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TEETZEL, J. JANUARY 9TH, 1905.

WEEKLY COURT.

RE POWELL AND LAKE SUPERIOR POWER CO.

Arbitration and Award—Misconduct of Arbitrator—Refusal to State Case — Reasonable Application — Proceeding to Execute Award notwithstanding Motion for Special Case—Remitting Award back — Non-compliance with Previous Order.

Motion by the company to set aside an award, upon the following grounds:—

(1) Misconduct on the part of the arbitrator in refusing on 15th July, 1904, upon a special application made to him, to state a special case for the opinion of the Court upon certain questions of law, and in proceeding with the reference after the service upon him of a notice of motion to the Court for an order calling upon him to state a case, and pending the motion making his further or amended award.

(2) Excess of authority on the part of the arbitrator in that by his award he vested in the company the chattels referred to and included in a document dated 5th January, 1901, as the owners thereof, and in presuming to control the ownership by vesting it in either party to the submission.

(3) Uncertainty in the award declaring that the company were the mortgagees under the said document, and were at the same time the owners of the property, and in not determining or stating why and in what manner the company became the owners of the property, or why and in what manner or for what reason the arbitrator assumed to vest the property in the company.

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

G. H. Watson, K.C., for Powell and Mitchell.

TEETZEL, J.—The agreement of reference provides that the arbitration shall be conducted under the provisions of

R. S. O. 1897 ch. 62. The original award was dated 9th December, 1903, and upon a motion to set it aside an order was made by Meredith, C.J., on 22nd June, 1904, remitting the award to the arbitrator "for the purpose of finding and making his award as to the ownership of the property which was included in the instrument of 5th January, 1901, and which entered into the figures which the arbitrator has set out in the award, and which form the amount found due from the company to Powell and Mitchell;" and directing such further award to be made on or before 1st August, 1904.

Pursuant to this order the arbitrator, on 16th July, 1904, amended and re-executed the award, the amendment being as follows: "3 (a). I further award and determine that the goods, chattels, and property referred to and included in the document dated 5th January, 1901, before mentioned, be hereby vested in the Lake Superior Power Company as the owner thereof."

On 15th July, 1904, counsel for the company, pursuant to notice and in presence of counsel for Powell and Mitchell, applied to the arbitrator to state in the form of a special case for the opinion of the Court certain questions of law which had arisen during the reference, but this the arbitrator refused to do, whereupon counsel for the company requested the arbitrator to delay making his award until the company could apply to the Court for a direction to him to state such case, but this the arbitrator also refused to do, and intimated that he would proceed on the following day to make his award.

On the following day, 16th July, counsel for the company again appeared before the arbitrator and served him with a copy of a notice of motion to the Court for a direction to state a case, and again requested the arbitrator to delay making his award till the application had been heard, and again the arbitrator refused to grant the delay, and proceeded to make and execute the amended award.

From the best consideration I have been able to give the material filed on this application, I am of opinion that the application made by the company to the arbitrator was bona fide and reasonable, and was not frivolous or made for the purpose of delay only, and that a reasonable time should have been given to enable the company to have their application to the Court for a direction to state a special case disposed of by the Court.

When the motion did come before the Court, it was dismissed, on the ground, as stated in the argument, that after an award is actually executed an order will not be made directing the arbitrator to state a special case.

Section 41 of R. S. O. 1897 ch. 62 provides that an arbitrator may at any stage of the proceedings under a reference, and shall if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference; but it appears to be well settled that if the arbitrator, when applied to, refuses to state a special case, and proceeds to execute his award, the Court will not, while the award stands, remit to the arbitrator to state his award in the form of a case: see Redman's Arbitrations and Awards, 4th ed., p. 255. His refusal to state a special case, however, may be a ground for setting the award aside: Re Palmer and Hosken, [1898] 1 Q. B. 131, 137. . . .

In my view of the facts of this case, the award should, on the authority of Re Palmer and Hosken, be remitted to the arbitrator for reconsideration under sec. 11 of R. S. O. 1897 ch. 62.

The agreement of reference contains the following clause: "And it is further agreed that if motion is made to set aside or otherwise respecting the award, the Court may, whether the award be insufficient in law or not, remit the award from time to time to the reconsideration and re-determination of the arbitrator."

I further think that the arbitrator did not comply with the terms of the order of 22nd June, 1904. That order required him to find and award as to the ownership of the property included in the instrument of 5th January, 1901; and, without determining whether he has the power to vest the property in one party or the other, I am of the opinion that he does not satisfy the terms of the order by awarding that the property "be hereby vested in the Lake Superior Power Company as the owner thereof;" and, for this additional reason, I think the award should be remitted to the arbitrator for reconsideration.

I express no view upon the other grounds set forth in the notice of motion.

There will be no costs to either party. The award to be made on or before the first Monday in April next.

BRITTON, J. JANUARY 10TH, 1905.

TRIAL.

BURTON v. LOCKERIDGE.

Promissory Note—Forgery—Conflicting Evidence — Collateral Circumstances—Comparison of Handwriting.

Action against William Lockeridge, John Lockeridge, and Mary J. Campbell, upon a promissory note, alleged to

have been jointly and severally made by them, dated 19th January, 1903, for $1,000, payable, with interest at 5 per cent., 6 months after date to the order of plaintiff.

. . The Lockeridges made no defence. Mary J. Campbell said that her name upon the note was not placed there by her or by her authority.

A. B. Macdonald, Brussels, for plaintiff.

R. Vanstone, Wingham, for defendant.

BRITTON, J.—Plaintiff is a labourer, an illiterate man, and somewhat peculiar as to his money matters. He had confidence in defendant Mary J. Campbell, and so on or about 14th May, 1900, he placed in her hands for safe-keeping a sum exceeding $1,600, and defendant deposited this in her own name in the Bank of Hamilton at Wingham.

The other defendants lived at Brussels, and had a woollen mill there. Their business in December, 1902, had begun to decline, although the firm did not actually fail, so William says, until after the note sued upon fell due. William was, however, on the lookout for money. He knew that plaintiff had money in the hands of defendant, and apparently he at that time had the confidence of both plaintiff and defendant.

. . .

The evidence of William Lockeridge is quite clear, and it is that he and plaintiff made two visits to defendant Campbell, and on the first occasion he asked her if she would indorse for him, and she said she would. At that time the money was at Wingham, and she said she would bring it to Brussels. . . . He says the second visit was on 19th January, 1903, the day the note bears date.

Defendant Campbell says she did not sign this note. . . . The evidence is in direct conflict, and I must endeavour to arrive at the truth by a consideration of collateral facts. . . .

It is, in view of the evidence, a thing of great importance that defendant Campbell's name is apparently written with entirely different ink from the other signatures. The note was drawn up by Mr. Blair, solicitor for William Lockeridge. William says the names were all signed at defendant Campbell's house, with one pen and with ink from one bottle. . . . That, in my opinion, cannot be correct. Plaintiff is seeking to establish this claim against defendant Campbell mainly by the evidence of William Lockeridge, the man who obtained the money. The claim is met by the strong denial of defendant Campbell and by the circumstances. . . . Defendant Campbell seems trustworthy; of course she is interested in the result to the extent of what is a large amount for either plaintiff or defendant to lose; but she is not more interested

than plaintiff or than William Lockeridge. I think the evidence is not sufficiently satisfactory to enable me to find in plaintiff's favour.

For the purpose of comparison of the disputed note, certain papers were put in evidence by plaintiff, proved to my satisfaction to be genuine, that is, to bear the genuine signature of defendant Mary J. Campbell. No comparison was made by any witness; no evidence of experts, or of persons professing to be such, and no evidence of any witness as to comparison, was submitted to me; but papers bearing the genuine signature and the disputed note were submitted to me, and I was invited by counsel to make the comparison if that would assist me in determining the difficult question of fact between the parties. . . . I have made the comparison. It is perfectly clear that there is a very strong resemblance, and if the signature to the note is not genuine, it is an excellent imitation. There is quite as much difference between any two of the genuine signatures as between any one of these and the disputed one; but, notwithstanding this, I am obliged to say, without attempting an analysis of the slants and strokes of the letters forming defendant's name, that my comparison confirms me in the conclusion to which I come apart from the comparison, viz., that plaintiff has not proved that defendant did sign the note in question.

Action as against Mary Jane Campbell dismissed with costs.

BRITTON, J. JANUARY 10TH, 1905.

TRIAL.

BURTON v. CAMPBELL.

Money Had and Received—Deposit—Repayment—Evidence—Corroboration—Costs.

Action to recover money alleged to have been given by plaintiff to defendant for safe-keeping. The amount claimed was $627 and interest.

A. B. Macdonald, Brussels, for plaintiff.

R. Vanstone, Wingham, for defendant.

BRITTON, J.—The amount claimed is made up as follows: Left with defendant on or about 14th April, 1900, two sums, one $1,619, and one $35, = $1,654. Plaintiff admitted getting back $1,000, which sum he lent to Lockeridge & Bro., and a further sum of $27, leaving the balance sued for.

Plaintiff in his evidence puts the amount which he first handed to defendant at $1,616, but says he sold a horse for $35, and gave this additional sum to defendant.

Defendant admits that she got the $1,616, and that plaintiff sold a horse and received $30, not $35, so that plaintiff had $1,646 in all; and that he discussed with her the matter of leaving his money with her, with the result that plaintiff retained $41, and left $1,605, which amount defendant deposited on 14th May, 1900, in the savings bank department of the Bank of Hamilton at Wingham, as she promised to do.

As between plaintiff and defendant, I think plaintiff has failed to shew that defendant received any more money than the $1,605 which defendant admits. . . .

There is now no dispute about the sum of $1,000, which was paid to plaintiff on 6th December, 1902. Defendant says plaintiff is mistaken about the sum of $27, as she did not pay him that sum in April, 1903, but she did pay him $30 about 2nd January, 1903.

The dispute is narrowed to the following items which defendant says she paid to plaintiff:—

2nd June, 1900	$500
18th March, 1903	133
8th June, 1903	10
2nd July, 1903	15

I find that plaintiff is mistaken as to the amount and date of the alleged payment to him of $27 as of April, 1903, and that plaintiff should be charged with $30 as contended for by defendant.

I am of opinion that the evidence of defendant is corroborated as to the payment by her to plaintiff of $500 on or about 4th June, 1900, and so I find that payment made as alleged.

As to the $133, defendant has not satisfied the onus cast upon her of establishing this payment. . . . The circumstances are such that in the face of the denial of plaintiff I can not find in defendant's favour upon that item. . . .

As to the items of $10 and $15 which defendant says were paid, I did not understand plaintiff, when cross-examined, positively to deny their receipt. I must find that these sums were paid to plaintiff. . . .

Plaintiff is entitled to judgment for $131.55 with County Court costs.

This is a case in which, in the exercise of my discretion, I should certify to prevent defendant setting off costs against plaintiff. Plaintiff is illiterate. Defendant is a shrewd business woman. The defence set up as to the payment of the $133 is such as to disentitle defendant to set off costs. . . .

CARTWRIGHT, MASTER. JANUARY 11TH, 1905.

CHAMBERS.

READHEAD v. CANADIAN ORDER OF WOODMEN OF THE WORLD.

Discovery—Examination of Officer of Benefit Society—Clerk of Subordinate "Camp."

Motion by defendants to set aside an appointment issued by plaintiffs for the examination of one Harley Field as an officer of defendants.

The action was brought to recover from defendants the amount of a policy upon the life of plaintiffs' son, payable to plaintiffs. The son died in November, 1903.

C. A. Moss, for defendants.

J. W. Bain, for plaintiffs.

THE MASTER.—By the constitution of defendants the governing body is the "Head Camp," which alone has power to form subordinate camps and issue charters to them. The "Head Camp" consists of one delegate from each subordinate camp and eleven officers who are elected every two years by the members from among their own number. This has absolute jurisdiction over all members. Every subordinate camp has similar officers, who are elected annually by the members. These officers are paid by the subordinate camps such compensation as they see fit. The dues of the members are payable monthly to the clerk of the subordinate camp and handed to the banker. But no clerk or banker can be installed until he has given security to the satisfaction of the Head Camp's three head managers. The clerk and banker of the subordinate camps are the persons by whom the dues of the members are collected and remitted to the Head Camp.

In the present case, Field is the clerk of the Woodstock camp, of which deceased was a member; but he was not the clerk during the lifetime of insured. It is not easy to see what information he can give; but, if he is the proper officer to examine, he must prepare himself accordingly.

The question really seems to be whether plaintiff's solicitor is to go to London and examine one of the officers of the Head Camp, as defendants contend; or whether defendants' solicitor is to go to Woodstock, as plaintiffs desire.

After reading through the by-laws of the Order and the material filed, I think plaintiffs' view is right, and that the clerk and banker of the subordinate camp are officers of this Order, and liable to examination.

Motion dismissed with costs to plaintiffs in any event.

CARTWRIGHT, MASTER. JANUARY 11TH, 1905.

CHAMBERS.

BARNUM v. HENRY.

Summary Judgment—Rule 616—Pleading—Breach of Promise of Marriage—Examination of Plaintiff for Discovery—Admission of no Breach before Action.

Action for breach of promise to marry plaintiff. The marriage was to have taken place in July, 1904; at the request of defendant it was postponed.

The defendant moved under Rule 616 for summary judgment dismissing the action on the grounds: (1) that the statement of claim did not allege that there was a breach of the alleged contract before action; (2) that plaintiff in her examination for discovery admitted that this was not any breach before action.

W. C. McKay, for defendant.

J. T. Richardson, for plaintiff.

THE MASTER.—In answer to question 379 plaintiff says: "He did not fix any special day. We were to be married when my sister was here; he pleaded business, and said we could just as well be married in August; that is all that was said about it." The marriage not having taken place in the first half of that month, plaintiff became uneasy. She went to defendant's house, but his sister said he was ill. Her mother afterwards went to see defendant, and her step-father also went but failed to see him.

It is quite true that plaintiff is not able to point to any specific and definite request to defendant, made either by herself, her mother, or her step-father, to marry her on any fixed day in August. It was therefore argued that there was no breach, because there being no request there could be no refusal; and that the action should therefore be dismissed. As might be expected the cases under Rule 616 are few. From Cook v. Lemieux, 10 P. R. 577, to Coyle v. Coyle, 19 P. R. 97, these applications, it is said, are to be granted only in the very clearest cases.

After reading through the whole of plaintiff's depositions, I am not satisfied that the present is a proper case for applying the Rule invoked.

In actions of this kind it cannot be necessary that a formal notice should be served on the suitor calling on him to perform his contract, or that he should be required to do so by plaintiff in a prepaid registered letter.

It is a well known saying that actions speak louder than words. The whole conduct of the parties themselves and of the mother and step-father of plaintiff, and of defendant towards them, are, in my judgment, matters which must be left to the jury under the direction of the Judge at the trial. After hearing plaintiff's case, the presiding Judge will have to say whether or not there is any case to go to the jury—any evidence on which 12 or 10 reasonable men could find that there was a breach by defendant before action. To him I must leave it to decide.

The motion is therefore dismissed with costs in the cause to plaintiff.

I have not dealt with the first ground of the motion, for the reasons given in Knapp v. Carley, 7 O. L. R. 409, 3 O. W. R. 187.

JANUARY 11TH, 1905.

DIVISIONAL COURT.

BLACKLEY CO. v. ELITE COSTUME CO.

Writ of Summons—Service out of Jurisdiction—Contract—Breach—Place where Contract Broken—Sale of Goods—Place of Payment.

Appeal by defendants from order of BRITTON, J., 4 O. W. R. 417, affirming order of McAndrew, official referee, sitting for the Master in Chambers, dismissing motion by appellants to set aside an order made by the Master in Chambers, upon the ex parte application of plaintiffs, allowing service of the writ of summons to be effected out of the jurisdiction, and to set aside the writ and the service of it upon appellants at Montreal, in the Province of Quebec.

George Kerr and Joseph Montgomery, for appellants.

R. W. Eyre and E. E. Wallace, for plaintiffs.

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

MEREDITH, C.J.—By his order the official referee gave leave to defendants to enter a conditional appearance, but they are not satisfied with that leave and have brought the present appeal. . . .

Defendants are an incorporated company carrying on business and having their head office in Montreal, and plaintiffs a firm carrying on business in Toronto.

On 12th March, 1904, defendants gave an order in writing to an agent of plaintiffs for certain goods described in the order. The order was given to the agent at Montreal,

and the price of the goods ordered amounted to several hundred dollars. The agent was not a resident agent in Montreal, but a traveller for plaintiffs.

Defendants shew that plaintiffs' place of business was at Toronto, and that, according to the ordinary course of business, the acceptance of the order which they had given would be by letter from Toronto; and an acceptance was necessary for the formation of a contract between the parties.

On the facts of this case, an acceptance by post was within the contemplation of the parties, and, that being the case, the contract must, I think, be taken to have been made when plaintiffs' letter accepting the offer was posted at Toronto: Henthorn v. Fraser, [1892] 2 Ch. 27; Brewer v. Moore, [1892] 1 Ch. 305.

We are, therefore, I think, bound to follow the decision of a Divisional Court in Phillips v. Malone, 3 O. L. R. 47, 492, 1 O. W. R. 200, and to hold that the order allowing service to be effected in Montreal was rightly made. . . .

It would, perhaps, have sufficed to rest our decision upon the authority of Phillips v. Malone, but, in view of the able and strenuous arguments of the learned counsel for defendants, we have thought it better to consider the question raised independently of the decision in that case, so that, if we had come to the conclusion that we ought not to follow it, defendants might have had the benefit of our referring the question to a higher Court for decision under the provisions of sec. 81 of the Judicature Act.

The claim of plaintiffs as indorsed on the writ is for breach of contract and for goods sold and delivered, and it is quite clear that, as respects the first of these claims, the order was rightly made. The contract provides that the goods are to be delivered f.o.b. at Toronto. The property in the goods, therefore, passed to defendants upon such a delivery being made, and a breach of the contract by non-acceptance was a breach within Ontario of an obligation of the contract to be performed within Ontario: Nathan v. Siltz, 4 Times L. R. 570; Empire Oil Co. v. Vallerand, 17 P. R. 27 (C. A.) . . .

[Reference to Rule 162 (e); English Order xi. r. 1 (e); Comber v. Leyland, [1898] A. C. 524, 529; Bell v. Antwerp and Brazil Line, [1891] 1 Q. B. 103, 107, 108; Glen v. Browning, 34 L. T. 760; Robey v. Snaefell Co., 20 Q. B. D. 152; Hassall v. Lawrence, 4 Times L. R. 23; Golden v. Barlow, 8 Times L. R. 57; Thompson v. Palmer, [1893] 2 Q. B. 80.]

The English cases appear to indicate that in determining whether there is an implied stipulation in the contract that,

although the contract is made in England and according to English law, the debtor must seek out his creditor to pay him, that rule of law is to be excluded, and the question to be determined solely upon the construction of the contract itself —taking into consideration, of course, the facts which existed when it was made.

The words "according to its terms" (in the English Rule) were probably, I think, introduced so as to make it necessary to shew that in the entering into the contract it was in the contemplation of the parties that it should be performed within the jurisdiction, so that the party to it resident out of the jurisdiction must be taken to have given "a sort of consent," as Lord Halsbury puts it in Comber v. Leyland, p. 527, that wherever he may be living, or wherever the contract may have been made, any question as to the thing agreed to be done may be litigated within the jurisdiction.

The omission of the words "according to the terms thereof" from our Rule, I am inclined to think leaves it open, in construing the contract in order to determine whether it is to be performed within Ontario, to apply the rule of our law that the debtor must seek out his creditor to pay him, unless the application of it is inconsistent with the terms of the contract, construing it in the light of the facts which existed when it was made.

But, if the rule of our law is to be excluded, upon the facts of this case I am of opinion that it was in the contemplation of the parties when the contract was made that payment for the goods which were ordered by defendants should be made at Toronto, and that the obligation to pay was, therefore, one to be performed within Ontario.

The circumstance that plaintiffs desired defendants to close the transaction with the agent in Germany of the manufacturers of the goods, and that this agent proposed to draw on defendants for the price, is immaterial, I think, and can afford no light as to the meaning of the contract, settlement with the agent not having been in the contemplation of the parties when the contract was made, and being expressly repudiated by defendants themselves as a thing which it was not incumbent on them to do.

For these reasons, I am of opinion that plaintiffs made out a prima facie case as to the contract, and that there had been a breach within Ontario of the obligation which, under it, rested on defendants to accept and pay for the goods, and to be performed within Ontario; that their application was rightly refused; and that this appeal therefore fails and should be dismissed with costs.

BOYD, C. JANUARY 12TH, 1905.

WEEKLY COURT.

CAMPBELL v. HAMILTON CATARACT AND POWER COMPANY.

Injunction—Expropriation of Land—Compensation — Tenant for Years.

Motion by plaintiff to continue an injunction restraining defendants from asserting possession of lands expropriated for the purposes of their works.

J. E. Jones, for plaintiff.

W. W. Osborne, Hamilton, for defendants.

BOYD, C.—The injunction should not be continued. Defendants are properly in possession under the warrant granted by the County Court Judge, and the proceedings for possession were known by plaintiff and not objected to.

I do not preclude the prosecution of this action for the purpose of seeking or obtaining compensation for the alleged rights of plaintiff, as tenant for years, in the land taken. That I do not prejudge, but leave for further litigation. . . . Reference may be made to Detlor v. Grand Trunk R. W. Co., 15 U. C. R. 595.

Injunction is dissolved and costs to be costs in cause.

BOYD, C. JANUARY 12TH, 1905.

WEEKLY COURT.

RE CORNELL.

Settled Estates Act—Leave to Sell Land—Trust for Sale at Named Period—Acceleration with Sanction of Adult Children—Advantage to Beneficiaries—Death of one Adult—Sale without Sanction of Survivor.

Petition under the Settled Estates Act for leave to sell land.

J. E. Jones, for petitioner.

W. J. Boland, for adult beneficiary.

F. W. Harcourt, for infants.

C. J. Holman, K.C., for the prospective purchaser.

BOYD, C.—The scheme of the will (which is home-made) appears to be this, that the land is to be rented by the executors until the youngest son comes of age, unless with the sanction of the adult children named the executors sooner sell the property "at good advantage." When the youngest child is 21, the property is to be valued and certain options to purchase given to the children. And lastly power of sale is given to the executors for the purpose of distribution as mentioned in the will. That is substantially a trust for sale of the land, but not till the youngest child is of age, unless it is sooner sold with the sanction of the adult children named.

A devise of land in trust to permit occupation during life or widowhood of testator's wife and then to sell, has been held to be a limitation "by way of succession" within the Settled Estates Act: Carlyon v. Truscott, L. R. 20 Eq. 348. See R. S. O. 1897 ch. 71, sec. 2 (1). And in a case where the trustees were to receive the rents during the minority of any of the children, and during that time the children were not to be entitled to the beneficial interest in possession, but on the youngest child attaining 21 they were to get possession, it was held by Malins, V.-C., in Re Shepherd's Estate, L. R. 8 Eq. 572, that this was limited by way of succession within the beneficial scope of the statute.

With some hesitation, I think this case may be regarded as falling within the scope of the Settled Estates Act. The purchaser is a willing one, and will be protected by secs. 39 and 40 of the Act. See Micklethwaite v. Micklethwaite, 4 C. B. N. S. at p. 858, defining "settled estate;" Re Hooper, 28 O. R. 179; Re Laing's Trusts, L. R. 1 Eq. 416.

A good case is made for realizing money from the property by the sale of the whole, in view of the increased taxation, the disrepair of the houses, and the inability to make sufficient outlay from the funds of the estate.

The terms of the will contemplate a sale for the purpose of distribution in the future; even an accelerated sale is provided for, with the sanction of the two children adults. One of them is dead, and it is impossible to carry out that provision: Montefiore v. Browne, 7 H. L. Cas. 241: but I think the Court may under the Act exercise its power of directing a sale forthwith under the supervision of the Master. The purchase money may be paid into Court, after satisfying the mortgage, upon the trusts of the will: Re Morgan Estate, L. R. 9 Eq. 587; see sec. 33 of Act. Costs out of estate.

JANUARY 12TH, 1905.

DIVISIONAL COURT.

GARLAND v. CLARKSON.

Discovery — Examination of Person for whose Immediate Benefit Action Defended — Action against Assignee for Creditors—Examination of Assignor—Reference for Trial —Power of Referee to Order Examination.

Appeal by defendant from order of TEETZEL, J., in Chambers, of 9th December, 1904, dismissing appeal from certificate of Neil McLean, official referee, of his ruling in the course of a reference that plaintiff was entitled to examine for discovery one David E. Starr, against whose assignee for the benefit of creditors this action was brought, to establish the right of plaintiff to rank upon the insolvent estate.

The appeal was heard by BOYD, C., MEREDITH, J., MAGEE, J.

C. A. Masten, for defendant.

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

BOYD, C.—Rule 440 and Rule 466 are in pari materia and provide that a person for whose immediate benefit an action is prosecuted or defended is to be regarded as a party for the purpose of examination and for the purpose of discovery. The origin of these Rules is the former Chancery Orders Consolidated, Nos. 138-140. By this old practice, production might be had "at any time after the answer and before and at the hearing of the cause." Under the present Rules examination for discovery may be "before the trial" (Rule 439), and production may be ordered "at any time pending the action or proceeding" (Rule 463.) Rule 440 has been construed to apply to a debtor who has assigned his estate for the benefit of creditors, even though the estate may be insolvent. In Macdonald v. Norwich Union Ins. Co., 10 P. R. 462 (1884), Mr. Justice Rose held, after conference with his colleagues, that such an assignor might be treated as one to be immediately benefited by the litigation. This decision was followed in 1897 by McColl, J. (afterwards Chief Justice of British Columbia), in Tollemache v. Hobson, 5 B. C. R. 214, and I think that as a correct decision on a matter of practice it should not be disturbed after the lapse of so many years: see Johnston v. Ryckman, 7 O. L. R. at p. 523, 3 O. W. R. 198.

There would be no difficulty then in supporting this order to examine the debtor Starr for discovery, and have him make production of papers if the action had not been referred. This cause being at issue, all the matters were referred by order of 6th April, 1904, to be tried before a referee, pursuant to sec. 29 of R. S. O. 1897 ch. 62. The whole cause and all its issues were thus before the referee to be tried, and, having regard to the original scope of the Rules in question, I think it competent for an order to issue for the purpose of examining the assignor with a view to the proper trial of the cause. The referee has plenary power to deal with the cause under the statute, and, in addition, under Rules 648, 665, 666, 667, and 669. The English Rule as to this aspect of references for trial, Order xxxvi., Rule 50 (474), provides that the referee shall have the same powers as a Judge with respect to discovery and production of documents, and this provision is by reasonable implication to be treated as embodied in his power to examine the parties and investigate the matters in difference referred to him.

The reference being before trial and for the purpose of trial, I hold that the referee can properly direct one to be examined for discovery who is a party or who is to be treated as a party to the litigation.

Appeal dismissed; costs in cause to plaintiff.

MAGEE, J., gave written reasons for the same conclusion.

MEREDITH, J., dissented on both grounds, giving reasons in writing.

JANUARY 12TH, 1905.

DIVISIONAL COURT.

McNULTY v. CITY OF NIAGARA FALLS.

Cemetery—Owner of Plot — Removal of Corpse — Mistake of Caretaker—Right of Action.

Appeal by plaintiff from judgment of BOYD, C., 4 O. W. R. 443.

F. W. Griffiths, Niagara Falls, for plaintiff.

F. C. McBurney, Niagara Falls, for defendants.

THE COURT (MEREDITH, C.J., MACMAHON, J., MAGEE, J.), dismissed the appeal without costs.

CARTWRIGHT, MASTER. JANUARY 13TH, 1905.

CHAMBERS.

CITY OF TORONTO v. TORONTO R. W. CO.

Consolidation of Actions—Identity of Parties—Similarity of Issues—Counterclaim.

Motion by defendants to consolidate 22 actions brought by plaintiffs against defendants to recover penalties amounting in all to $15,100. The pleadings were similar in each action, but in one (No. 188) defendants counterclaimed for two sums of $2,015 and $2,362 damages alleged to have been caused on 6th and 7th February and from 28th February to 1st March, through negligence of plaintiffs in respect of the tracks during the severe weather which overtook the city at that time.

J. Bicknell, K.C., for defendants.

J. S. Fullerton, K.C., for plaintiffs.

THE MASTER.—Plaintiffs' counsel argued that the facts were not the same in all the cases. This, however, would, if considered decisive, prevent any consolidation at any time.

It would seem to me that plaintiffs have not adhered to that view themselves. The material shews that the last ten actions combine the whole period of 153 days from 1st June to 31st October. The facts can scarcely have been identical in the days of each of these groups.

I think the actions should be consolidated and tried together, except No. 188, which may be treated as substantially an action by the Toronto Railway Co. against the city.

It would seem more convenient to have the whole question dealt with at once, and it would probably be a great saving of costs.

CARTWRIGHT, MASTER. JANUARY 13TH, 1905.

CHAMBERS.

WILLIAMSON v. MERRILL.

Discovery—Examination of Defendant—Defamation—Privilege—Statements made by Defendant to his Wife.

Motion by plaintiff for order requiring defendant to attend for re-examination for discovery and to answer questions 2403 to 2405 and question 2422. The action was for defamation. See the report of a former motion, 4 O. W. R. 528.

A. E. O'Meara, for plaintiff.

G. M. Clark, for defendant.

THE MASTER.—The questions were not answered on advice of defendant's counsel, who argued that they were irrelevant, and that defendant could not be compelled to state what he had told his wife. On the argument I held that the questions were relevant and should be answered. The motion was reserved to consider the other ground. . . .

I do not think the objection can be sustained. No doubt, a husband or wife cannot be made to disclose any communication made during marriage by the one to the other: R. S. O. 1897 ch. 73, sec. 8. That, however, is a very different thing from saying that a husband or wife cannot be compelled to disclose any statement made by the witness to his or her partner. Such a principle would in the present case be an absolute bar to the action, where the whole alleged cause of action is founded on statements made by defendant to his wife.

Whether such an extension would be desirable is not a matter for present consideration. See Connolly v. Murrell, 14 P. R. 187, 270. . . .

The order will go as asked, with costs to plaintiff in the cause.

BOYD, C. JANUARY 13TH, 1905.

WEEKLY COURT.

RE DUNN AND CITY OF STRATFORD.

Municipal Corporation — Alteration in Grade of Sidewalk — Injury to Adjoining Land—Absence of By-law—Remedy—Arbitration—Sale of Land after Injury—Right of Vendor to Compensation.

Appeal by city corporation from award of arbitrator allowing claimant $80 damages for injury to his property by the raising of the level of a sidewalk.

R. S. Robertson, Stratford, for appellants.

E. Sydney Smith, K.C., for claimant.

BOYD, C.—When a municipality undertakes to raise the level of a street and does so to the detriment of adjoining land, that is a matter for which compensation may be obtained by the owner whose land is injuriously affected. Whether done under by-law or by the inherent authority of the body as conservator of roads, the like liability arises, not by way of action, but under the method of arbitration: Pratt v. Town of Stratford, 16 A. R. 5.

The finding of the learned arbitrator "that there was not imposed upon this corporation any obligation or necessity

demanding the raising of the walk between 11 and 15 inches over its former level at the side of the claimant's land" cannot be used to imply that the damages arising from raising the land did not "necessarily result from the exercise of the municipal powers," and so oust the right to arbitrate and remit the contention to the forum of the Court. The work was done voluntarily by the corporation in the exercise of its powers, and was so done as to raise the level of the highway, from which damage necessarily resulted to the frontager.

I find no error or miscarriage in the conduct or conclusions of the arbitrator. . . .

Nor do I think the sale of the land at a lessened value on account of this damage, after it had been done, deprives the owner at that time of his right to . . . compensation, although he has since ceased to be the owner. He had a vested right, which is not disturbed by the subsequent alienation.

Appeal dismissed with costs.

BOYD, C. JANUARY 14TH, 1905.

CHAMBERS.

CANADIAN RADIATOR CO v. CUTHBERTSON.

Writ of Summons—Service out of Jurisdiction—Cause of Action, where Arising — Contract — Conditional Appearance.

Appeal by defendants from order of Master in Chambers refusing to set aside order for issue of writ of summons for service out of the jurisdiction, the writ issued pursuant to the order, and the service upon defendants in Manitoba.

C. J. Holman, K.C., for defendants.

C. A. Moss, for plaintiffs.

BOYD, C.—The contract is not in writing, and a writ has been issued in the Province of Ontario and served in Manitoba, on affidavits setting forth that the contract was to be performed by payment in this Province. This satisfies what is required by Rule 1246, and, although defendants by affidavit dispute and say that the contract was made and to be performed in Manitoba, yet that issue cannot or should not be determined in a summary way on affidavits. Yet should defendants be protected in this contention and have the benefit of it in a proper way and at a proper time.

The former common law practice was, in cases of doubt, to require plaintiff to give an undertaking to prove at the

trial a cause of action within the jurisdiction or else to suffer nonsuit; but the Ontario Rule 173, providing for conditional appearance, favours the former equitable practice, which was to enter such appearance and raise the want of jurisdiction by plea or demurrer. That is better also in that it severs the issue as to jurisdiction from the other defences, so that in a case where there will be great expense in the trial of all the merits, this preliminary matter as to jurisdiction may be ordered to be tried separately. . . .

That is the proper course to take on this appeal—not to try the disputed question of jurisdiction on affidavits, but to permit defendants to enter a conditional appearance and thereafter raise the contention on the record.

Appeal dismissed; costs in cause to plaintiffs.

BOYD, C. JANUARY 14TH, 1905.

CHAMBERS.

REX v. MAY.

Criminal Law—Bail—Estreat—Certificate of Non-appearance—Informality—Criminal Code—Forms—Motion to Vacate Estreat—Delay—Action Taken on Certificate.

Application by two sureties to vacate the estreat of the recognizance of bail given by them on behalf of defendants on 12th January, 1899, because there was no certificate of non-appearance indorsed on the recognizance, pursuant to sec. 589 of the Criminal Code.

L. F. Heyd, K.C., for applicants.

R. C. Clute, K.C., for the Crown.

BOYD, C.—There has been great delay (not explained) in making this motion, and unless the objection is substantial it should not be favoured.

What appears on the bail-piece is this: "The accused was directed to appear to answer the charge before the police magistrate of St. Thomas, John B. Davidson, on 16th January, 1899, at 10 a.m." And on the back thereof is written: "Defendant and his sureties having been called and not appearing, let this bond be estreated. 16th Jany., 1899. J. B. D."

The initials appear to be those of the police magistrate, who has signed his name in full at the bottom of the recognizance, and the information given as to non-appearance is substantially what is expressed in the form of certificate given in the Code: see form R. in schedule.

Section 589 says: "If the accused does not appear . . . the said justice having certified upon the back . . . the non-appearance of the accused in the form R. of schedule hereto, may transmit," etc.: see now 63 & 64 Vict. ch. 46, amending sec. 589.

The use of the form is merely directory, and the Code says itself: "The several forms varied to suit the case, or forms to the like effect, shall be deemed good, valid, and sufficient in law:" sec. 982.

The magistrate has certified on the back with sufficient formality by affixing his initials to the memorandum of non-appearance on the very day of default: Caton v. Caton, L. R. 2 H. L. at p. 143; Sanborn v. Flagler, 9 Allen (Mass.) 478; Regina v. Hamilton, 12 Man. L. R. at p. 366.

The Judge at the Sessions having acted on the return and evidence of default as sufficient, I do not think his ruling should be interfered with after this lapse of time and for no substantial reason.

Application refused.

BOYD, C. JANUARY 14TH, 1905.

CHAMBERS.

REX v. BOLE.

Criminal Law—Bail—Estreat—Motion to Vacate—Delay—Adjournment of Hearing without Notice to Sureties—Conflicting Affidavits.

Application by sureties to vacate estreat of recognizance of bail given by them on behalf of defendant in 1899.

L. F. Heyd, K.C., for applicants.

R. C. Clute, K.C., for the Crown.

BOYD, C.—. . . I can find no good ground to interfere. This also is a case of delay in moving against an estreat ordered in 1899. The recognizance of bail and the certificate indorsed of its forfeiture are in due and regular form and in conformity with the Code.

What is relied upon is, that there was some understanding entered into, of which the sureties were not cognizant, as to the enlargement of the hearing. These allegations are met and fully answered by the affidavits of the magistrate and the county attorney; and it is not proper practice, in the face of conflicting affidavits on matters extrinsic to the written record, to interfere in a summary way to vacate the estreat.

Application refused.

JANUARY 14TH, 1905.

DIVISIONAL COURT.

MEENIE v. TILSONBURG, LAKE ERIE, AND PACIFIC R. W. CO.

Railway — Injury to Person Loading Car — Train Running into Car—Negligence—Absence of Proper Appliances to Stop Train—Evidence—Misdirection—Res Ipsa Loquitur —Evidence as to Cause of Injury also Given—New Trial.

Motion by defendants to set aside the verdict and judgment for plaintiff in an action for negligence tried before MAGEE, J., at Woodstock, and to dismiss the action or for a new trial.

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

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

C. Millar, for plaintiff.

MACMAHON, J.—Plaintiff is a labourer, and was on 28th January, 1903, employed by the Tilson Co. in loading with flour a car of defendants standing on the railway track in front of the mills of the Tilson Co. at Tilsonburg. While so engaged plaintiff received personal injuries which it is alleged were caused by the negligent and unskilful driving of a train, consisting of an engine, two flat cars loaded with lumber, and a box car, which struck the car plaintiff was unloading, causing a crate containing card-board, weighing about 500 pounds, to fall upon him, which caused the injuries of which he complained. . . .

The train crew consisted of the conductor, engine-driver, fireman, and brakesman, and when it reached Tilsonburg station, the train was divided at the rear end of the baggage car, and the engine and tender, with that car attached, hooked on to flat cars loaded with lumber, which were standing on a siding, to take them over to the Grand Trunk Railway air line.

The Tilson Co. had built a railway about seven-eighths of a mile long, by which it was connected with the Grand Trunk, the Michigan Central, and defendants' line, by means of switches.

In order to place the two cars of lumber on the Grand Trunk line, the train of defendants was run north from its station a short distance, and was then backed south on the Tilson

Co.'s line about 1,250 feet, where there is a switch connecting it with the Michigan Central, and before coming to this the brakesman got off to turn the switch at that point. At a distance of about 150 feet south of that is the Grand Trunk Railway switch, and before the engine reached it the conductor got off the train to open the switch so as to allow the train to pass over to the Grand Trunk line, but the engine-driver, although he turned the air brakes up to the emergency notch and reversed his engine, could not stop the train, which was backing on a down grade of 2½ feet in 100 feet, or an incline of 85 feet in 4,400 feet—the distance between defendants' station and Tilson's mill, where plaintiff was injured. The engine-driver jumped from the engine when 2,200 feet from the mill, and the fireman jumped off a short time after the engine-driver. The former said the train was then running at the rate of 10 or 11 miles an hour.

The engine-driver . . . followed the train down, and when near Tilson's mill the engine, with a full head of steam on, was returning with the tender and baggage car attached—the two flat cars having become uncoupled when they collided with the car standing at the mill. . . .

What I regard as the obstacle to plaintiff's retaining the verdict of the jury is what the learned Judge told the jury towards the conclusion of his charge, where he said:

"There is one thing I have not touched upon: the condition of the engine. . . . On most engines there is what is called a sand-pipe, coming down in front of the driving wheels, which, in case of a slippery rail, puts sand upon the tracks in order that the driving wheels may get a better grip thereby, and not slip upon the rails. It is said by Mr. Clark, the gentleman who was so long upon the railway, that it is now very largely the custom to have a steam-jet coming down in the rear . . . to clean the rail. He says that it is preferred to a sand-pipe. Then he also speaks of another pipe that is sometimes used—a rear sand-pipe, that is, a pipe . . . coming down behind. And it is important, perhaps, for you to consider that rear sand-pipe and what the evidence is with regard to it. Manifestly, putting sand upon a rail behind the driving-wheel would not give any grip to the wheel, because the wheel would be in advance until you come to reverse the engine; but then, when the engine is going backwards, that sand-pipe would become of use. Mr. Clark, the witness called by plaintiff, says that that is very seldom used. . . Mr. Kennedy, the Grand Trunk master mechanic, called for defendants, says that they have the sand-pipes at the rear of the driving-wheels on about 10 per cent. of their

engines, and then he adds this: 'It is used on engines for switching and on engines for heavy work, such as pushing up grade.' . . He says as to the steam-jet that about 50 per cent. of their engines have it. On the other hand, the gentleman from the Canadian Pacific, Mr. Preston, says: 'The sand-pipe behind the driving-wheel is not used to any extent on our line. I have not seen it on other lines. The steam-jet behind the drivers we do not use except on one engine, and then it is to wet the rails to clean the sand off. I never heard of it to get rid of a wet, frosty rail.' In dealing with the question as to whether, at this particular point, these defendants should have had better appliances than they had to guard against a train going down that grade, it is a question for you to consider whether, when the Grand Trunk use sand-pipes at the rear of the driving-wheels on engines for switching service, and on heavy work pushing up grades, these defendants should have provided a sand-pipe at this particular point. . . . You have to bear in mind that railway companies . . . are not supposed to have the very latest appliances. . . . They are expected to have reasonable appliances, reasonably up to date, reasonably sufficient for the work which is required to be done; and where the Grand Trunk have only 10 per cent. of their engines equipped with a sand-pipe at the rear, and the Canadian Pacific do not use it to any extent, it is a question for you whether it would be reasonable to expect these defendants to have it upon their engine, they having only 35 miles of road and a very few engines. But you have also to consider, on the other side of the question, whether that was a point which was so dangerous that they should have had a provision of that sort to guard against engines slipping down that grade either upon frosty rails or wet rails or upon other slippery rails, to guard against that and to do the heavy work which is required at that particular point, that is, the work of pushing up, with only a few locomotives. What do you say as to whether it would be reasonable to expect a small road to have engines such as the Grand Trunk have for the purpose of doing the kind of work that they have to do at Tilsonburg?"

As this train was backing on the line, sand-pipes, to be of any avail in staying the progress of the train on the down grade, must have been in rear of the rear driving-wheels. . . .

There was, in my humble judgment, no evidence whatever upon which a jury could properly find that defendants were guilty of negligence in not having the engine in question equipped with a rear sand-pipe. A like observation applies

to the alleged negligence of defendants in not providing a steam-jet behind the rear driving-wheels. . . .

It is impossible to say what effect the part of the learned Judge's charge referred to may have had on the jury. They may, in finding in plaintiff's favour, have reached the conclusion that defendants were guilty of negligence in not having one or both of the appliances referred to attached to the engine. If so, as I have pointed out, there was no evidence upon which such a finding could properly be made.

On the ground of misdirection, the verdict and judgment must be set aside, and a new trial had. The costs of the former trial and of this motion to be costs in the cause, unless otherwise ordered by the trial Judge.

MEREDITH, C.J.—I agree with the judgment of my brother MacMahon, and have only a few words to add. . . .

Counsel for defendants, while not disputing that the doctrine of res ipsa loquitur was applicable to the occurrence which resulted in the injury of which plaintiff complains, contended that plaintiff was not entitled to invoke that doctrine in support of the action, because, as the fact was, his counsel had not been content to rest his case on proof of the occurrence, and the injury having been caused by it, and the presumption arising from this expressed in the phrase res ipsa loquitur, but had gone on to attempt to prove specific acts of negligence, and, as counsel contended, to prove the actual cause of the accident. No authority was referred to in support of this contention, and I am unable to see why, on principle, the course taken by plaintiff's counsel at the trial should have the effect which it is contended should be given to it, or why, if, on the whole case, defendants, upon whom the burden rested of overcoming the presumption of negligence which arose from the happening of the occurrence, had not made it to appear that it had happened without negligence on their part, plaintiff was not entitled to recover?

. . .

[Great Western R. W. Co. v. Braid, 1 Moo. P. C. 104, referred to.]

TEETZEL, J., agreed in the result.