judgment reduced to $900, and appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

GABY v. CITY OF TORONTO.

Municipal Corporation—Highway—Non-repair—Accident to Foot Passenger—Negligence.

Appeal by defendants from judgment of MACMAHON, J., in favour of plaintiff, in action tried at Toronto, brought by the widow and administratrix of Levi Gaby, late of Richmond Hill, deceased, to recover damages for injuries which caused his death. The trial Judge found, after a lengthy review of the evidence, that deceased left the Commercial Hotel, in Jarvis street, in the city of Toronto, on 19th November, 1900, at 8.30 p.m., in a sober condition, and that his body was found between 7 and 8 o'clock the next morning in a hole, 4 1-2 feet wide and nearly 8 feet deep, dug three weeks before by the contractor for masonry work of the new St. Lawrence market, added as third party; that the hole was not properly guarded, and was 16 feet from the building wall, and on the west side of Jarvis street, and deceased fell into it; and that, under his contract with the defendants, the third party, James Crang, was liable to them.

A. F. Lobb and W. C. Chisholm, for defendants.

T. H. Lennox, Aurora, and S. B. Woods, for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A.:—We are satisfied that there was abundant evidence of negligence, for which the city is responsible, in

the condition of the highway; and the death of the plaintiff's husband has been properly attributed to, and was the direct and well-proved result of, such negligence. We agree, too, that the attempt to fasten contributory negligence upon the deceased entirely fails.

Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

RE TORONTO RAILWAY CO. AND CITY OF TORONTO.

Assessment and Taxes—Street Railway—Trolley Cars—Real Estate.

Appeal by the Toronto Railway Company from the judgment of a board of County Judges (MCDOUGALL, MCGIBBON, and MCCRIMMON, JJ.) under the Assessment Act, holding that trolley cars of the company are assessable as part of or attached to the real estate of the company, the principle of Bank of Montreal v. Kirkpatrick, 2 O. L. R. 113, being applied.

J. Bicknell, K.C., for the appellants.

J. S. Fullerton, K.C., and A. F. Lobb, for the city corporation.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A., affirming the judgment below, upon the application of the principle laid down in the case cited.

Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

CUSHEN v. CITY OF HAMILTON.

Municipal Corporation—Invalid By-law—Payment of Money Under —Recovery from Corporation.

Appeal by defendants from judgment of ROSE, J., in favour of plaintiff, in action tried at Hamilton, brought to recover certain money paid to defendants in 1896 and 1897, under the provisions of a by-law requiring vendors of certain meats in quantities of less than a carcass to take out a license. The by-law was declared invalid in October, 1898, upon return of an order nisi to quash a conviction of plaintiff under it: Reg. v. Cushen, not reported. The trial Judge held, on the facts, that the payment made by plaintiff was not voluntary: Morgan v. Palmer, 2 B. & C. 729; that it was not necessary to quash the by-law before bringing the action, and not being an action of tort, no notice was necessary: Mallot v. Mersea, 9 O. R. 611; that the claims assigned

to plaintiff were assignable, and notice in writing under the Judicature Act of the assignment (sec. 58, sub-sec. 5) was not necessary between the parties; and that plaintiff was entitled to recover.

F. Mackelcan, K.C., and J. L. Counsell, Hamilton, for defendants.

W. R. Riddell, K.C., and J. G. Gauld, Hamilton, for plaintiff.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) was delivered by

OSLER, J.A.:—The by-law itself has not been quashed or set aside. In the case of some of these payments there was no evidence of the circumstances under which they were made, and, as to others, it appeared that they were so paid to avoid a threatened prosecution for breach of the by-law. Two of the witnesses spoke of a statement made to them by the market inspector or other city official that they could not be allowed to stand in the market unless a license was taken out, but it was clear that there was neither power nor attempt to enforce such a threat, and the proper inference is that, if made at all, it was stated only as a result which would follow a prosecution and conviction for a breach of the by-law. Under these circumstances, I am of opinion that the action does not lie: Pollock on Contracts, 6th ed., p. 579; Brisbane v. Dacres, 5 Taunt. 143.

Parker v. G. W. R. Co., 7 M. & G. 253, Steele v. Williams, 8 Exch., Hooper v. Mayor of Exeter, 56 L. J. Q. B. 457, Kennedy v. Macdonell, 1 O. L. R. 250, bear no analogy to the case at bar.

See May v. Cincinnati, 1 Ohio St. R. 268; Robinson v. Charleston, 2 Rich. S. C. Com. Law 317; Radich v. Hutchins, 5 Otto 210, per Field, J.; Mayor of Baltimore v. Heffernan, 4 Gill (Md.) 425.

The point is that defendants had no power to enforce the by-law except by resorting to judicial proceedings of some kind, in which it was open to plaintiff to resist his liability as effectually as if he were being sued for a debt.

Appeal allowed with costs, and action dismissed with costs.

JUNE 28TH, 1902.

C. A.

FISHER v. FISHER.

Gift—Parent and Child—Business Relationship between—Undue Influence—Onus of Proof.

Appeal by defendants Frederick and Charles Fisher

from judgment of FALCONBRIDGE, C.J., in favour of plaintiff, in action to set aside two discharges of mortgages, and for other relief. G. T. Fisher, the father of the appellants, died on 15th September, 1899, and clause 5 of his will, bearing date 7th May, 1895, directed that the indebtedness to him, at the time of his decease, of any child, should be deducted from the portion devised to such child. On 23rd April, 1898, the appellants, in the presence of R. T. Banting, a conveyancer, who had for years done the greater part of G. T. Fisher's business, procured their father to execute discharges of two mortgages they had given him in 1893. The plaintiffs and defendant Catharine Fisher are the executors of G. T. Fisher. The Chief Justice held that the appellants had not satisfied the onus of proving that a gift obtained under the circumstances here shewn was the spontaneous offering of a free and unbiassed mind.

E. F. B. Johnston, K.C., and W. A. Boys, Barrie, for defendants.

W. A. J. Bell, Alliston, and W. G. Fisher, Alliston, for plaintiffs.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

MOSS, J.A. (after reviewing the circumstances at length):—I am unable to discover in the evidence proof of the existence of such a relationship of trust and confidence, or of such assumption by the appellants of the management of the business affairs and property of the deceased, as to cast upon them the burden of proving that they had not abused their position, and that the execution of the discharges had not been brought about by any undue influence on their part. . . . Hopkins v. Hopkins, 27 A. R. 658, is not applicable. It was distinctly a case of duress.

Appeal allowed with costs and action dismissed with costs.

JUNE 28TH, 1902.

C. A.

RE TORONTO PUBLIC SCHOOL BOARD AND CITY OF TORONTO.

Public Schools—Expenditure—Annual Estimates—Powers and Duties of Municipal Council and of School Board.

Appeal by the city corporation from the order of a Divisional Court (2 O. L. R. 727) varying an order of STREET, J., in Chambers, upon an application by the school board for a mandamus to the city corporation to levy certain sums of money alleged by the school board to be re-

quired for school purposes for the year 1901, and granting such application in respect of most of the items of expenditure estimated by the applicants. The principal points decided by the Divisional Court were that it is only when it is made to appear that the expenditure would be clearly an illegal one, or *ultra vires* the school board, that the council is justified in refusing to raise the sum required by the board; and that all that the council has a right to ask is that an "estimate" shall shew that the board has in good faith estimated the amounts required to meet the expenses of the schools for the current year, and the purposes for which the sums are required, in such a way as to indicate that they are purposes for which the board has the right to expend the money of the ratepayers, and when that has been done, the duty is imposed upon the council of raising by taxation the sums required according to the estimate.

J. S. Fullerton, K.C., and A. F. Lobb, for appellants.

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

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A., BRITTON, J.) was delivered by

OSLER, J.A., adopting substantially the reasons of MEREDITH, C.J., in the Court below.

Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

COUNSELL v. LIVINGSTON.

Promissory Note—Notice of Dishonour—Sufficiency of—Husband and Wife Indorsers—Agency of Husband—Notice to Husband.

Appeal by defendants W. C. Livingston and C. E. Livingston from judgment of FALCONBRIDGE, C.J., (2 O. L. R. 582), in action by executrix of C. M. Counsell, deceased, to recover $3,500, amount of a promissory note, of which appellants are indorsers, and which was one of a series of renewals of a note given under an agreement by which the note was to be renewed within five days from the expiration of every three months from its date for four years. The plaintiff alleges that a notice was posted to W. C. Livingston the day after maturity in the following words:—"I beg to advise you that Mr. L.'s note for $3,500 in your favour, and indorsed by yourself and wife, and held by our estate, was due yesterday. As I have not received renewal, will you kindly see that same is forwarded with cheque for discount, as there is no surplus on hand?" The Chief Justice held that the notice was sufficient

to the indorser to whom it was addressed, and also to his wife, as he was her agent.

A. B. Aylesworth, K.C., for appellants.

E. Martin, K.C., for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

GARROW, J.A.:—I think the evidence amply sufficient to sustain the finding that the husband was the wife's agent to receive the notice. The husband admitted that his wife was cognizant of the transaction, and that he was looking after the business part of it, and she admitted that she kept no track of the notes, but left the matter entirely in his hands, and had no personal knowledge of the matter. By the Bills of Exchange Act, notice may be given to an agent and may be verbal, and a verbal notice to an agent who happened also to be an indorser would not require to be repeated. . . . I agree with the finding that the notice was sufficient in point of form. . . . I do not see how this case can be distinguished from Paul v. Joel, 3 H. & N. 455, 4 H. & N. 355. The notice here does not precisely say that the note is unpaid, but it must be remembered that it is one of a series intended to run, if necessary, for four years, with renewals every three months, and the four years has not expired, and the information given that the note was due and the request to send renewal and expenses was a notice that the note was unpaid, and that payment in one way or another was requested, which seems to be all that is required.

Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

GRAY v. McMATH.

Landlord and Tenant—Covenant for Renewal of Lease—Arbitration or Valuation—Waiver of Irregularities—Acquiescence of Landlord.

Appeal by defendant from judgment of MEREDITH, J., in action to compel defendant to execute and deliver to plaintiff a lease for five years of certain premises on the north side of Queen street, in the city of Toronto, occupied by him as a drug store and dwelling, and for damages for breach of covenant to renew.

J. K. Kerr, K.C., and W. Davidson, for defendant.

F. Denton, K.C., and H. C. Dunn, for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

GARROW, J.A.:—The agreement for renewal is contained in an indenture of lease, dated 14th April, 1896, whereby

the defendant demises the said premises to the plaintiff and one Buck for a term of five years, and is in the words following:—

"And it is hereby further covenanted and agreed by and between the said lessor and the said lessees that at the expiration of the term hereby granted, he the said lessor shall and will grant to the said lessees a new and further lease of the said premises thereby demised, including said stable, if the said lessees shall have elected to lease said stable as hereinbefore provided, for a further term of five years, with like covenants as are herein contained, excepting this covenant for renewal and also the covenant immediately preceding this covenant, relating to stable, at a rent to be fixed by arbitration as hereinafter provided, and payable as herein reserved. And it is hereby further covenanted and agreed between the said lessor and the said lessees that the amount of such rent shall be settled by the award of three indifferent parties, or of the majority of them, one to be named by the lessor, another by the lessees at least one month before the expiration of the term hereby granted, and the two thus chosen shall at once select a third, and their award, or the award of a majority of them, shall be made before the expiration of the then existing term. Provided that the expense of the said arbitration shall be borne equally between the parties hereto, but the said new lease shall be prepared by and at the expense of the said lessor."

The learned Judge held that arbitration in the strict sense was not what the parties intended by the agreement before set out, that what was wanted was in the nature of a mere valuation, and not a settlement of pending disputes, and that whether it was valuation or arbitration the defendant's own conduct precluded him from succeeding in his defence.

I agree with the learned Judge's conclusions on both grounds.

As to the first, from the language of the agreement before quoted and the nature of the subject-matter, it appears to me that what the parties intended to provide for was in the nature of a valuation rather than of an arbitration in the strict sense. The new lease was only to be for five years. The old rental was only $40 per month. The agreement makes no provision for calling witnesses, and neither of the parties, although aware that the proceedings were in progress, offered to produce or did produce witnesses or argued that witnesses should be called. An arbitration is usually an expensive proceeding, and the parties who, by

the agreement, were to bear the expense of fixing the new rent equally, may very well, and I think may wisely, have considered that their neighbours were as capable of fixing this rent as the usual crowd of experts called and sworn at great expense.

In my opinion the case falls within the principle of such cases as Re Cairns, Wilson & Green, 18 Q. B. D. 7; Re Hammond and Waterton, 62 L. T. N. S. 808.

But whether it was valuation or arbitration, it is, I think, clear that the defendant was fully aware of the alleged irregularities of which he now complains, and that he waived them and acquiesced in the course of procedure laid down and adopted by the board at their first meeting, and having taken the chance of the award being in his favour, cannot now be heard to complain: Hewlett v. Laycock, 2 C. & P. 547; Bignall v. Gale, 2 M. & G. 830; Moseley v. Simpson, L. R. 14 Eq. at p. 236.

Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

TAYLOR v. G. T. R. CO.

Railways—Passenger—Special Contract—Return Ticket Signed by Passenger—Failure by him to Conform to Conditions.

Appeal by plaintiff from judgment of Lount, J., dismissing with costs action for damages. The jury found $500 damages for the plaintiff. On 13th February, 1901, the plaintiff bought from the C. P. R. Co. a return ticket, good for three months, at reduced fare, from Indian Head to Toronto. Clauses 5 and 7 of the printed conditions were as follows: 5th. "That this ticket must be signed by the passenger in ink, and if presented by any other than the original purchaser, whose signature is hereon, the conductor will take it up and collect the fare. The purchaser will write his or her signature when requested to do so by the conductor or agents." 7th. "That it will not be good for return passage unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the G. T. R. system at Toronto in sufficient time to permit of return trip and arrival at original starting point on or before ———, and unless officially signed and dated in ink and duly stamped by said agent." The plaintiff deposed that, pursuant to one of the other conditions on the ticket, he signed it when he bought it in the presence of the C. P. R. ticket agent, but nothing further was said,

and that he (plaintiff) had never afterwards read the conditions nor complied with the 7th. Upon concluding his business in Toronto he presented the ticket at the G. T. R. Co.'s office, and procured a sleeping-car berth; that he then had his baggage checked, and then passed through the gate to the track the train stood on; in each case the official punching his ticket without objecting to the non-compliance with the 7th condition. The conductor of the train, however, put the plaintiff off the train at Thornhill, using violence, he alleges. The trial Judge submitted to the jury only the question of damages, and they found $500. It was contended that it should have been left to the jury to find whether the plaintiff knew of the 7th condition, whether he knew that he was travelling at a reduced rate, and also whether the defendants did what was reasonable and sufficient to give the plaintiff notice of such conditions; relying on Bate v. C. P. R. Co., 14 O. R. 625, 15 A. R. 386, 18 S. C. R. 697; Richardson v. Roundtree, [1894] A. C. 217; Harris v. G. N. R. Co., 1 Q. B. D. at p. 532; and whether the condition had been waived; and further whether the plaintiff had offered sufficient and reasonable compliance with the condition by proving identification under condition 5, which must be taken as in substitution for condition 7, after a passenger has once been invited to enter a car by any official whose duty it is to examine a ticket. The 7th condition, it was also contended, is unreasonable and contrary to the policy of the law, and is inconsistent with R. S. C. ch. 110, sec. 10.

H. T. Beck, for plaintiff.

W. Cassels, K.C., for defendants.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

MACLENNAN, J.A.:—The plaintiff is a business man, and signed the contract on the ticket agreeing to its provisions, but he says he did not read the 5th or 7th or any of the clauses printed, and therefore is not bound by them, and he relies on Bate v. C. P. R. Co., 15 A. R. 625, 18 S. C. R. 697; Henderson v. Stevenson, L. R. 2 Sc. App. 470; Parker v. S. E. R. Co., 2 C. P. D. 416; and Richardson v. Roundtree, [1894] A. C. 217. The present case is, however, different from those cited. The ground of the decision in the Bates case is explained by the Chief Justice in Robertson v. C. P. R. Co., 24 S. C. R. 617. In the present case the plaintiff was not asking for a ticket for an ordinary single journey, but for a special contract, viz., a return

journey, which it was entirely optional with the company to grant. That being so, there was nothing to put him off his guard, and when he was asked to sign the document which he received and paid for, I think he was as much bound by its terms whether he read it or not as in the case of any other business transaction. But for the contract he had no right to travel upon the defendants' railway at all, and in order to exercise that right he was bound to conform to the condition on which it was granted and to which he had assented by his signature.

Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

PURDY v. PURDY.

Will—Undue Influence—Mental Capacity—Preferring One Son to Others—Onus of Proof.

Appeal by plaintiffs from judgment of LOUNT, J., dismissing with costs action to restrain defendants Purdy, Sutherland, and Brown, the executors named in the will of Emeline Purdy, deceased, from obtaining probate of the will, and for a declaration that the will was not the true will of deceased, because she lacked testamentary capacity, and because, it is alleged, undue influence had been exercised by the defendant Purdy, one of her sons. The trial Judge held that the testatrix, 72 years of age, was perfectly capable of making her will, and had made it known, previous to doing so, that she intended to leave her money to her son Philip, who resided on the same farm, but not in the same house with her, until shortly before her death. Her other children lived in different parts of Canada and the U. S. A.

G. F. Shepley, K.C., and E. S. Smith, K.C., for plaintiffs.

T. G. Meredith, K.C., for defendants.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

GARROW, J., who, reviewing the evidence at length, held that Philip did not procure the will to be made in his favour, and therefore there was no onus of proof for him to satisfy, but that, if there was, he had satisfied it; that his conduct was perfectly righteous; and that there was not

a single circumstance against him except that he took a larger share of the estate than the others; and that the testatrix was of sound mind, and deliberately, voluntarily, and intentionally made the will in question.

Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

BOWMAN v. IMPERIAL COTTON CO.

Master and Servant—Injury to Servant—Negligence of Foreman of Master—Evidence of, Sufficient for Jury's Finding.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., upon the findings of a jury, in favour of plaintiff for $100 in an action for damages for injuries sustained by plaintiff, acting under the orders of defendants' foreman, and while engaged in tightening an arch in their factory in the city of Hamilton. The wrench plaintiff was using slipped and his arm was caught and crushed in a 12-inch belt, which was unprotected and in motion. The jury found that the plaintiff had not been negligent, and that defendants had; that the machinery was defectively guarded and improperly started while plaintiff was working; and they assessed the damages at $100. The Chief Justice gave costs on County Court scale without set-off.

J. J. Scott, K.C., for defendants. The plaintiff was, upon the evidence, guilty of negligence. The Factories Act, R. S. O. ch. 256, does not apply, because the plaintiff came within sec. 27, which does not give the benefit of the Act to a workman at work only in repairing.

W. A. Logie, Hamilton, for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

MOSS, J.A.—The sole question in this case is whether the injury to plaintiff was due to negligence for which the defendants are responsible. . . . (after reviewing the evidence):—Upon the whole case I find it impossible to say that there was not evidence upon which a jury might reasonably conclude that the injury was caused by the negligence of the defendants' foreman or overseer, to whose orders the plain-

tiff was bound to conform and did conform in doing the work in the course of which he received the injury.

Appeal dismissed with costs.

JUNE 28TH, 1902.

C. A.

McCULLOUGH v. HULL.

Solicitor and Client—Solicitor Agent—Disclosure of Agency—Commission.

Appeal by defendant from judgment of MACMAHON, J., allowing plaintiff's claim of $1,000 for commission on sale of certain timber, at $500.

E. E. A. DuVernet and J. A. Ferguson, for defendant. There was no contract for commission, and, if any, the contract has been abandoned. In any event, the plaintiff, being the solicitor for both parties to the transaction, is not entitled to recover a commission.

E. F. B. Johnston, K.C., and J. W. McCullough, for plaintiff.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

GARROW, J.A.—The plaintiff is a solicitor, and on the evidence I would hold that his brother-in-law, Mr. Jackson, was his client, and that, therefore, if he had succeeded in proving the case set forth in his statement of claim, he must in law have failed: Harrington v. Victoria Graving Dock Co., 3 Q. B. D. 549: and it would, I think, make no difference that the plaintiff, after making the contract with defendant, informed his client of it: Holden v. Webber, 29 Beav. 117. . . . But I think the proper conclusion upon the evidence is that the plaintiff in preparing the agreement acted as the solicitor of Mr. Jackson, as he had acted throughout the matter whenever a solicitor's services were required, and not as the agent of the defendant, which agency he voluntarily abandoned on the 15th October, thus surrendering, in my opinion, the right to claim the commission for which he now sues.

Appeal allowed with costs and action dismissed with costs.

JUNE 28TH, 1902.

C. A.

FULLER v. GRANT.

Evidence—Corroboration—Partition.

Appeal by defendant from judgment of LOUNT, J., directing partition or sale of the land in question. David Dunham, deceased, devised the land in question to his daughter Emma Dunham for life with remainder to her children, and a memorial of his will was registered in 1857. Emma Dunham died in 1891. F. Sessions, one of the two children of Emma Dunham, conveyed his share in 1896 to defendant. The plaintiff claims under a conveyance made to him in 1898 by Flora Haight, alleged to be the other child of Emma Dunham. The trial Judge held that the evidence of Flora Haight that she was a daughter of Emma Dunham, and half-sister to F. Sessions, was true and sufficiently corroborated, and that plaintiff was therefore entitled to a one-half interest in the land.

J. A. Robinson, St. Thomas, for defendant.

W. R. Riddell, K.C., and J. Cowan, Sarnia, for plaintiff.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) was delivered by

MOSS J.A.:— . . . I think the finding below is well supported by the evidence. . . . The appeal should be dismissed with costs.

JUNE 28TH, 1902.

C. A.

REX v. SCULLY.

Evidence—Malicious Prosecution—Record of Acquittal—Fiat of Attorney-General not Necessary—Mandamus—Clerk of Peace.

Appeal by Attorney-General for Ontario from order of a Divisional Court (2 O. L. R. 315) reversing order of FALCONBRIDGE, C.J., dismissing a motion for a prerogative writ of mandamus directed to the clerk of the peace for the county of Perth, commanding him to deliver to the applicant, the plaintiff in an action of Scully v. Peters, a record of the proceedings in the case of Regina v. Cornelius Scully, tried at the Court of General Sessions of the Peace

at the city of Stratford, and to make and deliver a certified copy of the indictment and indorsements or to produce the originals at the trial of the said action. One Louis Peters laid an information against the said Cornelius Scully for stealing 41 saw logs, the property of said Peters. Scully was indicted and tried at the Sessions, and the presiding Judge indorsed the indictment: "Withdraw the case from the jury —no case—discharge the prisoner." Scully then commenced his action for malicious prosecution, and desires the indictment as indorsed or a certified copy for use at the trial.

J. R. Cartwright, K.C., and Frank Ford, for Attorney-General for Ontario.

F. Arnoldi, K.C., for defendant.

ARMOUR, C.J.—(after reviewing the authorities):—The rule that a person acquitted of felony shall not have a copy of the record of acquittal for the purpose of being used in an action for malicious prosecution without an order of the Court or the consent of the Attorney-General, has always been in force in this Province and was maintained in Regina v. Ivey, 24 C. P. 78, and in Hewitt v. Cane, 26 O. R. 133, and I do not think that it should now be abrogated by judicial decision, but that it should be left to the Legislature to do so if it sees fit. The necessity for the rule is, at present, at least as great as it ever was, and if abrogated some other safeguard against unfounded actions for malicious prosecution ought to be substituted for it.

OSLER, J.A.—(after reviewing the authorities):—It is foreign to the general principles of our law that the right of one subject to pursue a civil remedy against another shall depend upon the permission of an official of the Crown, of however exalted a character; for if he may refuse to allow him to procure the evidence without which his action cannot be successfully prosecuted, he does, in effect, refuse to allow him to maintain the action at all. A practice, moreover, which concedes the right to a copy of the record of acquittal on an indictment for a misdemeanour, but denies it except by permission of the Attorney-General in the case of an indictment for felony, is anomalous and wanting in principle. . . . The learned Attorney-General has informed the Court that he has communicated with the law officers of the Crown in England as to the state of the practice there on the subject. He appears to have the authority of the present and former Attorney-General for saying that the practice which was supposed to be established here by

Regina v. Ivey, 24 C. P. 78, and which is now insisted on by the appellant, is quite obsolete in England; that the Attorney-General's fiat is not deemed necessary; and that no obstacle whatever is placed in the plaintiff's way in obtaining the evidence of the termination of the proceedings against him. The practice of the Attorney-General holding, as it were, an inquiry as to the existence or absence of reasonable and probable cause is unheard of.

Moss, J.A.—(after reviewing the authorities):—Reading the cases, English and Canadian, touching the question, I do not find that any fixed rule has been settled by judicial authority. In the present state of the authorities, I think we are at liberty in this Court to place our own construction upon the 46 Edw. III., which is undoubtedly in force in this Province, and to say whether the exercise of the rights thereby conferred are subject to the restriction sought to be placed upon them where a record of acquittal in a case of felony is sought for the purpose of being used as evidence in an action for malicious prosecution. In view of the many opinions which have been expressed, I venture mine with diffidence. On the whole, my conclusion is in favour of upholding the judgment appealed from.

I am not able to place upon the comprehensive language of the 46 Edw. III. the restricted meaning which has been contended for. It appears to me to apply to all judicial records, as well criminal as civil, and to give the subject access to them for his necessary use and benefit, which was, and is, the law of England. To my mind the declaration of Willes, C.J., in Rex v. Brangan, 1 Leach 27, that by the laws of the realm every prisoner upon his acquittal had an undoubted right to a copy of record of such acquittal, is a plain declaration of the meaning of the ancient statute.

I venture to think that the practice of requiring a fiat is not in accord with the true spirit and meaning of the law as declared in the statute; is not even supported by the Old Bailey Order, which, as before pointed out, did not extend the restriction beyond the time when the Court was actually in session, and is not adapted to modern conditions. The law gives a right of action for malicious prosecution, and if it is desirable to place restrictions upon the general right of a person who has been acquitted of a criminal charge to maintain such an action, the Legislature can so declare. In it resides the power to provide safeguards against frivolous or vexatious actions, if any safeguards are deemed necessary. Possibly if the trial of such actions were committed to Judges alone, no further safeguard would be required.

I would affirm the order appealed from.

MACLENNAN and GARROW, JJ.A., concurred with OSLER and MOSS, JJ.A.

Appeal dismissed with costs.

MACMAHON, J. JUNE 27TH, 1902.

TRIAL.

LANZ v. McALLISTER.

Patent—Infringement—Apple Syrup—Novelty—Onus of Proof.

Action against defendant for alleged infringement of plaintiff's patented process for manufacturing apple syrup.

J. P. Mabee, K.C., and A. G. Campbell, Harriston, for plaintiff.

E. E. A. DuVernet and E. P. Clement, Berlin, for defendant.

MACMAHON, J.—Bicarbonate of soda was used by a Mr. Snyder in 1888 (four years prior to the issue of the plaintiff's patent) in a public manner in the making of apple syrup when Taylor, Gideon Brake, and Noel Marshall were present. And other cider mills in the vicinity of Snyder's were making apple syrup before 1892, for in that year Snyder's customers told him that the other mills were making it and asked him to make the syrup.

This is a patent for "the certain process for manufacturing apple syrup," and the action is for the infringement by the defendant in manufacturing apple syrup by the process and invention of the plaintiff, so that, even if the process were patentable, the onus was on the plaintiff to shew that the articles manufactured in infringement had in fact been so made: Frost's Law of Patents, 2nd ed., p. 580; Palmer v. Wagstaff, 8 Ex. 840, 9 Ex. 494. The defendant in manufacturing syrup omitted many of what are called the requirements in the specification, e.g., after heating the cider in the evaporator he did not run it off into a vat and let it cool off, nor did he put it in a copper kettle and heat over fire again until it came to the heat specified.

There was absolutely no novelty in the so-called process for which the plaintiff obtained a patent.

The action will be dismissed with costs.

FALCONBRIDGE, C.J. JUNE 28TH, 1902.

WEEKLY COURT.

MERRITT v. NISSEN.

Costs—Receiver—Partnership—Advance by Partner—Priority.

Motion by plaintiff for judgment on further directions in a partnership action.

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

J. W. McCullough, for defendant.

H. T. Beck, for receiver.

FALCONBRIDGE, C.J., gave judgment discharging receiver and directing payment by plaintiff and defendant of receiver's allowance (as fixed by the Master) and his solicitor's fees and disbursements for issuing and filing report and of this motion; the amount advanced by plaintiff under the terms of the partnership articles to be paid out of the assets in priority to the costs of the action; after satisfaction of receiver's claim as above, plaintiff to apply balance of purchase money on his own claim, and he is not directed to pay the money into Court; no order, except as above, as to costs of this motion.

BRITTON, J. JUNE 28TH, 1902.

CHAMBERS.

BANK OF HAMILTON v. HURD.

Partition—Tenant by the Curtesy—Mortgagees—Judgment Creditor of Owner of Undivided One-Fourth Interest.

Motion under Rule 956 for partition or sale of certain lands in the village of Burlington and township of Nelson. The land was owned by Ophelia E. Hurd, who died intestate in September, 1881, leaving her husband and five children. Since the death of the mother, one of the children has died intestate and unmarried. Of the four remaining children, three have conveyed their interests to their father, so that he is now tenant by curtesy of the whole and the owner of three undivided fourth parts in the remainder. The remaining son, H. S. Hurd, procured his father to become surety for him and gave him a mortgage as security. The Bank of Hamilton were the son's creditors and held this mortgage, which they sold and assigned to one Lashing, and Lashing is now the mortgagee. H. S. Hurd owed

the Bank of Hamilton a further sum, for which they obtained judgment against him, and afterwards a mortgage from him for whatever interest he had in this property. The Bank of Hamilton and H. S. Hurd together now ask for partition against the father. Lashing objects to the partition.

H. L. Drayton, for plaintiffs.

W. T. Evans, Hamilton, for defendants.

BRITTON, J., held that, under the circumstances, the order for partition should not be made.

Motion dismissed with costs.

STREET, J. JUNE 27TH, 1902.

TRIAL.

DOHERTY v. MILLERS AND MANUFACTURERS INS. CO.

Fire Insurance—Non-Payment of Premium—Re-insurance.

Action tried at Goderich, without a jury. Action to recover $24,523.75 in respect of damage done by fire to the plaintiffs' property at Clinton. The property was insured by two policies issued by defendants, but the premiums had not been paid, although the defendants had re-insured their risk.

W. Proudfoot, Goderich, for plaintiffs.

W. Barwick, K.C., for defendants.

STREET, J., held that no contract existed between the plaintiffs and defendants for an insurance for the year beginning 31st October, 1901.

Action dismissed with costs.

FALCONBRIDGE, C.J. JUNE 11TH, 1902.

CHAMBERS.

LONDON LIFE INSURANCE CO. v. MOLSONS BANK.

Discovery—Production—Privilege—Information and Documents Obtained Prior to Action, but Not in View of It.

Appeal by plaintiffs from order of local Judge at London directing plaintiffs' manager to attend, at his own

expense, for further examination for discovery, and to produce documents and answer questions for which he claimed privilege on his former examination, on the ground that such information and the documents relating thereto were obtained after consultation with and upon the advice of plaintiffs' solicitors, with a view to the litigation which has since arisen between the parties. The local Judge held that there being no litigation actually pending, or even threatened, when such information and documents were obtained, the same were not privileged.

J. H. Moss, for plaintiffs.

I. F. Hellmuth, for defendants.

FALCONBRIDGE, C.J., held that there was privilege, following the principles laid down in Wheeler v. Le Marchant, 17 Ch. D., 675; Minet v. Morgan, L. R. 8 Ch. 361; and Loudon v. Blackney, 23 Q. B. D. 332.

Appeal allowed. Costs in cause to plaintiffs.

E. L. Jeffery, London, solicitor for plaintiffs.

Ivey & Dromgole, London, solicitors for defendants.