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COURT OF APPEAL.

MARCH 19TH, 1912.

REX v. WRIGHT.

Criminal Law—Offences against Canada Shipping Act, sec. 123—Fraudulent Use of Certificate of Service—False Representation to Obtain Certificate of Competency as Master of Vessel—Evidence—Absence of Guilty Knowledge—Finding of Fact by Trial Judge.

Case stated by the Senior Judge of the County Court of the County of York upon the acquittal of the defendant after trial upon a charge of offences against the Canada Shipping Act.

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

J. Jennings and H. C. Macdonald, for the Crown.

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

MOSS, C.J.O.:—The defendant, having been committed for trial by the Police Magistrate for the City of Toronto upon charges preferred against him in the Police Court, and being in close custody, duly elected to be tried by a Judge without a jury, pursuant to the provisions of the Criminal Code in that behalf. He was thereupon tried by His Honour Judge Winchester, Senior Judge of the County Court of York, presiding in the County Court Judge's Criminal Court, upon a charge-sheet containing two counts: first, that he fraudulently made use of a certificate of service to which he was not justly entitled, contrary to the Canada Shipping Act, R.S.C. 1906 ch. 113; and, second, that he made a false representation for the purpose of obtaining for himself a certificate of competency, contrary to the Canada Shipping Act. The date of the com-

mission of the alleged offences was stated to be the 12th March, 1910.

The learnd Judge found the defendant "not guilty" of either of the offences charged; but, at the request of counsel for the prosecution, stated a case under the provisions of the Criminal Code in that behalf, reserving two questions, viz.: "1st. Upon the evidence, was I right in holding that the use made by the defendant of the document which he presented to the examiner of masters and mates at Windsor was not an offence under the first count above set out? 2nd. Upon the evidence, was I right in law in holding that the defendant did not make such a false representation as to constitute an offence under the second count above set out?"

These charges were laid under sec. 123 of the Canada Shipping Act, the first charge having relation to sub-head (*d*) and the second to sub-head (*a*). The effect of these is to declare guilty of an indictable offence any person who—(*a*) makes, procures to be made, or assists in making, any false representation for the purpose of obtaining for himself or for any other person any certificate of competency or of service; or—(*d*) fraudulently makes use of any such certificate which is forged, altered, cancelled, or suspended, or to which he is not justly entitled.

It would have been more convenient if the order in which the counts are set out in the charge-sheet had been reversed so as to correspond with the order of the sub-heads of sec. 123 under which they are framed. And, inasmuch as the second count charges a violation of the provisions of sub-head (*a*), it is convenient to consider it first and to deal with the first count last.

The defendant, a sailor on the inland waters of Canada and the holder of a certificate of competency to act as mate on a ship trading on the inland waters of Canada, made application to Mr. W. F. McGregor, the official examiner at Windsor for the Department of Marine and Fisheries, to be examined for a certificate of competency as master of a passenger steamer on inland waters. A printed form of application issued by the Department was furnished him by the examiner, who filled in some of the particulars. The defendant filled in the remainder, signed it, and returned it to the examiner on the 12th March, 1910.

Accompanying the application were three other documents:—

(*a*) A certificate of discharge for seamen according to form K in the schedule to the Act, signed by the master of the

steamer "Iroquois," stating, among other particulars, the following:—

Capacity.	Date of Entry.	Date of Discharge.
1st Mate.	April 25th, 1908.	December 8th, 1908.

(*b*) A testimonial dated the 9th December, 1909, signed by the master of the steamer "W. D. Matthews," stating that the defendant was second mate on the "W. D. Matthews" from the 26th April to the 14th August, and first mate from the 15th August to the 9th December, 1909.

(*c*) A testimonial dated the 8th March, 1910, signed by the master of the steamer "Stormount," stating that he knew the defendant for the past few years as second mate of the steamer "Algonquin" and as mate of the "Iroquois" and the "Matthews." All these documents give him a good character for ability, conduct, sobriety, trustworthiness, and competence. In setting out the application the particulars of testimonials of service he gave the following:—

Ship's Name.	Rank.	Date of Commencement.	Date of Termination.	Time in Such Ship.
1. Iroquois.	Mate.	April 25, 1908.	Dec. 8, 1908.	7 months, 13 days.
2. W. D. Matthews	2nd Mate	April 26, 1909.	Aug. 14, 1909.	3 months, 18 days.
3. " "	Mate.	August 15, 1909.	Dec. 9, 1909.	3 months, 24 days.

The defendant was duly examined by the examiner, as required by the Shipping Act, and obtained a certificate of competence as a master.

The charge against him on the second count is, that, in the application and papers produced by him, he made a false representation for the purpose of obtaining the certificate. The gravamen of the charge is, that he represented that he had served as mate for a year, when in fact he had not served for that length of time, and that he made the representation knowing it to be false and for the purpose of deceiving the Department into granting him a certificate of competency. The learned Judge, who heard the testimony of the witnesses, including that of the examiner and of the defendant, completely

exonerated the latter from the charge of fraudulently or knowingly making any false representations; and, upon the whole evidence, he was justified in coming to that conclusion. There is no doubt that in one sense the statement in the certificate of discharge as to the capacity in which the defendant served on the "Iroquois" is not strictly correct. It represents the defendant as serving as first mate during the whole season of 1908, whereas during the greater portion of the time he was serving in the capacity of second mate. But, at the time the discharge was given and for some time before, he was the first mate of the "Iroquois." According to a literal construction of the Shipping Act, only one officer known as a mate is recognised on inland vessels. But, as the evidence shews and the learned Judge found, in actual practice there are officers serving under and next to mates who are called second mates, or probably in the passenger steamers second officers, as distinguished from mates or first officers. These persons not infrequently perform the duties or some of the duties of the mate or first officer. This appears to have been recognised by the examiner, who testified that, if the certificate had shewn the period of service on the "Iroquois" to be partly as first mate and partly as second mate, but covering the period stated, he would have accepted it. It is to be borne in mind, also, that, before shipping on the "Iroquois" for the season of 1908, the defendant had obtained and was the holder of a certificate of competence as mate, so that during that season he was actually qualified to perform, and to a considerable extent throughout the season did perform, the duties of a mate. The defendant, who seems to have given his testimony in a fair and straightforward manner, swore that the certificate of discharge was drawn up, signed, and handed to him by the master of the "Iroquois" without any request or suggestion as to its contents; that, when he read it, he saw it was incorrect, because he was not first mate all the time, but he did not know that there was only one person recognised under the law in Canada on the inland waters as mate—in other words, none but first mate—and that he considered that second mate's service under a certificate of competency as mate counted. In this view he appears to be supported by the examiner.

Upon all the facts, the learned Judge found that the defendant was not guilty of falsely intending to misrepresent the facts, and that there was no intent on his part to make use of the certificate of discharge as a false representation.

It is, of course, a matter of public importance and concern that there should be no evasion of the provisions of the

Shipping Act in regard to any of its particulars, and especially so in regard to the competency and skill of those to whom the safety of lives and property are intrusted; and that, where wilful fraud and misrepresentation are proved to have been practised, punishment should follow.

But where, as here, even the examiner, to whose judgment the question of proper service was committed by the Department, was unable to see any infraction of the law in what was done in this case, it could hardly be expected that the learned Judge should decide otherwise than he did.

The second question should, therefore, be answered in the affirmative.

The first question is readily answered. The first count charges the defendant with fraudulently making use of a certificate of service to which he was not justly entitled, and is laid under sub-head (*d*) of sec. 123. The certificate there referred to is plainly either the certificate of competency or of service referred to in sub-head (*a*).

The certificate of discharge under sec. 176, form K, is an entirely different document from the certificate of service referred to in sub-head (*a*) of sec. 123.

The certificate of competency there spoken of is plainly the document provided for by secs. 82-84, inclusive; and the connection renders it equally plain that the certificate of service spoken of is the document provided for by secs 85-91, inclusive.

It is against the fraudulent use of "such certificate" that sub-head (*d*) is directed. The production to the examiner of the certificate of discharge was, therefore, no offence against this provision of the Shipping Act; and there was no proof of the first count in the charge-sheet.

The first question should also be answered in the affirmative.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., for reasons stated in writing, agreed in the result. He said that the defendant obtained a master's certificate to which he was not entitled, and obtained it upon untrue statements in writing given by him for the purpose of obtaining such a certificate. But, by reason of the finding of fact exculpating him from a guilty knowledge of the wrong which he perpetrated, he must go free of the criminal law, however he might fare elsewhere.

MAGEE, J.A., wrote an opinion in which he stated that he fully agreed that the questions should both be answered in the

affirmative, and for the reasons above given. He added that he had been unable to find anything in the Canada Shipping Act, or the Regulations thereunder, to indicate that, for the purpose of obtaining a certificate of competency as master for inland waters, service in the capacity of second mate, by a person having a certificate of competency as mate, is not as effective as service in the capacity of first mate. This view was enforced by references to the Act and the Regulations.

Questions answered in the affirmative.

MARCH 19TH, 1912.

DAVEY v. FOLEY-REIGER CO.

Water and Watercourses—Adjoining Mill Properties—Dispute as to Triangular Piece of Land—Title—Deeds—Description—Tail-race—Cross-wall — Obstruction of Flow—Easement — Damages — Injunction — Declaration of Common Rights in Land in Dispute.

Appeal by the plaintiff from the order of a Divisional Court, 2 O.W.N. 1284, varying the judgment of BRITTON, J., at the trial, 2 O.W.N. 1028.

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

M. K. Cowan, K.C., for the plaintiff.

W. M. German, K.C., for the defendants.

MOSS, C.J.O.:—The dispute between the parties to this action, when narrowed down to the substantial merits, seems to lie within a comparatively small compass.

The raceway from the defendants' factory crosses from what is undoubtedly his property over a small triangular piece of land, and merges in an artificial watercourse situate on land which is undoubtedly the property of the Government of Canada. The waters flowing in this watercourse are the waters which emerge from the tail-races of the respective factories of the plaintiff and defendants, which are situate on adjoining lands. Each of the parties claims title to the triangular piece. The learned trial Judge found in favour of the plaintiff's claim of title, but on the whole case dismissed the action. A

Divisional Court held that the title was in the defendants, but subject to an easement entitling the plaintiff to discharge the water flowing from his factory to a certain specified extent. Upon the argument in this Court these contentions were renewed.

The determining factor appears to have been the exact line of the south-west boundary of the plaintiff's parcel of land. So far as the conveyances are concerned, they do not furnish as much light as could be desired. The descriptions are general, vague, and uncertain. This might be accounted for by the fact that all the earlier conveyances were among members of the family of George Keefer, who was the owner of both properties from 1826 until the time of his death, probably in the latter part of 1857 or the early part of 1858. He and those of the family to whom conveyances were made, as well as those of the family making such conveyances, were in all likelihood familiar with the position and limits of each parcel. At the date of George Keefer's death, there was on the parcel now owned by the defendants a flouring mill, which had been there from a very early date, certainly as early as 1831; and on the plaintiff's parcel a wooden building used as a cotton factory. When this was first built does not definitely appear, but probably as early as 1852. This was replaced by a stone building, probably between 1868 and 1870; but whether the walls of this building stood precisely on the same spot as the walls of the wooden building does not appear. Each used water from the Government head-race to the east, and each discharged by separate means into the tail-race over what was then the property of the Provincial Board of Works, and is now the property of the Government of Canada. The first conveyances after George Keefer's death which indicated limits separating these parcels were three deeds dated the 24th March, 1862, and made by John G. Keefer as grantor, the respective grantees being Catherine Eastman, John Keefer, and Thomas C. Keefer. They contain no description by metes and bounds, and the estate or interest granted by each deed is one undivided third of the lot and cotton mill thereon erected north side Mill street on the north of the Keefer mill on the east side of the Welland canal, together with one-third of the water and all other privileges thereunto attached, appertaining, or belonging. These grants were not made by owners of the Keefer mill parcel, and the descriptions could not vary the description by which George Keefer had devised the Keefer mill parcel to his three sons George, Peter, and John Keefer, viz., "all the large stone mill

and lot of land thereunto belonging, with all water privileges of the same as granted to me and my heirs forever by the Board of Works.'' It seems plain that the testator intended that the water privileges which were originally and primarily attached to this parcel, and involved the triangular piece, should continue undisturbed in so far as the water rights and all that was necessary to secure them as theretofore were concerned. And throughout the various descriptions and conveyances there are not to be found any that shew at all definitely or distinctly any intention on the part of the devisees of this parcel, or of those claiming under them, ever to relinquish or grant away these rights. Indeed, the conduct and dealings of the parties, the nature of the use made of the common tail-race, the acquiescence for years by the respective proprietors in everything that was done by his neighbour in regard to the discharge of water from their respective mills or factories over the small portion in question, all go to shew that it was considered and treated as common ground in which each proprietor had equal privileges and equal rights.

This involves, of course, a mutual obligation not to infringe upon each other's rights or to do anything which may unreasonably and materially interfere with the other's enjoyment of his rights.

I agree with the Divisional Court that the defendants have, in some of the respects indicated in the judgment of that Court, improperly interfered, and that they should pay the damages fixed, and be prohibited from continuing their obstruction in contravention of the plaintiff's rights. But I base my agreement to this extent upon the ground that the defendants and plaintiff have equal rights, and not upon any ground of superiority of title in either.

In my view, the judgment appealed from should be varied by striking out the declaration relating to the title to the raceway in question, and the rights of easement thereover, and substituting a declaration that the parties are entitled in common to the use of the triangular piece of land forming the raceway, with all necessary directions or variations from the judgment appealed from as may be consequent thereon; and that, with such variations, the appeal should be dismissed without costs.

Should any question arise as to the form of the certificate it may be settled in Chambers.

GARROW and MEREDITH, JJ.A., for reasons stated by each in writing, agreed in the result.

MACLAREN, J.A., agreed with MOSS, C.J.O.

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

Judgment below varied; no costs.

MARCH 19TH, 1912.

BULLEN v. WILKINSON.

Vendor and Purchaser—Contract for Sale of Land—Misstatement as to Frontage—Honest Mistake—"More or Less"—Specific Performance with Compensation for Deficiency—Alternative Claim—New Cause of Action—Discretion.

Appeal by the plaintiff from the order of a Divisional Court, ante 229, affirming the judgment of SUTHERLAND, J., 2 O.W.N. 1202.

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

W. J. Elliott, for the plaintiff.

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

The judgment of the Court was delivered by MEREDITH, J.A.:—The plaintiff is seeking equitable relief; for, in addition to specific performance of a contract for the sale to him of land, he is insisting upon compensation for a deficiency in the quantity which, he asserts, was sold to him: so that, in a sense, the Court has a discretion, which it may rightly exercise, to refuse the relief sought, leaving him to pursue his rights at law, if any he has.

In one of the cases very much relied upon by Mr. Elliott—Mortlock v. Butler, 10 Ves. 292—the Lord Chancellor, dealing with the question involved in this case, said: "For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion of his contract, and, if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the Court will not hear the objection, by the vendor, that the purchaser cannot have the

whole. But that always turns upon this; that it is, and is intended to be, the contract of the vendor."

There is little, if any, doubt about the facts of the case. The land in question adjoins lands of the plaintiff upon which he has built an "apartment house," and upon which he has resided for some time; and he is a builder by trade; and quite familiar with the land in question, having had, at one time, the use of part of it.

His contention is, that the defendant agreed to sell to him land having a frontage of 24½ feet for $4,000, and that she is able to convey to him only 20 feet, and that there should be performance of the contract with a proportionate diminution in price.

The contract in writing is to sell the premises known as No. 44, having a frontage of 24.6 feet more or less. The "premises" are residential property, the frontage of which is 20 feet, with a right of way over an additional adjoining 8 feet, and the residential building covers the whole 20 feet frontage.

That the plaintiff knew that the whole frontage over which the defendant had ownership rights was not absolutely hers, that she had a right of way only over part of it, is made very plain: that the plaintiff was more than once made aware of the fact is well proved, and indeed is admitted by him: it would be exceedingly improbable that he would not have become aware of it, if he had not been told. So too would it be that he did not know pretty nearly the frontage of the building: he admits that he thought it was between 19 and 20 feet and that the way was "about 9 feet, between 9 and 10 feet."

Some time before buying, he had gone to a land agent, through whom some earlier transactions respecting the land had taken place, and sought from him information as to the property with a view to buying, when, having no better means at hand of finding its dimensions, the land agent shewed him the dimensions as given in "an old assessment," and at the same time told him "that he was not sure whether the plaintiff owned the lane or half of it or had a right of way over it."

The plaintiff and the other land agent, through whom the sale was made, differ as to the manner in which the dimensions of the frontage came to be set out in the agreement. The plaintiff testified that there was no particular discussion on the subject, and that the land agent put them down. The land agent testified that the plaintiff said he wanted to know the frontage and said he would not buy unless he knew what he was buying, and so they were inserted. He says this took place

at the time the agreement was signed, which seems to be inconsistent with other parts of his testimony as to when, how, and why he obtained from the defendant the dimensions, but that is not very material except as shewing that care must be taken in accepting everything as a fact that is sworn to, because of memory's defects, to which all are more or less subject.

It was, doubtless, better for the plaintiff to assert that it was not upon his insistence that 24 feet and 6 inches frontage was inserted in the agreement without mentioning in any way the way, or any rights over it, for that might look like getting the defendant into a trap to agree to sell more than she had, when it is manifest that she was really only agreeing to sell that which she actually had, and which they both knew she had and occupied and used: which fact doubtless accounts for the careless way in which the dimensions were obtained, from the municipal assessor's returns only, when accuracy might so easily have been attained.

Whether in strictness an agreement to sell premises known as street number 44, having a frontage of 24 feet 6 inches more or less, would ordinarily bind the seller to convey at least 24 feet, need not be considered, because there is a good deal more in the case than that; there is the knowledge of the plaintiff that part of the defendant's right comprised a common way, and that number 44 comprised only 20 feet in addition to the right of way, and that that was what she was selling; and, in addition to that, there is no evidence that the 20 feet, with the right of way, is not worth quite as much as 24 feet without any such right, and, if it be, there is no right to compensation.

I am, therefore, of opinion that this is not a case in which the plaintiff is entitled to a judgment such as he seeks in this action, and that, therefore, the dismissal of it should not be disturbed. Nor can I think that he is entitled now entirely to change his position and demand specific performance, a thing which he might have had but would not: it may be that if, in this action, he had claimed such relief in the event of failing to get the greater—in the alternative—he might have it: but as it is, and under all the circumstances, it should, I think, now be refused. In a sale of residential property, promptitude is generally essential.

I would dismiss the appeal.

MOSS, C.J.O., IN CHAMBERS. MARCH 20TH, 1912.

NELLES v. HESSELTINE.

Appeal to Supreme Court of Canada—Order "Allowing Appeal" from Judgment of Court of Appeal — Supreme Court Act, sec. 71—Scope of—Jurisdiction of Judge of Court of Appeal—Judgment Sought to be Appealed from not a Final Judgment—Appeal not Brought within Prescribed Time—No Power to Grant Leave in Non-appealable Case.

Application on behalf of the defendants the Windsor Essex and Lake Shore Rapid Railway Company for an order allowing, in terms of sec. 71 of the Supreme Court Act, an appeal from a judgment pronounced by the Court of Appeal in this action on the 21st April, 1908 (11 O.W.R. 1062).

M. Wilson, K.C., and A. H. F. Lefroy, K.C., for the applicants.

C. J. Holman, K.C., for the plaintiffs.

MOSS, C.J.O.:—Several other directions are asked for in the notice of the application, but it is quite apparent that the only motion which I can entertain is that made under sec. 71. The other matters could only be dealt with by the Supreme Court of Canada or a Judge of that Court.

I have read the numerous affidavits and other papers forming the material on which the motion is supported and opposed, including the opinions of the Registrar of the Supreme Court of Canada upon the motion heretofore made on behalf of the applicants to affirm the jurisdiction of the Supreme Court to entertain an appeal from the judgment in question, and of Mr. Justice Idington, speaking for the Supreme Court, in affirming the Registrar.

I am fully sensible of the unfortunate situation which the applicants seem to occupy at present of not having ever had an opportunity afforded them of appealing from the judgment in question to the Supreme Court, owing to the form of the judgment and the view taken by the Supreme Court as to its jurisdiction to entertain an appeal in such a case. Upon the application to the Registrar of that Court to affirm jurisdiction, he expressly held that there was no jurisdiction because the appeal had not been brought within sixty days, and determined nothing

as to the point of the judgment not being a final judgment. But it is impossible not to see, from the references to the cases of Clarke v. Goodall, 44 S.C.R. 284, and Crown Life Insurance Co. v. Skinner, 44 S.C.R. 616, what the opinion of the Court was on the point.

Besides, the chief ground upon which the applicants rest their present application and excuse their delay is, that the judgment, not being a final judgment, was not appealable to the Supreme Court upon or after its being pronounced by this Court.

And, in view of the several decisions on the point found in the Supreme Court reports, which I have again read and considered, it does not seem open to question that the judgment of the 21st April, 1908, falls within the prescribed category of non-final and therefore non-appealable judgments.

The result is, that, as I have said, the applicants have been placed in an unfortunate position, seemingly without any special fault on their part. On the other hand, the plaintiffs are equally blameless, and undoubtedly, upon the faith of the judgment, have incurred large expense in and about the conduct of a reference which, on the applicants' contention, was based on an erroneous view of their liability.

The difficulty, and I think an insuperable one, that I find in the way of relief upon this application is, that the case is not one to which sec. 71 applies, and that I am without power to do what is asked. That section enables a Judge of the Court appealed from to allow an appeal only under special circumstances, although it was not brought within the prescribed time, which, if this were an appealable case, would be within sixty days. The expression "allow an appeal" has been interpreted as meaning only that a Judge may settle the case and approve the security: per Strong, J., in Vaughan v. Richardson, 17 S.C.R. 703. See also News Printing Co. v. Macrae, 26 S.C.R. 691, at p. 701.

But, as the context shews, the "appeal" to be allowed and the case to be settled and the security to be approved plainly refer to an appealable case, one that, but for the lapse of time, could have been appealed to the Supreme Court of Canada, as of course. The single power given to the Court or Judge appealed from is to remove, in such a case, the difficulty occasioned by the failure to carry an appeal to the Supreme Court within the prescribed time. It confers no power to grant leave to appeal in a non-appealable case, or for taking any other step in the matter.

I am unable, therefore, to see my way to making any order or to giving any directions as to security or otherwise as asked.

The motion must be dismissed, and the plaintiffs are entitled to their costs.

HIGH COURT OF JUSTICE.

CLUTE, J. MARCH 15TH, 1912.

MAGNUSSEN v. L'ABBÉ.

Master and Servant—Injury to Servant—Negligence—Absence of Proper Precautions—Act of Foreman—Findings of Trial Judge—Person Intrusted with Superintendence—Extended Meaning of—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 2; sec. 2, sub-sec. 1—Scope of—Damages—Costs.

This action was tried at Port Arthur on the 28th June, 1911, before BOYD, C., and a jury. No questions were submitted, but the jury found as follows: "We believe the plaintiff was injured by accident through no fault of his own or the defendants. The man Polson evidently started the log moving, whether accidently or not we are not prepared to say." Upon this finding BOYD, C., dismissed the action. A new trial was ordered by a Divisional Court (ante 301). The action was accordingly tried before CLUTE, J., without a jury, at Port Arthur, on the 7th March, 1912.

The parties agreed that the evidence taken at the former trial should be read, with such further evidence as either party might be advised to produce.

A number of witnesses were examined on the re-trial, including Alfred Polson, referred to in the jury's finding.

A. E. Cole, for the plaintiff.

A. J. McComber, for the defendants.

CLUTE, J.:—To understand the effect of the evidence of Polson, it will be convenient here to state the nature of the action and the evidence at the former trial.

The defendants were contractors. The plaintiff was in their employ. A trench was being dug for the city corporation, from which there led a cross-trench. The plaintiff was working in

the cross-trench. At the point of intersection there was a man-hole some 12 or 15 feet deep. The cross-trench was from 10 to 12 feet deep at the man-hole, and of a lesser depth as it extended from the man-hole. The sides of the upper portion of the trench were earth, sand, small stones, and hard-pan. There was further blasting to be done in the trench at a distance of some 20 feet from the man-hole. A number of blasts had already been put in. The plaintiff was in the cross-trench, about 8 feet from the man-hole, throwing out earth, broken rock and stone. Polson was in charge of the blasting. He had several men with him, assisting. It was a part of his duty, before the shots were fired, to cover the holes with logs to prevent the escape of rock and other débris thrown out by the blast. The defendant Bengsten had general charge and supervision of the work. He had authorised Polson to call to his assistance the men digging in the trench for any purpose for which he might require them in connection with his blasting, and particularly in removing the logs to be placed over the drill-holes. After a previous blast, the logs had been placed on the edge of the trench. The nearest log, I find from the evidence, was placed at from 2 to 2½ feet from the edge of the trench. The evidence differs as to the size of this log. It is spoken of as a telegraph pole. It was large at one end and smaller at the other. The largest end was near the man-hole. Polson was standing near that end. The men assisting him were near-by ready to give a hand. He held a cant-hook in his hand. He required further help to move the log, and called the plaintiff, who was working beneath in the trench, to his assistance. As the plaintiff looked in answer to him calling, he saw the earth and timber falling, and received a blow from the falling log which caused the injuries complained of. There was a dispute at the former trial as to what had taken place causing the log to fall in.

Polson was not present at the former trial, not living in the district at that time. The plaintiff's witnesses, being the men who were assisting Polson, swore that the bank caved in, causing the pole to roll in at one end where the bank gave way. The defendant Bengsten swore that he was about 100 feet away, but could see what took place, and declared that Polson with the cant-hook started the log rolling, that the bank did not cave in, but that Polson rolled the log in.

The new trial was granted mainly to get this further evidence. I may say here that the Chancellor, in his charge to the jury, gave credit to the plaintiff and his witnesses. He says: "These men impressed me favourably. They just stated simply

what they knew. What they did not know they did not try to tell. They tried to tell you the truth of what they remembered."

In reading the evidence one is impressed with this same view, and that is the opinion I formed of Polson. In his evidence before me, he stated that he called to the plaintiff; and, while he was waiting for him to come out of the trench, the earth caved in, and that he, Polson, went with it and went down feet first. He swears positively that he did nothing with the cant-hook. I am satisfied from the evidence of Polson and the plaintiff's other witnesses that this is the manner in which the accident occurred, and that the defendant is mistaken in his statement of how it occurred.

The cave-in, as described by some of the witnesses, extended back some 2½ feet, sufficient to start the log moving, and extended down the sides 4 or 5 feet. This corresponds exactly with what had occurred with a previous cave-in at the man-hole, of which the defendant Bengsten was aware prior to the accident in question.

There was also evidence that the effect of the blasting was to loosen the soil about the trench and render it liable to fall in, and that the trench was dangerous without being shored up or protected. The defendant Bengsten had knowledge of all that occurred, that is, of the condition of the trench, of the previous cave-in, of the position of the log on the edge of the trench, and ought to have known, I think, of the danger men incurred in working in the trench.

I find the defendants guilty of negligence in not taking proper precautions in shoring up the sides of the trench or adopting other means to prevent the cave-in.

I am further of opinion that, if the defendant Bengsten's evidence of the cause of the falling in of the log be accepted, that is, that it was owing to Polson rolling it over with the cant-hook, the defendants are still liable.

It was admitted by the defendant Bengsten before me that Polson had charge of the blasting and charge over the men whose duty it was to place the logs and prevent the discharged blast from flying out through the trench. He was, therefore, a man having superintendence, and, while in the act of such superintendence, he negligently and carelessly rolled the log into the trench, knowing that the plaintiff was there. The plaintiff, at that moment, was under his control, and was just in the act of obeying his command, but that would not make any difference. If he, as superintendent, under sec. 3, sub-sec. 2, was guilty of negligence which caused injury to a man, even in another department, the defendants would still be liable.

In Kearney v. Nicholls, 76 L.T.J. 63, it was held, "that it is not necessary that such superintendence should be exercised directly over the workman injured, or that the workman should be acting under the immediate orders of such superintendent; it is enough if the superintendent and the workman are both employed in furtherance of the common object of the employer, though each may be occupied in distinct departments of that common object."

Section 2, sub-sec. 1, does not limit the scope of sec. 3, sub-sec. 2, but enlarges the scope of the application of the Act as limited by sec. 8 of the English Act. This is apparent on comparing the two Acts.

I place, however, my decision upon the first ground.

The amount of damages that ought to be given is difficult to ascertain. The injuries suffered were: (1) the drum of the ear was broken, which seriously affects the hearing through that ear; (2) the injury to the eye causes the plaintiff to see double. The specialist states that it is impossible to say whether this injury is permanent or not, but he is strongly of the view that it is a permanent injury. It is not one that can be corrected by glasses.

The plaintiff is a young man, twenty-seven years of age, otherwise in good health, and was capable of earning $3.50 a day. He was a driller, and requires, therefore, his natural sight to see the drill. In attempting subsequently to drill, he had to cover the one eye, otherwise he would make a mis-stroke. He tried the method of wearing a handkerchief over one eye, and not with very satisfactory results. He is still far from well, suffering severe pains in his head; not capable of hard and continuous work. There can be no doubt that his earning power has been seriously depreciated and probably will be during his life. The evidence is uncertain as to the extent of the loss. After taking all the circumstances into consideration, I think $1,100 is a reasonable sum to assess as damages, and I assess such sum accordingly.

The plaintiff is entitled to the costs of the action, including the former trial, the appeal to the Divisional Court, and the second trial.

DIVISIONAL COURT. MARCH 15TH, 1912.

ABREY v. VICTORIA PRINTING CO.

Fraud and Misrepresentation—Action to Rescind Executed Contract—Innocent Misrepresentation not Amounting to Fraud—Statements Inducing Subscription for Shares in Company—Finding of Trial Judge—Appeal.

Appeal by the defendant company from the judgment of MULOCK, C.J.Ex.D., in favour of the plaintiff as against the defendant company, in an action for rescission of the plaintiff's subscription for shares in the defendant company and for damages against the individual defendants.

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

S. H. Bradford, K.C., for the defendant company.

J. Jennings, for the plaintiff.

The judgment of the Court was delivered by MIDDLETON, J.:—The action was brought against the company for the purpose of rescinding a subscription for stock and to recover back the $2,000 paid therefor, and as against the individual defendants for damages for misrepresentations; the misrepresentations charged being certain statements which induced the subscription for the stock in question.

At the trial, the action was dismissed as against the individual defendants, because the representations were not made fraudulently, but innocently. The learned trial Judge, however, set aside the subscription for stock and ordered a refund of the $2,000 by the company; holding that the plaintiff was entitled to this relief because the representations, although innocently made, were material.

With this we cannot agree. It is now settled by a series of cases—of which Angel v. Jay, [1911] 1 K.B. 666, is the latest—that "misrepresentation is no ground for setting aside an executed contract, unless such misrepresentation would be not only sufficient to afford ground in equity for rescission of an executory contract, but also is deceitful in contemplation of a Court of law; or, as Lord Selborne stated it, 'unless there is a fraud or misrepresentation amounting to fraud.'"

Mr. Jennings attempted to support the judgment by inviting us to consider the evidence and upon it to find that there was in this case a fraudulent misrepresentation. We have read the

evidence with care, and think the case comes perilously near to the line; but we cannot see our way clear to interfere with the finding of the learned trial Judge.

The appeal must, therefore, be allowed; but we think that the reasons which induced the trial Judge to deprive the individual defendants of costs justify us in depriving the company of the costs of either the action or appeal.

MIDDLETON, J. MARCH 15TH, 1912.

RE GALBREAITH.

Will—Construction—Legacy—Annuity for Limited Period—Sale of Homestead—Deferred Legacy—Hypothetical Questions—Devolution of Estate in Possible Events—Policy of Court.

Motion by the executors of General Brock Galbreaith, deceased, under Con. Rule 938, for an order determining certain questions arising in the administration of his estate as to the construction of his will.

H. Carpenter, for the executors and for Frank (or Joseph Franklin) Galbreaith and his wife.

W. M. McClemont, for Jessie Elizabeth Townsend.

J. R. Meredith, for two infants.

MIDDLETON, J.:—Upon the argument, I pointed out to the counsel that most of the questions asked were questions which could not properly be propounded at this stage, either upon an originating notice or in an action, because the information sought related to the devolution of the estate in events which had not yet happened, and that it was against the policy of the Court to attempt to answer hypothetical questions based upon conditions which may never arise. To rule otherwise might give rise to idle litigation and the incurring of much useless expense, particularly if the decision gave rise to a series of appeals.

Finally, the parties agreed that the only question that could now be advantageously dealt with was the one relating to the legacy of $150: the question being whether the intention of the testator was to give one sum of $150 or to give an annuity of $150, and, if so, for how long.

As I read the will, the testator has given an annuity of $150, payable on the 1st day of October in each year after his death until the homestead property is sold; which I interpret to mean until an actual sale of the homestead property is made by the executors, if, by reason of Frank's death, the right in the executors to sell arises, or the expiry of fifteen years from the date of the will, when Frank himself, if then living, is entitled to sell. I think the fifteen years is the extreme limit; but if, by reason of Frank's death, the property is sold earlier, the right to the legacy then ends, and the annuitant will, instead thereof, receive the pecuniary legacy given in the earlier part of the will.

The costs of all parties may be paid out of the estate.

MIDDLETON, J. MARCH 18TH, 1912.

RE CRAIG.

Will—Construction—Legacies—Death of Legatees before Period of Payment—Vested or Lapsed Legacies—Charge on Personalty as well as Land—Originating Notice—Costs.

Motion by A. W. Craig, upon originating notice, for an order declaring the construction of the will of the late John Craig.

A. D. Armour, for the applicant.

M. C. Cameron, for Augusta B. Maclaren, the residuary legatee.

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

MIDDLETON, J.:—The question arises upon the clause of the will in the words following: "I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say: To my beloved daughters Rachel Victoria Craig Mary Maud Craig Elva Florence Craig and Keitha Irene Craig I will and bequeath the sum of one hundred and fifty dollars each to be paid to them on attaining the age of twenty-one years the bequests hereinbefore made amounting in all to six hundred dollars I make a charge upon my land being the east half," etc.

Two of the testator's daughters, Mary Maud Craig and Rachel Victoria Craig, died under the age of twenty-one years; and, if these legacies are vested, the three surviving sisters and

the surviving brother are each entitled to $75. By the will, the whole residuary estate, including the land in question, passes to the daughter Augusta; so that the question narrows itself to the three sums of $75 each claimed by the infants and J. W. Craig.

Counsel for Augusta contended that the legacies, being charged upon land and being payable on the infant attaining the age of twenty-one years, lapsed upon the death of the legatee before attaining that age. There is no doubt that this would be so if the legacy was one simply charged upon the land, and there is no doubt that, in so far as the legacy is a charge upon the land, the land cannot be resorted to; but I think the legacy here is a legacy charged upon the personalty as well as upon the land. The clause commences with the significant words "I give devise and bequeath all my real and personal estate;" and, although there is a charge upon the land, this is not sufficient to free the personalty. There must be clearly expressed, not only an intention to onerate the realty, but to exonerate the personalty. The testator must not merely indicate that the realty may be resorted to, but must clearly substitute the realty for the personalty, which is the primary fund to be resorted to for the payment of legacies.

According to the Surrogate audit, there is ample personalty. The audit shews that $535 of chattels has been handed over to Augusta, and that there remains in the hands of the executors $138.85 personalty.

I cannot refrain from expressing regret that there should be litigation over such a small amount. Among the papers filed is a letter from the solicitor for the residuary legatee Augusta, written after the motion was launched, in which it is stated: "We utterly fail to see any occasion for a motion. Neither Mrs. Craig nor the executors have ever questioned the fact that the legacies of $150 each to the four daughters of the late John Craig were vested legacies. Neither has she nor any one else ever questioned that these legacies are a charge upon the lands." The letter concludes with the statement that the applicant should be saddled with the costs of an unnecessary motion.

It appeared that more than three months before launching the motion, Mrs. Maclaren was written to by the solicitor for the applicant, the son, requesting payment of his share of the legacies, and, this letter not being replied to, some three weeks later a letter was sent to the executor, which also was not replied to; and, notwithstanding the statements in the solicitor's letter that the applicant's right had never been and was not

disputed, upon the argument the applicant's right was strenuously resisted.

Under these circumstances, I see no reason why the residuary legatee should not pay the costs.

FALCONBRIDGE, C.J.K.B. MARCH 18TH, 1912.

JARRETT v. CAMPBELL.

Will—Validity — Action Transferred from Surrogate Court— Application for Order for Trial of Issues by Jury—Practice.

Motion by the defendant Campbell for an order that the issues be tried by a jury.

R. McKay, K.C., for the defendant Campbell.
E. C. Cattanach, for the plaintiffs.
J. R. Meredith, for the infant defendants.

FALCONBRIDGE, C.J.:—The action concerns the validity of the will of the late Charles Bugg. The plaintiffs, the executrices named in it, propounded it for probate in the Surrogate Court of the County of York. The defendant Campbell, the only surviving child and heir-at-law of the deceased, contested probate, upon the ground that the will was not duly executed, and that the testator had not testamentary capacity; also upon the ground that the execution of the will was obtained by the undue influence of the plaintiffs, who are not only executrices, but residuary legatees under the will, and who beneficially take the greater portion of the testator's estate, which is very large. The proceedings were transferred from the Surrogate Court to the High Court, and the order of transfer reserved to any party the right to apply for a trial with a jury.

In Re Lewis, 11 P.R. 108, Ferguson, J., determined that a probate action, transferred from the Surrogate Court to the High Court, was a matter over which the Court of Chancery had, at the time of the passing of the Judicature Act, exclusive jurisdiction; this being at that time the criterion upon which the right to demand a jury by a mere jury notice depended, as well as the criterion as to the mode of trial pointed out by sec. 45 of the Judicature Act of 1881.

Prior to that statute, Surrogate Court proceedings could be transferred to the Court of Chancery, and then fell under the

general provisions of the Chancery Act, which contained a provision authorising an order directing a trial by jury.

By the section in question, in cases in which the Court of Chancery had exclusive jurisdiction, "the mode of trial shall be according to the present practice of the Court of Chancery."

In the revision of 1887 this section was recast, and assumed the form in which it is now found, as sec. 103, which provides that "all causes, matters, and issues over the subject of which, prior to the Administration of Justice Act of 1873, the Court of Chancery had exclusive jurisdiction, shall be tried without a jury, unless otherwise ordered." The change of date from 1881 to 1873 is in this case immaterial, because the provision of the Surrogate Courts Act relating to transfer of cases to the Court of Chancery is found in the Consolidated Statutes of 1859.

As is pointed out in Re Lewis, the legislation here and in England upon this point has proceeded upon widely differing lines. The right of the heir-at-law in England to have the issue devisavit vel non tried by a jury was long carefully preserved to him; but here the result of our legislation is, that primâ facie the action "shall be tried without a jury," and the onus is upon the party seeking to have a jury to shew a case justifying it being "otherwise ordered."

In this case everything points to the desirability of a trial without a jury. There will be many witnesses, it is said some 125, and as many experts as the law or the trial Judge may allow to be called. The trial, it is said, will take two weeks. The circumstances of the case are such as to make it unlikely that the mind of the jury can be concentrated upon the real issue. As said in the case already referred to, "the cause can properly and fitly be disposed of in the ordinary way without the intervention of a jury."

Motion dismissed—costs in the cause.

DIVISIONAL COURT. MARCH 18TH, 1912.

KELLY v. MACKLEM.

Husband and Wife—Goods Seized under Execution against Husband—Claim by Wife—Interpleader Issue—Property Acquired by Wife in Separate Business—R.S.O. 1897 *ch.* 163, *sec.* 6(1)*—Evidence—Finding of Judge—Appeal—Costs.*

An appeal by execution creditors from a judgment of the County Court of the County of York finding an interpleader

issue, in respect of chattels seized under execution, in favour of the claimant, the wife of the execution debtor.

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

L. F. Heyd, K.C., for the execution creditors.

A. H. F. Lefroy, K.C., for the claimant.

The judgment of the Court was delivered by LATCHFORD, J.:—The judgment appealed from finds as a fact that the property seized was acquired by the claimant "in an employment, trade, or occupation in which she is engaged or which she carries on, and in which her husband has no proprietary interest" (R.S.O. 1897 ch. 163, sec. 6, sub-sec. 1), and was, therefore, her property as against the execution creditors. There is evidence by husband and wife which, if believed—and it was believed—amply supports the finding. Much of that evidence, I should, if trying the case, find difficulty in crediting; and I incline to the view that, had the circumstances connected with the claimant's business been more fully elicited, a different conclusion might properly have been reached. Upon the finding, however, no course is, I think, open but to dismiss the appeal.

As the execution creditors were misled by the claimant permitting the automobile which caused the injury to be registered by her husband as his own, there should be no costs.

DIVISIONAL COURT. MARCH 18TH, 1912.

VEITCH v. LINKERT.

Master and Servant—Injury to Servant—Negligence—Defective Plant—Horse Used in Business—Vice of Bolting—Knowledge of Master—Workmen's Compensation for Injuries Act—Right to Use Horse at Time of Injury—Servant Acting in Discharge of Duty—Findings of Jury—Evidence to Support—Proximate Cause of Injury—Damages.

Appeal by the defendants from the judgment of the County Court of the County of Wentworth, in favour of the plaintiff, upon the findings of a jury, in an action for damages for personal injuries sustained by the plaintiff by reason, as the plaintiff alleged, of the negligence of the defendants, in whose service the plaintiff was.

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

T. H. Phelan, for the defendants.

C. W. Bell, for the plaintiff.

BRITTON, J.:—The defendants are bakers, doing a large business in the city of Hamilton, and the plaintiff was in their employ as a delivery-man—delivering bread to customers of the defendants, and, for that purpose, using the defendants' horse and waggon.

Wentworth Young was also an employee of the defendants, engaged, with another horse and vehicle of the defendants, delivering bread to other customers, on a different route. On the 20th July, 1911, Young, having completed one round in delivering bread, had not supplied all the customers on his beat—so he returned to the defendants' place of business, and, according to the evidence of Young, what took place was as follows:—

He ran short of bread, and drove into the yard. He found that there had been bread returned; he put it in the little light waggon, which he took out instead of the heavy waggon, and he took the mare "Nellie." He did not want to overwork his horse, as there were complaints that his horse was getting thin. He had no instructions to take out the mare "Nellie," nor had he instructions not to take her. The mare stood in the stable with other horses, and was used regularly in the delivery business, but was driven by Carl Linkert, one of the defendants, or by one Whitelaw, another employee. Young had used this same mare at least on two occasions before the 20th July, and on the second occasion the mare "bolted"—that time doing no damage.

On this 20th July, the plaintiff and one Kingston, another employee of the defendants, were both at the office. Young asked one of these to go with him on the second trip. Neither responded willingly; so Young found Harry Linkert, one of the defendants, and obtained from him permission to take a driver, either Kingston or the plaintiff; and Young took Kingston. On the 21st July, the same thing happened to Young. He ran short of bread, returned to the office, changed his horse and waggon for the mare "Nellie" and a light waggon. He saw the plaintiff and said to him, "You had better come with me to-day." The plaintiff made no verbal reply, but went with Young.

Young admitted that the weight carried with the light waggon was not heavy enough to hold a horse inclined to run away, and that this light waggon had not an attachment, which

the heavy waggon had, for hitching the lines around the hub—which would assist, at least, in stopping a horse and in preventing a run-away.

Young and the plaintiff went away together, delivered the bread they carried, and on the way returning to the defendants' stables the mare bolted—ran away—and the plaintiff was seriously injured. The action is brought against his employers for damages. It is brought under the Workmen's Compensation for Injuries Act; and the claim is, that the accident happened by reason of a defect in the plant used in the business of the defendants, and that it arose from the negligence of the defendants.

The right of the plaintiff to recover need be considered only in reference to the character of the mare as defective plant, and in regard to the right to use the mare and the time and place of the accident.

The following questions were submitted to the jury by the trial Judge:—

1. Was the mare "Nellie" a dangerous horse to drive?
2. If so, did the defendants know it before this accident?
3. Was this accident due to the vice of this mare, if any?
4. Had Young the right, or had he reason to suppose he had the right, to take this mare for his short delivery?
5. Were the plaintiff and Young engaged properly in the defendants' business when the mare ran away?
6. When the plaintiff went with Young on this occasion, did he believe it was his duty as the defendants' employee to do so?
7. If so, had the defendants or either of them given him reason to think it was his duty to go?

All of these questions were answered in the affirmative, and the jury assessed the damages at $250.

This appeal by the defendants is on the grounds: (1) that, if the accident was caused by any negligence, it was the negligence of Young, a fellow employee with the plaintiff of the defendants; and (2) that, at the time of the accident, the plaintiff was not acting as a servant of the defendants. A further objection was taken at the trial, viz., that driving the mare to the place where she started to run was such a deviation from the route of Young as to prevent recovery. The objection is not taken in the notice of appeal; probably because, it being a question of fact as to where Young's duty called him, the defendants' counsel regarded it as closed by the answer of the jury to the 5th question submitted.

The defendants, in the alternative, ask for a new trial, on

the ground that the answers of the jury are contrary to the evidence, and perverse, and also on the ground that the damages are excessive.

It cannot be said that the findings were perverse; and, while the damages allowed are liberal, they are not so large as to permit interference with them.

A horse belonging to a manufacturing establishment and used for driving raw material or delivering the product or in the work of the factory may be considered part of the plant. A habit of "bolting" or running away in a horse used for driving in the delivery of bread would be a defect in a baker's horse.

There was evidence upon which the jury could find, as they have found, that the mare "Nellie" had the vice of bolting, and that the defendants knew it.

The jury have found in their answer to the 4th question that Young had the right to use this mare. There was evidence on which they could so find. Where the liability of the defendants depends upon questions of fact, and the evidence is contradictory, the findings should not be disturbed. Assuming, then, that the mare had the defect mentioned, that the defendants were aware of it, and that the mare was a part of the defendants' plant for Young's use, the negligence of the defendants was the proximate cause of the injury to the plaintiff. It may be that the defendants would not be liable to Young, if he was injured by this run-away. It may be that Young, as well as the defendants, would be liable to the plaintiff. I am not now attempting to decide either of these propositions.

If Young was negligent, his negligence may have been a concurrent cause of injury to the plaintiff. The cases decide that, "as a general rule, it may be said that negligence, to render a person liable, need not be the sole cause of an injury. It is sufficient that his negligence concurs with one or more efficient causes other than the defendant's fault—the proximate cause of the injury." "When two causes combine to produce injury, a person is not relieved from liability because he is responsible for only one of them." "Within the rule, the cause concurring with the negligence of one may be the negligent act of another."

As to the plaintiff being at the time of the accident in the employ of the defendants, in my opinion he was. He was doing the same kind of work as Kingston, to the knowledge of the defendants, had done on the day before the accident. It was the defendants' work, for their benefit, and in the regular course of their business. It was work done by the plaintiff, at the request of a fellow-employee, made before the plaintiff had left the de-

fendants' premises. The plaintiff did not consider his work for the day finished. Upon this, as well as upon the questions of Young's right to use the mare and as to the place of the accident, the jury have passed.

In my opinion, the appeal fails, and should be dismissed with costs.

FALCONBRIDGE, C.J.:—The case went to the jury on a charge to which no exception is now taken, the learned Judge having recalled the jury to make some further suggestions, in compliance with a request of the defendants' counsel.

In my opinion, the jury, viewing the whole of the evidence, might reasonably answer all the questions as they have done.

The appeal, in my opinion, ought to be dismissed with costs.

MIDDLETON, J., agreed in the result.

Appeal dismissed.

MIDDLETON, J. MARCH 19TH, 1912.

RE LIESMER AND PHILP.

Vendor and Purchaser—Contract for Sale of Land—Objection to Title—Erroneous Description in Title Deed—Rejection.

An application by the vendors under the Vendors and Purchasers Act.

D. C. Ross, for the vendors.
H. R. Frost, for the purchaser.

MIDDLETON, J.:—The sole question raised upon this application is the adequacy of the description contained in a conveyance through which the vendors claim title. The land is situated on the south side of Wyndham avenue, near Delaney crescent, in the city of Toronto, and consists of part of lots 1 and 2 according to registered plan B 363. Each of these lots, according to the plan, has a frontage of one chain. Upon the ground there is found to be an overplus of two feet six inches. For the purpose of widening Delaney crescent, the city corporation expropriated 8.4 feet along the westerly side of the lot. The Toronto General Trusts Corporation, as owners of the two lots, sold the easterly 45 feet and the westerly 25 feet; which, ac-

cording to the measurements on the plan, would leave the trusts corporation still the owners of the central 53.6 feet.

When the trusts corporation subsequently conveyed this central parcel, the description commenced 45 feet westerly from the intersection of the easterly limit of lot 2 with the south limit of Wyndham avenue, and proceeded westerly along the south limit of Wyndham avenue 54 feet to a point 25 feet easterly from the intersection of Wyndham avenue and Delaney crescent.

Upon an actual survey, it is found that the purchasers of the 25 feet and the 45 feet have enclosed the amounts granted to them respectively, and that between these parcels there is a frontage, not of 54 feet, but of 58 feet. The objection is based upon this discrepancy.

I think that, upon the facts stated, it is abundantly clear that the trusts corporation intended to convey everything between the two parcels theretofore conveyed, and that the statement of the distance between the two fixed points is erroneous and must be rejected; and, for this reason, the objection to the vendors' title is not well taken.

An order may be made so declaring. No costs.

CLUTE, J., IN CHAMBERS. MARCH 1ST, 1912.

DIVISIONAL COURT. MARCH 19TH, 1912.

FARMERS BANK OF CANADA v. HEATH.

Writ of Summons—Service out of the Jurisdiction—Cause of Action, where Arising—Place of Payment—Conditional Appearance.

Appeal by the defendants from the order of the Master in Chambers, ante 682, in one of the actions only, that upon the 1909 policy.

Shirley Denison, K.C., for the defendants.
M. L. Gordon, for the plaintiffs.

CLUTE, J. (at the conclusion of the argument):—I think the proper disposition of this matter is that which was made by the Master, following Kemerer v. Watterson, 20 O.L.R. 451. I think there is sufficient doubt in regard to the question as to where the contract was made, and as to where the breach oc-

curred, to justify the plaintiffs in bringing the action to have that question tested and to have a conditional appearance entered by the defendants, if they so desire: and I repeat what I said during the argument, that, if the facts are as suggested by counsel upon both sides, they might well have been spread out in form so that the Court could have acted upon them. I do not feel bound to act upon the documents above as they appear here; and, taking the insurance policy, issued apparently in London, to my mind it is obviously issued upon a form which shews that there was some person to whom the defendants were issuing it, and upon which they recognise that person as doing business in Toronto. Apparently, after it had been issued on the 20th January, 1909, in London, it passed to this person on the 8th February, 1909, in Toronto. Was that person the agent of the company of Lloyds? Or was he an agent of the bank? I do not know; but, upon the document issued by them, they recognised such a person. The natural inference was, that he was an agent of the defendants. That, of course, might be rebutted by the fact; and counsel for the defendants suggests that the fact is contrary to the inference I draw from the document itself; but that denial is not in such form that I can act upon it.

As I entertain a doubt as to where the contract was made or where the breach occurred, I think the proper order to make is that made in this case by the Master.

The appeal will be dismissed with costs to the plaintiffs in any event.

(This result is noted, ante 805.)

On the 12th March, 1912, an order was made by MIDDLETON, J., in Chambers, allowing the defendants to appeal to a Divisional Court from the order of CLUTE, J.

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

Shirley Denison, K.C., for the defendants.

J. Bicknell, K.C., and M. L. Gordon, for the plaintiffs.

The judgment of the Court was delivered orally, at the close of the argument, by FALCONBRIDGE, C.J.:—We are all agreed that Mr. Denison has presented this appeal with great skill and ingenuity. We are further agreed that it is neither necessary nor desirable that we should reserve the case merely for the purpose of adding to the literature on the subject.

The decision which we arrive at is not at all founded on the apparent hardship of the plaintiffs having to pursue individual underwriters into all the financial centres of Europe. It is based on what we consider the clear view of the law and practice.

There are two policies here, as to one of which the defendants admit that they have to submit to the jurisdiction of the Ontario Courts. As to the other one—it is for £5,145, which, by a written marginal note is declared to be equivalent to $25,000, the £1 sterling being taken at $4.86, the marginal note reading as follows, "£5,145 at ex. 4.86=$25,000"—counsel for the defendants has endeavoured to persuade us that there is no contract to pay this one in this country.

Two judicial officers have exercised their discretion on this motion, and, in our opinion, rightly. It seems to us that the cases of Canadian Radiator Co. v. Cuthbertson, 9 O.L.R. 126, Blackley Limited v. Elite Costume Co., 9 O.L.R. 382, and Kemerer v. Watterson, 20 O.L.R. 451, govern.

Not only is it a matter of doubt as to whether this contract is to be performed in Ontario, but I should think, without saying anything to prejudge the issue, it is quite arguable that the order appealed from is right: (1) by reason of the marginal note in the policy, which I have already referred to; and (2) from the fact that it is stamped with an agent's name, as referred to by Mr. Justice Clute. It is also suggested that the defendants have property in this country. However this may be, there is so much doubt in the case that the matters should be tried out in the cause, and not simply on affidavits. The practice is in substitution of the old common law practice requiring the plaintiff to undertake to submit to a nonsuit unless he proved a cause of action arising within the jurisdiction.

Appeal dismissed with costs to the plaintiffs in any event.

DIVISIONAL COURT. MARCH 19TH, 1912.

EVANS v. RAILWAY PASSENGERS ASSURANCE CO.

Accident Insurance—Claim for Disablement—Failure of Assured to Give Written Notice within Ten Days of Happening of Event Giving Rise to Claim—Bar to Action—Condition Precedent—Meaning of "Event"—Waiver—Inability to Give Notice—Costs of Action.

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Hastings dismiss-

ing an action in that Court to recover $600 under a policy issued by the defendants insuring against disablement from accident and certain other causes.

The appeal was heard by FALCONBRIDGE, C.J.K.B., CLUTE and SUTHERLAND, JJ.

M. Wright, for the plaintiff.

Shirley Denison, K.C., for the defendants.

The judgment of the Court was delivered by CLUTE, J.:— The action was brought under a policy of insurance, the plaintiff claiming $600 for disablement arising from an attack of appendicitis, and continuing for twelve weeks from the 24th November, 1909, to the 16th February, 1910.

The defendants plead that disablement from appendicitis is not within the policy, and further contend that the required notice in writing was not given by the plaintiff, for the neglect of which he is barred.

Dealing with the last objection first, the policy, clause 11, declares that "no claim shall be valid unless written notice of the happening of an injury or event which may give rise to a claim, or of any illness or disease, is given to the head office of the company in Toronto within ten days from the date of the happening thereof."

Verbal notice was given to the local manager within ten days from the 24th November, the date of disablement. A letter was written to the local manager at Belleville on the 27th January, 1910; but written notice to the head office was not given until the 4th February, 1910.

Mr. Wright urged that the event meant the disablement and its termination; and that, therefore, the plaintiff was entitled to ten days after he had left the hospital, which did not occur until the 16th February. The plaintiff was wholly unfit for business for a number of days after he entered the hospital, but this affords no excuse. The giving of the notice under the terms of the policy was, in my opinion, a condition precedent to the plaintiff's right to recover; and the fact that it was not given is fatal to the plaintiff's right of action.

It was argued that, even if this should be so, there was a waiver, inasmuch as blanks for the proof of claim were sent on, filled out and returned to the company; but the proof of claim itself contains this clause: "By furnishing this blank and investigating the claim, the company shall not be held to admit the validity thereof or waive the breach of any condition of the policy." This clause is a sufficient answer to the alleged waiver.

In Gamble v. Accident Assurance Co., I.R. 4 C.L. 204, the provision of the policy there made it a condition precedent to the right to recover that a notice should be delivered at the chief office of the company in London, within seven days after the occurrence of the accident; and it was held to apply to a case where, owing to the sudden character of the accident and its resulting in instantaneous death, there was nobody capable of giving the required notice. The terms of the policy in that case were such as to negative any presumption bringing it within the class of cases in which it has been held that there was that which involved the implied condition that the destruction of the person or thing with which the contract dealt should absolve from its performance. It was argued in that case that the condition was unreasonable. Pigot, C.B., who delivered the judgment of the Court, said: "Even if it were, it would still be binding if its meaning were clear."

Taking the view I do, that the effect of the want of notice required by the policy is fatal to the plaintiff's right of action, it is unnecessary to deal with the other defence.

It may be a matter for the legislature to consider, whether, in accident policies, there should not be statutory conditions giving the Court the right to declare whether the conditions imposed are reasonable under all the circumstances.

The appeal should be dismissed, but I do not think it is a case for costs. See Atkinson v. Dominion of Canada Guarantee and Accident Co., 16 O.L.R. 619, 632.

MIDDLETON, J. MARCH 20TH, 1912.

RE K.

Will—Construction—Gift of Income of Fund for Life—Maintenance of Sisters of Testator—Interest to be Paid from Date of Death—Executors—Power to Set apart Interest-bearing Securities—Absolute or Conditional Gift.

Motion by the executors of the will of J. G. K., upon originating notice, for an order determining certain questions arising upon the will.

J. D. Bissett, for the executors.

W. E. Raney, K.C., for the sisters of the testator.

C. G. Jones, for the Inspector of Prisons and Asylums, statutory committee of the widow and one daughter of the testator.

MIDDLETON, J.:—By his will the testator, who died on the 30th July, 1910, among other things, provided as follows:—

"I direct my executors to set aside or invest the sum of $10,000 and out of the income therefrom to make an appropriation yearly toward the maintenance of my sisters Emma Katherine and Marian who are now unmarried during their lifetime or the lifetime of such of them as remain unmarried but not to exceed $600 per year it being understood that this provision for my said sisters is only to be enjoyed by them or such of them as remain unmarried. This provision for my said sisters is made by me as I have been in the habit in my lifetime of making some yearly provision towards their maintenance in company with my two brothers and I express it as my desire that my two brothers shall after my decease continue to contribute also towards the maintenance of my sisters."

Subject to this provision and other provisions not now material, and to an annuity to the widow, which is not affected by the question in issue, the estate goes to the testator's five daughters. The questions raised upon this motion are:—

First, are the testator's sisters entitled to receive interest upon the $10,000 from the death of the testator or only from the expiry of one year from his death?

Secondly, have the executors discretion so to distribute the estate as to allot interest-bearing securities to the fund in question so that interest will be provided from the testator's death?

Thirdly, is the provision for the sisters conditional upon the testator's brothers continuing to contribute towards the sisters' maintenance?

Upon the argument I dealt with the last question, holding that the provision was in no way conditional.

There was not cited to me, nor have I been able to find, any English or Canadian authority expressly in point upon the question of interest. There is no doubt that an annuity will be computed from the death of the testator, and there is equally no doubt that, subject to some exceptions, interest upon a legacy will be computed from a year from the testator's death. This case is neither an annuity nor a legacy of a capital sum. It is a gift of the income to be derived from a portion of the testator's estate to be set apart for the purpose of producing such income during the lifetime of the beneficiaries.

I was told—and the motion was argued upon this footing—that the testator's estate amounts to about $275,000; a considerable portion of this being interest-bearing securities. Having this in mind, it appears to me to be plain that the intention of

the testator was, that the executors should set aside out of the investments already made, or if they saw fit, invest, $10,000, and use the income towards the maintenance of those sisters in continuation of the testator's benevolence during his lifetime; and he could not have intended that there should be a period during which they would not receive the aid which he in his lifetime had given and which he contemplated continuing after his death.

The well-reasoned case of Cook v. Meeker, 36 N.Y. 15, supports this position. It is there said: "When a sum is left in trust, with a direction that the interest and income should be applied to the use of a person, such person is entitled to the interest thereof from the date of the testator's death." That case is largely founded upon English authorities, although none of them is precisely in point.

Mr. Jones relied upon the case of Re Crane, [1908] 1 Ch. 379; but I think that, when carefully considered, it is distinguishable. There a sum of £8,000 was to be paid by the executors to trustees, and these trustees would hold on certain defined trusts, inter alia to pay the income to the testator's daughter-in-law during her widowhood. It was held that the legacy did not carry interest from the testator's death. There the legacy was the capital sum directed to be paid to the trustees; and it was attempted to bring the case within the well-known exception to the general rule which has been recognised where the beneficiaries are infants to whom the testator stood in loco parentis, and the Court has held that a gift of the income in the meantime for the maintenance must be implied, otherwise there would not be any fund for maintenance. Swinfen Eady, J., held that this rule had not been and could not be extended to the case of adults.

That case, it appears to me, has no bearing upon the present one, where the gift is not of the corpus but of income. Four of the testator's daughters, who are sui juris, assent to the contention of the sisters; and this application is only necessary by reason of the misfortune of the remaining daughter.

It will, therefore, be declared that the sisters are entitled to the income derived from $10,000 from the date of the death of the testator, and that it is competent for the executors to treat as held for this fund interest-bearing securities which came to their hands and to pay the income therefrom (subject to the limitation found in the clause itself) for the maintenance of the three sisters.

The costs of all parties will be out of the estate; those of the executors as between solicitor and client.

DIVISIONAL COURT. MARCH 20TH, 1912.

STONESS v. ANGLO-AMERICAN INSURANCE CO.

Fire Insurance—Interim Receipt—Issue by Agent of Insurance Company—Company not Declining Risk and not Issuing Policy—Insurance in Force until Determination of Head Office Notified—Loss Payable to Mortgagee—Assignment of Mortgagee's Claim—Negligence of Agent—Indemnity—Damages—Costs—Power to Make Third Party Pay Costs of Litigation.

Appeal by the defendants from the judgment of RIDDELL, J., in favour of the plaintiff in an action upon a fire insurance policy, and dismissing the claim of the defendants for indemnity against their former agent, made a third party.

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

F. E. Hodgins, K.C., for the defendants.

J. L. Whiting, K.C., for the plaintiff and the third party.

The judgment of the Court was delivered by BOYD, C.:—The learned Judge found that the risk in question was of a hazardous (perhaps extra-hazardous) character, and that a larger premium should have been paid than was collected by the agent—he should have charged double the amount at least, i.e., $80 instead of $40. None of this has been paid to the company.

The learned Judge again finds that, if he had power, he would be strongly inclined to allow the agent to pay the costs throughout, as, no doubt, the whole matter had been largely due to his negligence. He thinks the agent's conduct was such as to justify a direction that the costs of the litigation should be paid by that agent; but he apparently doubts the power so to do.

I think that both these items, the extra premium not received by the company and the extra expense incurred by the company in this litigation, may be rightly included as damages payable by the agent on account of the misleading manner in which the situation was placed before the Toronto office, and also by reason of his inaction in not carrying out his undertaking to supply the further information that was needed to enable the head office to appreciate the danger of the risk by being informed of the conditions under which the operations of the insured were being conducted.

I see no ground to disturb the finding that the company are liable to pay the amount of the "interim receipt" policy and costs of action. The company should also pay the plaintiff half the costs of the appeal—this division of appeal costs because the insured and the agent join in opposing the appeal.

But, as to the agent, I think the appeal should be allowed with costs, and that he should pay as damages $80 (for extra risk) and the amount of the taxed costs of the action of both the insured and the defendant company.

I have no reason to doubt that the company would have reinsured the risk to the extent of $1,000 if they had been aware that they were legally responsible for the $2,000 insurance. The company had so reinsured as to the earlier policy on this property, when it was operated by the present plaintiff, and would have done so again. But I do not see my way to charge this as damages on the agent, because the company might have acted so to protect, had they not been in error as to the expiry of the interim receipt in thirty days.

If an officer of the Court combines a variety of engagements, acting as agent of an insurance company and also acting for the owner and lessees of property to be insured, and is also a mortgagee of the property, the mortgage being assigned to another, and then gets matters so mixed up that he gives the insurance company to understand that the insurance is for the benefit of a new concern which has purchased the plant and property from the owner, whereas the real transaction is that the lessees insure in the name of the owner for the benefit of the mortgagee—given this situation, the knowledge of which is confined to the solicitor, who is also the original mortgagee and the insurance agent, and not communicated to the company till after the fire, it is little wonder that an investigation in the Court is called for and is needed before the tangle is cleared up—and, even as it is, is not satisfactorily cleared up.

Nor is the situtation simplified by the insurance agent acting as solicitor and chief witness in this suit for the plaintiff, a stranger to the insurance company.

That the Court has ample power to order payment of costs by a third party and to deal with him in this respect as a defendant, is shewn by Hornby v. Cardwell, 8 Q.B.D. 329; Piller v. Roberts, 21 Ch. D. 198, 201; Edison and Swan United Electric Light Co. v. Holland, 41 Ch. D. 28, 34; and many other cases.

MIDDLETON, J., IN CHAMBERS. MARCH 20TH, 1912.

CARTER v. FOLEY-O'BRIEN CO.
(AND TWO OTHER ACTIONS.)

Pratice—Consolidation of Actions—Particulars—Statement of Claim—Discovery—Costs.

Appeals by the plaintiffs from orders of the Master in Chambers refusing consolidation of the three actions (brought by different plaintiffs against the same defendants) and also directing particulars of the statements of claim.

W. R. Smyth, K.C., for the plaintiffs.

G. M. Clark, for the defendant company and the defendant Geddes.

MIDDLETON, J.:—First, with regard to consolidation or other relief of that nature. Each individual plaintiff alleges that he has been defrauded into subscribing for stock by statements made to him by or on behalf of the defendants. These statements are not covered by any common prospectus, but consist of oral statements made in interviews.

While these statements in each case are similar, each individual case will have to stand or fall upon its own evidence, as it is not admitted that the statements were made upon any of the occasions giving rise to the litigation. It may be that a good deal of evidence will be common to the three actions; and, if the plaintiffs' solicitor chooses to enter the actions for trial together—as undoubtedly he should— the trial Judge will be amply able to avoid any unnecessary repetition of evidence. See Williams v. Township of Raleigh, 14 P.R. 50, and Ryan v. Cameron, 16 P.R. 235.

The real complaint of the plaintiffs is, that they think it will be necessary to have separate examinations for discovery in each of the three cases. So far as the examination is for the purpose of discovery, they could probably find out everything concerning the truth or falsity of the statements made or said to have been made, upon one examination; and, so far as they desire to ascertain the facts relating to the different conversations giving rise to the action, there is nothing in common. No doubt, when the examinations take place, there will be no necessity for repeating the common evidence; but, even if convenience indicated the propriety of the order sought, I am clear that there is no power to make it.

Then as to particulars, I am quite satisfied that the Master is right. The plaintiffs, as I have said, allege misrepresentation. The defendants, among other things, plead laches and acquiescence. The plaintiffs seek to avoid this by stating in their reply that the delay in the bringing of the action was caused by "further misrepresentation," which must mean misrepresentations other than those set up as the foundation of the original claim.

Upon particulars being demanded, an answer was served which is entirely unsatisfactory, as it states that the particulars "are sufficiently set out in the said reply and joinder in the statement of claim and in the particulars furnished"—i.e., particulars of the allegations in the statement of claim—"and the plaintiffs before examination are not able to furnish any further or better particulars than those indicated."

If the reply is founded upon fact, and is not a work of the imagination only, the plaintiffs must know what statements were made to them which induced them to delay bringing the action, and they ought to give this information before calling upon their opponents to answer.

Complaint was made as to the way in which costs were dealt with by the Master. I am not sure that I would have made the same order; but I certainly cannot interfere with the Master's discretion.

Upon the argument, I was asked to direct that the plaintiffs might give further particulars after examination. In some cases, where the facts are in the defendant's knowledge, such a provision would be entirely proper; but I do not think that the provision would be proper where the facts must be within the knowledge of the party pleading. If at a later stage the plaintiffs desire to give further particulars, and can make a proper case, they will secure relief, upon proper terms; but the case to be presented ought to be developed upon the pleadings and ancillary particulars before discovery is had. And it ought to be borne in mind that discovery is in aid of the case as pleaded, and that the examining party has no right to interrogate for the purpose of finding out something of which he knows nothing now, and which may enable him to present a case that he has no knowledge of and which he has not set up in his pleadings. See Hennessey v. Wright, 24 Q.B.D. 445(n); Yorkshire v. Gilbert, [1895] 2 Q.B. 148.

Both appeals are, therefore, dismissed, with costs to the defendants in any event of the cause.

MIDDLETON, J. MARCH 21ST, 1912.

RE MCKINNON.

Will—Construction—Restraint upon Alienation—Invalidity—Hypothetical Question—Contingent Event.

Motion by the executors of the will of S. F. McKinnon, deceased, for an order, under Con. Rule 938, determining questions arising upon the construction of the will.

J. Bicknell, K.C., and W. H. Wallbridge, for the executors and the widow.

N. W. Rowell, K.C., for Mrs. Miles and her husband and sons.

F. W. Harcourt, K.C., for the unborn and as yet unascertained class entitled to take in certain contingencies.

MIDDLETON, J.:—The sole question argued before me is the effect of clause 36 in the will: "Should any legatee or beneficiary under this my last will and testament . . . in any way hypothecate mortgage pledge sell transfer or assign any interest benefit legacy bequest or advantage in which the said legatee or beneficiary is or may be in any way interested or entitled to hereunder then I will and direct that immediately thereupon any benefit advantage legacy or bequest to such beneficiary or any person through him or her shall be forfeited and the same shall revert to my estate and form part of the corpus thereof and such beneficiary shall be cut off entirely from receiving any benefit or advantage under this my last will and testament."

The scheme of the testator's will is unusual. He first gives his dwelling-house and furniture to his wife for life, and then devises the residue of his estate to trustees for investment, and out of the income directs payment of $12,000 annually to his wife for life. He makes a number of smaller legacies and annuities, and directs that on the 1st May, 1921, or upon the earlier decease of his wife, the accumulated estate shall be distributed or partly distributed. Those entitled to take are the daughter and her sons; but, in certain events, the estate is to be distributed in equal shares among the heirs-at-law of the testator and his wife.

The question argued is the validity of the restraint upon alienation found in the clause above quoted.

No good purpose would be served by adding to the confusion at present existing upon this subject, by any attempt to analyse and reconcile the decisions. I can only conclude that

Blackburn v. McCallum, 33 S.C.R. 65, has given a new starting-point, and that the full extent to which it has overruled the earlier cases will not be ascertained until the question is again taken to the Supreme Court. In the meantime McFarlane v. Henderson, 16 O.L.R. 172, justifies me in holding that the restraint here is invalid.

As indicated upon the argument, I do not think that question 4 is ripe for determination. It is not the practice of the Court to deal with contingencies until the contingent events happen.

The costs of all parties may be out of the estate; the executors' as between solicitor and client.

RE ANCIENT ORDER OF UNITED WORKMEN AND RIDDELL—MASTER IN CHAMBERS—MARCH 15.

Life Insurance—Benefit Certificate in Favour of Granddaughter—Change to Brother—Preferred Class—Issue as to Relationship—Onus—Security for Costs.]—Motion by the society for leave to pay into Court $1,000, less costs, in the following circumstances. A benefit certificate for $1,000 upon the life of one Riddell was issued first in favour of Adelia Pray; afterwards, in May, 1905, it was changed, and, as it appeared, the beneficiaries therein designated were the two claimants, "John Riddell, a brother, and Adelia Riddell, a granddaughter"—to receive $500 each. By indorsement dated the 20th April, 1909, the insured revoked this first direction, and gave the whole sum secured to John Riddell. On this was a pencil memorandum of Mr. Carder, the Grand Recorder, that, a granddaughter being in the preferred class, and a brother only in the ordinary class, this change could not be made unless she was of full age and assenting. Whether any and what investigation was made by the Local Recorder as to this, did not appear on the material. By his will, dated the 16th June, 1910, the insured left the whole $1,000 in question to the brother. To Adelia Pray (she having since married), and was there called "my granddaughter Adelia Riddell," he left a piano. It was now alleged that Adelia was not the granddaughter of the deceased, but only of his wife, and that the testator spoke of her as his granddaughter to please the grandmother. The Master said that an issue must be directed, and the trial should be at the next sittings at Cayuga, or some other convenient place. In this John Riddell should be plaintiff, and Adelia Pray, defendant—the issue being simply

whether or not she is a granddaughter of the deceased. As she was always so-called by him, the onus to disprove this was on John Riddell, who must shew her real ancestry. Under the authority of Knickerbocker Trust Co. of New York v. Webster, 17 P.R. 189, and cases cited, Mrs. Pray, though resident out of the jurisdiction, could not be required to give security for costs. See Rhodes v. Dawson, 16 Q.B.D. 548, cited and approved in the Knickerbocker case. The Master said that this emphasised the distinction to be made according as an interpleader issue arises out of a Sheriff's application, or as in the present case. A. G. F. Lawrence, for the society. Featherston Aylesworth, for John Riddell. T. N. Phelan, for Adelia Pray.

MITCHELL v. HEINTZMAN—MASTER IN CHAMBERS—MARCH 16.

Pleading—Statement of Claim—Negligence—Personal Injuries—Anticipating Defence—Particulars—Damages.]—In an action to recover damages for injuries inflicted by the defendant's automobile, the defendant moved to strike out paragraphs of the statement of claim, and for particulars of injuries and of damages. The paragraphs attacked, the Master said, set out a good many things that might be evidence at the trial, in reply to a statement of defence; but at present they did not seem to be material. The similar case of Lum Yet v. Hugill, ante 521, shewed all that was necessary in a statement of claim in this action. The best order now to make would be to give the plaintiff leave to deliver an amended statement of claim, omitting the paragraphs attacked and giving particulars of injuries and of special damages alleged in the 9th paragraph. Any defence set up could be answered in the reply. Costs in the cause. T. N. Phelan, for the defendant. J. P. MacGregor, for the plaintiff.

HARRISON v. KNOWLES—MASTER IN CHAMBERS—MARCH 16.

Venue—Motion to Change—Affidavits—Witnesses—Convenience—Jury Notice—Delay.]—The facts of this case appear ante 688. The defendants now moved to change the venue from Toronto to London. One of the defendants made an affidavit in which he said that he himself, T. M. Knowles, and some three or four experts, all from the city of London, would be required at the trial. He also relied on the fact that the machine in ques-

tion was at London. This was answered by a very full affidavit of the plaintiff's solicitor, who carefully complied with the provisions of Con. Rule 518. He said that the plaintiff and some one from his office would have to come from New York, and apparently one or two experts. But two experts resident in Toronto would also be called, and one on a question about a rubber blanket being considered a necessary part of the machine in question. He further said that the fact of the machine being in London was of no importance now, seeing that it had been in use for nearly two years. The shipping bill of the machine and rollers was dated the 10th June, 1910. This, he said, was confirmed by the fact that the defendants had made payments on account on seven different occasions since receiving the machine. The defendants, who were counterclaiming for damages for the alleged inefficiency of the machine, had served a jury notice. The Master said that, if this stood, there could not be a trial either at Toronto or at London until next September. Perhaps, on an application to strike out the jury notice, it might be thought right to do so, unless the defendants would accept the plaintiff's offer to have the case set down now and tried at the current jury sittings at Toronto. Another plan would be to strike out the jury notice and have the case tried at Toronto or at the London non-jury sittings at the end of April. However that might be, at present the Master did not think that any case was made out for the change of venue; and the motion was dismissed with costs in the cause. S. G. Crowell, for the defendants. O. H. King, for the plaintiff.

MEYER v. CLARKE—MASTER IN CHAMBERS—MARCH 19.

Discovery—Examination of Defendant—Libel—Questions as to Similar Statements — Privilege — Malice.] — Motion by the plaintiff for an order requiring the defendant to attend for re-examination for discovery and answer certain questions which he refused to answer upon his examination. The action was for libel. The defendant justified and also pleaded qualified privilege. Questions objected to were as to whether the defendant had written other similar letters or made similar statements respecting the plaintiff to other persons. These, the Master said, should be answered, as they tended to prove "malice in law," and displaced the ground of privilege. See Odgers on Libel and Slander, 8th Eng. ed., pp. 348, 390. The defendant should

attend again at his own expense and make answers to these questions. Costs of the motion to the plaintiff in any event. T. N. Phelan, for the plaintiff. J. A. Macintosh, for the defendant.

TREMBLAY v. PIGEON RIVER LUMBER CO.—MIDDLETON, J.—MARCH 19.

Contract—Sorting of Timber—Expense of—Apportionment — Evidence — Damages — Costs — Reference — Report — Appeal — Scale of Costs.]—An appeal by the defendants and a cross-appeal by the plaintiff from the report of the Local Master at Port Arthur; and a motion by the plaintiff for judgment on further directions and costs. The plaintiff's claim in the action and the defendants' counterclaim arose out of an agreement between them, which was not in writing. All the claims were referred to the Master for inquiry and report. The defendants were the owners of logs and pulpwood with which certain ties were mixed. The plaintiff was to sort and load the ties; and he agreed with the defendants that the ties should be sorted at their sorting jack in the Kam river, and that the expense of sorting should be borne in proportion to the quantity of timber sorted. The Master found that the expense should be shared equally; and upon the argument it was practically conceded that this finding could not be interfered with. Shortly after the making of the agreement, a freshet swept the mingled mass down the river, and carried away the booms of the sorting jack. This jack was afterwards replaced, and all the timber that then remained above it passed through it, and was sorted. The timber below was saved and boomed near the loading jack. The plaintiff sorted out of this the ties for which he was responsible, leaving the logs and pulpwood mixed. The Master disallowed the plaintiff's claim for remuneration for this; and properly so, in the opinion of the learned Judge. Each party made claim against the other for damages for delay; but neither claim was, in the opinion of the learned Judge, sufficiently supported by the evidence. The remaining question was the apportionment of the cost of the operation of the sorting jack. Both parties appealed as to the amount allowed to the plaintiff upon this head. Upon the evidence, the learned Judge found that the amount allowed to the plaintiff by the Master should be increased to $712.13, and the plaintiff's appeal allowed to that extent. The defendants' appeal should be dismissed. The learned Judge

found fault with the length of the evidence and the manner in which it was presented. The action could have been brought in the District Court; and the defendants' counterclaim was exaggerated and without foundation. Judgment for the plaintiff for the amount found in his favour, with the costs of the action, including the costs of the motion for judgment on further directions and of both appeals, upon the County Court scale, and with one-half the costs of the reference, also upon the County Court scale; without a set-off of costs in favour of the defendants. C. A. Moss, for the defendants. W. A. Dowler, K.C., for the plaintiff.

RE MILLIGAN SETTLED ESTATES—SUTHERLAND, J.—MARCH 19.

Settled Estates Act—Order Authorising Sale of Lands—Terms—Costs.]—Petition under the Settled Estates Act authorising a sale of lands settled by the will of Frederick Milligan, deceased. SUTHERLAND, J., said that a clear case seemed to be made out for a sale to the proposed purchaser of the real estate in question at the price of $28,000, upon the terms set forth in his written offer to purchase. An order should, therefore, be made granting the prayer of the petitioner to that end, and authorising the sale. Following the usual practice, the deposit of $200 and the further cash payment of $2,800 on account of principal moneys, to be made upon completion of the sale, should be paid into Court to the credit of this matter and subject to the trusts of the will, and the mortgage for the balance of the purchase-money, in the terms of the offer, should be made to the Accountant of the Supreme Court, also subject thereto. The agent's charge for commission on the sale, as mentioned in the offer to purchase, and the costs of the petitioner and Official Guardian should be paid out of the corpus. H. Cassels, K.C., for the petitioner. F. W. Harcourt, K.C., for the infants.

IMRIE V. WILSON—MASTER IN CHAMBERS—MARCH 20.

Parties—Addition of Plaintiff—Person Interested in Commission Claimed by Plaintiffs—Alleged Promise by Defendant—Discovery—Better Affidavits of Documents.]—This action was brought by Imrie and Graham to recover $1,315.40 as a commission on the sale of real estate for the defendant. The

cause was at issue and all parties had been examined for discovery, as well as one Stinson, who acted in the matter and submitted to be examined by the defendant "as a party interested in the claim sued for in this action." In that examination Stinson stated that he was to have a third of any commission recovered by the plaintiffs, and that the defendant agreed to this with him. Stinson also said that he was in a quasi-partnership with one Douglas, with whom he would divide anything he should get out of this. The defendant moved to have Stinson and Douglas made parties, and also to have the plaintiffs make better affidavits on production and attend for further examination, if required so to do. Stinson asserted positively that he saw Wilson on more than one occasion—that he was recognised by him as an agent for the sale, and that Wilson said he would protect him on the commission in question. This was confirmed by the plaintiff Graham, who said that Stinson was a partner and to share in this commission. The Master said that it seemed clear that Stinson was a necessary party to prevent Wilson being harassed by another action, and to have the whole of the matters in controversy disposed of in one action. But this did not apply to Douglas, who could assert no claim against Wilson, but could look only to Stinson. As to the other motion, the Master said that the plaintiffs should make further affidavits. Letters seemed to have passed between them prior to the bringing of the action. On the examination it was objected that these letters were privileged. This, however, must be shewn in the affidavits of the plaintiffs themselves. They should give the dates of these letters so that it may appear whether they were written before action or not. They must also conform to the rule laid down in Clergue v. McKay, 3 O. L.R. 478. Both motions were entitled to succeed, and should be granted with costs to the defendant in any event. F. Arnoldi, K.C., for the defendant. J. R. Roaf, for the plaintiffs.

NEY v. NEY—MASTER IN CHAMBERS—MARCH 20.

Husband and Wife—Action by Wife against Husband and Others for Conspiracy—Pleading—Statement of Claim—Depriving Wife of Consortium of Husband—Motion to Strike out Part of Pleading Containing Substance of Claim—Judgment—Con. Rule 261.]—This action was brought by the plaintiff against her husband, her husband's father, and another defendant, Reyburn. The plaintiff alleged a conspiracy of these three

defendants to break up her home and deprive her of the custody of her two infant children. She claimed damages "by reason of the misconduct of the defendants and for breaking up the domestic relations existing between the plaintiff and the defendant John Ney," her husband. The defendants the Neys moved to strike out pars. 6, 7, 8, 9, and 10 of the statement of claim as embarrassing. The motion was supported by reference to the judgment of the Court of Appeal in Weston v. Perry, 1 O.W.N. 155, following their previous judgment in Lellis v. Lambert, 24 A.R. 653. The Master said that these judgments seemed to support the contention that no action would lie by a married woman for the loss of the consortium of her husband. Her right to support from him in such an event is not taken away. The Master, however, felt the difficulty that to give effect to the motion would be equivalent to a judgment under Con. Rule 261, as the paragraphs attacked were the whole substance of the plaintiff's claim; and he thought it would be best, in the interests of all parties, either to strike out the paragraphs in question and give the plaintiff leave to amend as advised or else refer the motion to a Judge in Chambers, who could enlarge it into Court and deal with it under Con. Rule 261. The defendants to elect within a week which course they prefer. T. N. Phelan, for the applicants. W. J. McLarty, for the plaintiff.