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HON. MR. JUSTICE SUTHERLAND. JANUARY 18TH, 1913.

INGLIS v. RICHARDSON.

4 O. W. N. 655.

Sale of Goods—Wheat in Elevator—Destruction by Fire—Passing of Property in—Payment of Transhipping Charges by Vendor—"Track Owen Sound"—Meaning of—Knowledge of Bailee—Salvage—Claim on Insurance Company—Estoppel by.

Action by plaintiff, a miller, against defendants, for non-delivery of 3,000 bushels of wheat purchased by him from defendants. Plaintiff's place of business was near Owen Sound, and defendants carried a considerable stock of grain in the C. P. R. elevators at Owen Sound. Plaintiff purchased from defendants 2,000 bushels of wheat on each of two occasions, giving his orders to the C. P. R. agent at Owen Sound. Defendants, as was their custom, sent an order for the wheat purchased, with draft attached, to their bank at Owen Sound for presentation to plaintiff. The order read "track Owen Sound," but sufficient deductions had been made by defendants from the price to pay the cost of placing the wheat in cars on the track and, as a matter of practice, plaintiff had been in the habit of transhipping the wheat to cars procured by him as he needed it. Plaintiff paid the drafts, received the orders, took delivery of 1,000 bushels and left the balance in the elevator for some time, where it was destroyed by fire. Plaintiff claimed the property therein had not passed to him, as there had been no ear-marking of his wheat by defendants.

SUTHERLAND, J., *held*, that plaintiff was the owner of the wheat in question, and that the understanding and custom of the parties was that he was to load his own cars, and, further, that as the bailee's agent must have inspected the orders before making delivery of the 1,000 bushels, there was sufficient notice to the bailee of the transfer.

Lee v. *Culp*, 8 O. L. R. 210;
Box v. *Provincial Ins. Co.*, 18 Gr. 280, and
Marshall v. *Jameson*, 42 U. C. Q. B. 115, referred to.
Action dismissed, with costs.

Action for damages for non-delivery of 3,000 bushels of wheat purchased by plaintiff from defendants.

McPherson, K.C., and Masson, for the plaintiff.

Maclennan, for the defendants.

HON. MR. JUSTICE SUTHERLAND:—The plaintiff, a miller, carrying on business at Inglis Falls, not far from Owen Sound, had for some time prior to the fall of 1911, been purchasing grain from the defendants, whose head office is at Kingston, who have a sub-office in Toronto, and who carried a considerable stock of wheat in the Canadian Pacific Railway elevator at Owen Sound. The plaintiff's purchases were made usually, if not entirely, at the latter place. The defendants had, apparently, no agent at Owen Sound, but were in the habit of sending word to and receiving word from the plaintiff about sales of grain through the agent of the Canadian Pacific Railway in charge of the elevator there.

At other times the parties communicated directly as to prices and orders.

The usual and ordinary practice between them seems to have been as follows; the plaintiff, either personally or through said elevator agent, would place an order with the defendants for a certain quantity of wheat at a stated price, and the latter would thereupon send through their Toronto bank to a bank at Owen Sound a written order in favour of the plaintiff upon the agent in charge of the elevator authorizing him, on its production, to deliver to the plaintiff the number of bushels of wheat mentioned therein. Attached to the order, was an invoice and draft. The plaintiff then went to the bank at Owen Sound, paid the draft and received the order. Later, and when he wanted the wheat in whole or part, he applied to those in charge of the elevator for cars and received it.

The plaintiff probably on the 2nd November, 1911, through said agent in Owen Sound, placed with the defendants an order for 2,000 bushels No. 1 Northern wheat at $1.06 per bushel. The next day the defendants forwarded to a bank in Owen Sound, through their bank at Toronto, the following documents:—

"1. Invoice, Toronto, Ontario, Nov. 3rd, 1911.

W. A. Inglis, Esq., Inglis Falls, Ont., bought of James Richardson & Sons:—

To 2,000 bushels, No. 1 Northern Wheat at $1.06		$2,120 00
Cr.		
By elevation ½c. per bushel	$ 10 00	
By lake freight 1¼c. per bushel	25 00	
By sight draft	2,085 00	2,120 00

Track Owen Sound, order on elevator attached to draft.

2. Order. Toronto, Nov. 3rd, 1911: J. L. Simpson, Esq., C. P. R. Agent, Owen Sound, Ont. Dear Sir: On presentation of this order kindly deliver to W. A. Inglis, Inglis Falls, two thousand (2,000) bushels No. 1 Northern wheat. Yours truly, James Richardson & Sons, Limited, per.

3. Draft. $2,085.00, Toronto, Nov. 3rd, 1911. At sight pay to the order of The Merchants Bank of Canada, two thousand and eighty-five dollars, value received, and charge to account of James Richardson & Sons, Limited. This is to W. A. Inglis, Esq., Inglis Falls, Ont."

The plaintiff says he paid and took up the draft on November 7th, and received the order.

On the 30th November, the plaintiff by telephone placed a further order with defendants for 2,000 bushels of the same kind of wheat at $1.07 per bushel, and similar documents were on that date forwarded to Owen Sound by the defendants, who also wrote a letter, in which they say: "We confirm sale to you over 'phone to-day 2,000 bushels No. 1 Northern wheat at $1.07 per bushel track Owen Sound," etc.

The plaintiff paid this draft on the 4th December, and received a similar order on the agent. He also says that he held the orders and the grain remained in the elevator just to suit his convenience. At any time he could telephone those in charge of the elevator, and they would load a car for him. He also adds they could load the wheat when they liked, and make him take it when they wished.

The plaintiff applied the the C. P. R. agent, and on the 2nd December received a car of 1,000 bushels on the first of said orders, and up to the 11th December, 1911, had not apparently obtained the remaining 3,000 bushels. On that date a fire occurred, which destroyed the elevator in which the defendants' wheat of the kind in question, in all about 20,000 bushels, was stored, including the said 3,000 bushels belonging either to the plaintiff or defendants.

Under these circumstances the plaintiff contends that as there had been no separation by the defendants of his wheat from the rest of the wheat of the same quality, the agreement was still executory, and no property had passed. One of the cases relied on in support of this view is *Lee* v. *Culp*, 8 O. L. R. 210. In that case it was held "that the inference from the circumstances was that the culling was to be done by the defendant with the plaintiff's concurrence; that until the culling took place there could be no ascertainment of the

apples intended to be sold; that the property had, therefore, not passed, and that the loss must fall on the plaintiff."

One of the cases cited by Teetzel J., in *Lee* v. *Culp*, is *Box* v. *Provincial Ins. Co.* (1871), 18 Gr. 280. In this case "a warehouseman sold 3,500 bushels of wheat, part of a larger quantity which he had in store, and gave the purchaser a warehouseman's receipt, under the statute, acknowledging that he had received from him that quantity of wheat, to be delivered pursuant to his order to be indorsed on the receipt. The 3,500 bushels were never separated from the other wheat of the seller." It was held by the Court of Appeal that the purchaser had an insurable interest.

In that case the intention of the parties as to whether the property should or should not pass was discussed and Spragge, C., puts the effect of the conclusion arrived at, p. 290, as follows: "The judgment of my brother Mowat, upon the rehearing, proceeded upon the ground that it was the intention of the parties that the property should pass to the plaintiffs; and that the law, carrying out the intention of the parties, transfers the property where it appears to be the intention of the parties that it should be transferred. The learned Chief Justice adopts this reasoning."

In *Wilson* v. *Shaver* (1902), 3 O. L. R. 110, it was held "that whether the property in goods contracted to be sold has or has not passed to the purchaser depends in each case upon the intention of the parties, and the property may pass, even though the goods have not been measured, and the price has not been ascertained.

The plaintiff also contends that it was the duty of the defendants to place the wheat in cars on track at Owen Sound, and that the invoices so expressed.

The defendants claim that they paid all charges necessary to have the wheat placed in cars on the track at Owen Sound, deducting the lake freight and elevator charges for that purpose from the price of the grain as shewn on the invoices, and from the amount of the drafts drawn on the plaintiff, and the plaintiff accepting the invoices and drafts in this way, when he paid the latter, was in a position to then settle with the elevator people for all charges up to then necessary to enable the wheat to be placed on track at Owen Sound, having the money in his own pocket to do so.

It is not denied by the plaintiff that the deducted charges paid up everything in the way of charges to that date. The defendants contend, therefore, that the contract was, and

the meaning of the words "track Owen Sound," was intended to be and is on the basis of track Owen Sound, all charges paid. It could not well be contended by plaintiff, I think, that if he left the grain in the elevator thereafter for any period, and there were further charges, he could compel defendants to pay the same.

It was argued by counsel for defendants that the plaintiff had in the case of previous sales paid the additional elevator charges, and in support of this a reference was made to his examination for discovery. This reference was objected to by plaintiff's counsel, as the said examination had not been made part of the plaintiff's case.

The course of dealings previously, the terms of the orders and the course of dealing unders the orders in question, I think bear out the construction of the contract placed on it by the defendants. After he received the orders the plaintiff applied for the grain purchased by him and for cars in which to receive it when and as he wanted it without reference to defendants at all. They and he treated the grain sold after the drafts were paid and the orders on the C. P. R. agent taken as the plaintiffs. In some cases it has been held that if the bailee of the commodity in question has not been notified the property does not pass.

Reference to *Coffey* v. *Quebec Bank*, 20 U. C. C. P. 110, Gwynne, J., 124—In that case also at p. 116, Hagarty, C.J., says: "As I understand the course of decisions in our Courts, it has been considered that the usage of the trade does not require in wheat contracts that delivery must be made 'grain for grain,' that delivery of the stipulated quantity of the article of the quality and character bargained for, generally satisfies the contract."

In this case the defendant did not directly give such notice of the sales to the plaintiff, to those in charge of the elevator. It is clear, however, that the plaintiff must have shewn the order as to the first 2,000 bushels to the elevator people when receiving the 1,000 bushels part thereof from them. And it can certainly be considered that as to this 2,000 bushels there was a notice brought to the attention of the bailee sufficient to cover the case. Both plaintiff and the elevator people acted on that order.

I have come to the conclusion, and I find that the intention of the parties, when the drafts were paid and the orders on the elevator taken by the plaintiff, was that the property in the wheat should pass to the plaintiff.

The defendants make the further contention that "track Owen Sound" means that the cars were to be provided by the plaintiff in which to receive the wheat.

In *Marshall* v. *Jameson*, 42 U. C. Q. B. 115, a case where the contract was for wheat f.o.b. at Clinton, it was held to be the duty of the buyer to provide the cars, and that the defendant not having done so within a reasonable time could not recover in an action against the seller for non-delivery of the wheat.

In this case while the terms of this contract are not identical, it seems to me that the case applies, and that it was the duty of the plaintiff to have provided cars in which to receive his wheat. He paid the first draft on November 7th and took delivery later on the 1,000 bushels thereunder. He permitted the remaining 1,000 bushels to be left in the elevator from that date until the time of the fire, upwards of a month, when at any time he had a right, under the order in his possession, to get the wheat.

He paid the second draft on the fourth of December and allowed the 2,000 bushels paid for by it to remain in the elevator from that date till they were destroyed by fire on the 11th of December. I think in each case this delay was unreasonable on his part and that the grain being destroyed he must be at the loss thereof.

If defendants had meantime sold to other persons all the wheat of the kind in question, except the 3,000 bushels, and they had taken delivery thereof, the 3,000 bushels would alone have been left in the elevator. Would not that have been his wheat? His wheat was part of the whole that was there. All was destroyed and so his was destroyed. It was destroyed because he had delayed to take delivery for an unreasonable time.

The defendants had their wheat and other grain in the elevators at Owen Sound insured under what is called a "blanket policy." The practice was, as between them and the insurance company, that from day to day the quantity of grain going out of the elevator was reported, and at the end of the month the premiums were settled and adjusted on the basis of the varying amounts in the elevator during the previous month. The evidence of the defendants at the trial was to the effect that the insurance on each of the 2,000 bushels in question, after payment of the drafts, was taken out of the benefit of the insurance and the quantity of grain written off their own books as on completed sales.

After the fire which consumed or damaged a quantity of grain very much in excess of the 20,000 bushels of the kind in question herein, the insurance companies, of which there were several interested in the loss, proceeded to deal with the matter. The underwriters took possession of the damaged grain and made a sale of it. The sale was not one which was advertised, but the representatives of the companies intimated to those whom they thought likely to purchase, that a sale would be made, and put it up at auction to those present at the time indicated.

It appears that the plaintiff had no notice of this sale. On the other hand, the defendants were present, made the highest offer for, and purchased the damaged wheat, afterwards selling and disposing of it. The plaintiff says he attempted to buy a quantity of the damaged grain, which he saw in a certain bin at the elevator, which he thought was uninjured, and would reasonably fill the contracts which he had made with the defendants. One of the defendants on the contrary says that he told the plaintiff he could take wheat from a particular bin if he watched it himself to see he was getting what he desired. I am unable to find on the evidence that any definite agreement as to this was come to between the parties after the fire.

The plaintiff, however, says that in the course of the claim made by the defendants on the insurance companies, and which was for a very large sum they practically treated all the wheat of the kind in question herein in the elevator at the time of the fire as their own, ignoring the contention which they now put forward, that the 3,000 bushels of wheat, claimed by the plaintiff should have been taken away by him, was his at the time of the fire and the loss of which should be borne by him. The plaintiff contends the defendants are now estopped from claiming that the wheat was theirs.

At the time of the fire the defendants say that they were unaware of the fact that the plaintiff had not withdrawn his 3,000 bushels from the elevator. Later, it was discovered that there was apparently more grain therein than they were claiming, and at first the discrepancy seemed to be 1,000 bushels, later 2,000, and finally the 3,000 bushels in question. There are expressions in some of the documents put in at the trial in which the defendants speak of their contract with the plaintiff on track Owen Sound, and that they will stand between the insurance companies and the plain-

tiff in the matter of the settlement and payment of their claim for loss.

One of the defendants, however, says that in view of the large loss they were sustaining in any event, and the large amount of insurance moneys which they were claiming, and which was involved, and which they were seeking to obtain payment of as soon as possible, they made these references. They also point out, however, that the insurance companies were made aware of the situation so far as the plaintiff was concerned, and a special cheque for $558 was issued by the insurance companies payable to the order of the plaintiff and defendants jointly as representing the relative share of the plaintiff in the moneys obtained from the sale of the salvage.

It appears that before he commenced his action the existence of this cheque payable as indicated was made known to the plaintiff. It is said that he declined to accept it. In any event it is not pretended that he intimated that he would accept it, nor did he so indicate at the trial. I suppose that this cheque is still available for him if he will now accept it. The amount thereof approximately represents the plaintiff's share of the salvage.

I think the plaintiff's action must be dismissed with costs.

DIVISIONAL COURT.

JANUARY 3RD, 1913.

GUISE-BAGELEY v. VIGARS-SHEIR LUMBER CO.

4 O. W. N. 559.

Vendor and Purchaser—Specific Performance—Option Contained in Agreement for Lease—Forfeiture of Term—Option Dependent Thereon—Lapse.

Action for specific performance of an agreement to sell certain lands to plaintiff. Defendants agreed to lease the lands in question to plaintiff, "the lease to contain a covenant on the part of the lessors that the lessee may at any time during the said term exercise his right of pre-emption of the said premises" at a fixed price. No formal lease was executed, but plaintiff took possession, and, after remaining in possession for some time, abandoned the property and refused to pay rent. Defendants then leased the property to a third person and plaintiff brought this action.

MCKAY, DIST. CT. J., dismissed action, with costs.

DIVISIONAL COURT, *held*, that plaintiff had forfeited his lease by his conduct, and that the option to purchase was dependent thereon, and was also avoided thereby.

Appeal dismissed, with costs.

An appeal by the plaintiff from a judgment of His Honour, Judge McKay.

The appeal to Divisional Court was heard by Hon. Sir Wm. Mulock, C.J.Ex.D., Hon. Mr. Justice Clute, and Hon. Mr. Justice Sutherland.

C. A. Moss and F. Aylesworth, for the plaintiffs.

N. W. Rowell, K.C., for the defendants.

Hon. Sir Wm. Mulock, C.J.Ex.D.:—This is an action for specific performance of an agreement for the sale of certain lands, and was dismissed by His Honour, Judge McKay, junior Judge of the district of Thunder Bay, and from such dismissal the plaintiff appeals.

The plaintiff and his father owned the lands in question subject to a mortgage thereon in favour of one James Bergin. The father was also indebted to the defendants in the sum of $809.20, for which a judgment had been recovered Default having been made under the Bergin mortgage, the mortgagee was proceeding to sell the lands under the power of sale contained in it when the plaintiff and the defendants entered into an agreement bearing date the 27th October, 1908, whereby the plaintiff granted to the defendants his equity of redemption in the lands, and which instrument provided that the defendants should purchase the lands when sold under the mortgage, and upon obtaining a conveyance thereof should lease the same to the plaintiff "for a term of five years at the annual rent of," etc., "the said lease to contain all the usual clauses, provisoes, and conditions, including a power of re-entry upon non-payment of rent for one calendar month after the same becomes due, and a covenant by the lessee to pay all taxes and other outgoings, and to insure the buildings in their full insurable value in the names of the lessor and lessee. And also a covenant to keep the buildings on the said lands in good and substantial repair, and a proviso that in default the lessors may pay the same taxes, and insurance, and do repairs. And the said lease shall also contain a covenant and proviso on the part of the lessors, that the lessee may at any time during the said term, exercise his right of pre-emption of the said premises," "at the fixed price of," etc., "and that thereupon the lessors will convey the same respectively to him in fee simple free from incumbrances, and also a proviso that after the first

three years the lessors may sell the said premises free from the said lease on giving one calendar month's notice in writing of their intention so to do, but that the lessee shall have the option of becoming the purchaser at the price and terms agreed to be paid by the proposed purchaser on signifying his intention so to do in writing before the expiration of the said month, and on proceeding without delay to complete his purchase."

The defendants became purchasers of said lands sold under the Bergin mortgage and on the 30th November, 1908, obtained from the mortgagee a conveyance thereof. Thereupon it became the duty of the parties in pursuance of the agreement between them, to enter into a written lease of the lands, but they did not do so. When the agreement of the 27th of October, 1908, was entered into, the plaintiff was in possession, and so remained until March, 1909, when he abandoned possession, refused to pay rent, and the defendants took possession and leased the property to a third party.

It must be assumed that the plaintiff was in possession by virtue of the agreement, that is as lessee. The rights of the parties must be determined as if a formal written lease within the meaning of the agreement had been actually entered into, and under such a lease the conduct of the plaintiff would have operated as a forfeiture, so that as a matter of law the term provided for by the agreement came to an end in March, 1909.

The question then is, whether the plaintiff's option to purchase the lands also then ceased.

The plaintiff contends that notwithstanding the determination of the lease, his right of pre-emption continues throughout the period of five years from the time when the defendants acquired their conveyance, subject to the qualified rights of the defendants after the three years to sell to a stranger.

The question is what did the parties mean when by the agreement they said that the "lease shall contain a covenant and proviso on the part of the lessors that the lessee may at any time during the said term exercise his right of pre-emption," etc? It does not say during five years, but during the said term. That is, whilst the said term is still subsisting.

If the plaintiff's contention is adopted then at any moment during the five years, although the lease had ceased to exist, the plaintiff, on exercising his option, would be en-

titled to a conveyance of the lands in fee, and with it, immediate possession.

In the meantime what use could the defendants make of the property? They or their tenants could only hold it on sufferance being liable to be ejected at a moment's notice. It is inconceivable that the parties contemplated a tenure so precarious and destructive of the value of the use of the property. Practically it would mean that during the continuance of the option the defendants should not be in a position to make any reasonable use of the property, that is the plaintiff might abandon its user as lessee and yet the owners could not either by themselves or others make a reasonable use of it. In the meantime the defendants would be obliged to pay the taxes, insurance, and upkeep with no income to meet these charges, and with no right under the contract to add interest to the purchase money. This result is wholly inconsistent with the scheme of the parties. Practically, though not as a matter of law, the right of re-purchase was intended to give to the plaintiff the benefit of redemption, the purchase price being the amount of the defendants' judgment, the prior mortgage and the disbursements which the defendants might properly incur for taxes, insurance and upkeep, the rental payable by the plaintiff taking the place of interest on the defendants' claim until the plaintiff purchased.

If, notwithstanding these consequences, the parties contracted to the effect contended for by the plaintiff, then we have nothing to do with consequences, but when an ambiguous set of words is used the circumstances assist in making clear the sense in which both parties so expressed themselves.

Then the proviso that "after the first three years the lessor may sell the premises free from the said lease," etc., shews that they contemplated the lease as subsisting.

Then further on it is provided that "the lessee shall have the option of becoming the purchaser at the price " etc., not that the plaintiff shall have the option, but the "lessee."

Thus throughout the whole instrument dealing with the option there runs the prevailing idea that the plaintiff qua lessee only is to be entitled to exercise the option.

I, therefore, am of opinion, that the proper interpretation to place upon the instrument in question is, that the plaintiff's right of pre-emption ceased when the lease came to

an end; and, therefore, this appeal should be dismissed with costs.

HON. MR. JUSTICE CLUTE and HON. MR. JUSTICE SUTHERLAND, agreed.

DIVISIONAL COURT.

JANUARY 11TH, 1913.

RE CORKETT.

4 O. W. N. 632.

Executors and Administrators—Passing of Accounts—Sums Paid for Maintenance—Order of H. C. J.—Allowance by Surrogate Judge—Discretion—Persona Designata—Estoppel.

Appeal by one W. G. C., from order of Surr. Ct. J., Co. Peel, declaring the said W. G. C. entitled to certain sums for maintenance under the will of his father, until he should reach the age of 25 years, but no longer. The order appealed from was made upon the passing of the accounts, and was intended to be a determination by the Court of what was a fair allowance for W. G. C.'s maintenance.

DIVISIONAL COURT dismissed appeal, without costs.

Costs of opponents of motion out of estate, those of executors as between solicitor and client.

Appeal by William George Corkett from order of Surrogate Judge of the county of Peel.

B. F. Justin, K.C., for William George Corkett.

R. G. Agnew, for Margaret J. Kee.

E. C. Cattanach, for the infant.

A. F. Aylesworth, for the executors.

HON. MR. JUSTICE SUTHERLAND:—One George Corkett made his will dated 24th February, 1902, and codicil thereto on the same date, and died on the 4th March, 1902. Letters probate were issued on the 4th April, 1902. There is a provision in the will with respect to the support and maintenance of certain devisees and legatees. One of these, William George Corkett, on the 1st May, 1911, launched a motion for an order declaring him entitled to such support and maintenance, and in his notice of motion asked that the executors and trustees be authorised and directed to pay to him out of the estate from time to time such sums

as might be necessary for his support and maintenance from the first day of July, 1910, until he arrived at the age of 25 years.

The application came on for hearing before Falconbridge, C.J., on the 5th October, 1911, and an order was made that out of the income of the estate in the hands of the executors there should be paid to the applicant $600 forthwith and $100 per month until the 17th February, 1912, for his support and maintenance. On this latter day this maintenance was to cease on his then attaining the age of 25 years.

In the year 1912 the executors of the estate under Consolidated Rule 938 made an application for an order "declaring the construction and interpretation of certain clauses of the will." The motion was heard by Clute, J., and on the 28th February, 1912, he gave judgment, from which I quote in part as follows:—

"I am also of opinion that the children, Margaret and William George are entitled to what is a fair allowance for their maintenance, whether that maintenance, support and education be upon the premises or not. In case the parties differ as to what a reasonable sum would be, the Surrogate Court may adjust that matter in settling the accounts of the executors."

An appeal was taken from said judgment to a Divisional Court and on the 22nd April, 1912, a judgment was delivered by it varying in some respects the judgment of Clute, J., but substantially, in paragraph 4 of its judgment, repeating and affirming that part thereof just quoted as to maintenance.

The executors petitioned the Surrogate Judge of the county of Peel to audit, take and pass their accounts and fix their compensation. A hearing followed before the Surrogate Judge in which evidence was taken at some considerable length with respect to the question of maintenance. On the 3rd July, 1912, the said Surrogate Judge made an order which, besides dealing with the question of the audit and the fixing of the compensation of the executors, contained the following clauses:—

"And I find and declare that William George Corkett applied to the Court for an allowance for maintenance and that on the 5th day of October, A.D. 1911, an order was made by the Chief Justice of the King's Bench, allowing

him $600 to be paid forthwith and $100 a month for four months. And I find that the said amounts were duly paid to him or on his behalf as and for his maintenance.

"And I find that the said sums so paid were and are a reasonable amount to be allowed to the said William George Corkett for his maintenance and that he is not entitled to be allowed any further amount for such maintenance.

"I further find that Margaret Jennie Kee consented before me to waive any further claim of maintenance in the event of no further amount being allowed to the said William George Corkett and I therefore find that the said Margaret Jennie Kee is not entitled to any further allowance for such maintenance."

From this order William George Corkett appeals, and in his notice of motion, after setting out that he had previously received various sums, on account of maintenance, prior to the order of the 15th October, 1911, already referred to, and that at the time of the making of such order it was understood "that an application would be made on behalf of the executors for construction of the will of the said George Corkett, deceased, on the question of maintenance upon the said William George Corkett attaining the age of 25 years in the event of his living to attain that age," he goes on further to allege that the "learned Judge of the Surrogate Court erred in refusing to admit evidence as to the facts in connection with the application on which the order of 15th October, 1911, was made," and also "in holding that the amount of the maintenance to which the said William George Corkett was entitled was in any way fixed or intended by the parties or by the Court to be fixed by said order." And further, that the order of the Divisional Court is binding "apart from whether the said order of the 15th October, 1911, assumes to fix such maintenance or otherwise," and that upon the evidence the amounts as fixed by the said order of the 15th October, 1911, were not reasonably sufficient to pay his necessary expenses of maintenance and a reasonable sum should now be allowed.

Upon the application it was contended on the part of those opposing that no appeal could lie as the Surrogate Judge was *persona designata*, and further that the order of Falconbridge, C.J., was a consent order and intended to cover all past unpaid maintenance and all future maintenance. Contradictory affidavits and statements were filed and made.

When the motion came on for hearing before a Divisional Court, over which Falconbridge, C.J., was presiding, it appeared to him after some discussion that it was inadvisable for him to take part under the circumstances, and he accordingly withdrew. By consent of all parties it was agreed to go on with the appeal before the two remaining members of the Court.

When it is considered that allowances for maintenance had previously been made to the applicant before the launching of his motion in 1911, and that in the notice of that motion he asked for support and maintenance from the 1st July, 1910, until he arrived at the age of 25 years, colour is lent to the contention that the order made by Falconbridge, C.J., was intended to cover all claims for maintenance which had not thus far been paid, and in addition future maintenance. On the other hand, one must suppose that the parties now opposing this application must have had in mind the said order when the motion was made before Clute, J., for a construction of the will, and when his judgment was formally drawn including that portion hereinbefore quoted and which suggests that in case the parties cannot agree on the question of maintenance it might be adjusted in the Surrogate Court when the accounts of the executors were being dealt with. The same applies to the order of the Divisional Court.

These orders seem clearly to leave that question open to be dealt with by the Surrogate Judge on passing the accounts. All parties seem to have gone before him in that way and under these orders. I think, therefore, that the matter is properly before us by way of appeal from the order of the Surrogate Judge; in the light of the previous allowances for maintenance and of the sums allowed under the order of Falconbridge, C.J., and of the evidence taken before him at considerable length, the Surrogate Judge has come to the conclusion that the sums so paid were and are a reasonable amount to be allowed to the applicant for his maintenance, and that he should not be allowed any further amount for that purpose.

I am unable to see that he has not exercised a reasonable discretion in the matter and was not warranted in so disposing of the matter.

I think his order should be affirmed and the appeal dismissed, but under the circumstances without costs so far as

the appellant is concerned. Those resisting the appeal will have their costs out of the estate; the executors as between solicitor and client.

BRITTON, J.:—I agree that the appeal of William George Corkett should be dismissed. In my opinion he accepted such sums as were paid on account of maintenance, so that at the time of his application to the Chief Justice of the King's Bench Division—he intended—or must be considered as having intended—to accept the sum allowed for maintenance from 1st July, 1910, until he arrived at the age of 25 years—as in full for all maintenance.

The appeal should be dismissed without costs as to the appellant. The respondents should get their costs out of the estate.

HON. SIR JOHN BOYD, C. JANUARY 10TH, 1913.

CAMERON v. HULL.

4 O. W. N. 581.

Vendor and Purchaser—Specific Performance—Objection to Title—Prior Application under Vendor and Purchaser Act—Res Judicata—Will—Parties—Practice—Originating Notice.

Action by vendor for specific performance. On a Vendor and Purchaser application, Sutherland, J. (21 O. W. R. 655; 3 O. W. N. 807), had refused to decide that an objection by the purchaser to the title involving the construction of a will was groundless, and dismissed the application, leaving the vendor to "seek such other remedy as he may be advised." Vendor thereupon brought this action.

BOYD, C., *held*, that while any point expressly decided by a Judge upon a summary application cannot be reviewed in an action for specific performance, in this instance the point in question had expressly been left open for decision.

Thompson v. *Roper*, 44 L. T. 507, distinguished.

Re Walsh, [1899], 1 Ch. 521, referred to.

The proper practice in cases of doubtful title arising out of testamentary language is for the matter of construction to be brought up on an originating summons with all parties before the Court, and this might have been done pending the application under the Vendor and Purchaser Act.

Re Nichols, [1910] 1 Ch. 45, followed.

Action for specific performance of a contract to purchase land. See 21 O. W. R. 655; 3 O. W. N. 807.

R. G. N. Weekes, for the plaintiff.

T. G. Meredith, K.C., for the defendant.

HON. SIR JOHN BOYD, C.:—Cameron is vendor and Hull is purchaser of 40 acres of land in North Dorchester. The purchaser objected that Samuel Henderson, under whom the vendor claimed, had not the fee of the land, and required that a release from the heirs of Mary Jane Henderson should be procured. On this point the vendor applied in a summary way under the Vendors and Purchasers Act, to have it declared that the objection was not valid, the outcome of which was that the motion was dismissed with costs "leaving the vendor to seek such other remedy, if any, as may be advised in the matter."

This action being brought in apparent pursuance to that leave it is now broadly objected by the defendant (purchaser) that the question of specific performance, as between them, has been definitely and finally settled by the dismissal of the summary application, and that such decision is to be treated as *res judicata*.

The situation must be examined. The testator disposed of the land in these words—"I give to my mother Mary Jane Henderson, and to my brother Samuel James Henderson jointly . . . the farm on which we live, to have and to use or to sell as they may choose; each to be entitled to the benefit of one-half of the product of the farm and chattels. But it is hereby clearly understood and designed that my mother shall have no power to sell or convey any part or portion of the whole of what is hereby given to her by this will; but is only to have a share of the proceeds for her use during her life. And at my mother's death, then the whole of my interest in this estate . . . is to go to my brother Samuel James Henderson, as above to have and to hold as and for his own or to dispose of as he may wish."

This will was made in August, 1894; the testator died before February, 1896, when the will was registered (no probate has been issued) and the mother has died—no attempt having been made to sell the land during her life.

Pending the summary application a direction was given by Mr. Justice Clute that the representatives of the deceased mother should be added as parties and be bound by the proceedings and order to be made therein. These representatives are also made parties to this action, but have in no way earlier or later intervened actively in the litigation.

Sutherland, J., doubted as to power to bring in the representatives of the mother, and as to the will, though he thought the mother took no more than a life estate, still a different opinion might be held by another. He made no further order, though he may have thought that, as between the parties, the title was too doubtful to be forced on an unwilling purchaser.

The title was not found to be bad, and I think after the length of time possession was held under the brother, it could fairly be said to be a good holding title, even if the frame of the will was doubtful.

Speaking for myself, I would say that the Judge might well have held that the title was good without any release from the representatives, and I can clearly and unquestionably so declare in the present action, to which the representatives are properly parties.

It was with a view of some such proceeding as this that the leave was given by Mr. Justice Sutherland, as I have ascertained from him. Even without that leave, there was no *res judicata* on the question of title. The summary proceedings under the Act afford a convenient and inexpensive way of getting the opinion of the Court on isolated points arising out of or connected with the contract. The real question here was whether a release from the heirs of the mother was needful in a proper conveyance of the farm. Sutherland, J., abstained from declaring that the title could not be forced on the purchaser, and rightly so, because, as pointed out by Kekewich, J., in *Re Walsh*, [1899] 1 Ch. 521, the whole case is not exhaustively treated on a vendor and purchasers summons, and to reach such a conclusion is really a matter for decision in an action for specific performance.

Any point expressly decided by a Judge summarily cannot be reviewed in an action for specific performance, and this is all that is meant or decided in the case relied on by Mr. Meredith of *Thompson* v. *Roper* (1881), 44 L. T. 507.

Apart from the question on the will, raised before my brother Sutherland, the purchaser started a claim that the vendor had released him from the contract and had sold to another. This contention is also set up in the pleadings before me (par. 8 of defence), but no evidence was offered to substantiate it. But for this contention the proper practice in cases of doubtful title arising out of testamentary language is for the matter of construction to be brought up on originating summons with all parties before the Court, and this

might have been done pending the application under the Vendor and Purchaser Act; see *Re Nichols*, [1910] 1 Ch. 45.

The claim as to cancellation of the contract called for an action to determine the whole controversy, and as a consequence of this excessive litigation, much outlay for costs has been incurred. The purchaser obtained his costs under the vendor and purchaser application, and he should pay costs of this action, in which he fails. But the taxing officer should not allow for any of the documents copied out in *extenso* in the statement of claim.

The application was dismissed on the 6th March, 1912, and the order was entered on the 23rd March. On the 16th March the purchaser wrote withdrawing from the contract and refusing to complete. The action for specific performance was begun on the 4th May, 1912. The purchaser might have taken possession had he chosen, and notice was given him that the vendor would without prejudice dispose of the hay on the land and look after the weeds pending the result of the action. Evidence was given that the property had become deteriorated to the extent of $300. But that is far beyond the mark; the deterioration will be far more than covered by the $75 to be paid for the hay—a sum which will enure to the benefit of the defendant Hull. Judgment will be for the balance of the price, $2,800, and in strictness he should also pay interest, some $160 or so. But I will act on the offer of the plaintiff to take $2,800 and the $75 without interest. The land is vested in the defendant, who is to pay $2,800 in a month and costs of action—with lien on the land till paid; the plaintiff is to collect the $75 from Broughton.

MASTER IN CHAMBERS. JANUARY 10TH, 1913.

ST. CLAIR v. STAIR.

4 O. W. N. 645.

Evidence—Cross-examination on Affidavit Filed—Action for Conspiracy to Defame and Libel—Motion for Security for Costs—Lengthy Examination—Scope of Further Examination Refused.

MASTER-IN-CHAMBERS dismissed a motion for further examination of defendant Rogers on an affidavit made by him in support of a motion for security for costs, where the deponent had already been examined twice at great length, on the ground that the merits of the case could not be tried on an interlocutory motion.

Swain v. *Mail Printing Co.*, 16 P. R. 135, and *Bennett* v. *Empire Printing Co.*, 16 P. R. 63, referred to.

In this action for libel afterwards amended so as to charge a conspiracy to defame plaintiff, the defendants Rogers & Jack Canuck Publishing Co.—moved for security for costs, under 9 Edw. VII. (Ont.), ch. 40, sec. 12, on the usual affidavit of the personal defendant, who is also the president of the defendant company. It was admitted that the plaintiff had no means.

The plaintiff proceeded to cross-examine defendant on this affidavit, and had done so at great and very unusual length. On 11th December, defendant was ordered to attend for further examination and answer questions which he had so far refused to answer.

He so attended and now the plaintiff made a similar motion.

W. E. Ranney, K.C., for plaintiff.

McGregor Young, K.C., for defendants.

CARTWRIGHT, K.C., MASTER:—In view of what was said in *Greenhow* v. *Wesley*, 16 O. W. R. 585, and *Duval* v. *O'Beirne*, 20 O. W. R. 884, it might have been better to have had a fuller statement of the grounds for the publication complained of.

However, no objection was taken to its sufficiency *prima facie*. It has, however, been attempted to disprove the allegation of good faith by shewing that the moving defendants were acting as the hired agents of their co-defendant Stair, and that the information of detectives and others admittedly received by them did not justify their statements, but rather shewed not merely a want of good faith, but a

deliberate intention to vilify the plaintiff and a conspiracy to effect the ruin of his reputation and seriously to impeach his moral character and good faith in the course of conduct which has brought him so prominently before the public in the last few months. The determination of the present motion, it was conceded by both the learned counsel on the argument, must depend upon whether the plaintiff was or was not entitled to full discovery on all the allegations in the defendants' affidavit.

No authorities were cited on either side, nor am I aware of any previous motion of this kind.

Whether Mr. Young is right in saying that no cross-examination should have been allowed, I am not prepared to say. The practice seems to be otherwise—though perhaps never carried so far as in the present case.

In *Swain* v. *Mail Printing Co.*, 16 P. R. at p. 135, it was said that on such applications "the Judge is not to try the merits of the case or to pass upon disputed facts disclosed in conflicting affidavits filed against the application. The materials under oath used by the applicant are to be weighed, and if from these it appears that there is a good defence on the merits—that is, a *prima facie* case of justification or privilege—one which ought to succeed if it is not answered or explained away at the trial, then the statute is satisfied and security should be ordered."

The principle above enunciated applied to the present motion would seem to require its refusal.

The good faith of the defendants cannot be tried on any interlocutory motion. It is pre-eminently a question for the jury at the trial—so too as regards the contemplated justification. Nothing bearing on its success can be usefully considered at present. To the same effect is the judgment in the similar case of *Bennett* v. *Empire Ptg. Co.*, 16 P. R. 63. The language there at p. 68, seems very pertinent to this case. At present as the motion for security has yet to be dealt with it is not advisable to say any more than that the present motion should not be granted, as full disclosure has been made so far as it can usefully be made at this stage.

The costs of the motion under the special circumstances will be reserved until the main motion is heard.

The judgments in *Southwick* v. *Hare*, 15 P. R. 222, a case analogous to the present, may be usefully referred to as to the scope of such enquiries as the present at this stage.

MASTER IN CHAMBERS. JANUARY 3RD, 1913.

HEAD v. STEWART.

4 O. W. N. 590.

Judgment — Default of Defence — Motion to Reopen — Defective Material—Absence of Client no Excuse—Correspondence between Solicitors—Terms—Costs.

MASTER-IN-CHAMBERS refused to permit a defendant to re-open a judgment signed where the statement of defence was in default, where there had been unreasonable and unaccounted for delay on the part of defendant, and no affidavit was made that defendant had a good defence on the merits.

"A litigant is not justified in putting himself out of the reach of his solicitors and then expecting the usual course of an action to be stayed to suit his convenience and allow him to attend to other matters which he thinks of more importance."

This action is brought to recover £670 ($3,260) lent in England by plaintiff to defendant and acknowledged by him, with interest. The writ issued on 20th February, 1912, and the statement of claim was delivered on 13th March. No statement of defence has ever been delivered. On 17th December inst., judgment was entered for default of defence.

The plaintiff has given security for costs.

The defendant has moved to set this judgment aside and to be allowed to defend at this late hour.

F. Aylesworth, for the motion.

E. D. Armour, K.C., contra.

CARTWRIGHT, K.C., MASTER:—The motion is supported only by Mr. Aylesworth's affidavit, which makes an exhibit of a bundle of correspondence between the solicitors consisting of 21 letters, beginning with March 19th and ending 18th December. There is no affidavit from the defendant who is said in his solicitors' earlier letters to be out of reach of communication—at Seattle or elsewhere. I have no hesitation in saying, and as I have said before, and now say, if necessary to secure attention with increasing emphasis that this is no excuse and is no valid reason for depriving a litigant of any rights given him by the rules of practice or for interfering with their application. A litigant is not justified in putting himself out of reach of his solicitor, and then expecting the usual course of an action to be stayed to suit his convenience, and allow him to attend to other matters, which he thinks of more importance.

This is especially the case here. The defendant Stewart is the same S. who is plaintiff in the action of *Stewart* v. *Henderson,* reported in 23 O. W. R. 414. He was certainly here last month, probably for some time, as his examination and that of defendant Henderson took place then—both at considerable length.

No blame on this account attaches to his present solicitors, who are not his solicitors in his action against Henderson.

There is, therefore, strictly speaking, no material on which the motion can succeed—as there is no affidavit from the defendant that he has a good, or in fact, any defence. He must have known how this action stood in March, and he could have certainly attended to this last month, when here in his action against Henderson for $500,000.

There is also a further reason why plaintiff should not have his judgment taken away.

On 4th June, 1912, plaintiff's solicitors wrote to defendant's solicitors as follows: "Your Mr. F. A. told our Mr. A. on Saturday last that the latest position taken by you was that you are not going to defend this action. If so, be good enough to let us know, and we will move for judgment." To this no reply was sent, and on 12th June, plaintiff's solicitors wrote again: "Will you please state to-day whether you will defend or not." To this a reply was sent same day; it does not repudiate the statement attributed to F. A. As to the inference to be drawn from this see *Weideman* v. *Walpole,* [1891] 2 Q. B. 534, at p. 537. It says only that they have "sent a special messenger to defendant pointing out the necessity of his seeing us to-morrow"—and asking "for a delay of a couple of days, when we will have the matter settled one way or the other."

At this stage Mr. Armour went to England. He there found that no settlement could be had there of the matters in controversy between plaintiff and defendant. On his return on 19th November, he so informed defendant's solicitor, and again asked for a consent to judgment. To this as before no answer was sent, and on 9th December inst., another letter was sent saying that if no reply was given plaintiff's solicitors would note the pleadings closed, and move for judgment.

To this on 14th December, an answer was sent saying defendant was at Seattle and would be absent until 1st January, and asking to have the matter allowed to stand until then. To this plaintiff's solicitors replied pointing out in what an unsatisfactory position they were placed with their client.

Some further correspondence took place. In this on 16th December, plaintiff's solicitors said that unless some security was given the action must proceed.

The defendant's solicitors in answer said in effect this could not be done. Next day, therefore, the plaintiff's solicitors entered judgment—quite rightly in my opinion.

The date asked for on defendant's behalf has now been reached. It does not appear that he has any assets in this province, and it is stated that he has none at Seattle either—available in execution.

Had the plaintiff in this case moved for judgment under Consolidated Rule 603, he would probably have been successful in the absence of any affidavit by defendant, or what would seem likely to have developed on cross-examination if he made one.

So far as appears the plaintiff's solicitors have shewn great and perhaps unauthorized leniency to the defendant. He cannot expect anything more unless he gives security to the reasonable satisfaction of the plaintiff within ten days.

In any case the costs of this motion will be costs to plaintiff in any event.

DIVISIONAL COURT.

JANUARY 4TH, 1913.

ONTARIO ASPHALT BLOCK CO. v. COOK.

4 O. W. N. 591.

Account—Reference—Book-accounts—Credits—Absence of Surcharge or Falsification — Payment — Onus on Defendants — Amounts Received in Excess of Those for which Credit Given.

Appeal by defendants from report of Local Master at Welland upon a reference to ascertain if plaintiffs were creditors of defendants, and if so, in what amount. On the reference, plaintiffs brought in accounts shewing amounts owing to them by defendants as well as certain credits verified by the affidavit of their bookkeeper. Defendants filed no surcharge or falsification and on appeal took exception to the statement of credits furnished and verified by plaintiffs' bookkeeper, claiming that onus was not on them to attack the account.

MIDDLETON, J., *held*, 22 O. W. R. 203; 3 O. W. N. 1289, that onus was on defendants, and moreover no surcharge had been filed as required by Rules.

Appeal dismissed with costs.

DIVISIONAL COURT dismissed appeal from above judgment, with costs.

An appeal by the defendants from an order of HON. MR. JUSTICE MIDDLETON, in Chambers, 22 O. W. R. 203; 3 O. W. N. 1289, by which he dismissed defendants' appeal from the report of the Local Master at Welland, dated February 21st, 1912.

The appeal to Divisional Court was heard by HON. MR. JUSTICE BRITTON, HON. MR. JUSTICE CLUTE, and HON. MR. JUSTICE KELLY.

F. W. Griffiths, for the defendants.

D. L. McCarthy, K.C., for plaintiffs.

HON. MR. JUSTICE KELLY:—Mainly the objection to the order appealed from is in respect of money received and disbursed by Casson, in connection with what is known as St. Boniface Job No. 2.

Plaintiffs gave credit for the amount they received from Casson on account of that work, but defendants contend that plaintiffs should have accounted for the moneys received and disbursed by Casson, and that the onus was not on them (defendants) to attack the account which was submitted.

Hon. Mr. Justice Middleton held this position not tenable, and that the onus was on defendants to shew that plaintiffs received more than the amount for which they gave credit, and his judgment was in accordance with that view. Under the circumstances, as revealed in the evidence, I think the order appealed from is right and that it should not be disturbed.

On the argument we were asked to grant leave to have the matter opened up, and that defendants be allowed to again go into the accounts. Having regard to the opportunities afforded of attacking the plaintiffs' account during the long time over which the reference extended—the reference was directed on May 18th, 1909. I see no good reason for granting that indulgence.

The appeal should be dismissed with costs.

HON. MR. JUSTICE CLUTE:—I agree.

HON. MR. JUSTICE BRITTON:—I agree that this appeal should be dismissed with costs.

If either the plaintiff or his agent has been guilty of fraudulent concealment of any money received by either,

which should have gone to the credit of the defendant, the defendant will not, in my opinion, by reason of this judgment, be estopped from succeeding, upon establishing such facts, in any action he may bring for the purpose.

MASTER IN CHAMBERS. JANUARY 8TH, 1913.

SHANTZ v. CLARKSON.

4 O. W. N. 592.

Venue—Change of—Expediting of Action—Delay—C. R. 529 (c)—Local Action.

MASTER-IN-CHAMBERS dismissed motion to change the venue of an action from Berlin to Toronto, in order to expedite the trial, where little would be gained thereby and the applicants had been guilty of delay in proceeding with the action.

"Motions to change the venue should not be encouraged."

Motion by defendants to change venue from Berlin to Toronto.

R. H. Parmenter, for the defendants.

H. S. White, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—The object sought is to expedite the trial so as to free lands of an insolvent company from a certificate of *lis pendens* and allow a sale already made to be completed and the assets distributed.

Had the order of 15th August been complied with the case if not heard at the September sittings at Berlin would easily have been disposed of at the November sittings. For some reason defendants did not make any move until 25th October, and thereby threw away their chance of getting down to November sittings.

There will be a sittings at Berlin in March. Little would be gained by transferring the trial to Toronto unless the 3 weeks was eliminated. I see no reason for so ordering.

As a general rule motions to change venue are fruitless and should not be encouraged.

The motion in this case is dismissed with costs in the cause. Plaintiff must undertake to go to trial in March with the usual penalty for default in so doing.

The order will provide that plaintiff set case down and proceed to trial at the sittings at Berlin commencing on 4th March, that plaintiff do attend for examination for discovery at his own expense at Berlin if so required by defendant on some day not later than February 4th and file affidavit of documents at least a week previous thereto.

On default in any of these requirements the defendants or either of them may move *ex parte* to have action dismissed with costs.

It does not appear from the pleadings whether the sale now impeached was at Berlin. If so the plaintiff's evidence as to undervalue, etc., would probably be found there.

It is also arguable that the action being to set aside a sale of realty situate at Berlin, the venue is properly laid there under C. R. 529 (c).

MASTER IN CHAMBERS. JANUARY 2ND, 1913.

ONTARIO BANK v. BRADLEY.

4 O. W. N. 588.

Venue—Change — Preponderance of Convenience — New Matter in Affidavit in Reply—Order Made.

MASTER-IN-CHAMBERS made order changing the venue of a County Court action from Toronto to Cornwall, where it appeared that four necessary witnesses resided at Cornwall and only one at Toronto.

McDonald v. *Park*, 2 O. W. R. 812, 972, followed.

Motion by two of the three defendants to transfer action from County Court York to County County Stormont, Dundas and Glengarry.

J. Grayson Smith, for the motion.

M. Lockhart Gordon, contra.

CARTWRIGHT, K.C., MASTER:—The statement of claim alleges that the bank in June last recovered a judgment—as yet wholly unsatisfied—against S. W. Bradley. He earlier in same month sold some land to Mr. Hitchcock, who in part payment gave a note for $500 to the defendant Minnie B., the wife of S. W. B. The plaintiff asks a declaration that note is held in trust for her husband by Mrs. B.

and that H. be ordered to pay the note to the bank. The statement of defence and affidavits of the defendants the Bradleys admit the judgment and non-payment, but allege that the note was given to Mrs. B. in repayment of money lent to her husband. The issue is therefore simple and the onus is largely no doubt on the defendants, as they will admit at the trial the judgment and non-payment, which is all that is necessary to prove the plaintiff's *prima facie* case.

The motion as served only mentioned an affidavit of S. W. B. In it he said that he resided at Cornwall with his wife, but that his business is mining and kept him during the summer in Nipissing. He said the defendant Hitchcock also lived there. These defendants with one Cowan living at Carleton Place were said to be all the material witnesses for the defence. There is no affidavit from Hitchcock.

The affidavit in answer on the part of the plaintiff speaks only of the necessity of his own presence and of that of the Clerk of Records and Writs. But the presence of the latter is done away with by the admissions of the defendants.

An affidavit in reply was made by S. W. Bradley. This cannot be considered so far as it mentions for the first time three more witnesses all resident in Cornwall. An applicant in all cases must make his whole case at the first. There is also an affidavit of defendants' solicitor which is quite immaterial and which is not to be recited in the order to be made.

Applying the principle of *McDonald* v. *Park*, 2 O. W. R. 812, 972, I think the motion is entitled to prevail as the present is eminently a case for trial at Cornwall.

Costs will be in the cause.

HON. MR. JUSTICE HODGINS. JANUARY 23RD, 1913.

TRIAL.

DICKSON CO. v. GRAHAM.

4 O. W. N. 670.

Landlord and Tenant—Overholding Tenant—Hotel Premises—Action for Possession — Claim of New Lease — Authority of General Manager — Evidence — License — Agreement to Assign—Double Value—Unnecessary to Award—Stay.

Action by lessors against an overholding lessee for possession of certain hotel premises and for damages. Defendant set up an alleged agreement for a lease extending his term for a year, which, he claimed, had been made with the general manager of plaintiff company.

HODGINS, J., *held*, that while negotiations had taken place in regard to an extension of the lease, the parties had never been *ad idem*, and no concluded agreement had been arrived at, and that in any case, plaintiffs' general manager had not authority to bind them, as both parties well understood.

That, as defendant was not "conscious that he had no right to retain possession, double value should not be awarded against him. *Swinfen* v. *Bacon*, 6 H. & N. 846, followed.

Judgment for plaintiff for possession and a reference, with costs. Twenty days' stay.

Action for possession of certain hotel premises and for damages. Defendant claimed to hold the said premises under an agreement for lease for one year from May 1st, 1912.

Watson, K.C., and Goodwill, for the plaintiffs.

D. L. McCarthy, K.C., and Kerr, for the defendant.

HON. MR. JUSTICE HODGINS:—The defendant held the Oriental Hotel in Peterborough under a lease dated the 31st December, 1906, the term in which began on 1st February, 1907, and expired on the 30th April, 1912. On the 1st May, 1912, the defendant alleges that an agreement was made between the plaintiff company and himself whereby as the statement of defence puts it "the plaintiff company demised and relet the premises in question to the defendant for the term of one year commencing on said 1st of May, 1912, at the same rental and on the same terms (except those relating to the liquor license) as those contained in a certain lease dated the 31st day of December, 1906, between Richard Hall, trustee, of the first part, The Dickson Company of Peterborough, Limited, of the second part, and George N. Graham, of the third part (to which lease the defendant craves leave to refer at the trial of this action) with the further terms in addition to the provisions in said lease contained and in sub-

stitution of those relating to the liquor license that the *defendant should execute a power of attorney* to the plaintiff company authorizing *the said company* to execute *a license transfer of the defendant's liquor license* on *the expiration of the said term*, or other sooner determination of said reletting, and that in case of sale of the realty the lessor should have right of purchase of defendant's license and hotel assets not including liqnor, coal, groceries, and merchandise) for $12,000, the terms of said demise and reletting to be embodied in a formal lease by the plaintiff's solicitors."

The plaintiff company having on the 10th and 30th May, 1912, served notices to quit on the defendant, took proceedings under the Overholding Tenants' Act. The result of these proceedings was that the learned County Judge having declined to try out the rights of the parties, an appeal by the plaintiff company was allowed by a Divisional Court, and the plaintiff company was given liberty to bring an action within one month.

The judgment of the Divisional Court is dated 3rd October, 1912, and reported *Re Dickson Co.*, 27 O. L. R. 239.

This action was begun on 21st October, 1912, and was tried without a jury at Peterborough on 30th and 31st December, 1912.

The defendant is still in possession, and has paid into Court as directed by the Divisional Court up to the 27th of December, 1912, the sum of $2,203.43 for use, and occupation of the premises in question, the payments being without prejudice to the claims of either party in this action.

The circumstances prior to the 1st May, 1912, were shortly these—A lease dated 25th January, 1906 had been made for 3 years and 4 months, expiring on the 30th April, 1909. Subsequently to that, and on the 17th December, 1906, the defendant had arranged (see ex. 22) with one Wilson, a merchant in Montreal, for advances which were secured by that document, and in which very explicit provision was made so as to enable Wilson, in case of default, to apply for the liquor license, and to sell and assign it with the business. From a recital in this document it appears that the defendant had agreed to obtain a renewal of the then current lease, which would improve Wilson's security. The lease of the 31st December, 1906, now expired, was therefore obtained by the defendant from the plaintiff's predecessor in title, and the plaintiff company was made a party to the lease, they holding a chattel mortgage on the defendant's effects. Both

the now-expired lease and the one it superseded, contained the following clause, as to the liquor license:—"And that he (the lessee) will at the expiration or other sooner determination of said term, make, procure, or cause to be made or procured, a proper and sufficient transfer of the license to sell liquors upon the said premises to the person specified by the lessor, or the company for that purpose, and that he will lend his assistance to procure the assent of the License Commissioners to such transfer (and) upon the completion of such transfer with the assent of the License Commissioners, the lessee to be entitled to be paid by the assignee thereof, as consideration money, an amount equivalent to the proportionate part of the license fee for the unexpired part of the license term."

The defendant professes not to have known of this clause, or perhaps of its full extent till the winter of 1911, when owing to a talk with Dickson Hall, or Dickson Davidson, he made enquiries about it. In the result, he knew prior to, and on the 1st May, its scope and effect, and was advised just prior to the negotiations on that day, in which he took part, of his rights in relation thereto. He was fully alive in those negotiations, to the difference between an application for, and a transfer of a license, and of the fact that a yearly application before 1st April, was necessary to secure a license, or its renewal, if that term is appropriate under the Liquor License Act. The defendant was anxious to continue as tenant, as his letter of 7th June, 1911 (Ex. 2) shews. In it he addresses the president of the plaintiff company and registers the letter, so that I think it is fair to conclude that he knew that others besides Mr. Shook, the plaintiff company's general manager, had to deal with the matter. The reply from the plaintiff company, dated 12th June, 1911, refuses his request for a renewal, and gives the text of the resolution of the board of directors of the company on the subject. The defendant, however, kept at it, and on the 12th April, 1912, in answer to his request (how made is not shewn) the plaintiff company enclose him a copy of a resolution passed by the company, as follows:—

"That the lease dated 31st December, 1906, from Richard Hall, trustee, and the Dickson Co. to Geo. A. Graham, be extended for a period of 10 months from 1st May, 1912, subject to all the covenants, provisoes and conditions of said lease. The rent being at the same rate of $3,024 per year, but the amount to be paid per week shall be $75, instead of

$62 per week as provided in said lease. The surplus over and above the said rental to be applied on the chattel mortgage mentioned in said lease, and this extension is made upon the express condition that the terms and conditions in said lease applicable to the expiration or determination of same, shall be equally applicable to the termination of the extension now granted."

Following this letter comes a request from Mr. Gordon, the defendant's solicitor, on 26th April, 1912 (Ex. 12), addressed to Mr. J. C. Shook, c/o the plaintiff company, making an alternative proposition for a year's lease, which was apparently declined on the same day by letter from the plaintiff company's solicitors, Messrs. Bennett and Goodwill (Ex. 13). On the following day Mr. Gordon again writes confirming an arrangement which he states he had made with Mr. Bennett that day allowing the defendant to remain in the hotel until the night of the 1st May for the sale and removal of such of his chattels as might be sold. This sale had been advertised for the 1st May, 1912, on which day the defendant had it adjourned until the 4th May, owing partly, to want of buyers, and partly to something which defendant alleges Mr. Shook had said to him. At all events he admits his extreme desire to come to some arrangement for a further lease.

What occurred earlier than 5 p.m., on the 1st May, between Mr. Shook and Mr. Gordon, and what is alleged to have been said by Mr. Gordon, the defendant's solicitor, with regard to a possible sale of the property and other matters, is not, in my judgment (except on one point to be noticed later) of the importance attached to it by counsel for the plaintiff. Neither party asked at the trial for the production of the telegrams referred to, nor attempted to shew whether an enquiry from Toronto by some one desirous of buying the hotel property, had actually been made that day, or had been received at an earlier period, though not brought forward till that moment. At all events Mr. Shook could not have been averse to negotiating for a sale, and the conversation probably led to the interview later in the day—between 5 and 6 p.m., at which he, Dickson Davidson, the defendant, and Mr. Gordon were present. At that time the license for 12 months from 1st May, 1912, had been granted to the defendant for the sale of liquors in the Oriental Hotel—this was admitted on the argument, and was so stated by Mr. Gordon and the defendant—Mr. Shook says he did not know about it.

But I think I can presume that both parties either knew it or dealt with the matter on the basis that there was a license in existence, because it would have been manifestly unreasonable to negotiate about a license which had expired, instead of one which had taken its place and was good for the year then under discussion. Counsel for the defendant contended that as the sale of the defendant's chattels had been actually advertised, the plaintiff company, or rather their general manager, Shook, was pressed by the fact that if the hotel were deunded of furniture by the sale it would be left on their hands in such a condition that they would find it more difficult to dispose of the property, and that as defendant had obtained the license, and the time for applying it for another had passed they could not sell it at all for hotel purposes. And he argues that this is practically decisive on the question of whether it is likely that an agreement was actually come to that afternoon or not.

Admitting the cogency of this argument from a business standpoint, if the conditions were entirely as counsel urged they were, it is important to consider just how the parties stood. The plaintiff company had the lease containing the covenant which I have quoted; they owned the hotel to which the license had been attached; they had refused an extension in June, 1911, and again in April, 1912, except for 10 months which would have enabled them to apply for the new license, and they had from Mr. Gordon an undertaking to protect their chattel mortgage interest out of the proceeds of the sale. They took no steps to open negotiations, but after having given to the plaintiff the opportunity to sell, consented at his solicitor's request to see him and his client, the defendant, later in the day. If they were in a position of difficulty owing to the license being in the defendant's name, they had the covenant to transfer the license to them, and no one had suggested that it did not cover the new license. The defendant, while holding the actual license would be in a like difficulty, in that he would have to secure another hotel building, and a transfer with the consent of the License Commissioners to the new location, and this in face of his agreement that at the expiration of his term he would make, procure, or cause to be made or procured, a proper and sufficient transfer of the license "to sell liquors upon the said premises" to the person specified by the lessor or the company for that

purpose, and that he would lend his assistance to procure the assent of the License Commissioners to such transfer. It would, therefore, seem that the defendant may have been equally alive to the difficulty of his position in case he was unable to come to an agreement with his lessors.

Upon the best consideration I can give to this phase of the subject, it seems to me that it does not carry the matter further than to indicate advantages, obvious to both parties, in coming to an agreement, but that there was not on the defendant's side such a preponderance of advantage—as against the plaintiff company—as to compel the general manager or vice-president of the plaintiff company to act on the instant and agree to reverse, without further authority, the policy of the company as declared twice in writing.

Coming then to the agreement which it is said was made at the interview between the ex-parties named, difficulty is at once experienced because the writing then made, and said to have been initialled, has been lost. Secondary evidence of it is given, consisting partly of a typewriter's memo. (Ex. 7) and partly of *viva voce* evidence of what occurred—and at the trial Mr. Gordon pencilled down his recollection of what the writing he drew had contained (Ex. 20). Counsel for the plaintiff put forward the typewritten memo. as containing terms proposed by defendant, but not agreed to by the plaintiffs, and also a pencil note (Ex. 8) of what the board had agreed to after considering the typewritten terms.

The defendant repudiates both, the former as not containing what his solicitor put down that night, and the latter as not having been agreed to by him. The typewritten memo. had admittedly some words in it, which were not in Mr. Gordon's written memo. Hence, there is nothing in writing which can be said to contain any agreement, conditional, tentative or otherwise, on which all parties are united. But the defendant contends that if there was a parol agreement that would be sufficient for his purpose, if it finally established his position as tenant for a year.

The four parties met and discussed matters. As the discussion on each matter was ended Mr. Gordon put in writing, as he says, the conclusion as to it. His evidence in chief is that the parties agreed upon (1) lease for a year (2) option to sell hotel business, license, assets except stock, for $12,000; (3) defendant to give power of attorney to execute license transfer; (4) and that he wanted an option to buy property for $65,000, this latter term he admits Shook never assented

to. He also said that he initialled his written memo., and his impression was that Shook did so too. Then he adds that either defendant or he himself asked if it was all right or satisfactory, and he thinks they (Shook and Davidson) said yes. On being shewn the typewritten memo. he says that he thinks the words "to include right to license and transfer" have been added, that the clause relating to the $65,000 option is out of place as it was the last thing discussed, and that the last paragraph was not written by him. He further says that there is nothing in it about the power of attorney which was written down by him, and that he remembers the defendant nodding to him as that was an important part to the defendant. On cross-examination, Mr. Gordon was not positive that he had initialled the memo. which he wrote, but his impression was that he did so. He also says the whole difficulty on 1st May, was about the license, and that the words in the typewritten memo. "to include right to license and transfer" were not in what was agreed to, and that defendant never agreed to transfer the license, and that he never agreed on his behalf to do so. This position is affirmed by defendant, and he appears to have maintained it before the County Judge. The defendant says that the clause as to license was a separate one, and the clause as to the lease was a separate one. Shook says that Mr. Gordon's proposition is that set out in the typewritten memo., and that it is a copy of what the latter wrote except the heading "Proposed terms" added by Overend the stenographer, and the concluding words "and the property vacated by the lessee" added at Dickson Davidson's suggestion by the stenographer upon his (Shook's) instructions. Shook further says that he said the board possibly might extend the time if they got assurance of the license, and that Mr. Gordon offered to give a power of attorney to transfer the license. This is not in the typewritten memo. On cross-examination Shook says he told the defendant and Gordon that so far as he was concerned he would recommend the proposal if he was satisfied about the license and had a power of attorney.

It turns out that before going to meet Shook and Davidson, the defendant had been advised by Mr. Gordon that he could agree to give a power of attorney to transfer the license without preventing himself from applying for a license in competition with the plaintiff company, and that he was willing to give the power of attorney to transfer the license because he could apply before the end of the year, but that this

was not stated to the others during the discussion on 1st May. Upon this evidence supplemented by that of Dickson Davidson and Overend the stenographer, it appears to me that no clear and definite common ground was reached on the 1st May, leaving aside for the moment the question of authority and ratification by the board. Even eliminating the option to purchase at $65,000 which all parties agree was not assented to, but was to be submitted to those interested, and assuming that a lease for a year, and an option to purchase the lessees' interest, including the license, within the year for $12,000, were matters on which no difference of opinion existed, I think the provision as stated by Mr. Gordon that the defendant was to give a power of attorney to transfer the license is not the same as the assurance of the license, as required by Shook, nor a transfer of the license, as put by Dickson Davidson, nor, if the typewritten memo. is to be accepted, as giving the right to the license and transfer. The defendant on cross-examination definitely stated that he did not understand that one of the terms of getting a renewal was that the license was to go to the plaintiff company. Mr. Gordon states in chief, that before the interview in question the discussed terms with Shook, one of which was that the landlords were to be given a power of attorney to transfer the license any time during the year. But apart from that it is quite evident that the parties never understood one another on the first of May, as to the license itself. The lessors understood that they had the right to the license on the expiration of the lease. The defendant, while he says he was not aware of the terms of his lease as to the license, admits that he learned of them in the winter of 1911. The reservation of the right to apply for a new license would seriously impair the landlord's rights under the lease, but even if they possessed no such right, his agreement to transfer it and to give them a power of attorney to transfer it without disclosing this reservation was, whether fair or not to them, at all events such a qualification of the consideration passing to them that I would have to be satisfied by very clear evidence before coming to the conclusion that the plaintiff company so understood it. The evidence for the plaintiffs is all the other way, and I think the mode of stating what the defendant would give was capable of misleading, and did mislead Shook and D. Davidson on this point. Mr. Gordon frankly admits that Shook and D. Davidson may have had the idea that the license was to go with the house at the end of the term, from the fact that

defendant was to execute a power of attorney to transfer the license.

In the questions on examination put in at the trial, it is said, by way of question, "After all it comes down to this, you were going to give them partial right and still keep hold of it?" And the defendant answered, "Take what meaning you like."

The plaintiff company might, if the defendant could apply in competition with them, on the 1st April, find themselves seriously embarrassed, either in securing the license or in transferring it, and the power of attorney was, judging from the defendant's objections to the draft lease, to be strictly confined to a transfer of the license and not a right to apply in his name.

I find therefore that there was no common ground arrived at on the first of May, and that even if the words used indicated an understanding, the minds of the parties never came together, with regard to the subject matter of the agreement on the point of greatest importance to both parties. The radical difference was this: that the defendant, while giving a power of attorney to transfer the license, intended to, and could defeat its operation if on his individual application he obtained the license for the sale of liquor on premises other than the Oriental Hotel.

But there remains the question whether, assuming that the parties then present agreed upon certain terms, it was anything more than a tentative agreement to proposals which had to be ratified by the board before the plaintiff company was to be bound thereby. Shook was general manager. Neither his agreement with the plaintiff company, nor their by-laws give him any definite powers in this regard. But this is not conclusive. I find, however, nothing to enable me to say that his authority went far enough to agree to the terms proposed on the 1st May. All the previous correspondence points the other way, and indicates that the board was supreme. The letter of April 12th, 1912, contains this paragraph, "Be assured that the company will not entertain any modification of the above resolution as the matter was very fully considered." Shook denies that he had authority; so does D. Davidson, and it is clear that they immediately referred the matter to the board. Notwithstanding the tendency of the Courts to uphold contracts made by a general manager within the general scope of his authority, where the other party has no notice of any limitation (see *Skinner* v.

Crown Life, 16 O. W. R. 461; (affirmed 18 O. W. R. 455; 44 S. C. R. 616); *Nat. Malleable Co.* v. *Smith's Falls*, 14 O. L. R. 22; *Russo-Chinese Bank* v. *Li Yan Sam* [1910] A.C. 174). I think it is a fair inference to make from the evidence that all parties knew that the action of the general manager was subject to that of the board which had to approve of any alteration of the terms of the resolution embodied in the letter from which I have quoted. This is much fortified by the fact that all parties agree that the $65,000 option if granted, had to be approved by the board. There are other relevant facts. Mr. Gordon said on cross-examination "that he left with the impression that Mr. Bennett (solicitor for plaintiff company) would draw up a memo. which would be signed that night. He had previously stated that his memo. was to go to Bennett who was to draw lease. The defendant says he went to the office of the plaintiff company that night after 8 p.m., and asked for Mr. Gordon. Dickson Davidson says that he saw defendant that night after the board meeting, and asked for Mr. Gordon, who saw him later on, and approved of the board's memo. (Ex. 8). Mr. Gordon admits the interview, but says he recapitulated the earlier terms, though he is not sure he mentioned the power of attorney. I am quite unable to understand why, if Mr. Gordon saw the memo. (Ex. 8) that night he should not have pressed his enquiry for his own memo. in the morning, and had a clear understanding in view of the fact that when he saw Ex. 8, in Dickson Davidson's hands he noticed that it attempted to extend (as he puts it) the terms of his arrangement. But he seems to have expected a memo. to be prepared by Mr. Bennett from Shook's instructions, and communicated with them and asked for it. Fleming says Mr. Gordon saw Ex. 8 on the morning of the 2nd May, and that he asked when he came in for a memo. of the meeting of the company the night before. Mr. Gordon denies this, but there was no other memo. in the hands of D. Davidson or of Fleming, on the 2nd May, but Ex. 8, and it was what actually went to Mr. Bennett. In addition to all this the defendant says that on the 1st May, when he alleges the agreement was concluded he spoke about a lease, and said he would get Mr. Gordon to write it out but Shook said Mr. Bennett would attend to it, and that both Mr. Gordon and Mr. Bennett were to make up a lease, and what they drew they were to combine. If there really was a concluded agreement made between 5 and 6 p.m., in the afternoon, as the defendant asserts, I am quite unable to understand why the defend-

ant and his solicitor were active later in the evening, evidently expecting something further, or some final memorandum from the company's solicitor.

There was much evidence given both for and against the assertion of Shook that when all four were present "he told them anything. Said there would have to be submitted to the board." Dickson Davidson corroborates this: Mr. Gordon says that earlier in the day when he saw Shook, he thinks the latter said he wanted to see the Dickson ladies (and later on he again says so rather more positively), but that at the final meeting nothing was said about seeing the ladies. When before the County Judge, he appears to have said he "didn't hear the ladies mentioned that I recollect," but asserts now that Shook did not mention them. The defendant also denies that the ladies were mentioned, but before the County Judge he said he "kind of thought Shook said he would have to consult the other members." On this point I think I must find that this condition was stated and that Mr. Gordon and the defendant are mistaken or have forgotten this point. Mr. Gordon admits he was very busy in April and up to the 15th May.

Upon the whole I have little doubt that there was no concluded agreement, either in terms or in intention, come to on the 1st May, entitling the defendant to a lease for a year, or upon the other matters stated to have been discussed then. If there was, then I find, under the circumstances of this case, no authority in Shook or Dickson Davidson to bind the company, and that all that was done was done subject to the condition that the board should ratify it, which the board did not do. I have not discussed Dickson Davidson's authority as vice-president because what I have said as to the general manager is applicable to him. His position is not shewn to be of greater practical importance, and is certainly of no greater legal authority.

I do not desire to put my judgment upon the ground that any of the parties are not to be believed. I rest it upon an analysis of the evidence, giving such weight to each part of it as I think it deserves, and having regard to the fact that witnesses may often be honestly mistaken, and that the surrounding facts and circumstances accord more nearly with the contention of the plaintiffs than with that of the defendant. There is much in the evidence which I have not gone into in detail. The case was very fully presented on both sides and many points were argued, but it narrows down in

the end to the questions I have dealt with. D. Davidson's remarks next morning may well be attributed to his impression that Mr. Gordon approved of exhibit 8 or to his expectation that the defendant would accept the terms agreed to at the board meeting.

The result is what might be expected. A draft lease was prepared and rejected. If there had been an agreement come to, it might have been necessary to have examined the terms of the draft in order to see if the defendant was justified in refusing to sign it. He, however, relied upon the supposed arrangement, and as that fails his objections to the various clauses are unimportant. I think the defendant's conduct relieved the plaintiff company from nominating anyone to take a transfer of the license or from tendering any instrument of transfer.

I think the plaintiffs are entitled to judgment for possession and to an order directing the defendant to execute an assignment or transfer of the license to the plaintiff company, or whom they may appoint, the form of which may be settled by the local Master, and to an injunction restraining the defendant from dealing with the license and from violating his covenant as contained in the lease of the 31st December, 1906, so far as it relates to the license or doing any act which would be a breach of that covenant. The plaintiffs are also entitled to payment out of Court of the moneys now paid in and to judgment for occupation rent at the same rate weekly until possession is actually given, and for such proportion of the taxes as may accrue up to the same date. The exact amount of the occupation rent and of taxes and proportion of the license fee to which the defendant is entitled on the transfer of the license as provided in the lease may be ascertained by the local Master, and the latter item should be credited on the amount payable by the defendant. I am not obliged to give double value, and I do not do so, as I cannot hold in this case that the defendant was "conscious that he had no right to retain possession." *Swinfen* v. *Bacon*, 6 H. & N. 846; and see the view of the learned County Judge on the application before him.

There will be a reference to the Local Master for the purposes I have indicated, if the parties cannot agree on the amount.

The defendant should pay the costs of the action and of his counterclaim.

The defendant can have a stay for 20 days, which stay should (and if I had the power I would so direct) on the defendant filing with the Local Master an undertaking to pay, pending any appeal, the weekly amount fixed in the order of the Divisional Court, dated the 3rd of October, 1912, on the terms stated therein, and so long as he does so pay, include a stay of the injunction granted.

MASTER IN CHAMBERS. JANUARY 8TH, 1913.

CAULFIELD v. NATIONAL SANITARIUM.

4 O. W. N. 592.

Pleading—Statement of Claim—Motion to Strike Out Paragraphs as Embarrassing—Wrongful Dismissal—Other Causes of Action—Relevancy.

MASTER-IN-CHAMBERS dismissed a motion to strike out certain paragraphs in a statement of claim as embarrassing where defendant had understood the action as simply being for wrongful dismissal but where counsel for plaintiff explained that this was only one of a number of causes of action alleged.

Millington v. *Loring*, 6 Q. B. D. 190, referred to.

Motion by defendants to strike out 13 or 14 paragraphs of the statement of claim as embarrassing—in effect to require the delivery of a new statement of claim.

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

D. L. McCarthy, K.C., contra.

CARTWRIGHT, K.C., MASTER:—The statement of claim was subjected to a good deal of minute verbal criticism of certain parts of the paragraphs attacked, and of certain expressions in those and other portions of the same.

A good deal of what was then said might, no doubt, have been justified if the action had been only one for wrongful dismissal, as the counsel for defendants seem to have taken it to be. But on a closer examination, and after hearing counsel for the plaintiff, it appears that although the plaintiff's claim involves the assertion of his wrongful or rather premature dismissal by the defendants, it does not stop there.

On the contrary the main ground of plaintiff's case is that the original agreement of December, 1908, was varied in April or May, 1911, for reasons set out in some of the para-

graphs attacked. As a consequence of such alterations a new agreement was in effect entered into whereby plaintiff was to have leave of absence for four months to prosecute his studies abroad or longer if necessary, and report the results of his research from time to time to the defendants, which he accordingly did, shewing thereby that it was for the common interest of both parties that the plaintiff should be facilitated in his work. To this end it was further agreed after plaintiff's return to Gravenhurst, his engagement could be terminated by either party on six months' notice. The plaintiff returned in December, 1911, and on April 11th the following year the plaintiff for reasons given in paragraph 11 gave six months' notice to the defendants. They at once sent him a cheque for April and six months salary in lieu of notice, and as is alleged wrongfully ejected him and his assistant from the building and destroyed the specimens on which plaintiff sets great value for reasons set out in his statement of claim. The plaintiff claims that in consequence of the defendants' alleged wrongful acts he was deprived of the opportunities of completing his research work to his very serious financial and professional loss, and also of the board and lodging to which, in his view, he was entitled under the agreement of April, 1912, and also suffered loss through the destruction of his specimens.

This seems to set out clearly good causes of action which defendants need have no difficulty in contesting. Perhaps viewed simply as an action for wrongful dismissal, the statement of claim might seem unnecessarily prolix. But as explained by counsel, it is seen that there is nothing really irrelevant—nothing which is not covered by the case of *Millington* v. *Loring*, 6 Q. B. D. 190. It was conceded that perhaps paragraph 3 might be amended, and this can be done is so desired. In any case the motion will be dismissed with costs in the cause—defendants to plead by January 7th, prox.

DIVISIONAL COURT.

JANUARY 13TH, 1913.

MITCHELL v. HEINTZMAN.

4 O. W. N. 636.

Negligence—Motor Vehicle—Personal Injury—Motor Vehicles Act, s. 7—Onus — Insurance Company Real Defendant — Evidence Tending to Disclose Fact—Address of Counsel—Demand that Case be Withdrawn from Jury—Excessive Damages—Reduction —New Trial—Costs.

Action for damages for personal injuries sustained through the alleged negligence of defendant in operating a motor car on Yonge street, Toronto.

BOYD, C., on the findings of the jury, entered judgment for plaintiff for $1,000 and costs.

DIVISIONAL COURT, *held*, that although certain questions had tended to disclose the fact that a certain medical witness had been sent to examine plaintiff by an insurance company, there was nothing brought out to prove to the jury that the insurance company were the real defendants, and that, therefore, the learned trial Judge was correct in refusing to withdraw the case from them.

Lougheed v. *Collingwood Shipbuilding Co.*, 16 O. L. R. 64, distinguished.

Verdict reduced to $800, no costs of appeal. If plaintiff does not consent, costs of former trial and of appeal to be in cause.

An appeal from a judgment of HON. SIR JOHN BOYD, C., awarding $1,000 damages to the plaintiff, on a general verdict by the jury.

The appeal to Divisional Court was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE KELLY.

T. N. Phelan, for the defendant, appellant.

J. P. MacGregor, for the plaintiff, respondent.

HON. MR. JUSTICE CLUTE:—The plaintiff claims damages for injuries received from an automobile owned by the defendant. On the 15th January, 1912, at about 11 o'clock at night the plaintiff and one Simpson were returning home from a social club walking up the west side of Yonge street, and crossed the street to take the car near the intersection of Shuter street with Yonge.

The plaintiff states in his evidence that while he and his friend were standing looking down Yonge street the Yonge street car came first and then the College car, and he stepped out as the car was coming to a stop, and was knocked down

by the automobile. The witness Simpson, who was with the plaintiff, says that they crossed over to get a car at Shuter street, and were scarcely come to a stand-still, just enough to see that there was a car, and the plaintiff said there is a Yonge street car, which he was to take, and a College car, which was suitable for me; that a motor car came up Yonge street just when the plaintiff stepped out on Yonge street and knocked him down. He says he saw it just when it was opposite the College car, and shouted "Look out!" but by that time he was knocked down. The College car was immediately behind the Yonge car. It was just back far enough to be safe. As to speed he says that the motor car came all of a sudden, so fast that he had just time to shout "Look out." The plaintiff was hit on the left thigh, knocked over, his left shoulder hitting the pavement. He was laid up for some five weeks and then returned to his work and received the same pay as he had received before the accident. For some days he spat blood. He complains that he still suffers from the effect of the injury, being unable to lift any heavy weight, and his doctor confirms this, and says that he is uncertain as to how long this weakness of the arm may continue. A doctor called for the defence states that as far as he could see, the plaintiff has fully recovered. The question is one for the jury.

Section 7 of the Motor Vehicles Act, declares that any person who drives recklessly or negligently or at a speed or in a manner dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the highways in guilty of an offence under the Act, irrespective of the clause regulating speed. Upon a careful reading of the evidence it is quite clear that the case is not one which could have been withdrawn from the consideration of the jury, notwithstanding the question of the onus of proof, which in this case under sec. 7 of the Act was upon the defendant. Upon this point the charge was in favour of the defendant as no special reference was made thereto. I see no objection to the charge read in connection with the evidence.

The principle objection argued was that under the authority of *Lougheed* v. *Collingwood Shipbuilding Co.*, 16 O. L. R. 64, there should be a new trial upon the ground that evidence was submitted to the jury in proof of insurance carried by defendant against accident, and that counsel in his address to the jury was allowed to emphasize the fact that the

action was not being defended by the defendant, but by a certain insurance company. Affidavits were offered on both sides by counsel who attended the trial as to what took place. These were not received, but the usual practice was followed, permitting counsel to state what had occurred, and reference was also made to the Chancellor as to what took place.

As to the admission of evidence, there is nothing appearing upon the notes which would warrant a new trial under the authority relied on. All that we can find as to the admission of evidence is at pp. 4, 46, and 71.

On p. 4, during the examination of the plaintiff, he was asked:—

"Q. Did you ever have any other doctor examine you? A. I had. Dr. Wallace (Scott) came over and examined me.

Q. Did you send for him? A. No, sir.

Q. Do you know how he came to come? A. I think he told me that the insurance company had sent him there.

Q. You don't know that for a fact? A. I don't know that for a fact.

Mr. Phelan: I object to that evidence.

His Lordship: No, that is not evidence."

On the cross-examination of Dr. Wallace Scott, called by the defence, he was asked:—

"When did Mitchell send for you? A. He did not send for me.

Q. How did you come to go there? What was your authority for going there? On what representation did you make this examination? A. Am I to be spoken to in this way, my Lord?

His Lordship: Q. You are asked how you came to be there?

Mr. Phelan: He will take the consequence of telling him, my Lord.

His Lordship: And I take the consequence of telling him to answer.

Mr. MacGregor: Q. He did not send for you? A. No.

Q. Who sent for you? A. I went in response to a telephone or a letter from Mr. Hull. Mr. Hull is connected with the Travelers Insurance Co.

His Lordship: Q. You were sent on behalf of the Travelers Insurance Co.? A. Yes.

Mr. Phelan: I now take the objection that your Lordship should dispense with the jury, under the authorities.

His Lordship: We will get the authorities later. The jury is dealing with it now, and they want the facts of the case.

Mr. MacGregor: Q. Doctor, it was in answer to those directions that you were permitted to examine Mitchell? A. It was."

At p. 71, Dr. Cook was recalled by the plaintiff in reply, and Mr. MacGregor in his question used this expression:—

"Q. Dr. Scott, who was called a moment ago by the defence and who examined Mr. Mitchell on behalf of the insurance company," etc., etc.

This is all that appears on the notes with reference to the evidence. There is no statement that any insurance company was the real defendant, or that Dr. Scott made the examination at the instance of the defence; for all that appears the plaintiff may have been examined with reference to his own insurance. The jury could not, I think, from this infer that the Travelers Insurance Company was the real defendant. Mr. MacGregor argued that his questions were put in order to shew that Dr. Wallace Scott was not a disinterested witness, but was sent by an insurance company to examine as to the extent of the injuries the plaintiff had received, and so might be biased in favour of his employer. I think he had the right to do this, carrying the questions no further than were necessary for that purpose, and without intimation to the jury that the insurance company was the real defendant.

Then as to what occurred in the address of Mr. MacGregor to the jury. The note is this:—

"Mr. MacGregor then addressed the jury. During the course of his address Mr. Phelan protested against Mr. MacGregor saying anything to the jury about Mr. Heintzman not being the defendant, but the insurance company, and asked that the reporter make a note of his objections.

His Lordship: Mr. MacGregor, you had better not place much emphasis upon that.

Mr. MacGregor: I accept your Lordship's ruling." And nothing further was said with reference to it. On reference to the Chancellor, he does not recollect distinctly what Mr. MacGregor said to the jury, and counsel do not agree. The Chancellor, however, was not of opinion that any substantial wrong or miscarriage had been occasioned by the reception of the evidence relating to the insurance company, or, as far as he heard, by what counsel said. We think this case dis-

tinguishable upon the facts from *Lougheed* v. *Collingwood*, and that a new trial should not be granted upon this ground.

A further question is that of damages, which the defendant claims to be excessive. Upon a careful reading of the evidence we think this ground is well taken, and unless the plaintiff will consent to have the damages reduced to $800 there should be a new trial. If he consents to such reduction the appeal will in other respects be dismissed without costs. If the plaintiff does not consent the costs of the former trial and of this appeal should be costs in the cause.

HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE KELLY, agreed.

COURT OF APPEAL.

JANUARY 15TH, 1913.

COOPER v. LONDON STREET RW. CO.

4 O. W. N. 623.

Negligence—Railways—Street Railways—Passenger Alighting—Crossing Tracks—Struck by Car from Opposite Direction—Contributory Negligence—Nonsuit.

FALCONBRIDGE, C.J.K.B., gave judgment in favour of plaintiff on findings of jury in an action for damages for injuries sustained by being struck by defendants' car after having alighted from another car and while attempting to cross the opposite track.

DIVISIONAL COURT, 22 O. W. R. 87; 3 O. W. N. 1277, dismissed appeal with costs.

Wright v. *Grand Trunk Rw. Co.*, 12 O. L. R. 114; 7 O. W. R. 636, followed.

Brill v. *Toronto Rw. Co.*, 13 O. W. R. 114, distinguished.

COURT OF APPEAL dismissed appeal with costs.

Per MEREDITH, J.A.:—"There can be a non-suit on a question of contributory negligence."

Appeal by defendants from judgment of a Divisional Court, 22 O. W. R. 87; 3 O. W. N. 1277, dismissing an appeal from the judgment of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., at the trial awarding plaintiff $1,000 damages upon the findings of a jury in an action for damages for personal injuries alleged to have been sustained through defendants' negligence.

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

I. F. Hellmuth, K.C., for the defendants.

Sir George C. Gibbons and George S. Gibbons, for the plaintiff.

HON. MR. JUSTICE MEREDITH:—The appellants' one contention here is that the plaintiff should have been nonsuited at the trial; a new trial is not sought.

There are just two questions raised; whether there was any evidence adduced at the trial upon which reasonable men could find, as the jury did find, (1) that the defendants were guilty of negligence; and (2) that the plaintiff was not also so guilty.

In my opinion there was evidence, upon each point, which precluded a nonsuit; that is that each finding is supported by reasonable evidence, or, as before put, evidence upon which reasonable men might find, as the jury did, in the plaintiff's favour on each of these questions.

It was contended for the plaintiff that, although there might be a nonsuit for want of reasonable evidence, of negligence on the defendants' part in a case where there is such a want of evidence, there never can be a nonsuit, or dismissal of the action, without a verdict, on a question of contributory negligence, because the onus of proof in such a case is upon the defendants; but that contention must in my opinion be held, in these days, to be erroneous; and that in all cases in which there is no reasonable evidence upon which the jury could find in the plaintiff's favour the case should be withdrawn from them and the action dismissed. Why not? Why make any difference? It is just as much no legal evidence whether the onus is the one or the other way; a verdict must be supported by some legal evidence no matter upon whom the onus of proof may be or which way the finding may be; and if there be no legal evidence on one side, no matter which, there is nothing upon which a jury can pass, and so the case should be withdrawn from them: it is not necessary, in my opinion, in these days, to go through the form of directing them to find a verdict; and it has always seemed to me to be illogical, from all points of view that they should be so directed; if there be any evidence, the verdict should be theirs; if there be no evidence, the judgment should be the Court's as a matter of law. But if the technical ground upon which the respondent relies were applicable in any case now why should such a

nonsuit not be applicable to this case; proof of more than negligence, only, is essential to the plaintiff's success; proof that such negligence was the cause of the injury; then the plaintiff gives no reasonable evidence of that, but proves that negligence contributed by her together with negligence contributed by the defendants was the cause and that without both the accident would not have happened?

On the question of negligence the extremity of each contention is erroneous; a railway company is not free from all restraint in regard to the rate of speed of its cars; nor is it at all within the power of any jury to lay down the law in that respect.

A railway company operating on a public highway, must, apart from legislative rights or restrictions, run its cars with reasonable care for the rights of others using the highway. What if such care is not to be measured by what the company may say it should be; nor is it to be measured by the length of the jury's foot. It is a thing quite capable of proof and is to be determined—just as any other question of fact is to be determined—upon competent evidence adduced at the trial.

Then was there any competent evidence adduced at the trial upon which the jury could find that the plaintiff's injury was caused by the defendants imprudently running the car by which the plaintiff was struck at too great a speed at the place of the accident and under the circumstances existing there at the time of it?

I think there was. It is not disputed that a moving car approaching a car stopped to let down passengers ought to approach and pass it with more care than would be needed if both were moving, in order to avoid especially just such accidents as that which is the subject matter of this action. And that is proved by the conduct of the driver of the car with which the plaintiff came in collision; he said that on approaching the car which had stopped he cut off the power from his own car. Then the evidence of the shopkeeper, extracted on cross-examination, was that this car was running at an unusually high rate of speed under the circumstances existing at the time, so much so as to attract his attention, and that in all the long time he had seen cars so passing his shop only in a very few instances had they gone as fast. There was in this I think enough evidence

to go to the jury; that is there was evidence upon which reasonable men might find that the rate of speed was excessive and beyond what even the defendants deemed proper; and there was also evidence upon which they might find that if the speed had been less the collision would not have occurred, or if it had occurred it would have been harmless —merely brushing the plaintiff aside; this was sworn to by one of the witnesses. I do not take into consideration the evidence as to the rules or practice of one other railway company; that was not, in my opinion, evidence; the question is not what any one individual or company may do; but what prudent individuals or companies generally, do.

So too on the question of contributory negligence: the circumstances were peculiar. The plaintiff, a very old woman, was deaf; the weather was unpropitious—a storm in her face; another car was following up that from which she alighted; and the jury might well upon the evidence have found that her attention was absorbed in it, and in her desire to cross before it could come down upon her; all of which a jury might find to be quite natural, and such as would apply to an ordinarily prudent person under the same circumstances. Cars were not constantly passing in the opposite direction on the other track; indeed one might cross hundreds of times in the same manner without meeting one. I would not have been able to find as the jury have found on this question; but equally I am unable to say that there was no evidence upon which reasonable men could find as they found. On this ground also the contentions on each side went quite too far; it is not, on the one side, the actual state of mind of the plaintiff at the time that is essential; nor, on the other, that circumstances not thought about by the defendants are not to be taken into account; all the circumstances, however, brought about, may be taken into consideration; and the question is, what would persons of ordinary prudence do in such circumstances.

Accidents such as this are likely to happen unless perhaps considerable more care than the ordinary person takes is taken. Not only should the passenger be more than ordinarily careful in crossing the other track after alighting from a car and passing close behind it; but also conductors as well as motormen should be more than usually alert to prevent accidents so happening. The companies should

remember that when they use the public highways as discharging and receiving stations for their passengers, that they, as well as the passenger, should have some care that the alighting and discharge and boarding are made with some reasonable regard to saving the passenger from the danger incident to one on foot in a horse road traversed by a railway as well as ordinary traffic.

I would dismiss the appeal.

HON. MR. JUSTICE GARROW:—I agree in the result.

HON. MR. JUSTICE MIDDLETON. JANUARY 22ND, 1913.

NOKES v. KENT CO. LTD.

4 O. W. N. 665.

Negligence—Injury to Workman—Refrigerating Plant — Escape of Ammonia Gas—Ownership of Plant—Hire Purchase Agreement —Attention Called to Defect—Neglect to Remedy.

MIDDLETON, J., entered judgment for $1,000 and costs upon the findings of a jury in an action for damages for personal injuries sustained through a defective cylinder in a refrigerating plant owned by defendants, under a hire purchase agreement.

Action tried at Toronto, with a jury, on the 14th, 15th and 16th of January, 1913.

S. Denison, K.C., and H. W. A. Foster, for the plaintiff.

H. H. Dewart, K.C., and H. Ferguson, for the defendants.

HON. MR. JUSTICE MIDDLETON:—At the trial I reserved the question of nonsuit, and allowed the jury to answer questions which counsel agreed would raise all the issues necessary for the determination of the action. After the jury had answered these questions the matter was argued at length; the defendant claiming that upon these answers the plaintiff was not entitled to judgment.

The action arises out of an accident occurring on the 14th of August, 1911, by which a quantity of ammonia escaped from a refrigerating plant upon the premises of the Harry Webb Company, Ltd., at Toronto, through the packing of the joint between the cylinder and cylinder-head of the condenser forming part of the plant in question.

The plaintiff was an engineer employed by the Harry Webb Co., and was at the time of the accident engaged in operating the machine in question. The effect of the inhalation or attempted inhalation of the ammonia gas, and of the exertion incident to turning off the valves of the engine so as to prevent a further escape and injury to others upon the premises, was most serious, as the plaintiff was sixty-two years of age and in a somewhat enfeebled physical condition because of the fact that he suffered from chronic bronchitis and arterial sclerosis. Ever since the accident he has been disabled and entirely unable to work, and is now practically a dying man.

The defendant company contracted with the Harry Webb Co. to instal the refrigerating plant in question. By the contract the property in the plant was not to pass to the purchasers until paid for. At the time of the accident the plant had been installed and was in operation, but had not proved satisfactory, owing to the fact that it did not give sufficient refrigeration. For this reason the Harry Webb Co. had declined to accept it; and some modifications were being made in the refrigerating pipes, to remove the objections raised.

The condenser was not manufactured by the defendant company, but purchased by them from the York Manufacturing Company, of York, Pennsylvania. It constituted but one link in the entire outfit being supplied by the defendants to the Harry Webb Co. It was constructed and assembled by the York company, and was shipped by them in a condition in which it was supposed to be ready for erection and operation. Before leaving the factory it was tested and found to be perfect and in running order. It was shipped direct from the factory to the Harry Webb Co.'s premises at Toronto, and was there placed in position and connected with the operating dynamo and the pipes constituting the refrigerating plant and condenser system.

At the trial some endeavour was made to shew that the machine was defective in design owing to the absence of a proper flange to protect the packing constituting the gasket at the joint between the cylinder and cylinder-head. This contention was entirely displaced by the production of the parts in question, which shewed them to be properly constructed.

To understand the evidence, it is necessary to know in a general way how the plant operated. Essentially it consists of a closed circuit containing ammonia. The ammonia vapour is compressed by the compresser to a pressure of about two hundred pounds; and the effect of this compression is to raise the temperature very considerably. The compressed vapour is then artificially cooled, by bringing the pipes containing it in contact with water. The cool vapour is conducted to the refrigerating pipes and permitted to escape into them practically at atmospheric pressure. As in the expansion the temperature is reduced precisely to the same extent that it was raised in the compression, and as the starting point of this reduction has been lowered by the cooling of the vapour, a very low temperature is thus produced, which brings about the refrigeration. The ammonia vapour thus expanded is returned again to the compresser, to be started once more through the system.

On the morning in question the plaintiff was about to put the machine in operation. He started the compresser. He says—and the jury had believed him—that he opened the exit valve of the compresser, but that nevertheless the machine would not operate properly; the pressure raised abnormally and he stopped the machine. He started it again, when almost immediately the pressure became so great that the ammonia was forced through the packing of the cylinder-head, with the result described.

The defendants contended that this was brought about by the failure to open the discharge pipe from the condenser, and that in no other way could the pressure necessary to bring about the result have been obtained. Plausible as this theory is, the jury have rejected it.

It appears that some time prior to this, while the machine was in operation, Nokes drew the attention of the defendants' engineers to the fact that the condenser, which was supposed to operate silently, ran with a heavy pounding. Goulet who was in charge for them, admits that he was told of this. He thought that it did not indicate anything wrong with the machine and he instructed Nokes to continue its operation.

The jury has, I think, taken the view, and I so read their findings, that this pounding indicated that there was something wrong with the condenser, and that it then became the duty of the defendants to open it up and ascertain

the cause, and that the defendants were negligent in failing to do so. The jury also find, as I understand their answers, that the effect of this pounding was to gradually loosen the packing of the cylinder-head, so that when it was subjected to a somewhat unusual strain—from whatever cause that was brought about—the loosened packing permitted the ammonia to escape.

After the accident Goulet was called in. He tightened the bolts on the cylinder-head, thus compressing the packing; and ran the engine without disaster for several days; but he did nothing to remedy the defect that existed in the machine, whatever it was. In the result, about a week thereafter, a somewhat similar accident took place, in which the head was blown off the cylinder and the discharge valves and other internal mechanism at the cylinder-head were completely wrecked.

I do not think that under these circumstances I can nonsuit; in fact, I think the jury were well warranted in taking the view that there was something wrong with this condenser which would have been discovered had the defendants heeded the warnings given by the unusual noise in its operation. This defect resulted in the escape of the gas on the 14th of August, when the cylinder-head was loose enough to yield, and it resulted in the entire wreck of the machine when the cylinder-head was tightened so that it could not yield. It may have been that owing to the defective condition of the refrigerating portion of the plant some ammonia was returned to the condenser in a liquid form. This, in a compresser, operating at the speed of the machine in question, would account for its wrecking and possibly explain the serious effect of the leakage on the 14th of August, which more nearly corresponds with the discharge of some fluid ammonia than with the discharge of mere ammonia gas.

Understanding the facts to be as above set out, I do not think there can be any doubt as to the plaintiff's right to recover in law. The defendants were yet in charge of the machine. They owed to the plaintiff a duty which called upon them to see that the machine was put in order when they had, as here found, knowledge of its defective condition.

No good purpose could be served by reviewing the numerous authorities cited upon the argument.

Judgment will therefore go, in accordance with the verdict, for $1,000, and costs.

COURT OF APPEAL.

JANUARY 15TH, 1913.

RE WADDINGTON AND TORONTO AND YORK RADIAL RW. CO.

4 O. W. N. 617.

Railway — Street Railway — Extended Switches and Turnouts — Freight — Agreements and Statutes Affecting Company — Construction of.

COURT OF APPEAL, *held*, that the Toronto and York Radial Rw. Co., had the power, under the agreements of its predecessors in title with the county of York, and the various statutes relating to the company and its predecessors, to enlarge and increase their switches and turnouts, and to carry freight against the will of the successors in title of the county of York.

Appeal by corporations of the town of North Toronto and the city of Toronto from an order of the Ontario Railway and Municipal Board, dated October 2nd, 1911, declaring that the company do construct and put in such switches and turnouts as might be necessary for the operation of their line and to carry freight.

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

I. F. Hellmuth, K.C., and T. A. Gibson, for the town of North Toronto.

Irving S. Fairty, for the city of Toronto.

C. A. Moss, for the Toronto and York Radial Rw. Co.

R. McKay, K.C., for the applicants Waddington and Winter.

HON. MR. JUSTICE MEREDITH:—The substantial, and the only substantial, questions involved in this appeal are; (1) Whether there is any power in the Railway Board to permit the railway company to enlarge their switches and increase them against the will of the appellants; and (2) Whether the railway company has a general right to carry freight.

The first question was dealt with by the Chairman of the Board as if depending upon a proper interpretation of the several agreements made between the company and the county of York, and I purpose so dealing with it in the first place, because if his interpretation was right, as I think it was, it will be unnecessary to discuss other questions.

Then, as to the first point. In the earliest agreement there was a plain restriction as to the number and length of switches; but afterwards, from time to time, there were extensions of the railways so that it has become quite a different and more extensive undertaking than that originally provided for; and so one is not surprised to find in a subsequent agreement—that 28th June, 1889—an enlargement of the company's rights respecting switch; it is there provided that: "The company may alter the location of or extend culverts, switches and turnouts as may be found necessary from time to time for the efficient and economical working of the said rail or tramway."

The agreement of 17th December, 1889, in no way restricts these additional rights but relates to switches of another character—branching into other highways and to the company's power-house.

It is true that under the agreement of the 20th October, 1890, the restriction as to number and length of the switches was again imposed, but only as to the addition to the railway provided for in that agreement.

But again in the last of the agreements—dated 6th April, 1894—general power was again conferred upon the company in these words: "The company for the purpose of operating its railway may; . . . construct, put in and maintain such culverts, switches and turnouts as may from time to time be found necessary for the operating of the company's line of railway on Yonge street, . . . and the company may from time to time alter the location of such culverts, switches or turnouts."

These words seem to again extend the company's right so as to overcome the restriction contained in the agreement of 20th October, 1890, and to put the company on the same footing in regard to all switches throughout the whole length of the line; but it is contended that that is not so, that these words ought to be held to apply only to the addition to the road provided for in that agreement.

But why so? The words are general; "for the operation of the company's line on Yonge street;" not only a part of that line, the part provided for in the agreement of 6th April, 1894. And no reason has been suggested why the same right should not apply to all parts of the railway; why there should be any difference in regard to the portion provided for that agreement. The agreement of 6th April, 1894, dealt with the whole road not only in that respect but also several respects. There can be no reasonable contention that it is altogether restricted to the part of the railway provided for in it.

I have no doubt the Chairman was quite right in his interpretation of the agreements in this respect; and the question was one within his jurisdiction.

On the other point, the appellants' contention is that these agreements deprive the company of the right to carry freight.

But there is really no substantial weight in that contention. On the contrary the agreements fully recognise that right, the first of them, that of 25th June, 1884, reciting that the company was empowered by legislation "to take transport and carry passengers and freight."

The agreement of 28th June, 1889, and that of 6th April, 1894, each contain a provision that the company shall carry certain freight at certain rates to be fixed as therein provided; thus not only recognising the power of the company to carry freight, but requiring them, in certain events, to do so.

To imply from these provisions an obligation on the part of the company to carry no other freights, or an abandonment of their legislative rights in that respect, or an attempt to transfer the power in that respect to the municipal corporation, would be entirely unwarranted; they, obviously I would have thought, gave, as far as the company had power to give, a right to compel them, as therein provided, to exercise the right to carry freight.

And so I find nothing in the agreements purporting to restrict the right which the Board has expressed its intention to exercise regarding switches or freight; and so I agree with the Chairman of the Board in his interpretation of the agreements in this respect; and that being so it is unnecessary to consider any other question of law which was, or might have been raised, before the Board; merely

finding nothing in the agreements staying the hands of the Board; without considering what would be the effect of such an agreement if it in fact existed.

The Board properly constituted can now go on and deal with the questions of fact properly arising upon the application before them; as, from the Chairman's certificate, it now appears it was intended to do.

HON. MR. JUSTICE GARROW:—I agree.

COURT OF APPEAL.

JANUARY 15TH, 1913.

MACDONELL v. DAVIES.

4 O. W. N. 620.

Landlord and Tenant—Renewal of Lease—Right of Lessee to—Construction of—One-sided Bargain—Leaning of Court against.

COURT OF APPEAL, *held*, that a certain lease should be so construed as to give the lessee, as well as the lessor, a right of renewal. Judgment of LATCHFORD, J., at trial, reversed.

Appeal by defendant from judgment of LATCHFORD, J., at the trial in favour of plaintiffs' claim and dismissing defendants' counterclaim.

The action was for recovery of possession of certain lands formerly leased by plaintiff to defendant and for damages for deprivation of possession thereof and defendants counterclaimed for a renewal of the lease aforesaid, or rectification there of.

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

E. D. Armour, K.C., and M. H. Ludwig, K.C., for the defendant.

G. H. Watson, K.C., for the plaintiff.

HON. MR. JUSTICE MEREDITH:—However one-sided the writing may be, if the right of renewal appertained to the lessor only, it cannot be extended to the lessee also; it is not now the time for making, but is the time for interpreting

only, the agreement between the parties evidenced by the lease in question; but, if the writing be ambiguous, the extraordinary one-sided character of the agreement, as contended for by the respondent, may well be taken into consideration and easily turn the scale against that contention.

The term of 21 years certain, and the provision for reentry at its expiration, and the other provisions of the lease, are all subject to the agreement, contained in it, for the renewal of it "forever," in like terms of 21 years.

For the plaintiff it is contended that this right of renewal pertains to him only; and that although he can have a renewal only in the event of his declining to pay to the lessee the value of the building on the demised property, yet the lessee has no right of renewal whatever, but must yield up possession of everything without compensation, if the lessor so choses at the end of any of the terms of 21 years; in other words, that if the lessor give the notice which the lease provides for giving, he must renew or pay compensation, but that if he does not give such notice he may have the property back again without payment of anything for any building or improvement, though the lessee had been bound to expend, and had expended, thousands of dollars in such improvements.

Of course the parties were legally competent to make such an extraordinary one-sided bargain; but one can hardly imagine a lessee in his sober senses doing so; and I cannot think the words which the parties used to evidence their bargain by any means compel us to consider that they did.

There is much, no doubt, in the writing that looks that way, but the governing words seem to me to be "renewable forever;" it is true that they are preceded by the words "which said lease shall be;" but it seems to me that these words may be well applied to the lease itself as to renewal leases; I can imagine no reason why they should not be made by the parties so applicable, and cogent reasons why they should be are obvious; and it will be observed that where a renewal lease is plainly meant it is described as the "said renewal lease," "the further lease," and "renewal term," and also that in these clauses of the lease "this present demise" is mentioned, to which the words "which said lease" might have literal reference; and I can have no doubt that they were meant to have actual reference to the lease in which they appeared as well as to every renewal of it. It seems impossible to believe that the parties meant that if

the landlord required a valuation he must pay for the buildings and improvement; but that if he did not he could take them without giving any kind of compensation.

The conduct of the parties was quite in accord with the view I have taken, and entirely inconsistent with the present contention of the landlord, until the matter came into the hands of the landlord's solicitors, with a view to an arbitration under the lease, when the uncertain words of the lease were seized upon to gain for the landlord the extraordinary advantage sought in this action and given effect to at the trial.

The result is that the effect of this loosely drawn lease, is that it was a demise for 21 years renewable forever in like terms, but determinable by the lessor only at the end of any of these terms, in manner provided for in the lease, including payment for improvements as therein provided; also subject, at the option of the lessor only, to a reconsideration of the question of the amount of the rent, in the same manner and at the same time as the valuation of the improvements; the parties to be bound by the amount of the new rent if the lessor did not elect to pay for the improvements and take back the land.

There is, as I have said, a good deal that literally favours the interpretation of the trial Judge; but there is, I think, more to support the interpretation I have considered right, which is also favoured by the fact that the rent is described as a ground rent.

HON. MR. JUSTICE LATCHFORD. JANUARY 13TH, 1913.

RICHARDS v. LAMBERT.

4 O. W. N. 646.

Reference—Accounts—Appeal from Master—Reduction in Amount Found Due.

LATCHFORD, J., on an appeal from the report of the Local Master at Sandwich, upon the state of accounts between the parties, reduced the amount found due plaintiff from $12,130.72 to $11,634.20, and gave judgment for plaintiff for latter amount, with costs of action and reference.

An appeal from a report of the Master at Sandwich, upon a reference directed to him by his Lordship, the Chancellor, to report as to the state of the accounts in the matters set up

in the pleadings; further directions and costs having been reserved.

A. R. Bartlet, for the defendant, appellant.
J. H. Rodd, contra.

HON. MR. JUSTICE LATCHFORD:—The plaintiff, a resident of Windsor, brought this action on behalf of himself and as the only shareholder other than the four individual defendants, in the Regal Motor Car Company of Canada, Limited.

The four individual defendants are the other shareholders of the said company, and are also the owners of or the only shareholders in the Regal Motor Car Company, of Detroit.

In November, 1909, the parties entered into an agreement contemplating an incorporation of a company in Ontario; and in anticipation of the incorporation subsequently obtained, lands were purchased and the construction of buildings begun. The company was organized in February, 1910, and the plant made ready for the proposed operation. Haines was appointed manager of the Canadian company, and the plaintiff assistant manager.

At a very early date friction appears to have arisen between the plaintiff and his associates; and he was in June excluded from the management of the company. The manufacture of automobiles was stopped, and it is alleged that the stock which the Canadian company had on hand at the time was, in the fall of the same year, appropriated by the defendants to their own use and the use of the Regal Motor Car Company of Detroit. As a result, the Detroit company was enabled, the plaintiff alleges, to obtain payment of a large non-existent liability, and obtain possession of the stock and machinery of the Canadian company at an improper price; and the interest of the plaintiff in the Canadian company was thereby greatly reduced, if not entirely eliminated, and the plaintiff in consequence lost the $6,000 he had invested, and the time which had been expended by him in connection with the company. The plaintiff further alleges that the Detroit company was a party with the individual defendants to the wrongs of which he complains, and that the company is, with such defendants, liable in damages to him.

On the part of the defendants, all improper interference with the plaintiff is disclaimed, and they say that as the Canadian company had become financially embarrassed it was

necessary to sell the cars that had been manufactured—or rather, assembled—at a price less than the list price, and that upon an action being brought against the Canadian company for damages, the Lamberts and Haines believed it to be in the interest of the Canadian company, and of its creditors that the debts should be paid; and as this could be done only by the sale of the assets, the defendants sold the assets and turned back such of them as they could to the person from whom they were purchased, receiving in return their full market value. The defendants further allege that they acted in good faith and to realize as much as possible out of the assets of the company for the benefit of its creditors and shareholders. To this defence there was a mere joinder of issue.

The Master has reported that the Canadian company was in a solvent and fairly prosperous condition up to November, 1910, and that then the defendants the Lamberts and F. W. Haines, the officers and shareholders in the Detroit company, concluded the business should not be carried on in Canada; that they appropriated the assets of the Canadian company to their own use and to the use of the Detroit company, and removed such assets—excepting the lands and buildings—from Walkerville to the premises of the Detroit company.

The Master further finds that the assets, consisting of the parts used in constructing the cars and called "running stock," and the tools, were carefully counted, checked and invoiced from Walkerville to the Detroit company at reasonable and proper prices; but that after such assets were received by the Detroit company a number of claims were made for over-valuation and for shortages. The Master finds that such claims have no foundation in fact, and reports that by direction of the Lamberts and of Haines, entries were made in the books of the Canadian company, by which that company was stated to be indebted to the Detroit company in the sum of $6,245.53.

With this statement of account as a basis, the Master went minutely into the facts affecting the several items of this account and the accounts submitted on behalf of the plaintiff, I have gone carefully over the voluminous evidence taken upon the reference, and had the assistance of the able and lengthy arguments of counsel for the parties.

The questions in issue are questions of fact upon which there has been much contradictory evidence. Obviously the Master declined to believe the testimony of Haines, the chief

witness for the defendants. He also rejected the evidence tending to depreciate the assets of the Canadian company transferred to the Detroit company. The enormous shrinkage alleged in the value of what was known as "the running stock" was not satisfactorily accounted for. Having that fact in mind, the Master may possibly have lent greater credence than I should have been inclined to accord to the evidence adduced on behalf of the plaintiff regarding certain of the credits claimed for the Canadian company. But I am unable to say that he was wrong except as to two items amounting together to $496.52. With this deduction, leaving the amount due $11,634.20, instead of $12,130.72, the report is confirmed and the appeal dismissed with costs.

There will be judgment for plaintiff accordingly, with costs of trial and reference.

MASTER IN CHAMBERS. JANUARY 15TH, 1913.

PLAYFAIR v. CORMACK & STEELE.

4 O. W. N. 647.

Discovery—Examination of Defendant—Shares in Mining Company—Dealings in—Collateral Dealings—Questions as to—Order for Re-attendance.

MASTER-IN-CHAMBERS, *held*, that a party must, on his examination for discovery, answer questions which may, not which must, assist the examining party, and that consequently, where an action was brought in respect of dealings in certain mining stock, questions relative to dealings between the same parties, in respect of other mining stock of the same company, were permissible.

Motion by plaintiffs for an order requiring defendant Steele to re-attend at his own expense and answer certain questions which upon his examination for discovery on the advice of counsel he refused to answer.

The action was brought to recover $4,263.57 as a balance due to plaintiffs as brokers in respect of transactions in the stock of the Swastika Mining Co., between 23rd May, 1911, and 29th February, 1912.

An action for the same matters and the same amount was first brought against defendant Cormack alone. On a motion made therein for judgment, the defendant set up that all the transactions in question were made with plaintiffs and now defendant Steele the president of the Swastika Co., and that it was well known that he (Cormack) had nothing to

do with it, so as to render him in any way liable to plaintiffs.

That action was thereupon allowed to rest, and the present action was commenced claiming the same amount against both defendants, but without saying how they are jointly liable or whether the claim is against one of them only in the alternative.

The defendants have severed and each asserts that the other was liable. Defendant Steele further says that all accounts between plaintiffs and himself were settled on 11th April, 1912, by payment to them of $8,000, and that he has had no further dealings with the plaintiffs. The statements of defence were delivered in first week of October, and there has been no reply.

The defendant Steele was examined for discovery on 19th November. On the advice of counsel he declined to answer certain questions which plaintiffs now move to have answered.

Harcourt Ferguson, for the motion.

W. D. McPherson, K.C., contra.

CARTWRIGHT, K.C., MASTER:—Defendant Cormack was examined the day before Steele—and in answer to the last question in his examination, he said that the agreement between himself and Steele, was that the latter was to indemnify him against any loss, and that they were to divide any profit that might be made in the transaction.

The questions which Steele refused to answer were Nos. 7 to 25 both inclusive—83, 84, and 89 to 95 both inclusive. Those in the first series were directed to the question whether Steele had any documents between himself and plaintiffs relating to Swastika stock. His counsel submitted that defendant could only be asked as to "stock specified in the statement of claim." He would not in consequence even admit or deny his signature to a document shewn him by plaintiffs' counsel dated 18th May, 1911, and purporting to be signed by him and to be in reference to Swastika stock; nor would he say if he was the largest shareholder in that company or if in May, 1911, he was the secretary-treasurer. Questions 83, 84 were as to Steele's belief at the time when Cormack told him that he was not financially responsible that Cormack did not intend to hold himself responsible for any loss in this matter. This he would not answer nor would he say who was in his opinion to bear any loss. Why this lat-

ter question was objected to I cannot understand, as the position is plainly taken in Steele's statement of defence that Cormack alone is liable to plaintiffs.

Question 83 does not appear to be of sufficient importance to be passed upon formally. The defendants are now at arms' length, each seeking to throw any liability on the other. When either of them first became aware of this attitude on the part of his co-defendant does not seem to be relevant to plaintiffs' case. It might be otherwise if the examination was between the defendants.

Questions 89-95 are simply a repetition of the first series which is now to be disposed of.

The position avowedly taken by Steele's counsel, and on which he pressed for a definite ruling, was as follows:—

"Question 90: I advise the witness to answer in such a way as will relate only to dealings (if any) between him and the plaintiffs in regard to the particular stock (? share) mentioned in the statement of claim."

This position in my view of the law and the practice is too unqualified. In the present case it is admitted on the statement of defence that Steele had other dealings with the plaintiffs. These were on such a scale that they resulted in his having to pay $8,000 in settlement.

It is also stated in his examination, question 8, that defendant has no written agreement with plaintiffs or with Cormack with reference to the stock referred to in the action.

It appears from the statement of plaintiffs' counsel at question 12, that there was what purported to be a formal agreement on 18th May, 1911, between plaintiffs and defendant, and the Swastika Co., as to stock. I think Steele should have acknowledged his signature or denied it, and then there might be light thrown thereby on the present question, which is to be tried. As I understand the matter a ruling was solicited on the general question raised by Steele's counsel and not as to the particular questions asked. And my answer to that question must be in the negative. In Bray's Digest of the Law of Discovery (1904), paragraph 10 (p. 3), the scope of discovery is defined in such a way as to require the defendant to answer questions which *may*, not which *must*, assist the examining party.

The defendant should re-attend as may be arranged for further examination at his own expense and the costs of this motion will be to plaintiffs in the cause.

MASTER IN CHAMBERS. JANUARY 16TH, 1913.

POLSON IRON WORKS LTD. v. MAIN.

4 O. W. N. 648.

Pleading — Counterclaim — Striking Out — Action for Calls — Counterclaim against Directors—Claim on behalf of Shareholders of Company—Amendment.

MASTER-IN-CHAMBERS, *held*, that a claim against certain directors of a company for misfeasance in office and for repayment of certain sums to the company and claims against such directors personally, could not be set up as a counterclaim to an action for calls on stock subscribed, unless such claims were alleged to constitute a ground of liability on the part of the company.

Stroud v. *Lawson*, [1898] 2 Q. B. 380, and *Bennett* v. *McIlwraith*, [1896] 2 Q. B. 464, followed.

Motion to strike out certain paragraphs of a counterclaim as filed.

The plaintiff company brought an action to recover from defendant $16,144.65 as due by him for calls on 160 shares held by him in the company. The statement of claim was delivered on 28th May. 1912. On 1st November the statement of defence and counterclaim was delivered to the latter, the plaintiff company, together with the executors of F. B. Polson, deceased, and John B. Miller, were made defendants.

The two latter have moved against the counterclaim under Consolidated Rule 254:

Connsel for Miller against paragraphs 25 and 26 only, and to have Miller's name struck out from counterclaim; and for counsel for executors of F. B. Polson, against paragraphs 2-23, and also against 25 and 26 as setting up a distinct cause of action.

J. F. H. McCarthy, for Miller.

C. A. Moss, for the executors of F. B. Polson.

R. McKay, for the defendant Main.

CARTWRIGHT, K.C., MASTER:—The statement of defence and counterclaim consists of 27 paragraphs. The 2nd and 21st following give in much detail a history of the defendant's connection with the plaintiff company and with the deceased Polson and his partner Miller before their business was transferred to the plaintiff company in 1905.

It sets out in paragraphs 10 and 11 certain representations and promises made by Polson on behalf of the com-

pany on the faith of which defendant says he was induced to agree with Polson and Miller by an agreement in writing of 27th June, 1906, to effect the transfer to the plaintiff company of the very profitable business of the Heine Co., of which defendant was in June, 1906, part owner and apparently in control of that company. These representations are set out very fully under seven different heads. Under the 4th head it is alleged that as a consideration for the transfer of the Heine Co.'s business defendant was promised by the company through Polson, its president, that defendant should receive $75,000 in stock of the company of which $50,000 was to be issued to him as paid up stock and the $25,000 was to be paid for by yearly dividends of 10 per cent for 5 years on the $50,000, and that no calls were otherwise to be made or paid on the $25,000. Also that Main was to be assistant manager for at least those 5 years at a salary of $10,000 a year.

After giving a history of the matter down to the end of 1911, and alleging certain defaults on the part of the company—and the discovery of some of the before mentioned misrepresentations as to the company's financial position and otherwise in paragraph 19, it is alleged that at the end of 1911, defendant was wrongfully dismissed by the company from its service; and paragraphs 21 and 22 allege injury from such dismissal and from non-payment of dividends on the $50,000 of stock which he alleges is now valueless and apparently in his view always was to the knowledge of Polson and Miller.

By paragraph 24 defendant repeats paragraphs 2 to 23 by way of counterclaim and claims $50,000 damages, presumably from the defendants by counterclaim.

Paragraphs 25 and 26 allege misfeasance by F. B. Polson and Miller as officers and directors of the company and claim an account of their dealings with the company's assets and repayment to the company. This is in substance an action on behalf of the company's shareholders and for their benefit.

These two last paragraphs cannot stand under the decision in *Stroud* v. *Lawson*, [1898] 2 Q. B. 380—a case of which the facts are very similar to those of the present. If this involves the striking out of the name of Miller as a defendant to the counterclaim then Mr. McCarthy's motion will succeed necessarily.

The counterclaim for wrongful dismissal as alleged in paragraphs 21 and 22 must be confined to the plaintiff com-

pany, in the same way as paragraph 27 counterclaiming for the cancellation of defendant's subscription for the $25,000.

The motion of the executors of F. B. Polson is entitled to prevail to this extent—the defendant must amend to shew if he can something that will entitle him to make his claims against Polson and Miller personally a ground of liability on the part of the company to him for their alleged wrongful dealings with him, or to make a claim against them in the alternative as in *Bennett* v. *McIlwraith*, [1896] 2 Q. B. 464. It was not contended on the argument that either of these claims did appear at present sufficiently, if at all.

The defendant must amend within a week as he may be advised. If this is not done the counterclaim except as against the plaintiff company as in paragraphs 19 and 27 must be struck out.

The costs of these motions will be to the moving parties in any event—together with all costs lost or occasioned thereby as in *Hunter* v. *Boyd*, 6 O. L. R. 639.

MASTER IN CHAMBERS. JANUARY 20TH, 1913.

GROCOCK v. EDGAR ALLEN CO.

4 O. W. N. 660.

Discovery—Officer Resident Outside Jurisdiction—Con. Rule 1321—Scope of—Con. Rules 439 (2), and 454—"Officer"—Admissions of—Order Refused.

MASTER-IN-CHAMBERS refused to order the examination of one T. H., alleged to be the "manager for Canada" of defendant company, a Sheffield, Eng., corporation, on the ground that Con. Rule 1321 conferred a discretion as to the making of an order thereunder, and, as a company was bound by the admissions made upon such an examination, it must be clearly shewn that a responsible officer is sought to be examined.

Scope of Con. Rule 1321 discussed.

The facts of this case appear in the previous report in 22 O. W. R. 219; 3 O. W. N. 1315.

Motion by plaintiff for the examination for discovery of "Thomas Hampton, manager for Canada of the defendant company at such time and place at Montreal or elsewhere," as may be thought best. It is not shewn what his position involves. The plaintiff swears that he is conversant with the matters in issue, and is in his opinion the proper officer to make discovery.

R. J. Maclennan, for the motion.
H. E. Rose, K.C., contra.

CARTWRIGHT, K.C., MASTER:—The motion is made under Consolidated Rule 1321, the terms of which and its proper scope and application now come up for decision for the first time, so far as I am aware.

This rule was passed on 23rd September, 1911, to meet the difficulty pointed out in *Perrins Limited* v. *Algoma Tube Works*, 8 O. L. R. 634; 4 O. W. R. 233, 289.

What has been done has no doubt been done designedly—and some important differences appear on a comparison of this Rule with Rules 439 (2) and 454.

Rule 1321, is as follows:—

"1321. The Court or Judge may order the examination for discovery at such place, and in such manner as may be deemed just and convenient of an officer residing out of Ontario of any corporation party to any action. Service of the order and of all other papers necessary "to obtain such examination may be made upon the solicitor for such party, and if the officer to be examined fails to attend and submit to examination pursuant to such order, the corporation shall be liable, if a plaintiff, to have its action dismissed, and if a defendant, to have its defence struck out and to be placed in the same position as if it had not defended."

The language used puts foreign corporations in the same position as those within the province under Rule 439 in the consolidation of 1897—for some purposes.

In consequence of the questions raised as to what the term "officer" meant (see *Thomson* v. *Grand Trunk Rw. Co.*, 5 O. L. R. 38) on 20th June, 1903, Rule 439 (a) was passed allowing the examination "of any officer or servant" of a corporation; but with the proviso that "such examination shall not be used as evidence at the trial."

Rule 1321 is limited to the examination "of an officer residing out of Ontario." It contains the penalty for default given in Rule 454. But not the proviso against use of such examination as evidence at the trial, which would therefore appear to be capable of being so used.

These differences in the language of the three rules in question must have been deliberately made and must be given full effect to.

In the present case it would be a very serious matter for the defendant company resident in Sheffield to have

judgment entered against it for default of Mr. Hampton in attending for an examination of which his company never had any notice or knowledge—or to have his admissions made behind their back and 3,000 miles away used against them at the trial.

The new Rule with its serious penalty for default and the possible use of the depositions taken thereunder must be applied with caution so as not to do injustice or give rise to unfavourable comment on the administration of justice in this province, which has always upheld the principle "that a fair trial is above every other consideration."

As at present advised, I think, the rule did not contemplate a case like the present, and was not intended to apply thereto unless the person to be examined is clearly an "officer."

No doubt an order must go when asked for to examine an officer of the defendant company at Sheffield. Then the company will have full information to give as well as the protection of seeing that their case was not prejudiced by any default of the officer or any unwarranted admissions.

The motion will be dismissed—with costs in the cause as the point is new.

CHAMBERS.

HON. MR. JUSTICE BRITTON. JANUARY 16TH, 1913.

REX v. BROUSE.

4 O. W. N. 640.

Criminal Law—Inspection and Sale Act—R. S. C. c. 99, s. 321—Apples Improperly Packed — Conviction — Plea of Guilty — Defendant Precluded from Objecting to Information—Section Discloses one Offence and Several Modes of Committing it—Information Valid.

BRITTON, J., *held*, on a motion to quash a conviction for exposing apples for sale packed contrary to the provisions of s. 321 of the Inspection and Sale Act, R. S. C. c. 99, that the fact that defendant had pleaded guilty, precluded him from objecting to the form of the information, and that the section in question disclosed only one offence, which could be committed in several ways.

R. v. *Macdonald*, 6 Can. Crim. Cas. 1, referred to.

Motion to quash a conviction made by George O'Keefe, Esq., P. M. of the city of Ottawa, on the 16th of December, 1912—convicting John A. Brouse of violating the "Inspection and Sale Act."

The motion was heard at Ottawa on 11th January, 1913.

Gordon S. Henderson, for the motion.

W. J. Code, for Dept. of Agriculture.

J. A. Ritchie, C. C. Atty., for the Crown.

Hon. Mr. Justice Britton:—On the 11th of December, 1912, one Charles M. Snow, fruit inspector, laid an information against the defendant Brouse for that he did at the city of Ottawa on or about the 30th of October, 1912, unlawfully offer, expose or have in his possession for sale ten barrels of apples, packed contrary to the provisions of sec. 321 of "The Inspection and Sale Act"—R. S. C. ch. 99.

Upon this information the accused appeared before the police magistrate on the 16th of December. The information was before the police magistrate and the accused upon being charged pleaded "guilty"—whereupon the police magistrate imposed a fine of $20 and costs—fixing costs at $2—ordering payment forthwith, and in default, one week in gaol. The formal conviction made on same day followed the information, and is, that John A. Brouse on or about the 30th of October, 1912, at the city of Ottawa, did unlawfully offer, expose or have in his possession for sale ten barrels of apples packed, contrary to the provisions of sec. 321, of "The Inspection and Sale Act." The objections to the conviction are, that neither the information nor the conviction discloses any offence mentioned in sec. 321 of the said Act—or, as that section taken as a whole, creates several offences, then the information and conviction in this case are bad as they contain more offences than one—and (3) that the information did not conform to the provisions of sec. 321—and was not sufficiently definite to enable the accused to plead thereto, and, therefore, the plea of guilty entered by the accused was inoperative and of no effect.

Upon the construction I am bound to put upon this sec. 321, the information does state an offence.

The offence charged is that of offering for sale, or exposing for sale, or having in his possession for sale, fruit (apples) packed contrary to the provisions of sec. 321 of the Inspection and Sale Act." After the prohibition contained in sec. 321, the rest of that section states the circumstances under which the offence may be committed—It mentions the acts which, if committed—will be proof of the offence.

With the statement such as there is—alleging an offence—it is too late after a plea of guilty—to object. If the objection had been taken before the P. M., and before the plea of guilty was recorded, the information could, if necessary, have been amended. Sec. 321 creates at most, three offences—(1) to sell, offer to sell, expose for sale, or have in possession for sale, packed fruit in closed packages, unless the packages are packed, as provided in the Act; (2) If marked "fancy quality" it is an offence unless the fruit is as described in the sub-section. If marked No. 1 quality, it is an offence unless fruit as described in the sub-section. If marked No. 2 quality, it is an offence unless fruit as described in the sub-section; (3) It is an offence if the faced, or shewn surface of fruit packed gives a false representation of the contents of the package.

The information according to this division of the section, discloses the first offence named—if it can be said that the section creates more than one, and I think the information discloses only one offence, and so is not open to the objection taken.

This falls within the decision in *Rex* v. *Macdonald*, 6 Can. Cr. Cas. 1, where the offence is only one, but which may be committed in one of several ways.

I have considered in disposing of this case the following, which I cite without further comment—Criminal code secs. 724, 852; *Rex* v. *James*, 6 Can. Cr. Cas. 159; *Regina* v. *Hazen*, 20 A. R. 633; *Regina* v. *Alward*, 25 O. R. 519.

The motion will be dismissed with costs.

MASTER IN CHAMBERS. JANUARY 14TH, 1913.

FISCHER v. ANDERSON.

4 O. W. N. 647.

Costs—Security for—Præcipe Order—One Plaintiff in Jurisdiction—Order Set Aside.

MASTER-IN-CHAMBERS set aside a *præcipe* order for security for costs where one plaintiff resided within the jurisdiction.
McConnell v. *Wakeford*, 13 P. R. 455, followed.

Motion by plaintiffs to discharge *præcipe* order for security for costs.

The claim endorsed on the writ of summons is: "For an injunction restraining the defendant from infringing the patented rights of the plaintiffs and for damages for the infringement of the said patented rights of the plaintiffs." Under head of character of parties appears the following: "M. H. F. is patentee . . . and Geo. H. Lees & Co. are licensees." It appears by another endorsement that Fischer resides in the United States but the Lees Co. at Hamilton. Under these circumstances the defendant obtained a *præcipe* order for security for costs by Fischer on the ground of his residence abroad.

J. F. Edgar, for the motion.

J. E. Jones, contra.

CARTWRIGHT, K.C., MASTER:—The order at the present stage of the action was at least premature. The language of Maclennan, J.A., in *McConnell* v. *Wakeford*, 13 P. R. 455, at p. 457, is emphatic. The fact there was that one plaintiff actually resided in Ontario and the other in the United States just as in the present case. The judgment then proceeds: "If that had been the statement upon the writ of summons, I think the order would have been one which the deputy clerk of the Crown could not have made. It would have been altogether out of his power and would have been void and therefore would have had to be set aside" at any stage, and could not have been considered as waived.

In *Smith* v. *Silverthorne*, 15 P. R. 197, the state of the cause is not mentioned. From the judgment it would seem that the statement of defence had been delivered—certainly there the order for security was not on *præcipe*.

The proper disposition of the motion will be to set aside the *præcipe* order with costs to plaintiffs in any event without prejudice to a motion for security thereafter if defendant thinks he is entitled thereto.

From what is said in H. & L. 3rd ed., 1426, on the authority of *Irving* v. *Clark*, 12 P. R. 29, when the case is developed on the pleadings such a motion may be successful.

HON. MR. JUSTICE SUTHERLAND. JANUARY 17TH, 1913.

RE GOLD & ROWE.

4 O. W. N. 642.

Deed — Construction — Habendum — Bar of Entail — Sufficiency of Words Used—R. S. O. c. 122, s. 29—Vendor and Purchaser Application.

SUTHERLAND, J., on a Vendor and Purchaser application, *held*, that a deed containing an *habendum* "to have and to hold unto the said party of the second part, her heirs and assigns to and for her, and their sole and only use forever," was sufficient to pass a fee simple and to bar an estate tail.

An application under the Vendors and Purchasers Act, 10 Edw. VII. ch. 58.

J. A. McEvoy, for the vendor.

Eric Armour, for the purchaser.

HON. MR. JUSTICE SUTHERLAND:—The agreement is dated the 17th August, 1912. One David L. Reed was the owner of the property in question, and died on the 27th of September, 1887, having previously made his last will and testament, dated September 30th, 1885, wherein he devised and bequeathed the said lands to his grandson "William Scott Gold and the heirs of his body." Letters probate were duly issued on the 7th October, 1887.

On the 8th December, 1906, the said devisee, W. S. Gold, by deed under the Act respecting Short Forms of Conveyances and of the Revised Statutes of Ontario, 1897, did "grant unto the said party of the second part (in fee simple) the said lands. The grantee was his wife, the said Mary T. Gold.

The *habendum* in the said deed is as follows: "to have and to hold unto the said party of the second part her heirs and assigns to and for her and their sole and only use forever." The vendor contends that said deed was a sufficient one to bar the entail.

The contention of the purchaser on the other hand is that R. S. O. (1897) ch. 122, an Act respecting Assurances of Estates Tail, sec. 29, applies," and that the disposition of the lands under this Act by a tenant in tail could only be effected by some one of the assurances (not being a will) by which such tenant in tail could before the Ontario Judi-

cature Act (1881), have made the disposition if his estate were an estate at law in fee simple absolute. He argues that the words "in fee simple" following the grant in the deed as indicated, before 1881 would be ineffective without the use of the word "heirs" to pass the fee, and consequently the deed in question cannot be said to properly bar the entail.

It seems to me that apart from the possible effect of the *habendum* in the deed this contention would be correct; but I think the *habendum* clearly aids in so construing the deed as to give effect to the contention of the vendor that the entail has been effectively barred.

If we treat the words "in fee simple" as entirely ineffective and so as though eliminated from the deed, then we have a simple grant by the tenant in tail to his wife the party of the second part in the deed.

In Norton on Deeds, 1906, p. 290, it is said that the mere mention of the grantee's name in the premises does not give him any estate inconsistent with the estate limited by the *habendum*, whatever that estate may be. And at p. 229: "The office of the *habendum* is properly to determine what estate or interest is granted by the deed though this may be performed and sometimes is performed in the premises. In which cases the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises."

I think, therefore, it is clear that the *habendum* explains the estate the grantor intended to convey and that it shews that the intention of the grantor was to grant an estate at law in fee simple absolute.

On the other hand, the very use of the words "in fee simple" though ineffective to carry such an estate under the statute applicable to it is suggestive of the estate intended by the grantor to be conveyed and the *habendum* is consistent therewith and explanatory thereof.

The purchaser must, I think, therefore, accept the deed as sufficient to bar the entail.

No costs are asked, and there will be no order as to costs.

HON. MR. JUSTICE KELLY. JANUARY 18TH, 1913.

RE OAG & ORDER OF CANADIAN HOME CIRCLES.

4 O. W. N. 643.

Evidence—Presumption of Death—Absence for over Seven Years—Diligent Enquiry—Insurance Moneys.

KELLY, J., *held*, that where a man had not been heard of by his near relatives for over seven years, in spite of diligent enquiry, the presumption was that he was dead, and insurance upon his life should be paid to the beneficiaries thereof.

Hagerman v. *Strong*, 8 U. C. Q. B. 291, referred to.

Application made under sec. 165 of 2 Geo. V. ch. 33, for a declaration as to presumption of death of Benjamin Charlton Oag.

W. T. McMullen, for the applicant.

J. E. Jones, for the order.

HON. MR. JUSTICE KELLY:—A certificate, (No. 14177) for $1,000, in the Order of Canadian Home Circles was issued to Benjamin Charlton Oag; his sister, Margaret Gunn of Houghton Centre in Ontario, is the beneficiary named therein. She is the only living member of his family; his step-mother, however, lives in Toronto.

From the time of his father's death in 1889, the insured made his home with his sister, and from about 1891 until 1904, he was in the habit of taking employment during the summer months sailing on the lakes, but spent every winter, except one, during that time at his sister's home.

In the spring of 1904, he went as usual to his employment on the water, and in that season was employed on the vessel Oregon on the great lakes. At the close of navigation in the fall of 1904, he received his discharge from the vessel at Chicago, and for a day or two in December, 1904, he was a guest at the Atlas hotel in that city. This was the last trace that has been obtained of him, for since that month neither his sister nor her husband, nor other friends of his, or those who knew him in his employment, have heard anything of him.

His step-mother says she has heard nothing of his whereabouts for the past eight years.

In addition to enquiries having been made for him amongst those who might be expected to know something of him, advertisements have been inserted in newspapers in Chicago, and in Springfield, Massachusetts, asking information about him; and the Chicago city directories have been consulted; but none of these efforts have brought any results.

In *Hagerman* v. *Strong,* 8 U. C. Q. B. 291, it is said at p. 295, "the principle itself (that is the principle of law, as to the presumption of death) is founded upon the necessity of taking some measure of time as a rule in such cases, in order that it may not be forever uncertain at what time an absent person, of whom nothing has been heard, may be concluded to be no longer living. Seven years has been adopted as a reasonable period; the meaning of which I take to be that the law considers it possible that a person who has left his domicile, and gone abroad, may be still living, though nothing has been heard of him or from him for seven years; but does not consider it, morally speaking, possible that he should live longer without evidence being in some manner, afforded of his existence."

In Halsbury's Laws of England, vol. 13, p. 500, sec. 692, it is laid down that "as to death, on the other hand, there exists an important presumption, for if it is proved that for a period of seven years no news of the person has been received by those who would naturally hear of him if he were alive, and that such enquiries and searches as the circumstances naturally suggest have been made, there arises a legal presumption that he is dead."

Reference may also be made to *Willyams* v. *Scottish Widows' and Orphans' Life Assurance Society,* 4 T. L. R., 489; Phipson on Evidence, 5th ed., 644, and cases there cited.

The evidence before me warrants the making of an order declaring the presumption to be that Benjamin Charlton Oag is dead.

Costs of the application will be payable out of the insurance monies.

MASTER IN CHAMBERS. DECEMBER 14TH, 1912.

SMYTH v. BANDEL.

4 O. W. N. 498.

Judgment—Speedy Judgment—Motion for—Con. Rule 603—Chattel Mortgage on Licensed Hotel—Alleged Agreement as to—Prima Facie Defence Shewn.

MASTER-IN-CHAMBERS refused to vary order made on former application (23 O. W. R. 649), where plaintiff renewed the motion for speedy judgment, claiming to have found new material on ground that the same was disputed by defendants.

Grand Trunk Rw. Co. v. *Toronto*, 9 O. W. R. 671, at p. 674, referred to.

Motion for speedy judgment under Con. Rule 603.

H. S. Murton, for plaintiff.

J. T. Loftus, for defendant.

After the judgment in this case of 3rd December, inst., reported in 23 O. W. R. 649; 4 O. W. N. 425, counsel for the plaintiff found the agreement not produced on the former argument, and obtained leave to have the matter further discussed.

The motion was accordingly reargued by the same counsel as appeared on the first argument. It may as well be premised that, the writ was issued on 29th May, last, and served next day. No statement of claim has ever been delivered, though defendant appeared on 5th June. But on 31st October, the present motion was launched, a date which brings the case very nearly within the time to which a plaintiff can be limited in making a motion under Con Rule, 603, as laid down in the judgment of Riddell, J., in *G. T. R.* v. *City of Toronto*, 9 O. W. R. 671, at p. 674. This is a circumstance which might be entitled to weight in disposing of the motion; but it is not necessary to consider it at present.

The agreement now produced is no doubt silent as to the term spoken of by defendant. She, however, has made a further affiavit on which she has not been cross-examined. In this she says that the agreement now produced is not the agreement referred to in her former affidavit.

As said on the former argument such an agreement seems not improbable under the existing state of public opinion as to the usefulness of the liquor traffic, and is certainly not unprecedented.

Whether such an agreement was or was not made as defendant alleges must be left to be dealt with at the trial, when full discovery has been made on both sides, and the evidence has been given in open Court, and subjected to the test of cross-examination before a Judge or a Judge and jury, who will then have the advantage of hearing and seeing the opposing witnesses, and estimating their respective credibility. Once an issue is clearly raised such as is done in this case, rule 603 has no application.

This is my understanding at least of the case of *Jacobs* v. *Booth's Distillery*, 5 O. W. R. 49, 85, L. T. R. 262, which Riddell, J., said in *G. T. R.* v. *Toronto*, *supra*, "lays down the proper principles authoritatively. Where, assuming all the facts in favour of the defendant they do not amount to a defence in law, there, and only there, an order should be made for judgment under this rule."

This is confirmed by the more recent case also in the House of Lords, of *Codd* v. *Delap*, 92 L. T. 511, as noted in my former opinion. The reasons given by the L. C., and his three colleagues are clear, distinct and emphatic on this point of the proper application of C. R. 603. I see no reason to vary my former disposition of this motion which stands dismissed with costs in the cause of this argument to defendant only.

COURT OF APPEAL.

JANUARY 15TH, 1913.

REX v. RYAN.

4 O. W. N. 622.

Criminal Law—Bribery—Counselling and Procuring—No Evidence of —Conviction Quashed—Criminal Code, s. 1018.

COURT OF APPEAL quashed conviction of defendant for having counselled and procured the bribery of a peace officer on the ground of lack of evidence.

Crown case reserved by LATCHFORD, J.

J. Haverson, K.C., for defendant.

E. Bayly, K.C., for Crown.

HON. MR. JUSTICE MEREDITH:—The defendant was convicted of having counselled and procured the bribery of a peace officer; but there was no evidence of the peace officer having been bribed, nor indeed of any attempt to bribe him having been made; so how can the conviction stand?

On the other count there was a verdict of not guilty; and no case has been reserved as to it, so nothing further need be said as to it.

I would answer the second question in the negative; and direct that defendant be discharged; see the Criminal Code, section 1018. The disgraceful conduct of the defendant would be no excuse for his conviction, except as the law provides.