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CARTWRIGHT, MASTER. DECEMBER 10TH, 1906.
MEREDITH, C.J. DECEMBER 11TH, 1906.

CHAMBERS.

CROWFORTH v. GUMMERSON.

Discovery — Order for Examination of Party — Ex Parte Order—Irregularity as to Place of Examination and Person of Examiner—Setting aside Order—Practice.

Motion by defendants to set aside an order obtained by plaintiff ex parte, under Rule 444, for the examination for discovery of the defendants at a place other than the county town, and before a person other than those mentioned in Rule 443.

Gideon Grant, for defendants.

B. F. Justin, Brampton, for plaintiff.

THE MASTER:—It was contended that there is no provision in Rule 444 requiring notice, as is the case under Rule 477. It is not necessary to decide this point. . . .

The practice here has always been to make such orders only on notice just as in a case of a commission, which it very closely resembles.

In both cases it is necessary, in the interests of justice and fairness, that where the regular course is to be departed from, the opposite party should have the fullest opportunity of seeing that what is proposed is necessary, or at least convenient, and of safe-guarding himself against any possible injury.

It is not necessary to enumerate the serious consequences that might result from such an order being made

ex parte. They will at once suggest themselves. To guard against these it has never been the practice, either under the Rule in question or the analogous Rules 485 and 499, to make the order ex parte. Even where the examination is de bene esse, some ground of urgency is necessary to dispense with notice: see Baker v. Jackson, 10 P. R. 624, and Holmested & Langton, 3rd ed., pp. 708, 709. See too Rule 357, as to when orders may be made ex parte.

The order must be set aside. But, as the motion might have been made sooner, and as plaintiff's solicitor seems to have acted only with a view to save expense and possible inconvenience to defendants, the costs may be in the cause.

I would suggest that defendants might agree to an order being made now allowing the examination to be had in the same way as directed by the order in question, if on inquiry they are satisfied that they will not be prejudiced thereby.

I have no material which would enable me to make an order now as on a substantive application. As the case is set down for trial next week, this motion may throw it over in any case. However much to be regretted, this is not the fault of defendants.

Since the argument the copy of the order, with appointment indorsed, has been left with me. From this it appears that the examination could not have taken place, as the hour for the same is left blank.

Plaintiff appealed to a Judge in Chambers.

The same counsel appeared.

MEREDITH, C.J., dismissed the appeal with costs to defendants in any event.

MACMAHON, J. DECEMBER 10TH, 1906.

TRIAL.

PATTERSON v. DART.

Limitation of Actions — Conveyance of Land — Security — Agreement—Default—Redemption—Sale by Public Auction —Possession.

Action for redemption, etc.

W. Mills, Ridgetown, for plaintiff.

W. E. Gundy, Chatham, for defendant.

MacMahon, J.:—The writ of summons in this action was issued on 29th June, 1905.

The plaintiff, by his statement of claim, seeks to redeem, asks for an account of the rents and profits received by the defendant, and payment of the balance, if any, in his favour.

On 28th March, 1893, the plaintiff conveyed to the defendant lot 1 on the north side of Main street in the town of Ridgetown.

In an action in which the Molsons Bank were plaintiffs, and Archibald Patterson (the plaintiff), James A. Dart (the defendant), James D. Teetzel, and John Turner, were defendants, which was tried in November, 1894, before Chief Justice Armour, judgment was given in favour of the Molsons Bank against the defendants Archibald Patterson, James A. Dart, and James D. Teetzel, for $1,493.40 and costs, the total being $1,752.10; and also judgment for the defendant Dart against the defendant Patterson therein for the sum of $1,857 and interest from 7th November, 1894, and costs to be taxed. It was also declared by the judgment that the deed from plaintiff to defendant was a mortgage only, and that plaintiff was entitled to redeem on payment to defendant Dart of the amount found to be due in respect thereof, and in default a sale of the lands. A reference was directed to the Master at Chatham.

Judgment was on the 17th April, 1895, entered in that action by the Molsons Bank against Patterson, Dart, and James D. Teetzel, three of the defendants therein, for $1,752.10; and judgment was also on the same day entered in favour of James A. Dart against Archibald Patterson for $1,857, and interest from the 7th November, 1894, and costs to be taxed.

The Molsons Bank on the 15th May, 1895, assigned their judgment against Patterson, Dart, and Teetzel, to David Waterworth.

By an agreement under seal bearing date 27th April, 1895, between the plaintiff, of the first part, and the defendant, of the second part, the terms of the judgment of Chief Justice Armour are recited, and it is also therein recited that there is no dispute as to the accounts between them, and that they have agreed upon a period for redemp-

tion; and in order to avoid the trouble and expense of a reference, they mutually agree upon a statement of accounts set out therein as to advances made by Dart to Patterson on account of lands up to 1st February, 1895, and the estimated expenditure from 1st February to 1st July, 1895, and an account of the rents received by Dart up to 1st February, 1895, and the estimated receipts from 1st February to 1st July, 1895.

It is then covenanted that "immediately after the taxation of the costs payable by the parties thereto, the total amount payable by the party of the first part (Patterson) to the party of the second part (Dart) shall be ascertained by computing the amounts paid out by and allowed to the party of the second part (Dart), as set forth, including all amounts which will be necessarily paid out by him before 1st July, 1895, and the amount of the judgment above mentioned, with costs, which it was adjudged should be paid by the party of the first part (Patterson) to the party of the second part (Dart), and deducting therefrom the amounts received and which will be received by the party of the second part (Dart) as above mentioned, as well as the costs of the party of the first part (Patterson), payable to him under the judgment, and the said sum so ascertained to be payable by the party of the first part (Patterson) to the party of the second part (Dart), shall be payable by the party of the first part to the party of the second part not later than the 1st day of July, 1895."

"On payment as above mentioned the party of the second part (Dart) agrees to convey to the party of the first part (Patterson) the said lands, subject to the mortgage to the Canada Savings and Loan Company for $6,000."

It is then provided that in default of payment by the party of the first part (Patterson) of the sum found due on or before 1st July, 1895, the party of the second part (Dart), without notice to the party of the first part, may sell the said lands by public auction and convey and assure the same to the purchaser. And it is agreed that the said property shall be put up at auction, subject to a reserve bid of at least $7,700, and after an advertisement of at least two weeks in a local paper and by posters, and if there shall be no bona fide bid equal to or greater than the sum of $7,700 at the said sale, then the party of the first part (Patterson) shall receive credit for the sum of $1,700 upon his indebt-

edness to the party of the second part (Dart), computed as aforesaid, in the first place in extinguishment of the indebtedness with reference to the said lands, and in the second place in reduction of the amount of the judgment of the party of the second part against the party of the first part. And the party of the first part (Patterson) shall stand absolutely debarred and foreclosed of and from all equity of redemption in and to the said lands. "And these presents shall be considered an absolute release to the party of the second part of all the right, title, and interest and equity of redemption of the party of the first part in to or out of the said lands and premises."

No payment having been made by Patterson on 1st July, 1895, in accordance with the terms of the agreement, defendant on 10th July, 1895, advertised by posters the property for sale by public auction at the Queen's Hotel, Ridgetown, on Monday, 22nd July, 1895, at 2 o'clock; the advertisement describing the premises as being "lot number 1 on the north side of Main street in the town of Ridgetown, and known as the three-storey brick block of two stores now occupied by H. M. Green, hardware, and R. Davidson, gents' furnishings, offices, lodge rooms, etc.; terms 10 per cent. on day of sale, balance in 30 days."

Twenty of the posters are sworn to have been posted up in conspicuous places in the town of Ridgetown. And also that the following advertisement was inserted in the "Standard" newspaper published in the town of Ridgetown, in the issues of that paper of the 11th and 18th July: "There will be offered by public auction at the Queen's Hotel, Ridgetown, on Monday 22nd July, at the hour of 2 o'clock, that valuable property the three-storey block of stores now occupied by H. M. Green and R. Davidson."

It was admitted by plaintiff that the costs referred to in the agreement—which when taxed were to be set off as therein provided — have never been taxed. And he also admitted that up to the issuing of the writ herein no demand had been made by him on the defendant for an account.

The property was put up for sale by auction as advertised, but, there being no bidders at the upset price, it was withdrawn. And the defendant has already credited the plaintiff with the sum of $1,700; and if not already cred-

ited with that amount he is entitled to credit therefor on his indebtedness as provided by the agreement, and the judgment will shew what the balance is.

It was urged on behalf of the plaintiff that the clause in the agreement as to advertising the property for sale had not been complied with, as the advertisement in the "Standard" newspaper did not contain a full description of the premises, and the property had not been legally put up for sale.

The advertisement in the "Standard" did not contain as full a description of the premises as the posters, but both the posters and the advertisement were intended to meet the eyes of any prospective local purchasers, and what was contained in the "Standard" was amply sufficient for that purpose.

The buildings were burnt down twice, and rebuilt.

The defendant has been in possession of the lands and premises since 27th April, 1895, and any claim the plaintiff may have had was barred by the statute at the time the writ was issued on 29th June, 1905.

There must be judgment for the defendant dismissing the action with costs.

DECEMBER 10TH, 1906.

DIVISIONAL COURT.

POTTER v. ORILLIA EXPORT LUMBER CO.

Appeal to Divisional Court—Decision of Local Master upon Reference for Trial—Appeal Heard by Consent—Sale of Lumber—Rejection of Part—Action for Value—Finding of Master—Interference by Court.

Appeal by defendants from decision of local Master at Barrie awarding plaintiff $1,062.50 and the costs of this action.

R. D. Gunn, K.C., for defendants.

A. E. H. Creswicke, Barrie, for plaintiffs.

The judgment of the Court (ANGLIN, MAGEE, MABEE, JJ.), was delivered by

ANGLIN, J.:—. . . The record bears the following indorsement: "The parties hereto consenting, it is ordered that all the questions in this action be tried by James R. Cotter, Esquire, deputy registrar and Master of this Court at Barrie, sitting as and for the trial Judge, with all the powers of such Judge."

The local Master, who is not one of His Majesty's counsel, is not a person whom a Judge of the Supreme Court of Judicature might, under sec. 87 of the Ontario Judicature Act, request to preside over a sitting or adjourned sitting for the trial of causes. There is no other power under which the Master could be appointed to discharge the functions of a trial Judge, and if the proceedings before him are not to be deemed coram non judice, they must be regarded as taken under a reference made pursuant to sec. 29 of the Arbitration Act. That such was the power which the Judge who presided at the Barrie sittings intended to exercise in referring this action at the request of both parties to Mr. Cotter for trial, there can be no doubt, and the presence, or the significance, of the words "sitting as and for the trial Judge," in the indorsement drawn up by counsel, must have escaped his attention.

However, upon the appeal before us, taken on the assumption that the findings of the Master should be treated as a judgment after trial, appealable to a Divisional Court, counsel for both parties agreed that the reference should be treated as having proceeded under sec. 29 of the Arbitration Act, and that in lieu of defendants appealing to and plaintiffs moving for judgment before a Judge in the Weekly Court, the Divisional Court might hear and deal with the matter as arbitrators, and give final judgment, by which both parties agreed to abide. It is in this capacity that we entertain the appeal, at the express request of counsel for both parties.

Plaintiffs' claim was for the value of a quantity of lumber which defendants had refused to accept from plaintiffs, upon the ground that it did not answer the description of the lumber which defendants had agreed to purchase. Defendants had inspected the entire "cut" of lumber made by plaintiffs, and offered by them in fulfilment of their con-

tract with defendants, and had accepted a very large part of it, but had rejected the portion in respect of which the present action is brought, as not of the character for which they had stipulated in the contract.

Counsel for defendants conceded at Bar that there was evidence before the Master which would support his findings, but he contended that the witnesses who gave such evidence were not qualified to pronounce opinions upon which reliance should be placed as to the quality and classification of lumber, and that the weight of the testimony before the Master sustained defendants' rejection of the lumber in question. . . .

[Reference to the testimony of certain witnesses.]

The question for our consideration is, whether the weight of evidence so overwhelmingly preponderates in favour of defendants that we should set aside the Master's finding in favour of plaintiffs for a portion of their claim.

After carefully weighing the evidence, and taking into account the fact that the Master saw all the witnesses and had opportunities, which we have not, of judging of their credibility and of the value of their testimony, I am of opinion that an interference, which would involve a substitution of our views for his upon these points, would be unwarranted. Nothing is more difficult than to make out a case for reversal of findings of fact upon conflicting evidence, and it is right that such an undertaking should be difficult. Not being satisfied that the Master was clearly wrong, we are not in a position to reverse his apparently carefully considered findings.

Appeal dismissed with costs.

DECEMBER 10TH, 1906.

DIVISIONAL COURT.

BARTHELMES v. CONDIE.

Bankruptcy and Insolvency—Assignment for Benefit of Creditors — Right of Creditor to Rank on Estate — Owner or Chattel Mortgagee of Insolvent's Business—Evidence—Representations—Conduct—Estoppel.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., in favour of plaintiffs in an action for a declaration that

defendant was not entitled to rank upon the estate of George Dodds, trading under the name of the Prince Piano Co.

J. Bicknell, K.C., for defendant.

W. R. Riddell, K.C., and W. D. McPherson, for plaintiffs.

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

TEETZEL, J.:—Plaintiffs are creditors of George Dodds, trading under the firm name of the Prince Piano Company, and on 9th June, 1904, obtained judgment against both Dodds and the company for $1,157, and on the same day an assignment by Dodds for the benefit of creditors was duly filed.

Defendant filed with the assignee a claim for $4,530.

The plaintiffs having given a notice of contestation of defendant's claim, an order was made by a County Court Judge directing that plaintiffs should be at liberty to institute an action in the High Court against defendant for a declaration that the affidavit and claim of the defendant filed with the assignee were invalid and should be disallowed and set aside; and this action was accordingly instituted.

Defendant was an employee of one W. A. Cockburn, and it was established at the trial that defendant had no personal interest in the claim filed by him, and that the money represented by that claim was the money of Cockburn, and that defendant was only his agent or trustee in the matter. That the amount represented by defendant's claim had been paid by Cockburn, either directly to the Prince Piano Company for the purchase money of its original assets, or to its creditors, was abundantly established at the trial.

The Chief Justice of the King's Bench, who tried the case, reached the conclusion that Cockburn was the "actual owner of the business" of the Prince Piano Company, and directed judgment to be entered declaring that at the time defendant filed the claim in question, he was not a creditor of George Dodds and the Prince Piano Company, or either of them, and further declaring that the claim filed was invalid and void.

It is quite apparent from the observations of the Chief Justice that he was chiefly influenced in his conclusion by

certain statements and representations made by Cockburn to plaintiffs and others, with regard to the Prince Piano Company's business.

These statements, according to plaintiffs' witnesses, were substantially as follows: "He said he had bought one-half interest in the Prince Piano Company." "He asked me if I was open for a proposition to buy out the Prince Piano Company. He was the proprietor." "He told me George Dodds had no interest in it whatever; he said he owned the business, and that Dodds was managing the business for him. He said he had the Prince Piano Company. He was interested in that." "He told me he owned every cent that was in that factory, and that Dodds was not doing what was right, and he was not going to give him any more chance, and he was going to close out the business." "He called at my place and forbid me paying Dodds any money, and said he was the owner, and that the money was to be all paid to him."

In his evidence Cockburn does not specifically deny that he made these and similar statements, but swears that in fact he never for himself bought any interest in the Prince Piano Company business, but that he, in 1900, advanced money for the purchase of the assets of a former business which had failed, for George Dodds, his father-in-law, who was a practical piano maker, and Mrs. Prince, whose husband was also a practical piano maker, and who had been a partner in the insolvent firm, and subsequently made further advances for the purpose of enabling the business to be carried on, taking a chattel mortgage to cover the original and subsequent advances, which mortgage, however, was not registered; and further states that all he said and did from the beginning was in respect of his interest as the chief creditor of the firm, holding a chattel mortgage under which he was entitled to close out the business. That he did make efforts to find a purchaser, in order to realize upon his interests, as Dodds was drinking heavily, and was not attending to the business, and he said he explained the nature of his interest to nearly all the persons he spoke to about the matter.

The right of defendant to rank on the estate of the Prince Piano Company depends upon whether, as a matter of law, upon all the evidence, Cockburn was or was not the

actual owner of the business; in other words, whether Dodds was a mere agent or trustee for him.

While assuming all the alleged statements to have been actually made by Cockburn, and granting that, unanswered, they would furnish the best proof against defendant's right to rank, they are not in this case final or conclusive.

Plaintiffs' claim is not based on estoppel, warranty, misrepresentation, or fraud. They do not pretend to say that in any way plaintiffs acted upon anything that was said by Cockburn, or that their position was in any way changed, or their conduct in any way influenced, in consequence of the statements alleged.

The statements, therefore, not being in themselves the foundation of any independent right of plaintiffs by virtue of the doctrine of estoppel, warranty, or representation, defendant is at liberty to disprove their truth as items of evidence against him. . . .

[Reference to Heane v. Rogers, 9 B. & C. 577, 586; Ridgway v. Philip, 1 C. M. & R. 415.

In addition to the evidence of Cockburn denying the truth of the statements related by plaintiffs' witnesses, he deposed that in all his statements regarding his interests in the company he had reference to his position as chattel mortgagee, and that it was under the power and authority of his mortgage that he contemplated selling the assets of the company.

It seems to me, having regard to all the circumstances of the case, that the interest he manifested in the business, and his efforts to realize upon it, are quite consistent with his position as holder of a chattel mortgage for a sum nearly approaching the full value of the business, and that his statements and conduct might be fairly referable to his position and rights thereunder.

The conduct of all the parties and the records of the company from beginning to end strongly support this attitude, and are inconsistent with the claim that Cockburn was the owner or partner.

During the latter part of 1899 Mrs. Jennie Prince was carrying on business under the name of the Prince Piano Company, having purchased but not paid for the assets of an insolvent business in which her husband was a partner, and on 24th January, 1900, she and George Dodds entered

into a formal partnership agreement, in which it is recited that the parties had become possessed in equal shares of the piano business lately carried on by her. Under this agreement the same firm name was adopted, and, by a bill of sale, dated 31st January, 1900, Mrs. Prince conveyed to Dodds a one-half interest in the assets of the business.

On 29th January, 1900, Cockburn indorsed for the partnership a note for $3,500, and an account was opened in the firm's books, in the name of W. A. Cockburn, in which he was debited with the note and credited with the proceeds, and this account was continued in the books, shewing him to be a creditor for various balances, until the transfer was made to Condie, after which Condie appears in the books as creditor until the assignment.

The partnership between Mrs. Prince and Dodds was dissolved on 30th May, 1901, and by the agreement of that date, in consideration of the payment by Dodds to her of her interest, ascertained to be $193.05, she transferred to him all her interest, with a right to continue the trade name.

Dodds continued alone until 18th February, 1903, when J. T. White became a partner, and they continued to carry on the business until 1st September, 1903, when the partnership was dissolved, and since that time, until the assignment, Dodds continued the business alone.

On 1st March, 1901, Mrs. Prince and Dodds executed a chattel mortgage on the partnership assets to W. A. Cockburn, which was expressed to be a security for "the amount of the account from time to time owing by the mortgagors to the mortgagee." This mortgage was not registered.

On 19th October, 1903, Dodds made a mortgage to Condie, defendant, for $4,500 on the business assets, which was filed; but in an action by these plaintiffs on behalf of themselves and creditors of Dodds and the Prince Piano Company, it was declared to be void.

It was pointed out upon the argument that the logical result of the judgment as it stands is that if Cockburn and not Dodds was the actual owner of the business, the personal creditors of Dodds should not be entitled to rank on the estate; and should there be a surplus Dodds should be deprived of it, although he was not a party to the proceedings or even called as a witness; and further that Cockburn,

if the actual owner of the business, should be liable for its whole indebtedness. I think the conduct of the parties during the three years and a half and the written records of their transactions shew that no such results were in their contemplation.

Quite independently of the consequences of the judgment, I am of opinion, with very great respect, that by the evidence of Cockburn, supported as it is by the conduct of all the parties who were from time to time in actual possession of the property, and having regard to the books kept by them and all the recorded acts of ownership, and to the entire absence of the element of estoppel, the case made by plaintiffs is completely displaced, and that the judgment should be set aside and the action dismissed with costs.

MAGEE, J. DECEMBER 11TH, 1906.

TRIAL.

RYAN v. PATRIARCHE.

Arbitration and Award — Submission to Arbitration — Time for Making Award—Power of Arbitrators to Extend—Failure to Exercise—Action for Account—Defence of Arbitration Pending—No Answer to Action.

Action by Peter Ryan against P. H. Patriarche for an account of moneys received by defendant under a contract for the construction and installation of an electric light plant for the town of Orillia, in which plaintiff alleged he had an interest under certain agreements with defendant. Defendant set up certain arbitration proceedings as an answer to the action.

R. D. Gunn, K.C., for plaintiff.

J. E. Day and J. M. Ferguson, for defendant.

MAGEE, J.:—It is conceded that this would be a proper action in which to direct a reference were it not for the arbitration proceedings. The submission was dated October, 1904, and was under seal, and bound the parties to abide by the award so as it was made on or before 30th October, 1904, or any subsequent day to which the arbitrators should by writing extend the time.

There was no covenant not to take other proceedings. The two arbitrators named appointed a third, but found that they could not get through by 30th October, and each of them so wrote to the party who had nominated him, but said they would proceed with the arbitration. They did not, however, by writing extend the time for the award. They found the accounts involved, and evidence and vouchers needed, the production of which caused delay, and they had to adjourn from time to time, and had some 40 or 50 meetings, each of the two original arbitrators obtaining from time to time from his nominator explanations, proofs, and vouchers as items came up. The plaintiff appears to have protested from time to time to his arbitrator against the delay and against going on. He did not, nor did counsel, solicitor, or agent for him, attend any of the meetings, nor does it appear that defendant did. The arbitrators seem to have been left to themselves in trying to arrive at the facts and conclusions. Finally, about May or June, 1906, plaintiff positively instructed his arbitrator not to proceed further, and in consequence that gentleman so informed his colleagues, and himself declined to go on, and nothing more was done excepting meeting once as to some items which were then being dealt with. They had done about three-fourths of the work referred to them, but it would still require several months before it could be completed in the ordinary course, and the items and matters yet to be considered are of a more contentious character than those which they have already had before them. It is urged for plaintiff that they can be more effectively dealt with by an officer of the Court, and such is the opinion even of defendant's arbitrator. For defendant it is pressed that the arbitration should proceed, that plaintiff had been cognizant of and assenting to and even aiding in the work done, and expense has been incurred which should not now be rendered useless. The question comes up now by way of defence at the trial.

Assuming that plaintiff's course amounted to an assent to the arbitration being proceeded with, it would be only a parol submission: Ruthven v. Rossin, 8 Gr. 370; Hull v. Alway, 4 O. S. 375. And, being so, it could not have been made a rule of Court under 9 & 10 Wm. III. ch. 15, nor could an application for stay of proceedings have been made under the Common Law Procedure Act of 1856, sec. 91.

Section 3 of the Arbitration Act, R. S. O. 1897 ch. 62, which makes submissions of the same effect as an order of the Court, and irrevocable without leave of the Court, only applies by virtue of sec. 2 to submissions in writing. And the same is the case with sec. 6, which allows an application to stay proceedings.

It may be argued that, inasmuch as the law (sec. 10 of the Arbitration Act) attaches to every submission in writing the liability to be extended by the Court, therefore it is always an existing submission in writing, though the time has passed. I am, however, dealing with matters as I now find them, without any certainty that any extension could ever be granted. In Cooke v. Cooke, L. R. 4 Eq. 77, practically the same state of affairs existed at the commencement of the action as here, but after action the submission was made a rule of Court, and an order obtained extending the time for the award, and thus reinstating the submission. It was held that it afforded no answer to the action. I must hold that no answer exists in this case.

Both parties to the action reside in Toronto, and so does the defendant's solicitor. The plaintiff's solicitor resides in Orillia, but it is admitted that no evidence will be required from there. As the parties have not otherwise agreed, the reference should be to the Master here to take the accounts, and report, further directions and costs being reserved.

If the parties desire to avail themselves to any extent of the labour or conclusions of the arbitrators, so far as they have gone, a clause to that effect may, by consent, be embodied in the judgment.

DECEMBER 11TH, 1906.

DIVISIONAL COURT.

SCOTT v. JERMAN.

Contract—Construction—Division of Land—Trespass—Title—Damages—Scale of Costs.

Appeal by plaintiff from judgment of MEREDITH, C.J., dismissing an action for trespass to land.

E. Meek, for plaintiff.

T. M. Higgins, for defendant.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—We think the agreement of 1898 between Scott and Mrs. Torrance was intended and expressed so as to divide the property on the same line of separation as was marked by the line fence put there some years before, when a division of the property into east and west portions was arrived at between plaintiff and defendant. That would give to plaintiff approximately the 28 acres to the east, and the western part approximately 30 acres to Mrs. Torrance. Mrs. Torrance got, besides this, the "bush and water power" forming part of the eastern division going to plaintiff. Defendant's contention is that this "bush and water power" comprises about 6 acres of land of the eastern portion, but we do not think that can be the proper construction of the words used. The Chief Justice read the agreement as if the word "lot" was added, but that is, we think, not permissible, having regard to all the terms of the writing and the conduct of the parties. Plaintiff since 1893 has used all the eastern part of the lot, which contains accurately only 25½ acres, for purposes of cultivation and pasture, and there was no change in that user after the agreement of 1898 till defendant broke into the land adjoining the watercourse and turned plaintiff's cows out of it, which gave rise to this action.

The bush is the land covered by the bush, and the "water power" would not carry any of the land—much less the several acres claimed as the water power lot. The only difficulty is as to the use of the words with reference to the 28 acres as being now cultivated by plaintiff. It was not strictly cultivated at the time—it had been cultivated, and it was, as already said, all along used as a pasture field by plaintiff. That use sufficiently satisfies the words used so as to give effect to the acreage of 28 acres, which was kept as his part by plaintiff.

We think the judgment should be entered in favour of plaintiff, and, as the Chief Justice has fixed the amount of damages at $50 in case his finding should not stand, we accept that as the measure of damages to be paid to plaintiff by defendant. Costs should be on the High Court scale, as plaintiff, after trying in the Division and County

Courts to get redress, was driven into the High Court by the defence raised as to title to land.

DECEMBER 11TH, 1906.

DIVISIONAL COURT.

HOGABOOM v. HILL.

Husband and Wife—Moneys Borrowed on Insurance Policy on Life of Husband of which Wife is Beneficiary—Separate Property of Wife—Business of Wife—Interest of Husband—Moneys Derived from Business—Execution against Husband as Member of Partnership—Property Liable to Satisfy Execution—Declaratory Judgment.

Appeal by defendants from judgment of MACMAHON, J., ante 352.

G. H. Kilmer, for defendants.

I. F. Hellmuth, K.C., for plaintiffs.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

MAGEE, J.:—The capital put into the Hill Printing Co. was $954.15. The trial Judge found that $654.15 of that sum was contributed by the wife, being the proceeds of a loan on the policy in her favour on her husband's life. The balance, $300, was the proceeds of a loan to the wife from her mother, for which the wife gave as security a mortgage upon certain household furniture. Upon the evidence before him the trial Judge held that the furniture so mortgaged was really the husband's and not the wife's, and he, for that reason, found that the money so borrowed upon its security was also the husband's. It is difficult to understand that such a result was ever contemplated by the mother-in-law, the wife, or Hill himself. There would be every reason why that should not be so. He was then in difficulties. Whether there was an attempted transfer to

the wife of goods which did not belong to her or not, the very last intention the wife and mother could have had would have been to make him possessed of any money which would be so readily traced and become available to creditors if it were his. Though the security furnished for the loan may have been the husband's, the loan itself was obtained by the wife in her own name, on her own liability, and from her relative. To transfer it from her to her husband requires, I think, more than a mere deduction from the fact that she was enabled to get it through his assistance, and in this respect, I think, the appellants' contention is well-founded. Whether the furniture was the husband's or not, the mortgage upon it was in fact paid off out of the business, and the chattels themselves again rendered liable to his creditors, if they ever were so.

Then the result of the judgment appealed from is to declare that the husband and wife were partners and entitled to profits in the proportion of their contributions to the capital. Both disclaimed partnership. If the husband contributed nothing, and had no proprietary interest, the wife would be entitled to all. As the payments on the Lowther avenue property were made by her out of the profits of the business, it follows that if the latter were hers the former would be hers also. Even if the husband were entitled to share in the business, it does not appear that the amount drawn out to be paid on the land for the wife exceeded her share of the profits; rather the contrary is to be inferred from the evidence; there would be no reason why it should be declared to belong to the partnership rather than that her share in the partnership should be reduced by so much. In either case plaintiffs would have no right to the land.

The action thus fails as to both the real and personal property which plaintiffs seek to avail themselves of.

There are other difficulties in their way, which, in the view taken, it is not necessary to deal with. . . .

Appeal allowed and action dismissed with costs.

FALCONBRIDGE, C.J. DECEMBER 12TH, 1906.

WEEKLY COURT.

RE MILES.

Will — Construction — Residuary Bequest — "Parties Mentioned" in Will who shall be Living at Winding-up of Estate—Corporations—Poor of Town—Period of Distribution—Executors.

Motion by executors for order declaring construction of will of Robert B. Miles, deceased.

V. A. Sinclair, Tilsonburg, for the executors.

W. S. Brewster, K.C., for Joseph W. Porter.

M. F. Muir, Brantford, for E. A. Miles and W. Miles.

J. H. Spence, for Ruth Stuart.

M. C. Cameron, for the official guardian, appointed to represent beneficiaries who have died since the testator, also the poor of Tilsonburg.

G. F. Mahon, Woodstock, for the Woodstock Hospital.

J. M. Godfrey, for Wellington Walker.

W. C. Mikel, Belleville, for the Ontario Institute for the Deaf and Dumb.

No one appeared for the Baptist Church at Burford.

FALCONBRIDGE, C.J.:—The facts of the case and the questions propounded are set forth in the affidavit of Vivian and Elliott, the two executors.

1. The first question is propounded in clause 1 of paragraph 9 of the affidavit. The 52nd paragraph of the will is as follows: "I direct that all the rest and residue of my estate, both real and personal, shall be converted into cash by my executors and trustees hereinafter named, and shall, after the payment of the expenses of winding-up my estate, be divided share and share alike among the different parties mentioned in this my will who shall be living at the time of the winding-up of my estate;" and the 53rd paragraph of the will provides as follows: "I further direct that in case any of the legacies mentioned in this my will shall lapse, the

amount or amounts of same shall become part and parcel of the residue of my estate, and shall be divided or apportioned as in the clause last above mentioned."

I think it is highly probable that the testator intended the word "mentioned" to be the equivalent of "mentioned as beneficiary," but, as eminent Judges both in England and in Ontario have said over and over again in different modes of expression, a Judge is not justified in departing from the plain meaning of words which admit of a rational interpretation, for the purpose of giving effect to an assumed intention. The verb "to mention" is applied to something thrown in or added incidentally in a discourse or writing, e.g., "In the course of conversation that circumstance was mentioned," (Imperial Dictionary.) The Century defines it, "to speak of briefly or cursorily;" and the Standard, "to make slight allusion to." These definitions, then, of leading lexicographers favour the construction which I feel obliged to put upon it—the plain every-day meaning of the word. There is no emphasis in the word, and nothing to justify me in supplying a phrase to fortify it. The answer to the first question will, therefore, be that Joseph W. Porter, Wellington Walker, and Mary Jane Miles, or Phillip, are entitled to share in the residuary estate.

2. The expression "parties who shall be living at the time of the winding-up of my estate" is inapplicable to a corporation, and therefore the Ontario Institute for the Deaf and Dumb at Belleville and the Hospital at Woodstock are not entitled to share in the residuary estate.

3. This objection does not apply to the poor of Tilsonburg who are living—"for the poor shall never cease out of the land"—and this gift is not void for uncertainty; therefore the poor of Tilsonburg will share in the residuary estate, and will also be entitled to the $6, proceeds of the buggy and the cutter. The corporation of the town of Tilsonburg will take charge of and administer this fund.

4. The "winding-up of my estate" appears to be a matter not dependent upon the will or whim of executors; and the authorities seem to authorize the confining of the time to the one year which is allowed by law, and that one year is therefore the time meant by the "winding-up of my estate." Therefore the representatives of the legatees who were alive at the expiration of the year are entitled to share under the residuary clause.

5. The Baptist church at Burford is not entitled to share in the residuary estate, on the ground stated above.

6. As to the corporations, this has been answered above.

7. The executors are also parties "mentioned in the said will," and are entitled to share in the residuary estate.

Costs to all parties out of the fund.

MULOCK, C.J. DECEMBER 12TH, 1906.

TRIAL.

BIGGAR v. TOWNSHIP OF CROWLAND.

Highway—Obstruction by Committee of Council of Township—Stakes in Highway to Mark Course of Ditch—Misfeasance—Liability of Corporation for Acts of Committee—Injury to Pedestrian on Highway—Damages.

Action for damages by John Biggar and Margaret Biggar, his wife, against the municipal corporation of the township of Crowland, because of the injury caused to the wife by certain obstructions on the highway.

J. F. Gross, Welland, for plaintiffs.

W. M. German, K.C., for defendants.

MULOCK, C.J.:—The municipal council decided to construct a ditch along the side line between the 8th and 9th concessions of the township of Crowland, under the provisions of the Ditches and Watercourses Act, and, their engineer having prepared the necessary plans and specifications and made the inquiries and award called for by the Act, the council appointed three of their number, namely, the reeve, Mr. Mathews, and councillors Carl and Misner, a committee to meet on the side road where the ditch was to be constructed, and there to let the contract for the work by public competition. Accordingly this committee of council met officially at the appointed time and place, where were assembled a number of the public interested in the letting of the contract, and, in order to indicate to prospective contractors where the ditch was to be constructed, they drove four stakes in the high-

way, one, at least, and perhaps two, of these stakes being on the travelled portion of the road and very near to the centre; the others being nearer the side. They had with them the plans and specifications prepared by the engineer, and the reeve made the measurements shewing where the stakes were to be driven, and councillor Carl, with an axe, drove the stakes at the places pointed out by the reeve. The latter testified that what they did was as a committee of the council; that they considered the placing of these stakes necessary in order to let the contract. Councillor Carl, one of the committee, was examined on behalf of defendants, and states that the stakes were driven into the road in order to indicate how much earth would be required to be removed. The contract was then let, and the stakes were left in position, projecting about 6 inches above the ground, and unprotected by barrier, light, or otherwise. In the dusk of the same evening Mrs. Biggar, with her son Bruce, was returning home on foot, and, when walking along the travelled portion of the road, struck her foot against one of these stakes and was thrown to the ground and seriously injured. Feeling around with her hand, she found the stake, which could not be seen by a person standing up.

The evidence shews beyond reasonable doubt that the accident happened on the travelled part of the highway; that it was occasioned by the obstruction placed and left there by the committee of the council; that it was a dangerous obstruction; and that defendants adopted no precautions in order to prevent injury to the public.

The plaintiffs' cause of action is framed at common law for misfeasance. Defendants seek to treat it as one under the statute for non-repair of the highway.

The plaintiffs' cause of action is framed at common law for misfeasance. Defendants seek to treat it as one under the statute for non-repair of the highway.

I am unable to regard it as a case of non-repair. At common law any obstruction which unnecessarily inconveniences or impedes the lawful use of the highway by the public is a nuisance: Angell on Highways, sec. 223.

It might have been lawful for defendants to have left the stake in the highway if they had adopted proper precautions to prevent danger, as, for example, protecting it with a light, or by driving it so far into the ground that it could

not cause injury, but it was unlawful for them to leave it in a condition that made it dangerous to the public: Rowe v. Counties of Leeds and Grenville, 13 C. P. 315; Clemens v. Town of Berlin, 7 O. W. R. 35.

Defendants did not neglect any duty to repair. The injury was occasioned by no act of omission on defendants' part to repair, but by an act of commission, the creating of a nuisance on the highway, which was in itself an unlawful act: McDonald v. Dickenson, per Osler, J.A., 24 A. R. 43; Gilchrist v. Township of Carden, 26 C. P. 1.

Placing an obstruction in the highway and leaving it so unguarded that it endangers the public safety is a nuisance for which an indictment lies, and also renders the guilty person liable to an action at the suit of an individual who has sustained special damage: Borough of Bathurst v. Macpherson, 4 App. Cas. 256; McKinnon v. Penson, 8 Ex. 327.

If the municipality itself creates the nuisance it is no more exempt from liability than an individual.

I therefore think that the accident in question was caused by misfeasance.

The next question is whether defendants are liable for the act of the committee. Where members of a township council are appointed a committee to perform work for the council, they are servants or agents of the corporation while in the performance of the work: McDonald v. Dickenson, supra.

The committee were authorized by defendants to proceed to the place where the ditch was to be constructed and there to let the work. It was in the interest of defendants that the ditch should be constructed in the exact place selected for that purpose by the engineer. A disregard of such an important detail might seriously interfere with the efficiency of the work. I therefore think that for the information of tenderers and the guidance of the contractor, and to secure the performance of the work in accordance with the plans and specifications, it was both proper and necessary that the precise location of the proposed work should be marked out on the ground.

In arranging for the letting to be done on the spot where the work was to be performed, and appointing three of their number as agents of the corporation to attend on the spot to let the contract, it must be assumed, I think, that the council authorized the committee to do what seemed to them

expedient, in order to the letting of a contract according to the plans and specifications of the engineer and the decision of the council. Making intelligible to competitors the location of the proposed ditch was information reasonably necessary in order to the carrying out of the instructions of the council to let the contract, and thus for that purpose in planting the stakes the committee were acting in the course of and within the scope of their authority, and for their torts the defendants are liable: Stalker v. Township of Dunwich, 15 O. R. 342; Nevill v. Township of Ross, 22 C. P. 487; Gilchrist v. Township of Carden, supra; Conrad v. Trustees of Village of Ithaca, 16 N. Y. 161; . . . Bayley v. Manchester, L. R. 8 C. P. 148, 152. . . .

The question as to whether a servant or agent is acting within the scope of his employment or authority is one of fact, and no general rule can be formulated which will determine in each case whether the servant or agent was acting within the scope of his employment or authority, and Teetzel, J., in the unreported case of Grimes v. City of Toronto, expressed the view that if the servant is engaged to do work upon a highway, anything done by him in the course of that work or in furtherance of it, or anything omitted to be done that ought to have been done, speaking generally, will create a liability on the corporation.

Being of opinion that defendants are liable for the injury sustained by Mrs. Biggar, the remaining question to determine is the amount of damages. Before the accident she was an able-bodied and remarkably healthy woman. Her age was about 50. She gave evidence on her own behalf, and impressed me as a perfectly truthful and candid witness. The accident was a very serious one; two ribs were fractured; her left knee was injured; and she sustained serious internal injury, causing inflammation of the bladder, and partial paralysis of the throat accompanied by severe pain. She was confined to her bed for 7 weeks.

None of the medical gentlemen who gave evidence spoke with any degree of confidence as to her ultimate recovery, and the reasonable inference is, I think, that there may be some improvement, but she will never recover the full use of her left leg, whilst there is a reasonable probability of permanent impairment of the knee-joint. At the time of the trial it was swollen, being two inches larger than the sound one. Although 7 months had elapsed since the accident, she was

evidently in considerable pain, not only in the knee joint, but in the left side of her body. She can move only with the help of a crutch, but on account of the pain in her left side she is obliged to use the crutch under the right arm and to throw almost her whole weight over on the crutch in order to take a step forward with her right leg. Thus her body must lean out of the perpendicular and far to the right to enable her to lift her right foot off the ground.

From the evidence I entertain no doubt whatever as to the serious nature of the injury, and think it very problematical if she will ever, even after considerable time, have a complete recovery. She has suffered very much and still suffers, and the accident has greatly impaired her general health. The plaintiffs are farm people in a respectable walk of life, and before the accident Mrs. Biggar was an active, industrious woman; a valuable helpmate to her husband. Now she is a charge on him. A grown-up daughter, who had been employed in a factory, has been brought home to wait on her mother. A considerable liability has already been incurred for medical attendance, and more doubtless will follow.

I award to the female plaintiff the sum of $1,500 damages, and to her husband the sum of $500. I direct judgment to be entered for plaintiffs for these sums with costs of the action.

MACMAHON, J. DECEMBER 13TH, 1906.

TRIAL.

LEE v. TOTTEN.

Trusts and Trustees—Breach of Trust—Threat of Litigation—Promise to Make Amends by Will—Compromise—Consideration—Enforcement—Revocation of Will—Claim on Estate.

Action by John C. R. Lee, on his own behalf and as executor of Sophia Lee, deceased, against the executors of Julia Stanton, deceased, to compel defendants to make good to plaintiff out of the estate of Julia Stanton, deceased, the share to which plaintiff was entitled as representing Sophia

Lee, had Julia Stanton by her will provided for Sophia Lee and her representatives equally with other members of the family of William H. Stanton, deceased, or to restore a settled fund and interest, and for administration of the estate of Julia Stanton.

A. C. McMaster, for plaintiff.

H. M. Mowat, K.C., and J. E. Robertson, for defendants.

MacMahon, J.:—Prior to the marriage of Sophia Stanton with Joseph Smith Lee, a marriage settlement was executed between her intended husband and herself, dated 30th June, 1858, of which William A. Himsworth was appointed the trustee. Himsworth, however, never acted, and the trusteeship was assumed by William H. Stanton, of Toronto, a brother of Sophia Lee.

The settlement provided that "the trustee may pay out and invest the moneys in Government debentures, bank stocks, municipal debentures, or other good security, with authority from time to time to transpose the securities when and so often as he should think fit."

The sum which came into the trustee's hands was $2,000, which, under the terms of the settlement, was to be "for the use and benefit of Sophia Stanton during the joint lives of said Joseph Smith Lee and said Sophia; and after the death of either of them to the sole and only use of the survivor, his or her heirs and assigns."

The trustee with that fund purchased 50 shares of Gore Bank stock, of the par value of $40 per share. The bank suspended payment, and on its being wound up there was a loss of $600 on the investment made by the trustee.

With the remaining $1,400 of the fund, Stanton, on 2nd April, 1872, purchased 35 shares of Royal Canadian Bank stock at a par value of $40 per share, the share certificate shewing that Stanton held the stock "in trust for Joseph S. Lee and Sophia Lee."

Mr. Frank Arnoldi said that Joseph Smith Lee released his right by survivorship to the trust fund. This also appears by a memorandum in Mr. Stanton's handwriting attached to exhibit 4.

The trustee in June, 1874, sold two of the Royal Canadian Bank shares for $80, one share on 5th January, 1897,

for $40, and two shares in May, 1876, for $80, the proceeds of which sales were paid to Sophia Lee.

Mrs. Lee had at that time perfect confidence in her brother W. H. Stanton, for on 17th April, 1870, she made a will by which she bequeathed all her estate, including the bank stock, to him in trust for her son John, the present plaintiff.

The Royal Canadian Bank amalgamated with the City Bank of Montreal, and the amalgamated banks were, in 1876, incorporated by 39 Vict. ch. 44, as "The Consolidated Bank," and the 33 shares then held by the trustee became stock of that bank; and of these the trustee sold two shares and paid the proceeds ($80) to Sophia Lee.

W. H. Stanton died in June, 1879, and his personal estate was sworn to at $6,000 by his widow, the executrix under the will. It was also stated that he left considerable real estate.

The Consolidated Bank suspended in August, 1879, at which time there stood in Stanton's name as trustee $1,120 of its stock. On the winding-up, the whole of the stock was lost.

Mr. Arnoldi, representing Mrs. Lee, said he had an interview with Mr. Stanton early in 1879 in relation to the trust fund, when Stanton admitted that he was liable for the loss of the fund, but was not able at that time to make it good, but that in the meantime he would make his sister, Mrs. Lee, an allowance of $100 a year, and would make the trust fund good to her by his will.

There must be some mistake in speaking of the trust fund having been lost early in 1879, as the Consolidated Bank did not suspend until August of that year, and W. H. Stanton died in June, two months prior to its suspension.

On learning that Mr. Stanton had not, as promised, made provision for Mrs. Lee by his will, but had left all his estate to his widow, Julia Stanton, Mrs. Lee saw Mrs. Stanton, who referred her to Mr. Huson Murray, Mrs. Stanton's solicitor.

Mr. Arnoldi then, on Mrs. Lee's behalf, saw Mr. Murray, who, on 9th October, 1879, wrote him the following letter:—

"Dear Mr. Arnoldi,—I have seen Mrs. Stanton in reference to Mrs. Lee's matter, and while she distinctly repudiates any legal liability whatever, she has assured me that, provided it is left with her as a matter of honour, she will do

what she believes her husband would have done, namely, she will make up to Mrs. Lee as long as she lives, in January and July, the amount which the dividends on her Consolidated Bank stock fall short of $100 per annum, and should there be no dividends at all, she will then pay her $100 per annum by half-yearly payments of $50 each, in January and July, the first payment to be made January next. This is, of course, on the assumption that the shareholders will not be called upon to pay anything. I desire also to say that Mrs. Stanton has, as you no doubt are aware, provided for Mrs. Lee in her will equally with other members of the family."

Mr. Arnoldi states that after receiving that letter he told Mr. Murray that the terms mentioned therein would not be accepted, and there would be immediate litigation unless the matter was amicably arranged; that he then asked to see the will alluded to, which was shewn to him by Mrs. Stanton, dated in 1879, which he said had been duly executed by her, by which she left a share—an absolute gift—(to the best of his recollection, one-fifth) to Mrs. Lee and her representatives.

After seeing the will, Mr. Arnoldi stated he told Mr. Murray that on Mrs. Lee's behalf he would accept the bequest made by the will as being sufficient, and there would be no litigation.

Mrs. Lee died in June, 1898, and up to the time of her death the half-yearly payments of $50 each were made by Mrs. Stanton.

Mrs. Stanton died on 2nd August, 1905 (leaving an estate valued at $30,000), having executed a will, dated in November, 1892, by which she bequeathed to Sophia Lee the sum of $2,000, if she survived the testatrix; and in the event of her predeceasing the testatrix she bequeathed to John C. R. Lee (the plaintiff and son of Sophia Lee) the sum of $500.

Mr. Murray stated that he was solicitor for Julia Stanton, and that the will executed by her in which Mrs. Lee was named an equal beneficiary with the other members of the Stanton family must have been in existence when he wrote the letter of 9th October, 1879, although he now has not any recollection of its contents, nor does his memory carry him back to the interview he must have had with Mr. Arnoldi prior to that letter being written. He (Mr. Murray) drew the will made by Mrs. Stanton in 1892, but he cannot remem-

ber any discussion at that time as to the contents of the former will, under which Mrs. Lee's share would have been about $6,000.

While Mr. Arnoldi was threatening proceedings against the estate of W. H. Stanton, of which his widow was the executrix and sole devisee, it is clear from the letter of Mr. Murray that Mrs. Stanton did not consider her husband's estate liable for the loss of the trust fund belonging to Mrs. Lee. But Mr. Arnoldi was of a contrary opinion, and, as already stated, told Mr. Murray that proceedings would be instituted unless the matter was settled. And it was in consequence of his having seen the will referred to in the letter of Mr. Murray that Mr. Arnoldi became satisfied with the generous provision Mrs. Stanton had made for Mrs. Lee, and accepted it as a settlement, and the contemplated litigation was abandoned.

As that will was in existence when the letter of Mr. Murray was written, and as Mrs. Stanton was not prior to the making thereof aware of any legal proceedings being threatened, the provision in the will for Mrs. Lee was the spontaneous act of Mrs. Stanton and of course uninfluenced by the subsequent threats of litigation.

Having communicated to Mr. Murray that he accepted the terms of the will shewn to him, and that no suit would be brought,—which he, on behalf of his client, carried out—there was, I consider, a compromise which might have been enforced had a binding agreement been entered into: Cook v. Wright, 1 B. & S., judgment of Blackburn, J., at p. 568; Miles v. New Zealand Alford Estate Co., 32 Ch. D. 266. But Mr. Arnoldi knew that the liberal provision in the will for Mrs. Lee might at any moment be revoked unless there was a covenant against revocation; and it was revoked by the execution of the will of 1882.

Mrs. Stanton is spoken of by the witnesses as a woman of high principle, and not likely to do an act which she would consider unjust, and as in the letter from her solicitor to Mr. Arnoldi she had been insisting that Mrs. Lee's rights "should be left to her as a matter of honour, and she would do what she believed her husband would have done," and as Mr. Murray has no recollection of the former will having been considered when preparing the will of 1882, it is likely that Mrs. Stanton was unmindful of its contents, and made the

bequest in her last will in favour of Mrs. Lee which she believed her husband would have made.

One may regret the conclusion that must be reached, which I consider the inevitable one, that the action must be dismissed, but under the circumstances without costs.

DECEMBER 13TH, 1906.

DIVISIONAL COURT.

RE PRESTON.

Payment into Court—Fund in Hands of Trustee de son Tort —Constructive or Express Trustee—Trustee Relief Act— Infant Cestui que Trust—Jurisdiction of Court to Order Infant's Money into Court on Summary Application— Contract between Original Trustee and Transferee of Fund.

Appeal by Mary E. Preston from order of MABEE, J., in Chambers, directing James Moneypenny, on his own application, to pay into Court a sum of $1,019.92 in his hands, to which the infant Lois E. Preston was beneficially entitled.

The appeal was heard by MULOCK, C.J., ANGLIN, J., CLUTE, J.

W. E. Middleton, for Mary E. Preston.

W. E. Raney, for James Moneypenny.

ANGLIN, J.:—An insurance policy on the life of the deceased father of the infant was, by indorsement, made payable to the appellant, his widow, Mary E. Preston, "for the maintenance and support" of their child Lois. These moneys were collected for Mary E. Preston by James Moneypenny, her brother-in-law. After they had come to his hands, by arrangement between himself and Mrs. Preston, Moneypenny retained them and employed them in the business of the firm of Dignum & Moneypenny, in which he was a partner. He gave to Mrs. Preston the following acknowledgment:—

"Toronto, March 1st, 1905.

"Mrs. D. M. Preston,
"Philadelphia.

"Dear Madam: We beg to advise you that we hold to the credit of Miss Lois Preston's account the sum of nine hundred and forty-seven dollars and fifty-six cents ($947.56) bearing interest at the rate of six (6) per cent. per annum, payable quarterly.

"Yours truly,
"Dignum & Moneypenny."

The evidence discloses that the infant is residing not with her mother, but with Mr. Moneypenny, by whom she is being supported. After the moneys in question had been in Moneypenny's hands for more than a year, apparently because of some misunderstanding or quarrel between himself and Mrs. Preston, she demanded that he hand these moneys over to her, and pressed her demand. Believing, as he swears, that Mrs. Preston contemplated marrying again, and that if these moneys were given to her they would be diverted from the purposes of the trust to which they were subject, Mr. Moneypenny refused to pay over the moneys to Mrs. Preston, and immediately instructed the application upon which my brother Mabee made the order allowing payment in. Mrs. Preston now appeals, on the ground that the Court has not jurisdiction to make such an order The amount paid in includes the principal sum received by the applicant with interest thereon at 5 per cent. from the date at which he received such principal, less his costs of the application, which were given him by the Judge and were taxed at the sum of $30, and the costs of the appellant fixed at a like sum.

There can be no doubt that Mr. Moneypenny took these moneys and kept them with full knowledge of the trust to which they were subject, and must be deemed to have been aware that his retention of them pursuant to the arrangement with Mrs. Preston was in breach of trust. It follows that Moneypenny was at least a trustee de son tort of these moneys. He was as such accountable to the fullest extent as a trustee for the moneys and for his use of them—accountable not merely as a debtor to Mrs. Preston, but as a trustee to Lois E. Preston, his cestui que trust. By the document which he gave to Mrs. Preston he made himself,

though otherwise perhaps merely chargeable as a trustee by operation of law, an express trustee of this fund. In the circumstances of this case this document is a declaration by Moneypenny of an express trust upon which he held the money. His attempt to limit his liability for its use to payment of a fixed rate of interest cannot give him the legal status of a mere debtor.

Being then a trustee, though de son tort, and as such liable to account to an infant cestui que trust, the applicant, however much at fault, was, I think, entitled to come to the Court, under the Trustee Relief Act, R. S. O. ch. 336, sec. 4, and sec. 2, defining "trustee," and ask to pay the money in his hands into Court, thus relieving himself pro tanto of his onerous responsibilities as a trustee. The Court, which, in the exercise of its equitable jurisdiction, imposes upon the applicant the burdens and liabilities of a trustee, will not deny to him relief to which as a trustee the statute would entitle him. Qua debtor of Mrs. Preston the applicant had no right to thus discharge his liability; qua trustee he may be entitled to be thus relieved quoad his cestui que trust, the infant. A trustee by operation of law, because of his knowingly retaining trust moneys, an express trustee, I think, by virtue of his own declaration, Mr. Moneypenny, in my opinion, rightly asked the Court to allow him to discharge himself as permitted by the Trustee Relief Act. Where, as here, it clearly appears to be for the benefit of an infant cestui que trust that payment in should be permitted, the Court may, and I think should, pronounce the order—though in other cases, where the interests of the cestui que trust seem not to require it, the Court, in the exercise of its discretion, may refuse to entertain such an application, though made by a person whose status as a trustee is indisputable.

But upon another ground entirely I think the order in appeal may be supported. The Court was apprised—from what source cannot be material—of facts which indicated that money of an infant was, in breach of trust, in the hands of a person who was before the Court. The original trustee, likewise guilty of breach of trust, was also before the Court. The fitness of this trustee to again handle such moneys was seriously in question. A case of jeopardy of infant's money was sufficiently established, had an application been made on behalf of the infant by the official guardian, or by

a next friend, to warrant the Court making an order for payment in of the fund. Jurisdiction to make such an order on summary motion by the cestui que trust is expressly conferred by Rule 938 (d). Mr. Moneypenny, if not entitled, as contended by the appellant, to the privileges, rights, and remedies of a trustee, is certainly subject to all the powers and jurisdiction which the Court can exercise over trustees for the benefit of cestuis que trust. One of these powers is to order payment into Court of any money in the hands of a trustee on motion made on behalf of the cestui que trust.

As custodian of the interests and property of infants, the Court, exercising the jurisdiction formerly vested in the Chancellor, must be able, motu proprio, to order that which, upon application of the official guardian or of the infant by her next friend, it could and would direct.

In Huggins v. Law, 14 A. R. 383, at p. 394, Patterson, J.A., says: "The jurisdiction of the Court in respect of the property of infants and its power to direct guardians or other trustees in their management of that property, or to take it out of their hands and assume the care and management of it, is not open to dispute. In the exercise of that jurisdiction it may be the general rule of the Court to require that money shall not remain in the hands of the guardian, executor, or other trustee, but shall be paid into Court." He speaks of "the right of the guardian to get in the estate, of whatever it consists, and to manage it until interfered with by the order of the Court."

In Re Harrison, 18 P. R. 303, Robertson, J., quotes this language as indicative of the wide powers of the Court in dealing with infants' property and the trustees thereof.

In Campbell v. Dunn, 22 O. R. at p. 106, the Chancellor said: "The fund having been brought before the Court by the parties, and there being a contest as to its custody, I will order it to be paid into Court for the protection of the infants."

In re Humphries, 18 P. R. 289, the Chancellor again stated the jurisdiction of the Court in very broad language, and held on a summary application under Rule 938 against a trustee, though not made by the infant cestui que trust, that an order for payment in should be made.

These cases indicate the scope of the jurisdiction which the Court exercises for the protection of the property of infants.

If the order in appeal were vacated, and Mrs. Preston were allowed to bring an action to recover this money from Mr. Moneypenny, the moment she should commence such action an order for payment into Court would be pronounced on the application of either party, or on that of the official guardian intervening for the infant, such facts being shewn as are now admitted by both parties, though the solvency, the conduct, and the character of Mrs. Preston were subject to no imputation: Whitewood v. Whitewood, 19 P. R. 289.

If there were any doubt of our jurisdiction, it would, I think, be our plain duty before disposing of the present appeal to direct the official guardian to intervene and to make a substantive application on behalf of the infant for the retention of these moneys in Court. But, having no doubt of the jurisdiction under which the order of my brother Mabee was made, I see no reason for putting the infant's small estate to the expense of another motion.

The application for payment in was made to relieve a situation arising entirely from the breach of trust in which the applicant as well as Mrs. Preston participated. Having created the difficulty, he should not, I think, have been allowed to remove it at the expense of the infant. I would, therefore, vary the order in appeal by striking out the allowances to the applicant and to Mrs. Preston of the sum of $30 each for costs. Of the present appeal, in view of this variation, there should be no costs.

Though the material does not shew it, there is in the acknowledgment of Mr. Moneypenny quoted above, an indication that Mrs. Preston was, in March, 1905, a resident of Philadelphia, Pa. If her residence there lasted for the period of a year, and continued until this application was launched, the order might also be supported under 62 Vict. ch. 15, sec. 3.

CLUTE, J.:—I agree in the result arrived at by my brother Anglin, upon the ground that the respondent, in the facts and circumstances in this case, became a constructive trustee within sec. 2 of the Trustee Relief Act. . . .

[Reference to Lee v. Sankey, L. R. 15 Eq. 211; Lewin on Trusts, 15th ed., pp. 558, 560, 561, 1141; Soar v. Ashwell,

[1893] 2 Q. B. 390, 396, 402, 403, 405; Wilson v. Moore, 1 My. & K. 337; Life Association of Scotland v. Siddal, 3 D. F. & J. 58, 72; Burdick v. Garrick, L. R. 5 Ch. 233.]

Upon the other ground of my brother Anglin's judgment, I desire to express no opinion. . . .

MULOCK, C.J.:—I agree in the conclusion of my brothers Anglin and Clute that this appeal should be dismissed, and propose to refer only to the argument of Mr. Middleton that the dealings between Mr. Moneypenny and Mrs. Preston created a legal contract whereby he was bound to repay the money to Mrs. Preston, and that the matters in controversy cannot be treated otherwise than as arising out of such contract.

Mrs. Preston was trustee of the fund for her infant child, and intrusted it to Mr. Moneypenny to invest in a mercantile business. Such an investment of this trust fund was a breach of trust. Mr. Moneypenny, when accepting the money, knew it was a trust fund, and whilst he was, I have not doubt, innocent of any intentional wrong-doing, nevertheless his action in investing the fund in a mercantile business made him also guilty of breach of trust. So that the transaction resolves itself into this, that the subject matter of the alleged contract is a trust fund, and one of its terms is that this fund shall be illegally invested.

It was not competent for the parties to control the rights of the cestui que trust in respect of the fund by such a contract, which, involving a breach of trust, is fraudulent and void as against the cestui que trust, and therefore cannot stand as a bar to the Court's exercising its equitable jurisdiction in respect of the trust fund in question.

CARTWRIGHT, MASTER. DECEMBER 14TH, 1906

CHAMBERS.

CRAWFORD v. CRAWFORD.

Discovery—Examination of Defendant—Scope of—Discovery of Mines—Dates and Places.

Motion by plaintiff for an order requiring defendant McLeod to attend for further examination for discovery

and answer certain questions which he refused to answer upon his examination.

W. N. Ferguson, for plaintiff.

J. B. Holden, for defendant McLeod.

THE MASTER:—This action is for an account of the discoveries, other than that of the Lawson mine, said to have been made by defendants under the prospecting agreement referred to in the judgment in McLeod v. Lawson, 8 O. W. R. 213. In that case nothing turned on the date of the discovery of the Lawson mine. Here the dates are of importance, as plaintiff alleges and must prove, in order to succeed, that there were other properties, as well as the Lawson, discovered in the same period. In this view it may be helpful to trace the movements of defendants and get from them their account of the matter, and test the accuracy of their statements. It does not seem that by doing so plaintiff violates the order of 17th October precluding him from raising here any issues raised in the previous actions.

The questions which plaintiff wishes to have answered are as to where defendant McLeod camped on 13th and 14th September, and when the Lawson mine was first reached, and how long before its discovery.

The scope of an examination is not to be unduly restricted. It is better that counsel should not be too prompt to object to questions unless plainly improper and irrelevant.

The order should go. . . . Costs of the motion to plaintiff in the cause.

MEREDITH, C.J. DECEMBER 14TH, 1906.

CHAMBERS.

RE DOMINION BANK AND KENNEDY.

Interpleader—Moneys on Deposit in Bank—Death of Depositor—Will—Judgment Establishing—Rights of Executor—Adverse Claim under Agreement.

Appeal by James Kennedy, a claimant, from an interpleader order made by the Master in Chambers, ante 755.

L. V. McBrady, K.C., for James Kennedy.

W. A. Baird, for Robert Kennedy, the adverse claimant.

W. B. Milliken, for the Dominion Bank, stakeholders.

MEREDITH, C.J., varied the Master's order by directing an issue to decide the question whether James Kennedy, as executor, is entitled to the moneys in the bank. Money to remain in the bank subject to the order of the Court. Liberty to apply reserved to both parties to the issue. Robert Kennedy to be plaintiff. Costs of the appeal, except those of the bank, to be disposed of as in the Master's order. Costs of bank to be deducted from the fund.

FALCONBRIDGE, C.J. DECEMBER 14TH, 1906.

WEEKLY COURT.

INTERNATIONAL TEXT-BOOK CO. v. BROWN.

Constitutional Law—Powers of Provincial Legislature—Act respecting Licensing of Extra-provincial Corporations—Intra Vires—Company Carrying on Business in Ontario.

A special case stated for the opinion of the Court. The two questions submitted were: first, whether the Act respecting the Licensing of Extra-provincial Corporations, 63 Vict. ch. 24, was intra vires the Legislature of Ontario; second, whether plaintiffs were carrying on business in Ontario so as to bring them within the provisions of the Act.

Hume Cronyn, London, for plaintiffs.

H. S. Blackburn, London, for defendant.

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

FALCONBRIDGE, C.J.:—1. The first question seems upon its face to be a somewhat large one, but I think it may be shortly disposed of as being within the powers of the Legislature of Ontario under sec. 92, sub-secs. 2 and 9, of the British North America Act, as being a mode of direct taxation within the province, or as relating to the issuing of a license in order to the raising of a revenue. The point has

been dealt with in Bank of Toronto v. Lambe, 12 App. Cas. 576; and also in two cases in Nova Scotia, viz., City of Halifax v. Western Assurance Company, 18 N.S.R. 387, and City of Halifax v. Jones, 28 N. S. R. 452. It is to be observed, in connection with this branch of the case, that not only is a fee for licenses exacted, but it is required that there shall be paid to the Provincial Secretary, for the public use of Ontario, a yearly fee upon the transmission to him of the annual statement required by the Act. No question whatever arises under clause 25 of sec. 91 of the British North America Act. There is no distinction made in the Act between alien corporations and those of the mother country or of other portions of the Empire. I may say that I should hesitate, notwithstanding some dicta cited in Mr. Harrington's very able brief, to class the purposes and operations of the plaintiffs as "commerce." The selling or lending of books and other material to students is only ancillary to the principal purpose of the company, which is to give instruction by correspondence through the mail.

The answer, therefore, to the first question will be, yes.

2. The second question is whether plaintiffs are carrying on business in Ontario so as to bring them within the provisions of the Act. This point is covered by the judgment of the King's Bench Division in Bessemer Gas Engine Co. v. Mills, 8 O. L. R. 647, 4 O. W. R. 325. The application of the English income tax cases, such as Granger v. Gough, [1896] A. C. 325, is taken away by sec. 14 of 63 Vict. ch. 24, which, so to speak, interprets itself by declaring that a penalty shall be incurred if an unlicensed corporation shall carry on in Ontario any part of their business; and that the company shall not be capable of undertaking an action in respect of any contract made in whole or part in Ontario.

The answer to the second question also will be in the affirmative.

The judgment, therefore, will be for the defendant. There is nothing said in the case about costs, and I suppose the parties have their own arrangement. If I have any power of disposition over costs, I direct them to be paid by plaintiffs to defendant; and also to the Attorney-General, if the Crown condescend to accept costs.

DECEMBER 15TH, 1906.

DIVISIONAL COURT.

BURTCH v. CANADIAN PACIFIC R. W. CO.

Negligence—Railway—Hand-car—Injury to Child Playing in Street at Level Crossing—By-law of Municipality—Contributory Negligence—Findings of Jury—Duty to Give Warning of Approach of Hand-car—Damages.

Appeal by defendants from judgment of ANGLIN, J., upon the findings of a jury, in favour of plaintiff, a boy of ten, for the recovery of $1,000 damages in an action for personal injuries sustained by plaintiff by reason, as alleged, of the negligence of defendants.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., CLUTE, J.

H. S. Osler, K.C., for defendants.

W. J. L. McKay, Orangeville, for plaintiff.

CLUTE, J.:—Defendants' railway passes through the town of Orangeville, crossing John street. Plaintiff on 29th September, 1905, while on an errand upon that street, and while passing the point where the railway crosses the same, was run down by a hand-car of defendants, then used by the employees of defendants, and seriously injured, owing, as it is alleged, to the negligence of defendants.

The evidence shewed that plaintiff had stopped on the road to play with other boys, after having delivered certain parcels with which he was sent, and that he was coasting down the incline of John street, in his little express waggon, when the accident occurred. He was sitting in front, steering the waggon, and another boy was behind, facing the opposite direction.

Questions were submitted to the jury and answered as follows:—

1. Were defendants guilty of any negligence which caused the injuries sustained by plaintiff? A. Yes.

2. If so, in what did such negligence consist? A. The negligence consisted of having a close board fence along the west side of street running south from the railway to south of railway limit, also the bank running west along the south side of track, also shrubbery and weeds growing along the wire fence. We consider it negligent in not giv-

ing some warning in approaching a crossing such as John street.

3. Did plaintiff omit to take any reasonable care which he should have taken, and which, if taken, would have prevented the occurrence in question? A. No.

4. If so, what such care did he omit to take?

5. Could defendants, after plaintiff's danger became or should have been apparent, have avoided injuring plaintiff? Yes, after it should have been apparent.

6. If so, what could they have done which they did not do? A. We think they could have stopped the car.

7. At what sum do you assess plaintiff's damages? A. $1,000.

Supplemental question: Was it the duty of defendants, apart from the requirements of sec. 228 of the Railway Act, to have warned plaintiff of the approach of the hand-car which struck his cart? A. Yes.

It was submitted on behalf of defendants that there was no evidence on the part of plaintiff rendering them liable for the accident which happened; and in support of this contention it was strenuously urged that to hold defendants bound to give notice of the passing of a hand-car, in circumstances such as the present, would be for the jury to assume the functions of the Railway Commission; that a railway company using a hand-car in the ordinary manner, and having no obligation imposed upon them by the statute with reference to signals or notice, were not bound to give notice, and for the jury to find that their neglect in so doing was negligence was beyond their competency, in the circumstances of this case . . .

[Reference to Lake Erie and Detroit River R. W. Co. v. Barclay, 30 S. C. R. 360.]

Here the jury do not assume to lay down any general rule as to what care or precaution should be taken. They simply find that, having regard to the condition of the approach to this crossing on defendants' railway, and the circumstances of the case, some warning should have been given. The answer, I think, was unobjectionable. It simply disposed of a case, having regard to certain special circumstances. I think there was evidence to support the finding, and, under the authority of the above case, that the findings of the jury in no way infringed upon the jurisdiction of the Railway Commission.

Grand Trunk R. W. Co. v. McKay, 34 S. C. R. 81, was relied upon by counsel in support of his contention. But that case, in my judgment, does not conflict with the case just referred to. . . . But it is said that the judgment of Davies, J., 34 S. C. R. at p. 97, shews that Parliament by sec. 187 of the Railway Act vested in the Railway Committee, now the Railway Commission, the exclusive power and duty to determine the character and extent of the protection which should be given to the public at places where the railway track crosses the highway at rail level. That section reads as follows: "And the Railway Committee, if it appears to it expedient or necessary for the public safety, may, from time to time, with the sanction of the Governor in council, authorize or require the company to which such railway belongs, within such time as the said committee directs, to protect such street or highway by a watchman or by a watchman and gates or other protection." Having regard to the purview of the section and what is said by Davies, J., I think it clear that it has no application to the present case.

This is not the case of affording protection as indicated in that section, but whether or not, having regard to the peculiar circumstances of the case, notice should have been given by the passing hand-car of its approach.

Having regard to the interpretation clauses of the Railway Act, sec. 2, sub-secs. (t), (aa), and sec. 228, the argument at first glance seems to be complete that the hand-car is a "train" within the meaning of the Act, and that warning should be given under that section.

Mr. Osler sought to get rid of the logical effect of the interpretation clauses as imposing such duty, by urging that sec. 228 so manifestly had reference to an ordinary train that the context required a more limited meaning to the word "train" than would be otherwise indicated by the interpretation clauses. I am of opinion that this is so, and that the above clauses of the Act do not help plaintiff. There was, however, evidence of negligence in not giving warning, which, in my judgment, was proper to go to the jury.

The further question remains as to whether plaintiff has not precluded himself from recovering in this action by his own conduct.

The question of contributory negligence is for the jury. Defendant must, therefore, go further and shew that there

was no evidence on the part of plaintiff to submit to the jury. In other words, that his conduct by his own admission is such as to shew that he was the cause of his own injury. He was properly upon the street. The fact that he was playing in the street would not necessarily prevent his recovering if he were injured by defendants' negligence: Ricketts v. Village of Markdale, 31 O. R. 180, 610. It is said in Farrell v. Grand Trunk R. W. Co., 2 Can. Ry. Cas. 250, 2 O. W. R. 85, that the Ricketts case was cited and doubted by some of the members of the Court of Appeal; but it has not, so far as I know, been overruled. . . .

Reference was made to by-law No. 366 of the town of Orangeville, intituled a by-law to prevent children riding behind waggons, etc. . . . The by-law is in part as follows: "No person shall coast on a handsleigh or sleigh, or tobaggan, or other device, on any street or sidewalk within the municipality of Orangeville; it shall be the duty of the chief constable to notify any child or person doing so of the consequences of violating this by-law, and after a second offence to summon and to bring such child or person before the magistrate."

Murray defines "coasting" to mean, the winter's sport of sliding on a sled down hill, and hence the action of shooting down hill on a bicycle or tricycle. Here the by-law uses the words "other device," and, having regard to the popular meaning of "coasting" and the expression of the by-law, I am of opinion that the by-law is sufficiently broad to apply to the present case. There was, however, no evidence that plaintiff had been warned, and coasting in the street does not appear to be an offence punishable under the by-law until the accused is warned, although it is something which the town council desired to prohibit in the manner indicated. But I do not think defendants are entitled to avail themselves of the by-law as an answer to plaintiff's claim. It was probably admissible as evidence for what it was worth, as shewing the action of the municipality in regard to the rights of children playing upon the street; but it was manifestly passed to prevent sport of that kind from interfering with the ordinary use of the street, and I do not think a by-law passed for that purpose can be invoked by the railway company for another purpose. . . .

[Reference to Gorris v. Scott, L. R. 9 Ex. 125.]

Plaintiff's infancy has, I think, a direct bearing upon the question of defendants' liability. . . .

[Reference to Russell on Crimes, 6th ed., vol. 1, p. 114; Simpson on Infants, 2nd ed., pp. 110, 111; Gardner v. Grace, 1 F. & F. 359; Makins v. Piggott, 29 S. C. R. 188; McShane v. Toronto, Hamilton, and Buffalo R. W. Co., 31 O. R. 185.]

In the present case it has not, in my judgment, been made to appear that it was necessarily by plaintiff's own negligence that the injury was caused. Without deciding whether an infant of tender years can be guilty of contributory negligence, I think, upon the authorities, that in the present case it was for the jury to say, having regard to plaintiff's age, to the location, and the circumstances of the case, whether or not plaintiff was guilty of contributory negligence. Plaintiff was not a trespasser. He was there as of right. So far as defendants were concerned, he had a right to ride his waggon if he pleased in descending the grade. At all events he had not been warned not to do so, even if the by-law applied. Upon the facts in this case, I think the trial Judge was right in submitting the whole case to the jury, and . . . I see no reason to disturb the verdict. The damages are not, I think, unreasonable, having regard to the nature and extent of the injuries.

Appeal dismissed with costs.

BRITTON, J., gave reasons, in writing for the same conclusion.

FALCONBRIDGE, C.J., also concurred.

DECEMBER 15TH, 1906.

DIVISIONAL COURT.

RE CRICHTON.

Medical Practitioner—College of Physicians and Surgeons of Ontario—Erasure of Name from Register—Ontario Medical Act—"Infamous and Disgraceful Conduct in a Professional Respect"—Advertising Remedy for Disease—Secrecy as to Preparation of Remedy—Misleading or Defrauding Public—Inquiry by Committee of Medical Council—Adoption of Report—Charge—Refusal of Particulars—Change in Nature of Alleged Offence—Mistrial—Appeal.

Appeal by Alexander Crichton, a physician and surgeon, from a resolution or decision of the council of the College of

Physicians and Surgeons of Ontario under the Ontario Medical Act, removing the appellant's name from the register.

Section 36 of the Act gives the right to a medical practitioner whose name has been erased to bring the whole matter before a Divisional Court for review, and the Court may order the restoration of the name so erased, and also make such order as to costs as to the Court may seem just.

The appeal was heard by BOYD, C., MAGEE, J., MABEE, J.

W. F. Kerr, Cobourg, for the appellant.

H. S. Osler, K.C., and J. W. Curry, K.C., for the College.

BOYD, C.:—This lengthened inquiry has resulted in a mistrial. To manifest this it is necessary to consider the proceedings briefly.

The charge as originally launched on 24th January, 1905, was that Alexander Crichton "did in the years 1902, 1903, and 1904, cause to be issued to the public and the drug trade circulars and advertisements as to the efficacy of 'Grippura' as a cure for grippe and influenza, and that he in so advertising was guilty of infamous and disgraceful conduct in a professional respect."

There was no publication in the newspapers, but the objectionable circular was sent by mail to various persons—"intelligent persons," says the accused—selected from names in the directory and Bradstreet. The circular is in the form of a broad-sheet (22 by 14 inches in size), except that it is printed on both sides, and contains a miscellaneous jumble of testimonials, references to different diseases, commendation of "Grippura," information about the appellant himself and his discovery, and quotations as "to many important discoveries being fearfully hindered and opposed at the start."

At the opening of the investigation particulars of the charge were sought, but this was refused by the prosecution, on the ground that all might be found in the circular.

The appellant was then questioned at large under oath as to all the circulars, including that of 1905. Substantially they are the same; and as to all that is stated therein respecting his secret remedy "Grippura" and its power to cure certain ailments and alleviate certain others, he affirms the truth or his belief in the truth. The testimonials printed from persons benefited are all genuine, and generally it was

spoken of by the witnesses for the prosecution thus: "There was nothing in the wording of the circular offensive or of objectionable character." . . . "It is not the contents of it I am objecting to—the claims he makes are entirely objectionable." . . .

The accused declined to disclose the ingredients of this preparation, but offered to submit it to be practically tested in the hospital and to have it "sifted to the bottom," as he expressed it.

It was also proved that the accused was a graduate in Arts in the University of Toronto and Silver Medallist in Classics; that he had studied and completed his course in medicine in the Toronto School, and had been in practice since 1892.

Four physicians were examined for the prosecution, and their evidence in the main agrees that the conduct of the accused in keeping his remedy a secret and in advertising its benefits publicly was disgraceful and infamous in a professional point of view under the statute, and this even if the remedy was a good one. But they all discredit the truth of what is claimed, and, though they have not tried the mixture, and have not any practical knowledge of it, they give expert opinions in contravention of the testimonials and of the statements of the accused and others examined. The underlying belief in the minds of these professional witnesses may be thus expressed: the fact of the formula being kept a secret indicates fraud; the fact of advertising the nostrum indicates quackery.

Dr. Ferris explains his point of view in this way: "If he is right, the circular might not prove to be misleading, but at the present time it would be. . . . It should be subject to test at the hospital, and if he is right, the circular is not misleading."

Dr. Douglas (who was formerly a partner of the accused) says: "I believe the object is to deceive the public." Dr. Ferris thinks it "not intentionally misleading." Dr. Douglas proceeds: "This conduct is little better than a quack," who, he explains, "is a man who advertises to the public that he can do a certain thing, and gets money out of them, when what he advertises is no good." And again: "It is misleading to the public, because I don't think he can accomplish what he claims." He places no value on the lay testimonials, and says medical people are best able to judge, and he agrees

with Dr. Ferris that it would be a fair test to submit the preparation to be applied in a hospital.

Dr. Henderson says the claims the accused makes are objectionable unless they were proved to be true, and further that the accused's own experience and the testimony of laymen are not proper tests or proofs.

The accused then put in a Presbyterian and a Methodist clergyman and an old resident of Castleton (where the accused practised), who proved that he had a good reputation for honesty, integrity, and truthfulness. These witnesses also spoke generally of the benefits they and their families had derived from the use of "Grippura."

Upon these materials the committee of inquiry reported on 5th February, 1905, that they had failed to arrive at a conclusion, and asked leave to consider further the evidence, exhibits, and the case generally. In submitting this report, the chairman said that all agreed that it was disgraceful conduct and came under the statute . . . that, although from all the facts the advertisements and statements were such as were very misleading to the public, and had the effect of taking money out of the people's pockets, yet the committee had never recommended that any man should be struck off for advertising alone—there has always been something more in connection with it. . . . He did not feel that the case was sufficiently strong to bring in a verdict against the accused. . . . It is a very difficult case. . . . The accused firmly believes he is doing what is right. He thinks he is sent to help poor suffering humanity for consideration. If the consideration was not there, I don't think he would do it. . . . We do not want to report a man where the evidence is, in our mind, not quite strong enough. . . . If counsel says this evidence is not sufficient, we will try to get some more.

It was then referred back to the committee to take further proceedings if the accused did not stop advertising.

The second notice of proceedings to erase the name was served on 27th April, 1906, alleging that the appellant had been guilty of infamous and disgraceful conduct in a professional respect, and giving in the notice, as particulars, these: "That he did infamously, improperly, and unprofessionally, advertise and distribute advertising circulars claiming to have discovered a remedy which would cure La Grippe or influenza in a few hours (and assist in curing a number of

other diseases), and did solicit and request that all letters of inquiry in reference to the said remedy should be sent to him, etc., and that said advertising pamphlets were distributed to some of the residents of the county of Ontario and throughout the province."

In answer to a letter from the appellant's solicitors asking for full particulars as to wherein the advertisement or circular was infamous or disgraceful, the solicitors for the College made response referring to the words quoted, and saying: "No further particulars necessary; the mere fact of Crichton permitting his name to be used in connection with an advertisement of a patent medicine, which apparently this is, is sufficient to bring him within the wording of the Act. We cannot see that we can give any further particulars."

Thereupon and thereafter the inquiry was resumed, and a second trial had, with the taking of further evidence in addition to what had been given on the former inquiry.

The rule of law in such trials is that the accused person is not to be taken unawares—full particulars should be given so that he may be fully apprized of what he is being specifically charged with: Re Washington, 23 O. R. at p. 309. The charge was not substantially varied from what it was at first, and the new evidence given was not essentially different from the old, with this single exception that "Grippura" had been meanwhile analyzed, and its ingredients reported as being about 8 per cent. of hydriodic acid and the rest glycerine and water. This analysis was ex parte, and the accused asserts that, in addition to these, there are other ingredients, which he does not disclose.

Dr. Crichton was again called, and repeated his honest belief that all the statements were true. He referred to Dr. Smith, a medical graduate of Queen's (not licensed in this province), who writes that after using 30 bottles (not personally, I assume), he was convinced that many of the statements in the circular are true. The accused also repeats his offer to have the medicine tested by other doctors in fair cases, or in any hospital.

The prosecution then called Dr. Pyne to prove his analysis. He said it is disgraceful to advertise something and get money by it when it will not cure; it would be misrepresentation and misleading. "That composition would cure nothing that I know of. I would not say it is impossible to cure any-

thing, but I do not know that it does." "It is because it is against professional etiquette (to advertise cures and to keep remedies secret) that I say it is disgraceful and infamous; that is from a doctor's point of view." "If the statements are true, I would not consider it disgraceful in an ordinary person to publish, but in a doctor it is contrary to rules laid down by the Ontario Medical Council, and would be disgraceful."

I would just note here that the accused was admitted to practice before these rules were passed by the council.

Dr. Pyne continued: "Hydriodic acid is not in the British Pharmacopœia; it is not recognized as an official preparation; it is hardly used at all. It is supposed to act as an alterative and lowerer of the temperature, but that does not seem to be stated on very good authority. . . . It is possible it may have that effect."

Dr. Field, having heard read the analysis, said: "As to 'Grippura,' it is absolutely worthless; I never tried it for grippe." In re-examination he is asked: "It would be imposing on the credulity of the people?" A. "Yes; obtaining money for something which was not true." Mr. Kerr (counsel for the accused) objects to the leading, and asks, "If it does what they say the people are not being defrauded?" A. "If it does what he says, they are not."

Dr. Ferris, again examined, says it was infamous to withhold a saleable remedy from the profession, if it was, as claimed, of general benefit, and that the statements in the circular are infamous and disgraceful from a medical standpoint.

Upon all the evidence the committee then made a written report to the council finding proved the charge that the accused did infamously, disgracefully, improperly, and unprofessionally advertise, and also that the accused endeavoured to impose on the credulity of the public for the purpose of gain by attempting to deceive such persons as might read the said advertisements.

My brother Mabee comments on the refusal to furnish particulars and to supply a copy of the first evidence, and on the apparent neglect of the council to read or master all the evidence, and I agree with his observations on these points.

I proceed to what was said by and before the council when the report was adopted.

Dr. C. said: "The question is a very simple one. It is not whether this man has violated any code of ethics or not . . . it is not whether he has advertised or not. The question is simply this: he is an educated man, medically educated, and a graduate of the College. Can an educated medical man, acquainted with the action of drugs, advertise to the whole community that a remedy which he keeps secret, but which consists of a few drops of hydriodic acid, will cure any particular disease and every case of it in an hour or two? Is that fraud or not?"

Dr. H.: "It is fraud, of course."

Dr. B. (Chairman of committee): "This man has had two trials; there was evidence taken at both of these trials, and . . . I maintain that he has been conducting a fraud, and . . . the council cannot do anything else than strike him off the register."

The President: "Not to punish him, but to protect the people."

Upon which the motion to adopt was carried, one member not voting and one member voting "nay."

The report was thus affirmed, with its rider disclosing a new phase of the investigation, the result of which was that the bona fides and truthfulness of the accused are negatived, and his fraudulent and deceitful conduct affirmed.

Without taking him to task on these grounds, it is in effect assumed that he did not and could not believe in the efficacy of his alleged discovery; that what was put forth in his circular was false; that acting as an imposter he seeks to impose upon and lead astray a credulous public; and that his whole conduct was fraudulent with intent to deceive the community for his own personal gain.

Surely, in an investigation of such serious moment, involving professional extinction to the party inculpated, there should have been at the outset the charge formulated in this respect of fraud and falsity. The whole evidence for the defence must have assumed a very different aspect, had the prosecution been framed and conducted on these lines.

Standing with the simple yet comprehensive charge that the man advertised his business setting forth the curative virtues of his medicine (which of itself, in the opinion of the witnesses, constituted infamous and disgraceful conduct from

a professional point of view), this was covertly diverted during the course of the proceedings, so that in the issue it is found that the statements in the circular were false; that he knew them to be false; that he made them with intent to deceive and impose on the public; and that the whole system of falsehood and imposition was merely for the purpose of making money. . . .

No doubt, the provincial legislation was suggested by the provision found in the English Medical Act of 1858, 21 & 22 Vict. ch. 90, sec. 29. By this, if a medical practitioner was, after due inquiry, adjudged by the medical council to have been guilty of infamous conduct in any professional respect, his name might be erased. The council were made the sole judges, and no appeal lay if one was found guilty by the council after due inquiry. But internal evidence indicates that the real origin of our statute is sec. 13 of the English Dentists Act of 1878 (41 & 42 Vict. ch. 33), by which it is enacted that if a person registered as a dentist has been guilty of any infamous or disgraceful conduct in a professional respect, he shall be liable to have his name erased by the council. Other provisions follow as to trivial offences, etc., which are found in our legislation, thus ear-marking its origin. The section of the Ontario Act applicable to this prosecution first appeared as a new provision by way of amendment to the existing Medical Act in 1887 (50 & 51 Vict. ch. 24, sec. 3), which is now found in R. S. O. 1897 ch. 176, sec. 33 (j). Power is given to the Council to erase the name of any registered physician who has been guilty "of any infamous or disgraceful conduct in a professional respect." These words have been treated in the mouths of witnesses as if the last word was "aspect" and not respect. The meaning of the statute is not what is "infamous or disgraceful" from a professional point of view, or as regarded by a doctor, and as construed in the light of the written or unwritten ethics of the profession; it is whether his conduct in the practice of his profession has been infamous or disgraceful in the ordinary sense of the epithets and according to the common judgment of men.

The language of the English Judges on the like words in the Medical Act afford a good definition.

In Allinson v. General Council of Medical Education, [1894] 1 Q. B. 750, 761, Lord Esher, M.R., and his brethren, construe the words "infamous conduct in a professional respect" thus: "If it is shewn that a medical man in the

practice of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency—then it is open for the medical council to say that he has been guilty of infamous conduct in a professional respect."

The meaning is, perhaps, made more clear when we couple with this the words of Bowen, L.J., speaking as to the Medical Act: "Upon a charge of infamous conduct in some professional respect, the particulars which should be brought to his attention in order to enable him to meet that charge ought to be particulars of conduct which if established is capable of being viewed by honest men as conduct which is infamous. . . . If nothing is brought before the tribunal which could raise in the minds of honest persons the inference that infamous conduct had been established, that would go to shew there had not been a due inquiry:" Leeson v. General Council of Medical Education, 43 Ch. D. 366, 383-4.

In The Queen v. General Council of Medical Education, 3 E. & E. 525, Crompton and Hill, JJ., treated the phrase "infamous conduct in a professional respect" as equivalent to "infamous professional conduct."

Now, the essence of the inquiry here (not as it was begun, but as the committee regarded it at the end) was falsehood or no falsehood, fraud or no fraud, deceit or no deceit.

As said by Halsbury, L.C., in Beneficed Clerk v. Lee, [1897] A.C. 226, 230, "a false statement made knowingly in order to gain some benefit is, whatever is the subject matter of the statute, and in every sense of the term, an immoral act." And as to "defraud" and "deceive" one cannot find a more terse or happy elucidation of the meaning than is given by Buckley, J., in In re London and Globe Finance Corporation, 10 Mans. B. C. 198, 202: "To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: by deceit to induce a man to act to his injury. To deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

Thus tested, how stands the evidence? The statements made were believed to be true by the accused, and he is a

man of learning and of professional skill—one, besides, in good repute for truth and integrity. The fact of "Grippura" being efficacious is attested by the written certificates of people of intelligence and of well-known reputable character—some of them also of medical learning. As a proof of bona fides, the physician offers to submit his medicine to any fair test. And in the books and pamphlets laid before us it is manifest that hydriodic acid is now well known and is accounted to be of varied excellence by American physicians—against whose competence no suggestion has been made.

On the other hand, expert opinion is offered of the worthlessness of hydriodic acid by gentlemen of the medical profession who do not know and have not used or tried the acid. Surely the better plan is to waive matters of personal etiquette and have the thing brought to a practical and satisfactory as well as scientific test by skilled observers in applied medicine.

The broad distinction between the Washington case, 23 O. R. 299 (from which judgment the framers of the "rider" in this case appear to have borrowed their language) and the present, is that there the accused dared not or would not or did not deny what was charged against him—by his silence he in effect confessed its truth and admitted his falsehood: see p. 310. The false statement there acted upon by the council and confirmed by the Court as sufficient to be "infamous" was the representation that persons in the last stage of consumption were suffering from catarrhal bronchitis, and that he could cure them.

Now, I am far from belittling the importance of professional ethics in regard to physicians or other learned professions. There is no doubt that this man has grievously offended against the conventional rules, well recognized, though, it may be, not forming a written code, which obtain among the members of every learned and honourable profession. In two respects he has violated proper decorum: modesty and propriety have been forgotten in his self-advertising and discreditable proclamations; and he has, in the second place, kept to himself and for himself an apparently valuable remedy, and has not made known the formula in order that its benefit may be shared in by the profession and the public.

But neither of these offences against the comity of the profession invites, per se, imputation of moral deliquity

—which is, I think, connoted by the terms "infamous" and "disgraceful." Yet obnoxious conduct is sufficient to put the offender practically outside of the professional pale, but whether it can call down the statutory punishment of exclusion from practice seems to me, as at present advised, to be answerable in the negative.

To revert to the advertising question. The English rule against it, even in the most modest form, is exceedingly strict; not so in America and Canada, where a moderate and limited use of advertisement is permissible. One reason of the rule (though there are others) grew out of the desire to mark emphatically the distinction between a trade and a profession. In the case of a mere money-making business, advertising in any and every extreme of extravagance and exaggeration is considered a legitimate outcome of sharp competition. The professional man, however, is not on this plane; he is not to thrust himself forward and solicit patients by any form of public appeal. It was regarded in the profession as a badge of charlatanism to advertise in any but the simplest way of giving notice of the whereabouts of the practitioner's office. The venders of patent medicines and proprietary remedies might puff their wares and publish their testimonials and tout for customers; but not the physician. No doubt, as said by Dr. Brudenel Carter: "Medical men, from the necessity of living, have become indifferent to the censures of the body of the profession, or to the knowledge that they are offending against the great consensus of professional opinion. They have a living to get, and they get it by such means as offer themselves. Competition induces struggling physicians to follow courses not always consistent with self-respect, and which fall short of a high standard of honour and propriety:" 11 International Journal of Ethics, p. 28. This is the shelter under which the appellant takes refuge, and, though his action may be undesirable and reprehensible, derogatory to himself and injurious to the higher interests of the profession, it perhaps has to be left to himself as to its discontinuance.

To deal further with his "secretiveness," as a witness calls it. The rules which govern English medical practice (e.g., those promulgated by the Royal College of Physicians and Surgeons) forbid the use of secret remedies and methods of treatment, and the rule is enforced by appro-

priate penalties. These secret remedies (commonly called nostrums) are special preparations of which the formula are unknown in whole or in part. The reason why they should not be encouraged is because it is unscientific to prescribe a dose of anything the nature of which the physician does not know. Hence it easily follows that if one discovers something which proves of real efficacy in disease, the ethical claims of the profession persuade, if not compel, him to place his discovery at the disposal of his brethren and the public, without other reward than professional approval and public esteem.

If, however, a stronger compulsion arising out of his own needs and the stress of competition among the members of a crowded profession overmaster the ethical claim, and he retains control and proprietorship of his nostrum, then he has to incur the condemnation of his fellows, in placing money-making above the high standard of his profession.

There is, however, a distinction marked in the cases between patent and proprietary medicines. Patent medicines are properly those the component parts of which are of record in the Patent Office, and any one can by inquiry find out of what they are made up, whereas the ingredients of a nostrum or proprietary medicine can only be ascertained by analysis: Pharmaceutical Society v. Armson, [1894] 2 Q. B. 720, 726. It is permissible for the physician to prescribe this kind of patent medicine, and even as to nostrums there is this to be observed: if knowledge exists or is obtained of the substantial ingredients entering into the composition of the secret remedy, then its use might be justified both by the discoverer and other members of the profession: Dr. Saundby's Medical Ethics (1902), p. 67.

I think there is no doubt but that the substantial ingredient which gives importance to "Grippura" has been laid bare by analysis, and that it is sufficiently made known to the profession to indict the next step (which I venture to recommend), viz., to apply the practical test as to its alleged efficacy in various ailments.

If the use of hydriodic acid in this and other like preparations known and prescribed by United States physicians is in truth an agent of varied use and value in the treatment of diseases, it is surely a thing to be taken up by the profession and applied to public needs. If, after satisfactory testing, it stands approved, it will not need to be

circulated by advertising as a valuable secret, but will be generally prescribed and distributed by the profession and used by their patients.

There appears to me to be a good suggestion in the view presented by Dr. Saundby (though he writes of cases which do not respond to the usual treatment.) He writes: "The application of new methods of treatment and of new remedies ought not to be undertaken without due and good cause. The general reason for such experiments is the impossibility of progress without the trial of new suggestions, and on particular grounds the remedy may be resorted to if there is reasonable prospect of its affording relief, and that it is harmless:" Medical Ethics (1902), p. 55.

Upon the present evidence it does not appear to be proved (always assuming honesty and fair dealing to begin with) that the alleged discovery is a mere pretence; that the remedy is worthless and neither cures nor helps those who take it; that the whole scheme is a delusion; that it is put forward dishonestly or carelessly not for the good of the public but for the gain of the advertiser.

If, however, it fails to stand the scientific as well as the empirical testing, the situation may be very materially changed. The question after that would probably be whether he could reasonably and sincerely retain faith in the virtues of "Grippura" and honestly recommend and advertise it on that footing.

The medical council does not appear to possess such extensive power to discipline and exclude delinquents as has been given by the legislature to the Law Society. To the Benchers is intrusted power to inquire into the conduct of lawyers who are charged with professional misconduct or with conduct unbecoming a member of the Law Society: R. S. O. 1897 ch. 172, sec. 44. Under such language there is power to deal with cases where the charge is violation of the conventional or other regulations which are either prescribed or commonly observed in the profession: see Ex p. Pyke, 6 B. & S. 703, per Cockburn, C.J.

So to more limited extent in medicine, if one has been admitted to practice on certain explicit conditions, and has given an undertaking to observe these (e.g., a promise not to advertise in any offensive way), his breach of that engagement might well be regarded, if wilfully and deliberately

made, as disgraceful conduct in a professional respect. Such a case was considered in Ex p. Partridge, 19 Q. B. D. 467, and again in the same connection in Partridge v. General Council of Medical Education, 25 Q. B. D. 90, 95.

That element is wanting in the case now in hand; at all events no definite delinquency is charged in that respect; for no code of medical ethics was in force here till about 1898; before that time the matter of conforming oneself to medical ethics or etiquette rested in the honour and good sense of the individual.

The conclusion I reach is that there has not been a due inquiry in this Crichton case, and the appeal should be allowed. As a consequence his name (if struck off) should be restored to the register; but this judgment is to be without prejudice to the question whether on subsequent inquiry there may not appear to be proper grounds for erasing his name. This is the term which was imposed in the Partridge case, 25 Q. B. D. 95.

As to costs: I cannot say that this proceeding has been frivolous or vexatious: the conduct of the appellant has been such as to provoke complaint and to invite investigation. He has offended against the provisions of the Ontario code of ethics which declares it to be derogatory to the dignity and prestige of the profession to resort to these practices of secrecy on the one hand and publicity on the other—which, though not in force when he was registered, yet declare the professional standard of conduct which he has disregarded, to set up a trade-standard for himself, so that while in the result he may be right legally, he is wrong professionally. Having regard to these and like considerations, I do not think that the council, who are discharging a quasi-public duty, should be called upon to pay costs of the investigation or of this appeal.

MAGEE and MABEE, JJ., concurred, for reasons stated by each in writing.