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HON. MR. JUSTICE KELLY. APRIL 15TH, 1913.

IRESON v. HOLT TIMBER CO., LIMITED.

4 O. W. N. 1106.

Waters and Watercourses—Obstruction of River by Logs—Saw Logs Driving Act—R. S. O. 1899 c. 43—Crown Grant—Reservation of One Chain on Bank—Riparian Rights—High Water Mark—Location of—Trespass—Evidence — Injunction — Damages — Reference—Costs.

Action by plaintiff, owner of certain lands upon the South Magnetawan River in the township of Burton, for an injunction restraining defendants, a lumber company, from trespassing upon his lands, from unreasonably booming and blocking the river with logs, and from damming up the river so as to overflow his lands, and for damages.

KELLY, J., *held*, that the Crown reserve of one chain along the bank of the river did not preclude plaintiff from obtaining the relief asked.

Metropolitan Board of Works v. *McCarthy*, 7 H. L. C. 243, referred to.

That the plaintiff's lands should not be measured from the high water mark and in any case the high water mark was not the point to which the waters of the river had been raised by the actions of defendants.

County of York v. *Rolls*, 27 A. R. 72, followed.

Judgment for plaintiff for injunction as prayed, $15 damages for trespass, a reference as to damages for the obstruction of the river and costs.

Action by plaintiff who had built a summer home on the South Magnetawan river on lands purchased from the Crown, for damages for wrongful entry and trespass on his lands and an injunction restraining defendants, a lumber company, from further entry and from destroying and injuring his trees and timber and from storing logs in the river, and for an order compelling them to remove the booms or so arrange them as not to interfere with his use and enjoyment of the river.

W. G. Thurston, K.C., for the plaintiff.

E. B. Ryckman, K.C., for the defendant.

HON. MR. JUSTICE KELLY:—The happenings which gave rise to this action took place in the township of Burton in the district of Parry Sound.

Plaintiff in 1911 became the owner of part of broken lot No. 34 (containing six acres) and the south-east part of broken lot No. 35 (containing seven acres), both in the 14th concession of the township of Burton, "saving and excepting on said lot No. 35 the right of way of the Canadian Northern Ontario Railway, and also an allowance of one chain in perpendicular width along the shore of the Magnetawan river, as contained in the original patent from the Crown."

The part of lot 34 referred to is defined as all the part of that lot lying south of the right of way of the Canadian Northern Railway, and the part of lot 35 as that part along the south of the Magnetawan river adjoining the aforesaid part of lot 34 south of that river.

The South Magnetawan river flows in a southerly or south-easterly direction along the westerly side of lot 35, and a bay or inlet from the river lies to the south of the parts of lots 34 and 35 owned by the plaintiff, his land being separated from the waters by the one chain reserve above mentioned.

In 1911 plaintiff built on his portion of lot 35 (lot 35 lies to the west of lot 34), a substantial house to be used as his summer residence, and to the front a wharf; and also, before the commencement of the trouble resulting in this action, a boat house; and on the westerly bank of the river opposite his residence, an ice house. His evidence is that he expended about $4,000 in the purchase of the lands, erecting and furnishing his buildings, and for his boats and launches.

Defendants are the holders of a license from the province of Ontario for the year ending 30th April, 1912, to cut timber on certain lands; in the township of Mackenzie (upstream from the plaintiff's lands).

Several miles above plaintiff's lands, the Magnetawan river divides into two branches known respectively as the North and South Magnetawan. The latter flows past plaintiff's lands. Defendants' operations of cutting timber were carried on above the point where the river so divides, and in former years they floated their logs down the North Magnetawan river.

In the spring or early summer of 1912, they decided to bring down the logs by the South Magnetawan as far as plaintiff's lands, and drive them easterly into the bay or inlet to the south thereof, where by means of a jack-ladder—which they built in July, 1912—they intended to take them from the water and load them on cars on the Canadian Northern Ontario Railway Co.'s tracks, which at that point are but a short distance north of the waters of the inlet.

At points along the river are dams. One of these is located above the point where the two branches of the river divide. Another is on the South Magnetawan river between six and seven miles below plaintiff's property. From his property to the latter dam the water is practically level, in which, according to one of the witnesses, logs would drift with the wind, but not with the current. To facilitate the operation of bringing the logs to the point where they were to be loaded on the cars, defendants changed the upper dam and put stop logs in the lower dam thereby raising the water in the vicinity of the plaintiff's property to a height of about seven feet above its usual level.

Defendants also placed across the river three booms, one just above plaintiff's property, and two a short distance below it. These two were for the purpose of preventing the logs from going further down the river so that they could be easily turned into the bay or inlet. Defendants placed another boom across the bay or inlet near its westerly end for the purpose of confining the logs therein until taken over the jack-ladder to the cars.

The evidence of the president of the defendant company is that 129,000 logs were to have been taken by defendants through these waters in the summer of 1912, and so loaded.

Plaintiff and his family occupied this property of his during the past summer.

Defendants' logs started to come down the river about June 1st, and they were allowed to accumulate in the water in front of plaintiff's residence, being held there by the booms until taken into the inlet; there also they lay in large quantities.

According to the evidence of Joseph Simpson, a resident of the locality for more than twenty years, and familiar with its conditions, there were between 50,000 and 60,000 logs stored in the inlet in August.

The means of getting from place to place in that locality is mainly by water. Defendants' logs prevented plaintiff from having ready access to the water, the booms interfered with his navigating the river with his launches and boats, so much so that at times his only means of getting to the post-office on the opposite bank of the river, and reaching the place where he obtained his supplies, was by walking over the open and unguarded trestle bridge of the railway.

His chief causes of complaint are: (1) that defendants' operations in the river were so conducted as to prevent his using it as he had a right to use it, and (2) that defendants committed a trespass upon his property by erecting the jack-ladder wholly or in part thereon, and caused him damage by destroying and removing trees and by flooding a portion of his land.

Dealing with the first of these objections, defendants have placed much reliance upon their contention that plaintiff by reason of the one chain reserve along the shore of the river is not a riparian proprietor, and so is not entitled to the privileges of such an owner. This contention is based upon the assumption that the reserve is to be measured from high water mark, and that, therefore, at times of low water, land would intervene between the shore side of the reserve and the edge of the water. Even were it conceded that the measurement of the chain reserve is to be made from high water mark (a position which on the authorities is untenable), it cannot be admitted, as contended by defendants, that the line of those waters in the summer of 1912, when defendants for their own purposes raised the water level several feet above normal, can be considered as the high water line. *County of York* v. *Rolls*, 27 App. Reports 72, Angell on Watercourses, 7th ed., sec. 53, p. 50, note 1.

The further contention that the chain reserve itself cuts off plaintiff's right of access to the water cannot prevail. A case much similar in this respect to the present is the *Metropolitan Board of Works* v. *McCarthy*, 7 H. L. C. 243, reference to which will throw some light upon the effect of the conditions existing here.

Another element to be considered in solving the question of defendants' liability is whether they were within their rights in using the river as they did use it. They maintain that they have not exceeded the statutory rights of those engaged in a business such as they carry on. The Saw Logs

Driving Act, R. S. O. 1897, ch. 43, relates to the duties of persons floating logs and their obligations to break jams and to clear the logs from the banks and shores of the water with reasonable despatch, and to run and drive them so as not to unnecessarily obstruct the flow or navigation of the waters.

It is unquestionable that defendants did so obstruct the river as to render it extremely dangerous and at times impossible for it to be used by those having the right to navigate it; and conceding the rights given by statute to float logs and use the water for that purpose, I am of opinion that the evidence establishes that the defendants exceeded their rights and unreasonably obstructed this river.

In reaching this conclusion I have not disregarded the statement that permanent settlers and those residing in this region during the summer months are but few, and are located at considerable distances from each other. To these any interference with or improper use of the river, which obstruct their passage over it, is a serious matter, especially as other means of transport are not readily available.

In the early stages of defendants' operations in 1912, and prior to the commencement of this action, discussion took place between plaintiff and defendants' representatives about modifying the conditions created by the defendants so far as was necessary to enable plaintiff to safely navigate the river and to pass through the booms with his boats. Though promises were given him nothing was done that resulted in any improvement. True, defendants provided a means by which the booms, or some of them, could be opened in the centre; but to do this required skill and experience on the part of the persons using the boats, and while men accustomed to river work and log driving might find it a satisfactory means of passing the booms, it was a most dangerous attempt to be made by persons not so accustomed. Even Simpson, an experienced man, whose frank and straightforward evidence I accept, considered it highly dangerous.

It is also urged that plaintiff did not suffer any special damage such as to entitle him to maintain this action. My view is quite the contrary. He was deprived of the reasonable and proper means of using the river as well as of reaching places where it was necessary for him to go. His own statement is that for days at a time he and his family were practically prisoners on his property. He had such special

interest and sustained such special damage as gave him an actionable right.

"If any direct injury resulted to a private individual from any obstruction placed in a public travelled highway, whether on land or on water, which injury was other and greater than that occasioned to, or suffered by, the general public, the person so injured had his remedy by action at common law for damages, and in equity by injunction to restrain the continuance of the obstruction causing the injury. There is no lack of cases which establish this proposition." *Hislop* v. *Township of McGillivray*, 17 S. C. R. 479 (at 480).

Dealing now with the claim that defendants have trespassed on plaintiff's lands, removed trees therefrom, and built their jack-ladder thereon, not a little evidence was given tending to shew that the ladder does not encroach on plaintiff's lands, and that it is situated entirely on the one chain reserve. When plaintiff became aware that defendants were building the ladder, he notified their representatives that it did so encroach.

The raising of the waters by defendants created an abnormal condition; a fact which to a considerable extent entered into the evidence on the question of the location of plaintiff's property.

Plaintiff submitted the evidence of two qualified land surveyors, who, in the summer of 1912 found that the water had encroached 20 to 25 feet beyond the line of vegetation. This was due to the rising of the water above its normal height. It was not a case of slow and imperceptible encroachment which results in an alteration of boundaries. These surveyors, one of whom had located the stakes of the original survey, as a result of their investigations and measurements found that the ladder had encroached on plaintiff's lands to the extent of at least 320 feet (one of them puts it at much more than that), and that thereby a small triangular piece of plaintiff's land of about similar area lying to the east of the ladder was severed from his other lands.

For defendants was submitted the evidence of three persons who had made or helped to make measurements in the locality for the purposes of the railway company,—one of whom also made a measurement and survey of this property in August, 1912. These were put forward as land surveyors, but it turned out that one only of them is entitled

to that designation in the sense of being technically qualified, the others being civil engineers.

I have with great care gone over the evidence of these various witnesses and am convinced that the testimony on this point is in favour of the plaintiff. I cannot but accept the evidence of Abrey and Ward, whose statements are based on more definite data and knowledge than that on which the evidence of defendants' witnesses rests.

The exact superficial area of the lands encroached on by the jack-ladder, I do not determine, but it is at least 320 feet, and there is also the triangular piece to the east cut off from plaintiff's other lands. Trees which had been on the site of the jack-ladder were removed by defendants. What these were worth was not made clear; but I do not think on the evidence generally that their value was great.

Another result of the rising of the water was the flooding of a small portion of plaintiff's lands west of the ladder on which are growing trees.

Effect cannot be given to defendants' contention that if there is an encroachment or trespass on plaintiff's lands the value of this land is so small as not to be cognizable by the Court in a claim for damages. Authorities are not wanting to shew that under such circumstances the owner of the land is entitled to a right of action and to damages even though nominal. *Wright* v. *Turner*, 10 Gr. 67; *M'Glone* v. *Smith*, 22 L. R. (Ir.) 559.

It will serve no useful purpose to go further into the details of the evidence, nor do I think it necessary to review the many authorities cited on the argument, and others which I have also considered. The conclusions which I have reached are in my opinion in harmony with the general effect of these authorities.

Plaintiff claims damages for wrongful entry and trespass on his lands and an injunction restraining the defendants from further entry, and from destroying and injuring his trees and timber, and from storing logs in the river; and an order compelling them to remove the jack-ladder and its apparatus, an order to remove the booms or so arrange them as not to interfere with his use and enjoyment of the river, and to rearrange the logs. He is entitled to this relief.

Damages for the trespass and entry and the trees cut and removed I fix at $15.

Judgment will go accordingly with costs of the action, including costs of and incidental to the granting of the injunction.

In his argument plaintiff's counsel applied for leave to amend the claim by adding a claim for damages for the obstruction of the river. I grant this application and allow the claim with a reference to the Master-in-Ordinary to ascertain the amount of damages, if plaintiff so desire it; costs of the reference to be reserved until the Master shall have made his report.

With reference to defendants' counterclaim for damages for being restrained by the injunction from August 16th to August 20th, when on their application the injunction was dissolved, in view of the conclusion I have arrived at, that claim must be dismissed with costs. Plaintiff was entitled to the injunction, and the dissolving of it in the circumstances under which the order for that purpose was made, does not conflict with that view.

I have taken occasion to refer to the learned Judge who made the order dissolving the injunction, and I have learned that he adopted that course not because he believed plaintiff was not entitled to the injunction, but because he considered it convenient and desirable that the logs should be removed by means of the ladder, (apparently then the most speedy means of disposing of them), even though it trespassed on plaintiff's lands, rather than that they should remain untouched and so continue to interfere with the use of the river and its branches.

During the trial I became impressed with the belief—and a more deliberate consideration of the evidence confirms this—that had the defendants been more heedful of plaintiff's wishes, when in the early part of the summer he requested their representatives to so conduct their operations as not to deprive him of reasonable means of access to the water and of the right to navigate the river, an amicable working arrangement could easily have been arrived at. They acted, however, highhandedly and without due regard for the inconvenience and hardships which their operations caused him, and thus brought about the dissatisfaction on his part which resulted in the present proceedings.

HON. MR. JUSTICE MIDDLETON. APRIL 21ST, 1913.

BADIE v. ASTOR.

4 O. W. N. 1180.

Costs— Security for—Motion for Further—Special Circumstances—Order for $200 Additional Security.

MASTER-IN-CHAMBERS, 24 O. W. R. 147, 4 O. W. N. 880, refused to order further security for costs in an action where the costs incurred up to the date of the motion were amply secured by the original bond given for security.

Stow v. *Currie*, 13 O. W. R. 997, followed.

MIDDLETON, J., on appeal ordered $200 additional security where the action had progressed to exceptional lengths and the plaintiff was already liable for certain costs in any event of the action.

Appeal from an order of the Master in Chambers, *ante* 147, refusing further security for costs.

G. H. Kilmer, K.C., for the defendant.

R. McKay, K.C., for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—The matter has been standing for some time as the defendant's solicitor asked leave to file a further affidavit, and the plaintiff's counsel now notifies me that he does not desire further argument.

The security given, when required by our practice, ought to be adequate, but great care must be taken to avoid the requirement being oppressive. Four hundred dollars mentioned in the rules must be regarded as adequate for any normal action. In this case the appeal from the judgment and the reference then ordered in lieu of a new trial are beyond the ordinary course and I think justify an order requiring $200 further security. The costs of the first trial and appeal are payable by the plaintiff in any event of the cause and so are taken out of the general costs of the cause. The order, on this new material, will be made for the $200 further security and costs here and below will be in the cause.

HON. MR. JUSTICE MIDDLETON. APRIL 21ST, 1913.

RE CAIGER.

4 O. W. N. 1174.

Insurance—Life Insurance—Ontario Insurance Act—2 Geo. V. c. 33, s. 178 (7)—Construction of—Application to Sole Beneficiary.

MIDDLETON, J., *held*, that the words "one or all of the designated preferred beneficiaries" in s. 178 (7) of the Insurance Act of 1912, 2 Geo. V. c. 33, included a sole designated preferred beneficiary.

By policy dated 1st October, 1901, the deceased W. E. Caiger insured his life in favour of his wife, who died on 13th October, 1911. The deceased survived his wife, dying 8th November, 1912, but executed no document in any way affecting this insurance—$3,128.25 the proceeds of the policy has been paid into Court by the insurance company as a contest has arisen between the creditors and the children of the deceased.

The rights of the contestants depend upon the construction of sec. 178 (7) of the Insurance Act 2 Geo. V. ch. 33. If that section applies, the children take. If not, then under sec. 171 (9) the money forms part of the estate of the insured.

Sec. 178 (7) applies if the words "one or more or all of the designated preferred beneficiaries" can be held to cover the case of a "sole designated preferred beneficiary" for then the section as applied to this case directs the money to go to the children.

The wording of the statute is not uniform throughout and in some of the sections the Legislature has, as in the case of 171 (9) been careful to say "all the beneficiaries or the sole beneficiary," but in seeking to interpret the words used, I think the words here used "all the beneficiaries" are wide enough to cover the cause of a "sole beneficiary." To hold otherwise would be to create an unwarrantable exception and an indefensible anomaly.

The money will be declared to belong to the children and will be paid accordingly. The creditors must pay the costs of this motion and the costs of the company deducted when the money was paid into Court.

COURT OF APPEAL.

APRIL 22ND, 1913.

McKENZIE v. ELLIOTT.

4 O. W. N. 1151.

Contract—Building Contract—Action for Price—Question whether Contract was Abandoned—Onus of Proof.

An action to decide whether a barn built by plaintiff for defendant was built under the signed contract or if the signed contract was abandoned and a new arrangement substituted to entitle the plaintiff to a sum in excess of the $7,000 agreed. Master in Ordinary dealt with the case from the viewpoint of fact, and held that the writing was indefinite and if in force as to price it was in force for all purposes and *vice versa*. BOYD, C., *held*, 19 O. W. R. 726; 2 O. W. N. 1364, that the Master-in-Ordinary erred in his appreciation of the whole body of evidence and its application to the controversy in its legal aspect, and the original contract was but lightly varied. Plaintiff entitled to $8,000 and costs. Divisional Court, 21 O. W. R. 929; 3 O. W. N. 1083 affirmed above judgment. RIDDELL, J., *dissenting*.

COURT OF APPEAL varied judgment of DIVISIONAL COURT by directing judgment for plaintiff for $3,315, with interest.

No costs of appeal.

Appeal by the plaintiff from judgment of Divisional Court, 21 O. W. R. 929; 3 O. W. N. 1083, affirming judgment of Boyd, C., 19 O. W. R. 726; 2 O. W. N. 1364, which varied the report of the Master-in-Ordinary upon a reference in an action upon a contract to build a barn.

The appeal to Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE LENNOX.

I. F. Hellmuth, K.C., and W. Mulock, for the plaintiff, appellant.

A. W. Anglin, K.C., and J. Shilton, for the defendant, respondent.

HON. MR. JUSTICE MEREDITH:—There is of course no law against an appeal, in a case which has been determined upon the credibility of witnesses; an appeal lies in such a case just as much as in any other, and it is not only the right but the duty of an appellate Judge to hear and duly consider such an appeal; the exception to the general provisions giving a right of appeal in cases not tried by a jury, is generally speaking only matters in the discretion of the trial Judge or judicial officer; as to them it is generally provided that there shall be no appeal except by leave.

But it is quite obvious that where the findings depend altogether upon the credibility of the witnesses, and there is nothing to indicate that the parties have not had a full

and fair trial, an appeal would be hopeless, because those who hear and see the witnesses have so much better opportunity for forming a right judgment upon such a question.

Cases of that kind, however, are few and far between. Circumstantial evidence enters very largely into almost all cases; and in regard to the probabilities arising from such circumstances a Court of Appeal sometimes has advantages which a trial Judge had not.

This case is very plainly not one depending altogether, or anything like altogether, upon the credibility of the witnesses; the learned Master did not so treat it; and if he had would have erred; his view was that he must look at the "surrounding circumstances and attendant facts to arrive at the truth;" but I cannot think that after all he really did; or if he did that he gave them sufficient consideration.

We start with an agreement in writing duly signed by both parties; an agreement not to be got rid of merely because some of its provisions were not filled out or were inapplicable; it was a general form, not one drawn for the purposes of this contract. In making light of this signed writing; in treating it very much as if it were no more than waste paper, the Master, I think, got off at a false start in his enquiry. His observation, that if it were in force as to the price it must be in force for all purposes; or in other words if not in force for all purposes cannot be as regulating the price, was a mistake and one which I am inclined to think dominated to a considerable extent his conclusions against the defendant.

He has given at length his reasons for not giving weight to the testimony of the witnesses Coleman and the defendant's wife, reasons which do not seem to me to be of anything like the most convincing character. He was also apparently very considerably impressed by the fact that the defendant's sons were not called as witneses, expressing the firm belief that there must have been conversations between father and sons as to the nature of the contract; but apparently forgetting that such conversations could not be given in evidence by the defendant.

No object, however, would be gained by going over the many other circumstances, not depending on the credibility of witnesses, which weighs against the Master's finding upon the question of an agreed upon general price or no agreement as to cost: the case has been so fully and so carefully

investigated and considered by the Chancellor, with the assistance of the Master's reasons for his findings, and again in the Divisional Court, with the assistance of all that had previously been said upon the subject, that further discussion would be merely putting in my own words those things which have been plainly and well said. I quite agree in that which was said in each Court as to the Master's finding upon this important initial question.

But I cannot think that the case is a proper one for sending the parties back to the morass of another reference, the costs of which might amount to more than the real amount in difference. I agree with the Divisional Court in the view there expressed that the evidence already taken suffices to do justice between the parties as to the amount due to the plaintiff based upon the price named in the agreement and making all proper allowances for variations in all respects.

On the 15th December, 1910, the plaintiff wrote to the defendant that he had decided to accept the amount the defendant had offered him, $3,315 in settlement, provided that he should have also some posts and shingles described in the letter; that sum with the amount already paid on account of the contract amounting to $8,315.

A very careful examination of the whole evidence satisfies me that in the making and accepting of the offer of this amount each of the parties knew pretty accurately the true amount which was really due from the one to the other; that in truth the sum so due is the amount mentioned in that letter; and that any number of references, and the waste of any amount of additional costs, could not rightly lead to any better conclusion.

For the order made in the Divisional Court I would substitute one directing judgment for the plaintiff for $3,315 with interest from the date mentioned; with costs to be paid as already adjudged; but without costs of this appeal: when parties to an action have left the subject-matter of their litigation so tangled or uncertain that the interposition of the Court is needed to make plain that which they would have themselves made plain, neither party whether winner or loser, or partly each, can well complain if part of the costs falls on him.

HON. MR. JUSTICE GARROW and HON. MR. JUSTICE LENNOX agreed.

HON. MR. JUSTICE MACLAREN:—Judgment varied. (The parties consenting that this Court dispose of the whole case without application to the Court below for further directions). The plaintiff to recover the sum of $3,315 with interest from the 15th of December, 1910. No costs in this Court or in the action up to the judgment of reference. Costs of the reference to the defendant. Other costs disposed of by paragraph 7 of the judgment of the Chancellor and by the Divisional Court to stand.

MASTER IN CHAMBERS. APRIL 22ND, 1913.

BICKELL v. WALKERTON ELECTRIC LIGHT CO.

4 O. W. N. 1181.

Trial—Place of—Motion to Change Venue—Action of Negligence by Workman—Place of Accident Proper Place of Trial—Lack of Means of Plaintiff—Terms as to Transportation, etc.

MASTER-IN-CHAMBERS *held*, that Walkerton where the accident occurred and not Toronto where plaintiff later resided was the proper place of trial of an action of a workman for damages for alleged negligence, and made an order changing the venue accordingly upon the terms that defendants furnish transportation for plaintiff and three witnesses as plaintiff made affidavit that he was without funds. *McDonald* v. *Park*, 2 O. W. R. 972, *Seaman* v. *Perry*, 9 O. W. R. 537, 761, and *Meredith* v. *Slemin*, 24 O. W. R. 315, referred to.

Motion by defendants to change the venue from Toronto where the plaintiff now resides, to Walkerton where the accident occurred, in an action for damages for alleged negligence brought by an employee of defendants.

G. H. Kilmer, K.C., for the motion.

J. M. Laing, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—The motion is supported by the affidavit of the president of the defendant company which states that it will require at least 10 witnesses all necessary and material and all resident at or close to Walkerton. The plaintiff states in answer that he is without money and unable to work so as to earn anything considerable and that he cannot pay witness fees to Walkerton though he has nine witnesses all resident at Toronto.

The home of the action (see *McDonald* v. *Park*, 2 O. W. R. 972, per Osler, J.A.), is certainly at Walkerton and "the

case is eminently one for trial" there. This plaintiff has been fully examined for discovery. He there says that no one was present when the accident occurred. The only person who would know anything about it would be the defendants' servants and the physician and nurses at the Walkerton hospital.

When examined for discovery the defendants' counsel attempted to find out what the plaintiff's nine witneses were expected to prove. But his counsel would not allow him to answer any questions on that matter. This is to be regretted as it was done in the face of plaintiff's affidavit that he is without means so that all the expense of the action will have to be borne by the defendants even though they succeed in their defence. The expense of a separate cross-examination should not have been imposed on defendants in this case.

It was stated by plaintiff's counsel on the argument of this motion that these nine witnesses were men who were now in Toronto but who were on the work at Walkerton and could give evidence as to the condition of the pump which caused the plaintiff's injury.

As to this it is beyond all question that two or three would be as good as nine on this point. But it is admitted that no one was present when the accident occurred, so that evidence of the defective condition at previous times would not be very cogent. If there was any serious defect one would suppose the plaintiff would have spoken of it to the foreman or superintendent. But nothing is said as to this.

This case is very like that of *Seaman* v. *Perry*, 9 O. W. R. 537, affirmed on appeal by Riddell, J., at p. 761, where the cases up to that time are noted. The distance of Walkerton from Toronto is only about a quarter of that of Sault Ste. Marie, so that it would not be necessary that defendants should advance much more than a third of what was ordered there.

No jury notice has been served yet through an oversight of a clerk. But it may be assumed that defendants will not oppose this being allowed in view of *Qua* v. *Woodmen of the World*, 5 O. L. R. 51, and later cases. If the defendants will agree, then one order can issue allowing plaintiff to serve jury notice and changing place of trial to Walkerton on their agreeing to provide free transportation for plain-

tiff and three other persons to be named by him, as in *Meredith* v. *Slemin*, 24 O. W. R. 315, 4 O. W. N. 1038—not to exceed $24.

It may be of interest to note that in *Seaman* v. *Perry* the defendants succeeded at the trial.

(As there is no possibility of a trial until after the long vacation, no order need issue until defendants have decided whether to agree to the proposed order as to the jury notice or to leave plaintiff to move for that purpose.)

MASTER IN CHAMBERS. APRIL 19TH, 1913.

RE McLAULIN, McDONALD v. McLAULIN.

4 O. W. N. 1143.

Pleading—Statement of Defence—Motion to Strike Out Paragraphs as Irrelevant—Paragraphs Relevant to Support Counterclaim—Amendment.

MASTER-IN-CHAMBERS refused to strike out certain paragraphs of a statement of defence which were not strictly relevant as a defence, but which were pleadable in support of a counterclaim set up, but directed that the pleading should be amended to make clear how the paragraphs in question were pleaded.

Motion to strike out certain paragraphs of the statement of defence as irrelevant.

H. S. White, for the plaintiff.

John Jennings, for the defendant.

CARTWRIGHT, K.C., MASTER:—This action was originally brought in the Surrogate Court to establish the will of the testator in solemn form.

On application of the parties the cause was transferred to the High Court Division. The statement of defence was unusually long and the plaintiff moved to strike out paragraphs 3 to 29 inclusive, as embarrassing and improper. These paragraphs allege that the testator had from the very beginning of their married life acquired complete control over his wife, the now defendant, and induced her to transfer to him all her very valuable property and that not only was he at his decease of unsound mind and without testamentary capacity but also that all he assumed to deal with was defendant's property and not his own, and a declaration to this effect is asked.

It may be a question whether in the present condition of the statement of defence paragraphs 3 to 29 inclusive are relevant.

But there is nothing to prevent the defendant from counterclaiming for the relief asked for in clause (b) of the prayer for relief.

This statement of defence is really and would then formally be a statement of claim and the paragraphs in question could not be struck out as they set up facts which might well support and establish the claim asserted by the defendant that all the property over which at his death her husband, the testator, had any control or power was her property—for the reasons stated in the paragraphs in question (perhaps with unnecessary fullness) and accounting therein for the delay in moving on her part to obtain the relief asked for. The defendant should amend by making the necessary allegation of counterclaim and the motion will be otherwise dismissed with costs in the cause.

MASTER IN CHAMBERS. APRIL 19TH, 1913.

NORTH AMERICAN EXPLORATION CO. v. GREEN.

4 O. W. N. 1142.

Discovery—Further Examination of Officer of Company—Further Affidavit on Production—Motion Premature.

MASTER IN CHAMBERS refused to make an order for a better affidavit on production by the plaintiff where the motion was premature, but ordered further examination for discovery of another officer of plaintiff corporation where a previous examination of another officer had elicited little information.

Motion by defendant for better affidavit on production and for examination of another officer of the plaintiff company for discovery. The action is to have it declared that certain land bought by defendant was acquired by him only as a trustee for the plaintiff company of which he was an officer, and for an account, etc.

J. M. Ferguson, for the defendant.

Tuckett (H. J. Macdonald), for the plaintiff.

CARTWRIGHT, K.C., MASTER:—The motion for better affidavit is premature. No ground has yet been laid for that. See *Ramsay* v. *Toronto Rw. Co.*, 23 O. W. R. 513. As to

the other branch of the motion the examination of another officer is still pending, to allow of this motion to be made to get production of the books, etc., of the plaintiff company, which are very relevant to the action—Q. 126, 127, shew that the purchase of the lands giving rise to this action was discussed at meetings of the directors.

The previous examination is vague and indefinite and difficult to understand. It appears that Mr. Ivens, the president, was in communication with the defendant about the matter of the suit (Q. 300 *et seqq.*). It was he who instructed this action to be brought (Q. 376, 387, 388).

In answer to Q. 398, the officer under examination on being asked to produce the documents called for by the notice, says they are not in his possession—but that they can be got from Ivens.

The best course seems to be to close the examination now pending, and allow defendant to examine Ivens, and require him to produce the documents and books of the company. Being a limited company the examinations are for discovery only which should be freely given.

Costs of the motion will be in the cause.

MASTER IN CHAMBERS. APRIL 18TH, 1913.

ST. CLAIR v. STAIR.

4 O. W. N. 1141.

Pleading—Motion to Strike out—Paragraph—Irrelevance—Allegation as to Particular Theatrical Performance—General Character of Performances not Pleadable—Costs.

MASTER-IN-CHAMBERS in an action for conspiracy to defame and libel where part of the facts pleaded by the plaintiff alleged a visit by plaintiff to a certain theatre owned by defendant where an alleged indecent performance was given, struck out as irrelevant another paragraph which alleged that for a number of years indecent performances had been given at such theatre.

Flynn v. *Industrial*, 6 O. L. R. 635 and other cases followed.

Motion to strike out certain parts of the statement of claim as scandalous, embarrassing and irrelevant.

E. E. Wallace, for the defendant.

E. F. Raney, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—The facts of this case are matters of public notoriety. See previous reports, 23 O. W. R. 740, 930. In this action brought by plaintiff for libel

and conspiracy to destroy his moral character and reputation the third paragraph of the statement of claim alleges that; "For a number of years the defendant Stair has permitted indecent and immoral performances to be given at his said theatre, and by reason of the public and evil reputation which the said theatre has acquired and" in pursuance of the objects of the said (vigilance) committee the plaintiff visited the said theatre" and in paragraph four it is alleged that on that occasion the plaintiff witnessed an indecent, immoral, and obscene performance.

The defendant moves to strike out the first part of paragraph three enclosed in brackets, and ending with the word "and" in the fourth line as being scandalous, embarrassing, and irrelevant.

The motion is entitled to prevail as it cannot be seriously contended that the matters alleged in the part of the paragraph complained of could be given in evidence at the trial.

Any justification of the report of the plaintiff as to what actually occurred at the defendant's theatre can be given under the allegation in the fourth paragraph of what plaintiff himself witnessed. What may have occurred on other occasions does not come in question here. The general character of the theatre or of any other performance than the one at which the plaintiff was present cannot be enquired into this action. The fourth and subsequent paragraphs of the statement of claim sufficiently allege and explain the wrongful acts of the defendant for which the plaintiff seeks redress and offer a sufficiently wide field for discussion and enquiry at the trial before a jury without going behind the time of the plaintiff's visit to defendants' theatre and alleging matters of an earlier date with which this action has no connection, and which very likely might prejudice the jury against the defendants if allowed to remain in the pleadings and be read to them at the opening of the case by plaintiff's counsel.

See *Flynn* v. *Industrial*, 6 O. L. R. 635—approved by the Divisional Court in *Lougheed* v. *Collingwood*, 16 O. L. R. at p. 65—also on the same point.

Gloster v. *Toronto Electric Light Co.*, 4 O. W. R. 532.

As in those cases the costs of the motion will be to defendant in any event. Time for delivery of statement of defence extended until 21st inst.

HON. MR. JUSTICE MIDDLETON. APRIL 18TH, 1913.

MYERS v. TORONTO RW. CO.

4 O. W. N. 1120.

Negligence—Street Railway—Plaintiff Crossing Street—Struck by Street Car—Contributory Negligence—Evidence.

MIDDLETON, J., dismissed without costs an action by an elderly woman for damages for injuries sustained from being struck by a street car of defendants, holding upon the evidence that the action was caused by plaintiff's contributory negligence in that she crossed the street in front of the car without taking sufficient precaution to avoid being struck.

Action by plaintiff for damages on account of being struck by a street car of defendants by reason of the alleged negligence of the motorman in charge thereof.

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

D. L. McCarthy, K.C., for the defendants.

Action commenced at the non-jury sittings, Toronto, November 6th, 1912, and resumed on several different occasions.

The plaintiff is a lady, fifty years of age, who maintains herself by her own exertions. On the 15th January, 1912, walking down Simcoe street, she was struck by a street car travelling east along Queen street. She was seriously injured, and, if entitled to recover, should receive a considerable sum.

The plaintiff's case was supported by the evidence of one Robert Sinclair, who said that he was a passenger on the car, and, intending to get off at University avenue, rose and went to the vestibule so that he could ascertain how near he was to the corner, as the windows of the car were frosted. On opening the vestibule door the first thing that attracted his attention was this woman crossing the street. The car was then three hundred feet west of her. He said to the motorman, "You are going to hit that woman." The motorman responded, "Let her get out of the way;" and did not slow the car at all until after the woman was struck, nor did he sound the gong to warn her of his approach. The car was then travelling, according to this witness, at from 20 to 27 miles an hour.

If I could accept this evidence, there could be no doubt as to the result of the action. The motorman was not present at the trial. His evidence was afterwards taken by commission, the trial being adjourned for that purpose. He contradicts Sinclair. At the time the evidence was given I found myself unable to believe Sinclair. I cannot account for his giving the evidence he did, but it did not impress me as being a true story.

Other evidence was given, which I did not find of much assistance; and the case ultimately falls to be determined upon the plaintiff's own story. I am satisfied that the plaintiff gave her evidence with perfect honesty and fairness. At about half-past eight in the evening she went down the east side of the street on her way home. The night was clear and very cold. There was little traffic upon the street, and the car in question was the only vehicle in sight. The plaintiff at Simcoe street saw the car, as she thought west of Duncan street. She bases the latter part of this statement upon the fact that she could see the Duncan street lights; but these would be visible even if the car were east of Duncan street. She says she realized that the car was getting close, yet she thought it was far enough away to enable her to cross safely. Before she succeeded in getting across the car had struck her. She did not hurry, because she thought the car was so far away that she would be safe. She did not look a second time, as she did not think there was any occasion to do so. She did not hear the gong, and is sure that it was not rung. Just as she was almost clear of the car-track she was struck and thrown to the south. She says: "If I had looked again I would not have been caught."

I think the plaintiff was guilty of negligence, and that her negligence was the proximate cause of the accident. When one ventures to cross in front of a moving car, rapidly approaching as this was, I think it is incumbent on the person to keep the car in sight, and not to trust blindly to the opinion formed on leaving the sidewalk that there is ample time to cross. If the plaintiff had exercised any kind of care, she could readily have escaped the disaster which overtook her.

I think it my duty to assess damages; and, in the event of the plaintiff being held entitled to recover, I assess them at $2,500.

As I understand the defendants not to ask for costs, the action will be dismissed without costs.

HON. MR. JUSTICE MIDDLETON. APRIL 18TH, 1913.

OLLMAN v. CITY OF HAMILTON.

4 O. W. N. 1122.

Municipal Corporations—Negligence—Flooding — Surface Water—No Interference with Watercourse—Costs.

MIDDLETON, J., *held* that defendants, a municipal corporation, were not liable for damage done by surface water diverted from a highway by them into a ditch where it properly flowed.

Action for damages for flooding, tried at Hamilton on the 2nd and 5th of April.

W. M. McClemont, for the plaintiff.

S. F. Washington, K.C., for the defendants.

HON. MR. JUSTICE MIDDLETON:—Mrs. Ollman, the plaintiff, has a life estate in about five acres of land, in Hamilton, upon which she carries on business as a brick-maker. The property is bounded by Macklin street, King street, Paradise road, and Hunt street; the latter not being opened out; and, according to the plans, is crossed by Athol street and Dufferin street. A deep ravine extends across the north-west portion of the land and to the west.

In the summer of 1911, a building was erected in this ravine, almost immediately opposite Paradise road, where it crosses the ravine. This building contained the machinery for the manufacture of bricks, a furnace-room, and drying-room; the furnace and tunnels to carry the heat to the drying-room being some seven or eight feet below the level of the soil at the bottom of the ravine; the floors of the machine-room and of the drying-room being on a level with the surface of the soil there.

In the spring of 1912, water from the thawing of the snow upon the plaintiff's own land and the unopened streets which she uses for her own purposes, together with some water from Macklin street, and possibly from King street where these streets adjoin her property, flowed through a ditch upon the lands and was emitted upon Paradise road, just about at the bank of the ravine, flowed down the slope of the road a short distance, and then re-entered the plaintiff's own land and flooded the buildings at the bottom of the ravine, doing considerable damage. It is for this that the action was brought.

Some five or six years ago an endeavour was made to grade Paradise road where it crosses the ravine. The crests of the hills were cut down, and the earth therefrom was used to construct an embankment at the lowest place. No complaint is made of this; and any injury that was sustained from the construction of the embankment would have been the subject of arbitration.

On the western part of the southern portion of the plaintiff's land, the whole surface has been removed for the purpose of using the clay to make bricks. This has resulted in cutting down the top of the high land by about eight feet. The water from this land would naturally flow to the north, seeking the ravine; but a ditch has been constructed which intercepts this water before the ravine is reached. As the excavation of the clay progressed from time to time, this ditch has been lowered; and it is now much below what is said to have been an original natural watercourse draining the water to the west.

When this ditch neared Paradise road—the water flowing in a westerly direction—a channel some years ago existed through a high bank on the plaintiff's land east of the road. The course of this channel has recently been changed, it is said because of some small cutting made to enable teams to drive up on to the plaintiff's land for the purpose of obtaining some earth to be used in repairing the road; and the water now passes through a channel three or four feet deep, cut through this bank where the teams passed, and is discharged on the surface of the road.

In the spring of 1912, this water had cut a channel across the road and was flowing into the ravine west of Paradise road. This water flowing across the road made the place most dangerous to passers-by; in fact, quite impassable. The city officials being notified, men were sent to the place. They had some suspicion that the water had been intentionally diverted across the road. This was denied by the sons of the plaintiff. It appears that part of the bank beside the road had fallen into the channel along the roadside where the water would otherwise have gone. All that was done by the city officials was to remove this obstructing earth, so that the water continued to flow, as it would otherwise have done, down the side of the roadbed and to repair the roadbed. When opposite the building in question the water made for itself a channel down the bank, and did the damage.

I fail to see that by removing this fallen earth and by filling in the channel cut across the road, the municipality was guilty of any misconduct. Since this occurrence a box drain has been placed in the road. This conducts the water across the road, and the water flows into the ravine west of the embankment. This has prevented the occurrence of any further injury.

To me the case seems plain. The water in question was the drainage of the plaintiff's own land, augmented by some slight flow of surface water from King and Macklin streets, confined in this ditch constructed by the plaintiffs themselves, and allowed by them to flow on to Paradise road. All that the city did in the spring of 1912, was to remove the earth that had fallen and to fill the excavation that had been made, so that the water which the plaintiff had thus brought on the road would flow in its natural course either down the road or back into the ravine on the plaintiff's land.

The action will be dismissed. Costs must follow the event if they are demanded. In view of the fact that the city officials might well have constructed the box drain in the first instance, and might well have made a ditch which would have carried the water beyond the building, the city will probably see its way clear not to exact costs.

There is a counterclaim and a counterclaim to the counterclaim on the record. No evidence was given as to these matters, and as to them there will be no order and no costs—and this will not prejudice the rights of either party as to these matters.

HON. MR. JUSTICE MIDDLETON. APRIL 18TH, 1913

REX EX REL. MARTIN v. JACQUES.

4 O. W. N. 1112.

Municipal Corporations — Office of Water Commissioner — Quo Warranto Proceedings — Windsor Waterworks Act—37 Vict. c. 79, s. 39—61 Vict. c. 58, s. 24—Incorporated Sections of Municipal Act—Municipal Act, ss. 207, 215a, 233—Contract with School Board—Arrears of Taxes—False Declaration — New Election—Claim by Next Highest Candidate — Discretion of County Judge—Costs.

MIDDLETON, J., *held*, that section 80 of the Municipal Act, disqualifying any person from office having "an interest in any contract with or on behalf of the corporation," applies to a person having a contract with the school board of the municipality.

That section 215*a* of the Municipal Act, providing machinery for the filling of vacancies in a council, does not apply to a vacancy caused by *quo warranto* proceedings.

Appeals by both relator and respondent from the judgment of the Judge of the County Court of Essex, pronounced on March 19th, 1913, unseating the respondent from the office of water commissioner and directing a new election, heard in Chambers on the 8th April, 1913.

F. D. Davis, for the relator, Martin.

Featherston Aylesworth, for the respondent, Jacques.

HON. MR. JUSTICE MIDDLETON:—It will be convenient to deal with the appeal of the respondent first. The Windsor waterworks is governed by private Acts; 37 Vict. ch. 79, 57 Vict. ch. 87, 61 Vict. ch. 58. By sec. 39 of the first-named Act, provision is made for the election of commissioners at the same time and in the same manner as the mayor and reeve; "and all the provisions and remedies by the municipal Act at any time in force with respect to councillors shall apply in all particulars not inconsistent with Act to the said commissioners, as to election, unseating, filling vacancies, grounds of disqualification and otherwise."

By sec. 24 of the last-named Act a commissioner who has been elected—"may resign his office, and shall cease to hold office for the same cause as by municipal law the seat of a member of the city council becomes vacant; and in the case of a vacancy in the office of water commissioner, during the term of his office, the vacancy shall be filled in the same manner as provided by the Act in force respecting municipal

institutions at the time of such vacancy, as to vacancies in the council of a city," but if the vacancy occurs by death or removal within six months from the expiration of the term of office the council may appoint a successor.

The election of the respondent was attacked on two grounds; first, by reason of the fact that he had a contract with the public school board of the town for the erection of a school-house; secondly, because at the time of his nomination he owed taxes to the municipality and untruly made a declaration that there were no arrears of taxes against the lands in respect of which he qualified.

There is no doubt as to the facts. The contract existed; the taxes were in arrear; and a declaration was made as stated.

The Municipal Act does not lay down any general principle governing disqualification; and the case must be determined upon the letter of the law. Section 80 of the Municipal Act disqualifies any person having—"an interest in any contract with or on behalf of the corporation, or having a contract for the supply of goods or materials to a contractor for work for which the corporation pays or is liable directly or indirectly to pay." Although the contract is a contract with the school board, I think the school Board must be taken to contract on behalf of the corporation within the meaning of the section. The words "for which the corporation pays or is liable directly or indirectly to pay," are not grammatically connected with the words which here apply, as they relate only to work done for contractors; but they indicate the meaning of the statute, and that a wide meaning should be attached to the words "a contract with or on behalf of the corporation." The municipal council and the school board are two administrative bodies charged with the care of different departments of municipal affairs; but the school board is, after all, one of the governing bodies of the municipality.

This renders it unnecessary for me to consider the second alleged ground of disqualification.

The relator's appeal is based upon the contention that under the law applicable to this matter a new election should not have been ordered, but the candidate having the next largest number of votes should have been declared elected.

It would perhaps be sufficient to say that the application before the County Court Judge did not ask for this relief.

I prefer, however, to deal with the matter upon the law. Section 215a. provides that in the case of a vacancy in the office of alderman in a city, occasioned by death or resignation or by any cause, where the aldermen are elected by a general vote, the unsuccessful candidate who received the highest number of votes at the last municipal election shall be entitled to the office. It is argued that although the aldermen in Windsor are elected by wards, the water commissioners are elected by general vote.

The learned Judge has taken the view that the section only applies to a city where aldermen are elected by a general vote, and has no application to the case in hand. I prefer to base my judgment upon the view that the section in question applies to a vacancy arising under sec. 207 of the Act, or for some cognate reason, and does not apply to a vacancy created by *quo warranto* proceedings; which is governed by sec. 233, and gives a discretion to the Judge either to declare a claimant duly elected or to order a new election.

I agree with the result arrived at by the learned County Court Judge; and both appeals will be dismissed.

As both fail there will be no costs.

HON. MR. JUSTICE MIDDLETON. APRIL 18TH, 1913.

RE THE TRUSTS OF THE NORTHERN ONTARIO FIRE RELIEF FUND.

4 O. W. N. 1118.

Trusts and Trustees—Relief Funds—Forest Fire Sufferers—Surplus on hand—Establishment of Hospitals with—Provision for Maintenance by Municipalities.

MIDDLETON, J., *held*, that a surplus remaining in the hands of trustees of funds collected to aid sufferers from a Northern Ontario forest fire should be devoted towards the establishment of hospitals at Cochrane and Porcupine upon satisfactory assurances being given that such hospitals would be maintained by the two municipalities in question.

Motion by the trustees of a fund for an order determining what shall be done with a surplus remaining in their hands after payment of all claims in respect of the purposes for which the fund was primarily contributed.

A. C. McMaster, for the trustees.

H. E. Rose, K.C., for the township of Tisdale, for the Dome Mines, for the South Porcupine Board of Trade, and for the township of Whitby.

S. A. Jones, K.C., for the town of Cochrane, for the Cochrane Board of Trade, and for the hospital.

J. B. Holden, for the mine-owners at Porcupine.

J. R. Cartwright, K.C., for the Attorney-General.

HON. MR. JUSTICE MIDDLETON:—In July, 1911, a disastrous forest fire took place in Northern Ontario, extending over the whole territory known as the Porcupine district and for many miles north, covering the Cochrane district. An appeal was made for contributions to relieve the sufferings thereby occasioned, and in the result $56,590 was remet, there remains in the hands of the committee a balance ceived by the committee. After all proper claims had been of about $18,000.

The committee has devoted much time and energy to the consideration of the purpose to which this sum should be applied, and various resolutions have been from time to time passed, and much negotiation has taken place with those concerned, looking to the propounding of some satisfactory scheme. During the course of these negotiations there has been some fluctuation of opinion on the part of the committee. In the result, no scheme satisfactory to all parties has been evolved, and the matter is placed before the Court upon notice to those more particularly concerned; the trustees by their counsel desiring to take a position of neutrality.

Mr. Gourlay, one of the trustees, expressed his own views —possibly shared by his colleagues—that the fund ought to be distributed by allotting two-fifths in aid of an institution or institutions in Porcupine; three-fifths in aid of an institution or institutions in Cochrane.

Upon the argument all seemed agreed that the fund—having regard to the purposes for which it was contributed—could best be used by aiding in the establishment of a hospital or hospitals. This idea commended itself to the Attorney-General; and I think, it may be taken for granted that this is the proper destination.

Upon the argument it appeared that at or near Porcupine different mine-owners had established hospitals in connection with their mines. They desired that the fund or so much of it as may be diverted in that way, should be used to aid these hospitals.

With this idea I do not at all agree. I do not think that the fund was contributed in case of mine-owners who maintain hospitals in connection with their work.

As an alternative the mine-owners suggested that the fund should be invested and the income applied in paying for the maintenance of indigent patients, who might be cared for in these private hospitals. I do not think that this scheme would be satisfactory.

After reading the material and weighing as best I can the arguments presented, I think that justice would be more nearly done by directing the division of the fund between the two contending territories; the $1,000 as to which Porcupine sets up some particular claim to be regarded as part of its one-half share, and the material now at Cochrane to be turned over to Cochrane on account of its share, at the figure suggested by Mr. Gourlay, namely, $300.

I think these funds should be used to establish a hospital at or near Cochrane, and a hospital at or near Porcupine; the title of the hospitals to be vested either in a Board of trustees or the municipality; but the funds should not be paid over until satisfactory provision is made by the respective municipalities for the furnishing of a free site and for adequate maintenance. The municipalities by their counsel offer this. This offer, however, should be implemented in some formal way to the satisfaction of the Attorney-General. These hospitals should be held upon a proper trust, securing the admission of the indigent and unfortunate upon reasonable terms. If counsel for the applicants, for the respective municipalities, and for the Attorney-General cannot agree, then I may be spoken to upon the subject. The costs may come out of the fund.

HON. MR. JUSTICE KELLY. APRIL 19TH, 1913.

UNITED NICKEL COPPER CO. LTD AND S. G. WIGHTMAN v. DOMINION NICKEL COPPER CO. LTD.

4 O. W. N. 1132.

Contract—Mining Location—Exclusive License—Grant by Four Joint Owners out of Six—Rescission of Agreement — Evidence — Counterclaim—Reference Costs.

KELLY, J., *held*, that where a mining property was owned by six owners jointly, four of them could not grant an exclusive license to work it, and that in any case the agreement granting such license had been subsequently terminated by the parties.

Action by the plaintiffs for an injunction restraining defendants from operating or trespassing upon the lands referred to in a certain agreement in respect of which the action is brought, and from allowing their plant, machinery, and chattels to remain on the lands, and for damages for trespass.

The agreement, which bears date January 28th, 1911, is set out in the statement of claim; it purports to have been made between B. Howard Coffin and his associates of the one part, and plaintiff Wightman of the other part.

Coffin and five associates were the owners of these lands; the agreement was signed by Coffin and three of his associates; the others, Eastbrooke and Hetzel, did not sign it, Eastbrooke at that time was out of the country; Hetzel refused to enter into the agreement.

J. T. White, for the plaintiffs.

R. McKay, K.C., for the defendants.

HON. MR. JUSTICE KELLY:—I do not consider it necessary to set out in detail all the facts, but the evidence establishes the following: The agreement was intended to grant to Wightman a right of entry upon the property which was known as the Mount Nickel Mine in the Sudbury district "for the purpose of operating the same in such manner and by such methods, together with the right to mine and use the ore therefrom and in such quantities as the party of the second part" (Wightman) "may elect." Wightman was to begin operations within twelve months from the date of the agreement, and was to pay quarterly to Coffin and his associ-

ates $2 per ton for the ore mined until payment should be made thereout, and out of the proceeds of the sale of certain stock of Nickel Alloys Company of the sum of $80,000. Wightman was also to pay to the other parties to the agreement $5,000 out of each $50,000 of stock of the Nickel Alloys Company sold. Coffin and his associates who made the agreement agreed that the deeds of the property should "remain in escrow to be released" to Wightman as soon as he should have completed the payment of the $80,000. It was also provided that "the party of the second part as a part of his duties herein, in order to hold the parties of the first part agrees to have the said Nickel Alloys Company legally bind itself to the party of the first part to have all the duties of the party of the second part herein fully performed."

At the trial it was admitted that defendants went upon the property prior to the commencement of the action under a right which they claim to have acquired by written agreement from Coffin and his associates; and while admitting this to be so, plaintiffs' counsel did not admit that this latter agreement (which was not produced at the trial) had any effect.

Plaintiffs set up that on February 14th, 1911, Wightman agreed to transfer to his co-plaintiffs his title and interest to these lands, and that on February 14th, 1912, he executed to them an assignment of his agreement of January 28th, 1911. They also claim that they thus acquired the exclusive right to the property and to mine upon it.

I have grave doubts as to the agreement being sufficient in form as to have given Wightman such exclusive right, but even if it had such effect, another circumstance in connection with it is fatal to plaintiff's claim.

The agreement was clearly intended to be made by all the persons who were owners of the property at that time, namely, Coffin and his five associates; four only entered into the agreement, the other two for the reasons stated above not having executed it, and it is not shewn that it was ever brought to Eastbrook's attention.

On this ground I am of opinion that the owners of the property were not bound.

In Halsbury's Laws of England, vol. 7, p. 336 it is laid down that "where a promise is intended to be made by several persons jointly, if any of such persons fail to execute the agreement there is no contract, and no liability in incurred

by those who have executed the agreement." In making this summary of the law, the author refers to a number of leading cases on the subject (some of which on the argument were cited by counsel for the defendants), but apart from this I find the further fact that even if the agreement had been binding it was put an end to in February, 1912.

Up to that time Wightman had not paid anything to Coffin or his associates out of the proceeds of the mining operations nor in respect of the sale of stock in the Nickel Alloys Company, though he had in the meantime sold a considerable amount of that stock; nor had he procured from the Nickel Alloys Company anything to bind that company for the performance of his obligations as contemplated by the agreement.

This was the state of affairs about the end of January and the beginning of February, 1912, when Coffin and his associates, Flint, Parsons, and Riley, who had signed the agreement, complained of Wightman's default and declared their intention of repudiating the agreement and considering it at an end.

Wightman with one Gilder who was associated with him met Coffin and his three associates mentioned above, in Boston, and on the evidence of what took place at that meeting I find that they then agreed to the cancellation and rescission of the agreement. Wightman was evidently moved to this course by his failure to carry out several important and essential terms of the agreement.

Following this rescission and on the same day negotiations were opened up by Wightman, or on his behalf with these other parties with the object of making a new agreement, and he then made a proposal which was to be taken into consideration by them.

Wightman and Gilder then return to New York, but before the other parties had sent a formal reply to the proposition for a new agreement, the Nickel Alloys Company—through its secretary—forwarded to them a copy of a resolution of that company passed on February 14th, 1912, purporting to ratify the contract of January 28th, 1911, which it declared had been accepted on February 14th, 1911, by the stock-holders of the plaintiff company. What right that company had to accept at that time is not made clear. In view of the fact that the written assignment by Wightman to his co-plaintiffs, and which was produced at the trial,

bears date February 14th, 1912 (not 1911), I cannot see that the plaintiff company had any status in the matter on February 14th, 1911. One witness, it is true, stated that this was an error for February 14th, 1911. I have no doubts of that being the fact.

On February 15th, 1912, Coffin wrote Wightman expressing surprise at the action taken in view of what was understood and agreed upon at the meeting held on the 12th, and repeating the understanding arrived at at that meeting. No reply or communication of any kind came from plaintiffs afterwards.

This seems to have been the end of the negotiations. On April 14th, Coffin wrote for himself and his associates to Wightman, requesting him to discontinue all operations on the property as nothing further had been heard from him with reference to any new negotiations, and as no business relations existed between them.

I am satisfied that there was a rescission of the agreement of January 28th, 1911 (if any such existed), at the meeting of February 12th, 1912. So far as the evidence shews, no further action was taken by plaintiffs by way of operating the property down to the commencement of this action. Their conduct indicated that they treated the agreement as at an end.

I see no grounds on which they can establish a claim to an injunction or damages and the action must be dismissed with costs.

Defendants had entered upon the property in November, 1912. On the 22nd of that month plaintiffs obtained an interim injunction restraining defendants from operating or trespassing upon the property, and on the return of the motion to continue the injunction it was dissolved on September 17th.

Defendants having counterclaimed for damages for being prevented by the interim injunction from carrying on their mining operations, this counterclaim is allowed with costs. Evidence of the amount of damage was not gone into at the trial; and if defendants think it of sufficient importance to pursue this claim there will be a reference to the Master in Ordinary to ascertain the amount. Costs of the reference are reserved until after the Master's report.

HON. MR. JUSTICE MIDDLETON. APRIL 14TH, 1913.

REX EX REL. GARDHOUSE v. IRWIN.

4 O. W. N. 1043, 1097.

Statute — Construction of Municipal Waterworks Act — R. S. O. 1897, c. 235, s. 41—To be Read and Construed as part of Municipal Act—Waterworks Commission—Grounds for Disqualification—Incumbent High School Trustee—Quo Warranto.

MIDDLETON, J., *held*, that s. 54 of the Municipal Waterworks Act, R. S. O. 1897, c. 235, s. 41, as amended, providing that the Act should be read and construed as part of the Municipal Act does not make applicable to water commissioners appointed thereunder all the provisions of the Municipal Act as to disqualification of councillors, and, therefore, that a high school trustee is not precluded from holding office as a water commissioner.

Judgment of WINCHESTER, Co.C.J., reversed.

Appeal by the respondent from the following order of HIS HONOUR JUDGE WINCHESTER, senior Judge of the county of York, unseating the respondent upon *quo warranto* proceedings taken under the Municipal Act.

The respondent was elected to the office of commissioner of light and water in the village of Weston, and was unseated because at the time of his election he was a member of the high school board of that village.

C. W. Plaxton, for the relator.

James S. Fullerton, K.C., for the respondent.

HIS HONOUR JUDGE WINCHESTER:—Counsel admitted that Dr. E. F. Irwin was elected over Sydney Macklem as commissioner of water and light for the village of Weston at the election held on the 6th January, 1913. It was also admitted that Dr. Irwin was high school trustee for the village of Weston at that time, and still is, and that the relator was duly qualified to vote at such election and was a proper relator. Counsel for the relator contended that Dr. Irwin, being a high school trustee, was disqualified to become a commissioner of water and light under the statutes. He referred to the Municipal Waterworks Act, R. S. O. 1897 ch. 235, secs. 40 and 54, and the Municipal Act, 1903, secs. 80 and 207.

By sec. 54 of the Municipal Waterworks Act, it is provided that that Act shall be read and construed as part of the Municipal Act. Section 40 of the Waterworks Act pro-

vides for the election of commissioners as therein set forth. Section 41, sub-sec. 5, provides that "the place of a commissioner shall become vacant from the same causes as the seat of a member of the council of the corporation." The Consolidated Municipal Act, 3 Edw. VII. ch. 19, sec. 80, sets out a list of persons disqualified from being members of councils. In the list high school trustee is included.

Section 207 of the Consolidated Municipal Act provides as to when the seat of a councillor may become vacant after his elevation, as follows: "If, after the election of a person as a member of council, he is convicted of felony or infamous crime, or becomes insolvent within the meaning of any Insolvent Act in force in this province, or applies for relief as an indigent debtor, or remains in close custody, or assigns his property for the benefit of the creditors, or absents himself from the meetings of the council for three months without being authorised so to do by a resolution of the council entered upon its minutes, his seat in the council shall thereby become vacant, and the council shall forthwith declare the seat vacant and order a new election."

Section 208 provides for the taking of certain proceedings to unseat a member of the council, as follows: "In the event of a member of council forfeiting his seat at the council or his right thereto, or becoming disqualified to hold his seat, or of his seat becoming vacant by disqualification or otherwise, he shall forthwith resign his seat, and in the event of his omitting to do so within ten days thereafter, proceedings may be taken to unseat such member, as provided by secs. 219 to 244, both inclusive of this Act, and the said section shall, for the purpose of such proceedings, apply to any such forfeiture, disqualification or vacancy."

Sections 219 to 244 provide for the procedure in setting aside the election of a member of the council.

Counsel for the respondent contends that, while sec. 207 provides for the vacancy referred to in sec. 41 (5) of the Waterworks Act, the subsequent sections of the Municipal Act do not apply, as the commissioner of waterworks is not named in any of these sections, and that there are no clauses in the Consolidated Municipal Act or Waterworks Act which make procedure under sec. 219 of the Consolidated Municipal Act applicable to a commissioner under the Waterworks Act, it being specifically applied to mayor, warden, reeve, deputy-reeve, etc. (naming them), and that there are no sections of the Act made applicable to a waterworks

commissioner; and he submits that being a high school trustee is not a disqualification under the Waterworks Act; and that, if it be a disqualification, the procedure taken herein is not the proper procedure and cannot avail the relator, as the Waterworks Act provides that the place of a commissioner shall become vacant from the same causes as the seat of a member of the council of the corporation.

The question to decide is, what are the causes which will render the seat of a member of the council of the corporation vacant?

Section 80 of the Consolidated Municipal Act provides that a high school trustee is disqualified from being a member of the council of the corporation.

Section 207 states some of the causes by which a member of the council renders his seat in the council vacant.

It appears to me that sec. 208 refers, not only to the causes rendering the seat of the member of the council vacant, after he becomes a member of the council, but also to his disqualification under sec. 80.

In my opinion, the causes which would render the seat of a member of the council vacant are set out in these secs., 207 and 208. In sec. 28 the words are, "or of his seat becoming vacant by disqualification or otherwise." What is the disqualification referred to in this section? The disqualifications referred to in the Act are those set forth in sec. 80: "No Judge . . . no high school trustee . . . shall be qualified to be a member of the council of any municipal corporation." These are disqualifications which effect a member of the council prior to his election, and which would render his seat vacant. If the commissioner of water and light must have the same qualifications as the member of the council, and his seat becomes vacant from the same causes as the seat of the member of the council of the corporation, then it appears to me that, under sec. 80, he is disqualified from becoming a waterworks commissioner, as well as for the causes set forth in sec. 207.

It was argued by the relator that there were reasons why a high school trustee should not become a commissioner of water and light, and it may very well be that conflicting interests might arise. The question of disqualification on similar ground, and reasons therefor, were set forth in *Regina ex rel. Boyes* v. *Detlor*, 4 P. R. 195. The case of a county councillor and a member of a school board came up in *Rex ex rel. Zimmerman* v. *Steele*, 5 O. L. R. 565, and *Rex*

ex rel. O'Donnell v. *Bloomfield*, 5 O. L. R. 596, where it was held that it was incompatible for a school trustee to qualify as a county councillor.

In my opinion, the words of sec. 41, sub-sec. 5, of the Waterworks Act provide for the disqualification of a commissioner, and refer to the causes for which his seat may become vacant, and these causes are those set forth in secs. 80, 207, and 208 of the Consolidated Municipal Act; and "commissioner" may be read and construed as referring to a member of council in the Consolidated Municipal Act, under sec. 54 of the Waterworks Act.

I hold, therefore, that Dr. Irwin, being a high school trustee, is disqualified from becoming a commissioner of water and light for the same municipality.

I, therefore, declare vacant the seat of Dr. Irwin as commissioner of water and light for the village of Weston.

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

C. W. Plaxton, for the relator.

HON. MR. JUSTICE MIDDLETON:—The Municipal Waterworks Act, R. S. O. 1897, ch. 234, sec. 41, as amended by 3 Edw. VII., ch. 24, sec. 5, and 6 Edw. VII., ch. 40, sec. 2, provides for the constitution of the board; and sub-sec. 5 provides that the place of a commissioner—that is, of a commissioner who has been appointed—"shall become vacant from the same causes as the seat of a member of the council of the corporation;" and sec. 43 provides that no commissioner shall be interested, directly or indirectly, in any contract. There are no sections expressly providing for the disqualification of commissioners. Elections are to be held in a manner similar to other municipal elections; and certain provisions are made by which the commissioners retire in rotation.

Section 207 of the Municipal Act provides that certain things shall cause a municipal councillor to vacate his seat in the council and that a new election may thereupon be ordered. This provision is quite apart from sec. 80 of the Municipal Act, disqualifying certain persons from holding office in the municipal council. Section 80 provides, *inter alia* that no high school trustee shall be qualified to act as a councillor; but it contains no provision preventing him from holding the position of water commissioner.

Section 54 of the Municipal Waterworks Act provides that "this Act shall be read and construed as part of the Municipal Act;" and the learned Judge has held that the effect of this section is to make applicable to water commissioners all provisions found in the Municipal Act with reference to the disqualification of councillors, *mutatis mutandis*.

I cannot follow him in this reasoning. Assumed that the 53 sections of the Municipal Waterworks Act had been embodied in the Municipal Act; I do not see how that would enable the sections dealing with the qualification and disqualification of municipal councillors to be read as applicable to water commissioners. It is significant that sec. 53 makes applicable to the election of Commissioners the sections of the Municipal Act relating to "elections." These sections, if regard is had to the divisions of the Municipal Act, commence with sec. 95, and are quite independent of the sections relating to qualification and disqualification of councillors.

In my view the appeal must be allowed, and the original application dismissed with costs.

Both parties proceeded upon the assumption that the *quo warranto* section of the Municipal Act applies to this case. I have not investigated that matter.

HON. MR. JUSTICE LENNOX. APRIL 19TH, 1913.

COLEMAN v. McCALLUM & CITY OF TORONTO.

4 O. W. N. 1127.

Municipal Corporations—Apartment House By-law—Definition Contained in Earlier By-law—Definition in Statute — Former Definition Adopted—2 Geo. V. c. 40, s. 10—"Private Temperance Hotel"—Mandamus Granted for Permit—Conditions — Undertaking.

LENNOX, J., granted a mandamus compelling the city architect of defendant corporation to issue a building permit for the erection of a structure at the corner of Sherbourne and Rachael streets, Toronto, holding that by-law 6061 of defendants passed by virtue of statute 2 Geo. V. c. 40, s. 10, prohibiting the erection of apartment houses upon certain streets must be taken to have adopted the definition of "apartment house" set out in an earlier by-law of the defendant corporation as to buildings, and not that of the statute under which it was passed, and that therefore the proposed structure was not a contravention of the by-law.

Motion for a mandamus compelling defendant, city architect of defendant corporation, to issue a permit for the

erection of a structure at the south-west corner of Sherbourne and Rachael streets, Toronto, according to plans filed.

W. N. Ferguson, K.C., for the applicant.

Irving S. Fairty, for the respondents.

HON. MR. JUSTICE LENNOX:—I think the applicant is entitled to a mandatory order, but not unconditionally.

On the 11th of March, 1907, the respondents, the City of Toronto, passed "No. 4861, A By-law for Regulating the Erection and to provide for the safety of Buildings;" and, subject to certain amendments not material to this application, this by-law continued in full force until the 1st of April instant. Under the head of "Definition of Terms," it was enacted by sec. 14. "The following terms of this by-law shall have the meaning assigned to them respectively. . . .

"Apartment or Tenement House. (32) A building which, or any portion of which, is or is intended to be occupied as a dwelling by three or more families living independent of one another and doing their cooking upon the premises."

. . . .

"Lodging House. (34) A building in which persons are accommodated with sleeping apartments, including hotels and apartment houses, where cooking is not done in the several apartments." The punctuation perhaps obscures the meaning a little but at all events it is plain that, for the purpose of "regulating the erection . . . of buildings" in the city of Toronto, suites or groups of apartments are divided into two classes, namely; (a) Suites in which the occupants do their own cooking—the building containing these is an apartment or tenement house; and (b) Suites in which the occupants do not do their own cooking—the building containing these is a lodging house.

Having thus eliminated from "Apartment House" a class of building which might otherwise have been called, which I think, would otherwise have been called, an apartment house, sec. 42 proceeds to provide for a special method of construction to prevent the spread of fire, in all apartment houses which are not fire proof, and to off-set the additional risk incident to the multitude of kitchens permitted in this class of building—precautions which are not enacted and which are obviously not so necessary in the case of a lodging house. This was the building law in Tor-

onto when the Legislature in 1912 amended sec. 541a of the Consolidated Municipal Act of 1903 as enacted by sec. 19 of the Municipal Amendment Act of 1904 by adding after clause (b) the following clauses:—

"(c) In cities having a population of not less than 100,000, to prohibit, regulate and control the location on certain streets to be named in the by-law of apartment or tenement houses and of garages to be used for hire or gain.

(d) For the purposes of this section an apartment or tenement house shall mean a building proposed to be erected or altered for the purpose of providing three or more separate suites or sets of rooms for separate occupation by one or more persons. 2 Geo. V. ch. 40, sec. 10."

Subsequently on the 13th of May, 1912, and without repealing or amending the definitions of "apartment or tenement house" and "lodging house" above set out, and with by-law 4861 still in force "for regulating the erection of buildings" in this city, the respondents, the city of Toronto, passed "No. 6061, A by-law to prohibit the erection of apartment or tenement houses, and of garages to be used for hire or gain, on certain streets" and by clause 1 prohibited, as the council had power to do, the erection of any apartment or tenement house upon property fronting upon Rachael, Sherbourne and other streets.

With this provincial law and the by-laws referred to in force the applicant in the month of March last filed plans and specifications and applied to the city council for permission to erect what he calls a temperance hotel upon property fronting upon Rachael and Sherbourne streets. There have been several alterations in the plans. Coleman originally intended and the application was launched for permission to erect a building in which cooking would be done in the several suites, and clearly an apartment or tenement house as defined by by-law 4861; a class of building prohibited upon these streets by by-law No. 6061. The plans as now on file shew only provision for one kitchen and dining room in the building and the applicant swears that finding his first application was contrary to by-law 6061: "I decided to erect and conduct on the said premises an hotel conducted as an ordinary licensed hotel is conducted, excepting that I have no license for the sale of liquor and do not intend to apply for the same.

3. Following out my changed scheme, I had the plans altered so as to cut out all the separate kitchens, sinks, etc.,

and provided on one floor reading rooms, dining rooms, lavatories, baths, wash-house, catering department, and servants quarters and lavatories similar to that provided for in the ordinary licensed hotel, and it is my intention, and the plan of my building is drawn for use in this manner only, that none of the guests at my hotel shall be allowed to wash in my rooms or to cook in my rooms, and that the work of their rooms shall be done by my servants, and the light shall be furnished by me, and the heat shall be furnished by me and the meals shall be furnished by me in the general dining room, and in general the whole building shall be under my control and supervision."

As shewn by Mr. Benk's affidavit in the end, as at the beginning, the permit was refused upon the ground that the erection of the proposed building "would constitute a contravention of by-law No. 6061." Upon the argument it was mentioned, but only as affecting the size of the bedrooms, that a new by-law was passed on the 1st of April instant. I have obtained a copy of this by-law 6401. It too is "a by-law for regulating the erection, and to provide for the safety of buildings," and it repeals No. 4861. Passed at a time when this motion was standing for argument, it may be that the city is not entitled to rely upon it, but as there were several stages in the applicant's proceedings I have decided to take this by-law into consideration in arriving at a conclusion. The only points to be noted are: (1) For "apartment or tenement house" this by-law adopts the definition contained in 2 Geo. V. ch. 40, sec. 10, above quoted. Under this definition, if the council had chosen to leave the matter there the narrowing effect of the definitions in the old by-law would have been avoided; and by a re-enactment of prohibitory by-law 6061 the probable object of the council might have been accomplished; (2) But, instead of this, this repealing by-law re-enacts, word for word, the definition of the former by-law as to what constitutes a lodging house, and thus again excludes from "Apartment or Tenement House" any building of the apartment house class in which cooking is not done or provided for in the several apartments.

(3) Under the new by-law bed-rooms shall have a floor area of at least one hundred square feet, in hotels, apartment, tenement, and lodging houses; and

(4) Section 42, for special safeguards against fire in apartment houses, is re-enacted.

After a very great deal of hesitation, I have come to the conclusion that perhaps the proposed building may be legitimately described as a temperance hotel. Hotels of course are not prohibited. I prefer, however, not to rest my decision wholly, or mainly, upon this view of the question.

Take it, however, that it is not an hotel, is the applicant entitled to be permitted to erect the proposed building upon the proposed site? I am of opinion that he is. The refusal, as I have stated, was based upon by-law No. 6061, but the question cannot be determined by this by-law alone. It prohibits the erection of an "apartment or tenement house" upon the site in question. When it was passed building by-law No. 4861 was in force and this latter defined and constituted an apartment house where separate cooking is not done, as I have already quoted, "a lodging house." The proposed building as now shewn by the plans and specifications and described in the affidavits is a lodging house within the meaning of this definition. That it is called an hotel is immaterial as an hotel, by the same definition is also a lodging house. It is manifest then that by-law 6061 prohibited apartment and tenement houses as defined under this caption in the building by-law, only, and not those designated lodging houses in the same building by-law.

It was argued that you must adopt the unlimited description of the statute of 1912, but this contention is based on a misconception of the function of the statute. The statute is not intended to prohibit anything. It gives the power to prohibit and limits its extent. Within that limit the council can act, short of that limit they may stop—as they did here. Beyond that limit they cannot go. To adopt the full measure of the statutory definition, or rather limitation, the council had only to repeal the definitions quoted; and failing to do this these definitions govern.

Is the situation altered by the new by-law? I cannot see that it is, and I have already indicated the reason, namely, that it re-enacts the former definition of a lodging house. A lodging house as defined under the former by-law was not prohibited by No. 6061. A lodging house under the new by-law is just what it was under the old and is nowhere prohibited.

The wisdom or unwisdom, or the fairness or unfairness of the powers conferred by the Legislature, or, the exercise

of these powers by the council, are not matters for me to deal with, but statutes, and *a fortiori* by-laws, purporting to control or take away rights ordinarily incident to ownership, quasi-expropriation without payment, confiscation as it is often called, must be construed strictly and the meaning must not be left in doubt—they must be definite and certain to all intents.

On the other hand having regard to the easy stages by which the applicant has developed his present proposals there should be some guarantee of the good faith of the applicant and that not only will a building be erected of the character now indicated but that afterwards it will be used for the purposes and in the manner declared.

Therefore upon the applicant amending the plans on file so as to provide that each of the bed-rooms shall have a clear floor area of 100 square feet at least and upon undertaking by his counsel that the building in question shall not at any time without the consent of the municipality or the Court be diverted from the uses and purposes or be occupied or used in a manner inconsistent with the uses and purposes now declared by the applicant and that in the event of the sale of the property due notice of this undertaking and of the order now to be made shall be given to the purchaser and he will be required, in and by the conveyance to him, to bind himself and his heirs and assigns to observe and abide by the conditions above set out and such order as the Court may make.

And the applicant for himself and his heirs and representatives in estate undertaking to abide by such order or judgment as the Court may make or pronounce touching the matters hereby provided for an order of peremptory mandamus reciting or embodying the foregoing conditions and an undertaking will issue to the purport and effect in the notice of motion claimed.

There will be no costs.

HON. MR. JUSTICE MIDDLETON. APRIL 18TH, 1913.

RE SMITH.

4 O. W. N. 1115.

Will—Construction—Codicil—Overriding of Terms of Will by — Annuity—Corpus.

MIDDLETON, J., *held*, that a codicil giving a legatee a certain annuity overrode the provisions of the will giving her a share in the corpus of the estate.

Motion to determine certain questions arising from the construction of the will of the late Emma Josephine Smith.

R. J. McLaughlin, K.C., and S. S. Smith, for the executors.

E. D. Armour, K.C., D. C. Ross and A. H. Beaton, for Vernon Smith, Elias Smith and Carl Smith.

C. A. Moss, for Dale M. King.

HON. MR. JUSTICE MIDDLETON:—The testatrix died on the 9th August, 1896, having made her will on the 19th October, 1889, and added a codicil on the 16th July, 1894. She left her surviving her husband, three sons and one daughter. The daughter was the youngest member of the family. At the time of the making of the will she was about ten years old, and at the time of the codicil about fifteen.

The will itself presents no difficulty. It is a well drawn document, prepared by a solicitor. The testatrix, after some minor gifts, divides her estate into two parts; the first covering property recently transferred to her by the trustees of the estate of the late Robert Charles Smith. A deed is produced dated August 6th, 1889, which was very shortly before the date of the will, shewing that certain Port Hope property is what is so designated. This property is dealt with by clause seven of the will. It is given to the husband, the executor, in trust, to receive the income for his own use during his life. After his death it is to be equally divided among the children, to be transferred to them after the death of the husband as they respectively attain age. The income—presumably after the husband's death—to be used for the maintenance of any child under twenty-one. If any child dies before attaining age, leaving a child or children, such issue shall take the parent's share.

By clause eight, furniture, books, etc., are to be divided among the children.

By clause nine, the residue of the property of the testatrix is dealt with. This consisted of some Toronto property of very considerable value, and the investments of the testatrix. It is given to the trustee to be held till the youngest surviving child attains the age of twenty-one years. The income is to be a fund to provide for the maintenance of the minor children. If there is a surplus, the husband may retain what is necessary to make up his income, derivable from the first trust devised, to six hundred dollars; and any residue then remaining is to go for the benefit of the child or children out of whose prospective shares the same may have arisen. When the youngest child attains the age of twenty-five this second trust fund is to be then realised and the proceeds divided equally among the children and the issue of such of the children as may then be dead; a sufficient fund being set apart to maintain the income of the husband at six hundred dollars.

The will also contains a provision authorising the husband to spend $150 per annum in continuing his life insurance.

The codicil appears to have been prepared by the testatrix herself or by someone entirely unskilled in the preparation of legal documents. It is prefaced by the statement: "Not feeling satisfied with the provision made in my will for Bertha Hope Smith, my only daughter, I hereby add this codicil." This would lead one to expect that the codicil would confer an additional benefit upon the daughter. The testatrix proceeds; "I desire the sum of $600 to be paid to her out of my estate . . . until she attains the age of twenty-five years. If at that time she should be married, then for the remainder of her life time to pay her $400, "unless the income realised through or by my property on division should yield more to each surviving child. Should such be the case, then I authorise such division to be made." The testatrix then proceeds, "Bertha having attained the age of twenty-five years as aforesaid, should Bertha remain unmarried, then she is to be paid the sum of $600 a year . . . for the remainder of her life."

These provisions I think concern entirely the income derived from the estate, save that Bertha is to receive her $600 either from the income or from the *corpus*. The divi-

sion referred to is a division of income and not a division of *corpus*. The estate of the testatrix, it is said, yielded by way of income about the sum necessary to pay the $600 to the husband, the $150 for life insurance, and the $600 to Bertha; $1,350 in all; so that the effect of this provision, unless the estate greatly increased in value, would be practically to tie up the whole estate during the lifetime of Bertha.

Bertha attained the age of 25 in the year 1905, and was then unmarried. She married on the 10th October, 1911, and died on the 13th September, 1912. Her husband, Dale King, as her executor, is entitled to receive her share in the estate. No question arises as to arrears of income. The question which presents itself is the right of King, as the executor of Bertha, to a share of the *corpus*.

The difficulty is occasioned by the clauses of the codicil following the provisions dealing with Bertha's annuity. These are as follows: "Whatever my estate realises over and above the payment of this bequest to Bertha and the provision made for my husband and executor in my will, is to be equally divided between my surviving sons or their surviving child or children as provided in my will. This bequest to Bertha is to supersede all those made in my will, with the one exception of the provision made for J. D. Smith, my husband."

It appears to me that the result is plain. The whole will is abandoned except in so far as it provides for the husband. The annuity to Bertha is substituted for her quarter interest, and whatever remains after providing for the husband and providing for the daughter is to go to the surviving sons or their children "as provided in the will" which is referred to to explain this substitutional gift, but for no other purpose.

The only thing that causes hesitation is the question suggested by the preamble to the codicil; but this cannot over-ride the plain words used; and it may well be that the testatrix thought that she was making a more satisfactory provision for her daughter when she gave her an annuity, and made this a first charge upon her estate.

I cannot surmise why no provision is made for possible issue of the daughter, while careful provision was made for the issue of the sons. All I can say is that no such provision is found in the will; and it may be that the testatrix

preferred that her estate should pass to her sons and their issue rather than by any possibility to a son-in-law whom she had never seen.

The costs of all parties may come out of the estate.

MASTER IN CHAMBERS. APRIL 17TH, 1913.

SWALE v. CAN. PAC. RW. CO.

4 O. W. N. 1110.

Third Party—Order of Directions—No Right to Appeal Reserved — Amendment of Order—Con. Rules 312 and 640—Terms—Costs —Indemnity.

MASTER-IN-CHAMBERS allowed an order of directions for the trial of a third party issue to be amended after trial had, so as to give the third parties the right of appeal from the judgment herein (24 O. W. R. 224) upon terms as to costs, etc.

Gilleland v. *Wadsworth*, 1 A. R. 82, and *Peterkin* v. *McFarlane*, 4 A. R. at pp. 44 and 45, referred to.

Motion by third parties, Suckling & Co. Ltd., to amend an order of directions providing for the trial of the third party issue by inserting a clause therein allowing them to appeal from the judgment herein, 24 O. W. R. 224.

M. Lockhart Gordon, for third parties.

Shirley Denison, for the defendants.

W. M. Hall, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—In this case after the judgment reported in 25 O. L. R. 492, an order was issued on the application of the defendants made on 4th March, 1912, for directions as to the trial of the third party issue.

This order though dated on 4th March was not really issued on that day. The entry made in my book is "order to go in usual form when settled by parties." This was apparently not done until 30th March which is the date of entry and of admission of service on solicitors of plaintiff and third parties.

The case came on for trial about a year later and the judgment then given is to be found in 24 O. W. R. 224.

From this judgment the third parties launched an appeal in the name of the defendants, who thereupon moved to quash the appeal on the ground that the order of 4th March, 1912, did not give any such right. The defendants' motion

was thereupon enlarged to allow the third parties to move before me to amend the order as to directions so as to conform to the order made in *Deseronto* v. *Rathbun*, 11 O. L. R. 433. In my understanding and use of this term this is what was meant by "the usual form" it having been settled by Sir W. R. Meredith, C.J.O., in that case.

The motion was made under C. R. 640. But I hardly think it applies under the facts of this case. There was no "accidental slip or omission." What was done was done after a good deal of discussion and various attempts at settlement of the order as is shewn by the lapse of over 3 weeks between 4th and 30th of March.

But perhaps a remedy can be given under the very wide language of C. R. 312 and the decisions on that rule and the provisions of 36 Vict. ch. 8, where it originally appeared.

I refer especially to the judgment of the Court of Appeal in *Gilleland* v. *Wadsworth*, 1 A. R. 82, and *Peterkin* v. *MacFarlane*, 4 A. R. at pp. 44 and 45. In both of thoses cases an appeal was allowed from the refusal of the trial Judge to allow an amendment "To do otherwise would be to avow that a decision by which a party was finally bound was given not according to the right and justice of the case but according to what may have been an error or a slip," per Patterson, J.A. I refer also what I said in *Muir* v. *Guinane*, 6 O. W. R. 65, 10 O. L. R. 367, on a similar question.

See too, Yearly Practice, 1912, (Red book) vol. 1, 352, and cases cited.

As the order of 4th March, 1912, provided in clause 1 that "the third parties shall be bound by the result of the trial between the plaintiff and the applicants (defendants)" the third parties desire leave to appeal not only against the defendants' judgment as against them but also to be allowed to shew if they can that the judgment in favour of plaintiff is excessive.

It would seem contrary to natural justice that any party should be bound by a judgment without the right to appeal therefrom, unless he has expressly consented to do so.

Here there is no such consent, and it does seem that this is just a case in which C. R. 312 should be applied to allow the third parties to question the judgment by which they are bound.

This can be done on proper terms—which will be to give to defendants proper indemnity both as to the judgment and the costs which they have been ordered to pay to

the plaintiff and those which the third parties are to pay to defendants to be settled by one of the Registrars of the Court or by myself if the parties so desire.

The costs of this motion will be costs in the appeal to the plaintiff and defendants in any event.

MASTER IN CHAMBERS. APRIL 17TH, 1913.

TROWBRIDGE v. HOME FURNITURE CO.

4 O. W. N. 1140.

Costs—Security for—Admission of Liability by Defendants—Counterclaim or Set-off—Defendants in Position of Plaintiffs as to.

MASTER-IN-CHAMBERS *held*, that where defendants admit owing a plaintiff resident out of the jurisdiction $2,500, but claim a set-off or counterclaim for more than this amount, security for costs cannot be ordered as defendants are practically plaintiffs in respect of their counterclaim.

After the decision in this case reported in 24 O. W. R. 181, the plaintiff cross-examined Mr. Brown—at some length—and the defendants motion for security for costs was further argued.

H. S. White, for the defendant.

J. F. Boland, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—In his cross-examination Mr. Brown admits that the plaintiff's share of the profits to which he is *prima facie* entitled is "Approximately $2,500 according to the agreement (Q. 165)."

If the matter rested there it is obvious that no security could be ordered. And although Mr. Brown alleges that the defendants assert a counterclaim to the amount of "$3,508, according to this list in front of me now," Q. 170—yet this cannot be considered to offset the $2,500, admittedly due to plaintiff. As to the defendants' counterclaim or set off, they are really *quasi* plaintiffs.

The motion will, therefore, be dismissed with costs in the cause.

MASTER IN CHAMBERS. APRIL 15TH, 1913.

McPHERSON v. U. S. FIDELITY CO.

4 O. W. N. 1140.

Judgment—Speedy Judgment—Action on Bond—Con. Rule 603 — Good Defence on Merits Alleged.

MASTER-IN-CHAMBERS refused to make an order for judgment under Con. Rule 603 in an action upon a bond given as security in an interpleader issue where a good defence upon the merits was alleged.

Smyth v. *Bandel*, 23 O. W. R. 798, followed.

Motion by plaintiff for judgment under Con. Rule 603, in an action on a bond given as security in the interpleader issue lately decided by the Judicial Committee of the Privy Council and reported in the current volume of the reports at p. 149.

W. Laidlaw, K.C., for the plaintiff.

G. H. Kilmer, K.C., for the defendants.

CARTWRIGHT, K.C., MASTER:—As appears in the affidavit filed in answer and the exhibits thereto there are two main defences suggested to this action. The first goes to the whole matter, and in an attempt to shew that the ground of the plaintiff's claim was destroyed by certain dealings of his with the matter out of which all the subsequent proceedings arose—(see paragraphs 12 and 13 of affidavit).

The other submission is that even if this defence fails, the plaintiff is not entitled under the true construction of the final judgment to the full amount of the bond, but at most, to less than one-half, and that in any case the amount due has not been ascertained by legal direction. The application of Con. Rule 603, comes up from time to time—but the decisions tend rather to restrict than to enlarge its application.

The last case is one of *Smyth* v. *Bandel*, 23 O. W. R. 798, where the cases are cited—cases as will be seen of the very highest authority. The decision above cited was affirmed on appeal by Middleton, J., on 20th December last.

In *Cod* v. *Delap* 92 L. T. N. S. 510, cited and followed by the Court of Appeal here in *Jacobs* v. *Beaver*, 17 O. L. R. 496, at p. 501, it was said by Halsbury, L.C.: "There is an

affidavit by the person sued that he has a good defence. I do not say that he has. I know nothing more about it than this; that in the state of conflict which there is between the parties—there is a question to be tried, and not to be stifled by an order of the Court under order XIV."

That language seems as applicable to the present motion as it was in *Smyth* v. *Bandel, supra* (where in the result the defendant did not even appear at the trial as I was informed).

So far as I can see this Rule 603 is useful chiefly to find out what defence is going to be set up, if defendant will adhere to his affidavit on a cross-examination. On some cases it enables plaintiff to get judgment where a defendant is too honest to set up a fictitious defence—sometimes it is apparently used to allow a defendant to give a consent to judgment without appearing to do so. I have a recollection of a case in which judgment was obtained in this way against a complaisant defendant on the same day that the writ was issued. It cannot be applied if there is a possible defence alleged. The defendants also state that they have been indemnified by the Temiskaming Lumber Co. and others, and wish to have them made third parties—and that plaintiff runs no risk of failing to recover all he may be found entitled to.

The motion must be dismissed with costs in the cause.

Leave to appeal on Friday is desired.

MASTER IN CHAMBERS. APRIL 28TH, 1913.

WHITE v. HOBBS.

4 O. W. N.

Trial—Motion to Change Venue—Balance of Convenience—Delay—Jury Notice—Unfairness of—Order Made on Terms of Abandonment of Jury Notice.

MASTER-IN-CHAMBERS changed the venue of an action from London to Toronto upon the balance of convenience upon the defendant agreeing to strike out his jury notice in order that the trial might be expedited.

Motion by defendant residing in the township of Scarborough to change the place of trial to Toronto from London.

T. N. Phelan, for the motion.

E. C. Cattanach, contra.

CARTWRIGHT, K.C., MASTER:—The plaintiffs seek to enforce an agreement given by defendant for purchase of a traction engine. Default is admitted, but it is said that the engine would not do the work required, and for which it was bought, to the knowledge of the plaintiffs. The venue is laid in London, where the plaintiff company carries on business.

The defendant used the engine for a month or six weeks in threshing for neighbouring farmers. He alleges that the engine used an excessive quantity both of coal and water—and as these are apparently supplied by the customers, this fact would seriously injure his business, now of some 20 years standing. He also counterclaims for $500 damages for loss of profits and for the custom of his former employers.

In the affidavit in support of the motion he states that he will call three of those who acted as engineers and six of the farmers who employed him to thresh. All the nine will speak of the excessive consumption of fuel and water and of the inability of the machine to do its work properly. These witnesses all live in the township of Scarborough except one, who is a resident of Toronto.

The secretary of the company makes an affidavit in answer in which he says the company will require 10 witnesses all resident at London, where the engine in question also is lying in the G. T. R. yard.

If the matter rested there the motion must fail. Since these affidavits were filed both parties have been examined for discovery. From this it appears that only 3 of the witnesses spoken of by the company's secretary are material. These are Lumley, who went down to see the engine after the defendant had complained of its inefficiency, and two experts, who tested it since this motion was launched, and who are prepared to testify to the character of the engine, and as to the quantity of coal and water required during a continuous test of three hours.

From question 130 in defendant's examination it seems that the agreement he signed had the force of a chattel mortgage, and is registered as such. This fact and the pending litigation will prevent defendant from preparing himself for the coming season, if the action is tried by a jury, as there will be no jury sittings either here or at London until after the long vacation.

It is of great importance to defendant to escape such a long delay, and his counsel offered to have a trial at the May sittings of the County Court here before a jury. As might be expected plaintiff does not agree to this. The company does not think it can have a fair trial before a jury of this county as against one of the farmers.

I assume that the jury notice was given by defendant. If he is really anxious to have a speedy trial, he can do so by withdrawing the jury notice, and then the case can be transferred here and tried at the non-jury sittings.

This will accomplish what will be advantageous to both parties and will obviate the objection of the plaintiff company to a trial before a possibly adverse jury.

The costs of the motion will be in the cause.

HON. MR. JUSTICE MIDDLETON. APRIL 29TH, 1913.

TUCKER v. BANK OF OTTAWA.

4 O. W. N.

Action—Motion to Stay—Security for Costs—Claims against a Bank for Alleged Torts—Assignability of.

MASTER-IN-CHAMBERS dismissed a motion to stay an action or for security for costs where plaintiff had made an assignment for the benefit of creditors upon the ground that the damages recoverable upon the claims of tort made in the action were not in any case assignable and so the action was clearly being prosecuted for the plaintiff's own benefit.

White v. *Elliott*, 30 U. C. R. 253, and other cases referred to.

MIDDLETON, J., affirmed above judgment, costs to plaintiff in cause.

Appeal by defendant from order of the Master in Chambers, dismissing motion to stay action, or for security for costs, argued on 18th April, 1913.

Grayson Smith, for the defendant.

F. Aylesworth, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—The plaintiff claims that the bank unlawfully charged to his account certain notes not yet due and misappropriated certain money the proceeds of certain discounts whereby he was compelled to

assign for the benefit of his creditors, and so his credit was damaged for which he claims $60,000, and his character was damaged for which he claims $60,000, and his business was damaged for which he claims $30,000—$150,000. If the statement of claim discloses no cause of action it cannot be attacked in this way, and Mr. Smith does not base his appeal upon this ground, but contends that an assignment having been made, the action ought to be stayed. The action is the plaintiff's action, and be it well or ill founded, there is no ground for saying he is a nominal plaintiff put forward by others. The first two claims (if they can be enforced) and probably the third, are claims for purely personal damages such as would not pass to the assignee—*White* v. *Elliott*, 30 U. C. R. 253; *Dunn* v. *Irwin*, 25 U. C. C. P. 111; *Smith* v. *Coml. Union*, 33 U. C. R. 529. *Hodgson* v. *Sidney*, L. R. 1 Ex. 313 is a case the parties may well study as indicating that the damages which the plaintiff here seeks to recover are too remote.

The present motion fails and must be dismissed with costs to the plaintiff in the cause. This will not prejudice any properly conceived motion.

HON. SIR G. FALCONBRIDGE, C.J.K.B. APRIL 25TH, 1913.

RE PATERSON AND CANADIAN EXPLOSIVES LIMITED.

4 O. W. N. 1175.

Sale of Land—Deficiency—Abatement of Purchase Money—Vendor and Purchaser Application—Jurisdiction—Mention of Survey in Agreement—Printed Form — Absence of Mala Fides—Specific Parcel Intended.

FALCONBRIDGE, C.J.K.B., refused upon a vendor and purchaser application to permit the purchasers to retain a portion of the purchase money agreed to be paid for lands purchased as being 100 acres more or less, but in which there was actually only 90 45-100 acres, upon the ground that the parties did not contract as to acreage, but as to the specific parcel of land sold.

Wilson Lumber Co. v. *Simpson*, 22 O. L. R. 452, 23 O. L. R. 253, followed.

Application under the Vendors and Purchasers' Act for an order authorizing the purchasers to retain out of their purchase money the sum of $2,005.50 for compensation by

reason of the alleged deficiency in the area of the lands described in the contract for sale between the parties.

In the contract the land was described as being "the north half of lot 31, con. 1. township of Scarboro, county York, together with all improvements thereon, being 100 acres more or less."

The area of the land, as shewn by actual survey, was 90 45/100 acres. The purchase money is $21,000; and the purchasers claimed that only the sum of $18,994.50 should be paid.

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

R. J. McLaughlin, K.C., for the vendors.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Mr. McLaughlin contended that I had no jurisdiction, on this application, to decide in effect that the purchasers are entitled to specific performance with abatement of purchase money and that the compensation mentioned in 10 Edw. VII., ch. 58, sec. 4, is only compensation arising out of the contract itself. I do not pass upon this objection, because I think the case is not one in which. in any view of the case, I can give relief to the purchasers.

The facts of the case are as follows: The said north half was patented on the 23rd of September, 1836, to one Robert Galbraith; and in the patent the land is described thus: "All that parcel or tract of land situate in the township of Scarboro in the county of York, in the Home District of our said Province containing by admeasurement one hundred acres, be the same more or less, and being the north half of our Clergy Reserve, lot number thirty-one in the said township of Scarboro."

The said half lot has always been described in the same manner, and always remained in the family of the original patentee until the transactions now in consideration.

By writing bearing date 28th June, 1912, F. D. Galbraith, a descendant of the original patentee, entered into an agreement for the sale to Paterson, the present vendor, of the said half lot, describing it in the same way, for the sum of $18,000. Within very few days the present agreement of purchase was made. The agreement between Galbraith and Paterson has never yet been consummated by

the making and delivery of a deed. In other words, Paterson simply sold his option or agreement at a profit of $3,000. There is no allegation whatever of any want of good faith on the part of any of the persons interested.

Mr. Denison based an argument on the following sentence in the purchasers' offer: "You shall not be bound to produce any abstract of title, or any title deeds, or evidence of title or *survey*" (the italics are my own) "except such as you may have in your possession." The contention is that the use of the words "or survey" contemplates the making of a survey before closing the matter, and that, therefore, this constitutes a contract made with a view to a possible abatement.

The words in question appear as part of a real estate broker's printed form, and I do not think that they are open to the construction which the purchaser seeks to give to them.

The cases on this subject are reviewed and discussed in *Wilson Lumber Company* v. *Simpson* (1910), 22 O. L. R. 452; in the Divisional Court (1911), 23 O. L. R. 253.

As I said before, there is no fraud or suggestion of fraud on the part of the vendor. He simply turned over what he had acquired the right to purchase using the *ipsissima verba* of his own contract; and I do not think that there is anything in the contract itself to raise a presumption that there should be an abatement or even a survey of the property. The purchasers' application is, therefore dismissed. Under all the circumstances I shall not make any order as to costs.

HON. MR. JUSTICE KELLY. APRIL 26TH, 1913.

RE NORTH GOWER LOCAL OPTION BY-LAW.

4 O. W. N. 1177.

Municipal Corporations—Local Option By-law—Motion to Quash — Passage within One Month of Publication—Deputy Returning Officer Strong Advocate of By-law—Illiterate Voter — Blind Voter—Omission to take Declaration—Consolidated Municipal Act, ss. 171, 204—Voters' List—Certificate of County Judge as to—Refusal to go behind—Costs.

KELLY, J., *held*, upon a motion to quash a local option by-law that where no one had been prejudiced thereby the fact that the by-law had been passed within a month from the first publication thereof, by a few hours only, was not a fatal objection to the same.

Re Duncan and Midland, 16 O. L. R. 132, followed.

That the fact that one of the Deputy Returning Officers was a strong advocate of the passage of the by-law was not a disqualifying circumstance.

That the omission of an illiterate person to take the declaration provided by section 171 of the Municipal Act is a mere irregularity in the mode of taking the vote and does not avoid the same.

Re Ellis and Renfrew, 23 O. L. R. 427, followed.

That the certificate of the County Judge as to the correctness of the revised voters' list should not be gone behind and the steps investigated by which he arrived at his conclusion.

Ryan v. *Alliston*, 18 O. W. R. 131, followed.

Application to quash a local option by-law.

F. B. Proctor, for the applicant.

G. F. Henderson, K.C., and George McLaurin, contra.

By the notice of motion the applicant rests his case on six objections:—

1. That the by-law did not receive a three-fifths majority of the votes of the duly qualified voters.

2. That the voting upon the by-law was not conducted in accordance with the provisions of the Municipal Act, and of the Liquor License Act, and that persons were allowed to vote, whose names did not appear upon the last revised Voters' List of the municipality as persons qualified to vote at municipal elections.

3. That unauthorized names were entered upon the list of voters used in voting upon the by-law, which names had not been entered upon the list of voters in accordance with the provisions and requirements of sec. 17 and subsequent sections of the Ontario Voters' Lists Act.

4. That illiterate voters were allowed to vote on the by-law without first having taken the declarations required by sec. 171 of the Consolidated Municipal Act.

5. That the by-law was finally passed within one month after its first publication in a public newspaper, contrary to the provisions of sec. 338(3) of the Consolidated Municipal Act.

6. That Norman Wallace, who was appointed and acted as deputy returning officer for polling subdivision No. 1 of the township upon the taking of the vote, was disqualified by interest from holding that office.

Objections 1 and 2 rely for their effect upon the validity of the other objections or some of them.

The first publication of the by-law was on December 13th, 1912, and the by-law was finally passed by the municipal council on January 13th, 1913.

The result of the vote as declared by the clerk was that 297 votes were cast in favour of the by-law and 191 against it, being a total of 488 votes. A scrutiny having taken place before the senior County Court Judge of the county of Carleton, he, on February 19th, 1913, certified as the result thereof as follows:—

Total number of votes cast 487
For the by-law 295
Against the by-law 192 487

And that on an enquiry as to the qualifications of certain persons who had voted, he found that four such persons had not, on the date of the election, the necessary qualifications, and he deducted these four, thus reducing the total number of votes cast to 483.

For the by-law 291
Against the by-law 192 483

On this finding, which I adopt, the by-law was carried by a majority of 1-1/5 votes.

Objection 5. To this objection—that the by-law was finally passed within one month after the first publication, *Re Duncan and the Town of Midland*, 16 O. L. R. 132, and particularly that part of the judgment of Osler, J., appearing on p. 135, has special application. I need not repeat the line of reasoning adopted in the judgments of the Court of Appeal in this case. In the present case the final passing of the by-law on January 13th, did not in any way interfere with or prejudice the rights of any elector or other person

having an interest in the result of the voting. It did not take away the right to demand a scrutiny; and it is not conceivable, and it is not alleged, that the result would have been different had the final passing been delayed for a few hours until the full month had elapsed from the first publication.

The essential thing in the submission and passing of what is known as a local option by-law is the expression of the will of the persons entitled to vote thereon, and when, as in this case, at least three-fifths of the qualified voters who have voted have expressed themselves in favour of the passing of the by-law, the statute makes it plain that it is the duty of the council to finally pass the by-law, and on neglect or refusal to do so, they may be compelled by mandamus to take that action. Their duties in that respect are of the most formal kind.

If what the applicant characterises as a premature passing of the by-law had in any way affected the merits of the vote or deprived persons entitled to object thereto of any of their rights, a different conclusion might be reached; but under the present circumstances I see no reason for giving effect to this objection.

Objection 6. The facts sworn to to substantiate this objection are, that Wallace, a deputy returning officer, was a strong and active worker in endeavouring to procure the passage of the by-law; that he was largely instrumental in obtaining signatures to the petition for its submission to the electors; that it was presented by him to the municipal council, and that he held the position of secretary in the local option organization, which carried on an active propaganda for the passing of the by-law. There is no evidence, nor has it even been hinted, that in the performance of his duties as deputy returning officer Wallace committed any act which could be considered illegal or which would have had the effect of invalidating any vote or votes or frustrating the will of the voters. It is well known that at times persons appointed as deputy returning officers and poll clerks, entertain strong views in favour of one or the other side of the question voted on, but I know of no express prohibition against such persons holding such positions. This objection is not sustained.

Objection 4. The facts relied upon in support of this objection are, that three voters were incapacitated from mark-

ing their ballots—two, Rusheleau and Trimble, through illiteracy, the other, Pettapiece, by reason of blindness—and that their ballots were marked for them by the deputy returning officer without requiring them to make the declaration required by sec. 171 of the Consolidated Municipal Act. This objection is fully met by the decision of the Court of Appeal in *Re Ellis and the Town of Renfrew*, 23 O. L. R. 427, where it is held not to be a statutory condition precedent to the right of an illiterate person to vote that he should take the declaration required by sec. 171, that the omission to take the declaration is merely an irregularity in the mode of receiving the vote, and so covered by the curative clause of the statute sec. 204. The reasons for the conclusions arrived at by the majority of the Court in that case are set out in the judgments of Garrow and Magee, JJ., and deal with declarations both of illiterate persons and of those incapacitated through blindness.

Objection 3. To affect the general result of the vote it is necessary that at least four of the 483 votes allowed by the County Court Judge should be disallowed, or in other words that the total vote of 483 be reduced to 479 or less. The disallowance of the votes of Dalglish and McQuaig here objected to would not alter the general result. Notwithstanding this, however, I express the opinion that the objection cannot be sustained. The ground of objection is that the procedure prescribed by the Voters' List Act (7 Edw. VII., ch. 4), to be adopted in adding names to the list, was not followed. It is not contended that, apart from noncompliance with the terms of the Act in that respect, Dalglish and McQuaig were not persons who were then entitled to have their names on the list as voters. There names not appearing on the original list, an application was made to the Judge of the County Court to have them added, and they were so added by him, after which he certified to the revised list as required by section 21 of the Act. I do not think I am required to go behind this certificate and examine into the sufficiency of the various steps by which the judge arrived at his results. *Ryan* v. *Alliston* (1911), 18 O. W. R. 731; 7 Edw. VII., ch. 4, sec. 24.

The applicant on all grounds fails, and the motion is dismissed with costs, such costs to include only one counsel fee.