The
Ontario Weekly Notes

Vol. III. TORONTO, NOVEMBER 22, 1911. No. 10.

COURT OF APPEAL.

NOVEMBER 15TH, 1911.

*GISSING v. T. EATON CO.

Release—Action for Damages for Personal Injuries—Acceptance of Sum of Money in Settlement—Inadequacy—Improvidence—Absence of Fraud—Undue Advantage not Taken of Inequality or Incapacity.

Appeal by the defendants from the order of a Divisional Court (BOYD, C., LATCHFORD and MIDDLETON, JJ.), affirming (MIDDLETON, J., dissenting) the judgment of TEETZEL, J., at the trial, in favour of the plaintiff Alice Gissing. See 2 O.W.N. 1021.

The action was brought by Alice Gissing and her husband to recover $5,000 damages for injuries alleged to have been sustained by the plaintiff, Alice Gissing, in the defendants' departmental store in the city of Toronto, by rolls of oil-cloth toppling over and falling upon her, by reason, as the plaintiffs alleged, of the negligence of the defendants' clerks or servants.

After the plaintiffs had made a claim upon the defendants for compensation for the injury, the defendants, through one Black, offered them $50, and they accepted it, giving a receipt in full. The defendants pleaded this as a release of the cause of action. The plaintiffs replied that the settlement was improvident and the consideration inadequate, and that undue advantage was taken of them by Black.

The issue as to the release was tried by TEETZEL, J., without the assistance of a jury, and was found by him in favour of the plaintiffs.

*To be reported in the Ontario Law Reports.

The claim for negligence was then tried with a jury, who found in favour of the plaintiff Alice Gissing, and assessed her damages at $750, upon which findings judgment was entered in her favour with costs; the claim of her husband being dismissed.

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

I. F. Hellmuth, K.C., and G. W. Mason, for the defendants.

T. N. Phelan, for the plaintiffs.

Garrow, J.A. (after setting out the facts):—I feel compelled to agree with Middleton, J., in his dissenting judgment. People must not be allowed to play fast and loose with settlements made, as this was, deliberately, intentionally, and with full knowledge of all the facts. Business could never be carried on in that way.

I am, with deference, quite unable to see in the evidence any justification for the statement that the settlement was brought about by intimidation or fraud, or by imposition of any kind.

Black did not seek the plaintiffs, nor urge, nor advise them to settle. They sought him as the representative of the defendants having charge of the matter, and he went to the plaintiffs' residence only in pursuance of the arrangement made with the male plaintiff, at the instance of his wife, who sent him to obtain a settlement if possible. Before going, he had given to the husband his ultimatum—$50, and not a cent more—and this was duly reported to the female plaintiff by her husband on his return. So that when, later in the day, Black came, the matter was of the very simplest, namely, to say "yes" or "no" to the offer. It had in the meantime been under discussion and consideration by the plaintiffs; and, as the female plaintiff herself admits, her husband had advised—she puts it in one place "influenced" and in another "drove"—her to accept.

The female plaintiff is, it is true, shewn to have been in bed, and she may have been ill and in pain, although it would have been more satisfactory on these points if her physician had been called or even her husband, neither of whom was examined on this issue. But, granting that her condition was as she describes, there is absolutely nothing fairly to shew that she was so ill as to be unable understandingly to accept or reject the offer, which, after all, is all that she was called on to do. Some-

thing might even, not unreasonably, in the circumstances, be said about the alleged improvidence, or, as I would prefer to call it, inadequacy of the consideration. The claim was by no means admitted; on the contrary, it was, honestly and on quite sufficient grounds, stoutly contested. The female plaintiff was willing to accept $200; and, in considering the question of inadequacy, that sum, and not the sum subsequently awarded by the jury, should alone, I think, be regarded. But, however that may be, improvidence or inadequacy of consideration alone is not sufficient to justify setting the settlement aside. "Mere inadequacy of consideration is not a ground even for refusing a decree for specific performance of an unexecuted contract. And still less can it be a ground for rescinding an executed contract. The only exception is where the inadequacy of consideration is so gross as of itself to prove fraud or imposition on the part of the purchaser. Fraud in the purchaser is of the essence of the objection to the contract in such a case:" Borell v. Dann, 2 Hare 440, at p. 450. See also for other illustrations, of which there are many, Harrison v. Guest, 6 DeG.M. & G. 424; Middleton v. Brown, 47 L.J.Ch. 411.

It must be made to appear not only that there was inequality or incapacity of some kind, but that advantage was taken of the circumstance; and, in my opinion, nothing of the sort appears in this case.

I would allow the appeal and dismiss the action, both with costs, if demanded.

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

Moss, C.J.O., Maclaren and Magee, JJ.A., also concurred.

November 15th, 1911.

STEVENS v. CANADIAN PACIFIC R.W. CO.

Railway—Injury to Person Crossing Track at Highway Crossing—Heel Caught between Rail and Plank—Negligence—Findings of Jury—Unsatisfactory Evidence—New Trial.

Appeal by the defendants from the judgment of Boyd, C., in favour of the plaintiff, upon the findings of a jury, for the recovery of $2,000 damages, in an action for injury sustained by the plaintiff at a highway crossing.

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

I. F. Hellmuth, K.C., and W. L. Scott, for the defendants.

J. A. Macintosh, for the plaintiff.

Magee, J.A.:—The plaintiff alleges that the defendants negligently placed planks between their rails on a highway crossing so that an unnecessarily wide space was left between the rail and the planking, and his left boot-heel was caught therein as he was walking along the highway, and he was unable to extricate himself before an approaching engine and train came upon him and severed his leg above the ankle.

The highway is a main road, much travelled, near Vankleek Hill. The defendants' railway crosses it at nearly right angles; and in the middle of the highway, at the travelled part of it, the defendants had laid planking between and outside their rails and parallel therewith so as to keep the surface nearly flush with the top of the rails. Outside of the tracks, the planks are said to be tight up to the rails; but on the inside it was necessary to leave a space between the rail and the nearest plank for the flange of the train wheels. The flange is $1\frac{3}{4}$ inches in width and projects downward in the case of the engine drive-wheels $1\frac{3}{4}$ inches to 2 inches and on others $\frac{3}{4}$ of an inch to $1\frac{1}{4}$ inches. What the defendants' witnesses call the "standard" width of space to be left for the flange is 2 inches. The rail then used was $4\frac{3}{4}$ inches high, but may have sunk somewhat into the tie; whatever its height above the tie, the 2-inch space below the flange would be left vacant, and would be increased in width by the hollow in the side of the rail below its head.

The accident occurred after half-past five, on a snowy, sleety evening, the 29th November. The plaintiff was walking home, going north, and had followed the foot-track along the east side of the travelled portion of the highway. When he came to the south side of the plank crossing, instead of continuing straight on the line of the foot-path, which would have taken him along the east end of the planking, he says that he turned diagonally northwest, to avoid a puddle on the side of the road north of the track, and was almost across when his left foot slipped on the north rail, and his boot-heel went into the flange space and became fastened there. He saw a train approaching from the west a considerable distance away, but says he could not extricate his foot; and, after trying by waving his hands to attract the attention of those on the engine, had to throw himself down to the side to save his life, and "the foot was cut clean off and above the

ankle joint." No further description of his injury was given at the trial, and none was asked. He had, before the trial, been examined by the defendants for discovery; and apparently this short statement of his injury was considered sufficient by both parties. Although surgeons had been called in and his leg amputated, no medical witness was called on either side. And, although the defendants called the two witnesses who first saw the plaintiff immediately after the injury, and others who saw him subsequently, no question whatever as to the condition of the foot or leg, or even of the boot, was asked of any of them. . . .

The one fact, if it be a fact, which it is difficult to reconcile with the actual condition of the boot, is that testified to by the plaintiff himself, namely, that, after the train passed, he drew the boot from between the rail and the plank, twisting it to get it out. One could understand that, if empty, it could be crushed down into the widened space below the head of the rail without injury; but the only theory which would account for its being uninjured is incompatible with its being in such a position as to be crushed into that space and so having to be twisted out of it.

It may be that the jury considered that the plaintiff, after his injury, did not really know what he did, and that he was honestly in error in the statement. . . . But that statement, as to twisting the boot out, is made and repeated by him so unhesitatingly, and the evidence as to the exact point of severance is so vague, and some knowledge of the condition of the boot seems to me so important, that it cannot be said that the trial has been of that satisfactory nature that the present verdict should stand upon the present evidence.

The defendants have not much right to complain that the evidence was vague. It would seem that it must intentionally have been left so. Yet the plaintiff is resting upon it in the condition in which it is. Were it not for that statement of the plaintiff himself, I cannot see any reason for interfering with the finding of the jury, who had all the witnesses before them.

It was argued that, even if it were true that the space left by the defendants between the rail and plank was $2\frac{3}{4}$ inches, they could not be held liable for an injury which would depend upon the width of a person's heel. Their own evidence shews that the wheel flanges are only $1\frac{3}{4}$ inches wide, and that a space of 2 inches is all that is necessary, and is indeed the standard. That there is great danger of persons having a foot caught in similar spaces is shewn by the legislation as to packing the frogs of switches, even on the company's own premises. It could not be contended that they might with impunity leave unneces-

sarily on the highway, between the planking, placed by themselves, and the rail, a space into which the foot of a horse would be likely to catch. It is necessary to have proper space for the flange to run; and, if a person wears heels of such a width as to be liable to catch in that proper space, that person may have to run the risk and abide the consequences. But, when the company leave, in such a situation, an unnecessarily wide space, and a person sustains injury therefrom, the company cannot escape liability. Whether they did so is a question for the jury.

There should, in my opinion, be a new trial; and, as the defendants, who had examination of the plaintiff for discovery, seem to have been satisfied to leave the evidence in its present indefinite condition, the costs of the former trial should be costs in the cause, and the costs of the appeal should be costs to the defendants in any event.

Moss, C.J.O., Garrow and Maclaren, JJ.A., concurred.

Meredith, J.A. (dissenting):—To support the judgment appealed against, each of these three things must appear upon the evidence adduced at the trial: (1) that there was reasonable evidence that the space between the rail and the plank was about 3 inches; (2) that there was reasonable evidence that permitting such a space to be there was actionable negligence on the part of the defendants; and (3) that there was reasonable evidence that such negligence was the proximate cause of the plaintiff's injury. And I am unable to find any such evidence in regard to any of these three things; that is to say, any evidence upon which reasonable men, acting conscientiously, could find in the plaintiff's favour; and, if that be so, judgment should have been entered, at the trial, in the defendants' favour, though it would be enough to defeat the action if the plaintiff's case failed in respect of any of them. . . .

Nor can I find any excuse, which would satisfy my mind, for directing a new trial: a thing which would be unjust to and a grievous hardship upon those who, after a full and fair trial, are entitled to the judgment of the Court in their favour; as well as being a thing distinctly against public interests, in more ways than one, but especially as a potent incentive to perjury in order to make the case fit with all that has been now learned is essential to support a verdict in favour of the unfortunate plaintiff. It is not suggested, it has not at any time been suggested, even, that the plaintiff could adduce any further evidence; and, if it is meant that he should change his evidence so as to eliminate parts

which make against him, and to permit swearing to a more plausible story, that, of course, would be inexcusable.

I would allow the appeal, and dismiss the action.

New trial ordered; MEREDITH, J.A., *dissenting.*

NOVEMBER 15TH, 1911.

REX v. AUSTIN.

Criminal Law—Gold and Silver Marking Act, 1908 (D.)*—Prosecution for Sale of Article in Breach of Provisions of Act—Construction of sec.* 11*—"Article"—"Composition."*

Case stated by R. E. Kingsford, Esquire, a Police Magistrate for the City of Toronto.

The case arose upon a prosecution under the provisions of the Gold and Silver Marking Act, 7 & 8 Edw. VII. ch. 30 (D.) The defendant was acquitted; and the questions submitted were the following:—

1. Was I right in holding that the requirements of secs. 10 and 11 of the Gold and Silver Marking Act are that articles stamped a certain number of carats need not contain that number of twenty-fourths of the total weight of the whole article of gold?

2. Was I right in holding that the requirements of secs. 10 and 11 of the Act are, that articles stamped so many carats should be composed of that number of twenty-fourths gold to the weight of the gold alloy only in the article in question?

3. Was I right in holding that filling or any substance other than gold or alloy was not part of the "composition" referred to in the said sections?

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

J. Jennings, for the Minister of Justice for Canada.

T. C. Robinette, K.C., for the defendant.

GARROW, J.A.:—The total weight of the ring, which was stamped and sold as 9 k. gold, was 22.500 gr., made up of metal alloy 10.634 gr., and of filling 11.866 gr. The gold in the metal alloy weighed 4.36 gr.; and if only the weight of the alloy is to

be considered, as was the opinion of the learned Police Magistrate, there was clearly no offence, for the proportion of gold in the alloy considerably exceeded the 9 k. demanded by the statute.

The learned Police Magistrate based his conclusion upon the construction of "composition" in sec. 11(*b*), which he held to mean the metal alloy and not the article or part of it—"The 'composition' means the alloy, as I read the Act, not the article," are his words. And the question is, whether that is the right construction.

The language of the statute certainly leaves something to be desired in the way of clearness. The object—to prevent the fraudulent marking of articles within its enumeration—is, of course, plain enough. And it is equally plain that, if the construction which commended itself to the learned Police Magistrate is to prevail, the statute would entirely fail of its purpose, for there would be nothing to prevent the manufacture and sale of an article as gold, marked even with the highest carat mark, although composed of lead or other cheap material within, and merely veneered, however thinly, with a gold alloy, as long as the alloy contained the requisite quantity of gold. That absurd result, it may safely be assumed, was not the intention; nor is it, in my opinion, the reasonable or necessary construction of the language of the statute when carefully considered. . . .

Section 3 makes the term "article" include every portion of it; sec. 10 prohibits marking or selling, as made of gold or an alloy of gold, any article with a mark indicating that the gold *in the article* is of less than 9 k.; sec. 11 directs that the mark shall indicate the quality of gold or alloy of gold used in the construction *of the article;* and sec. 13 provides for the case of an inferior metal covered with gold or silver (or an alloy of either), in which case the mark must indicate the proportion of gold or silver to the gross weight *of the article*, or part of it.

So far, the intention to make the article itself the basis of any computation as to its ingredients seems clear. Any confusion is caused, I think, by misapprehending the true meaning of the words "composed in whole or in part" in the first part of sec. 11, and the word "composition" in clause 6 of the same section.

The section provides for two classes of articles, one composed wholly of gold or an alloy of gold—such, for instance, as a gold ring without setting, or a gold pen—the other, of gold or an alloy of gold and also some other separate material, such as a gold-headed cane or a gold-mounted dressing-case. In an article falling within the first class, marked, for instance, 9 k., it is clear that there must be nine twenty-fourths of gold. And the same

result must follow as to any distinctive part similarly marked, by the application of the interpretation clause (sec. 3), which makes "article" include any portion of the article, whether a distinct part thereof or not; in other words, one must imply after the word "article," in the fourth line of sec. 11, the words "or part of the article," and after the word "composition," in the eleventh line, the words "of the article or the part of the article as the case may be." And the words "the gross weight thereof," in the 9th and 10th lines, can refer only to the gross weight of the article itself, or of the part of it said to be of gold, and marked under the statute. There is no other subject-matter that I can see to which it can be reasonably referred. The fact is, the illustration does not really illuminate, but rather helps to darken what was none too clear before, although, upon the whole, the intention can, without reasonable doubt, I think, be spelled out.

For these reasons, I would answer the questions against the conclusion of the learned Police Magistrate, and direct a new trial if the Crown so desires—although, in the circumstances, the Crown's purpose will probably have been served without that.

MOSS, C.J.O., MACLAREN and MEREDITH, JJ.A., agreed in the above result, for reasons stated by each in writing.

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

NOVEMBER 15TH, 1911.

*REX v. WOOD.

Criminal Law—Neglecting to Provide Necessaries for Wife—Foreign Divorce—Jurisdiction of Foreign Court—Domicile—Desertion—Likelihood of Permanent Injury to Wife's Health—Evidence—Findings of Jury.

The defendant was convicted at the General Sessions of the Peace at Toronto, on the 16th May, 1911, under sec. 242(2) of the Criminal Code, before the County Court Judge and a jury, of omitting without lawful excuse to provide necessaries for his wife, Alice Jones, whereby her health was likely to be permanently injured.

*To be reported in the Ontario Law Reports.

The defendant admitted that he had married Alice Jones at Toronto, in 1903; but asserted that he had secured a valid divorce at Cleveland, Ohio, on the 27th June, 1910. He also denied that her health was likely to be permanently injured for want of medical necessaries, as she asserted.

The County Court Judge submitted to the jury the following questions, which were answered by them as follows:—

1. Had the accused husband, when he commenced his divorce proceedings and obtained the divorce, acquired an actual, real, and permanent domicile or home in Ohio? A. No.

Or, did he go there merely for the purpose of living there long enough to enable him to obtain the divorce, and then return to Canada? A. Yes.

2. If the answer to the above question be that he did not acquire such permanent domicile in Ohio, then is there any lawful excuse shewn for not supplying the necessaries to his wife, either on the ground of her having deserted him, or on the ground of his inability to supply them? A. No.

3. Has the wife's health been permanently injured, or is it likely to be permanently injured, by the husband not supplying the necessaries of life? A. The wife's health has not been permanently injured, but is likely to be permanently injured, by the husband not supplying the necessaries of life.

In addition, the jury brought in a general verdict of "guilty."

The County Court Judge had fully instructed the jury as to the law applicable to the case, in a charge which was not objected to.

At the request of the defendant's counsel, he reserved for the Court of Appeal the following question: "Are the findings and the verdict of the jury, based upon such instructions and directions, sufficient in law to support or warrant the conviction of the prisoner?"

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

A. R. Hassard, for the defendant.

J. R. Cartwright, K.C., for the Crown.

Maclaren, J.A. (after stating the facts as above):—It has been for years the well-settled law in this country that it is the Courts of the domicile of the parties that have jurisdiction on the subject of divorce: Rex v. Woods, 6 O.L.R. 44; The King v.

Brinkley, 14 O.L.R. 434; Rex v. Hamilton, 22 O.L.R. 484; Bater v. Bater, [1906] P. 209.

The defendant had been domiciled in Toronto when he married his wife there in 1903. The jury have found that he had not acquired a new domicile in Ohio; and I do not see how, upon his own evidence, they could have found otherwise.

But it was argued that the certified copy of the Cleveland judgment put in at the trial is conclusive on this point. However, an examination of the judgment shews that it contains no reference or statement as to either the domicile or residence of either of the parties. It is simply a decree of divorce of the Court of Common Pleas in the State of Ohio in a case of "Walter M. Wood, plaintiff, v. Alice M. Wood, defendant," without saying where either the plaintiff or defendant resided or was domiciled. The judgment does not shew nor does it appear in any way, nor was it proved at the trial here, that either domicile or residence in the State of Ohio is a pre-requisite to the obtaining of a divorce in that State.

On the other point, as to the wife's health being likely to be permanently injured by the husband not supplying her with the necessaries of life, the testimony of the wife and of Dr. Tuck is sufficient to justify the verdict of the jury on this point. It was shewn that she needed to undergo a serious operation, for which she had neither the means nor the strength, so long as she was compelled to continue the menial labour she had performed for the support of herself and their child.

The evidence also shewed that she had not deserted him, but that he had deserted her.

The question reserved should be answered in the affirmative.

MEREDITH, J.A., reached the same conclusion, for reasons stated in writing.

MOSS, C.J.O., GARROW and MAGEE, JJ.A., also concurred.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. NOVEMBER 11TH, 1911.

BULLEN v. WILKINSON.

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

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 2 O.W.N. 1202.

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

W. J. Elliott, for the plaintiff.

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

BRITTON, J.:—There was ample evidence to warrant the findings of the learned trial Judge. It seemed to me, upon the argument, that, upon the whole evidence, this was not a case for specific performance with compensation. I have had more difficulty in dealing with what the plaintiff in the alternative asks, namely, specific performance without compensation. The plaintiff did not ask for this in his statement of claim. His claim was to get the land—the whole land as, according to the plaintiff's contention, covered by the agreement—or, if the plaintiff could not make title to the whole land according to the description the plaintiff contended for, then he was willing to accept what the vendor could give, and fair compensation for the deficiency.

The plaintiff, as it appears to me, is too late in making the offer. The case of Wilson Lumber Co. v. Simpson, 22 O.L.R. 452, 23 O.L.R. 253, to which we were referred, was where the vendor offered either to convey the part to which he could make title without compensation, or to withdraw from the bargain. Upon the alternative offer being made, the purchaser would accept neither, and the action was dismissed without giving the purchaser any further opportunity to get the land on any terms.

A perusal of the evidence in this case satisfies me that the sale was of a particular parcel of land for a lump sum—not a sale by the foot frontage.

The learned trial Judge has found that there was the utmost good faith on the part of the defendant. The facts that the original offer of the plaintiff was $3,000, that the defendant wanted $5,000, and that then the defendant agreed to accept $4,000, and that the frontage per foot value was not discussed, are cogent evidence that the plaintiff knew what the defendant really could sell. The plaintiff in a general way, as found by the trial Judge, knew the property—he had spoken with the tenant, and stated that he had estimated the property at about nineteen feet frontage.

All things that came out point to an honest mistake on the part of the defendant in giving a description apparently obtained

from the assessment roll or notice; and it is not easy to understand how the plaintiff was misled.

In view of the position taken by the defendant in treating the case as one in which she could not make title to the additional four feet odd, and of her instructing Mr. Wood to return the deposit, that deposit should now be returned to the plaintiff; and, in default of such return, the same should be allowed as payment pro tanto on the costs of this action and appeal.

The appeal should be dismissed with costs—subject to the above.

Falconbridge, C.J.:—I agree.

Riddell, J.:—My learned brother Sutherland has set out the facts; and I see no reason, on principle or authority, to differ from his conclusion.

The plaintiff before us for the first time expressed his willingness to take at the price mentioned in the contract what the defendant had to give. This would raise a new action; and I do not think we should entertain his new claim. But the dismissal of the present action and appeal may well be without prejudice to any action he may be advised to bring for this new claim.

Middleton, J. November 16th, 1911.

Re PRINGLE.

Will—Devise—Precatory Trust—Injunction to "Take Care of" Brother of Devisee—Death of Devisee—Claim of Brother on Land Devised.

Motion by the administratrix of the estate of Mary E. P. Bonnell for an order determining a question arising under the will of Martha E. Pringle.

S. H. Bradford, K.C., for the applicant.
B. H. Ardagh, for Solomon Waldron Pringle.

Middleton, J.:—By her will the testatrix gave her real and personal property to her daughter Mary, and then proceeded thus: "And the said Mary E. P. Bonnell is to take care of her father, Ezra H. Pringle, during his lifetime, and also her brother Solomon Waldron Pringle."

Mary is dead, the father is dead; and the question is as to the rights, if any, of the brother.

In re Moore, Moore v. Roche, 55 L.J. Ch. 418, is conclusive against any claim by him. There, property was given to the testator's sisters, and "they are hereby enjoined to take care of my nephew C., as may seem best in the future." Kay, J., says: "The direction is, that they are to 'take care of' him. It is not 'to support' or to 'provide for' or 'educate' him, but there is only this indefinite direction to take care of him. . . . I do not think that a precatory trust has been by that direction sufficiently imposed upon these legatees to enable the nephew to bring an action to have it carried into effect."

Add to this the fact that the proper given was worth only $800, and that the brother was not an infant or an aged or infirm person. I cannot think that these indefinite words can have been intended to impose on this sister the burden of supporting and maintaining a brother who, for aught that appears, was well able to maintain himself.

Mary being dead, any obligation that may have been intended died with her, and her brother can have no claim upon the property devised.

As this order is sought to clear the title to the lands, the costs of the brother may be allowed at the sum of $15 out of the estate. The other costs, if any order is asked, may also be paid out of the estate.

MEREDITH, C.J.C.P. NOVEMBER 16TH, 1911.

*WALLACE v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

Accident Insurance—Temporary Total Disability—Double Indemnity—"Passenger"—Injury to Assured while Alighting from Street Car.

Action upon an accident policy issued by the defendants to the plaintiff, the assured, by the terms of which, in the case of temporary total disability, which was defined by the policy to mean, "Injuries not fatal, and neither partial nor total as described above, but which shall result in the assured being immediately, continuously, and wholly disabled, and thereby prevented from transacting any and every kind of business pertain-

*To be reported in the Ontario Law Reports.

ing to his occupation," the assured was entitled to $25 per week for the period of disability, not exceeding 200 consecutive weeks; or, if the injuries are sustained while a "passenger," which means, as defined by the policy, "while riding as a passenger in or upon a public conveyance provided by a common carrier for passenger service," to double that sum per week.

The claim of the plaintiff was resisted altogether, on the ground that there was no temporary total disability in fact, and that, if it existed, it was not due to the injuries received; and the defendants contended that, if liable, they were not liable for the double indemnity, because the injuries were not received while the plaintiff was a "passenger," within the meaning of the policy.

The plaintiff was a passenger on a belt line car of the Toronto Railway Company on the night of the 17th August, 1910, between nine and ten o'clock. His intended stopping-place was that opposite the St. Lawrence Market, King street. What occurred when he reached that point was not very clear from his testimony, which was the only evidence as to the way in which the accident occurred. He said that he went to get off the car, which was an open one, and as he stepped off there was an automobile coming up the other street; he saw the automobile there, and stepped back on the car again and reached to catch the handle; the car must have been in motion, because it threw him right around the other way; and he grabbed on to the mud-guard of the fender of the automobile, and the car pulled out from under him; it threw him around against the car, and his shoulder and the side of his head hit the car.

The action was tried without a jury. The Chief Justice found that the plaintiff's injuries had resulted in temporary total disability, within the meaning of the policy, entitling him to the indemnity of $25 a week; and reserved for further consideration the question of his right to the double indemnity.

H. H. Dewart, K.C., and D. Urquhart, for the plaintiff.

George Wilkie, for the defendants, argued that the injuries had not occurred while the plaintiff was a passenger, within the meaning of the policy, and that his account of the occurrence shewed that before he was injured he had left the car in which he had been travelling, and that his journey by the railway had come to an end.

MEREDITH, C.J. (after setting out the facts at length) :—I do not think that it can be said that the plaintiff had safely alighted

from the car when he was injured. He was in the act of alighting; but, when he was confronted by the danger which he apprehended from the passing motor vehicle, he desisted from the act of alighting and endeavoured to get back on the car; and it was while so doing that he was injured.

It would be, I think, altogether too narrow a view to take of the definition of "passenger" which the policy contains, to limit the right to the double indemnity to cases in which the assured is actually in or upon the vehicle by which he is being or is to be or was conveyed. The cases cited by Mr. Dewart shew that a person travelling by rail remains a passenger until he has safely alighted from the vehicle, and is a passenger while in the act of entering or getting on or into the vehicle by which he is to be carried. The plaintiff's feet, no doubt, had reached the pavement, but he had not completely or safely alighted from the car; and, in my opinion, he was still a passenger, within the meaning of the policy, when he met with his injuries. There is a further ground. . . . Although the plaintiff had reached his destination and intended to terminate his journey at the point where he attempted to alight, he had the right, when he was confronted with the danger which he apprehended from the motor vehicle, or indeed if he was so minded for any reason, to get upon the car again and to be carried to a place where he might alight with safety; and that, putting his case on the evidence at the lowest, he was doing when he was injured. . . .

[Reference to Powis v. Ontario Accident Co., 1 O.L.R. 54, as decisive in favour of the plaintiff, upon this view.]

The plaintiff is, in my opinion, entitled to judgment declaring that the injuries which he received . . . resulted in temporary total disability, within the meaning of the policy, and that they were received while he was a passenger, within the meaning of the policy, and to recover from the defendants for the aggregate of the weekly sums of $50 which were payable at the commencement of the action, with costs. As only two periods of thirteen weeks elapsed between the date of the accident (17th August, 1910), and the date of the issue of the writ (15th March, 1911), there can be recovery in this action for only twenty-six payments, and the sum for which judgment is to be entered will be $1,300.

HODGINS V. DIXON—MASTER IN CHAMBERS—NOV. 14.

Pleading—Statement of Claim—Administration.] —Motion by the defendant to strike out the 5th and 7th paragraphs of the statement of claim as shewing no cause of action and being embarrassing. The plaintiff by the statement of claim alleged a debt due by the defendant's testator, who made the defendant his sole executrix and devisee, and asked administration. Probate was granted on the 25th May, 1907. Paragraph 5 alleged that the deceased had lands near Sault Ste. Marie, which the defendant claimed as her own. Paragraph 6 was not objected to, though without paragraph 5 it would not have been intelligible. It alleged that the deceased "in his lifetime appropriated certain of the said lands to be selected by the plaintiff in payment of his debt aforesaid," and went on to claim discovery from the defendant as to the property and estate of the deceased. The Master said that this could be better inquired into at the trial or in the Master's office, if administration were granted. Paragraph 7 stated that the plaintiff had discovered that certain lands in the township of McTavish were still in the name of the deceased, but that the defendant was intending to sell them and would do so unless restrained by the Court. The prayer for relief asked: (1) administration; (2) discovery as in paragraph 6; (3) the right to select as in paragraph 6; (4) a declaration that the McTavish lands were subject to the testator's debts, and an injunction restraining the defendant from dealing with the same; (5) costs; (6) further relief. The Master said that, as paragraph 6 was not objected to, paragraph 5 could not be attacked, as it was only introductory to paragraph 6 and explanatory of it. Nor did paragraph 7 seem objectionable. It merely stated facts as in paragraphs 5 and 6 on which the plaintiff would rely at the trial, as shewing assets in the hands of the defendant, who had filed an affidavit on this motion stating that the testator "left practically no estate of any value," not sufficient even to pay his funeral and testamentary expenses, which were borne by the defendant. There was no improper joinder of causes of action —the existence of the debt was not denied, and there was nothing embarrassing in paragraph 5 or 7. The Master added that it would seem the better course to accept the offer made in paragraph 9 of the statement of claim and allow an order to go for administration. Then, if the plaintiff could not establish anything, he would have to pay the costs. If this were not acceded to, the motion should be dismissed with costs to the plaintiff in the cause. E. G. Long, for the defendant. F. E. Hodgins, K.C., for the plaintiff.

WILBUR V. NELSON—MASTER IN CHAMBERS—NOV. 15.

Pleading—Statement of Defence and Counterclaim—Action for Possession of Land—Assertion by Defendant of Right to Half Interest—Agreement with Plaintiff's Testatrix.]—Action to recover possession of house No. 14 Bellevue avenue and of the contents. The defendant by his amended statement of defence and counterclaim asked a declaration of his title to an undivided one-half interest in the Bellevue avenue house, and abandoned any claim to the contents. The plaintiff moved to have paragraphs 4 to 12 of this statement of defence and counterclaim struck out, as being irrelevant and embarrassing. In paragraph 3 the defendant alleged that the house in question was not the sole propety of the testatrix, who assumed to devise it to her daughter, the plaintiff, the said testatrix having been the defendant's wife; that the house was paid for by the joint property and earnings of the defendant and the testatrix, so that, although the deed was taken in her name, he was entitled to an undivided half interest therein. This paragraph was not attacked. The next 9 paragraphs entered with minuteness and at some length into the dealings of the defendant, and his wife from the 30th April, 1879, to the 29th August, 1893, as tending to shew that all his earnings during that time were invested in other properties, which he at the latter date conveyed to his wife, on her promise to hold in trust for him and reconvey on request or devise the same by her will so as to protect him, if she died before reconveyance. It was further alleged that the plaintiff, for certain reasons, was able to induce her mother to make her will in breach of such agreements, though well known to her to have been made, and notwithstanding that the testatrix had assured him that she had made her will as agreed on, and especially had made such provision therein as would protect his rights in respect to this Bellevue avenue house. The Master said that it was not necessary to set out these facts, but it was an advantage to the plaintiff to be informed of the defendant's line of defence. There was not, in the Master's opinion, anything objectionable or embarrassing in these 9 paragraphs: Stratford Gas Co. v. Gordon, 14 P.R. 407, and cases therein cited, especially Millington v. Loring, 6 Q.B.D. 190. They contained statements of facts on which the defendant relied to establish his right to a half interest in the house in question. It would be for the trial Judge to say, when this evidence was tendered, whether or not it was to be received and to what weight it was entitled. The defend-

ant's pleading was perfectly allowable and in no sense embarrassing. Motion dismissed with costs to the defendant in any event. The plaintiff may have a week to reply if this is desired. W. C. Hall, for the plaintiff. W. D. McPherson, K.C., for the defendant.

KUNTZ BREWERY CO. v. GRANT—MASTER IN CHAMBERS—NOV. 16.

Parties—Action to Set aside Chattel Mortgages as Fraudulent —Addition of Mortgagor as Defendant.]—In an action to set aside as fraudulent two chattel mortgages made by an hotel company to the defendants, the hotel company was not made a party; and the defendants moved, before pleading, to have the company added as a defendant. The Master said that in Gibbons v. Darvill, 12 P.R. 478, it was decided that in an action of this character, by a simple contract creditor, the grantor was a necessary party. And in Cassels on the Ontario Assignments Act (1895), p. 32, the learned author, citing the Gibbons case, says: "In Ferguson v. Kenny, 16 A.R. 276, the Court of Appeal on the argument expressed the opinion that the transferor or grantor should in all cases be made a party." Mr. Cassels was at that time reporter to the Court. This is decisive of the motion; and the writ and statement of claim should be amended accordingly. In any case, it would seem unjust to allow a grantor to be found guilty of fraud in his absence from the record. And further it could not but be advantageous to the plaintiff in such actions to have the grantor before the Court to defend himself if he can, but in any event to be subject to examination for discovery and to make production. Costs of the motion to the defendants in the cause. G. H. Kilmer, K.C., for the defendants. A. B. McBride, for the plaintiffs.