The
Ontario Weekly Notes

VOL. IX. TORONTO, NOVEMBER 19, 1915. No. 11

APPELLATE DIVISION.

NOVEMBER 8TH, 1915.

DAVISON v. FORBES.

Evidence—Discovery of Fresh Evidence—Motion for New Trial—Leave to Adduce Evidence before Appellate Court—Rule 232(3)—Terms—Costs.

Appeals by the defendants from the judgment of KELLY, J., ante 22.

The defendant Forbes also moved for a new trial.

The appeals and motion were heard by FALCONBRIDGE, C.J. K.B., MACLAREN, J.A., RIDDELL and LATCHFORD, JJ.

Wallace Nesbitt, K.C., J. W. Bain, K.C., and Christopher C. Robinson, for the appellant Forbes.

R. McKay, K.C., for the appellant Haines.

W. N. Tilley, K.C., and J. T. White, for the plaintiff, respondent.

RIDDELL, J., delivering an interm judgment of the Court, said that the crux (or one of the cruces) of the case was whether the plaintiff knew that, while the defendant Haines was ostensibly selling out to Forbes, he was in fact buying out the plaintiff with Forbes. The affidavit upon which a new trial was asked set out: (1) statements made by the plaintiff to his brother that he knew the facts; and (2) that the affiant (the defendant Forbes) did not know that the plaintiff's brother was aware of these facts, nor was the affiant informed to that effect until after judgment had been given by KELLY, J. This affidavit was the only one filed.

On an application for a new trial, on the ground of newly discovered evidence, it is a well-established rule that "it must be shewn that the evidence could not with reasonable diligence have been discovered and have been given before:" Murray v. Canada Central R.W. Co. (1882), 7 A.R. 646, 656; Trumble v. Hortin (1895), 22 A.R. 51, 52; and cases quoted in the Ontario Digest of Case Law to 1900, vol. 3, col. 4799 sqq. This rule is generally strictly enforced; and this Court has in at least two cases refused leave to the applicant to supplement material defective in this respect (Detlor v. Hannah, 31st May, 1915, is one of them). This, like every other rule of discretion, may in a proper case be relaxed: see Trumble v. Hortin, 22 A.R. at p. 52, per Osler, J.A.

In this case a new trial should not be granted; but, in view of the very great importance of the question to be decided and the amount involved, the defendant Forbes should (on proper terms) be allowed to have the evidence referred to before the Court before the appeal is disposed of.

The Court, therefore, exercising the power given by Rule 232 (3), directed that, upon the defendant Forbes undertaking to pay in any event the costs of the plaintiff of the motion for a new trial and of the supplementary evidence, he may adduce before the Court, on the 15th November, the evidence viva voce of A. E .Davison, the plaintiff's brother. The Court will then consider the further steps to be taken.

NOVEMBER 9TH, 1915.

VANSICKLE v. JAMES.

Way — Assertion of Right of User — Public Highway — Plan — Estoppel—Private Way—Limitation of Actions—Abandonment—Evidence.

Appeal by the defendant from the judgment of KELLY, J., 7 O.W.N. 473.

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

E. D. Armour, K.C., for the appellant.

S. F. Washington, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., delivering judgment, said that the action was brought to recover damages for an alleged trespass by the

appellant upon land of which the respondent claimed to be the owner, and for an injunction to restrain the appellant from further trespassing upon it. The appellant alleged that the loci in quo were public highways, or, in the alternative, that he was entitled to a right of way over them, and that the acts complained of were lawfully done in the exercise by the appellant of his right to use them. The respondent denied that the loci were public highways, and alleged that, if the appellant or his predecessor ever had any right in respect of the land in question, that right was only to an easement, and was barred by the Limitations Act; and the trial Judge had given effect to both of the contentions of the respondent.

The learned Chief Justice, after stating the facts, said that, if it had been established, as he thought it had been, that the appellant was right in his contention that the lands in question were public highways, there was an end of the case; but, even if the appellant had not established that, the respondent was estopped from denying the appellant's right to use them. The appellant was the owner of lot 3 on the west side of John street, and that lot was described in the conveyance from Nathan Vansickle to George H. Longman, through whom the appellant derived title, as fronting on John street, and by its lot number according to the plan. Reference to Rowe v. Sinclair (1876), 26 U.C.C.P. 233.

If it could not properly be held that the lands in question were public highways, at the least the appellant was entitled to use them as a means of access to his lot No. 3: Furness R.W. Co. v. Cumberland Co-operative Building Society (1884), 52 L.T.R. 144. The plan plainly indicated that the owners of the lots shewn on it were to have the right to use the parcels in question as streets; and, if that were so, the Limitations Act had no application: Mykel v. Doyle (1880), 45 U.C.R. 65; Jones v. Township of Tuckersmith (1915), 33 O.L.R. 634; and the proper conclusion upon the evidence was, that the appellant's right to use them had not been lost by abandonment. The question of abandonment is one of fact; and, in the circumstances of this case, abandonment had not been proved. Mere non-user is not of itself abandonment, though it may be evidence of it; and, as was said in James v. Stevenson, [1893] A.C. 162, 168, "it is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it."

The appeal should be allowed with costs and the action dismissed with costs.

GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A., agreed in the result, on the ground that the appellant's right was a right to a private way.

Appeal allowed.

NOVEMBER 9TH, 1915.

*CAMPBELL v. DOUGLAS.

Mortgage — Conveyance of Land Subject to — Obligation of Grantee to Assume and Pay off Mortgage—Oral Evidence to Shew Real Transaction—Admissibility—Nominal Purchaser—Exchange of Lands.

Appeal by the defendant from the judgment of LENNOX, J., 8 O.W.N. 501.

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

W. D. Hogg, K.C., for the appellant.

J. R. Osborne, for the plaintiff, respondent.

HODGINS, J.A., delivering judgment, said that the deed was not the whole transaction. Evidence was admitted, and properly so, to shew the circumstances out of which the giving of the deed arose, and effect should be given to it: Mills v. United Counties Bank Limited, [1912] 1 Ch. 231. The date of the deed was the 15th January, 1913, and the consideration stated in it was "an exchange of lands and $1." It conveyed land, subject to certain mortgages, the description of which was followed by the words, "the assumption of which mortgages is part of the consideration herein." The habendum does not mention these incumbrances, and there is no express covenant by the appellant to assume and pay them, nor did he sign the deed. The assumption of these mortgages as part of the consideration evidently referred to the exchange of lands—which was the only portion of the named consideration set forth in which the assumption of the mortgages could be comprehended. This was not a case of such precise expression of a consideration as would preclude the admission of parol evidence to explain the full extent and nature

*This case and all others so marked to be reported in the Ontario Law Reports.

thereof, arising out of the transaction called "an exchange of lands:" Norton on Deeds, 2nd ed., pp. 201, 205; Rex v. Inhabitants of Llangunnor (1831), 2 B. & Ad. 616.

Upon the oral evidence admitted, it was clear that the deed was made to the appellant not as a purchaser, but as the nominee of the respondent, and that the mortgages were, by virtue of the contract between Power, the real owner of the land, and the respondent, to be assumed by Power as part of the consideration for the exchange of lands owned by the respondent. This satisfied the terms of the deed and was not contradictory of it. There was no covenant by the appellant to pay these mortgages nor to indemnify the respondent against them; but the respondent stood upon the deed as containing a contract with the appellant that the latter would "assume, pay, and discharge" the said mortgages. This was not the true effect of the agreement referred to and of the deed in question as explained thereby.

In the absence of an express agreement, any liability would primâ facie be upon an equitable obligation arising from the relationship of vendor and purchaser—a position which is not established here.

The cases of Corby v. Gray (1887), 15 O.R. 1, and Walker v. Dickson (1892), 20 A.R. 96, are not in conflict with Small v. Thompson (1897), 28 S.C.R. 219.

The equitable obligation of the purchaser to indemnify the vendor arises only when the purchaser is actually one in fact; this is not a case in which the frame of the deed precludes the reception of evidence to contradict the consideration as expressed therein.

The appeal should be allowed with costs and the action dismissed with costs.

MEREDITH, C.J.O., and GARROW and MACLAREN, JJ.A., concurred.

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

Appeal allowed.

NOVEMBER 9TH, 1915.

McPHEE v. CITY OF TORONTO AND BULMER.

Negligence—Injury to Person by Breaking of Bench in Public Park—Duty of Owner of Bench to Public Resorting to Park—Evidence—Condition of Bench—Reasonable User.

Appeal by the defendant Bulmer from the judgment of DENTON, Jun. Co. C.J., in favour of the plaintiff, upon the findings of a jury, against the appellant, in an action in the County Court of the County of York brought to recover damages for personal injuries sustained by the plaintiff by the breaking of a bench upon which she was sitting. The bench was owned by the appellant and was placed by her in a pavilion in a public park in the city of Toronto.

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

James Haverson, K.C., for the appellant.

J. M. Godfrey, for the plaintiff, respondent.

HODGINS, J.A., delivering judgment, said that the bench which broke down was one intended "comfortably and adequately to seat and accommodate 25 persons," and was owned by the appellant. It was in use by a party, and this could not have been the case except with the consent and approval of the appellant, who was accustomed to rent such benches for the convenience of those who came in to partake of their own refreshments or to purchase them from her. There was a vacant space on it, upon which the respondent and her daughter sat down preparatory to going into the inner room to get some tea from the appellant.

As the bench was intended to provide safe accommodation for 25 persons, and as no evidence as to its condition, except that afforded by the accident itself, was given, the appellant must be held to be responsible for its failure to serve its purpose.

The respondent's user was natural, and was such a user as was contemplated when it was rented. She was properly in the pavilion, and there was nothing to indicate to her that the bench was not available for her temporary use while on her way to procure and pay for a cup of tea. No objection was made by those already occupying it. The accident happened because the appellant had supplied an unsafe bench and allowed it to be

placed in such a position as to invite its occupancy by the respondent.

The appellant was practically lessee of the whole pavilion subject to the right of the public to enter and use it.

The duty of the occupier of premises to which the public have a right to resort is considered in Norman v. Great Western R.W. Co., [1915] 1 K.B. 584.

The circumstances here brought the case within the rule laid down in that case, namely, that reasonable care must be taken to see that the premises are reasonably safe for persons using them in the ordinary and customary manner, and with reasonable care.

The appeal should be dismissed with costs.

MEREDITH, C.J.O., and GARROW and MACLAREN, JJ.A., concurred.

MAGEE, J.A., agreed in the result.

Appeal dismissed.

NOVEMBER 9TH, 1915.

*LUTTRELL v. KURTZ.

Division Court—Jurisdiction—Title to Land—Action to Recover Sale-deposit—Title Defective owing to Breach of Restrictive Building Covenant—Division Courts Act, R.S.O. 1914 ch. 63, sec. 61(a)—Appeal—Evidence not Certified—Secs. 127, 128(2).

Appeal by the defendant from the judgment of the First Division Court in the County of York in an action for the return of a deposit of $100 made upon a contract for the sale and purchase of land.

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

G. T. Walsh, for the appellant.

G. Keogh, for the plaintiff, respondent.

HODGINS, J.A., delivering the judgment of the Court, referred to sec. 61 of the Division Courts Act, R.S.O. 1914 ch. 63, which provides that "the Court shall not have jurisdiction in

(*a*) an action for the recovery of land, or an action in which the right or title to any corporeal or incorporeal hereditaments, or any toll, custom or franchise comes in question.'' This action was for the return of a deposit of $100, upon the ground that the defendant's title to certain lands was defective owing to a breach of a restrictive building covenant preventing a user of the land by the erection thereon of a building of certain material and character nearer than 15 feet to the street-line. The question which fell to be decided in the Division Court was, whether or not that covenant affected the land, and, if so, whether it had been broken, and whether that breach rendered the title defective.

In view of the difficulty in determining whether such a covenant has ceased to bind the land (Elliston v. Reacher, [1908] 2 Ch. 374, 384), it is not advisable that such an action as this should be disposed of in a Division Court; a Division Court is a Court of record (sec. 8); and if, after a decision either way, one of the parties should sue for specific performance or rescission, he would, if jurisdiction existed, be bound by the judgment. And the Division Court had no right to decide whether or not the deposit must be returned, if the decision involved the question of the possession, at the date of the contract or trial, of either a good or a defective title in the defendant.

No evidence was certified to the Court, as required by sec. 127; there is nothing which enables the appellate Court to become seized of the appeal unless sec. 127 has been complied with (see sec. 128, sub-sec. 2). The place of the evidence cannot be taken by a statement of facts agreed upon by the parties, which may or may not have been what the Judge acted on

Appeal allowed and action dismissed; no costs.

NOVEMBER 9TH, 1915.

*REX v. TORONTO R.W. CO.

Criminal Law — Common Nuisance — Street Railway — Overcrowding of Cars—Criminal Code, secs. 221, 222, 223—*Ontario Railway Act, R.S.O.* 1914 *ch.* 185, *secs.* 163, 169—*Indictment—Conviction—Punishment—Abatement—''Public Nuisance'' — Injury Confined to Passengers — Nuisance Continuing at Time of Indictment.*

Case stated by RIDDELL, J., before whom, upon the verdict of a jury, the defendant company was convicted on the 3rd Feb-

ruary, 1911, of a common nuisance. See Rex v. Toronto R.W. Co. (1911), 23 O.L.R. 186.

The indictment contained several counts, only one of which, 6A, was in question, the jury having failed to agree upon a verdict as to the other counts.

Count 6A charged undue, dangerous, and illegal overcrowding of passengers in the cars of the defendant company.

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

H. H. Dewart, K.C., and D. L. McCarthy, K.C., for the defendant company.

J. R. Cartwright, K.C., and Edward Bayly, K.C., for the Crown.

MEREDITH, C.J.O., delivering the judgment of the Court, after setting out count 6A, and referring to secs. 221, 222, and 223 of the Criminal Code, said that all of the objections urged by counsel for the defendant company, except perhaps one, were dealt with by RIDDELL, J., in his judgment, 23 O.L.R. 186; with which he (the Chief Justice) entirely agreed, and to which he had but little to add.

In addition to the reasons given for holding that the defendant company had omitted to discharge a legal duty, the Chief Justice referred to the power which the defendant company has under what is now sec. 163 of the Ontario Railway Act, R.S.O. 1914 ch. 185, to make by-laws respecting the number of passengers to be allowed in cars (clause *i*), and the power under sec. 169 to enforce observance of such by-laws. Such a by-law requires the approval of the Ontario Railway and Municipal Board before it can take effect; but no such by-law appeared to have been passed, and so no attempt had been made to obtain the power which it would confer. It should not be understood that without such a by-law the defendant company would not have the powers mentioned in clause (*i*).

The learned Chief Justice was unable to agree with the contention of counsel for the defendant company that what was stated in count 6A to have been done was not indictable and punishable as a crime. He referred to the report of the Royal Commission appointed in 1878 to consider the law relating to indictable offences; and to Archbold's Criminal Pleading, 24th ed., pp. 1, 147, 150.

It was intended by sec. 152 of the Code drafted by the Com-

mission, says the Chief Justice, to leave untouched the common law right to proceed by indictment or information, which are the only modes by which a prosecution for a public nuisance can take place, but to prevent persons convicted of the nuisances to which that section applies from being punished as they might be, according to the common law, by fine or imprisonment, and to limit the proceedings after a conviction to the other remedy which the law provided—the abatement of the nuisance if it continued to exist; and that is the effect of sec. 223 of the Code. This conclusion is strengthened by sec. 28 of the Interpretation Act.

The question whether the overcrowding of the cars constituted a public or common nuisance was raised—the contention being that to constitute such a nuisance the act complained of must have affected all of the public, and that, as the overcrowding affected only those who had become passengers in the defendant company's cars, the defendant company's acts were not ad commune nocumentum. The learned Chief Justice said that he was unable to agree with that contention. He referred to Macdonald v. Hamilton and Port Dover Plank Road Co. (1853), 3 U.C.C.P. 402; Williams v. East India Co. (1802), 3 East 192, 210, 211; Russell on Crimes, 7th ed., p. 1857; Archbold's Criminal Pleading, 24th ed., p. 1311; Rex v. Allen (1803), 4 Esp. 200; Regina v. Price (1884), 12 Q.B.D. 247. What the evidence disclosed was not an isolated case of overcrowding, but a systematic course of conduct persisted in and apparently deliberately adopted by the defendant company, and at certain hours of the day and on certain of the lines affecting all who had become passengers on the cars.

Judgment for abatement on a conviction for a puble nuisance cannot be given unless the nuisance continues at the time of the indictment; that, however, was sufficiently alleged in the indictment and found by the jury.

Conviction affirmed.

NOVEMBER 9TH, 1915.

SHEARER v. REEDER.

Payment — Satisfaction of Obligation — Part Performance — Cheque Marked in Full—Endorsement and Cashing—Extinguishment of Obligation—Estoppel—Findings of Fact of Trial Judge—Mercantile Law Amendment Act, R.S.O. 1914 *ch.* 133, *sec.* 16.

Appeal by the defendant from the judgment of COATSWORTH, Jun. Co. C.J., in favour of the plaintiffs, in an action in the County Court of the County of York, brought to recover $200, the balance of a deposit made by the plaintiffs upon a purchase from the defendant of an automobile.

The purchase-price was $1,500; $400 was paid in cash; and the balance was to be paid in instalments with interest. The contract was never carried out. The defendant returned $200 of the $400 paid, by a cheque which was marked on the back, "In final settlement of account and all demands, see letter of April 8, 1915, endorsement is accepted as such." The plaintiffs endorsed and cashed the cheque; and then sued for the remaining $200. The learned Junior Judge found that the cheque was not expressly accepted in satisfaction of the defendant's obligation to repay the $400.

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

J. J. Gray, for the appellant.

T. S. Elmore, for the plaintiffs, respondents.

MEREDITH, C.J.O., delivering judgment, said that the question upon the answer to which the right of the respondents to recover depended was, whether or not the cheque for $200 which the appellant sent to them, and stated to be in full settlement of all claims, was, within the meaning of sec. 16 of the Mercantile Law Amendment Act, R.S.O. 1914 ch. 133, expressly accepted by the respondents in satisfaction of the appellant's obligation to repay the $400 which he had received. The question was one of fact, and the finding of the trial Judge was that the cheque was not so accepted. That there was in fact no intention on the part of the respondents so to accept it was clear upon the evidence; but it was, no doubt, open upon it to find that, by their

endorsing the cheque for $200 and presenting and receiving payment of it, they were estopped from denying that it had been accepted upon the terms on which they had received it. That also was a question of fact, and the finding of the trial Judge was against the appellant.

The case was very near the line, the learned Chief Justice said, but he was not able to say that the findings were clearly erroneous.

GARROW and MACLAREN, JJ.A., concurred.

HODGINS, J.A., also concurred, giving a written opinion, in which he referred to sec. 16 of the Act and to Mason v. Johnston (1893), 20 A.R. 412; Day v. McLea (1889), 22 Q.B.D. 610.

MAGEE, J.A., dissented; reasons to be given later.

Appeal dismissed.

NOVEMBER 9TH, 1915.

WELSH v. TORONTO POLICE BENEFIT FUND.

Pension—Benefit Society—Toronto Police Force—Dismissal of Member—Board of Police Commissioners—Determination of Right by Committee of Society—Rules of Society—Right to Pension and Allowance.

Appeal by the defendant society from the judgment of LENNOX, J., ante 2, declaring that the plaintiff was entitled to a pension and allowance out of the funds of the defendant society.

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

I. F. Hellmuth, K.C., and D. T. Symons, K.C., for the appellant society.

M. K. Cowan, K.C., and J. W. Pickup, for the plaintiff, respondent.

MEREDITH, C.J.O., who delivered the judgment of the Court, said that it was clear upon the evidence that the respondent was dismissed by the Board of Police Commissioners, and that his case was not that of a constable who voluntarily retired. The

tenure of office was during the pleasure of the Board, which had, therefore, the right to dispense with his services, without assigning any reason therefor.

The respondent applied for a pension; his application was considered by the committee of the defendant society; a majority of the committee recommended that he should receive a pension of $1 a day during life; and the recommendation was approved by the Board of Police Commissioners. Rule 30 of the rules and regulations of the society does not deal with all allowances or pensions, but only with those claimed by members who have been dismissed or compelled to resign; and such a member is not entitled to any allowance or pension, unless, upon consideration of his case, the committee recommends it, and the Board approves.

The respondent, no doubt, had the right to have his case considered by the committee; and, if there had been no real consideration, he might have been entitled to the relief which the plaintiff got in Lapointe v. L'Association de Bienfaisance et de Retraite de la Police de Montréal, [1906] A.C. 535. There is a wide difference between the rule under consideration in that case and Rule 30 above referred to.

It was argued that rule 24 (b) gave an absolute right to the pension which the respondent claimed—the provision "it shall be optional with the members of the police force to retire at or after the end of 30 years' service by giving 3 months' notice in writing," making it unnecessary that "the consent in writing of the Police Commissioners" should have been "first obtained to the resignation," as provided by rule 24. As to this the Chief Justice said that, assuming that in such a case the consent of the Commissioners to the resignation was not required, there were at least two fatal objections to the respondent's claim: one, that, when he ceased to be a member of the force, he had not served for 30 years; and the other, that he did not resign, but was dismissed.

Appeal allowed with costs and action dismissed with costs.

NOVEMBER 9TH, 1915.

*RE ROSS AND HAMILTON GRIMSBY AND BEAMSVILLE R.W. CO.

Ontario Railway and Municipal Board—Jurisdiction over Electric Railway Crossing Dominion Railway—Work for the General Advantage of Canada—Railway Act of Canada, 51 Vict. ch. 29, sec. 306—Construction—"Branch Line or Railway"—Secs. 6a., 173, 177, 307.

Appeal by the railway company from an order of the Ontario Railway and Municipal Board, dated the 10th May, 1915, requiring the company to provide certain sanitary conveniences on its cars.

The only question raised upon the appeal was whether the Board had jurisdiction to make any order affecting the company. The incorporation was by the Ontario Legislature; but the company contended that its railway had been declared to be a work for the general advantage of Canada, and that it was, therefore, not subject to the legislative authority of the Ontario Legislature or of the Board constituted by Acts of that Legislature.

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

I. F. Hellmuth, K.C., and G. H. Levy, for the appellant company.

J. R. Cartwright, K.C., and Edward Bayly, K.C., for the Attorney-General for Ontario and the Ontario Railway and Municipal Board.

The Attorney-General for Canada was not represented, though notified.

MEREDITH, C.J.O., delivering the judgment of the Court, said that the initial question was, whether the railway ever came under the legislative authority of the Parliament of Canada by having been declared to be a work for the general advantage of Canada. The contention of the company was that, as its line now crosses one of the railways named in sec. 306 of the Railway Act of Canada, 1888, 51 Vict. ch. 29, its railway, although when that Act was passed it had not been built and had not even been authorised to be constructed, became, when it crossed, as it does,

one of those railways, by force of that section, subject to the exclusive legislative authority of the Parliament of Canada. By sec. 306 it was declared that several railways, including the Grand Trunk and the Canadian Pacific, were works for the general advantage of Canada, "and each and every branch line or railway now or hereafter connecting with or crossing the said lines of railway, or any of them, is a work for the general advantage of Canada."

The learned Chief Justice said that, in his opinion, the word "branch," which qualified the word "line," also qualified the word "railway" which immediately followed; and by sec. 307 strength was lent to the view that sec. 306 was intended to affect only the named railways and their branch lines. If it were otherwise, there was no reason for enacting sec. 177; and the amendments made from time to time to sec. 173 did not help the appellant company.

Section 1 of the Act 63 & 64 Vict. ch. 23 added a new section, 6*a.*, to 51 Vict. ch. 29; but the added section does not add anything to sec. 306, and may well be taken to have been intended to make it clear that sec. 306 did not apply to street railways and tramways and the electric railways mentioned in subsec. 2 of sec. 6*a.*; and if, according to its true construction, sec. 306 does not apply to any railway except those named in the section and their branches, sec. 6*a.* cannot be treated as extending the operation of sec. 306 to railways that are not branches of the railways mentioned in it.

The initial question must be answered in the negative.

Appeal dismissed with costs.

NOVEMBER 9TH, 1915.

LINCOLN ELECTRIC LIGHT AND POWER CO. OF ST. CATHARINES LIMITED v. HYDRO-ELECTRIC COMMISSION OF ST. CATHARINES.

Municipal Corporations—Distribution and Supply of Electric Power—Management of Works and Operations Entrusted to Commission—Company Authorised to Supply Electric Power—Erection of Poles and Wires in Streets of City—By-law Authorising Use of Company's Poles for Stringing Wires of Corporation—Construction and Scope.

Appeal by the defendant Commission from the judgment of FALCONBRIDGE, C.J.K.B., 7 O.W.N. 688.

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

E. D. Armour, K.C., and C. H. Connor, for the appellant Commission.

D. L. McCarthy, K.C., and A. Hope Gibson, for the plaintiff company, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O., holding that, upon the proper construction of clause 7 of the by-law passed by the Council of the City of St. Catharines on the 26th September, 1905, the city corporation had the right to require the plaintiff company to allow the corporation, without compensation, to string wires on the company's poles, not only for the city's fire alarm and police signal systems, but also for the purpose of carrying on its business of supplying electricity for power or lighting purposes to its customers throughout the city. The key to the interpretation of the provision was to be found in the opening words of clause 7, "In order to prevent a monopoly by the company and to avoid the erection of unnecessary poles in the city streets."

Appeal allowed with costs and action dismissed with costs.

NOVEMBER 9TH, 1915.

MEREDITH v. MACFARLANE.

Contract—Restoration of Building—Services of Architect—Remuneration—Evidence.

The plaintiff, an architect practising at the city of Ottawa, was employed by the defendant, the owner of a building there which had been partly destroyed by fire, to prepare plans and specifications and to superintend the work of restoration. The plaintiff sued in the County Court of the County of Carleton to recover remuneration for his services; he alleged that he had duly performed the work for the doing of which he was employed. The defendant resisted payment upon the grounds that the plaintiff had not, before action, completed his contract, and that, in any event, he had been guilty of gross negligence disentitling him to payment; and in respect of that negligence the defendant also counterclaimed.

The action was tried before the County Court Judge without a jury; and his judgment was in favour of the plaintiff for $478.98 and costs.

The defendant appealed.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

R. D. Moorhead, for the appellant.

H. Fisher, for the plaintiff, respondent.

GARROW, J.A., delivering judgment, said that the County Court Judge was, quite properly, much impressed by the defendant's letter of the 8th May, 1914. She had had at that time, presumably, a report from Mr. Bartlett, the critic called by her to pass upon the plaintiff's work as sufficiently and satisfactorily completed for her purposes, and asked the plaintiff to hand her his final statement so that she could settle the same. Such a letter, deliberately written months before action, was of much more value than the rather feeble criticisms of Mr. Bartlett, a man of very limited experience, who did not appear to have impressed the learned Judge, since he almost invariably preferred and accepted the plaintiff's explanation rather than the conclusions of the critic.

The work was somewhat peculiar and of a kind not requiring microscopical perfection. The building was old, the work was a restoration, and it was to be left in a partly unfinished condition to suit incoming tenants. Altogether it was a more difficult work to pass upon fairly than if the building had been new. Under the circumstances, it was unfortunate for the defendant that she relied so entirely upon the opinion of Mr. Bartlett, who was not an architect, nor even a builder with modern experience. The plaintiff did not say that he had given the defendant a perfect result, but that, with the materials at his command, he had given her what he promised to give, and that she had in the result good value for her money.

No sufficient reason had been shewn for disturbing the result arrived at by the County Court Judge.

MACLAREN and HODGINS, JJ.A., concurred.

MAGEE, J.A., agreed in the result.

Appeal dismissed with costs.

NOVEMBER 9TH, 1915.

CALDARELLI v. O'BRIEN.

Master and Servant—Injury to Servant—Negligence—Findings of Jury—Defective System—Absence of Evidence to Support—Suggested Ground of Action—Negligent Order of Foreman—Workmen's Compensation for Injuries Act, sec. 3 (c), sec. 14—Refusal of New Trial—Dismissal of Action.

Appeal by the defendants from the judgment of the Judge of the District Court of the District of Temiskaming, upon the findings of a jury, in favour of the plaintiff.

The action was brought to recover damages for injuries sustained by the plaintiff, while in the defendants' employment, by reason, as he alleged, of the negligence of the defendants.

The plaintiff was employed as a section-man on a railway in course of construction by the defendants. He and his foreman and two other men were proceeding along the track in a hand-car when they saw an engine coming, and at once, by direction of the foreman, proceeded to unload tools from the hand-car and to remove it from the track. The plaintiff got off the car, grabbed a jack which was on the car, tried to move it with one hand and failed, proceeded to use both hands, when the left hand was injured by the jack falling upon it and then tumbling off the car.

The Judge told the jury that, if there was any negligence, it must be in the system the defendants were operating. The jury, in answer to questions, found: (1) that the accident was due to the defendants' negligence; (2) that such negligence was—foreman of hand-car should have had instructions to slow down car on approaching curve in track; (3) that the plaintiff could not, by the exercise of reasonable care, have avoided the accident; and they assessed the damages at $200, for which the plaintiff had judgment.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

H. D. Gamble, K.C., for the appellants.

G. W. Mason, for the plaintiff, respondent.

GARROW, J.A., delivering the judgment of the Court, said that there was no evidence to justify the second finding—no evidence at all of instructions or absence of instructions to

the foreman—and the finding was, therefore, wholly unwarranted.

There was also a total absence of any reasonable evidence proper for the jury on the question of defective system. The sole question must be concerning the order of the foreman—was it an order which should not have been given? Was it negligence, on the part of the foreman, having regard to all the circumstances, to give such an order? If it was, the plaintiff might have a cause of action under clause (c) of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1914 ch. 146; and the defendants, not having given the notice required by sec. 14 of that Act, would not be able to rely on the absence of the notice of action required by that statute: see Wilson v. Owen Sound Cement Co. (1900), 27 A.R. 328.

Justice did not seem to require that a new trial should be granted to litigate the suggested question. The plaintiff, through his counsel, deliberately selected his cause of action—a defective system. He could now be allowed another chance only on payment of costs. The evidence upon which he would have to rely was probably all now before the Court, and was quite too weak reasonably to convince an honest jury that the giving of the order was an act of negligence.

Appeal allowed with costs and action dismissed with costs, if demanded.

NOVEMBER 11TH, 1915.

*CUT-RATE PLATE GLASS CO. v. SOLODINSKI.

Mechanics' Liens — Claim against Purchaser of Land as "Owner"—Absence of Privity — Mechanics and Wage-Earners Lien Act, R.S.O. 1914 *ch.* 140, *secs.* 2 (c), 6, 8—*Remedy against Mortgagee—Sale of Mortgages—Mortgagee as "Owner"—Increase in Selling Value of Land.— Evidence.*

Appeals from the judgment of R.S. Neville, K.C., Official Referee, in proceedings under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140.

The Referee dismissed the claim of the T. Eaton Company Limited to a lien for $422 and interest as against the defendant

Blanchard. The Referee, however, adjudged that the T. Eaton Company Limited was entitled to a lien on the interest of the defendant Margaret I. Hyslop under certain mortgages upon the land, subject to a first charge in her favour for $11,275.10—the amount advanced by her prior to the registration of the Eaton company's lien. The Referee directed that the mortgages be sold and the proceeds applied first in satisfaction of her claim under the mortgages, and secondly in or towards payment of the Eaton company's lien.

The Eaton company appealed against the part of the judgment dismissing its claim against Blanchard; and the defendant Hyslop appealed against the part of the judgment declaring the company entitled to a lien upon her interest in the land, and directing a sale of her securities.

The appeals were heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

G. W. Mason, for the T. Eaton Company Limited.

W. H. Ford, for the defendant Blanchard.

E. G. Long, for the defendant Hyslop.

LATCHFORD, J., delivering the judgment of the Court, explained that the defendant Blanchard was the purchaser from the defendant Solodinski of the land in question, upon which Solodinski was, at the time of the agreement of purchase (March, 1914), erecting three houses. The Eaton company's lien was for work done and materials furnished for Solodinski, completed in July, 1914, before Blanchard and Solodinski made their final adjustments, although Blanchard had possession in May. The Eaton company had no communication, direct or indirect, with Blanchard, in regard to work or materials. What the company did was not done at Blanchard's request, express or implied, nor upon his credit, nor with his privity or consent, nor for his direct benefit.

The lien given by sec. 6 of the Act attaches to the estate or interest of the "owner." "Owner" is defined by sec. 2 (c); and Blanchard does not fall within that definition. Orr v. Robertson (1915), 34 O.L.R. 147, 8 O.W.N. 471, distinguished.

The appeal of the T. Eaton Company failed, and should be dismissed with costs.

The defendant Hyslop's appeal against the judgment, so far as it directed a sale of her mortgages, must be allowed—the statute gives no such remedy.

The mortgagee did not, in the circumstances of the case, fall within the definition of "owner," nor was there any find-

ing or evidence that the selling value of the land incumbered by the mortgages to the defendant Hyslop was increased by the work or materials of the Eaton company—a prerequisite to the attachment of a lien under sec. 8 upon such increased value in priority to the interest of a mortgagee.

The defendant's Hyslop's appeal, on this ground also, should be allowed; and the costs of that appeal should be paid by the Eaton company.

NOVEMBER 11TH, 1915.

NAIMAN v. WRIGHT.

Mortgage—Foreclosure—Covenant for Payment—Title — Quit-claim Deed—Mistake—Reformation—Husband and Wife—Outstanding Interests in Mortgage—Releases.

Appeals by the defendants C. F. Wright and Mabel Wright from the judgment of MIDDLETON, J., 8 O.W.N. 492.

The appeals were heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

J. J. Gray, for the appellant C. F. Wright.

J. P. MacGregor, for the appellant Mabel Wright.

A. C. McMaster and J. H. Fraser, for the plaintiffs, respondents.

THE COURT ordered that, upon the respondents filing releases of any outstanding interests in the mortgage (any disputes as to these to be settled by HODGINS, J.A., in Chambers), the appeals should be dismissed with costs.

HIGH COURT DIVISION.

LENNOX, J., IN CHAMBERS. NOVEMBER 8TH, 1915.

RE COUNTER.

Life Insurance—Designation of Beneficiary—Identification of Policy—Letter Written by Insured—Insurance Act, R.S.O. 1914 ch. 183, sec. 171(3)—Payment of Insurance Money into Court by Insurance Society—Application for Payment out to Trustee for Designated Beneficiary—Proof of Death of Insured—Proof of Circumstances Warranting Order for Payment of Principal to Trustee.

Motion by William Edwin Counter for payment out of Court to him, as trustee for his brother Edward, of the sum of

$690.84, paid into Court by the Grand Lodge of the Ancient Order of United Workmen of the Province of Ontario, being the sum payable under a beneficiary certificate issued by the society to Moses R. Counter, now deceased.

W. H. Clipsham, for the applicant.

LENNOX, J., said that greater latitude as to identification of the policy is allowed under the present Insurance Act, R.S.O. 1914 ch. 183, sec. 171 (3), than under the former Act; and the letter of the 4th April, 1914, from Moses R. Counter, now deceased, to the applicant, having enclosed therein benefit certificate No. 3758, covering the money now in Court, was a sufficient designation of the beneficiary under the provisions of sec. 171 (3).

There was little doubt that Moses R. Counter was dead, but the fact should be shewn; the applicant must file an affidavit stating that Moses is dead and when he died; and that, subsequent to the receipt of the letter above referred to, the applicant was not notified, never heard, and has no reason to believe and does not believe, that his brother altered or revoked the disposal of the insurance money in the letter contained, or designated or appointed any other beneficiary—or to that effect.

The applicant, however, was a trustee only; the beneficiary was said to be a feeble-minded person; and the Court is a safe custodian of trust funds. The principal should not be paid out as a matter of course. Upon this point also, the material before the Court should be supplemented.

No order made at present; the motion may be mentioned again.

BOYD, C., IN CHAMBERS. NOVEMBER 9TH, 1915.

*MENZIES v. McLEOD.

Discovery—Examination of Co-defendant—"Party Adverse in Interest"—Rule 327—Action to Establish Will—Defendant in Same "Interest" as Plaintiff—Pecuniary or Substantial Interest in Subject-matter of Litigation.

Motion by the defendant McLeod and two other defendants, next of kin of Margaret Menzies, deceased, to commit the defendant Martha McGuire, for refusal to attend for examination for discovery at the instance of the applicants, as a "party adverse in interest" to them, under Rule 327.

The action was brought, by the executor named in an instrument purporting to be the last will of the deceased, to establish it as such; the plaintiff and the defendant McGuire were the principal beneficiaries under that instrument; and the applicants, though also beneficiaries under the instrument, would be gainers if it were declared inofficious.

W. Lawr, for the applicants.

A. W. Langmuir, for the defendant Martha McGuire.

THE CHANCELLOR traced the history of the phrase "adverse in interest" from its origin in Order 50 of the Chancery Orders of 1850, through the Orders of 1853, Order 22(1); the Administration of Justice Act, R.S.O. 1877 ch. 50, sec. 156; Rule 487 of the Rules of 1887; Rule 439 of the Con. Rules of 1897; and finally Rule 327 of the Rules of 1913. He then referred to Fonseca v. Jones (1909), 19 Man. R. 334, relied on by the defendant McGuire, in which Mathers, J., declined to follow Moore v. Boyd (1881), 8 P.R. 413.

The learned Chancellor then said that this testamentary action disclosed really two sets of litigants who were adverse—those who sought to uphold the will and those who sought to invalidate it. There was no doubt as to which side the defendant McGuire was on; her whole interest in the litigation was with the plaintiff, the executor. An actual issue in tangible form, spread upon the record, is not essential, so long as there is a manifest adverse interest in one defendant as against another defendant. "Interest" is a flexible term, meaning pecuniary interest, or any other substantial interest in the subject-matter of litigation.

In Moore v. Boyd, supra, the interpretation by the Master in Ordinary of what is meant by a "party adverse in interest" accords with that expressed by Mowat, V.-C., in Forsyth v. Johnson (1868), 14 Gr. 639, 643.

Having regard to the genesis of the Ontario Rule 327 and the practice which has obtained, it is not competent to introduce the limitations as to the examination of co-defendants which are found in the English practice under Rules differently expressed. The characteristic English phrase is "opposite party"—in Ontario, "party adverse in interest." Reference to Molloy v. Kilby (1880), 15 Ch. D. 162, 164; Shaw v. Smith (1886), 18 Q.B.D. 193; Spokes v. Grosvenor Hotel Co., [1897] 2 Q.B. 124, 127; Marshall v. Langley, [1889] W.N. 222; Birchal v. Birch Crisp & Co., [1913] 2 Ch. 375.

Moore v. Boyd is to be preferred to Fonseca v. Jones. Within the meaning of Rule 327, the defendant McGuire is a party to the action adverse in interest to her co-defendants, who seek to gain discovery from her as to the execution of the will and the condition of the testatrix. The Court favours an early disclosure of all matters surrounding the execution of an impeached will. In probate actions, too, there is a wider latitude in ordering discovery: Tristram and Coote's Probate Practice, 14th ed., p. 506.

In all likelihood, the defendant McGuire, who was the nurse of the testatrix, knew more about her physical and mental condition than any other available person.

The defendant McGuire should, on due notice of time and place, attend at her own expense and submit to be examined under Rule 327.

BOYD, C. NOVEMBER 9TH, 1915.

*RE SOVEREIGN BANK OF CANADA.

Bank—Winding-up—Contributories—Right to Discovery—Examination of Bank Manager—Winding-up Act. R.S.C. 1906 *ch.* 144, *sec.* 117—*Liquidator.*

Appeal by one Newman and four other persons charged as contributories from an order of an Official Referee, in the winding-up of the affairs of the bank, refusing to allow the appellants to examine one Jemmett, formerly manager of the bank.

W. R. Smith, K.C., for the appellants.
M. L. Gordon, for the liquidator.

THE CHANCELLOR said that sec. 117 of the Winding-up Act, R.S.C. 1906 ch. 144, was copied from English legislation; and, according to the decision in In re Norwich Equitable Fire Insurance Co. (1884), 27 Ch.D. 515, 521, 522, gives a special power, of inquisitorial character, intended to be used by the liquidator for his own guidance in the conduct of the liquidation, and not for the purpose of establishing a claim adverse to the liquidator. And, according to In re Imperial Continental Water Corporation (1886), 33 Ch. D. 314, the private litigant should not, for the purpose of aiding his claim in the winding-up, have greater powers of investigation or a greater scope of discovery than he would have if he were proceeding in the Courts. Such cases as

the two referred to, considered by themselves, would justify the conclusion of the Referee. But there is another line of cases which shews that in given circumstances there may be some defined right of discovery open to a contributory. These cases are referred to in Whitworth's Case (1881), 19 Ch. D. 118, 120.

In this case, the liquidator refused to enter upon the examination proposed by the contesting contributories. It was for the Referee then to determine whether the right to examine should be entrusted to the applicants to any extent or with what limitations. The Referee knows more about the condition and facts of the case than the appellate Judge. The Referee should consider the application in the view that the contributories may have a claim to invoke the aid of sec. 117: see Re Penysflog Mining Co. (1874), 30 L.T.R. 861; and in other aspects the application should be dealt with by him.

No costs of the appeal.

MASTEN, J., IN CHAMBERS. NOVEMBER 10TH, 1915.

BERLINER GRAMOPHONE CO. v. POLLOCK.

Appeal—Order of Judge in Chambers—Leave to Appeal from—Rule 507, cl. 3 (b)—Patent for Invention—Validity — Pleading—Defence and Counterclaim—Jurisdiction of Supreme Court of Ontario—Patent Act, R.S.C. 1906 ch. 61, secs. 34, 35, 38, 45—Judicature Act, R.S.O. 1914 ch. 56, sec. 3.

Motion by the plaintiff company for leave to appeal from an order of BOYD, C., in Chambers, affirming an order of the Master in Chambers, granting leave to the defendant to set up a defence or counterclaim attacking the present validity of the plaintiff company's patent on the grounds of illegal importation and non-manufacture.

R. C. H. Cassels, for the plaintiff company.
Casey Wood, for the defendant.

MASTEN, J., said that if the motion rested exclusively on the grounds argued before the Chancellor, the motion should fail, for he was unable to see that the defendant was at present a licensee of the plaintiff company.

It seemed, however, that the jurisdiction of the Supreme Court of Ontario to determine whether or not a patent had be-

come void (even as between parties) rested on the provisions of the Patent Act, R.S.C. 1906 ch. 61, rather than on sec. 3 of the Ontario Judicature Act, R.S.O. 1914 ch. 56. Special provision is made for raising such a defence in an action for infringement, but this was not such an action. Having regard to secs. 34, 35, 38, and 45 of the Patent Act, it is doubtful whether the defence and counterclaim referred to in the Master's order can, in such an action as this and in the manner now proposed, be entertained by the Provincial Courts of Ontario.

In this aspect of the matter, there was, in the view of the learned Judge, good reason to doubt the correctness of the order from which the applicant sought leave to appeal, and the appeal would involve matters of such importance, that leave to appeal should be given pursuant to Rule 507, clause 3 (*b*).

Order accordingly; costs in the appeal.

LENNOX, J. NOVEMBER 13TH, 1915.

HARRISON v. MATHIESON.

Trusts and Trustees—Husband and Wife—Breach of Trust by Husband—Knowledge and Benefit of Wife—Liability.

Appeal by the plaintiff from the report of a Local Judge, to whom a question of accounting in respect of a trust estate was referred.

The motion was heard in the Weekly Court at Toronto.

R. T. Harding, for the plaintiff.

R. S. Robertson, for the defendants.

LENNOX, J., said that the only question now in dispute was as to the sum for which the defendant Mary Mathieson was personally liable. By the report it was found that the estate of John Hugh Mathieson was indebted to the plaintiff in the sum of $16,105.25. The plaintiff contended that the defendant Mary Mathieson should be held liable for the whole of this indebtedness. LENNOX, J., agrees with the Local Judge's findings of fact, with one exception. In addition to the sums for which the defendant Mary Mathieson was found liable by the report, she should have been found liable for four sums aggregating $7,699 and interest.

The Local Judge found that three of these sums were paid out of trust funds and in breach of trust by the defendant's husband (now deceased), and were applied upon debts owing by the defendant Mary Mathieson and for her benefit, but that the payments were made "without her prior knowledge or procurement;" and for this reason the Local Judge found that she was not liable for their repayment, basing his conclusion of law upon Ewart v. Steven (1871), 18 Gr. 35. But that case, and others like it, are distinguishable from this, in which an insolvent husband made a purely voluntary gift of trust moneys to his wife. LENNOX, J., said that he attached no importance to the argument that John Hugh Mathieson was a constructive trustee of his wife's money as well. He was her agent, and without means of his own, as she well knew, and they were jointly engaged in reckless speculation upon borrowed money.

As to the fourth sum, $5,230, part proceeds of a debenture of the London and Erie Company, applied in part payment of a promissory note of the husband and wife, the Local Judge found that the defendant Mary Mathieson was not liable. With that conclusion LENNOX, J., did not agree. He referred to Halsbury's Laws of England, vol. 28, p. 204, note (*n.*); Barnes v. Addy (1874), L.R. 9 Ch. 244; Pannell v. Hurley (1845), 2 Coll. 241. The learned Judge added that the law of Bank of Montreal v. Stuart, [1910] A.C. 120, did not alter the facts.

Appeal allowed to the extent indicated, with costs to be paid by the defendant Mary Mathieson personally.

MIDDLETON, J. NOVEMBER 13TH, 1915.

FREEMAN v. WRIGHT.

Master and Servant—Dismissal of Servant—Contract of Hiring —Novation—Change in Employer — Indefinite Period — Reasonable Notice—Damages—Costs.

Action for damages for wrongful dismissal, tried without a jury at Hamilton.

C. W. Bell, for the plaintiff.
G. S. Kerr, K.C., for the defendants.

MIDDLETON, J., said that the plaintiff was employed as a bookkeeper in 1903, at an annual salary of $1,000, payable monthly. This salary was from time to time increased during

the 12 years of employment to $1,500 a year. The employment was originally by the defendant H. J. Wright; but the proper inference of fact was that there was a novation, and that the defendant company was under all the obligations of the original employer.

The employment was terminated on the 1st June, 1915, upon a month's notice.

Reference to Bain v. Anderson (1898), 28 S.C.R. 481.

While the payment of an annual salary points to a yearly hiring, that is not conclusive. The finding of fact should be that the intention of the parties was that the employment should be for an indefinite time, terminable by either party on reasonable notice.

Beeston v. Collyer (1827), 4 Bing. 309, was before the Supreme Court of Canada when considering Bain v. Anderson, supra; it does not help the plaintiff.

One month's notice was not a reasonable notice, in all the circumstances of the case.

Judgment for the plaintiff for $150 with costs on the appropriate scale and without interference to prevent a set-off.

RE CARNAHAN'S CONVICTION—RE RICHARDSON'S CONVICTION—SUTHERLAND, J., IN CHAMBERS—NOV. 8.

Municipal Corporations—Hawkers and Pedlars' By-law of County—Convictions for Offences against—Sale of Coal Oil by Travelling Salesmen — Binding Contracts of Sale — Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 416—*Amendment by* 5 *Geo. V. ch.* 34, *sec.* 32—*Refusal to Quash Convictions—Leave to Appeal.*]—Motions by S. A. Carnahan and A. E. Richardson for leave to appeal from the orders of MEREDITH, C.J.C.P., *ante* 117, refusing to quash the convictions of the applicants under the legislation respecting hawkers and pedlars. SUTHERLAND, J., said that, in view of the recent amendment of the law and of the importance in a general way of its application, he thought he should grant leave to appeal. Order accordingly. Costs of the motions to abide the result of the appeal. G. S. Gibbons, for the applicants. R. G. Fisher, for the complainant.

HYATT v. ALLEN—SUTHERLAND, J.—NOV. 8.

Company — Directors — Account — Reference — Report — Salaries and Disbursements of Directors—Value of Preferred Shares Received by Directors—Evidence—Costs.]—Appeal by the defendants and cross-appeal by the plaintiffs from the report of the Local Master at Picton upon a reference to take certain accounts. See Hyatt v. Allen (1911-12), 2 O.W.N. 927, 4 O.W.N. 370, 1401. The Master's report was dated the 3rd June, 1915. The first ground of the defendants' appeal was, that the Master should have allowed a further sum for remuneration to two of the directors (defendants) of the Lakeside Canning Company Limited, Arthur Allen and W. C. Cronk, in respect of wages paid to workmen, salaries of the two directors, and travelling expenses. The learned Judge entirely agrees with the Master upon this branch of the appeal.—The second contention of the defendants was that the Master erred in directing the defendants to account for the preferred stock of the Dominion Canners Limited at the sum of $10,968.75. The defendants contended that the stock might have been advantageously disposed of pending the litigation, but for the refusal of the plaintiffs to agree to a sale thereof, and that the stock had much depreciated in value. The learned Judge was of opinion that the defendants, by the course pursued on the reference, had entirely precluded themselves from now raising any objection to accounting as directed. It was proper for the Master to charge the defendants with the market value of the stock as of the 4th March, 1910; and it was not now open to them to question the value as fixed at $10,968.75.—The third and fourth grounds of appeal were that the Master should have admitted evidence to shew that certain of the plaintiffs were not entitled to recover, and had disregarded evidence to that effect. In the circumstances of the case, the learned Judge did not feel that he would be warranted in giving effect to the defendants' contentions in regard to these two grounds.—The defendants also contended that the plaintiffs should be ordered to pay that portion of the costs of the reference incurred in contesting points upon which they were not successful. The learned Judge said that he had examined the proceedings and evidence upon the reference and had formed the opinion that the costs thereof had not been so substantially increased by matters unsuccessfully brought forward by the plaintiffs that they should be deprived of any portion of the costs of the reference.—The plaintiffs should have the costs of the re-

ference. The costs of the trial were not spoken to. The defendants' appeal from the report should be dismissed with costs. The cross-appeal of the plaintiffs should be dismissed without costs. J. W. Bain, K.C., and M. L. Gordon, for the defendants. E. G. Porter, K.C., for the plaintiffs.

BENNETT v. STODGELL—SUTHERLAND, J.—NOV. 8.

Vendor and Purchaser—Agreement for Sale of Land—Option—Validity—Acceptance—Failure of Vendors to Convey—Damages—Costs.]—Action by purchaser against vendors for specific performance of an alleged agreement for the sale and purchase of land. The action was first tried by MIDDLETON, J., who dismissed it without costs (6 O.W.N. 163). A Divisional Court of the Appellate Division ordered a new trial (6 O.W.N. 333). The re-trial of the action was twice postponed. The trial finally took place before SUTHERLAND, J., without a jury, at Sandwich. The learned Judge, reviewing the evidence, was of opinion that the option of purchase given by the defendants and accepted by the plaintiff was valid and subsisting when accepted; but that specific performance could not be decreed. Judgment for the plaintiff for damages, assessed at $2,500, less any proper deduction for rent up to May, 1913, and for occupation rent since at the like rental excepting so far as rent may have been paid since. The plaintiff to have the costs of the postponements of the second trial and the costs of the second trial; the order of the Divisional Court as to the costs of the original trial and of the appeal to stand. J. H. Rodd, for the plaintiff. E. D. Armour, K.C., for the defendants.

CURRIE v. SPERER—MIDDLETON, J., IN CHAMBERS—NOV. 8.

Mortgage—Judgment on Default of Appearance in Mortgage Action—Reference—Report—Notice of Filing—Necessity for—Rules 35, 429.]—Rule 35 declares that "except where otherwise provided or otherwise ordered a defendant who fails to appear shall not be entitled to notice of any subsequent proceedings in the action." Rule 429 provides that "any party affected by a report may file the same, or a duplicate thereof. He shall forthwith serve notice of filing." In this mortgage action, the defendant did not appear; judgment was obtained by the plaintiff, with a reference to the Master, who made a report. MIDDLETON, J., ruled that it was not necessary to serve the defendant with notice of filing the report. R. H. Greer, for the plaintiff.

RE PEACOCK—SUTHERLAND, J., IN CHAMBERS—NOV. 9.

Distribution of Estate—Intestate Succession—Absentee Next of Kin—Presumption of Death—Evidence.]—Edward Francis Peacock died at the city of Hamilton on the 4th June, 1914, intestate. His widow, Margaret Peacock, was appointed administratrix of his estate by letters of administration dated the 17th September, 1914. William Peacock, a brother of the intestate, had not been heard of for upwards of 15 years prior to the death of the intestate, his last address being Dawson City, in the Yukon District, in the Dominion of Canada. During all that time he apparently did not communicate with his brother, or, so far as the widow had been able to ascertain, with any one else. She caused an advertisement to be inserted in the Hamilton "Spectator," notifying all persons who were next of kin of the estate of her deceased husband to send in their claims, and also had a letter addressed to William Peacock and sent by registered post to Dawson City, where he was last heard from. This letter was returned to her as uncalled for. No claim pursuant to the advertisement was sent in by or on behalf of the said William Peacock. The balance of moneys of the estate of her deceased husband remaining in the hands of the administratrix amounted to $101.25. SUTHERLAND, J., said that there was a clear presumption that William Peacock predeceased the intestate; and an order similar to that in Re Ashman (1907), 15 O.L.R. 42, should be made, and the administratrix should divide the balance in her hands amongst those entitled thereto as though William Peacock had predeceased his brother without issue. Costs of the motion out of the estate. P. R. Morris, for the administratrix.

HOME V. M. S. BOEHM & CO. LIMITED—LENNOX, J.—NOV. 10.

Contract—Land Company—Director Acting as Sales-agent—Remuneration—Commissions—Construction of Agreement—Account—Reference—Report—Appeal—Costs — Discretion.]—Appeal by the defendant company from the report of a Referee. The plaintiff was a shareholder, director, and sales-manager of the defendant company. The Referee credited him with $650 in respect of a transaction called the Schafer Syndicate sale. The plaintiff was entitled, under his agreement with the defendant company, to receive personally a profit of 5 per cent. on all com-

missions received by the company upon sales of suburban property, such as the Schafer Syndicate sale; but the defendant company contended that no "commission" was earned or collected by the company; that they bought the property and afterwards sold it at a profit of $13,000. LENNOX, J., however, was of opinion, agreeing with the Referee, that, upon the evidence, the $13,000 was to all intents and purposes a commission and nothing else; and, if it were otherwise, that the plaintiff's agreement with the company, properly construed, meant 5 per cent. on what the company should make, whether as commission strictly or as profits; and he was entitled to the $650.—Held, also, that the plaintiff was entitled to $229.50 upon the Garden City sale, as reported by the Referee; the sale of stock was equivalent to a sale of the land.—But held, in respect to the Ashley sale, that the Referee had credited the plaintiff with $400 to much—the plaintiff was entitled to a percentage upon the commission actually received by the company and to no more; the item of $532.03 should be reduced to $132.03.—The defendant company appealed against the Referee's apportionment of costs. The decision of the Referee ought not to be disturbed. Costs were not in his disposal by the order of reference, but the parties agreed to leave the question of costs to him—to substitute the Referee for the Court. This voluntary arrangement ought not to be read as giving either party two chances. If it was only meant to see what he would say about it, a right to appeal should have been reserved. In any case, it could not be said that the Referee did not exercise a wise discretion. The reduction in the amount allowed to the plaintiff, however, opened the question; and the Judge had now to consider what should be done as to costs with the case as it now stood. As a matter of discretion, having regard to all the circumstances, he left the costs of the action and reference at $189, to be paid by the defendant company. No costs of the appeal. A. Bicknell, for the defendant company. A. W. Holmested, for the plaintiff.

SECOND DIVISION COURT OF GREY.

WIDDIFIELD, JUN.Co.C.J. NOVEMBER 11TH, 1915.

STANDARD BANK OF CANADA v. ELLIS.

Division Court—Order Transferring Action after Judgment—Jurisdiction—Division Courts Act, R.S.O. 1914 *ch.* 63, *sec.* 79—*Judgment Summons—"Action"—Transcript of Judgment—Sec.* 188.

The plaintiffs sued the defendant, in the Eleventh Division Court in the County of Wellington, upon a promissory note. The defendant resided within the territory of the Second Division Court in the County of Grey; but he did not dispute the jurisdiction; and on the 4th May, 1915, judgment was given against him in the Wellington Division Court for $135. On the 11th June, 1915, a judgment summons was issued out of that Division Court, and served on the defendant. On the 8th September, 1915, an order was made by the Junior Judge of the County Court of the County of Wellington, as follows: "It appearing that this cause has been entered in the wrong Division Court, I hereby order that all papers and proceedings in this cause be transferred to the Second Division Court in the County of Grey, in pursuance of section 79 of the Division Courts Act, and that these proceedings may be continued in the same manner as if they had originally been entered in the said Court."

A. S. Clarke, for the plaintiffs, applied to WIDDIFIELD, JUN. Co.C.J., at a sittings of the Second Division Court in the County of Grey, to make an order against the defendant, upon a consent signed by the defendant.

WIDDIFIELD, JUN.Co.C.J., said that the Junior Judge of Wellington had no power to make the order of the 8th September under sec. 79 of the Act, R.S.O. 1914 ch. 63. That section has no application to a proceeding in the nature of a judgment summons—notwithstanding the extended meaning given to "action" in the interpretation clause of the Act. "Action" is used in sec. 79 in its ordinary sense, as meaning the initiating proceeding to enforce the plaintiff's claim. The whole context implies this. We do not speak of "entering" a judgment summons. A judgment summons is a process merely in the nature of execu-

tion: Re McLeod v. Emigh (1888), 12 P.R. 450; Re Reid v. Graham (1894), 26 O.R. 126.

Section 79 (2) contemplates that the transferring order shall be made before trial; and no authority is to be found in the Act for transferring the action to another Court after the entry of judgment.

A judgment summons can issue only from the Court in which the judgment debtor resides or carries on business. If the debtor does not reside within the territory of the Court in which judgment has been recovered, a transcript must issue under the provisions of sec. 188. After such transcript has issued, the judgment still remains a judgment of the original Court. This is plain by reference to sub-sec. 2. The plaintiffs should have proceeded under this section, and not under sec. 79.

The order of the 8th September was a nullity; the proceedings were never properly in the Grey Court; and the Judge in that Court had no jurisdiction to make any order, even by consent.