The

Ontario Weekly Notes

Vol. I TORONTO, DECEMBER 1, 1909. No. 10.

COURT OF APPEAL.

NOVEMBER 22ND, 1909.

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

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

Appeal—Privy Council—Application to Allow Security—Jurisdiction—Matter in Controversy—R. S. O. 1897 ch. 48.

Motion by the plaintiffs for the allowance of the security upon a proposed appeal to the Privy Council from the judgment of the Court of Appeal, 10 O. W. R. 483.

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

E. D. Armour, K.C., for the plaintiffs the Canadian Pacific Railway Company.

R. C. H. Cassels, for the plaintiffs the Grand Trunk Railway Company.

W. C. Chisholm, K.C., for the defendants.

The judgment of the majority of the Court was given by OSLER, J.A., who said that an appeal did not lie as of right under R. S. O. 1897 ch. 48. The controversy was not as to a pecuniary amount or of a pecuniary nature. It was simply as to the validity of an order of the Railway Committee. If it were a matter involving directly the value of property affected by the adjudication in the action, that value might be shewn by affidavit, as pointed out in the Falkners Gold Mining Co. v. McKinnery, [1901] A. C.

581. This was an action of a very different nature, and the decision of the Supreme Court of Canada in Toussignant v. County of Nicolet, 32 S. C. R. 354, though not binding upon the Court of Appeal on an application like the present, proceeded upon reasoning quite applicable to the Ontario Act above cited. He referred also to Gillett v. Lumsden, [1905] A. C. 601.

The applicants must be left to apply for leave to appeal, and their application for the allowance of security refused.

See also City of Toronto v. Toronto Electric Light Co., 11 O. L. R. 310.

MEREDITH, J.A., dissented, saying that he found it impossible to agree that the matter in controversy did not exceed $4,000. The applicants had been ordered to erect a bridge, which would cost them tens if not hundreds of thousands of dollars. The legislature meant the substantial matter in controversy, and the substance of the controversy was the bridge. He referred to City of Toronto v. Toronto R. W. Co., 11 O. L. R. 310; Lovell v. Lovell, 13 O. L. R. 587; Irving v. Grimsby Park Co., 18 O. L. R. 114; Coté v. James Richardson Co., 38 S. C. R. 41; Robinson Little & Co. v. Scott & Son, ib. 490; Gillett v. Lumsden, [1905] A. C. 601; Simmons v. Mitchell, 6 App. Cas. 156; Mohideen Hadjiar v. Pitchey, [1893] A. C. 193.

NOVEMBER 22ND, 1909.

RE TOWNSHIP OF HUNTLEY AND TOWNSHIP OF MARCH.

Municipal Corporations—Drainage — Assessment for Outlet — Drainage Area—Benefit—Report of Engineer—Evidence—Appeal.

Appeal by the Corporation of the Township of Huntley against the judgment of a Drainage Referee confirming (with a variation) the report and assessment of an engineer made under the provisions of sec. 3 of the Municipal Drainage Act.

The proceedings were begun by a petition to the council of the township of March praying that, in order to drain a described area in that township, the Carp river, which commences in the township of Nepean, flows northerly through the townships of Goulbourne, March, Huntley, and Flynn, and finally empties into the Ottawa river, might be deepened and improved.

The petition was referred to a civil engineer, who prepared a report, plans, specifications, and an assessment of the lands in the townships of Nepean, Goulbourne, March, and Huntley, and in the villages of Spotsville and Carp, which, in his opinion, would be benefited by the proposed work.

The corporations of the townships of Goulbourne and Huntley both appealed to the Drainage Referee, who dismissed Huntley's appeal, and in part allowed the other.

Huntley now appealed to the Court of Appeal.

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

E. D. Armour, K.C., and W. J. Kidd, for the appellants.

F. B. Proctor and A. H. Armstrong, for the respondents.

The judgment of the Court was delivered by GARROW, J.A., who, after setting out the facts, said:—The river as it is, with its slight fall, is no longer efficient to carry away and dispose of the waters which, by nature, and artificially by means of drains, come to it, without backing up and overflowing, and thereby causing injury to the low lands up stream in Huntley and March. The drainage area to the east in the township of Huntley is very narrow and of little consequence, but to the west the land slopes for several miles towards the river, which is the natural outlet for the drainage of the last mentioned area, either directly or by means of several smaller streams or watercourses which, passing through the area, empty into the river. These streams . . have sufficient fall and current to carry to the river the drainage waters which, by means of the various drains which have been constructed along their several courses, fall into them, and no difficulty arises until the river is reached.

Acting upon the impression that the drainage, directly and through the medium of these streams, is not carried to a sufficient or satisfactory outlet, the engineer assessed the lands in the last-mentioned area using these streams for their immediate outlet, for outlet liability, while other low lands in the township were also assessed for benefit.

The real difficulty in the case grows out of the circumstances of the lands so assessed for outlet, the contention being that, as they are comparatively high lands, they have already a sufficient outlet, and do not need and will not use the proposed new outlet.

. . .

The mere size of the area is of little consequence in considering whether or not the assessment is one which might lawfully be made. Drainage water must go not merely to an outlet by means of which it satisfactorily escapes from the lands which are being drained, but to a "sufficient outlet," which, as defined in sec. 2, sub-sec. 10, means the "safe discharge of water at a point where it will do no injury to lands and roads." And sec. 3, sub-sec. 4, as it now stands, shews that it is not sufficient in order to escape from liability simply to shew that the first discharge was into a "swale, ravine, creek, or watercourse." See Young v. Tucker, 26 A. R. 162; Township of Orford v. Township of Howard, 27 A. R. 223; Re Township of Elma and Township of Wallace, 2 O. W. R. 198.

There must, of course, . . . appear to be a reasonable connection between the source of the injurious water and the outlet in question, and, if such connection is established, the legal right to assess under the statute, however large the area, seems to follow.

The question, therefore, is largely one of fact, and is to be passed upon in the first instance by the engineer, necessarily an expert, and who, using his expert skill and experience, determines not only how the proposed work is to be done, but also what lands will benefit by it, and should therefore be assessed for its cost. His conclusions may, of course, be called in question by an appeal, but, in my opinion, his results ought not to be disturbed, unless it is satisfactorily proved that they are either erroneous in fact or that he proceeded illegally. . . . He found as a fact that these so-called high lands, which drain directly into the lateral streams, contribute a substantial part to the injury complained of, that the river is, therefore, in its present condition, not a sufficient outlet for the drainage which comes to it from such lands as well as from the other lands also entitled to drain into it; and he, therefore, as I think he might, assessed them for the proposed improved outlet. . . .

In my opinion, no illegality of any kind appears in the procedure of the engineer; and there is nothing in the evidence to justify disturbing his assessments for outlet or otherwise in the township of Huntley. . . .

Appeal dismissed with costs.

NOVEMBER 22ND, 1909.

TAIT v. SNETZINGER.

Estoppel—Res Judicata—Trespass—Title to Land—Judgment in Former Action as to Part of Land in Question—Identity of Issues.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., who tried the action without a jury, in favour of the plaintiff.

The action was in trespass respecting the westerly part of Sheik's island, to which both the plaintiff and defendant claimed title. The whole island is an Indian reservation, and in 1796 was leased by the Indians for 999 years to Sheik and French; French subsequently released his interest to Sheik. Sheik laid out the island in lots numbering from the east 1 to 7. The land in question lay to the west of 7, and was apparently either intended to form part of 7 or had no specific number of its own. The plaintiff claimed the land to the west of 7; his title was derived through a sale by the sheriff to one Chesley of the interest of the heir-at-law of Sheik and a deed of confirmation to Chesley by the Indians. The defendant claimed title under one Sheets, to whom, he alleged, Sheik in his lifetime sold lot 7, which lot, he asserted, included the land in dispute. Sheets and those claiming under him were for many years in possession of lot 7 exclusive of the land in dispute; the plaintiff asserted that the land in dispute never was a part of that lot.

It having been deemed by the Crown necessary to acquire 15 acres of the westerly end of the island, forming part of the land in dispute, for the purpose of enlarging a canal, proceedings were in 1894 instituted by the Crown by information in the Exchequer Court of Canada against William J. Sheets, Peter Nathaniel Tait (the plaintiff), Adam Dixon Wagner, executor of George G. Dixon, John G. Snetzinger (the defendant), and the Superintendent of Indian Affairs, as defendants. The information set out the taking of the lands for the use of Her Majesty; that the defendants claimed to have an estate in fee simple in the lands or such an estate as the defendants could acquire by assignment of lease from the Indians; that Her Majesty was ready and willing to pay to the defendants or others entitled $1,400, subject to any claim of lien made good by the Superintendent-General of Indian Affairs, in full satisfaction and discharge of all claims by the defendants or others by reason of the expropriation. To this information

separate defences were filed by the defendants other than Wagner; that of the now defendant Snetzinger claiming title as mortgagee under the defendant Sheets, whose defence he adopted. The effect of the several defences was to raise distinctly the issue between the defendant Tait (now the plaintiff), on the one hand, and the defendants Sheets and Snetzinger (now the defendant), on the other, of which of them owned the parcel of which the 15 acres formed a part. That issue was tried by the Judge of the Exchequer Court and found in favour of the now plaintiff and affirmed by the Supreme Court of Canada.

Upon the trial of this action (in which the estoppel was pleaded by the plaintiff) the proceedings in the former action were proved, and other evidence given. FALCONBRIDGE, C.J., in giving judgment for the plaintiff, proceeded entirely upon the principle of res judicata.

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

E. D. Armour, K.C., and R. Smith, K.C., for the defendant.

G. H. Watson, K.C., for the plaintiff.

GARROW, J.A.:—It is true that in the former action the subject matter was the 15 acres, and not the whole parcel. But the inquiry into the title to the 15 acres necessary to determine to whom the expropriation money should be paid necessarily involved an inquiry into and an adjudication upon the facts upon which the title to the whole parcel depended. And, as said by Lord Ellenborough, C.J., in Outram v. Morewood, 3 East 346, 355: "It is not the recovery but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. . . The estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them."

Appeal dismissed with costs.

MEREDITH, J.A., concurred, for reasons given in writing.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., also concurred.

HIGH COURT OF JUSTICE.

MEREDITH, C.J.C.P. NOVEMBER 18TH, 1909

MARCILLE v. DONNELLY.

Landlord and Tenant—Duty of Landlord to Repair—Covenant in Lease—Liability of Landlord to Stranger Injured on Premises by Reason of Non-repair—Notice to Landlord—Actual Possession of Tenant—Constructive Possession of Landlord.

The plaintiff sued to recover damages for injuries sustained by him at a hotel in the town of Thorold, owing to his having fallen through an opening in the floor of the north verandah of the hotel, the condition of which was such as to be dangerous to those using it.

The hotel was owned by the defendant, and was at the time of the accident occupied by Henry E. Wilkerson under a lease from the defendant to Alfred S. Williams, dated the 5th May, 1905, of which Wilkerson was the assignee, and the assignment to Wilkerson was made with the written approval of the defendant.

The lease was made in pursuance of the Act respecting Short Forms of Leases, and contained a covenant on the part of the lessee "to repair except outside repairs," and that the lessee will repair according to notice.

The action was tried before MEREDITH, C.J.C.P., and a jury.

The jury found that the condition of the north verandah was such as to make it dangerous to persons using it; that the defendant had notice of its condition before the plaintiff was injured; that the plaintiff was injured owing to the condition of the verandah; and that he was at the time of the injury lawfully using it as a guest of the hotel; and they also found that the plaintiff was not chargeable with contributory negligence; and assessed his damages at $500.

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

M. J. McCarron, for the defendant.

MEREDITH, C.J.:—The plaintiff's case is based upon the theory that, as between the defendant and his tenant, the defendant was under an obligation to make such repairs of the premises as might be necessary, and that, having failed, after notice of the want of repair to the verandah, to repair it, he is liable for the

damages sustained by the plaintiff owing to its dangerous condition due to the want of repair.

I am unable to see that the lease contains any covenant on the part of the defendant to do the outside repairs. The exception from the tenant's covenant has not the effect of a covenant on the part of the defendant to make outside repairs, but merely excepts such repairs from those which the tenant is to make.

But, even if it were otherwise, and the lease had contained an express covenant on the part of the defendant to make the outside repairs, and he was in default in making them, after notice of the want of repair, before the plaintiff was injured, the plaintiff is not, in my opinion, entitled to recover.

Cavalier v. Pope, [1905] 2 K. B. 757, [1906] A. C. 428, followed in Cameron v. Young, [1908] A. C. 176, is conclusive against the plaintiff's right to recover. According to those cases, there can be no recovery by reason of the covenant, because the plaintiff is a stranger to it, nor on the theory that by reason of the covenant the defendant was constructively in possession of the premises, and therefore in control of them, because the existence of the covenant had not that effect.

It is unecessary to refer to the earlier cases, most, if not all, of which are referred to in Cavalier v. Pope, further than to mention that the statement of the law by Erle, C.J., in Robbins v. Jones, 15 C. B. N. S. 221, that "a landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house, and the tenant's remedy is upon his contract, if any," which is said by Lord Macnaghten "is beyond question:" p. 430; and to refer to the statement of Lord Atkinson, on p. 433, that the liability of a landlord who covenants to repair is precisely the same as in Robbins v. Jones and Lane v. Cox, [1897] 1 Q. B. 415.

It must not be understood that anything I have said has any application to the liability of a landlord for an injury done by his house falling upon his neighbours owing to want of repair, or for an injury done to a passer-by owing to such want of repair. In such cases, as Lord Robertson points out in Cameron v. Young, [1908] A. C. at p. 180, "the person injured and claiming damages stands on his own rights and his relation to the offending or negligent proprietor is not constituted by any voluntary contract."

The action must therefore be dismissed, but, under all the circumstances, the dismissal will be without costs.

DIVISIONAL COURT. NOVEMBER 19TH, 1909.

HISLOP v. LESTER.

Judgment on Further Directions—Scope of—Action for Possession of Land—Declaration that Defendant Entitled to Specific Performance of Agreement to Convey Land in Question—Costs.

Appeal by the plaintiffs from the judgment of the Chancellor dated 23rd September, 1909, on further directions and as to costs reserved by the judgment at the trial, dated the 6th May, 1909.

The action was brought to recover possession of two lots in the city of Stratford.

In his statement of defence the defendant set up an agreement between the plaintiffs' predecessor in title and one James F. Smith, dated the 6th April, 1907, for the sale of the lots to Smith, of which agreement he alleged he was the assignee, and claimed the right to possession under that agreement, and specific performance of it, alleging that all instalments of purchase money which had fallen due had been paid.

By their reply the plaintiffs set up that both Smith and the defendant had failed to make the payments and to carry out the terms and conditions as provided and contained in the agreement with Smith, and that time was of the essence of the agreement, and denied the right of the defendant to possession or to specific performance.

By the judgment at the trial it was referred to a special referee to take an account of the amounts payable under the agreement at the commencement of the action, as well as up to and including the date of the report, and it was ordered and adjudged that the defendant should, forthwith after the making of the report, pay to the plaintiffs the amounts found due, and that the defendant until default in payment of the amount found due should have possession of the land; and further directions and the question of costs were reserved until after the report.

The report of the special referee was dated the 2nd July, 1909, and the finding of the referee was that at the commencement of the action there was due and payable under the agreement the sum of $90, and that the amount due and payable at the date of the report was $130.

Before the hearing on further directions, the defendant paid the $130, and that it had been so paid was recited in the judgment on further directions. By paragraph 2 of the judgment

it was declared that upon the defendant "duly making all future payments of purchase money, interest, taxes, and assessments, under the agreement, as and when and in the manner therein and thereby provided and agreed, until the whole thereof be fully paid and satisfied," the defendant should be and was thereby entitled to have the agreement specifically performed, leave being reserved to the plaintiffs to apply for further directions in case default should be made in making these future payments; and as to the costs the order was that they be taxed and two-thirds of them allowed to the plaintiffs and one-third to the defendant.

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

T. Hislop, for the plaintiffs, contended that the declaration which the judgment contained as to the right of the defendant to specific performance was not warranted by the judgment at the trial or by the practice of the Court, and also objected to the disposition made of the costs.

R. S. Robertson, for the defendant.

MEREDITH, C.J.:—We see no reason for differing from the disposition made of the costs; and as to the other ground it is to be regretted that there should have been an appeal as to a matter of no importance to the plaintiffs, the declaration of right which is complained of being no more than a statement of what is the unquestionable right of the defendant, viz., to have a conveyance of the land upon performance of the conditions of the agreement on which it was to be conveyed to him.

I have examined the somewhat numerous cases cited by the learned counsel for the plaintiffs, but none of them shews that the Chancellor erred in making the declaration of right complained of. There is no such unqualified rule as counsel contended exists forbidding the making a declaration of rights at the hearing on further directions.

The rule of practice applicable is thus stated in Daniell's Chancery Practice, 7th ed., p. 949: "The Court will not take any matters into consideration at the further hearing which were in issue at the first hearing but were not then decided, put into a train of investigation, or reserved." And as to declaration of rights of parties it is said, p. 948: "In general, if the case is such as will admit of it, the Court will on the first hearing on further consideration make a final order, and, when preliminary inquiries have

been directed, it will, when the case comes before it upon the Master's certificate, declare the rights of the parties in the matters in question."

In the case at bar it cannot be said that the judgment at the trial did not put into a train of investigation the matters in issue at the first hearing as to the right of the defendant to possession and to specific performance. The right of the defendant to both was denied, because, as alleged, time was of the essence of the agreement, and the payments had not been made at the stipulated times, and it cannot be said that the inquiries which were directed may not have been intended to enable the Court, at the hearing on further directions, to determine whether the defendant was entitled to the rights which he claimed.

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

MACMAHON, J.:—I entirely agree. The judgment pronounced at the trial and indorsed on the record by Mr. Justice Riddell was what the plaintiffs were contending for, and the judgment pronounced by the Chancellor on further directions was simply an amplification of the judgment on the record.

TEETZEL, J.:—I agree.

LATCHFORD, J. NOVEMBER 20TH, 1909.

MORTON CO. LIMITED v. ONTARIO ACCIDENT INSURANCE CO.

Employers' Liability Insurance—Judgment Recovered by Workman against Employer—Indemnity — Condition — Employment of Child under Fourteen — Knowledge of Employer—Evidence—Factories Act—Workmen's Compensation for Injuries Act — Estoppel.

This action was first tried by MACMAHON, J., and judgment given for the plaintiffs (11 O. W. R. 828). Upon appeal a Divisional Court directed a new trial (12 O. W. R. 269). The action was brought to recover the amount paid by the plaintiffs to one Jones in respect of a judgment recovered against the plaintiffs by Jones in an action for damages sustained by Jones while in the plaintiffs' employment, the defendants having insured the plaintiffs

against loss by liability for such injuries. See Jones v. Morton Co. Limited, 14 O. L. R. 402. The second trial took place before LATCHFORD, J., without a jury.

H. H. Dewart, K.C., and D. Urquhart, for plaintiffs.

I. F. Hellmuth, K.C., and R. H. Greer, for defendants.

LATCHFORD, J.:—The facts giving rise to the action are fully set forth in my brother MacMahon's judgment, and in Jones v. Morton Co. Limited, 14 O. L. R. 402, the evidence in which, so far as applicable, was by consent made part of the case before me. It was supplemented by the oral evidence of the witness Issard, who was called to establish not only that the accident to the boy Jones was caused by the negligence of the Morton Co., but that the boy was injured while conforming, as he was obliged to conform, to the orders of Issard. It would follow as a result of the evidence on the latter point that there was a breach by the Morton Co. of the provisions of the Workmen's Compensation for Injuries Act. Objection was made to the admission of this evidence, on the ground that the plaintiffs sought thereby to base their right to be indemnified by the defendants upon a new liability. The evidence on this point must, I think, be rejected. The money which the plaintiffs now seek to recover was paid under a judgment in which they were held liable only because of their breach of the Factories Act. Were it open to me to find, as upon such evidence I should find, that the plaintiffs were also liable because of their breach of the Workmen's Compensation for Injuries Act, the fact would remain that it was not upon the latter ground that the plaintiffs were held liable for the moneys they now seek to be reimbursed. It is not, in my opinion, open to me to consider evidence upon which they might have been—but were not—held otherwise liable. Issard's evidence, however, I regard as admissible to the extent that it enables me to find, as I do find, that there was negligence under the Ontario Factories Act occasioning the injury to the boy Jones, and entitling him to recover the damages from the Morton Co. determined by the Court of Appeal. Such negligence consisted in causing the boy to use an elevator which the company then defending knew to be out of repair. The employment of a boy under fourteen years of age, as Jones was, is evidence of negligence: Fahey v. Jephcott, 2 O. L. R. 449; and the Morton Co. were in fact negligent in employing the boy contrary to the prohibition of the statute. I find that the Morton Co. had, prior to the accident, no knowledge that the boy Jones was under the age of fourteen. The condition in the policy issued by the defendants to the plaintiffs upon which

the defendants relied both in this and in the former trial (11 O. W. R. at p. 830) affords no ground of defence.

It is not necessary for me to consider the question of estoppel, but, if it were, I should find that the defendants were by their conduct in assuming the whole burden of the defence in Jones v. Morton Co. Limited estopped from disputing their liability as limited by the Court of Appeal, or as now determined.

There will be judgment for the plaintiffs for $1,983.87, with interest from the 11th December, 1907, as found by my brother MacMahon (11 O. W. R. at p. 832). I consider that the plaintiffs are entitled to their costs of both this and the former trial.

RIDDELL, J., IN CHAMBERS. NOVEMBER 23RD, 1909.

RYCKMAN v. RANDOLPH.

Leave to Appeal—Order of Judge in Chambers—Con. Rule 1278 (777)—Conflicting Decisions in England—Reason to Doubt Correctness of Decision.

Application by the plaintiff under Con. Rule 1278 (777) for leave to appeal from the order of CLUTE, J., ante 171, dismissing an appeal from the order of the Master in Chambers, ante 150, setting aside the service of the writ of summons on the defendants E. & C. Randolph, of New York, by serving John J. Dixon at Toronto.

C. S. MacInnes, K.C., for the plaintiff.

W. E. Middleton, K.C., for the defendants Randolph.

Strachan Johnston, for Dixon.

RIDDELL, J.:—I have in Robinson v. Mills, 19 O. L. R. 162, considered the conditions under which such leave should be granted.

It is admitted that there are no conflicting decisions by Judges of the High Court for Ontario; but it is said that there are conflicting decisions by the Judges of the High Court in England. I do not think that that is sufficient; it is quite plain that the High Court referred to is the High Court of Justice for Ontario. Consequently the provisions of (3) (a) of the Con. Rule do not apply.

If leave is to be granted it must be under 3 (6), i.e.: (1) there must appear to me to be good reason to doubt the correctness of

the judgment; and (2) the appeal must involve matters of such importance that, in my opinion, leave to appeal should be given.

It will be seen that the first prerequisite is not the same as that appearing in the Ontario Judicature Act, sec. 81 (2), referred to in In re Shafer, 15 O. L. R. 266, 273, the word "deem" being used in this section. But I am not able to go even so far as is necessitated by the Rule—I cannot say that there is good reason to doubt the correctness of the judgment. I do not think it at all necessary that I should go into an elaborate discussion of the facts or the cases.

The motion will be dismissed with costs to the defendants Randolph in any event of the action as in Robinson v. Mills, 19 O. L. R. 162.

CLUTE, J. NOVEMBER 23RD, 1909.

RE PADGET.

Will — Construction — Devise of Farm — Life Estate — Annuity Payable by Devisee—Charge Limited to Life of Devisee.

Motion for order declaring the construction of the will of John Padget, deceased.

The testator devised all his real and personal estate to his executors in trust, directing them, at such time as the interest of his estate would permit, to convey the real estate to his sons therein named, subject to the conditions and obligations therein expressed. He then devised to his son James Charles certain described lands, "subject, however, to the following conditions and obligations, that is to say, the said son James Charles shall pay to his mother each year, at such time or times as my said executors shall appoint, the sum of $100 during her lifetime; that he, my said son James Charles, shall not and is hereby restricted from, at any time during his lifetime, incumbering . . . the said above described real estate, but he may farm or rent the said farm property . . . provided, in the event of my said son James Charles dying without lawful issue, the above described farm shall become the property of my son Alexander, . . . but, in the event of my son James Charles leaving issue, the above farm shall pass to his children unclouded by condition of title. . . . To my wife I give and bequeath the sum of $200 in lieu of dower to be paid to her yearly during her lifetime by my sons as hereinbefore directed, together with one-half of the household furniture," etc.

James Charles having died leaving issue, it was held on a previous application (1 O. W. R. 427) that he took an estate for life only in the lands in question.

The question for the opinion of the Court was whether the sum of $100 payable to the testator's widow, Ellen Padget, who survived, was still a charge on the lands devised to James Charles and now the property of his infant children.

C. H. Maclaren, for the widow.

T. Nixon, for the executors.

Travers Lewis, K.C., for the infants.

CLUTE, J.:— . . . I am of opinion that the only interest charged with the annuity was that which the son James Charles received. This charge is raised by implication that he ought not to take the benefit without discharging the obligation. This, it seems to me, cannot extend to that which he did not receive; that is, the reversion in the land which passes to his children "unclouded by condition of title."

I am, therefore, of opinion that the sum of $100 payable to Ellen Padget ceased to be a charge upon the lands in question upon the death of James Charles.

DIVISIONAL COURT. NOVEMBER 23RD, 1909.

STEWART v. COBALT CURLING AND SKATING ASSOCIATION.

Negligence—Breaking of Railing of Spectator's Gallery in Hockey Rink—Injury to Spectator—Liability of Owners—Insufficient Strength of Railing—Employment of Competent Architect — Warranty of Safety.

Appeal by the defendants from the judgment of RIDDELL, J., 14 O. W. R. 171, finding the defendants liable in damages for personal injuries sustained by plaintiff, owing to the breaking of a railing in front of the gallery of the defendants' rink, whereby the plaintiff, who had paid for admission to see a hockey match, was thrown down upon the ice.

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

H. E. Rose, K.C., for the defendants.

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

The judgment of the Court was delivered by BOYD, C., who said that there was plenty of evidence to uphold the conclusion of fact that the front rail in the gallery of the rink was not constructed so as to resist the pressure that might be expected to be brought upon it. . . . It was far from being absolutely safe; it was not even reasonably safe, considering what might be expected during exciting matches with an enthusiastic crowd of onlookers. . . .

[Reference to Francis v. Cockrell, L. R. 5 Q. B. 184, 501; Pollock on Torts, 8th ed., p. 508; Morney v. Scott, [1899] 1 Q. B. 992; Indermaur v. Dames, L. R. 1 C. P. 288; Duncan v. Perthshire Cricket Club, 42 Sc. L. R. 327; Valiquette v. Fraser, 39 S. C. R. 1; McCallum v. Northern R. W. Co., 45 Sc. L. R. 309.]

Appeal dismissed with costs.

DIVISIONAL COURT. NOVEMBER 23RD, 1909.

GRAHAM v. LAIRD CO.

Sale of Goods—Injury in Transit—Loss, whether Falling on Vendor or Purchaser—Delivery to Carrier F. O. B.—Bills of Lading—Property not Passing till Payment.

Appeal by the defendants from the judgment of BRITTON, J., 14 O. W. R. 497, in favour of the plaintiff in an action for the price of 558 barrels of apples sold by the plaintiff to the defendants, and delivered to the Grand Trunk Railway Company at Belleville, to be forwarded to the plaintiff at Regina, Saskatchewan. The apples were damaged by frost in transit.

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

H. Cassels, K.C., for the defendants.

McGregor Young, K.C., and W. S. Morden, for the plaintiff.

The judgment of the Court was delivered by BOYD, C., who said that the main question to be determined was whether the property in the apples was in the buyer or the seller, or, had the

seller, the plaintiff, divested himself of all proprietary right in the goods? . . .

A quantity of apples . . . ordered from Regina by the defendants were placed on cars at Belleville by the plaintiff in pursuance of one term of the contract, i.e., "f. o. b. Ontario." They were to be carried to the North-West, and, according to another term of the contract, to be paid for "cash on delivery at Regina." . . . The goods were sent with contemporaneous bills of lading made out to the seller, or his agents, the Bank of Montreal, to be held against the arrival of the goods. Drafts at sight were also forwarded with the bills of lading, to be accepted and paid by the defendants, and upon payment the bills of lading were to be handed over to the defendants. The invoice did not say that the goods were shipped on account of or at the risk of the buyers, whereas the bills of lading did shew that the goods were shipped as the property of the seller, or of his agents, the Bank of Montreal. . . .

The shipment "f. o. b." at Belleville was not a constructive delivery to the carrier for the purchasers; it was a delivery of possession to the railway company pursuant to the bill of lading, and for the seller or his agents, the bank, at Regina; and no delivery of possession to the purchaser was contemplated till he accepted and paid for the apples at Regina. Till then possession and property were alike withheld by the seller, and in this view the property was to be divested from him and lodged in the purchasers first and only when payment was made. . . .

[Reference to Gilmour v. Supple, 11 Moo. P. C., at p. 568, per Cresswell, J.; Anderson v. Morice, L. R. 10 C. P. 609.]

When the seller selected the apples called for by the order and placed them in barrels on the cars "f. o. b. Ontario," he had to that extent appropriated the apples to the particular contract, but he had not done so unconditionally by reason of the terms of the bill of lading. By these he had retained for himself and the bank the power of disposal or control till payment at Regina. . . . .

[Reference to Mirabita v. Ottoman Bank, 3 Ex. D. 172; Brown v. Hare, 3 H. & N. 489, 490, 4 H. & N. 822; Ogg v. Shuter, L. R. 10 C. P. 159, 1 C. P. D. 47; Sheppard v. Harrison, L. R. 5 H. L. 131; Cahn v. Pockett's Bristol Channel Steam Packet Co., [1899] 1 Q. B. 643, 663.]

Appeal allowed with costs and action dismissed with costs.

RE MOORE v. TOWNSHIP OF MARCH.

Drainage Referee—Jurisdiction—Claim of Engineer to Payment for Services Preliminary to Drainage Construction Work—Drainage Act. sec. 93—Prohibition—Costs.

Application by the defendants for an order prohibiting the plaintiff and George F. Henderson, Drainage Referee, from proceeding further in a certain action pending before the Referee, under the Municipal Drainage Act, R. S. O. 1897, ch. 226.

T. A. Beament, for the defendants.

H. A. Lavell, K.C., for the plaintiff.

LATCHFORD, J.:—In June, 1907, a number of the ratepayers of the township of March petitioned the municipal council of the township for the draining of certain lands, and the council appointed the plaintiff, a civil engineer, to examine the area proposed to be drained, to prepare plans of the work, specifications, and estimates, and otherwise to perform the duties required to be done by an engineer as prescribed by the Drainage Act. Mr. Moore did the work he was appointed to do, claimed $3,189.33 for his services, received $1,950 in promissory notes, and on the 3rd November, 1908, began proceedings against the defendants, under sub-sec. 2 of sec. 93 of the Act, notifying the defendants that he claimed the balance of $1,239.33 with interest. To this notice the defendants filed an appearance as in an action in the High Court. A statement of claim and statement of defence were delivered. The defendants did not deny employing Mr. Moore, but set up that they had paid all that was due him for his services. A month or two later the plaintiff served the defendants with a notice of motion returnable before the Referee on the 5th March, 1909, to fix a date for the trial of the action. On the return of the motion a question arose as to whether there had been an audit. The Referee fixed the 12th March, not apparently for the trial of the action, but merely to determine whether there had or had not been an audit in conformity with sub-sec. 5 of sec. 5a of the Drainage Act, 3 Edw. VII. ch. 22, sec. 4, and 6 Edw. VII. ch. 37, sec. 2. Counsel for both parties appeared before the Referee on the 12th March. His conclusions are reported in 13 O. W. R. 692. At this time, and indeed until the 18th October, the jurisdiction of the Referee to try the action was not questioned by the defendants. The decision of the Court of Appeal in Bank of Ottawa v. Township of Roxborough, 18 O. L. R. 511, had been given on the 5th May. It reversed the judg-

ment of a Divisional Court (24th April, 1908), which had held that an action begun by writ of summons in the High Court to enforce payment of the claim of a contractor to be paid for work done under the Drainage Act was properly dismissed summarily, on the ground that the Drainage Referee alone had jurisdiction. The defendants say the decision of the Court of Appeal has removed the impediment which deterred them until recently from objecting to the jurisdiction of the Referee. The present is a much stronger case against the exclusive jurisdiction of the Referee than the Roxborough case. There the claim arose out of a dispute between a contractor, who assigned his claim to the plaintiffs, and the municipality for which he constructed certain drainage works. In the present case the construction of the drain has not yet been begun. So far as material, sec. 93, as amended by 1 Edw. VII. ch. 30, sec. 4, enacts as follows: "All proceedings to determine the claims and disputes arising between . . . individuals and a municipality . . . in the construction, improvement, or maintenance of any drainage work under the provisions of this Act or consequent thereon . . . shall hereafter be made to and shall be heard or tried by the Referee only." The work done by Mr. Moore was undoubtedly a necessary preliminary to the construction, if not to the improvement and maintenance of the drain; but there has been no "construction of any drainage work."

Section 93 confers a new jurisdiction, and upon settled principles is to be strictly construed: Best, C.J., in Kite and Lane's Case, 1 B. & C. 101, at p. 107. The claim of the plaintiff has not arisen in the construction, improvement, or maintenance of the drainage work, but in matters wholly preliminary to such construction.

If, as was held by the Court of Appeal in the Roxborough case, the section in question does not refer to the claims of contractors or workmen to be paid for work performed by them in the actual construction of the drainage works, still less does it refer to such a claim as that set up by the plaintiff.

I think the defendants are entitled to prohibition, and with costs. On the question of costs the remarks of Lopes, L.J., in The Queen v. County of London, [1895] 1 Q. B. at p. 458, are pertinent: "It is difficult to understand on what principle a litigant who successfully impeaches the jurisdiction of a Court into which his adversary has improperly dragged him is to be deprived of the costs of a proceeding which the conduct of his adversary has rendered imperatively necessary."

KEMERER v. WILLS—MASTER IN CHAMBERS—NOV. 19.

Discovery—Production of Documents.]—Upon motion by the defendant Singlehurst, plaintiff by counterclaim, the defendant Wills, defendant by counterclaim, was ordered to file a further affidavit on production, and, if required, to deposit the documents in Court. The Master held that the existence of documents other than those mentioned in the former affidavits could be shewn by reference to the proceedings in another action, Singlehurst v. Wills, intimately connected with this. Costs in the cause. Glyn Osler, for the applicant. Z. Gallagher, for the defendant Wills.

GEORGE v. STRONG—MASTER IN CHAMBERS—NOV. 19.

Judgment by Default—Motion to Set aside.]—A motion by the defendant Duncan to set aside a judgment signed against him by the plaintiff for default of defence was referred to the trial Judge, as the action was going down to trial at once against the other defendants, and the defences were the same. J. H. Spence, for the applicant. G. H. Kilmer, K.C., for the plaintiff.

TITCHMARSH v. MCCONNELL—BTITTON, J., IN CHAMBERS—NOV. 19.

Leave to Appeal—Security for Costs.]—Leave to appeal from the decision of BOYD, C., ante 27, was refused the plaintiff. BRITTON, J., was of opinion that the decision was not in conflict with any case cited. J. B. Mackenzie, for the plaintiff. W. H. McFadden, K.C., for the defendant.

MARKS v. MICHIGAN SULPHIDE FIBRE CO.—MEREDITH, C.J.C.P., IN CHAMBERS—NOV 19.

Judgment by Default—Motion to Set aside.]—An appeal by the plaintiff from an order of the Master in Chambers setting aside a judgment signed by the plaintiff against the defendants for default of appearance, and letting the defendants in to defend, on terms, was dismissed, the defendants having produced very strong

evidence (in the main documentary) to support their contention that they did not owe the plaintiff any part of the claim for which the judgment was recovered, and the Master having exercised a discretion which ought not to be disturbed. Costs in the cause. W. E. Raney, K.C., for the plaintiff. Frank McCarthy, for the defendants.

VAN EVERY v. FORTIER—DIVISIONAL COURT—NOV. 19.

Principal and Agent—Commission.]—Appeal by the defendant Fortier from the judgment of MULOCK, C.J.Ex.D., in favour of the plaintiff against the appellant; and cross-appeal by the plaintiff from the same judgment dismissing the action against the defendant company. The action was brought to recover commission on the purchase money of a mining property owned by the defendant company and sold to one Wallace. The plaintiff's agreement for commission was with the defendant Fortier, a shareholder in the company. The commission was to be paid partly in cash and partly in shares. A Divisional Court (MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.), varied the judgment of MULOCK, C.J., by reducing the sum of $7,431 awarded to the plaintiff in money to $5,000. The cross-appeal was dismissed. No costs of the appeal or cross-appeal to either party. H. H. Dewart, K.C., for the appellant. C. Millar, for the plaintiff.

LAMONT v. WENGER—FALCONBRIDGE, C.J.K.B.—NOV. 20.

Injunction—Debtor Disposing of Property — Status of Creditor.]—After the order of MEREDITH, C.J.C.P., ante 177, in part affirming the report of a Master finding damages against the defendant, the plaintiffs moved for an injunction restraining the defendant from parting with or incumbering his property, pending the defendant's proposed appeal from the order of MEREDITH, C.J. The defendant's solicitor swore that it was the defendant's intention to carry the appeal to the Supreme Court of Canada, and that counsel advised that the plaintiffs were not entitled to any damages against the defendant. FALCONBRIDGE, C.J., said that the plaintiffs had no judgment and no right to execution, and were not entitled to an injunction: Burdett v. Fader, 6 O. L. R. 532, 7 O. L. R. 72; Knapp v. Carley, 2 O. W. R. 1186, 3 O. W. R. 187.

Motion refused; costs in the cause to the defendant. H. E Rose, K.C., and J. G. Wallace, K.C., for the plaintiffs. Grayson Smith, for the defendant.

WILLIAMS v. KEHR—MASTER IN CHAMBERS—NOV. 22.

Summary Judgment — Mortgage — Stifling Prosecution.]—Upon a motion for summary judgment under Rule 603, in an action upon the covenant for payment contained in a mortgage deed, the defence sought to be set up was that the mortgage was given to stifle a prosecution. The Master refused the motion, saying that the matter should be investigated at a trial in the usual way, and referring to Jones v. Merioneth, etc., Society, [1892] 1 Ch. 183, 184, and Morgan v. McFee, 18 O. L. R. 30. J. R. Roaf, for the plaintiff. L. F. Heyd, K.C., for the defendant.

MCPHERSON v. MCGUIRE—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—NOV. 22.

Summary Judgment.]—The Chief Justice dismissed an appeal from an order of the Master in Chambers refusing the plaintiff's motion for judgment under Con. Rule 603, and giving the defendant unconditional leave to defend. Laidlaw, K.C., for the plaintiff. J. T. White, for the defendant.

BUGG v. BUGG—MASTER IN CHAMBERS—NOV. 23.

Interim Alimony and Disbursements.]—The Master held that the amount of interim alimony does not depend upon the husband's income; the wife is entitled to an income suitable to her position until the suit is heard: Sykes v. Sykes, [1897] P. 306; Kettlewell v. Kettlewell, [1898] P. 138. In this case the husband's annual income was about $5,000, and the interim alimony was fixed at $20 a week; disbursements as agreed on by the solicitors up to $100 on the usual undertaking. Gideon Grant, for the plaintiff. J. A. Paterson, K.C., for the defendant.

WARREN GZOWSKI & Co. v. PETERSON LAKE SILVER COBALT MINING CO.—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—NOV. 23.

Company—Shares—Transfer—Mandamus.] — Motion by the plaintiffs for a mandamus to the defendants to record in their books the transfer of 3,000 shares of their capital stock to the plaintiffs. The Chief Justice held that, in view of the apparently bona fide contention that the shares in question were not fully paid up, being the subject of an action which might be very soon disposed of, and of the fact that the plaintiffs had abundant notice of such contention, he ought not at present to interfere, either by granting a mandamus in this action or by prerogative writ of mandamus. Motion refused; costs in the cause to the defendants. F. Arnoldi, K. C., for the plaintiffs. R. S. Robertson, for the defendants.

KELLY v. GRAND TRUNK R. W. CO.—DIVISIONAL COURT—NOV. 23.

Railway—Farm Crossing—Cross-appeal—Costs.] — Judgment dismissing the defendants' appeal from the judgment of CLUTE, J., 13 O. W. R. 781, was given by a Divisional Court (MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.), on the 22nd September, 1909: ante 24. The plaintiff's cross-appeal was dismissed at the argument, the question of the costs of it being reserved. The Court now directed that the cross-appeal should be dismissed with costs, fixed at $20. Grayson Smith, for the plaintiff. D. L. McCarthy, K.C., for the defendants.

ROETTER v. CANADIAN BANK OF COMMERCE—MASTER IN CHAMBERS—NOV. 24.

Gift—Deposit in Bank — Survivorship—Interpleader.]—The plaintiff sued the defendants for moneys deposited with them by her father, now deceased, originally to the credit of himself and wife jointly, but, upon the death of the wife, transferred to the joint credit of himself and the plaintiff, his daughter. She claimed as survivor. The moneys were also claimed by C. S., the plaintiff's brother, as executor of the father's will, on the ground that the moneys formed part of the estate of the father.

Upon the application of the defendants, the Master made an order directing payment into Court of the fund, less costs of the defendants (fixed at $28), dismissing the action as against the defendants, and substituting C. S. as defendant, unless the plaintiff preferred an issue in which C. S. should be plaintiff. The plaintiff had a sufficient interest in the estate to relieve her from giving security for costs. Reference to Re Ryan, 32 O. R. 224, and cases there cited; Payne v. Marshall, 18 O. R. 488. Featherston Aylesworth, for the defendants. W. M. Douglas, K.C., for the plaintiff. H. J. Martin, for C. S.

WILLIS v. COLVILLE—MACMAHON, J.—NOV. 24.

Principal and Agent—Sale of Land—Commission.]—An action by an estate agent for commission on the sale of the defendant's farm. The trial Judge held that, as the plaintiff never saw or knew the purchaser of the farm until after it was sold, he could not successfully claim commission on the sale. Reference to Locators v. Clough, 17 Man. L. R. 665; Rosenbaum v. Belson, [1900] 2 Ch. 269; Mackenzie v. Champion, 12 S. C. R. 649. Action dismissed with costs. H. L. Drayton, K.C., for the plaintiff. G. H. Watson, K.C., for the defendant.