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COURT OF APPEAL.

MARCH 14TH, 1911.

* EARL v. REID.

Negligence—Collapse of Building—Injury to Person in Neighbouring Building—Finding of Jury—Independent Contractor—Duty and Responsibility of Owner—Evidence—New Trial—Costs.

Appeal by the defendant Reid from the order of a Divisional Court, 21 O.L.R. 545, 1 O.W.N. 1067, affirming the judgment of LATCHFORD, J., at the trial, in favour of the plaintiff, upon the findings of a jury. Leave to appeal to the Court of Appeal was granted by MACLAREN, J.A. (1 O.W.N. 1101), upon the appellant undertaking to pay the costs of the appeal in any event. The action was for damages for injury sustained by the plaintiff by the collapse of the defendant Reid's building, the plaintiff being in a neighbouring building when the collapse occurred.

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

Sir G. C. Gibbons, K.C., and G. S. Gibbons, for the appellant.

J. F. Faulds and P. H. Bartlett, for the plaintiff.

GARROW, J.A.:—The facts appear to me . . . to have been very imperfectly developed. The architect was not called nor other expert evidence given to account for the disaster. All that was really proved as to it was that the wall was removed and pillars substituted, and then, in a few days, the collapse.

Much was said at the trial, and again before us, by counsel for the plaintiff about the alleged weakening of the wall by the arches, and yet not a witness was called to prove that the wall broke down because of that, or even that an arch was found broken down after the accident in such a way as to indicate

*To be reported in the Ontario Law Reports.

that it had given way because of the pressure caused by the changes. . . .

A motion for a nonsuit was made at the close of the plaintiff's case, and renewed at the close of the whole case, upon the grounds that the evidence shewed that Smyrles was the occupant; that he at least stood in the relation of independent contractor to the defendant Reid; and that there was no evidence of negligence on the part of the defendant Reid. . . .

[Extracts from the charge of LATCHFORD, J., to the jury.]

Objections were taken by the defendant's counsel, among other things, to the reference made by the trial Judge to the arches, which had not been connected by the evidence with the accident—an objection, in my opinion, well grounded and of a somewhat serious nature.

Other objections were urged more or less in line with the defendant's contention on the motion for nonsuit.

An owner may be liable, although out of possession, if he created or permitted to be created the nuisance complained of, or if the injury complained of was brought about through the defective condition of the premises which it was his duty under a covenant with this tenant to repair: see Todd v. Flight, 9 C.B. N.S. 379; Rich v. Basterfield, 4 C.B. 783; Payne v. Rodgers, 2 H. Bl. 348; Regina v. Pedley, 1 A. & E. 822. . . .

The changes and alterations which undoubtedly brought about the disaster were none the less Reid's because he did not perform the work with his own hands. He certainly authorised and indeed commanded it. . .

[Reference to Harris v. James, 45 L.J.Q.B. 545.]

I agree with Teetzel, J. (delivering the judgment of the Divisional Court), that the defendant Reid may, in the circumstances, claim to stand in the same position as one who has had work done by an independent contractor. But it is never, so far as I have seen, a good defence to say that a particular thing causing damage was done for the person charged by an independent contractor. Such a defence, based on the law of master and servant, or respondeat superior, extends only to injurious things arising in the course of the operation, and not in every case even to them, for there are many exceptions.

The law upon the subject is briefly but satisfactorily discussed by Williams, J., in Pickard v. Sears, 10 C.B.N.S. 470.

Here the injury does not arise collaterally, but is the direct consequence of the very thing contracted to be done, and for which, therefore, its author, the defendant Reid, is responsible, unless otherwise excused.

The defendant's real defence must be that in doing as he did he took reasonable care. He is not in the position of an insurer, liable at all hazards. . . .

[Reference to Hughes v. Percival, 8 App. Cas. 443, 445.]

That case was after Dalton v. Angus, 6 App. Cas. 740, and in its facts more nearly approaches this than does either Dalton v. Angus or Bower v. Peate, 1 Q.B.D. 321 . . . ; although in all of them the invasion of a right of property, in other words, a trespass, was an element, and in the first two a prominent element, which suggests that caution must be exercised in applying them to cases where no similar right is involved, a point referred to by Lord Blackburn, at pp. 446, 447, in Hughes v. Percival. Negligence is not an element in trespass; the only question is, was the wrongful or illegal act committed? See Sadler v. South Staffordshire, etc., Tramway Co., 23 Q.B.D. 17.

The result is, that the question here appears to be one of fact —did the defendant, by employing an independent contractor and by adopting and acting upon a plan prepared by an architect, do all that a reasonable man, in such circumstances, should have done? That was a question for the jury, to whom, in my opinion, with deference, it was not clearly submitted in the learned Judge's remarks. . . .

For these reasons, I very reluctantly have come to the conclusion that the only thing we can do is, if the defendant Reid desires it, to send the case back for another trial; the costs of the last trial to be costs in the cause to the finally successful party, the costs of this appeal having been provided for by the order granting leave to appeal. And in reaching this conclusion I am influenced to some extent by the circumstance that the jury may have been misled by the learned Judge's remarks, not, I think, warranted by the evidence, concerning the arches.

If the defendant does not, within one month, elect to accept a new trial, the appeal should be dismissed with costs.

MACLAREN, J.A.:—I am unable to find any principle upon which the defendant can be held liable in this case. It has long been well-settled law that, in such a case as this, it is the tenant or occupier, and not the landlord, who is responsible to third persons: Woodfall on Landlord and Tenant, 17th ed., p. 797; Cheetham v. Hampson, 4 T.R. 318; Bishop v. Trustees, 1 E. & E. 697. . . .

My opinion would be, that the plaintiff did not make out such a case as would entitle her to a verdict. But, inasmuch as a majority of my colleagues are of opinion that the case was not

properly tried out nor the real issues satisfactorily determined, I concur in the order for a new trial, if it is desired.

MEREDITH, J.A.:—It is, I think, much to be regretted that it should be deemed needful to send the parties . . . back to another trial. . . . Perhaps the parties will find it good to come to some settlement between themselves. . . . If the litigation must go on to the bitter end, it may be that it will be deemed advisable to reconstruct the action. . . .

RIDDELL, J.:—. . . As at present advised, I am unable to follow the reasoning which would make the defendant responsible for the negligence of the tenant. . . . But I am not at all satisfied that all the facts are before the Court, and I think that a new trial should be directed. . . .

MOSS, C.J.O.:—It is, perhaps, unfortunate that it becomes necessary to send this case back for a further trial. It is, to my mind, very doubtful whether the result will be different; but, as there is to be a new trial, I think it better to follow the rule usually adopted in such a case and make no comment upon the facts.

It would certainly aid materially in arriving at a final conclusion as to the defendant's liability in law if more light was thrown upon that part of the case relating to the employment of and instructions to the architect by whom the plan was prepared and under whose direction the work was done, and his knowledge and means of knowledge of the condition of the walls, as well as his competency.

As the case stands at present, we are left much in the dark with regard to these matters. Although the amount involved in this particular action is not large, the questions involved are important.

I agree, therefore, that there should be a new trial if the defendant desires it—the costs of it and of the former trial to be costs in the cause. The costs of this appeal are already disposed of by the order granting leave to appeal.

If the defendant does not notify his acceptance of the new trial within thirty days, the appeal will stand dismissed. In any case the defendant Reid must pay the costs of the appeal forthwith after taxation.

MARCH 14TH, 1911.

ALLEN MANUFACTURING CO. v. MURPHY.

Covenant—Restraint of Trade—Agreement by Servant not to Engage in Business of a Similar Kind to that of Master—Engaging in one of two Departments of Business—Breach of Covenant—Restriction Extending to the Whole of Canada—Unreasonable Restriction—Invalidity—Interests and Requirements of Covenantees' Business—Public Policy—Freedom of Contract.

Appeal by the defendant from the judgment of a Divisional Court, ante 442, 22 O.L.R. 539, reversing the judgment of MULOCK, C.J.Ex.D., at the trial, and directing judgment to be entered for the plaintiffs in an action based upon an alleged breach of a covenant in restraint of trade.

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

I. F. Hellmuth, K.C., and H. H. Shaver, for the defendant.

H. M. Mowat, K.C., for the plaintiffs.

MOSS, C.J.O. (after setting out the facts):—By the formal judgment the defendant is restrained until the 2nd June, 1913, from being either directly or indirectly employed or interested in any way, by himself or with or through any other person or persons or corporation whatever, in the city of Toronto, in any laundry business of a similar kind to that carried on by the plaintiffs in the city of Toronto, or from setting up or conducting the same. He is also condemned to pay damages, if the plaintiffs have sustained any by reason of the breaches set forth, to be ascertained by the Master, together with the costs.

Upon this appeal the only substantial question argued was whether the covenant or agreement in question offends the rules respecting agreements in restraint of trade. It is limited as to time, but as regards space it extends to the whole and every part of the Dominion of Canada. In this sense, it falls within the category of a general as distinguished from a particular or partial restraint. The prohibition extends to every kind of business carried on by the plaintiffs under their corporate powers and to the limits of the Dominion of Canada. It contains no words which would render the covenant divisible or capable of being construed so as to refer to one branch of the

business only. Indeed, the argument of the plaintiffs is, that the branches are not severable or to be severed, because in the manufacture of whitewear resort must be had to laundering processes, and that the defendant could not manufacture whitewear without carrying on the business of a laundry. It follows that to restrain the defendant from carrying on or being concerned in a laundry business shuts him out of the manufacture of whitewear as well.

The case is, therefore, to be dealt with as upon an agreement whereby the defendant is restrained from taking any part in any business of a similar kind to either branch of the plaintiffs' business, not only in or within a named radius from the city of Toronto, where the plaintiffs' factory and laundry are situate, but in any of the provinces or territories within the limits of the Dominion. The question is, whether this extensive and far-reaching restraint upon the prima facie privilege of a citizen of the Dominion to engage himself in that occupation with which he is best acquainted, and upon which he chiefly, if not wholly, relies as a means of livelihood, was or is reasonably necessary for the plaintiffs' protection in their business. In considering this question, the salutary rule, so frequently invoked in cases like this, as to maintaining and if need be enforcing contracts deliberately entered into by persons of full age is, of course, not to be overlooked. Nor, on the other hand, are the circumstances that the defendant was, at the time of entering into the agreement, a new-comer, unfamiliar with the country and its extent and with the manners and ways of its people, or that the agreement was prepared by the plaintiffs, or their legal advisers, and that, by its terms, the defendant was in great degree placed in the plaintiffs' power. They alone had power to terminate by notice, and it was possible for them, by the exercise of that right, within a few months from the date of the agreement, to have rendered the defendant subject for three years to all the restraints placed upon him by the agreement.

Restraints which may fairly be regarded as entirely reasonable when imposed in connection with the sale of a business or goodwill or with any transfer of patent rights or of a trade secret or with the dissolution of a partnership, should not be accepted in all cases as necessarily or even approximately applicable to restraints imposed upon employees to whom the only consideration for their covenant is employment and receipt of wages or remuneration for a more or less certain number of years. Such persons are ordinarily not on the same plane with one who has disposed of a very extensive business, which by

its very nature embraces world-wide interests and connections and involves dealings and transactions with most of the nations of the globe, and has received thereto a very large sum by way of purchase-money. . . .

[Reference to Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., [1894] A.C. 535, 548, 549, 552; Horner v. Graves, 7 Bing. 735, 743.]

Whether the restraint is reasonable or not is a question to be determined in view of all the circumstances. The Court is to say whether, having regard to the nature of the business, the relation of the parties, and the circumstances existing at the time the agreement was entered into, the restraint is confined to what is reasonably necessary for the protection of the covenantees' interests. . . .

The defendant was never engaged in or employed by the plaintiffs in the whitewear branch.

The plaintiffs' laundry business, though extensive, did not and does not extend even approximately to the limits of the Dominion.

It is to be observed also that there is a considerable body of testimony to the effect that such a covenant with respect to a business of this character is quite unusual.

The large bulk of the plaintiffs' custom laundry business is in the province of Ontario. That part of it which consists in laundering table and bed linen for dining and passenger cars on the Canadian Pacific Railway Company's main line is carried on at Toronto. Through agencies in a few towns and cities outside of Ontario comparatively trifling collections are made from customers; but, it may easily be gathered from the testimony, not to an extent appreciable to affect the volume of the home business. At least six of the provinces, and substantially the whole of the territories, are left unexploited by the plaintiffs' laundry business.

Can it be said that a restriction which practically drives the defendant, who is not now a young man, out of the only occupation in which he is at all adept, unless he quits the Dominion of Canada, is reasonably necessary for the protection of the plaintiffs' business. No other or lesser area is prescribed, and the covenant or agreement is not capable of divisibility. Only the one area is included, and, having regard to that, to the testimony, and to the principles recognised in the cases, the proper conclusion should be that the area is larger than is reasonably required for the protection of the plaintiffs' business, and that the covenant or agreement is oppressive and therefore unreasonable and not valid in law.

It was argued for the plaintiffs that the injunction awarded by the judgment was limited to carrying on or being concerned in the laundry business in the city of Toronto, and that, such a restraint being reasonable, the Court should uphold the agreement to that extent. The answer is, that the Court cannot carve out of the unreasonable distance a distance which would be reasonable. To do so would in effect be making a new covenant, not that to which the parties agreed. See Baker v. Hedgecock, 39 Ch.D. 520.

The appeal should be allowed and the judgment at the trial dismissing the action be restored, with costs throughout.

MEREDITH and MAGEE, JJ.A., agreed that the appeal should be allowed, for reasons stated by each in writing.

GARROW and MACLAREN, JJ.A., also concurred.

HIGH COURT OF JUSTICE.

BOYD, C., IN CHAMBERS. MARCH 11TH, 1911.

DEVANEY v. WORLD NEWSPAPER CO.

Costs—Taxation—Defendants Severing—Con. Rule 1162.

Appeal by the plaintiff from the taxation, by the senior Taxing Officer at Toronto, of the costs of the several defendants against the plaintiff.

J. T. White, for the plaintiff.
D. Urquhart, for the defendant Urquhart.
A. G. Ross, for the defendant Fasken.
H. R. Frost, for the defendant Keogh.

BOYD, C.:—The Con. Rule 1162 provides that defendants who severed in their defence, under circumstances entitling them to but one set of costs, shall be allowed but one set of costs.

Now, it is a general rule that in a case involving charges of fraud or wrong-doing the defendants are not required to unite in employing only one solicitor: they are entitled to make separate defences and to be paid therefor if they succeed: Clinch v. Financial Corporation, L.R. 5 Eq. at p. 484. This is applicable to such

a case as this, where the defendants are charged with libel or conspiracy. These matters are of a criminal character, involving serious charges as to the character of the defendants, and each one is, in my opinion, justified in intrusting his defence to a separate solicitor of his own choosing. The Taxing Officer has proceeded upon this principle, and his taxation should be affirmed with costs.

BOYD, C. MARCH 11TH, 1911.

RE MOORE.

Will—Construction—Devise—Life Estate—Remainder in Fee—Executory Devise over.

Motion by the executors of James Moore for an order determining certain questions as to the construction of his will.

W. M. McClemont, for the executors.
M. C. Cameron, for James Brown Moore.
J. R. Meredith, for unborn issue.

BOYD, C.:—The will is inartificially drawn, but effect may be given to all its words without addition to or change therein.

The important parts are these: "This farm lot will not be sold as long as my wife lives and shall remain in her possession as long as she lives and at her death it will be in possession of her only son and if the said party dies without heirs or will it will go to Mrs. William Parker's children," etc.

"My wife is to get living on this farm as long as she lives and she will get keeping cows hens and sheep and if her son James gets married and his wife and his mother cannot agree he is to allow her $100 a year as long as she lives."

"James Brown Moore" (the son) "gets the implements and horses."

The mother is alive, and the son is not yet married.

The intention of the testator is that mother and son shall jointly occupy the farm, which he is to work, and provide for her living during her life. If he marries and adds a wife as a new member to the family, and all agree, things are to go on as before—but, if the wife and the mother cannot agree to live together, then the son is to allow the mother $100 while she lives.

The intention is plain that, subject to the mother's life estate,

the son is to have the place out and out, and it is only to go over in case he dies without heirs (i.e., children or child) or without will (i.e., disposing of the property). The direction as to the payments of $100 to the mother in a certain event also indicates that the gift of a fee simple is intended.

It is pretty close to the case of Bateman v. Bateman, 17 Gr. 227, where similar language was construed as giving the fee simple with an executory devise over in case the son should die without issue living at his death.

This is the least that the son can take, but other expressions in the will may carry it further. The testator contemplates the land being sold after the death of the wife, and gives not only a power, but an interest in the land which can be disposed of by the will of the son, importing a testamentary transference of the fee. The farm is not to go over from the son if he has issue or makes a will devising the land. That would go to shew that an absolute vesting of the fee in the son is provided for, and the operation of an executory devise under the will of the testator is excluded. See Burgess v. Burgess, 21 C.P. 427, and Re Dixon, [1903] 2 Ch. 459.

It is perhaps the best way to declare that the son has an estate in fee simple, subject to an executory devise to Mrs. Parker's children—which is, however, subject to be defeated if the son otherwise disposes of the farm by will.

The case of Martin v. Chandler, 26 Gr. 81, as reported, seems to be against enlarging the primâ facie life estate of the son to a fee simple; but I think it must be incorrectly reported. At p. 83 it is said: "W. took an estate for life with an executory devise over to the grandchildren . . . in the event of W. dying without issue." But the case shews that W. had died leaving issue, and in that event his life estate would be enlarged to a fee, and no place would remain for the executory devise over.

Costs of this application out of the estate.

BOYD, C. MARCH 11TH, 1911.

RE CANADIAN MAIL ORDERS LIMITED.

Company—Winding-up—Contributory—Allotment of Shares—Absence of Notice—Special Application for Shares upon Unusual Terms as to Payment—Acceptance upon Different Terms—No Consensus.

Appeal by Meakins & Sons from the order of J. S. Cartwright, an Official Referee, in a winding-up proceeding, placing the names of the appellants on the list of contributories.

C. J. Holman, K.C., for the appellants.
R. C. Levesconte, for the liquidator.

BOYD, C.:—The decision in Re Wiarton Beet Sugar Co., Jarvis's Case, 5 O.W.R. 542, rests on grounds which were set forth in a stronger case of the same kind, to wit, Elkington's Case, L.R. 2 Ch. 511: a case in which the applicant had been notified of the allotment of stock and had carried on dealings with the company thereafter on the footing of his being a shareholder. But these elements are absent in the present case, which is in all substantial points governed by the case next in L.R. 2 Ch., Pellatt's Case, at p. 527, in which there was no communication made of the shares being allotted.

The Official Referee deals with the receipt as if it had been given at the time the note was collected at the bank; but the fact is that the receipt was given at the outset, and contemporaneously with the letter of Hunter, the company's agent, dated the 13th January, 1906, and the application for the shares, dated the 10th January, which was handed over on the 15th. Now, the receipt speaks of the balance (of 90 per cent.) as to be paid for "as per letter agreement," and the stipulations proposed in the letter is that the interchange of transactions should be for "not less than five years." Where as in the application the subscription is on the understanding that the transactions shall be for a period of ten years. There was, in this essential point, no consensus between the parties dealing, and it was all the more important, therefore, that notice of action on the part of the company as to allotment and in the way of adjusting this difference should have been communicated to the applicants.

To my mind, the circumstances and the papers repel the idea of there being a concluded transaction, in præsenti, by which the applicants became shareholders on the terms of paying money for their shares, and I conclude that they never proposed or became liable to assume the burden now placed upon them by the judgment in appeal.

It was admitted that this was an exceptional application for shares; yet, if we look at the books of the company, it appears that the application was treated by the directors as one in the usual form of paying the balance in money at short dates. It was included in a long list of applications accepted by the board of directors on the 22nd June, 1906. The engagement contemplated by this act of the company was that the applicants should pay in cash; and, had notice of this allotment been communicated to them, they would have had the opportunity of accepting

or rejecting this direct liability for payment in money, and not by means of the gradual application of percentages on the supply of goods during a period of ten years. Had it been communicated to the applicants that stock was allotted to them on which they would become liable to pay in money, and they had accepted that situation and proceeded to become shareholders with knowledge of their status, no doubt they would be fixed with that liability in the winding-up—but this was not done, and the matter is still in fieri.

The appeal should succeed and the names be taken off the list of contributories. Costs throughout should be borne by the liquidator and paid out of the assets.

It is not necessary, in the view I take, to deal with the ultra vires aspect of the transaction.

MIDDLETON, .J MARCH 11TH, 1911.

*MUTRIE v. ALEXANDER.

Will—Action to Establish—Jurisdiction of High Court—Jurisdiction of Surrogate Courts—Declaratory Judgment—Evidence to Establish Lost Will.

Action to establish the will of Andrew Alexander, deceased, and for a declaration that the executor named therein was entitled to probate.

H. Guthrie, K.C., for the plaintiff.

F. Denton, K.C., for the defendants except the widow of the deceased.

No one appeared for the widow.

MIDDLETON, J.:—The will of which probate is sought was drawn on the 2nd July, 1891, by Mr. Donald Guthrie, and on the 17th May, 1892, was handed by him to the testator. About ten years ago, Mr. Mutrie, the executor (plaintiff), drew a codicil, and, after shewing it to Mr. Guthrie, returned it to the testator, I am satisfied that both will and codicil were duly executed.

The testator is said to have died in Manitoba on the 8th September, 1909. No proof of adequate, or in fact of any, search for the will has been given.

*To be reported in the Ontario Law Reports.

The parties to this action are the testator's legitimate sons, two illegitimate sons, the mother of the latter, all represented by counsel, and the widow. The widow is excluded, and, as the estate consists entirely of personalty, is interested in shewing an intestacy. She made default in pleading, and as to her the pleadings are noted as closed.

I was asked to approve of consent minutes by which the will would be declared (as proved by Mr. Guthrie's memory), and the modification by the codicil (proved by both Mr. Guthrie and Mr. Mutrie), which dealt solely with the apportionment among the parties before me, should be, by their consent, disregarded.

I declined to approve of this settlement, because I did not think the Court had any jurisdiction in the premises, and because I was not satisfied that the will had been lost or that it was the last will. It may have been destroyed with the intention of revoking it, and there may be a later will for all I know.

I would allow further evidence if I thought I had any jurisdiction. . . .

[Reference to Marriot v. Marriot (1725), Gilb. 203; Allen v. McPherson (1847), 1 H.L.C. 191; Kerrich v. Bransby (1727), 7 Bro. P.C. 437.]

Since 1847 there has arisen no discussion of the matter in England, and none can arise. In 1857 the Probate Court was created, and upon the passing of the Judicature Act the jurisdiction of that Court was vested in the High Court.

Here the cause of legislation has been different. . . .

[Reference to 33 Geo. III. ch. 8, establishing a Court of Probate, and to 22 Vict. ch. 93, establishing Surrogate Courts and giving them jurisdiction in matters and causes testamentary, etc.]

These Surrogate Courts so established still remain and still have sole jurisdiction in all testamentary matters. . . .

[Reference to 7 Wm. IV. ch. 2, establishing the Court of Chancery, and to 12 Vict. ch. 64, reorganising the Court and (by sec. 10) giving it jurisdiction to try the validity of wills, etc.]

This enactment, following immediately the decision of the Lords in Allen v. McPherson, was, no doubt, intended to confer upon the Court of Chancery a concurrent jurisdiction in cases falling within it. . . .

[Reference to Perrin v. Perrin (1872), 19 Gr. 259, in which it was held that there was concurrent jurisdiction in both Courts, and to Wilson v. Wilson (1876), 24 Gr. 377, in which the jurisdiction of the Court of Chancery, where letters probate had been granted by a Surrogate Court, was upheld.]

The question was put at rest by an amendment to the statute in 1877, by the addition of the words "whether probate of the will has been granted or not," and in this amended form the section is now found in sec. 38 of the Ontario Judicature Act.

The jurisdiction of Chancery to declare the title to lands passing under a will is undoubted, and, as the Ecclesiastical Courts had no jurisdiction save as to personalty, there was no conflict.

The history of the jurisdiction is found in . . . Boyse v. Rossborough, Kay 71, 3 De G. M. & G. 817, 6 H.L.C. 1. See also . . . Sugden v. Lord St. Leonards, 1 P.D. 154, 286 et seq.

The only case conflicting with this is Dickson v. Monteith, 14 O.R. 719. . . .

[Reference to that case, explaining that the title to real estate was involved, and to Wilson v. Wilson, 24 Gr. at pp. 393, 394.]

I, therefore, conclude that the High Court has no testamentary jurisdiction except that conferred by the Surrogate Courts Act, 10 Edw. VII. ch. 31, secs. 32, 33, in matters commenced in the Surrogate Court and transferred to the High Court, and in actions to set aside wills, in which jurisdiction is conferred by sec. 58 of the Judicature Act. The Court also has the power to determine the title to land possessed by the Courts of equity and law upon the issue devisavit vel non.

Then it is said that the plaintiff may have a declaratory decree, and, having this, his course in the Surrogate Court will be made easy.

Apart from legislative authority, the Court had no power to pronounce a declaratory decree unless consequential relief was asked and could be given. By Chancery Order 538 the Court was empowered to pronounce a declaratory decree when no consequential relief was asked. This, it was held, enabled the Court so to do only when, upon the facts, the plaintiff might have obtained consequential relief had he chosen to ask it. The Act R.S.O. 1887 ch. 44, sec. 35, enabled the Court to grant a declaratory decree when no relief could be asked. The jurisdiction thus conferred is discretionary, and, as a matter of discretion, the Court adheres to the former practice, and in general refuses to make a merely declaratory judgment when, under the former practice, it would not have been granted: Bunnell v. Gordon, 20 O.R. 281; Barraclough v. Brown, [1897] A.C. 615; Stewart v. Guibord, 6 O.L.R. 262; Toronto R.W. Co. v. City of Toronto, 13 O.L.R. 532. As it is said, the Court will not grant a declaratory decree in the air: Attorney-General v. Scott, [1905] 2 K.B. 169; North Eastern Marine Engine Co. v. Leeds, [1906] 2 Ch. 499.

But a far more serious difficulty in the plaintiff's way is this.

The High Court, under the guise of a declaratory decree, must not usurp the jurisdiction conferred by the Legislature upon another tribunal: Grand Junction Waterworks Co. v. Hampton Urban District Council, [1898] 2 Ch. 331; Attorney-General v. Cameron, 26 A.R. 103; Barraclough v. Brown, supra.

In this view, the merits of the case need not be discussed. The parties may refer to Bessey v. Bostwick, 13 Gr. 279, as well as to Sugden v. Lord St. Leonards, supra, as to what is necessary when a lost will is propounded.

I have not considered what effect (if any) the Devolution of Estates Act and the power conferred upon the Surrogate Courts to grant administration as to realty have upon the jurisdiction of the High Court when real estate is involved.

Action dismissed without costs.

DIVISIONAL COURT. MARCH 14TH, 1911.

CAIN v. PEARCE CO.

Water and Watercourses — Mill Privileges — Dam — Raising Height of—Flooding Lands — Easement — Prescription — Damages — Judgment — Form of—Reference—Pleading — Particulars—Evidence—Surprise at Trial—New Trial.

Appeals by the defendants in the above and three other actions from the judgment of TEETZEL, J., 1 O.W.N. 1133.

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

E. G. Porter, K.C., for the defendants.

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

RIDDELL, J.:—It is, in my view, unnecessary to examine the course of decision in foreign jurisdictions, however similar the law there may be to our own—the Ontario cases cited by my brother Teetzel are sufficient to support the main conclusion.

Upon the admitted facts, there is more water kept back by the defendants by means of their dam upon the land of the riparian proprietors above than formerly—and it is, to my mind, immaterial whether that extra amount of water be due to an increased flow or otherwise. The rights of the defendants are not at all determined by what they do upon their own land, but by what they cause upon the land of others. No one has a right to complain of anything done by another upon his own land as such; it is

with reference to what affects the former that complaint may arise—and an easement of this character is a right to do something on another's land not one's own.

If it be the fact that now a larger quantity of water flows down the stream, it is not the right of the defendants to take advantage of the increased flow, if thereby they add to the burdens of the land of those above them. If the present dam be exactly the same as the former, and would not (the flow remaining the same) keep back any more water than the former, but does keep back more water in fact than the former did—not could—the defendants are wrong-doers.

The form of the judgment should be altered. As I understand my learned brother's judgment, he found that the defendants and their predecessors in title had in fact penned back the waters mentioned over and upon the lands of the various plaintiffs, but that, upon the evidence before him, he thought he should not fix the exact extent of the easement acquired—that the parties should, if possible, agree, but that "if the parties cannot agree upon the limitations of that easement, the same will be ascertained by the Referee:" 1 O.W.N. at p. 1137. The third clause in the formal judgment should be amended by erasing all the words "but this Court is unable" to the end: the Referee will determine the extent of the easement, upon the evidence already given, and such further evidence, if any, as any party may adduce upon the reference.

The evidence at the trial amply justifies the finding that an easement had been acquired—and I think the learned Judge would have been justified in finding its extent, even upon the evidence before him, but no fault can be found with his action in leaving the question of the extent open. The formal judgment is, however, not happily expressed, and should be amended as I have indicated.

Much complaint is made as to the action of the learned Judge in the McGrath case.

The statement of claim sets out the ownership by the plaintiff of "lots No. 9 and 10 and the west half of lot No. 8 in the 3rd concession of the township of Marmora," etc.; that he had the right to have the waters of lake and river maintained at their natural height; and that the defendants (4) "obstructed the flow of the waters from the said lake and down the said river at a point below the land of the . . . plaintiff . . . by erecting a dam or wall . . . and thereby forced back the waters of the . . . river so that it was hindered and prevented from flowing past and away from the said lands . . . as it of right ought to have

done and otherwise would have done." (6) "By reason of the premises, the water . . . has . . . overflowed and flooded the . . . plaintiff's land to the depth of several feet . . ." (7) "Other lands of the plaintiff, though not actually submerged, have been damaged by reason of the waters to such an extent that they have been made wet and swampy and unfit for cultivation, and their value has been and is much diminished."

It seems perfectly plain that the plaintiff was alleging that, in respect of some of his land, it was overflowed, but, as to other of his land, it was not overflowed or flooded, but the water was kept by the side of it to such an extent that the subsoil was made wet and the land rendered useless for all purposes of cultivation.

The defendants demanded particulars "under paragraph 6 . . . time . . . or period of flooding . . . quantity of land," etc., all referring to "flooding" only. Also "under paragraph 7 . . . the quantity and description . . . of lands which, though not actually submerged, have been damaged by reason of the waters," etc., etc., "time . . . for what periods the same have been made wet, swampy, and unfit for cultivation," etc., etc. The plaintiff furnished particulars, pursuant to demand, that lots 9 and 10 were "flooded and drowned," and the waters "soused and made damp and swampy the cleared part of said land, rendering it impossible to cultivate or till the same . . ." Then 6: "As to paragraph 7, along and outside the said lands flooded as aforesaid . . . there are two chains in width of the lands made wet, swampy, and unfit for cultivation . . ."

Lot No. 8 is not mentioned, and I am unable to follow Mr. Rose's argument that the particulars furnished did not purport to describe the land not flooded, but as to which complaint is made by paragraph 7 of the statement of claim. At the trial the learned Judge excluded evidence as to lot 8 (which, it is said, is not flooded, but its subsoil is made damp, etc.); but, upon mature consideration, thinks he should have allowed the evidence, and he gives judgment for the plaintiff for lot 8, though finding against him as to lots 9 and 10.

I do not think we need pass upon the propriety of the learned Judge's ruling at the trial—the experience of most Judges is that an objection for want of particulars is not bonâ fide in one case out of ten; and generally the objection may be got over by the trial Judge taking such evidence as is available and giving the objector the opportunity of adducing later any evidence he may have. Only once in my four years' experience has any such evidence been forthcoming. It might have been better had the trial Judge pursued this course; but he ruled out the evidence, and we must deal with this case upon that state of facts.

A state of facts not wholly dissimilar arose in Thompson v. Big Cities Realty and Agency Co., 21 O.L.R. 394 (see especially pp. 401, 402); the Divisional Court directed the matter to be tried. It may, in the present case, turn out that the defendants are not in reality in possession of any evidence to meet the evidence of the plaintiff already given, but they certainly have the right to have the opportunity of adducing it if it is available.

The judgment cannot stand: in setting it aside I think we should direct that the case be re-opened and the matter disposed of in the least expensive manner possible. If the parties agree, the case may be tried by the Referee who disposes of the other cases—if not, it must go down for trial before a Judge, preferably Mr. Justice Teetzel, if he consent to try it. In either case, the evidence already taken may stand, subject to the right of either party to adduce the same and (or) other witnesses—the costs of the last trial, of this appeal, and of the new trial, to be in the discretion of the trial tribunal. No doubt, such costs will be disposed of upon considerations based upon the new evidence adduced bearing out the defendants' contention and the bona fides of the suggestion of injustice perpetrated upon the defendants.

In the Bonter case, also complained of specially, I think there is evidence of damage, although that may turn out to be slight. Bonter is entitled in any case to a declaration, and the quantum of damage may well be disposed of by the Referee.

The defendants' appeals, in all but the McGrath case, should be dismissed with costs, the judgment to be amended as indicated—there will be judgment in the McGrath case as stated.

FALCONBRIDGE, C.J., and BRITTON, J., agreed in the result.

DIVISIONAL COURT. MARCH 15TH, 1911.

*PELEE ISLAND NAVIGATION CO. v. DOTY ENGINE WORKS.

Contract—Manufacture of Specific Article—Undertaking to Deliver by Certain Date—Proviso for Payment of Sum for each Day's Delay after Date—Liquidated Damages or Penalty—Construction of Contract—Surrounding Circumstances—"Excusing Term" of Contract—Exclusion from Contract—Understanding of Parties.

Appeal by the plaintiffs and cross-appeal by the defendants from the judgment of CLUTE, J., at the trial.

*To be reported in the Ontario Law Reports.

The parties entered into a contract whereby the defendants agreed, for $2,700, to supply the plaintiffs with a new boiler for a steam-boat. The boiler was to be delivered not later than the 1st March, 1910, failing which the defendants agreed to pay the plaintiffs "$25 for each and every working day after the above date as and for liquidated damages and not as a penalty."

The boiler was not delivered within the stipulated period, and this action was brought to recover $25 for each day's default. The defendants alleged that the contract contained a term whereby they were entitled to be excused for the delay complained of, and also that the $25 per day only was a penal sum, and that the plaintiffs had sustained no damage.

The trial Judge held that the alleged excusing term formed no part of the contract, and, if it did, that the defendants were not relieved from performance within the time agreed upon. He also held that the $25 per day was a penalty, and directed a reference to ascertain the damages.

The plaintiffs appealed on the ground that the $25 per day was liquidated damages; and the defendants appealed on the ground that they were entitled to the benefit of the alleged "excusing term," and also that no damage in fact was sustained.

The appeal was heard by MULOCK, C.J.Ex.D., TEETZEL and SUTHERLAND, JJ.

A. H. Clarke, K.C., for the plaintiffs.

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

MULOCK, C.J.:—Prior to the making of the contract, a correspondence had taken place between the parties, and upon the 6th December, 1909, Frank and Ralph Harris, representing the plaintiffs, and Frederick W. Doty, representing the defendants, met at . . . Windsor and discussed details of the proposed contract. Having agreed upon the 1st March as the day for the delivery of the boiler, they then discussed the question of damages in the event of its not being so delivered. Although navigation was not expected to commence on the 1st March, the plaintiffs' object in securing delivery of the boiler at that date was that they might thereafter have ample time before the opening of navigation to fit up the vessel. Accordingly, they attached importance to its delivery within the named period, and desired the contract to provide for $50 a day damages for each day's default. Mr. Doty would not agree to that sum, and, finally, according to the evidence of Frank Harris, the plain-

tiffs offered to take $25, and Doty sat down and wrote the contract out on his company's letter paper, the last item of which was as follows: "We agree to deliver the boiler on board cars at St. Catharines not later than March 1st, 1910, and if we fail to do this we agree to pay a penalty of $25 a day after the above date." At the top of the letter paper, in large type, are set forth the name of the defendant company and their business. Below that, in type large but not so large, are the word "Goderich, Canada," with a blank space for the date; and immediately below these words, in small type, is the "excusing term" . . . which is worded as follows: "Quotations subject to change without notice; all agreements are contingent upon strikes, accidents, or delays of carriers and other delays unavoidable and beyond our control." The date of the offer appears in faint-coloured ink above the "excusing term."

When Doty had completed writing his offer, he read it to the Messrs. Harris, but omitted to read or call attention to the "excusing term," which was not discussed or referred to, and neither of the Messrs. Harris knew of its being on the letter paper, nor had the plaintiffs any knowledge of its being there until after the 1st March and the commencement of the dispute between the parties.

Mr. Ralph Harris, before accepting the defendants' proposal, took it to Mr. Bartlett, the plaintiffs' solicitor, who advised changing the penalty clause, and Mr. Doty was thereupon sent for. When he arrived, the offer was read over, but not the "excusing term," and Mr. Bartlett explained to the parties the difference between a penalty and liquidated damages, and, in their presence and with their consent, struck out the word "penalty" and added the words "as and for liquidated damages and not as a penalty." Thereupon, on behalf of the plaintiffs, Ralph Harris, as president, accepted the offer; and such acceptance and offer constitute the contract between the parties. . . .

The proposal was written by Mr. Doty and read to the Messrs. Harris, but the "excusing term" was not read to them, nor did they nor did the plaintiffs, nor any one on their behalf, know of its being on the face of the paper on which the proposal was written at the time of its acceptance. Mr. Doty purported to read to the Messrs. Harris the whole of his offer; and the fair inference is, that he omitted to read to them the "excusing term," because he did not consider it as forming part of the contract. Thus, by mutual oversight or mistake, it was not struck out; but, nevertheless, neither party assented to its

forming part of the contract; and I am unable to see how one of the parties, without the consent of the other, can have it added now. To do so would, in fact, be adding a new term to the contract. . . .

Proceeding, then, to the main question involved in this appeal: the language of the contract is perfectly plain. . . . It is not to be lost sight of that the word "penalty" was struck out and the words "as and for liquidated damages and not as a penalty" were inserted, after an explanation by the plaintiffs' solicitor (which was not contradicted) that as altered the damages would be merely a matter of calculation by the parties, whilst if the sum were to be described and treated as a penalty, it would involve ascertainment by the Courts. Whilst the alteration did not, I think, change the legal effect of the clause as originally drawn, still the discussion and re-wording of the clause and the adoption of the re-wording, in order to make clear the views of both parties prior to the contract, is significant as to their intentions. . . .

[Reference to and quotations from Rye v. British Automobile Commercial Syndicate, [1906] 1 K.B. 429; Wallis v. Smith, 21 Ch.D. 266; Astley v. Weldon, 2 B. & P. 346; Law v. Redditch, [1892] 1 Q.B. 127; Elphinstone v. Monkland Iron and Coal Co., 11 App. Cas. 332; Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos, [1905] A.C. 15; Commissioners of Works v. Hills, 22 Times L.R. 589; Crux v. Aldred, 14 W.R. 657; Fletcher v. Dryche, 2 T.R. 32; Bonsall v. Bryne, I.R. 1 C.L. 575.]

In the present case the defendants agreed to do one particular thing, namely to deliver the boiler not later than the 1st March, failing which they agreed to pay $25 (not an extravagant sum) for each and every working day after that date, as liquidated damages. The sum contracted to be paid has reference to a single obligation, and is graduated according to the length of time the obligation shall remain unfulfilled, and brings the case within the rule laid down in the cases referred to, that, in such circumstances, it is a pre-assessment by the parties of the damage flowing from the breach.

For these reasons, I am, with very great respect, unable to concur in the view of the learned trial Judge, and think this appeal (the plaintiffs') should be allowed, and that judgment should be entered for the plaintiffs for the amount of their claim and interest, with costs of the trial and of these appeals.

The defendants' appeal dismissed with costs.

TEETZEL and SUTHERLAND, JJ., concurred; the latter giving reasons in writing.

MACDONELL v. TEMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION—DIVISIONAL COURT—MARCH 6.

Pleading — Statement of Defence—Railway Construction Contract—Dispute as to Payment for "Overhaul"—Reference to Earlier Contract—Interpretation of Contract—Relevancy—Amendment.]—Appeal by the defendants from the order of MIDDLETON, J., ante 523, striking out paragraph 21 of the statement of defence, in so far as it related to work done under the contract of October, 1902, and directing that it must be amended so as to confine it to the contract of June, 1904. The appeal was heard by MULOCK, C.J.Ex.D., RIDDELL and SUTHERLAND, JJ. THE COURT, at the close of the argument, directed that the appeal should be allowed, with costs in the cause to the defendants; but expressed no opinion as to the question of production of documents. W. N. Tilley, for the defendants. A M. Stewart, for the plaintiff.

GIBSON v. HAWES—DIVISIONAL COURT—MARCH 7.

Evidence — Cross-examination on Affidavit — Certificate of Receiver.]—Upon an appeal by the defendant to a Divisional Court (BOYD, C., RIDDELL and SUTHERLAND, JJ) from an order of TEETZEL, J., directing that the defendant be committed unless he should attend for further examination and answer certain questions which he refused to answer upon cross-examination upon an affidavit (leave to appeal having been granted by MIDDLETON, J., ante 772), the Court directed that a certificate should be obtained from the receiver, as an officer of the Court, as to his desire respecting the examination—this to be given after notice to and hearing of the parties. Judgment upon the appeal reserved meanwhile. E. D. Armour, K.C., for the defendant. F. Arnoldi, K.C., for the plaintiff.

BRENNAN v. BANK OF HAMILTON (AND TWO OTHER ACTIONS)—MASTER IN CHAMBERS—MARCH 10.

Venue—Motion to Change—Jurisdiction of Master in Chambers—Previous Order of Judge Fixing Place of Trial.]—Motion by the defendants to change the venue from Toronto to Hamilton. The Master expressed no opinion upon the merits, but held that he had no jurisdiction to entertain the motion, because to change the venue would be to vary an order made by the Judge at the trial, upon consent, fixing the place of trial. Motion dismissed

with costs to the plaintiffs in any event. C. W. Bell, Britton Osler, and H. S. White, for the defendants. Grayson Smith, for the plaintiffs.

BELANGER v. BELANGER—MASTER IN CHAMBERS—MARCH 10.

Security for Costs—Next Friend of Infant Plaintiffs Resident Abroad—Application Refused by Trial Judge—Dismissal of Action without Costs—Appeal by Plaintiffs to Divisional Court—Fresh Application for Security—Effect of Former Refusal—Subsequent Costs—Discretion—Delay in Moving—Appointment of New Next Friend.]—Motion by the defendants for security for costs. The writ of summons was issued on the 21st February, 1910, and from the indorsement it appeared that the defendants were entitled to a præcipe order for security for costs. No steps, however, were taken to obtain security until after notice of trial had been given for the sittings at L'Orignal beginning on the 14th November. On the 8th of that month an application for security for costs was made by the defendants to the Local Judge at L'Orignal, and was dismissed as having been made too late. The case came on for trial, and the defendant then appealed to the trial Judge from the order of the Local Judge. The appeal was dismissed, the trial Judge being also of opinion that the application was too late. The trial proceeded. Judgment was reserved, and on the 9th January, 1911, the action was dismissed without costs: ante 543. The plaintiffs on the 21st February gave notice of appeal to a Divisional Court, and set down their appeal for hearing. The appeal not having yet been heard, the defendants on the 2nd March made the present motion for security for costs. The Master said that, in the first place, it was evident that the motion must be restricted to the costs subsequent to the trial: to go behind that would be to reverse the order of the trial Judge on the appeal to him. But the motion, even so limited, could not be entertained. There was no reservation of any right to renew the motion at any further stage; and it did not seem to be going too far to hold that the order of the trial Judge dispensed with security up to any stage to which the plaintiffs could proceed in the usual course of an action without being obliged to give security. But, even if this was not a correct view, the motion should still be refused on the ground of discretion, because the defendants had not moved promptly. If there was any intention to make this application, the plain-

tiffs should have been notified as soon as the notice of appeal was given. Expense had been incurred in preparing for the appeal. An order for security, at any stage, would be of little use to the defendants: it would only stay the progress of the action until a new next friend, resident in the province, should be appointed, who need not be possessed of any property whatever, as the cases shew. Motion dismissed without costs. H. S. White, for the defendants. R. C. H. Cassels, for the plaintiffs.

LAPORTE v. WETENKEL—DIVISIONAL COURT—MARCH 10.

Malicious Prosecution — Reasonable and Probable Cause — Finding of Court.]—Appeal by the plaintiff from the judgment of the County Court of Bruce dismissing an action for malicious prosecution. By consent, the case was left to the Court (RIDDELL, SUTHERLAND, and MIDDLETON, JJ.) to decide as arbitrators. Upon a perusal of the evidence, all the Judges were of the opinion that there was reasonable and probable cause for the proceedings complained of. The appeal and the action were, therefore, dismissed, both with costs. O. E. Klein, for the plaintiff. G. H. Kilmer, K.C., for the defendant.

DOOLITTLE v. TOWN OF ORILLIA—DIVISIONAL COURT—MARCH 10.

Water and Watercourses—Flooding Lands—Dam on River—Cause of Flooding—Evidence—Appeal.]—An appeal by the plaintiff from the judgment of MIDDLETON, J., at the trial, dismissing the action, which was brought to recover damages for the flooding of the plaintiff's lands, alleged to have been caused by the erection by the defendants of a dam at the Ragged Rapids on the river Severn, for the purposes of supplying power to the town of Orillia. The appeal was heard by FALCONBRIDGE, C.J. K.B., BRITTON and LATCHFORD, JJ. The judgment of the Court was delivered by BRITTON, J., who said that the plaintiff's right to recover depended wholly upon questions of fact. He then referred briefly to the facts; and concluded by saying that the evidence did not satisfy him beyond reasonable doubt that the defendants' dam was the cause of injury to the plaintiff's lands. Appeal dismissed with costs. W. A. Lamport, for the plaintiff. E. F. B. Johnston, K.C., and D. Inglis Grant, for the defendants.

HORAN v. MCMAHON—DIVISIONAL COURT—MARCH 10.

Trespass — Boundary — Survey — Evidence — Onus — Injunction — Damages — Counterclaim.]—Appeal by the plaintiff from the judgment of RIDDELL, J., ante 224, dismissing the action and allowing the defendants' counterclaim. The action was in trespass to determine the boundary between two parcels of land in the township of Albion. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and LATCHFORD, JJ. The judgment of the Court was delivered by BRITTON, J., who reviewed the facts and said that the onus was upon the plaintiff to establish beyond reasonable doubt that the disputed land was really part of the east half of lot 32 in the 5th concession; and in that the plaintiff failed. Appeal dismissed with costs. L. V. McBrady, K.C., and R. R. Waddell, for the plaintiff. W. D. McPherson, K.C., for the defendants.

BANK OF TORONTO v. BIER—FALCONBRIDGE, C.J.K.B.—MARCH 14.

Guaranty — Misrepresentations — Evidence — Findings of Jury.]—An action on a guaranty, tried with a jury. The defendants alleged that their execution of the guaranty was induced by fraudulent misrepresentations of an officer of the plaintiffs. The learned Chief Justice said that, as to the defendant Bier, the jury's answers followed his evidence and disclosed no defence. His case was allowed to go to the jury only because it was necessary to take their opinion as to the position of the defendants Massecar and Chapin. As to these two defendants, the evidence adduced on their behalf would, if believed, have warranted findings of much more substantial misrepresentations. But the jury had chosen to confine their answers to a mere statement of opinion by the plaintiffs' manager, and had found, too, that such statement was not untrue to his knowledge; and the plaintiffs, therefore, succeeded. The pleadings had been closed against the defendant Bentham, and all the defendants, therefore, remained without defence. Judgment against all the defendants for $4,000 and interest from the 5th November, 1910, and costs. M. K. Cowan, K.C., and A. G. Ross, for the plaintiffs. W. S. Brewster, K.C., for the defendants.

HULL v. ALLEN—SUTHERLAND, J., IN CHAMBERS—MARCH 15.

Reference—Stay—Delay—Death of Defendant—Institution of New Action—Non-payment of Costs—Reference not to Pro-

ceed till Costs Paid—Offer of Settlement.]—Motion by the defendant to stay proceedings on a reference before a Master, upon these grounds: (1) that the plaintiff had not paid the costs of an appeal, as ordered; (2) delay on the plaintiff's part in proceeding with the reference of which he had the conduct; (3) that, the original defendant having died, the present proceedings were vexatious; (4) that another action at the instance of the plaintiff had been commenced, and this reference should not be proceeded with until its termination. SUTHERLAND, J., said that there had been a great deal of delay, and that it was unfortunate that the original defendant was dead, as he had personal knowledge of the accounts. That, however, was not in itself, and in the circumstances disclosed, a sufficient reason for staying the proceedings. The defendant might, long before his death, have compelled the plaintiff to proceed, or have himself applied under Con. Rule 663 to the Master for the conduct of the reference. The learned Judge also says that the plaintiff proposes to proceed with the reference, and it cannot be said that that proposal is vexatious. The institution by the plaintiff of a new action, arising out of a claim of the present defendant, made since the death of the original defendant, to be the owner of the property in question, is not a reason for a stay. But the plaintiff should pay the costs taxed against him and ordered to be paid forthwith, before he proceeds with the reference. Order made that the plaintiff pay the taxed costs within one month, and upon so doing, he may, if so advised, proceed with the reference. The plaintiff, however, should consider whether or not he will accept the offer of settlement made by the defendant upon the argument. If there is no settlement and the taxed costs are paid within one month, the costs of this motion will be in the cause. If such taxed costs are unpaid, the defendant will have leave to renew this motion. If the offer of settlement is accepted within a month, there will be no costs of this motion. J. T. Small, K.C., for the defendant. W. Nesbitt, K.C., and T. H. Wilson, for the plaintiff.

PIERCE v. WALDMAN AND WALDMAN SILVER MINES CO.—DIVISIONAL COURT—MARCH 15.

Partnership—Action to Establish—Oral Agreement—Evidence—Release—Allegation of Fraud—Failure to Establish.]—Appeal by the plaintiff from the judgment of SUTHERLAND, J., ante 258, dismissing the action. The Court (BOYD, C., LATCH-

FORD and MIDDLETON, JJ.), dismissed the appeal with costs. T. W. McGarry, K.C., and W. N. Ferguson, K.C., for the plaintiff. E. F. B. Johnston, K.C., for the defendant Waldman. J. F. Boland, for the defendant company.

KEYES v. MCKEON—MASTER IN CHAMBERS—MARCH 16.

Venue—Motion to Change—Witnesses—Expense—Costs.]—Motion by the defendant to change the venue from London to Goderich. The action arose out of the building of a church at St. Columban, in the township of McKillop, and county of Huron. The plaintiff resided at Stratford, and the defendant at St. Columban. The defendant swore to 9 witnesses at Seaforth, 4 at Clinton, 3 at St. Columban, 2 at Stratford, and 1 at Goderich. The plaintiff swore to 8 witnesses at Stratford and 2 at London. The Master said that the names of the witnesses and the nature of their evidence were not disclosed by either party, but from the nature of the case the numbers would not seem to be impossible. The plaintiff also swore that 2, and perhaps 3, of his witnesses were about to leave for the western provinces. To take the defendant's witnesses to Goderich would cost $21.25, and to London $50.15, leaving a balance of $28.90 in favour of Goderich. On the other hand, to take the plaintiff's witnesses to Goderich would cost $24.40, as against $12.80 to London. This left a balance in favour of London of $11.60, which, deducted from the $28.90, left a balance of only $17.30 in favour of Goderich—under the cases, not sufficient for the success of the motion, especially when some of the plaintiff's witnesses are anxious to leave the province in a few days. Motion refused. Costs of the motion reserved to be dealt with by the trial Judge on any application that the defendant may make to him on this point as well as for directions as to the taxation of witness fees if the plaintiff is successful in the action. If no such application is made, the costs will be in the cause. W. Proudfoot, K.C., for the defendant. Featherston Aylesworth, for the plaintiff.

CORRECTION.

In Re Ryan and Town of Alliston, ante 841, the Court was composed of MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.