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COURT OF APPEAL.

NOVEMBER 20TH, 1911.

*FARQUHARSON v. BARNARD ARGUE ROTH STEARNS OIL AND GAS CO.

Deed—Conveyance of Land in Fee Simple—Exception or Reservation—Construction—"Mines of Minerals"—"Springs of Oil"—Rock or Coal Oil—Natural Gas—Powers of Canada Company—Mining Powers—License—Right of Entry—Statutes of Limitations—Evidence—Trespass.

Appeal by the defendants from the judgment of BOYD, C., 22 O.L.R. 319, 2 O.W.N. 276, in so far as it was against the defendants.

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

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

Matthew Wilson, K.C., and J. F. Edgar, for the other defendants.

C. H. Ritchie, K.C., Thomas Scullard, and A. M. Stewart, for the plaintiff.

MOSS, C.J.O.:—This action was brought and is being maintained to establish and enforce against the defendants the property rights of Alexander Farquharson, who was in his lifetime owner of a certain lot of land described as lot number 6 in the 8th concession of the township of Tilbury East, in the county of Kent. The claim was and is, that the defendants were trespassing upon the lot in question; sinking wells and mining shafts, erecting derricks, and taking away oil and natural gas; and an injunction and damages were sought.

*To be reported in the Ontario Law Reports.

The defendants, in justification of their acts, pleaded the terms of a reservation or exception contained in the conveyance by the defendants the Canada Company of the lot in question to one Charles Farquharson, through whom the plaintiff's title is derived.

The action was tried before the learned Chancellor of Ontario, who determined that the defendants were not entitled to take and carry away the natural gas products upon or under the land in question, but were entitled to the oil products.

The appeal is by the defendants from so much of the judgment as negatives their asserted rights in respect of natural gas.

The plaintiff has not appealed. All question with regard to the defendants' rights in respect of the oil products is, therefore, eliminated. The sole question now is, whether they have been properly denied the rights claimed by them in respect of natural gas.

The learned Chancellor has in his judgment stated the facts and summarised the testimony so fully, and, I venture to say, accurately, as to render unnecessary any further statement of them.

The question is an important one, inasmuch as it affects the rights not only of the immediate parties to this action, but, we were told, of a number of other persons who held lands under conveyances from the Canada Company similar to that under which the plaintiff claims.

In my judgment, the decision appealed from is correct. I am so thoroughly in accord with it and the grounds stated by the learned Chancellor that I do not think it would serve any good purpose to add many observations of my own to what has been said in support of his conclusions. But I desire to refer shortly to one or two of the contentions set up by the defendants. One of them is, that under the conveyance the parties took nothing more than a grant of surface rights. Reference to the instrument shews that neither does it purport to be, nor do the words of grant confine it to, a mere grant of that nature. There is an express grant and release to the grantee of the whole parcel of land, and all the right, title, and interest of the Canada Company to and in the same and every part thereof. Then follow the words of reservation, except for which no question could arise as to the possession by the grantee of an absolute title in fee simple to the land and every part thereof.

It is quite plain, as all the surrounding circumstances tend to shew, that there never was an intention on the part of the

Canada Company to confine the grant to surface rights, nor any intention or desire on the part of the grantee to pay for or accept such a limited title—one so entirely opposed to the spirit and genius of the prevailing system of tenure and proprietorship of land in the Province.

Throughout the correspondence with the solicitors and the principal officers of the company in London, there was no suggestion of anything but a reservation of definite rights or interests. The intention was, that the grantee should be the purchaser and holder of the fee, and that, if deemed advisable, certain defined rights should be reserved to the grantors. The defendants must rely upon the words of reservation for their rights, for only to the extent of the proper meaning to be attached to them is the absolute grant of the title to the land to be deemed to be derogated from.

Another contention is, that the words of reservation, according to their true meaning and significance, include natural gas. The reservation is to be construed according to the ordinary rules, there being nothing in the context or the circumstances to give occasion for the application of any unusual or exceptional reading. No reason appears for extending the meaning of the language used beyond its fair and ordinary sense.

It seems somewhat singular that, if there was any intention to include natural gas among the reservations, some more apt words were not employed. If, as has been suggested, natural gas was then a substance unknown, or not known or regarded as one having a commercial value, the reason for not referring to it is plain. If, on the other hand, it was known, the deliberate omission to specify it by the use of apt words, or of some words resembling those used with regard to oil, leads to the conclusion that it was not intended to include it in the reservation. It can scarcely be conceived that, if it was intended to include it in the reservation, it would have been left to be covered by the general words upon which the argument is now hung.

Giving to these words the interpretation I think they should receive in the light of the evidence, I am unable to conclude that, occurring as they do in the conveyance in question, they included or were meant to include natural gas.

I think the appeal fails and should be dismissed.

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

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

MEREDITH, J.A., dissented, for reasons stated in writing.

NOVEMBER 20TH, 1911.

DEAN v. CORBY DISTILLERY CO.

Contract—Housing and Feeding of Cattle—Breach—Damages—Loss of Weight—Payments—Account.

Appeal by the defendants from the judgment of BOYD, C., 2 O.W.N. 832.

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

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

I. F. Hellmuth, K.C., and D. Urquhart, for the plaintiff.

MOSS, C.J.O.:—Appeal by the defendants from a judgment of the Chancellor, after trial without a jury, awarding payment to the plaintiff of the sum of $666.05, and directing a reference to the Master to ascertain and state what damages the plaintiff was entitled to over and above the sum of $666.05, and dismissing a counterclaim of the defendants.

The learned Chancellor, upon the evidence before him, found that the plaintiff was entitled to $7,500 as damages, in addition to the $666.05, but stated that, if either party was dissatisfied with the amount, he was to be at liberty to elect to take a reference. The defendants accordingly elected to take a reference; but, upon the argument of the appeal, both parties expressed themselves as willing and desirous that this Court should, upon the evidence as set forth in the case, ascertain and fix the amount of damages (if any), instead of leaving it to the Master.

The sole question, therefore, is as to what, if any, damages the plaintiff is entitled to recover from the defendants.

The defendants entered into an agreement with the plaintiff, evidenced by two instruments in the form of leases, purporting to be made in pursuance of the Act respecting Short Forms of Leases, for the housing and accommodation of and the supply of a specified quality and quantity of distillery slop to cattle belonging to the plaintiff; to the number of 1,200, for a period (called "the season") commencing on the 15th November, 1906, and terminating on the 30th June, 1907. For this service the defendants were to be paid the sum of $20,400, or $2,914.28 for each of the seven months; but, for convenience, it was agreed to be paid in eight equal instalments, amounting to

$2,550 each, payable in advance on the 15th days of November and December, 1906, January, February, March, April, and May, 1907, and the 1st day of June, 1907.

The plaintiff shipped cattle to the defendants' premises, commencing in November, and the whole number were in place on or about the 17th December, 1906. The defendants, however, were unable to supply any slop whatever during the first portion of the season, between the 15th November and the 1st December; and, by mutual arrangement, all claims against the defendants in respect of this period were adjusted and settled; and no question arises in regard to them.

But the failure to supply slop continued until about the 15th December, when it began to be supplied in small quantities, increasing more or less daily until about the 21st February, 1907, after which there was a supply in accordance with the terms of the agreement until the 12th May, 1907, when the defendants' distillery premises were destroyed by fire. The plaintiff then shipped his cattle to England, after selling a few in Montreal, and they were sold in England.

The plaintiff's claim is, that, in consequence of the failure to supply slop in accordance with the agreement, he had to provide hay and other feed in extra quantities; and, further, that the cattle did not derive the benefit in improved condition and increased weight that they would have done if a full supply of slop had been furnished.

The defendants, while not disputing that there was a breach of the contract, contend that the plaintiff has shewn no ground for recovering damages, and that in any case the sum of $7,500 assessed by the learned Chancellor was excessive. The plaintiff, on the other hand, while willing, for the sake of ending the matter, to accept the Chancellor's award, contends that, if the matter is to be dealt with at large, the award should be increased. According to the arrangement between the parties, the whole question is now open, both as to liability and amount.

Upon the evidence, there can be no doubt that the cattle suffered greatly in condition and weight from the lack of supply of slop in sufficient quantities during the months of December, January, and February; and there appears to be no reasonable ground for questioning the learned Chancellor's conclusion that the failure to supply the amount of slop engaged to be furnished resulted in direct damage to the plaintiff in the deterioration of the cattle in weight and saleable value. The fact that the cattle sold well, and the plaintiff emerged from the whole transaction

with a profit, cannot avail the defendants. Fortunately for the plaintiff, the cattle reached the market at a favourable time, and when good prices were ranging; but it seems very clear that, if they had been in the condition and of the weight they should have shewn, the plaintiff would have realised a considerable sum beyond that which he netted. His loss in this respect was the direct consequence of the defendants' breach of contract, for which compensation should be made.

The next step is to ascertain the basis and amount of the compensation. The plaintiff should be allowed for any excess of outlay for hay or other feed occasioned by the want or insufficiency of supply of slop. He should also be allowed for the deficiency in condition and weight, at such fair market-price as was obtainable at the time, less the payments to be made under the agreement up to the date of the fire. As he is claiming to be placed in the same position as respects the condition and weight of the cattle as if the defendants had supplied the slop, so he must place the defendants in the same position as regards payment.

An examination of the accounts rendered by the defendants to the plaintiff shews that the latter did pay the rental at the stipulated figure of $2,550 per month in advance up to the 15th May, 1907, i.e., for a period of three days beyond the date of the fire. The rental or monthly payment was to be made in advance. The defendants were in the habit of paying wages and for hay purchased for the plaintiff, and in other ways making advances on his account, and they appear to have rendered semi-monthly accounts or statements, and made drafts upon the plaintiff monthly for the amounts shewn at the foot, which were met by the plaintiff.

Among the items in the statement rendered to the 15th April, 1907, is that of "rental to May 15th, $2,550," the total amount of the statement being $4,421.12. The draft for this sum was paid by the plaintiff . . . thus covering the payments for the full supply of slop at the rate of $2,550 per month up to the date when the occurrence of the fire ended the supply. This left nothing remaining but to ascertain the amount of the difference between the $2,914.28 due per month and the $2,550 paid per month, and the deficiency in weight and the price per pound and the additional outlay (if any) in respect of hay and other feed. But at the trial the matter was complicated and confusion created by the production of a statement rendered to the plaintiff by the defendants in April or May, 1908, a year or so after the fire.

In this statement, the defendants set forth items of payment and outlay on account of the plaintiff, aggregating $1,613.55, and it is admitted that these items are correct. But in the same statement the defendants credit the plaintiff with $2,279.60 value of shortage in supply of slops, and strike a balance purporting to shew the defendants indebted to the plaintiff in the sum of $666.05. And, if there had been no claim by the plaintiff for damages, this might have been adopted as a rough and ready adjustment of accounts between the parties. Or, if the plaintiff had accepted the allowance of $2,279.60 and the dropping of all claim for the difference between $2,914.28 and $2,550 per month, as a settlement of his claim for damages, the same result would have been achieved.

But, in dealing at the trial with the plaintiff's claim for damages, the learned Chancellor treated this statement as entitling the plaintiff to the balance of $666.05, as well as to his full claim for damages. It is plain, however, that the plaintiff was not entitled, under the circumstances, to the credit of $2,279.60, and this sum should have been stricken from the account, leaving the plaintiff indebted on this account to the defendants in the sum of $1,613.55, as well as for the difference of amounts due for rental, and the assessment of damages should have been proceeded with upon that footing.

Then as to the amount of damages. An examination of the defendants' accounts rendered to the plaintiff and the plaintiff's own records, shew that the plaintiff was put to a considerable additional outlay for fodder in consequence of the failure of the slop supply; and, on the defendants' own shewing in this respect, as disclosed by an analysis of their accounts, the amount so expended exceeded what would have been necessary if the contract had been carried out.

The testimony as to the fattening and weight-producing qualities of the slop and the rate of increase per month or during the season discloses a very considerable variance of opinion. It is admitted apparently that the average gain or increase in weight of the plaintiff's cattle up to the time of the fire was about 69 lbs. per head. There is evidence tending to shew that it should have been as much as 250 lbs. per head, while others place it at considerably less. The plaintiff estimates 215 lbs., and, deducting 69 lbs., the actual increase therefrom, he makes claim for 146 lbs. per head. There seems to be very little, if any, dispute as to the price, viz., 5½ cents per lb. It is of course impossible to estimate the exact amount of the shortage;

but, making every fair allowance, an average of 130 lbs. per head would seem to be fair and reasonable. Upon the footing thus indicated, the sum of $8,875 for shortage in weight and allowances for other outlays for fodder appears to be a fair sum by way of compensation.

Against this sum, however, is to be set the difference between what was due in respect of payments up to the 15th May in respect of rental under the agreements, and the amounts actually paid.

After making all proper deductions and allowances this difference comes to $1,612.14, and adding thereto the sum of $1,613.55 the total is $3,225.69.

The result then is as follows:

Damages found against the defendants.....	$8,875.00
Amount payable to defendants on the accounts..	3,225.69
Balance in plaintiff's favour.....	$5,649.31

And for this sum judgment should be entered for the plaintiff with costs of the action. There should be no costs of the counterclaim. As to the costs of the appeal, while the defendants have obtained a reduction of the total amount which the Chancellor indicated would be his finding in the event of a reference not being taken by either party, they have not succeeded in reducing the quantum of damages actually found. The result now arrived at is upon the whole matter, as upon a reference, both as to accounts and as to damages. Upon this success is divided. There will be no costs of the appeal to either party.

The other members of the Court reached the same conclusion; MEREDITH, J.A., giving reasons in writing.

NOVEMBER 20TH, 1911.

EWING v. TORONTO R.W. CO.

Street Railways—Injury to Child on Track—Negligence—Evidence—Judge's Charge—Findings of Jury—New Trial.

Appeal by the defendants from the judgment at the trial, before MULOCK, C.J.Ex.D., and a jury, in favour of the plaintiffs.

The action was brought by Arthur Ewing, an infant, by his father and next friend, Richard G. Ewing, and the said Richard G. Ewing, as plaintiffs, to recover damages for injuries sustained in consequence of the infant plaintiff coming into contact with an electric car in use upon the defendants' railway.

The acts of negligence alleged in the statement of claim were: driving the car recklessly and at excessive speed; lack of proper control and of proper precautions (no particulars); speed not slackened; and no warning of approach.

The jury, in answer to questions, found the defendants guilty of negligence, consisting in the motorman failing to observe the child in time to stop the car; no contributory negligence; and assessed the damages at $2,500—$2,000 to the infant and $500 to the father.

At the time of the accident, the car was proceeding westerly along Arthur street, about 11 a.m. of the 14th November, 1908. The width of the street from kerb to kerb was 40 feet. There were two rail tracks which occupied 14 feet of the centre, leaving from each kerb to the nearest rail about 13 feet.

The adult plaintiff resided on the south side of Arthur street, about 150 feet west of Shaw street, which crosses Arthur street, and from his house the child had escaped and gone upon the street. The child's age was two years and seven months.

The only eye-witness to the accident called by the plaintiffs was Mrs. Mary Hare, who said she was returning from the market and was a passenger on the car in question, which she left by the front exit, at the east side of Shaw street; and, when she alighted, she saw the child on the south side of the tracks. She was asked: "Q. And which way was the child going? A. well, it looked to me as if it was crossing the street . . . to the north side of the street. Q. Then what happened? A. Well, of course, the car started on full speed. Q. It went full speed you say? A. Yes. Q. The car started at full speed, and what happened? A. Well, the next thing I seen, the car was over the child, before I got over to the corner of the street." She further said that she did not hear the gong sounded, and she knew of no reason why the motorman should not have seen the child.

For the defence several witnesses were called, who said that the car was going at a moderate speed and that the gong was sounded and the brakes applied. Some of them said that the child ran into the car.

The appeal was heard by Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A.

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

A. B. Armstrong, for the plaintiff.

Garrow, J.A. (after setting out the facts at length):—In the charge, the learned Chief Justice seemed to regard the evidence as conflicting, and from that point of view addressed the jury, pointing out that Mrs. Hare said certain things which were in conflict with certain other things said by the witnesses for the defence. I am, with deference, unable to see any material conflict, if due allowance is made, as I think should be made, for the different points of view of the several witnesses. . . . The jury, in effect, negatived the several allegations of negligence contained in the statement of claim, unless the finding of the motorman's failure to observe the child in time may be said to fall within one of them. Why they should have assumed so readily that the motorman did not observe the child, is not apparent. He unfortunately had died before the trial; and we, therefore, have no means of knowing directly whether he did actually see the child or not. But, so far as the evidence which we have goes, there is no reason to suppose that he did not see it as soon as Mrs. Hare and the others did. And the real question is: Wherein did he fail, if he did fail, to take such reasonable care as the circumstances demanded, after he saw or should be assumed to have seen the child? He sounded the gong after leaving Shaw street. The car was proceeding slowly. He was able to bring it to a stop within a few feet. As to these the evidence is perfectly clear and not in conflict. What more should he have done? Should he have brought the car to a standstill and waited to see what the child would do, whether it would advance or retreat, or be perhaps rescued by its mother, who was in the house near-by? Or should he have left his car for a moment and removed the child entirely from the street, for it was in almost as much danger while on the south track, along which a car might be expected at any moment, as from the car then on the north track.

The motorman had to consider, not merely the call of humanity in the shape of this little wandering, aimless child, but his duty to his employers and to the passengers; and the circumstances demanded an immediate conclusion one way or the other. Was it on his part, under all these circumstances, an act of negligence, or from which negligence can be reasonably

inferred, to proceed in the manner and at the speed which the evidence discloses? Or would a more reasonable man, in the circumstances, have seen that to do so was dangerous, and that the only safe course was to keep the car back until the child was put out of the way?

The defendants' counsel does not appear to have moved for a nonsuit, nor did he even object to the charge, so far as the record before us shews. The defendants now ask that the action should be dismissed, because there is no evidence to support the finding of the motorman's failure to observe the child; and, in strictness, I think . . . that that is so. But the criticism is verbal rather than substantial, for the finding, in the light of the evidence and the charge, may not unreasonbaly be read as a finding that the motorman should have stopped the car, under the circumstances, in time to have avoided the accident.

The utmost relief which this Court can or should, in my opinion, grant, would be, in the exercise of our discretion, to direct a new trial, to which I agree, chiefly on the ground . . . that there seems to be no substantial conflict between the evidence given on behalf of the plaintiff and of the defendants; and, therefore, in a case where the line is so finely drawn, a verdict based upon the theory that there is, is not satisfactory, especially where, as here, the damages, if not excessive, are at least very substantial.

I would, therefore, allow the appeal and direct a new trial if the defendants so desire; election to be made within thirty days; the costs of the last trial and of the appeal to be costs in the cause to the successful party. If the defendants do not so elect, the appeal will be dismissed with costs.

MEREDITH, J.A., for reasons stated in writing, agreed that there should be a new trial, on the ground that the verdict was against the weight of evidence.

MAGEE, J.A., also wrote an opinion, in which he discussed the evidence, and agreed that there should be a new trial, for the reasons stated by GARROW, J.A.

MOSS, C.J.O., and MACLAREN, J.A., concurred.

New trial ordered.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. NOVEMBER 16TH, 1911.

SECURITIES DEVELOPMENT CORPORATION OF NEW YORK v. BRETHOUR.

Company—Unlicensed Foreign Company — Contract to Sell Land—Action for Purchase-money—Carrying on Business in Ontario—Extra-Provincial Corporations Licensing Act.

An appeal by the defendant from the judgment of the First Division Court in the County of Carleton, of the 18th September, 1911.

The plaint was by a company incorporated under the laws of the State of New York to buy and sell real estate, for $195.35 and interest, on eight separate agreements signed by the defendant, in form somewhat like promissory notes, to pay $24 under each to William A. Hall or order, and by him indorsed to the plaintiffs. The defendant resided in Ottawa, Ontario; and in August of 1910, one Schwortz, an agent of the plaintiffs, came to Ottawa, and sold certain lots in Bellhaven Manor, New York State, to the defendant, who signed an agreement to purchase, made a small cash payment, and signed the eight separate agreements sued on, for the balance of the purchase-price.

It also appeared in evidence, and the trial Judge so found, that Schwortz took agreements from several other customers in the locality of Ottawa.

The defence was, that the plaintiffs, not being licensed to do business in Ontario, could not maintain the action because of the provisions of secs. 6 and 14 of the Extra-Provincial Corporations Licensing Act, 63 Vict. ch. 24(O.)

The Junior Judge of the County Court of Carleton, who tried the plaint, gave judgment for the plaintiffs, saying that he could not find that the plaintiffs carried on any business in Ontario, unless the soliciting of the defendant by Schwortz was "carrying on business" by the plaintiffs, and he did not think it was. He was of the opinion that the contracts, agreements, or notes, were not "contracts made in whole or in part within Ontario in the course of or in connection with business carried on contrary to the provisions of sec. 6," within the words of sec. 14.

The defendant appealed, on the ground that the Judge had erred in his interpretation of the statute.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.

W. J. Boland, for the defendant.

R. C. H. Cassels, for the plaintiffs.

THE COURT dismissed the appeal with costs, holding that the Act 63 Vict. ch. 24 did not apply, as the dealings in question were not "carrying on business" within Ontario, within the meaning of the Act.

TEETZEL, J. NOVEMBER 17TH, 1911.

*De STRUVE v. McGUIRE.

Intoxicating Liquors—Excessive Drinking in Licensed Hotel—Death from Exposure to Cold—Action by Administrator for Damages—Liability of Owner of Hotel and Bar-tender—Wrongdoers—Insurers—Liquor License Act, sec. 122—Proximate Cause of Death—"Caused by such Intoxication."

Action by the administrator of the estate of John Pundzius, deceased, against one McGuire, the proprietor of a licensed hotel at Thessalon, and one Coggin, his bar-tender, under sec. 122 of the Liquor License Act, R.S.O. 1897 ch. 245, to recover damages for the death of Pundzius while (as the plaintiff alleged) in a state of intoxication from drink furnished to him by the defendant Coggin, in the defendant McGuire's hotel, Pundzius having perished from cold on the way home.

On the morning of the 24th December, 1910, the deceased and two companions, all foreigners, employed in a lumber camp about twelve miles from Thessalon, walked into that town and arrived at the defendant McGuire's hotel about ten o'clock. They took several drinks before dinner and more after. The two companions took dinner, but the deceased did not. When they started for home, they were all intoxicated from the liquor furnished them by the defendant Coggin and drunk by them in the hotel. They wanted more liquor over the bar, but Coggin thought they were already too drunk to be furnished with more liquor in that way. Just before leaving for home, at about two p.m., they purchased from one Roach, another bar-tender in

*To be reported in the Ontario Law Reports.

the employ of the defendant McGuire, five quart bottles of brandy and two of gin, which they carried away in a bag. The day was extremely cold.

The three men not having returned to camp, a search party was sent out at about ten o'clock at night, and one of them was found about a mile and a half from the camp, very drunk; another, about two miles further on, lying in the snow; and the deceased, about half way between the camp and Thessalon, lying on his back in the snow. He was taken directly to the camp, and died in a few minutes after arrival there. A medical man who saw the body shortly after death was of opinion that the deceased had perished from cold.

N. H. Peterson, for the plaintiff.

T. E. Williams, K.C., and J. L. O'Flynn, for the defendants.

TEETZEL, J. (after setting out the facts):—The evidence as to when the three men, on the way home, took further drinks from the bottles is not very satisfactory; but I think the fair inference is, that they did not do so for a considerable time after they started. . . . There is no satisfactory evidence to enable me to find that at any time after the deceased left the defendant's hotel he had ceased to be intoxicated from the excessive drinking in the defendant McGuire's hotel. The most I can say is, that in all probability the extent of his intoxication had materially diminished, owing to fresh air and exercise as he progressed homewards, and until he took his first drink from the bottle; but, in my opinion, he continued to be intoxicated from the excessive drinking in the defendant McGuire's hotel from the time he left it until his death, and that, in the words of the statute, it was "while in a state of intoxication from such drinking" that he came to his death by perishing from cold. . . .

What is the proper interpretation to be placed upon the words "perishing from cold or other accident caused by such intoxication?" . . .

[Reference to Trice v. Robinson, 16 O.R. 433.]

The statute gives a right of action . . . "as for personal wrong;" and, therefore, I think, the principles applicable to actions of that nature apply to an action under the statute.

In an action for a personal wrong, whether the wrong complained of is intentional or is the result of negligence, the liability of the defendant in damages depends upon whether his act was the proximate cause of the injury; and it is immaterial

whether the act of some other person conduced or contributed to the injury, or for that matter may have been the immediate cause of the injury. . . .

[Reference to Scott v. Shepherd, 2 W. Bl. 89, 1 Sm. L.C., 11th ed., p. 454.]

If I am right in applying this principle in this action, can it be properly held, upon the facts here, that the intoxication of the deceased caused by his drinking to excess in the hotel was the proximate cause of his death? . . . I am of opinion that the deceased never recovered from such intoxication, and that to the very end it continued to operate as a weakening and debilitating influence upon the mind and body of the deceased. . . .

The proper conclusion is, that the intoxication of the deceased from the drinks furnished to and drunk by him to excess in the defendant McGuire's hotel was, within the principle of Scott v. Shepherd, the proximate cause of the death. . . .

While sec. 122 declares the defendants "liable to an action as for personal wrong," upon certain facts being established, it may be fairly argued that the legal effect of the enactment is to impose upon the defendants liability as insurers of the life of a person intoxicated, under the circumstances therein stated, against the contingencies mentioned in it.

If this is a proper interpretation of the effect and purpose of the section, the fact of the condition of the deceased when he left the defendant McGuire's hotel being established as coming within the Act, the question of the defendants' liability depends upon whether the evidence leads to the conclusion that the deceased came to his death owing to causes insured against by and within the limitations and conditions specified in the section. . . .

Assuming the fact to be . . . that it was the act of the deceased in drinking to excess out of the bottles that was the immediate cause of his death, that was clearly an irrational and dangerous act committed by the deceased, which I would attribute to his impaired mental and physical condition caused by the original intoxication; and, therefore, within the words of the Act, the death was "caused by such intoxication."

In the result, therefore, whether the defendants are to be treated as wrongdoers or as insurers, I find upon the facts that they are liable; and I assess the sum to be recovered as $500, with costs on the High Court scale.

TEETZEL, J., IN CHAMBERS. NOVEMBER 18TH, 1911.

NATIONAL TRUST CO. v. TRUSTS AND GUARANTEE CO.

Pleading—Statement of Defence—Embarrassment—Res Judicata—Dilatory Pleas—Parties—Motion to Add Defendant—Opposition of Plaintiff.

Appeal by the defendants from an order of the Master in Chambers, ante 104, striking out paragraphs 7, 8, and 10 of the statement of defence and refusing to add the Imperial Plaster Company as a co-defendant.

W. Laidlaw, K.C., for the defendants.
R. C. H. Cassels, for the plaintiffs.

TEETZEL, J.:—The paragraphs of the statement of defence in question raise the same legal objections to the action which were considered and dealt with by the Court of Appeal (24 O.L.R. 286, 2 O.W.N. 1315) on an appeal from an order dismissing an application of the defendants to bar the claim of the plaintiffs under sec. 89 of the Winding-up Act and to set aside a certificate issued by the Official Referee in a winding-up proceeding, granting leave to issue the writ and to prosecute this action, and to set aside the writ and the service thereof.

The defendants' reasons of appeal raise the same legal objections to the right of the plaintiffs to maintain this action as are set forth in the three paragraphs of the defence in question.

Those objections are: that the provisions of sec. 133 of the Dominion Winding-up Act are a bar to the action, and that the plaintiffs' claim can be dealt with only in the winding-up proceedings.

While expressing a doubt whether the language of sec. 133 is applicable to the first part of the claim indorsed on the writ, the judgment of the Court of Appeal clearly and unequivocally disposes of the objections and the matters raised in the paragraphs in question adversely to the appellants.

The learned Master rests his judgment striking out the paragraphs on the ground that the questions raised by them having been passed upon by the Court of Appeal were res judicata, and therefore they were embarrassing, because they raised a defence which the defendants were not entitled to avail themselves of.

I can find no authority for holding that an adjudication upon undisputed facts in a judgment upon an interlocutory motion cannot be relied upon as res judicata between the par-

ties, where, as here, the contest upon the motion is the same question as is involved in the proposed defence.

The general rule upon motions of this character is, as declared by the learned Chancellor in Glass v. Grant, 12 P.R. 480, that "the Judge should be chary in setting aside defences on a summary application unless the pleading is so plainly frivolous or indefensible as to invite excision." See also Stratford Gas Co. v. Gordon, 14 P.R. 410, at p. 414; also Attorney-General for the Duchy of Lancaster v. London and North Western R.W. Co., [1892] 3 Ch. 274.

I think in this case the defence is indefensible and clearly invites excision, because by the judgment of the Court of Appeal the matter alleged furnishes no defence whatever to the claim.

Then as to adding the Imperial Plaster Company as a co-defendant. The plaintiffs seek no relief against that company; and, if the liquidator does not represent that company's interests by virtue of the Winding-up Act, those interests cannot be prejudiced in this action, and, as stated in Imperial Paper Mills of Canada v. McDonald, 7 O.W.R. 472: "There must be a very clear and a very strong case made, to induce the Court to introduce a new defendant against whom the plaintiff does not wish to proceed, and whose presence is not necessary to determine the matters involved in the action as constituted between the original parties."

I can at present see no necessity for adding that company as a co-defendant; but I think this judgment should be without prejudice to any application that may be made at the trial, if it should appear to the trial Judge that the proposed defendant is a necessary party to enable him to adjudicate upon the title to the money in question.

With this variation the judgment appealed from will be affirmed and the appeal dismissed, with costs in the cause to the plaintiffs.

BRITTON, J. NOVEMBER 20TH, 1911.

McKINLEY v. GRAHAM.

Limitation of Actions—Action to Enforce Charge on Land—Will—Legacy—Executors—Devisee — Trust — Devolution of Estates Act—Limitations Act.

Action by Ann Charlotte McKinley, daughter of Charles Harper, deceased, for administration of her father's estate, real and personal, and for a declaration that the legacies given by his will form a lien or charge upon the real estate, and for payment of the legacies by the defendants the executors, and, in default of payment, for a sale of the lands and payment out of the proceeds of sale.

The action was tried, without a jury, at Whitby.

L. T. Barclay, for the plaintiff.

H. L. Ebbels, for the defendants the executors.

H. C. Macdonald, for the defendant Charles Harper junior.

BRITTON, J.: . . . Charles Harper made his will on the 1st June, 1887, and died on the 2nd July, 1889.

So far as material . . . the disposition by will of the testator's property was as follows: to his wife, the use of the dwelling-house and ten acres of land, "embracing the orchard," for her life, all the household furniture and effects, and $300 a year to be paid to her by the executors during her life; to his daughter Agnes Campbell, $500; to his daughters Elizabeth Harper, Henrietta Harper, Ann Charlotte McKinley (the plaintiff), Mary Jane Earle, Margaret Harper, and Fanny Harper, each the sum of $1,000, to be paid to these legatees as soon as the executors conveniently could pay them, but in any case within five years after the death of the testator. The testator then devised to his son William Telfer Harper the west half of lot 5 in the 11th concession of Scugog, subject to the payment of $200 a year until all the legacies should be paid. The son Charles Harper (defendant), under the will, took the residue of the testator's real estate, consisting of lot 4 in the 11th concession of Scugog and that part of lot 4 in the 10th concession owned by the testator. The devise to Charles was made subject, as a first lien thereon, to the payment of the annuity of $300 to the testator's widow; and, in the event of the personal property not being sufficient to pay all the legacies to the testator's daughters, the unpaid balance was to be a second lien upon the

said lands until those legacies were fully paid. There was in the will a further residuary devise to the testator's wife, sons, and daughters; but there was no residuary estate over and above what was specially dealt with.

It was admitted that the personal estate was properly realised upon, and the proceeds, after paying the debts and funeral expenses of the testator, applied in payment of legacies, the plaintiff having herself received $400 on account of the $1,000 bequeathed to her; but part of the $400 was, as I understood the evidence, received from William.

On the 12th June, 1891, the executors, as executors, executed a conveyance to the defendant Charles Harper of the lands devised to him. After the conveyance, the executors allowed the defendant Charles to deal with his mother. The sisters did raise some question, and apparently all were settled with, except the plaintiff, by their accepting less than the amount mentioned in the will. In fact, there never was sufficient to pay all in full, after paying the annuity to the widow and giving her the use of the house and ten acres of land.

The widow died in 1907.

The executors acted under a solicitor's advice, and brought in their accounts and had them passed by the Judge of the Surrogate Court of the County of Ontario shortly prior to the 1st June, 1892. It was proved that there was a clear statement up to that date, and that the executors did not receive any money thereafter; or, if they did, by reason of a small outstanding account, such money was fully accounted for. . . .

The defendant Thomas Graham, one of the executors, pleads the Statute of Limitations; that he has fully administered; and submits his rights to the Court. John Harper, the other executor, does not defend. Charles Harper denies that there was any such express or implied trust as alleged by the plaintiff; and he pleads the Statute of Limitations.

The case which the plaintiff seeks to make is, that, as the testator died prior to the 4th March, 1891, all his real and personal estate, notwithstanding the disposition thereof by his will, devolved upon and became vested in the defendants the executors, upon an express trust to pay the debts and legacies; and the contention is, that in such a case the Statute of Limitations does not apply. The plaintiff relies upon R.S.O. 1897 ch. 133, sec. 30, sub-sec. 1.

The plaintiff's contention, in my opinion, is wrong. Speaking generally, as between executors of an estate and creditors,

whether creditors are such as legatees or creditors of the testator before his death, no express trust exists. . . .

[Reference to Cameron v. Campbell, 7 A.R. 361, and Thompson v. Eastwood, 2 App. Cas. 215, distinguished those cases.]

In this case no express trust was created by the will; and, they being executors with no money and with no land or assets of any kind in their possession, there cannot be said to be, by operation of law, an express trust in the executors merely because they are authorised, if they are so authorised by the Devolution of Estate Act, to deal with the lands.

I am dealing with this case solely upon the ground that there is no express trust, and so the defendants are entitled to succeed upon their plea by reason of R.S.O. 1897 ch. 133, secs. 23 and 24. This is an action to recover a legacy out of land, or a legacy charged upon land, and it was not brought until after the expiration of ten years. The testator died on the 2nd July, 1889. The legacy became payable at latest on the 2nd July, 1894. This action was not commenced until the 28th October, 1907.

This is not merely an action against the land now claimed by Charles Harper: it is more. No question has been raised as to how far Charles may have acquired title under the conveyance to him of the 12th June, 1891, or by possession. By the payment of the annuity to his mother until her death, which did not occur until 1907, he certainly paid a large amount. It did not appear at the trial what arrangement, if any, had been made with the son William Telfer Harper. The land of the testator devised to William was charged with $200 a year until all the legacies were paid. It was stated that William paid money each year for five years to the plaintiff on account of her legacy—that is, part of the $400 received by her. He then sold the land devised to him, for $3,200, and then he dropped out. He has not been made a party defendant; and none of the legatees other than the plaintiff are parties to the action. As stated, they probably have been settled with. The plaintiff, according to the correspondence, was looking only to the executors and to the defendant Charles. The plaintiff makes no complaint as to the personal estate. The executors have fully administered that, and there is nothing in their hands. The widow received the $300 a year during her life from Charles, and the executors accepted from Charles her receipts to him.

The action should be dismissed with costs of executors to be paid by the plaintiff and with costs of the defendant Charles Harper, brother of the plaintiff, if demanded by him.

DIVISIONAL COURT. NOVEMBER 20TH, 1911.

RE MYLES AND GRAND TRUNK R.W. CO.

Evidence—Appeal from Award under Railway Act—Examination of Arbitrator—Reasons for Award—Scope of Examination—Appellate Forum—Divisional Court—Agreement of Parties—Judicature Act, sec. 67 (1) (*f*).

Motion by the railway company for an order allowing them to take evidence by viva voce examination of one of the arbitrators for use upon the hearing of an appeal from the arbitrators' award. See ante 176.

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

Frank McCarthy, for the company.

W. G. Thurston, K.C., for the land-owner.

RIDDELL, J.:—A motion is pending to the Divisional Court by way of appeal from the award of arbitrators under the Railway Act. No objection is taken to the jurisdiction of the Court, notwithstanding Re Montreal and Ottawa R.W. Co. and Ogilvie, 18 P.R. 120; and I assume that the "parties agree to the same being heard by a Divisional Court:" Ontario Judicature Act, sec. 67 (1) (*f*). The proceedings originated in an order, consented to by all parties, that upon the arbitration, which was under the Railway Act, there should be only one appeal, and that should be to a Divisional Court.

Upon the appeal, the railway company desire to have evidence of one of the arbitrators taken; and the present is an application for an order for such evidence. No objection is taken to the jurisdiction of the Court.

Any such application must be made to the Divisional Court, as we have decided in Trethewey v. Trethewey, 10 O.W.R. 893, following Kendry v. Stratton, 10th June, 1893, not reported.

What the applicants desire is to examine one of the arbitrators "for the purpose of explaining the basis of the arbitrators' findings." The objection is taken that such evidence, even if taken, would not be admissible, and consequently should not be taken. And, if the non-admissibility were made out, the conclusion contended for must follow. This is concluded by the case of Rushton v. Grand Trunk R.W. Co., 6 O.L.R. 425.

But is the former contention well-founded?

We may disregard the cases of referring back to arbitration, of which Re Grand Trunk R.W. Co. and Petrie, 2 O.L.R. 284, is an example; and also those of setting aside an award altogether. Here the statute gives an appeal, not merely an application to the Court to remit for consideration. In such an appeal, the Court is not "to disregard the judgment of the arbitrators and the reasoning in support of it:" Atlantic and North West R.W. Co. v. Wood, [1895] A.C. 257, at p. 263: that is, not only the award itself is to be considered, but also the basis of it. An examination of the arbitrators was used and effectively used in Re Montreal and Ottawa R.W. Co. and Ogilvie, supra; and affidavits in Re Cavanagh and Canada Atlantic R.W. Co., 14 O.L.R. 523. These cases should be followed as to the admissibility of the evidence, if taken.

And where, as in the present case, there is a very large sum awarded, and no reasons whatever are supplied, it seems to me that the Court in appeal must be most materially benefitted by the arbitrator stating the grounds of the award.

We give no decision as to whether the arbitrator can be compelled to make such disclosures, as we are informed that he is willing to do so—nor as to the extent to which the examination should go. Probably all parties will agree that, as the "reasoning in support" of an award is to be considered, the result of the examination will be much the same as though the arbitrator was a trial Judge giving formal reasons for judgment. Indeed, procuring the basis of an award is much the same as a Judge, upon an appeal from the Master's report, asking the Master for his reasons, or the Divisional Court "seeing the trial Judge."

Nor do we decide as to the power of the Chief Commissioner to make the order for arbitration or limiting or giving appeal, as we proceed upon the hypothesis that the forum of appeal is agreed to by the parties.

Costs of motion and of examination to be in the appeal.

FALCONBRIDGE, C.J.:—I concur.

LATCHFORD, J.:—I agree that the arbitrator may be examined. It is unnecessary here to express an opinion as to the limitations proper to be observed in his examination. They are pointed out in Duke of Buccleuch v. Metropolitan Board of

Works, L.R. 5 Ex. 221, 234, L.R. 5 H.L. 418, 457; O'Rourke v. Commissioner for Railways, 15 App. Cas. 371; and In re Christie and Toronto Junction, 22 A.R. 21.

BRITTON, J. NOVEMBER 23RD, 1911.

SMITH v. EXCELSIOR LIFE INSURANCE CO.

Life Insurance—Policy—Condition—Assured Taking Employment on Railway—Knowledge of Agent of Insurance Company—Acceptance of Premiums by Company—Authority of Agent—Liability of Company.

Action upon a life insurance policy.

John R. Logan, for the plaintiffs.
H. E. Rose, K.C., for the defendants.

BRITTON, J.:—This action is brought by Jean Smith, the widow and the administratrix of the late Charles Francis Smith, and by Zillah Smith, his mother, to recover $1,000, being the amount of a policy issued by the defendants upon the life of Charles Francis Smith. The policy is dated the 16th May, 1898, and is a contract that, upon the payment of twenty annual premiums of $23.35 each, annually in advance, at the head office of the defendants, the defendants will pay to Zillah Smith, mother of Charles Francis Smith, $1,000, at the expiration of twenty years from the date of the policy.

This policy was subject to the statements in the application being true; and as to proof of the age of the assured and to other things not necessary to mention, as no point is raised in reference to them by the defendants in this action. The following was one of the terms of the policy printed on its face: "Receipts for premiums. No payment to any person except in exchange for a premium receipt, duly signed by the president, vice-president, or managing director, shall be binding upon the company, and all payments made to an agent of the company by the assured, or any one representing him, without receiving a premium receipt signed as above, shall be deemed to have been received by the said agent as agent for the assured, and not for the company."

Then, in addition to what is on the face of the policy, in the body of it, it is made subject to certain conditions and provisions

indorsed thereon. One of these, 5 (1), is, so far as material in this case, as follows. "If, within two years from the date of this contract, the assured, without a permit, engage in employment on a railway, this policy shall be void, and all payments thereon shall be forfeited to the company."

Mr. Smith was canvassed for this insurance by one A. B. Telfer. The application is dated the 6th May, 1898, is upon one of the blanks of the defendants, and is signed by Mr. Telfer as the soliciting agent. Mr. Telfer was in fact then agent of the defendants, under a contract dated the 25th March, 1898. The contract as between Telfer and the defendants was terminated on the 30th June, 1898.

The assured, C. F. Smith, did in fact, on or about the 25th September, 1899, enter the service of the Grand Trunk Railway Company as fireman. He continued in the employment of that railway company until his death, which occurred on the 20th July, 1911. At the time of his death, C. F. Smith was locomotive engineer, having been promoted to that position some years before. He was killed when upon duty. The defendants plead, in bar of the plaintiffs' right to receiver, that the assured, without a permit from the defendants, did, within two years from the date of the policy, engage in employment on a railway, and that, therefore, the policy became void.

The defendants admit that, notwithstanding the alleged forfeiture of the policy, the premiums were regularly paid; and, without admitting any liability, the defendants bring into Court the amount of the premiums so paid for the years 1900 to 1911, inclusive, with interest thereon, which amount the defendants ask the plaintiffs to accept in full satisfaction of their claim. The plaintiffs, in reply, allege that the defendants had notice of the employment of the insured upon a railway; and, after such notice, the defendants, without objection, continued to accept from Zillah Smith and retain the premiums paid by her for the purpose of keeping the policy alive, and that, by so doing, the defendants waived any right to claim a forfeiture of the policy.

The question is, how far the defendants are affected by notice to A. B. Telfer, their former agent.

It is not certain when Telfer first had notice of the assured accepting employment on the railway—probably soon after 1899—but he admits that he knew of it in 1908, and knew that in subsequent years the insured continued in such employment.

The position of A. B. Telfer and his relation to the defendants was apparently no different, so far as the insured or the

plaintiffs knew, from what it was when the insurance was affected. All premiums from first to last on this policy, whether paid by C. F. Smith or by the plaintiff Zillah Smith, were paid to Telfer. Receipts from Telfer for 1898, 1899, 1900, 1901, 1902, and later years, were produced. These receipts or many of them were signed by Telfer as agent for the defendants. In all cases the money was remitted to the defendants; and official receipts were procured and handed over to the insured or the plaintiff Zillah Smith.

The defendants treated, dealt with, and recognised Telfer as to this policy as their agent in collecting premiums, and was paid by the defendants therefor the usual commission to agents. The plaintiff Zillah Smith had no means of knowing and did not know what other business, if any, Telfer was engaged in. All the business as to this policy and payment of premiums thereon was transacted by her with Telfer as her agent. It is true that, in the absence of Telfer, one or more letters were written by Telfer's wife, but she acted for her husband and only for him, to accommodate the plaintiff Zillah Smith.

As late as the 17th June, 1911, Telfer received that year's premium, remitted to the defendants, and again was paid the agent's commission. If established that Telfer was the agent of the defendants in respect to collection of premiums, then the notice to him must be treated as notice to the defendants, and the defendants will be precluded from insisting on the forfeiture of the policy.

Wing v. Harvey, 5 DeG. M. & G. 265, seems expressly in point. In that case, a life policy was subject to a condition making it void if the assured went beyond the limits of Europe without a license. An assignee of the policy, on paying the premiums to a local agent of the assurance society, at the place where the assurance had been effected, informed him that the assured was resident in Canada. The agent stated that this would not avoid the policy, and received the premiums until the assured died; and it was held that the society were precluded from insisting on the forfeiture. Here the local agent at the place where the assurance was effected, after knowing that the deceased had engaged in employment on a railway, accepted the premiums. The defendants accepted the premiums; and these were regularly paid down to the time of the death of the assured. In the case cited, Lord Justice Knight Bruce said: "The directors taking the money were and are precluded from saying that they received it otherwise than for the purpose and in the faith for which and in which Mr. Wing expressly paid it."

This is not the case of the authority of an agent—collecting agent—to waive a forfeiture occasioned by breach of a condition. The forfeiture is waived by the defendants themselves, by their accepting premiums from year to year, after the occurrence of what they now rely on as permitting them to declare a forfeiture—premiums paid in good faith and received by the defendants without inquiry or objection. In 1900, the defendants increased their rates. Had C. F. Smith not been insured with the defendants until 1900, the annual premium would have been, as of twenty-one years of age, $27.70. That increase of rate could not affect this contract, made in 1898. The defendants in 1898 were not issuing policies upon railway employees; but they were in 1900 and ever since, upon the terms of an annual addition of $5 to the regular premium rate. The local agent did not, nor did the defendants, in any way notify the plaintiffs or C. F. Smith, or, so far as appears, any existing policy-holder, of any additional amount required for premium.

Upon all the facts, I do not think the cases cited by counsel for the defendants are in conflict with Wing v. Harvey. It cannot be said that the defendants intended to declare a forfeiture —when the time mentioned in the policy within which the assured could not take railway employment had expired. The most they could attempt to do would be to impose the additional charge of $5 a year.

Wing v. Harvey is discussed in Wells v. Independent Order of Foresters, 17 O.R. at p. 326.

The claim seems to me a just and equitable one; and I am glad to find that the defendants—notwithstanding their pleading —admit by the letter of their actuary, put in upon the trial, that, upon the basis of a premium of $23.35 plus $5=$28.35, the plaintiffs would be entitled to $823.65.

In any event, in my opinion, the plaintiffs are entitled to that sum.

I would be sorry to find that the law is such as to prevent recovery of the whole claim by the claimant who has regularly paid all premiums, sometimes at personal inconvenience—relying upon ultimately getting the amount of the policy. The formal proof of claim was admitted on the 16th August, 1911. The plaintiffs are entitled to recover $1,000, with interest at five per cent. per annum from the 16th August, 1911, with costs.

TOWN OF STURGEON FALLS v. IMPERIAL LAND CO.—LATCHFORD, J., IN CHAMBERS—NOV. 17.

Particulars—Statement of Defence—Lien for Taxes—Validity of Assessments.]—Appeal by the defendants from the order of the Master in Chambers, ante 216. LATCHFORD, J., dismissed the appeal; costs in the cause. H. W. Mickle, for the defendants. G. H. Kilmer, K.C., for the plaintiffs.

STAVERT v. BARTON—STAVERT v. MACDONALD—MASTER IN CHAMBERS—NOV. 21.

Parties—Substitution of Plaintiff—Transfer of Cause of Action—Order to Proceed—Motion to Set aside—Con. Rules 396, 398*—Validity of Transfer—Locus Standi of New Plaintiff—Pleading—Amendment.*]—In these two actions, on promissory notes, the plaintiff's solicitors, on the 26th October, took out orders under Con. Rule 396, alleging a transfer of the cause of action to a new sole plaintiff, and directing the actions to proceed with the alleged transferee as sole plaintiff. Two days later, notices of setting down the actions for trial were given. On the 4th November, a motion was made by the defendant in each case to set aside the order to proceed, as well as the notice of setting down, and also to stay the trial until after the decision in the similar case of Stavert v. McMillan, now standing before the Privy Council. Counsel for the defendants stated that the motion was made under Con. Rule 398. The Master said that, after consideration, he was not satisfied that that Rule had any application. The whole argument was, that it was not shewn that the cause of action had vested in the assignee of the original plaintiff. No case could be found of a similar motion. It rather appeared that Con. Rule 398 was passed primarily to enable parties wrongly and by mistake added as defendants to have the order rescinded—as, e.g., if they were wrongly alleged to be the personal representatives of a deceased defendant, and no probate or administration had been granted. Where, as in the present cases, there is a substitution of a new plaintiff, by the act of the original plaintiff, it is, in effect, the commencement of a new action, at least to this extent, that the defendant is entitled to amend his statement of defence, as there may be grounds tenable against the new plaintiff that were not available against his predecessor in the action. So, too, the defendant might deny (as here) that the cause of

action had been validly transferred to the assignee of the original plaintiff so as to entitle him to continue the proceedings, as was done in Shepley v. Hurd, 3 A.R. 549, and then the matter would be disposed of at the trial. What the defendants seek by the present motion is, to have it decided, on an interlocutory motion in Chambers, that the new plaintiff has no locus standi, which, if proved, would necessitate a dismissal of the actions and could only be done under Con. Rule 261. For these reasons, the Master thought that the only order to be made was, that the defendants should have eight days to amend their statements of defence as they might be advised and the plaintiff four days thereafter to reply. This would re-open the pleadings, and so invalidate the setting down—and it became unnecessary to consider the question of postponing the trial. Costs of the motion to be costs in the cause. G. H. Kilmer, K.C., for the defendants. F. R. MacKelcan, for the plaintiff.