THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING DECEMBER 3RD, 1904.)

VOL. IV. TORONTO, DECEMBER 8, 1904. NO. 15

MEREDITH, C.J. NOVEMBER 25TH, 1904.

CHAMBERS.

COLEMAN v. HOOD.

Judgment Debtor—Transfer of Shares in Company—Injunction to Restrain Further Transfer — Examination of Transferee—Aid of Execution—Affidavit.

Appeal by defendant McIndoe from order of Master in Chambers, ante 309, requiring appellant to attend at his own expense for re-examination and to answer certain questions which he refused to answer upon an examination for evidence on a pending motion to continue an interim injunction restraining defendants from dealing with certain shares alleged to be the property of defendant Hood, against whom plaintiff had recovered a judgment for payment of money.

W. J. Boland, for appellant.

W. E. Middleton, for plaintiff.

MEREDITH, C.J., varied the order by substituting for the direction to attend, the appellant's undertaking to consent to the injunction being continued until the trial. Costs in the cause.

NOVEMBER 26TH, 1904.

DIVISIONAL COURT.

HOPEWELL v. KENNEDY.

Libel—Letter to Newspaper—Defence—Provocation by Utterances of Plaintiff Reported in Newspaper — Privilege — Mitigation of Damages—Counterclaim—Malice.

Appeal by defendant from an order of MACTAVISH, Co.J., sitting for a Judge of the High Court at the Ottawa assizes,

upon motion of plaintiff, striking out paragraphs 5, 6, 7, 8, and 9 of the defence, and also the counterclaim, but giving plaintiff leave to amend.

H. M. Mowat, K.C., for defendant.

No one appeared for plaintiff.

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

TEETZEL, J.—The action is for libel. . . The County Court Judge followed Murphy v. Halpin, Ir. R. 8 C. L. 127. . . . Plaintiff was an alderman of the city of Ottawa, and as such was a member of the building committee of the public library, and defendant was the contractor for the stone and mason work of the library building. The libel complained of was in a letter written by defendant to the editor of the Ottawa "Evening Journal," published in that newspaper on 23rd October, 1903, in which, after calling attention to certain statements made by plaintiff at a meeting of the committee criticizing the work upon the library building, defendant proceeds to charge in effect that plaintiff was actuated in his criticism by spite and bigotry; that plaintiff was himself an incompetent mechanic; that certain buildings were put up by plaintiff "of which he ought to be ashamed;" that plaintiff owed defendant an account which he had to force him to pay; that plaintiff was always in a quarrelling mood; and that "if the like of Alderman Hopewell is a fit man to inspect my work, it is time I quit building."

The paragraphs of the defence struck out allege that plaintiff at said meeting, well knowing the public character thereof, and that the proceedings thereat would be duly reported in the public newspapers, made several serious charges in respect of the manner in which defendant was carrying out his contract, alleging that the work had an appearance of "botch work," and that "the hand of a mechanic did not shew in any of it;" that in making the charges plaintiff claimed to be specially qualified to make the same by reason of being himself a public contractor; that the said charges were duly reported in the public newspapers, especially the said "Evening Journal," and became and were matters of great public interest; that if defendant wrote the said letter, it was addressed to the editor of said newspaper and was published to the said editor and in said newspaper by defendant, as he might lawfully do, in reply to the charges so

made by plaintiff and published in said newspaper, and bona fide for the purpose of vindicating his character against plaintiff's attack, and in order to prevent plaintiff's said charges from operating to his prejudice, and in reasonable and necessary self defence and without malice; and that the occasion is therefore privileged. In his counterclaim defendant repeats the above allegations, and says that the charges so made by plaintiff were falsely and maliciously spoken and published of defendant in the way of his trade and as a building contractor.

The point involved in the appeal is whether the above facts as pleaded constitute a privileged occasion, and therefore, in the absence of express malice, a defence to the action. It will be observed that it is not alleged by defendant that plaintiff procured or caused his remarks at the committee meeting to be published in the newspapers, but in paragraph 4 he says that the meeting was open to the public and was attended by the reporters of the leading newspapers in Ottawa, for the purpose of reporting the proceedings at said meeting in their respective papers, and in paragraph 5 charges plaintiff with well knowing that the proceedings thereat would be duly reported in said newspapers.

I take it to be well settled that where a person publishes in a newspaper statements reflecting on the conduct or character of another, the aggrieved party is entitled to have recourse to the same paper for his defence and vindication, and may at the same time retort upon the assailant when such retort is a necessary part of the defence, or fairly arises out of the charges made by the assailant, and in so doing if he reflects upon the conduct and character of the assailant, it is for the jury to say whether he did so honestly and in self defence or was actuated by malice: see O'Donohue v. Hussey, Ir. R. 5 C. L. 124; Dwyer v. Esmonde, Ir. L. R. 2 Q. B. D. 243; . . . Odgers, 3rd ed., p. 253; Folkard, 6th ed., p. 278.

Except in Laughton v. Bishop of Sodor and Man, L. R. 4 P. C. 495, I have found no case in which such a defence has been allowed where the defamation complained of by defendant consisted of oral statements made by plaintiff at a public meeting in the presence of reporters who, without being expressly required to do so, published such statements in their newspapers, but I do not think the Laughton case an authority for the defence in this action, by reason of the special and extraordinary conditions involved in it.

I think this case comes squarely within Murphy v. Halpin, Ir. R. 8 C. L. 127. . . . I adopt the language of Dowse, B., at p. 138, as singularly applicable to the chief conditions of this case. It was the duty of plaintiff as a member of the building committee to honestly criticize at meetings of the committee the workmanship on a building under its charge, and if such criticisms were not made in good faith and defendant felt aggrieved thereby, he could either resort to an action or communicate to the committee and such other persons as may have heard plaintiff's criticisms his defence thereto, accompanied with such retort upon plaintiff as may have been necessary as a part of his defence or fairly arising out of any charges made by plaintiff, and if in such retort defendant had reflected upon the conduct or character of plaintiff, it would be for a jury to say whether defendant acted in good faith and in self-defence, or was actuated by malice. But, in my opinion, he had no right to publish his defence and retort to the general public through the newspapers. In other words, the public as a whole, unlike the members of the committee and other persons who chanced to hear plaintiff, had no corresponding interest with defendant in the subject matter. . . . While I am clearly of opinion that the facts set forth in the 5 paragraphs in question establish no defence on the ground of privilege, I think many of them would be admissible in mitigation of damages, and limited to that purpose may be pleaded. . . . [Reference to Stirton v. Gummer, 31 O. R. 227.]

It is also well established that facts to be given in evidence in mitigation of damages in a libel action must be set out in the statement of defence: Beaton v. Intelligencer Printing Co., 22 A. R. 97.

While I agree with the learned County Court Judge in the substance of the order made by him as to the statement of defence, I think it would have been better to have struck out only that portion of paragraphs 8 and 9 in which defendant claims that "the occasion is therefore privileged," and allow him to substitute therefor the words "and defendant pleads the aforesaid facts in mitigation of damages," but the leave given to amend fully protects defendant.

As to the counterclaim the learned Judge was of the opinion that, as the occasion on which plaintiff is charged with defaming defendant was prima facie a privileged occasion, the counterclaim should have shewn in what respect plaintiff exceeded his privilege. With much respect, I think

the reference in the counterclaim to the charges as set forth in the defence, and the further allegation that such charges were falsely and maliciously spoken by plaintiff, are quite sufficient to make the counterclaim in its present form a good pleading within Rule 268.

It is never necessary or even permissible to set out the evidence by which malice is to be established at the trial: see Glossop v. Spindler, 29 Sol. J. 556; Odgers, 3rd ed., p. 556.

Appeal allowed as regards counterclaim and dismissed as regards defence. If defendant desires to amend his defence, he should do so within 5 days. No costs of appeal or of order appealed from.

BOYD, C. NOVEMBER 28TH, 1904.

TRIAL.

HIXON v. REAVELY.

Waste—Tenant for Life—Sale of Timber—Proceeds to be Used in Repairs—Injunction—Damages—Reference.

Action by remaindermen against tenant for life for an injunction and damages in respect of alleged waste by cutting timber from the land and selling it. Trial at Welland.

BOYD, C.—All the niceties of the ancient learning as to waste which obtain in England are not to be transferred to a new and comparatively unsettled country like this province. It is, no doubt, laid down in the books that the tenant for life cannot cut down trees for repairs and sell the same, and that he must use the timber itself in making the repairs, and that the sale is waste: Gower v. Eyre, G. Cowp. 161. And this doctrine was reluctantly applied by Lord Thurlow in a case where the tenant felled the timber and applied the produce instead; but he called it a hard demand and refused to give costs: Lee v. Alston, 1 Ves. Jr. 78; S. C., 3 Bro. C. C. 37. This case, however, turned very much on the pleading, wherein defendant admitted wrongful cutting. So in Summers v. Norton, 7 Bing. and 5 M. & P. 660, the Court held that, in the absence of a proper plea, evidence could not be given that the tenant had applied for repairs other timber bought with proceeds of the timber cut, which was unsuit-

able for the purpose. This line of defence may, however, even in England, be set up by way of set-off in mitigation of damages, so that in a case of reasonable dealing by the tenant he may escape with nominal damages: see Rennel v. Wither, Manning's Digest of N. P. cases, cited in Bewes on Waste, pp. 50 and 53.

In England consideration is extended to ecclesiastical bodies, tenants for life, who are allowed not only to fell timber and dig stone to repair, but may sell such produce in order to expend the money in repairs: Knight v. Morley, Amb. 176; Wither v. Winchester, 3 Meriv. 427. . . .

A like relaxation of the strict rule obtains in the United States, and the authorities of that country, so much alike in its territorial conditions to our own, may well be regarded by Canadian Courts, as was done in Drake v. Wigle, 24 C. P. 405.

I am content to adopt the language of Mr. Justice Story as found in Loomis v. Willows, 5 Mason U. S. R. at p. 15: "If the cutting down of the timber was without any intention of repairs, but for sale generally, the act itself would doubtless be waste; and if so it would not be purged or its character changed by a subsequent application of its proceeds to repairs. But if the cutting down and sale were originally for the purpose of repairs, and the sale was an economical mode of making the repairs and the most for the benefit of all concerned, and the proceeds were bona fide applied for that purpose in pursuance of the original intention, it does not appear to me possible that such a cutting down and sale can be waste. It would be repugnant to the principles of common sense that the tenant should be obliged to make the repairs in the way most expensive and injurious to the estate." See Miller v. Shields, 57 Md. 71.

In this case the life tenant is the testator's widow, and the remaindermen are distant relatives. They complain of former cutting, but at so remote a period that I think it disadvantageous for all parties to entertain the complaint in that regard: Bogot v. Bagot, 32 Beav. 519.

The present complaint arises out of a transaction whereby proper lumber and shingles were to be obtained from a dealer, who was to take an adequate quantity of timber off the place in exchange, that on the place being unsuitable for the repairs needed. This was afterwards varied so that a sufficient amount of timber was to be sold to pay for the stuff required in repairing, but all connected with the one busi-

ness of making repairs on the very old house and buildings. The executor plaintiff admits that the buildings are in need of repairs of "$200 or $300 any way," and defendant's witnesses, who have examined with more care, say $300 or $400.

On the present evidence there does not appear to me to be any case of waste made out to justify granting an injunction, nor anything on which to award damages if the timber is cut with due regard to the situation of the bush and the cleared land, and no unreasonable amount is taken off to recoup the cost of the timber and shingles used and to be used in the repairs. If the parties are content to leave it at this, I would dismiss the action without costs—as the question is new in this country—but if either party seeks a reference as to what amount and in what locality the timber should be cut, I will send it to the Master to direct proceedings, and reserve costs of the reference.

CARTWRIGHT, MASTER. NOVEMBER 29TH, 1904.

CHAMBERS.

FELGATE v. HEGLER.

Security for Costs—Infant Plaintiff in Jurisdiction—Adult Plaintiff and Next Friend out of the Jurisdiction—Separate Claims—Appearance—Praecipe Order.

Action by the father of an infant as next friend and also on his own behalf to recover damages resulting to the father and the infant from an injury to the infant for which it was alleged defendants were liable.

The father resided in England and the infant in this Province, as shewn by indorsement on writ of summons.

Defendants moved for an order for security for costs.

H. H. Clark, for defendants.

C. W. Kerr, for plaintiff, opposed the motion on 3 grounds: (1) as premature, because it was not shewn in the material that defendants had appeared in the action; (2) that an application should at least have been first made under

Rule 1199 for a præcipe order; and (3) that, inasmuch as the infant was within the jurisdiction, security for costs could not be ordered.

THE MASTER.—To the first objection I do not attach much weight. It was admitted on the argument that defendants' solicitors had accepted service and undertaken to appear. It was not disputed that they had appeared. If necessary defendants should have leave to file an affidavit proving this fact.

As to the second objection, I think this is not entitled to prevail. It is clear from the case of McConnell v. Wakeford, 13 P. R. 455, that an order could not be made on præcipe—"it would have been void." There could therefore be no object in making such an application.

The remaining ground of objection is more substantial. The facts of the present case are distinct from those in Topping v. Everest, 2 O. W. R. 744, and McBain v. Waterloo Manufacturing Co., 4 O. W. R. 147.

But it does not seem that the fact of the infant plaintiff being within the jurisdiction has any bearing in the point under consideration.

I am therefore bound by those previous decisions, unless the case of Smith v. Silverthorne, 15 P. R. 197, following D'Hormusgee v. Grey, 10 Q. B. D. 13, applies, as was contended by Mr. Kerr.

It seems, however, to be clearly distinguishable. Here there are two distinct actions being brought against defendants. This can now be done under Rule 185 in its present form, but there are none the less two separate actions.

The present motion will therefore be dealt with as was done in Topping v. Everest, supra.

Plaintiff can have such time as he may require (not exceeding six weeks) to give security.

In default the claim of the father will be struck out, and the matter will then be left for further consideration, or the order may be as in McBain v. Waterloo Manufacturing Co., whichever is approved by the parties. The costs of this motion will be in the cause, as the exact point now arises for the first time.

CARTWRIGHT, MASTER. NOVEMBER 30TH, 1904.

CHAMBERS.

LEACH v. BRUCE.

Venue—Change of—County Court Action—Venue Improperly Laid by Plaintiff—Costs of Motion to Change—Affidavit —Solicitor.

Motion by defendant to change venue and transfer action to the County Court of Northumberland and Durham from the County Court of Victoria.

H. E. Rose, for defendant.

Grayson Smith, for plaintiff.

THE MASTER.—It is admitted that the case comes within Rule 529 (b), which in Corneil v. Irwin, 2 O. W. R. 466, I held to apply to the County Court. I refer to what is said as to the proper practice in these cases in Brown v. Hazell, 2 O. W. R. 785.

For these reasons the order should prima facie be made. In this case it ought to go with costs to defendant in any event.

There is nothing to satisfy what was said in Pollard v. Wright, 16 P. R. 507, to be necessary to have a change of venue. Not only is there no proof of "a very strong case," but, strictly speaking, there is no proof that can be considered. The only affidavit is one of plaintiff's solicitor. According to Hood v. Cronkrite, 4 P. R. 279 (per Draper, C.J.), affidavits on these motions should be made by the party and not by his solicitor, who can only repeat what his client has told him. Attention was previously drawn to this in Baker v. Weldon, 2 O. W. R. at p. 434.

In the present case the solicitor's affidavit is vague and indefinite. If plaintiff could not speak more positively and precisely he could not expect to obtain an order to have the trial at Lindsay.

CARTWRIGHT, MASTER. NOVEMBER 30TH, 1904.

CHAMBERS.

CLARKSON v. BANK OF HAMILTON.

Discovery — Examination of Officer of Defendant Bank — Local Agent—Previous Examination of Principal Officer.

Action by the liquidator of the Palmerston Pork Packing Co. to set aside a chattel mortgage given by the company to defendants.

On 22nd June, 1904, the general manager of defendants was examined for discovery. He knew nothing of the facts. Subsequently on 5th November, 1904, the inspector was examined with no better results.

Plaintiff now moved for an order for the examination under Rule 439 (2) of the agent of defendants who was in charge of the Palmerston branch, and was present at the giving of the mortgage in question.

D. Henderson, for plaintiff.

L. F. Stephens, Hamilton, for defendants.

THE MASTER.—Where a corporation or other company is a party to an action, it would seem reasonable and convenient that the company should suggest for examination the officer or servant best qualified to give all information to which the opposite party is entitled. Such officer should prepare himself by obtaining full knowledge of all relevant facts, so that the examining party may be in as good a position as if contending with an individual.

That this is no more than the Rules require is shewn by Bray's Digest of Law of Discovery (1904), articles 17 and 18. The learned author refers to the following cases: Southwark Water Co. v. Quick, 3 Q. B. D. 315, at p. 321; Bolckow v. Fisher, 10 Q. B. D. 161, 169, 171. These were followed and applied in the recent case of Welsbach v. New Sunlight, [1900] 2 Ch. 1.

The principles of these English decisions would seem to be a fortiori under our practice. There the answers of the officer to interrogatories can be read as admissions against the company: Welsbach v. New Sunlight, supra, at p. 12, per Rigby, L. J.

The only question for determination here is whether in such a case as the present the interrogating party has been given all the information to which he is entitled.

Mr. Turnbull, the general manager, knew nothing of the chattel mortgage having been given until after it was executed.

Mr. Watson, the inspector, knows nothing of what took place when the mortgage was made, as he had left Palmerston before signature. He says that Mr. Hobson, their solicitor, and Mr. Campbell would know what was said and done at the time in question.

It appears from plaintiff's affidavit that application was made to be allowed to examine Campbell, but refused by defendants. I therefore think the order should go, with costs to plaintiff in the action.

The following cases in our own Courts seem to justify this disposition of the motion: Hartnett v. Canada Mutual Aid Assn., 12 P. R. 401, at p. 403; Smith v. Clarke, ib. 217, at p. 218; Going v. London Mutual Fire Ins. Co., 10 P. R. 642, at p. 643.

BOYD, C. NOVEMBER 30TH, 1904.

TRIAL.

McNULTY v. CITY OF NIAGARA FALLS.

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

Action against the city corporation for damages for illegal removal of the remains of plaintiff's deceased child from her plot in a cemetery owned by defendants.

BOYD, C.—It may be assumed that the mother who buys a plot in a cemetery, and inters her dead child therein, has a right of action if the remains are improperly removed: Meagher v. Driscoll, 99 Mass. 281. Criminal liability exists even though the act be done thoughtlessly or ignorantly, but punishment should be so adjusted as not to impose any serious penalty in such a case: Rex v. Lyon, 2 T. R. 733; Sharpe's Case, D. & B. C. C. 160. Here the disturbance arose out of the apparently unauthorized proceedings of the

caretaker, who took upon himself to disinter the body and reinter it in another place within the cemetery enclosure. It is not proved but disproved that this transaction was directed or sanctioned by the corporation defendants. Upon being informed of what was done, steps were taken before action to restore the remains to the original place of sepulture, and to assure the plaintiff in her occupation and ownership of the plot.

The whole trouble originated in the blundering of purchasers of different plots, which resulted in the mistake made by the caretaker, who thought the body taken up had no right to be where it was, and proceeded to do what he believed to be right. No action is brought against him, and I do not see that the defendants are legally implicated in his misconduct: Bolingbrook v. Swindon, L. R. 9 C. P. 575.

The result is what I thought it should be at the conclusion of the trial. Action dismissed without costs.

MacMahon, J. December 1st, 1904.

TRIAL.

BARTLE v. PEARCE.

Way—Right of—Easement—User—Statute of Limitations—Declaratory Judgment—Injunction.

Action for a declaration as to a right of way and an injunction restraining defendant from interfering with plaintiff's rights.

W. S. Brewster, K.C., for plaintiff.

T. Woodyatt, Brantford, for defendant.

MacMahon, J.—James Grace was the owner in fee of the whole of lot 27 on the north side of Nelson street in Brantford (except a small part . . .), and he on 19th January, 1887, conveyed to defendant Pearce a portion of the lot . . . reserving thereout a right of way over a strip of land 10 feet 6½ inches in width on Canning street, and extending the same width 60 feet towards the rear of the said lot, to be used by Grace, his heirs and assigns, in common with Pearce (defendant), his heirs and assigns, as a means of ingress and egress for the use of the occupants of the buildings on lot 27. . . .

Defendant took possession of the premises conveyed to him almost immediately after he received his deed. At that time there were buildings on the other part of the lot owned by Grace to the north of the reserved right of way.

On 29th January, 1887, Grace conveyed the part of the lot owned by him to William A. Morrison, and he on 2nd December, 1903, conveyed the same to plaintiff.

Morrison entered into possession shortly after the conveyance to him, and used the right of way for three years in bringing in his coal and wood, without any molestation or objection on the part of defendant. That would bring the time of his continuously using it down to 1890, which would be only 14 years before action brought. He states that, after the three years had elapsed, for his own convenience he had gratings put in the sidewalk on Park avenue, and generally used these for the purpose of getting in his supplies of coal and wood, although occasionally he used the right of way for the purpose of bringing in such supplies. I find that on at least two occasions since 1890 he brought his wood in over the right of way and threw it over the fence at the rear, which runs east and west from the corner of his building to the west side of the lot. He said on some of the occasions when he required to go through the right of way, both before and since 1890, he found it blocked up by the delivery waggons and oil cans of defendant, and that he never requested defendant's permission to go through the right of way, but he did request him to remove the articles blocking the way in order that he might pass, and that he always claimed to be entitled to the use of the right of way. Perhaps after 1890 he did not exercise his rights very frequently, as it was only occasionally he required to use the way, but when so doing he was on each occasion asserting his right over the easement as a means of ingress and egress to and from his premises.

Defendant stated that plaintiff desired to purchase the right of way from him. That may well be. Defendant might have been willing for a consideration to extinguish his right of way, and plaintiff was desirous of acquiring defendant's interest therein. Plaintiff is somewhat uncertain as to what his object was in asking defendant if he was willing to sell his right to the easement. That, however, cannot affect the present issue.

There will be judgment for plaintiff declaring that he is entitled to the unobstructed use in common with defendant of the right of way as described in the deed from James

Grace to defendant, and also to an injunction restraining defendant from interfering with said right of way so as to prevent the free user thereof by plaintiff. There will likewise be judgment for plaintiff directing defendant to remove the covering placed over the said right of way by him, and the other obstructions placed by him on said right of way.

Reference may be had to Mykel v. Doyle, 45 U. C. R. 65; McKay v. Bruce, 20 A. R. 709; Bell v. Goulding, 23 A. R. 485; Goddard, 5th ed., pp. 109 and 540.

Defendant must pay plaintiff's costs.

ANGLIN, J. DECEMBER 3RD, 1904.

WEEKLY COURT.

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

Street Railways — Contract with Municipal Corporation — Specific Performance—Private Statute—Special Case—Hypothetical Question—Refusal to Answer.

After judgment (ante 330) had been delivered by ANGLIN, J., upon the special case stated in this action, further argument was heard as to the bearing of the Ontario statute 63 Vict. ch. 102, secs. 1 and 5, upon the question presented as to the right of plaintiffs to a decree for specific performance.

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

W. Cassels, K.C., and J. Bicknell, K.C., for defendants.

ANGLIN, J.—This legislation (63 Vict. ch. 102, secs. 1 and 5), said to have been procured on behalf of the municipality to overcome the difficulty presented by the decision of the Court of Appeal in City of Kingston v. Kingston Electric R. W. Co., 25 A. R. 462, had not been alluded to in argument before me. In these circumstances, I thought it advisable to stay the issue of formal judgment, to withdraw my opinion upon and answer to the 5th question submitted, and to direct that the special case should again be placed on the Weekly Court list, in order that I should have the advantage of hearing counsel upon the scope and effect of these special statutory provisions.

Counsel for plaintiffs state that the omission to refer to these provisions was not intentional. Mr. Robinson added that, in his opinion, they cannot effect the judgment upon the 5th question in the special case. He points out that, before plaintiffs can claim a decree for specific performance by virtue of this special legislation, they must give evidence that the conditions exist which impose obligations upon defendants under their agreement with plaintiffs, and of the nature and extent of the breaches of such obligations, after which, in the exercise of its discretion, the Court is to determine what things, if done or forborne, would constitute a substantial compliance with such obligations, and these things, when so determined, it shall order to be done or forborne.

Counsel for both parties state that the 5th question in the special case was propounded for the purpose of obtaining an adjudication upon the applicability of the decision in the Kingston case—and, should it be held to be in point, a review of that decision.

Had there been no such legislation as is contained in 63 Vict. ch. 102, the question, as framed, would necessarily have involved the determination which the parties avow it to be their desire to obtain. But it must be obvious that, if plaintiffs should make out a case, as outlined by Mr. Robinson, entitling them to the benefit of this special legislation, it will be wholly unnecessary to consider the applicability or the authority of the decision in City of Kingston v. Kingston Electric R. W. Co., 25 A. R. 462. Upon a special case stated in an action only such questions of law can properly be raised as must sooner or later arise in the action: Republic of Bolivia v. National Bolivian Navigation Co., 24 W. R. 361.

To answer the 5th question so as to meet the real purpose of the parties in presenting it, I should be obliged to assume that plaintiffs will fail to establish facts entitling them to invoke the special statutory provisions of 63 Vict. ch. 102. On the other hand, taking these provisions into account, at best only a hypothetical answer can be made to this question. It will be time enough to determine whether the remedy of specific performance is open to plaintiffs under the statute when they have established a case to which the statute applies; time enough to consider their right to this relief apart from the statute, when it becomes clear that the statute has no application. At present the question propounded cannot be answered without disregarding the well

established practice of this Court to decline to answer contingently questions involving problems which, in the ultimate working out of the action, may not present themselves for solution.

The Court is not bound to answer every question which parties litigant may see fit to put: Viscount Barrington v. Liddell, 2 DeG. M. & G. 480, 506. The undoubted right of the Court to decline to express "speculative opinions on hypothetical questions," or hypothetical opinions upon questions a categorical answer to which can only be given when certain facts not admitted have been established by evidence, finds in the 5th question of the present special case a subject which compels its exercise.

For these reasons I feel obliged to abstain from answering this question.