The
Ontario Weekly Notes

Vol. I. TORONTO, JUNE 15, 1910. No. 38.

HIGH COURT OF JUSTICE.

MIDDLETON, J., IN CHAMBERS. MAY 28TH, 1910.

REX v. DUNKLEY.

Liquor License Act—Information for two Offences on same Day —Conviction on one Charge—Evidence—Minute of Justices—Informant not Residing in County.

Motion to quash a conviction made by two Justices of the Peace on the 18th April, 1910, by which the defendant was convicted of having on the 7th January, 1910, sold liquor without a license, upon the information of one Reid.

J. B. Mackenzie, for the defendant.

J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J.:—Two informations were laid by Reid against Dunkley before the same magistrates on the same day, each charging the sale of liquor on the 7th February, but one charging a sale at 3 p.m. and the other at 4 p.m. At the same time two similar charges were made against Neal. Apparently the informant intended to make the charges against Neal as occupant and against Dunkley as actual offender.

The four cases came on before the Justices on the same day, and by consent were all adjourned several times, finally coming on for hearing on the 1st April. On that day the Justices made the following minute:—

"Minutes of the proceedings of the adjourned cases of W. J. Reid against Albert Dunkley and A. T. Neal for selling liquor unlawfully in the village of Stirling on the 7th day of February, 1910. William J. Reid against Albert Dunkley (first case) called."

Then follows the evidence. This evidence shews that on the day in question Reid bought a flask of whisky from Dunkley in the bar, and, after taking the flask to one Meiklejohn, returned to the bar and bought another flask from Dunkley; in examination of Reid in chief, no hour is fixed, but in cross-examination there is much uncertainty, the purchases being said to have been made between 3 and 5 p.m. Other witnesses were called, who gave more or less relevant testimony, including both Dunkley and Neal. These two witnesses denied the sale, stating that Dunkley had not been in the bar till after 6 p.m.

The Court then adjourned till the 8th April, and on that day adjourned by consent till the 11th.

On the 11th the minutes were headed:—

"Minutes of the above adjourned cases, Reid v. Dunkley and Reid v. Neal, taken this 11th April, 1910."

Evidence for the defence is then given. It is not stated that it was given in the case that had then been opened and that was then in course of trial. I am asked to infer from the entry that the evidence was given in all the cases. This I cannot do.

At the close of the evidence judgment was reserved, and on the 18th April the magistrates found Dunkley guilty of selling liquor on the 7th February, and imposed a fine.

What became of the second charge or of the charges against Neal is not made to appear. I am told that they were not further prosecuted. I do not know which of the two charges against Dunkley was actually tried—probably the magistrates and the parties did know and quite understood what was meant by "Reid against Dunkley (first case)."

I do not find that the facts bring the case within the rule that prohibits two charges being tried together, because, as I understand the proceedings before me, one charge and one charge only has been tried; and, though the conviction does not follow the information, I think that, when the information charges an offence as being committed at a particular hour, and the evidence leaves the exact hour a matter of uncertainty, the magistrates might well convict, as they have, for the offence disclosed, i.e., a sale on the day in question.

Then it is said that the proceedings are void because the informant does not reside in the county. No doubt, if the statute required a particular person or a person having some particular qualification to be informant, then the compliance with this requirement would be essential. Here, the statute imposes no restriction, and enables any person to lay an information; and, while it has been said that the statement "things are not what

they seem" is particularly applicable to the construction of statutes, I think I should carry even this principle too far, and should be legislating, if I read "any person" as meaning "any person residing in the county."

The motion is dismissed with costs.

MIDDLETON, J. JUNE 2ND, 1910.

RE QUEEN CITY PLATE GLASS CO.

EASTMURE'S CASE.

Company—Salary of President—Sanction of Shareholders—General Meeting—Ontario Companies Act, sec. 88—Quantum Meruit—Winding-up—Claim for Money Illegally Paid as Salary.

Appeal by A. L. Eastmure from the certificate of an Official Referee, upon a reference for the winding-up of the company, of his finding that the appellant had become liable or accountable for $1,100 of the company's money paid to him for salary as president.

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

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

MIDDLETON, J.:—This appeal fails. The statute requires the sanction of the shareholders at a general meeting to a by-law of the directors before payment of the president or any director is permitted. In my view, this prohibits payment unless the statute has been complied with.

There must, in the first place, be a directors' by-law, and this must be followed by "confirmation" at a general meeting. This implies some resolution or by-law passed at such a meeting.

I accept as the principle applicable the opinion of Street, J., in Birney v. Toronto Milk Co., 5 O. L. R. 1. at p. 6. This section (sec. 88 of the Ontario Companies Act, 7 Edw. VII. ch. 34) should be given a broad and wholesome interpretation, and should be held wide enough to prevent a president and board of directors from voting to themselves, or any one or more of themselves, any remuneration whether for any services rendered to the company without the authority of a general meeting of the shareholders.

Assuming that the director in question can establish that every shareholder of the company was at the time content to pay the salary in question, that is not what is required by the statute. "The provision of the statute must be lived up to and the rigour

of the statute applied:" per Riddell, J., in Beaudry v. Read, 10 O. W. R. 622.

The alternative argument—that the director can be allowed the value of his services rendered—is ill-founded. A recovery upon a quantum meruit can only be permitted where, from the circumstance that services have been rendered and accepted, an implied promise to pay can be inferred. Apart from statutory authority, a director cannot receive remuneration for his services except with the sanction of a shareholders' meeting duly convened, when the remuneration is payable out of moneys which belong to the shareholders alone: In re George Newman & Co., [1895] 1 Ch. 674; Re Bolt and Iron Co., 14 O. R. at p. 216. Re Ontario Express Co., 25 O. R. 587, turned entirely upon the fact that the appointment of the directors to salaried offices had been confirmed by legislation.

Mackenzie v. Maple Mountain Mining Co., 20 O. L. R. 615, merely determines that, under the circumstances there shewn, the statute had been complied with; as Osler, J.A., says (p. 618), "in substance all that the Act requires has been done." Here, neither in form nor substance, probably through ignorance of the statute, has there been any attempt to comply with its provisions.

The appeal is dismissed with costs.

MIDDLETON, J. JUNE 2ND, 1910

RE J. A. FRENCH & CO. LIMITED.

Company—Ontario Companies Act, sec. 116—Rectification of Register of Shareholders — Fraud Practised Prior to Issue of Charter—Shareholder Named in Charter—"Sufficient Cause."

Motion by Charles Augustus Hernan to rectify the register of members and the memorandum of agreement and stock book of the company by removing therefrom the name of the applicant as the holder of $1,000 par value of shares of the capital stock of the company.

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

McGregor Young, K.C., for the company.

MIDDLETON, J.:—Power is given to the Court, "if the name of any person is without sufficient cause entered in or omitted from" the register of the shareholders of the corporation, to make an order for rectification: sec. 116 of the Ontario Companies Act.

According to the statement of the applicant, he has been defrauded by those connected with the organisation of the company. Whatever complaint he has is based on what took place prior to the issue of the charter. This, in my view, does not enable me, under this section, to remove the applicant's name from the register. The fact that by the charter he is declared to be a shareholder is "sufficient cause" for his name appearing on the list: see In re Haggert Bros. Manufacturing Co., Peaker and Runions' Case, 19 A. R. 582, and cases there cited. The English cases afford no guidance, because under the English Act there is nothing corresponding with the letters patent granted by the Lieutenant-Governor in council, under our Act.

By interfering with the charter in the manner indicated, I should in effect be reviewing departmental action, and in this case I should reduce the number of shareholders below the statutory minimum.

The applicant has mistaken his remedy; and the refusal of this motion will not prejudice any proper proceeding he may take. I do not deal with the merits.

Motion dismissed with costs.

MIDDLETON, J. JUNE 2ND, 1910.

RE CAMPBELL.

Will—Construction—Bequest of Property afterwards Disposed of by Testator in Lifetime—Gift of Money—"During her Life"—Life Interest in Company Shares—Property not Specifically Dealt with—Intestacy—Charitable gifts—"Missions"—Church not Specifically Named.

Motion by the administrator with the will annexed of the estate of Duncan Campbell, deceased, for an order under Con. Rule 938 determining certain questions arising under his will and in the administration of his estate.

The will was as follows: "After the payment of all my just debts and funeral and other expenses, I give devise and bequeath to Mary Campbell, my wife, $2,000 of the debentures in the Dominion Building and Investment Society and the principal and interest due on Mrs. Boyd's mortgage . . . also the interest on the stock of both the Dominion Building and Investment Society and the Agricultural Building Society, and the interest on my debentures in the Dominion Building Society, and whatever money may be in my bank book at my death with the furniture and contents of our house . . . and the house, during

her lifetime, and at her death the stock of both the Agricultural and Dominion Societies shall be sold and the house . . . and the property in No. 4 Ward . . . subject to present lease, and all added together with the 5,000 debentures in the Dominion Society, and the amount divided into five equal parts, one part to my son James, one part to Frederick, one part to Samuel, and one part to Francis A. Campbell, and the fifth part to be divided into three equal parts, first part to help pay off the debt of Knox Church, South London, of which I am a member, second part for Foreign Missions, and the third part to be equally divided between Home Missions and French Evangelization Missions . . ."

The questions propounded were:—

1. In the construction of the first paragraph of the will, containing dispositions in favour of the wife, are the words "during her life" to be taken to apply to all the foregoing bequests and devises, or are they confined to the immediately preceding devise of "the house?"

2. The will gives to the wife $2,000 of the debentures in the Dominion Building and Investment Society, and it also gives her "the interest on my debentures in the Dominion Building Society." The testator at the time of making his will held debentures in the Dominion Savings and Investment Society; subsequently to the making of his will he bought a debenture in the Dominion Permanent Loan Company; the first-mentioned debentures were all sold by him long before his death, but he held the latter at his death. Could the latter debenture be held to form the subject of and pass by the bequest to his wife?

3. Did the moneys on deposit in the Dominion Savings and Investment Society and in the Huron and Erie Loan and Savings Company pass to the wife under the words "whatever money may be in my bank book at my death." And, if so, did she take the moneys absolutely or only a life interest therein?

4. Are the bequests to Foreign Missions, Home Missions, and French Evangelization Missions valid, and, if so, are they payable to the Foreign Mission Fund, the Home Mission Fund, and the French Evangelization Fund, all of which are recognised funds in connection with the Presbyterian Church in Canada, or, if not, to whom are the legacies payable?

R. L. Defries, for the applicant.

No one appeared for Francis A. Campbell, appointed to represent as a class the children, etc., of the testator.

R. S. Cassels, for the Presbyterian Church in Canada, cited among other cases, Labatt v. Campbell, 7 O. R. 250, in support of

the argument that the gifts to Missions were intended for the Missions of the Presbyterian Church, the testator being a Presbyterian.

MIDDLETON, J.:—Declare that, according to the true construction of the will in question, in the events that have happened:—

(1) The bequest to Mary Campbell of $2,000 debentures and the Boyd mortgage fails by reason of the testator having disposed of them in his lifetime.

(2) The widow took the money in the Dominion Permanent and Huron and Erie companies absolutely.

(3) The widow had a life interest in the stock in the Dominion Building and Agricultural societies, and upon her death this stock falls to be divided under the last clause of the will.

(4) As to property of the testator not specifically dealt with by his will, he died intestate.

(5) That the gifts to Knox Church, Foreign Missions, Home Missions, and French Evangelization are good charitable bequests, and that the Presbyterian Church in Canada takes the three last for its Foreign, Home, and French Evangelization funds.

It should be shewn that Knox Church has a debt, as the gift is only toward the Church debt.

Costs out of estate—administrator's as between solicitor and client.

LATCHFORD, J. JUNE 2ND, 1910.

RE ROSS.

Marriage Settlement—Construction—Power of Appointment—Exercise by Will—General Devise and Bequest—Quebec Law—Domicile—Settlement Executed in Ontario.

Motion by the trustees under the marriage settlement of Thomas Ross and Ellen Eliza Creighton (both now deceased) for an order determining the following questions:—

1. Is Ann Jane Clayton (formerly Ann Jane Ross, and so described in the marriage settlement) now entitled to the whole of the capital fund settled?

2. Or did the settlor, Thomas Ross, by the settlement, effectively reserve to himself a power to appoint the fund to the exclusion of Ann Jane Clayton?

3. If such power of appointment was effectively reserved by the marriage settlement, did the will of Thomas Ross operate as an effective exercise of the power of appointment, having in

view the facts that at the date of the settlement he was domiciled in the province of Quebec, and that he subsequently changed such domicile to the province of Ontario?

4. In what manner should the capital fund be dealt with by the trustees according to the determination of the foregoing questions respectively?

The settlement was dated the 17th October, 1863, and by it Thomas Ross, then of the city of Quebec, assigned to a trustee and his assigns, now represented by the applicants, two policies of assurance, upon certain trusts, including a trust, on the death of Ellen Eliza Creighton (his intended wife) not leaving any child or children issue of the marriage, or upon the death of such children in minority, to pay over the proceeds of the policies "to Ann Jane Ross, the present daughter of him, the said Thomas Ross, or to such persons as he, the said Thomas Ross, shall by his last will and testament in that event appoint and direct."

The settlement was executed in Upper Canada, but in it the parties declared that their domicile "for all purposes and effects of their said marriage shall be held Lower Canada, whether they reside there or elsewhere." Thomas Ross was described as "of the city of Quebec, but at present being in the city of Toronto." His domicile at the date of the marriage was in fact in Lower Canada; but after the marriage he and his wife resided in Ontario, and had there for many years their actual domicile. He died at Ottawa on the 10th August, 1901, leaving him surviving his widow (formerly Ellen Eliza Creighton), his daughter (Ann Jane Clayton), and her daughter (Maud Honor Clayton, now Mrs. Grey.) His widow died at Ottawa in 1910, leaving no issue.

By his will, probate of which was duly granted by the Surrogate Court of Carleton, Thomas Ross did not expressly exercise the power of appointment reserved in the settlement; but he did deal with the whole of his real and personal estate, devising and bequeathing it to his executors in trust for the sole and separate use of his wife during her life, and directing that upon her death they are to stand seized of $3,000 in trust to pay the income thereof to his granddaughter (Mrs. Grey), and to hold the residue in trust to pay the income to his daughter (Mrs. Clayton) during her life and thereafter to Mrs. Grey; and after Mrs. Grey's death, the estate to pass to her children.

By sec. 29 of the Wills Act, R. S. O. 1897 ch. 128, a general devise or bequest of property which a testator has power to appoint in any manner he thinks proper "shall operate as an execution of such power, unless a contrary intention appears by the will."

The motion was heard in the Weekly Court at Ottawa.

J. F. Orde, K.C., for the trustees.

J. F. Smellie, for the Official Guardian, representing the unborn children of Mrs. Grey.

Mrs. Grey and Mrs. Creighton were notified, but were not represented.

LATCHFORD, J.:— . . . Thomas Ross did not expressly exercise the power of appointment which, in my opinion, he clearly reserved to himself in the deed of settlement in the event of there being no issue of the marriage. . . . He had, in the circumstances, the power to appoint in any manner he might think proper. He exercised that power by the general devise or bequest in his will. Even prior to the enactment in 1873 (36 Vict. ch. 26, sec. 24, Imperial Act 1 Vict. ch. 26, sec. 27) of what is now sec. 29 of the Wills Act, a bequest had been held to be a valid exercise of a power: Deedes v. Graham, 19 Gr. 167.

It has also been held in the province of Quebec by a single Judge that a general residuary legacy operates as an execution of a power of appointment: Gemley v. Low, 2 Mont. L. R. 311. But, whether that decision is good law or not—and Mr. Wright (a Quebec advocate) in his affidavit suggests that it is not—there can be no doubt, upon Mr. Wright's evidence, that the will of Thomas Ross would be recognised by the Quebec Courts as having full force as a testamentary disposition, and would be construed there in accordance with the laws of construction in force at the place of the testator's domicile at the time of his death. The marriage settlement was valid under the laws of Ontario; and, although not in what is called "authentic form" by art. 1264 of the Civil Code, art. 7 declares that acts and deeds—including marriage settlements—made and passed out of Lower Canada are valid if made according to the forms required by the country where they were passed and made.

There will be judgment declaring that, in the opinion of the Court, Mrs. Clayton is not entitled to the whole of the capital fund settled . . . ; that the settlor reserved to himself a power of appointment over such fund to the exclusion of Mrs. Clayton; that he effectively exercised such power; and that the trustees should hold the capital subject to the trusts expressed in the will. . . .

Costs of all parties out of the estate.

DIVISIONAL COURT. JUNE 2ND, 1910.

*THOMPSON v. COURT HARMONY OF THE ANCIENT ORDER OF FORESTERS.

Benefit Society—Sick Benefits—Refusal of Claim—Certificate of Medical Officer—Domestic Tribunals—Interference by Court—Jurisdiction—Erroneous Certificate—"Legal Fraud."

Appeal by the defendants from the judgment of the County Court of York in favour of the plaintiff in an action by a member of the defendant Court to recover $168 for sick benefits.

The defendants investigated the claim of the plaintiff and found against it, upon the certificate of Dr. Pyne, their own medical officer, who said that the plaintiff's illness was due to alcoholism, a cause which was excluded by the defendants' rules. Another physician was called in by the plaintiff, who certified that his illness was not due to alcoholism, but to another cause, but the defendants did not alter their finding against the plaintiff.

The action was then brought in the County Court, and at the trial evidence was given of a conflicting and contradictory nature as to the cause of the illness, which evidence was not before the defendants when they investigated.

The County Court Judge agreed that the defendants could not pay in the face of Dr. Pyne's certificate, which, under the direction of the general law of the defendants, they decided to act upon. He found that the medical certificate was given honestly, but erroneously, as to alcoholism having caused the plaintiff's illness, and therefore, though not intentionally fraudulent, it amounted to a legal fraud, and upon this ground held that his jurisdiction was not ousted. He found that the plaintiff appealed to all the series of appellate tribunals of the Order, but that they did not investigate or call any witnesses or give the plaintiff an opportunity to appear before them and give evidence as to the merits of his case, but simply reached their own conclusions upon the medical certificate.

The County Court Judge gave judgment for the plaintiff for $160 and costs.

The appeal was heard by BOYD, C., MAGEE and LATCHFORD, JJ.

* This case will be reported in the Ontario Law Reports.

L. F. Heyd, K.C., for the defendants.

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

The judgment of the Court was delivered by BOYD, C. (after setting out the facts and referring to the defendants' laws and rules):—The inquiry as to the man's condition . . . was presented as usual upon the doctor's certificate, and considered upon all the materials that the plaintiff desired to submit. That something else was not done by him is not a ground for disregarding the conclusion of the defendants and their officers. There was really no exclusion of evidence, because there was no tender of it; and, upon the materials before the defendants, the conclusion reached was right. . . .

Nothing was laid before the defendants or the officers who found upon the claim to indicate that the opinion or judgment of Dr. Pyne was erroneous, or that, when the doctors differed, the later opinion was to be preferred to his. The defendants did not take steps to investigate the soundness of Dr. Pyne's opinion by original inquiries, but that is not a matter provided for; they dealt with what was laid before them; and it is no reason for displacing their conclusion or their jurisdiction that a subsequent investigation in a Court of law has led to a different result. The matter is one to be disposed of by the methods of the Order, to which the plaintiff subjected himself on becoming a member. The action of the defendants is final unless it is made to appear that such action is contrary to natural justice or in violation of the rules of the body or done mala fide, as said in Essery v. Court Pride of the Dominion (1882), 2 O. R. 596, at p. 608.

The judgment in appeal introduces a new and further exception, in that an erroneous medical certificate, given honestly, but by mistaken diagnosis, is, though not intentionally fraudulent, to be regarded as "legal fraud." But it needs mala fides or dishonesty to annul the finding of a domestic forum. Lord Bramwell has taken particular pains to exterminate the expression "legal fraud." . . .

[Reference to Weir v. Bell (1878), 3 Ex. D. 238, 243; Holland v. Russell (1863), 11 W. R. 757, 758; Wilson v. Church (1879), 13 Ch. D. 1, at p. 51; Ex p. Watson (1888), 21 Q. B. D. 301, 309; Derry v. Peek (1889), 14 App. Cas. 337, at p. 346.]

The English authorities point out that all the officers or persons selected to deal with claims and disputes are to be regarded as arbitrators, and in respect of their findings relief is to be given in Courts of law or equity only when the persons designated have

misconducted themselves or abused their powers. Callaghan v. Dolwin (1869), L. R. 4 C. P. 288, 295.

These officers have nothing to do with getting up a case for a complainant or claimant or with getting witnesses or otherwise initiating any method of investigation beyond dealing with what is laid before them and acting thereon to their best judgment—as was unquestionably done in this protracted controversy: In re Enoch and Zaretzky Bock & Co.'s Arbitration, [1910] 1 K. B. 327, 332.

In brief it may be said as to these society disputes, where the officials deal as best they can with the materials brought before them, it is not enough to say they have reached an erroneous conclusion or that they have upheld an erroneous certificate: it must further appear, to give a foothold to the ordinary Courts of law, that the conclusion has been the result of corrupt motives: see Armitage v. Walker (1855), 2 K. & J. 211, and Bache v. Billingham, [1894] 1 Q. B. 107.

I think that no jurisdiction exists, as to this claim of the plaintiff, to warrant the judgment of the County Court. It should be vacated and the action dismissed without costs. This as to costs because the question is of a new and important character.

DIVISIONAL COURT. JUNE 2ND, 1910.

WOODS v. CANADIAN PACIFIC R. W. CO.

Railway—Right of Way through Farm—Construction of Drain—Injury by Flooding to Lands Adjoining Right of Way—Evidence—Railway Act, R. S. C. 1906 ch. 37, sec. 250—Application to Future Construction of Railways — Accumulation of Water on Railway Lands—Injury to Adjoining Lands—Common Law Liability—Damages—Injunction—Continuing Cause of Action.

Appeal by the defendants from the judgment of MACMAHON, J., 13 O. W. R. 49.

The appeal was heard by MAGEE, RIDDELL, and LATCHFORD, JJ.

W. L. Scott, for the defendants.

C. A. Moss, for the plaintiff.

MAGEE, J.:—Appeal by the defendants from the judgment of MacMahon, J., for $270 for five years' damage to 5.4 acres of the plaintiff's land from water.

The statement of claim is evidently modelled upon sec. 250 of the Railway Act, R. S. C. 1906 ch. 37. . . . The learned trial Judge has based his judgment upon the provision in sub-sec. 1 of sec. 250, and has held that apart from the section the plaintiff would have no cause of action. If the statement of claim, when it alleges that there were ditches and drains sufficient to drain "said land," and that the defendants had neglected and refused to make or maintain suitable ditches and drains to connect with those upon "said land," so that the existing drainage of "said land" should not be obstructed, is to be held to mean the lands of the plaintiff, and if the plaintiff is restricted to that allegation, then I agree with the learned Judge that the plaintiff must fail unless he is entitled under sec. 250. The cases he refers to—Knapp v. Great Western R. W. Co., 6 C. P. 187, Lesperance v. Great Western R. W. Co., 14 U. C. R. 173, and Wallace v. Grand Trunk R. W. Co., 16 U. C. R. 351—warrant that decision.

. . . .

With much respect, however, I am unable to agree with the learned Judge that sec. 250 gives the plaintiff here any rights in this action. In sub-sec. 1 it clearly refers, I think, to the future construction of railways and not to those theretofore constructed. It imposes a burden from which the companies were previously free, unless where where they had voluntarily assumed it as a matter of contract or special legislation or as legally attaching to lands acquired by them. . . . I see no just ground for extending its retrospective effect or endeavouring to find a meaning other than the words used plainly bear. It would be necessary to do that if we are to read the words "the company shall in constructing the railway make and maintain suitable ditches" as meaning also that the company shall so construct their existing railway as to make and maintain suitable ditches. . . .

[Reference to Langlois v. Grand Trunk R. W. Co., Q. R. 26 S. C. 511, 517, Q. R. 14 Q. B. 173, 174.]

If the matter rested there, this appeal might have to be allowed. But it appears in the evidence that the defendants have done more than merely obstruct the passage into their land of water from artificial ditches or drains or the undefined flow or percolation of water. It is necessary to consider the facts with some detail. . . .

[References to the evidence.]

If the defendants have taken active part in the injurious increase, then, however, advantageous or beneficial it might be to their own business, and however legitimate its object, it is a case

for the application of the rule so to use their own as not to injure that of another. . . .

[Reference to secs. 90, 91, and 92 of the Railway Act of 1888 (now R. S. C. 1906 ch. 37, secs. 151, 154, 155); sec. 52 of the Railway Act of 1879 (originally 20 Vict. ch. 12, sec. 17, and now sub-sec. 4 of sec. 306 of R. S. C. 1906 ch. 37); sec. 7 of the same Act.]

Against the filling in and the substitution of ditches therefor the plaintiff and his father, not being riparian proprietors, could not complain. It was an act done wholly on the railway company's own land, and need not have caused any injury, and until it did so no right of action would accrue. So long as ditches, if efficient, were kept efficient, the plaintiff would be disentitled to protest. Even when they were not properly cared for, it would be some time before damage would ensue. At any moment the obstruction could be removed, and the . . injury prevented or stopped.

It may be objected that the plaintiff framed his statement of claim not for wrongful and injurious accumulation of water on the defendants' land, but for refusal to allow the passage of water from the plaintiff's land. But, reading it critically, the plaintiff is, I think, entitled to say that it is at least open to the other construction; and, inasmuch as the evidence was gone into as fully as the parties desired and the plaintiff's counsel argued against a wrongful accumulation of water, he should, I think, be entitled to the benefit of the most favourable reading of his pleading or to any amendment setting forth the actual facts as disclosed in evidence. . . .

[Reference to R. S. C. 1906 ch. 37, sec. 306, "damages or injury sustained by reason of the construction or operation of the railway;" Prendergast v. Grand Trunk R. W. Co., 25 U. C. R. 193; McCallum v. Grand Trunk R. W. Co., 31 U. C. R. 527.]

Here the injury arises from an act or omission which, so far from being construction or operation of the railway, is shewn to be injurious to it and giving rise to constant trouble upon it. An action would lie at common law as between adjoining owners just as in the Prendergast case, on the same principle; and the plaintiff is not limited by the one year.

Then it is a continuing and recurring cause of action for which he would not be entitled to recover damages as if for ever once for all, but for which damages are to be assessed up to the present.

In the result, the plaintiff is, in my opinion, entitled to damages for the period since 6 years before action up to the present at $12.50 per year, making in all $100, and to an injunction restraining the defendants from continuing to so obstruct the flow

of water upon their land away from lot 19 as to cause the same to accumulate on lot 19 and overflow or saturate the lands of the plaintiff. The defendants should pay the costs.

LATCHFORD, J., agreed, for reasons briefly stated in writing.

RIDDELL, J., was of opinion, for reasons stated in writing, that sec. 250 of the Railway Act did not apply to the present case; but did not agree that the plaintiff had established a cause of action under other sections of the Railway Act or at the common law. He was, therefore, of opinion that the appeal should be allowed with costs and the action dismissed with costs, without prejudice to any action the plaintiff might be advised to bring based upon any alleged right not arising from sec. 250.

MIDDLETON, J. JUNE 4TH, 1910.

RE STANDARD COBALT CO.

Company—Winding-up—Motion by Creditors to Set aside Wind-up Order—Fraud—Prejudice — Interim Liquidator—Solicitor —Receiver—Application by Stranger for Leave to Intervene—Forum—Costs.

Motion by the Bailey Cobalt Mines Limited, on behalf of themselves and all other creditors of the Standard Cobalt Co., now in liquidation under the Dominion Winding-up Act, by virtue of an order made by TEETZEL, J., on the 14th May, 1910, to set aside that order and for the appointment of a receiver.

Petition by Hector M. Hitchings, a shareholder in the Cobalt Central Mines Co., a company holding the majority of stock in the Standard Cobalt Co., for an order authorising the petitioner to intervene and join in any motion to set aside the winding-up order, etc., and to intervene generally.

Motions by the petitioning creditor and the liquidator to set aside the notice of the Bailey Co.'s motion or to dismiss the motion and to set aside a subpœna and appointments for the examination of 12 witnesses in support of that motion.

G. H. Watson, K.C., and Grayson Smith, for the Bailey Cobalt Mines Limited.

Glyn Osler, for the petitioner Hitchings.

H. E. Rose, K.C., for the petitioning creditor.

W. R. Smyth, K.C., for the liquidator.

J. L. Ross, for the company.

W. J. Clark, for four creditors.

MIDDLETON, J.:— . . While fraud was vigorously charged upon the argument, the applicants were quite unable to suggest any fraud which would afford a reason why the winding-up order should be set aside.

Under the Winding-up Act all frauds that may have been perpetrated in the past can be investigated and full redress can be given. The fact that the winding-up order places the affairs of the company in the hands of a liquidator of admittedly great experience and ability and undoubted integrity and financial standing, whose every act is subject to the control of the Court, makes it impossible to suppose that any fraud can be perpetrated in the course of the winding-up. The applicants will, no doubt, be afforded ample opportunity to attend and watch the proceedings by the Referee having the matter in charge, and, if the result is beneficial, the costs of so attending may in a proper case be allowed out of the estate. Generally speaking, parties so attending will attend at their own expense—it being assumed that the liquidator and his solicitor will protect the estate. . . .

A winding-up order, though obtained by one creditor, is in effect a judgment of the Court directing the company's assets to be realised and applied pro rata in discharge of its obligations. No creditor can have any greater or higher right. The order cannot defraud any creditor, nor can it in any way prejudice him. The whole application, admittedly without precedent, is entirely misconceived and unwarranted by the practice.

Much was said upon the argument as to the fact that the solicitor retained by the interim liquidator is the solicitor for the petitioning creditor; and, although the applicants protested that they did not mean to suggest impropriety, yet this was again and again put forward as an indication that the suggested improper conduct of Messrs. Nevins & Sons would not be properly investigated. The permanent liquidator has not yet been appointed. The duty of the interim liquidator is merely to preserve the property until the permanent liquidator is appointed; and there can be no reason why the solicitor for the petitioning creditor should not take the preliminary formal steps looking to the appointment of the permanent liquidator, and advise the interim liquidator when there is no conflict of interest.

When the permanent liquidator is appointed, his duty will be to appoint his solicitor. This appointment must receive the approval of the Court. The duty of the liquidator will be to appoint some one who is quite independent of any of those who are charged with misconduct and whose dealings are to be investigated. The liquidator will only discharge this duty if he sees

that the solicitor whom he selects is in truth and in fact quite free from all grounds of suspicion of any connection with those accused.

It was admitted that the Court has no power, on this application, to appoint a receiver.

An application for leave to intervene is properly made to the Referee, and is not properly made here. . . .

I dismiss the application of the Bailey Cobalt Mines Limited with costs and refuse the enlargement sought by it to examine the proposed witnesses; and allow the motion to set aside the subpœna and appointments with costs—the two motions to set aside, etc., being treated as one.

The motion by Hitchings is also dismissed with costs, without prejudice to any application he may make to the Referee to attend the proceedings.

The creditors appearing by counsel have no costs.

MIDDLETON, J. JUNE 4TH, 1910.

STRATI v. TORONTO CONSTRUCTION CO.

Dismissal of Action—Default in Payment of Costs of Day—Motion to Extend Time after Expiry—Con. Rule 352—Remedy by Appeal.

Motion by the plaintiff for an extension of time for payment of the defendants' costs of the day ordered to be paid by the plaintiff as a condition of granting him a postponement of the trial; the order being that in default of payment the action was to stand dismissed.

H. S. White, for the plaintiff.

Grayson Smith, for the defendants.

MIDDLETON, J.:—With much regret I find myself unable to grant any relief on this motion. My brother Latchford, to whom I have spoken, agrees with me that, if possible, relief ought to be granted. Probably the only course open to the plaintiff is to appeal from the order of the trial Judge. If any leave is necessary. I grant that leave, so far as I have any power.

The series of cases of which Crown Corundum and Mica Co. v. Logan, 3 O. L. R. 434, is the latest, do not really proceed upon

the theory that the action is "dead." "In a case like this metaphor ought not to be used, and it is misleading to talk about an action 'dying'—such terms give rise to error when they are applied to the exposition of legal principles:" per Bowen, L.J., in McGowan v. Middleton, 11 Q. B. D. 473.

The real principle underlying all the cases, though sometimes lost sight of, is this. Upon the expiry of the time limited for doing the act in question, the Court has, under Con. Rule 352, power to extend the time, but this power cannot be exercised if some action has been taken based upon the default, unless the Judge applied to has power to undo that subsequent act. In cases in which a substantive motion is necessary to enforce the penalty attached to the default, until that motion has been disposed of the time may be extended. The difficulty only arises when the original order has been so framed that upon the happening of the default the action stands dismissed by virtue of its provisions. In this case what is sought is not merely an extension of time, but that I shall restore an action which the trial Judge has dismissed. This can only be done by an appellate Court.

There will be no costs of this motion, as, while the defendants may have the right to insist on the technical and perhaps temporary advantage they have obtained, greater liberality in practice would be commendable. See per Rose, J., in Backhouse v. Bright, 13 P. R. 117 . . . and per Robinson, C.J., in Shaw v. Nickerson, 7 U. C. R. 541.

RIDDELL, J. JUNE 4TH, 1910.

*FITZGERALD v. MANDAS.

Landlord and Tenant—Lease—Repudiation by Tenant—Reletting by Landlord not an Eviction—Treating Contract as Terminated—Damages—Computation—Rent—Taxes—Improvements.

On the 29th February, 1908, the plaintiffs made an indenture of lease of certain store property in London to the defendant for 10 years from a day subsequently by the parties agreed to be the 1st February, 1910, which was again extended to the 5th March, 1910, "yielding and paying therefor yearly and every year during the said term hereby created to the . . . lessors, their executors and administrators, the sum of $3,000, payable . . . in

* This case will be reported in the Ontario Law Reports.

equal parts on the first day of each and every month, in advance, during each year of the currency of the said term . . .” The defendant covenanted to pay rent and taxes, to leave in repair, and to add certain improvements, buildings, etc., specified, without compensation, to buy certain shelving, etc. The defendant was offered possession, but refused to take possession; after some negotiation as to the value of the shelving, etc., he repudiated the lease and refused to act under it. The plaintiffs, after doing their best to have the defendant go in under the lease, advertised the property for rent, and finally, on the 22nd April, 1910, they leased the premises to Neely et al. from the 30th April, 1910, for a term of five years, at a rental of $175 per month, beginning on the 1st June. The lessees were to have the right to remove their fixtures, and the lease was in many respects much less favorable to the plaintiffs than that made to the defendant.

This action was begun on the 7th April, 1910, immediately after the repudiation of the lease by the defendant, and in it the plaintiffs claimed the two gales of rent, $500, and damages for breach of contract.

The action was begun before the Neely lease; the statement of claim (28th April) after that lease; the statement of defence (6th May) set up a general denial, and that the plaintiffs failed to give the defendant possession of the premises, and consequently he was “released from accepting any lease of the same.”

At the trial it was admitted that the defendant had repudiated the lease; it was not denied that he had been offered possession and had refused; there was no question as to the good faith of the plaintiffs and their having done their very best to lease the property at the highest obtainable rental; and the defendant admitted that he was liable for some amount; and only defended as to damages.

W. R. Meredith, for the plaintiffs.

J. B. McKillop, for the defendant.

RIDDELL, J. (after setting out the facts as above):—So far as concerns the two gales of rent due the 5th March and the 5th April there is no dispute—$500 is due for these, and interest is to be allowed also: Skerry v. Preston, 2 Chit. R. 245.

The act of the landlords in leasing to Neely can scarcely be called an eviction, as “to constitute an eviction at law the lessee must establish that the lessor, without his consent and against his will, wrongly entered upon the demised premises and evicted him and kept him so evicted:” Foa, 4th ed., p. 166, citing Baynton v. Morgan, 21 Q. B. D. 101, per A. L. Smith, J., affirmed 22 Q. B.

D. 74; Prentice v. Elliott, 5 M. & W. 616, per Parke, B. And, even were this the case of an eviction, such eviction would not affect the liability for rent accrued due before the eviction: Boodle v. Campbell, 7 M. & G. 386; Selby v. Browne, 7 Q. B. 62. Neither is this the case of the landlord taking advantage of the proviso for non-payment of rent, which appears in this lease in the statutory form. Nor are we, in my judgment, embarrassed by considerations arising from the feudal relation of landlord and tenant. It is the case of two contracting parties of whom one expressly repudiates to the other the contract between them and notifies him that he will not be bound by it, and that in unequivocal terms. In such a case the law is well settled that the other party may thereupon treat the contract as at an end except for the purpose of claiming damages for breach of the same: Planché v. Colburn, 8 Bing. 14; Hochster v. Latour, 2 E. & B. 678; Withers v. Reynolds, 2 B. & Ald. 883; Mersey Steel Co. v. Naylor, 9 App. Cas. 434; Rhymy v. Brecon, [1900] W. N. 169. And since the withdrawal by Lord Bramwell, at p. 446 of the report in 9 App. Cas., of what was attributed to him in Houck v. Miller, 7 Q. B. D. 92 (Hoare v. Rennie, 5 H. & N. 19), the rule has not been changed or affected by the fact that the contract has been in part performed.

Of course, the repudiation of the contract must be plain and unequivocal: such cases as Johnstone v. Milling, 16 Q. B. D. 460, and these cited in 9 App. Cas. and [1900] W. N., shew the strictness of the rule.

The action then becomes a plain common law action for damages, the plaintiffs having elected to consider the contract at an end (except for the purpose of damages), instead of, as they might have done, insisted upon its continuance.

The measure of damages is the amount by which the plaintiffs are less well off than if the contract had been performed. The plaintiffs having done all in their power to minimise damages, there can be no question as to part of the claim. . . .

[The learned Judge then computed the damages under the heads of rent, taxes, and improvements, and allowed in all $10,982.87. In regard to taxes, he referred to R. S. O. 1897 ch. 224, sec. 26; Dove v. Dove, 18 C. P. 424. And he explained the method of computing damages for the plaintiffs' loss.]

Judgment for the plaintiffs as of the 6th June, 1910, for $10,982.87 and costs.

BRITTON, J. JUNE 4TH, 1910.

HURD v. CITY OF HAMILTON.

Negligence—Dangerous Place—Highway in City—Injury to and Death of Infant of Tender Years—Construction of Wall by Railway Company — Agreement with City Corporation — Liability — Fatal Accidents Act — Reasonable Expectation of Pecuniary Benefit by Parents—Damages.

Action by the father of Arthur Hurd, a boy of seven years, who died from injuries received (as alleged) owing to the negligence of the defendants, the Corporation of the City of Hamilton and the Toronto Hamilton and Buffalo Railway Company, or one of them, to recover damages for his death.

On the 7th November, 1909, the boy was walking on the sidewalk on the south side of Hunter street, in the city of Hamilton, near the intersection with Charles street. The tracks of the defendant railway company are laid along the north side of Hunter street and across Charles street. The east end of the railway tunnel is at the west side of Charles street, but the sidewalk upon Hunter street grades up to a height of about 4 or 5 feet at the east limit of Charles street, and Charles street is reached by descending a flight of steps. The part of the street on which the sidewalk is laid is about 16 feet 6 inches wide. The sidewalk itself is 7 feet 8 inches wide. Then there is a boulevard, which, including the width of the coping stone on the retaining wall, is about 8 feet 10 inches wide. There is no railing or fence on the north side of the sidewalk or at or upon the retaining wall.

The boy fell from the stone wall or abutment, and was so injured that he died.

The negligence complained of was that the wall or abutment was defectively and improperly constructed, and was allowed to remain in a dangerous condition, the danger being increased because of the absence of a fence or railing upon the retaining wall or abutment.

The action was tried without a jury by BRITTON, J., who, at the request of the parties, viewed the locus.

A. M. Lewis and J. M. Telford, for the plaintiff.

F. R. Waddell, for the defendants the Corporation of the City of Hamilton.

J. A. Soule, for the defendants the Toronto Hamilton and Buffalo Railway Company.

BRITTON, J. (after setting out the facts and referring to portions of the evidence):—In my opinion, there should have been a railing as a protection against accidents of this kind. . . .

This case comes within the line of decisions fixing liability for injury to children where inducements have been held out to them to go in the way of danger. . . . There are duties to infants where a different degree of care is required than is due to adults: Beven on Negligence, Can ed., p. 165. The boulevard or grassy spot between the cement sidewalk and the retaining wall is a tempting place for a child of tender years, unattended. In walking up the easy incline on Hunter street, a child would, quite naturally and without motive or reason other than childish playfulness, go to the wall and look over, and might, as in this case the child did, walk backwards, not appreciating the danger.

It is against this thoughtless action of children lawfully using the street that care should be taken, and, as it was not taken by having a protecting fence or barrier, there was negligence.

In this case there was that which, had the child been fourteen year of age or over and of the ordinary capacity and intelligence of children of that age, would have precluded recovery for his death. In the present case I am of opinion that the child's conduct does not bar the plaintiff's right to recover.

The work done, of which the erection of the retaining wall was a part, was done by the defendants the railway company, who were and are subject to the Railway Act of Canada. The Act then in force was 51 Vict. ch. 29, sec. 11 (h) of which gave the power to the Railway Committee of the Privy Council to determine upon applications for the construction of railways upon, along, and across highways. The power was exercised in this case, and the Committee approved generally of the plan and profile of the work.

The work was authorised and done under an agreement between the defendants, authenticated by a by-law of the city passed on the 29th October, 1894. . . . Counsel for the city contends that, if there is any liability, it should be borne by the railway company under sec. 7 of the by-law agreement—"The company shall at all times indemnify and save harmless the city corporation from and against all claims for compensation, damages, or costs by reason or on account of the construction of the railway."

I am of opinion that the present claim is not a claim "on account of the construction of the railway," within the meaning of the agreement. The city have the sole jurisdiction and control over that part of the street where the grade is not lowered, and of all the street, subject to the right of the railway company to their tracks and their use of the street for running trains. Holden v.

Township of Yarmouth, 5 O. L. R. 579, does not apply, for here there is no statutory obligation on the part of the railway company either to fence or rail off or to place fence or railing on the upper level of the part of Hunter street where the accident happened.

Then sec. 611 of the Municipal Act does not relieve the city corporation, as the work was done under agreement with the city, and was practically authorised by by-law.

The action against the railway company will be dismissed, but, in view of the user of the street . . . by the company and of the somewhat complicated agreement between the defendants, it should be without costs.

As to damages, it is, of course, only the pecuniary interest of the plaintiff and his wife . . . that can be looked at. Upon the evidence they are entitled to recover something.

The boy was in his eighth year, a bright boy, healthy, large for his age, generous, used to go upon messages for his parents. The plaintiff expected to have the boy educated for the medical profession. . . .

There was, in my opinion, a reasonable expectation on the part of the father and mother that they would live, and that the son Arthur, had he not met with this accident, would have lived to such an age as to be able to pay to them in money or money equivalent more than the cost of his maintenance and education. . . .

[Reference to McKeown v. Toronto R. W. Co., 19 O. L. R. 361; Houghkirk v. Delaware and Hudson Canal Co., 92 N. Y. 219; Rombough v. Balch, 27 A. R. 32; Blackley v. Toronto R. W. Co., 27 A. R. 44n.; Mason v. Bertram, 18 O. R. 1.]

I estimate the damages to the plaintiffs at $400, and direct judgment for that amount against the defendants the Corporation of the City of Hamilton, with costs; the money to be appropriated $200 to the plaintiff and $200 to his wife. There should be no set-off of costs.

RIDDELL, J. JUNE 9TH, 1910.

NOBLE v. GUNN LIMITED.

Master and Servant—Contract of Hiring—Wrongful Dismissal—Engagement for One Year—Payment of Wages Weekly—Yearly Hiring—Scale of Costs—County Courts Act, 10 Edw. VII. ch. 30.

The plaintiff sued the defendant companies, Gunn Limited and Gunn Langlois & Co. Limited, who had their headquarters at Toronto and Montreal respectively, for wrongful dismissal.

McGregor Young, K.C., for the plaintiff.

W. M. Douglas, K.C., for the defendants.

RIDDELL, J.:—At the trial before me at the non-jury sittings at Toronto, I found the following facts, upon the evidence, giving to the various witnesses the credit which I thought should be given, having seen them and observed their demeanour.

The plaintiff was in June, 1908, engaged for one year at the rate of $15 per week and travelling, etc., expenses, with such bonus as his employers should see fit to give him. He was employed by the Montreal company and not by the Toronto company. His employers, being under the impression (apparently) that the hiring was only by the week and not for a stated time, discharged him on the 19th January, 1909; they had no ground of complaint against him in fact and no justification for the dismissal. The plaintiff did his best to get employment, and succeeded only after 18 4/7 weeks' (130 days') loss of time, thereby sustaining a loss of $278.57.

The defendants Gunn Langlois & Co. Limited contend that, notwithstanding the engagement for the stated time of one year, the employment was in reality a weekly hiring, and that they could discharge at a week's notice. Many cases are cited, but none of them has any real bearing upon the present case.

No doubt, the circumstances that payment of wages takes place weekly or monthly is strongly in favour of the view that a hirng is for a week or a month—and, if there be nothing more, this circumstance will be conclusive as to the duration of the contract; and many cases are of that kind. But, if the term be proved, there is nothing in the fact that the wages are paid weekly. "Yearly servants often stipulate for the payment of their wages at short intervals, and an arrangement to pay weekly

or monthly may be merely for the convenience of a yearly servant:" Macdonnell on Master and Servant, 2nd ed., p. 136; Levy v. Electrical W. Co., 9 Times L. R. 495; Davis v. Marshall, 4 L. T. N. S. 216.

I should not have thought this even arguable, but for the earnestness with which the cases were urged. I have read all the cases cited; and only the following seem to call for any comment, all the others being quite different in their facts.

In Robertson v. Jenner, 15 L. T. N. S. 514, the head-note reads: "A hiring at 'two guineas a week for one year' is a hiring by the week and not by the year." But the contract of hiring is not correctly set out in the head-note, as will be seen from a perusal of the case itself. "The terms agreed upon were that the plaintiff should enter into the service of the defendants for one month on trial 'at a salary of two guineas a week for the first year.' The plaintiff remained in their service for about four months, when he was summarily dismissed with an offer of one week's wages . . . Bramwell, B., told the jury that the hiring was plainly a weekly hiring." The whole effect of the decision is that a hiring for a fixed weekly wage "for the first year" does not constitute a hiring for a year—it simply limits the amount of wages for a specified time after the beginning of the term of service, leaving the hiring to be a hiring by the week.

In Evans v. Roe, L. R. 7 C. P. 138, the agreement was in writing: "April 13th, 1871. I hereby agree to accept the situation as foreman . . . on my receiving a salary of £2 per week and house to live in from the 19th of April, 1871." Before signing the agreement, the plaintiff asked the defendants if the engagement was to be understood to be an agreement for a year, and one of the defendants answered "Yes, certainly"—the service was to begin, not on the 13th April, but at a future day, i.e., the 19th April—the case thus coming within the Statute of Frauds if the employment were for a year: Brittain v. Rossiter, 11 Q. B. D. 123; Cathorne v. Cordrey, 13 C. B. N. S. 406; Smith v. Gold Coast, etc., Ltd., [1903] 1 K. B. 285, 533.

Byles, J., in Evans v. Roe, L. R. 7 C. P. at p. 141, says: "Independently of any reference to the Statute of Frauds, the contract declared upon in this case is a written contract, clearly defining all the terms of the bargain. It is in terms a weekly hiring and a weekly service at weekly wages, and it cannot be varied by anything which passed at the time by parol, or, as I should think, by anything which might have passed afterwards." Brett, J.: "The agreement being in writing, oral evidence is not ad-

missible to vary it." So also Grove, J. The case is of authority only on the point of the admissibility of parol evidence to vary a written document—as in our own case of McNeeley v. McWilliams, 13 A. R. 324.

I can find nothing in any of the cases to modify the statement of Martin, B., in Davis v. Marshall, 4 L. T. N. S. at p. 217: "A contract for a year, with monthly payments, is still a yearly contract, unless the yearly hiring be rebutted by evidence to the contrary (Chitty on Contracts, pp. 502-3, and cases of Beeston v. Collier, 4 Bing. 309; Ridgway v. Hungerford Market Co., 3 A. & E. 171)."

The action should be dismissed without costs as against the defendants Gunn Limited, and judgment entered for the plaintiff against the defendants Gunn Langlois & Co. Limited for $278.57 and costs.

The action having been begun before the coming into force of the County Courts Act, 10 Edw. VII. ch. 30, the costs will be taxable as though that Act had not been passed.

DIVISIONAL COURT. JUNE 9TH, 1910.

McDONALD v. TRUSTS AND GUARANTEE CO.

Trusts and Trustees—Moneys Advanced on Chattel Mortgage Taken in Name of Trustees for Lenders—Default in Payment—Failure of Trustees to Renew Mortgage—Delay in Selling—Failure to Realise Debt—Duty of Trustees—Evidence—Findings of Trial Judge—Reversal by Appellate Court—Trustees Acting Honestly and Reasonably — 62 Vict. (2) ch. 15 — Charges made by Trustees against Property — Reference — Costs.

Appeal by the defendants from the judgment of LATCHFORD, J.

The two plaintiffs and two others advanced money to a newspaper publishing company, and arranged that a chattel mortgage upon the plant, etc., should be made to the defendants, a trust company, as trustees for the plaintiffs, to secure the advances. The mortgage was made by the newspaper company to the defendants, in March, 1906, for $2,000 and interest at 7 per cent. It was regularly filed on the 20th March, 1906, in the proper office. The mortgagors failed to pay the interest. By a series

of accidents the chattel mortgage was not renewed. The defendants took possession of the mortgaged property, ran the newspaper for a time, and at last sold it, in April, 1907. The proceeds were not sufficient to pay in full those who had advanced the mortgage money; and the plaintiffs sued the defendants for the amount lost to them; the other two participants in the loan not being parties.

At the trial judgment was given for the plaintiffs for $250 each.

The appeal was on two grounds: (1) that the defendants failed to renew the chattel mortgage; and (2) that the defendants omitted to sell until after the lapse of an unreasonable time.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON and RIDDELL, JJ.

J. W. Bain, K.C., and M. Lockhart Gordon, for the defendants.

D. B. Maclennan, K.C., for the plaintiffs.

RIDDELL J.:—Assuming that it was the duty of the defendants to renew the chattel mortgage in accordance with the statute, and assuming further that the omission to renew in the present instance cannot be excused, it is impossible, as I think, to hold that such negligence resulted in any loss. . . .

The second ground of complaint is put in this way: The defendants were trustees for the plaintiffs; it was their duty to make the most of the security; they could have made more had they sold at once; they not only sold for less, but they incurred an expense more than though they had sold without delay; this occasioned a loss to each of the plaintiffs.

The test applied by the trial Judge is at least as stringent as the plaintiffs can ask for. Did the defendants "act as an ordinarily prudent man would have done in regard to his own business," or were they "careless in dealing with the property which they had as security for the moneys given them by the plaintiffs and others?" (See judgment of the trial Judge, notes of evidence, pp. 124, 125.) I shall for the present purpose adopt it as giving the plaintiffs certainly all they can claim. It consequently becomes a question of fact so far as we have gone. It need not be said that the Court will not interfere with the findings of fact by a trial Judge except in a very clear case; but at the same time "the Court appealed to does not and cannot abdicate its right and its duty to consider the evidence . . . If the evidence which has been believed by him, when fairly read

and considered as a whole, leads the appellate Court to a clear conclusion that the findings of the trial Judge are erroneous, it becomes the duty of the Court to review these findings:" Beal v. Michigan Central R. R. Co., 19 O. L. R. 502, 506. . . .

The defendants first got a statement of the condition of the printing company, and then consulted their solicitor. They acted upon the advice of their solicitor. They consulted the advertising manager of the "Mail" Printing Co., and decided that of the two courses, to sell at once and to keep going and try to make a sale, the latter was preferable. . . .

I do not find any evidence upon which it can be found that, had the property been sold at the first, the receipts would have been larger. With much respect, such a finding is, in my opinion, a mere conjecture, and is not supported by evidence. Nor can I find anything which proves that any efforts on the part of the defendants would have resulted better.

Even though the defendants should be held to have made a mistake, I am of the opinion that the statute 62 Vict. (2) ch. 15 affords a protection. Their honesty was frankly attested by the counsel for the plaintiffs before us; the reasonableness of their action is, in my view, apparent; and they should be protected if the Court can fairly do so. The cases cited in Whicher v. National Trust Co., 19 O. L. R. 605, at p. 612, shew how far the protection can go. I am not at all impressed with the fact that the remuneration of the defendants was of the most trifling character—they got what they stipulated for, and, if it was not ample, they are themselves to blame; no one forced this trust upon them.

I have no hesitation in saying that the charge of fraud wholly fails; and it is a satisfaction to know that all concerned seem to have acted in the best of faith.

The appeal should be allowed.

It is said that there are charges made by the defendants against the fund which are improper and should not be allowed, even on the supposition that the defendants are not to be charged with neglect or default in delaying the sale. If it be desired to press such a claim, the plaintiffs may have a reference to the Master at Cornwall to take their accounts as trustees. This will be taken by the plaintiffs at their own peril as to costs; if this reference is taken, the general costs of the action and of the reference will be reserved to be disposed of by a Judge in Chambers after the report, but in any case the plaintiffs should pay the costs of this appeal. As to the costs of the trial, I agree with

my Lord, for the reasons given by him. If the reference be not taken, the appeal will be allowed and the action dismissed, both with costs.

FALCONBRIDGE C.J.:—I agree with my brother Riddell's disposition of the case and of the costs, with this exception, that, inasmuch as some of the evidence taken at the trial may possibly be used on the reference, the costs of the trial should also be reserved until the motion for further directions.

BRITTON, J.:—I agree that the appeal should be allowed, and that the plaintiffs should have, if they desire it, a reference . . to take the accounts. In the event of a reference, costs of the action and of the trial and reference should be reserved. Costs of the appeal to be costs to the defendants in any event. The plaintiffs to elect as to reference within two weeks. If reference not taken, appeal to be allowed with costs and action dismissed with costs.

RE DWYER—SUTHERLAND, J., IN CHAMBERS—JUNE 2ND, 1910.

Death—Presumption—Jurisdiction — Surrogate Court — Absentee.]—Application by the surviving brothers and sisters of Thomas Dwyer the younger, with the consent of the executors of the will of Thomas Dwyer the elder, for a declaration that Thomas Dwyer the younger is presumed to be dead and to have died before his brother Patrick Dwyer, and that the executors be not required to pay into Court the sum of $200 payable to Thomas Dwyer the younger under the will of his father, but be authorised and directed to pay the same to the applicants. Thomas Dwyer the younger had not been heard of for about twenty-three years. Held, following Re Coots, ante 807, that the Surrogate Court alone has jurisdiction to determine such a matter. Motion refused. No order as to costs. W. E. Raney, K.C., for the applicants.

CAHILL V. TIMMINS—BRITTON, J.—JUNE 2ND, 1910.

Principal and Agent—Option Secured by Agent—Payment for Services—Commission—Condition — Quantum Meruit.]—Action for a commission or a sum of money as remuneration for the

plaintiff's services in securing for the defendants an option to purchase certain mining claims. The plaintiff secured the option, but the defendants did not take it up. The learned Judge, in a written opinion, set out the facts and examined the evidence, and said that the conclusion he arrived at, upon all the evidence, was that the plaintiff was acting for the defendants and upon their instructions and was to be paid by them for his services. It was not the intention of the parties that the plaintiff should work for nothing or should work for his out-of-pocket expenses, or that whether he received any remuneration or not should depend upon the properties being placed or sold, either alone or with other properties, by the defendants. A contract of hiring was the only contract to be implied from what was done, and, if the defendants sought to make the pay for work done conditional upon the defendants taking the property and selling it, realising a profit from such sale, the onus was upon them, and that onus had not been satisfied. The plaintiff was entitled to recover upon a quantum meruit. The pleadings might be amended, if necessary, to set up such a claim. Judgment for the plaintiff for $2,185 with costs. T. W. McGarry, K.C., for the plaintiff. G. H. Watson, K.C., and J. B. Holden, for the defendants.

STANLEY v. MENNIE—MAGEE, J.—JUNE 4.

Report—Appeal—Judgment—Costs.]—An appeal by the defendants from the report of the Local Master at Stratford, and a cross-appeal and motion for judgment by the plaintiffs. The appeal against the Master's report and the cross-appeal are dismissed, except that the amount found owing to the plaintiff is by consent to be increased by $31.75, and, if both parties consent, is to be further increased by $10. Both appeals are dismissed without costs. Judgment is to be entered for the plaintiffs, on their motion for judgment on further directions, for the amount found due to them by the report as varied. The defendants are to pay the plaintiffs' costs of the action and reference (except in so far as increased by the claim for interest) and the costs of the motion for judgment. G. G. McPherson, K.C., for the plaintiffs. R. S. Robertson, for the defendants.

FASKEN v. WEIR—MAGEE, J.—JUNE 4.

Vendor and Purchaser—Contract for Sale of Land—Delivery—Taking Effect—Postscript Included in Contract—Uncertainty as to Land Intended—"South Part"—Specific Performance.]—Action for specific performance of an agreement by the defendant to sell certain lands to the plaintiffs, David and John W. Fasken. The agreement was in writing, dated the 15th August, 1908, and signed by "J. W. Fasken" and "Alex. Weir." The property specified was "the south part of the late William Kidd estate . . . . cottage, barn, and lake included;" and the consideration was $3,500. After the signatures these words were written: "P.S. This property lies east of Sprague road." For the defendant it was alleged that the agreement was made subject to the condition that he had the right on or before the 17th August, 1908, to cancel it, and that he did so cancel it; that the words of the postscript were added by J. W. Fasken after the agreement was signed and without the defendant's knowledge or assent; that the agreement, either with or without these words, was too vague, and did not comply with the Statute of Frauds; that, if the description included the land to the north of the cottage and barn, the defendant never intended to sell the same, and there was no consensus; that, if the agreement was binding, it should be reformed to exclude that part; and that, even if binding, there should, on account of the defendant's misunderstanding, be no specific performance. The learned Judge said that the matters in controversy practically rested on the evidence of the plaintiff John W. Fasken and the defendant, and were questions of veracity between them. And, on the whole, he was of opinion, considering the burden of proof and all the circumstances, that the defendant had failed to prove that the agreement was not to take effect at its delivery, or that he had any right to cancel it; and therefore he found that it did take effect from its delivery, and that the postscript was added immediately after the document was signed and before it had passed to either, and was intended to be part of it as much as if written there before the signatures, and that the signatures applied to it also. As to the parcel intended to be covered, there was much doubt; no precise part of the land could be said to be covered by the document; and the plaintiffs had failed to prove conclusively what part was intended. Action dismissed without costs. L. F. Heyd, K.C., for the plaintiffs. E. E. A. DuVernet, K.C., and J. H. Hancock, for the defendant.

BANK OF MONTREAL v. HOATH—MASTER IN CHAMBERS—JUNE 6.

Venue—County Court Action — Extra Expense—Motion for Leave to Amend—Forum.]—A motion by the defendant to transfer the action from the County Court of Victoria to the County Court of Grey was dismissed, the plaintiffs being willing to allow the extra costs of a trial at Lindsay as against one at Owen Sound to be costs to the defendant in any event, and the Master considering that, upon the facts as presented, it was not a case for change of venue. Costs of the motion to be costs in the cause. A motion by the defendant for leave to amend the statement of defence was also dismissed, the Master having no jurisdiction in a County Court action. H. S. White, for the defendant. Featherston Aylesworth, for the plaintiffs.

CARTER v. CANADIAN NORTHERN R. W. CO.—LATCHFORD, J.—JUNE 6.

Contract—Payment of Money—Condition—Non-fulfilment—Return of Money—Authority of Agent.]—Action to recover $480 paid by the plaintiff in April, 1908, to one Webster, as agent of the defendants, in connection with a proposition of the defendants that a syndicate should be formed in Findlay, Ohio, where the plaintiff resided, to purchase from the defendants 10,000 acres of land in the province of Saskatchewan. If the syndicate was not completed—if purchasers were not secured for the whole 10,000 acres—the money of the subscribers was to be returned, as the plaintiff alleged. The syndicate was not completed; signatures were secured for only 2,880 acres. The plaintiff subscribed for 960 acres, and handed Webster a cheque for $480, payable to the defendants, who cashed it. The defendants set up that the $480 had become forfeited. LATCHFORD, J., finds that Webster represented to the plaintiff that the defendants would return the money in the event of the syndicate not being completed. Judgment for the plaintiff for $480, interest from the teste of the writ, and costs. W. J. Elliott, for the plaintiff. I. F. Hellmuth, K.C., and G. F. Macdonnell, for the defendants.

DOMINION BANK v. TORONTO MICA CO.—MASTER IN CHAMBERS —JUNE 7.

Summary Judgment—Con. Rule 603—Defence to Action on Promissory Note.]—Motion by the plaintiffs for summary judgment under Con. Rule 603 in an action upon a promissory note. The Master said that the affidavits filed in answer disclosed such a state of facts as entitled the defendants to defend the action; referring especially to the following facts: that the manager cannot say when the plaintiffs first got the note sued on; the uncertainty whether the secretary-treasurer of the defendants was duly appointed and so authorised to sign; and the deposit with the plaintiffs of a large amount of scrip by the defendants' manager and the terms of the letter sent therewith before the note was given; and that the plaintiffs still held the scrip. Reference to Northern Crown Bank v. Yearsley, ante 655; Farmers Bank v. Big Cities Realty and Agency Co., ante 397. Motion dismissed; costs in the cause. W. B. Milliken, for the plaintiffs. S. H. Bradford, K.C., for the defendants.

RE ROBINSON—MIDDLETON, J., IN CHAMBERS—JUNE 7.

Lunatic—Order Declaring Lunacy—Petition to Supersede—Evidence—Supplementing—Practice—Appointment of Expert.]—Petition by John R. Robinson, declared a lunatic, for an order superseding the order declaring insanity and appointing a committee. The petition not only alleged sanity at the time it was presented, but that the petitioner never was a lunatic, and attacked not only the order made here, but also certain proceedings taken in California upon which the proceedings here were to some extent based. Notice of the petition was given to the committee and to no one else. The committee submitted to whatever order the Court might make. MIDDLETON, J., after setting forth the proceedings in California and here, said that the medical evidence produced consisted of two short affidavits of medical men in good standing. One of them said he knew the petitioner and other members of his family, and had been informed of the circumstances set forth in Robinson's affidavit and petition; that on the 19th May he carefully examined Robinson, and "as the result of my examination I have no hesitation in saying that, in my opinion, the said Robinson is not a lunatic, and is perfectly cap-

able of conducting his own affairs and managing his own property." The other doctor's affidavit was very similar, and no more satisfactory. Held, that this was inadequate to warrant an order of supersedeas: Re Holyland, 11 Ves. 10, per Lord Eldon; Pope on Lunacy, p. 191. The practice seems to require the Judge himself to examine the lunatic so as to satisfy himself, but it is now recognised that no satisfactory examination can be had by one who has not special training as an expert, and our Rules are wide enough to enable the Court to call an expert to its assistance. The present material is to be supplemented by: (1) Evidence from medical men or others acquainted with the applicant, and who know the grounds upon which insanity was found, shewing that there is no trace of these symptoms. (2) An examination by Dr. Charles Clark, appointed by the Judge as an expert, who must before the examination be supplied with full information as to the grounds of the original order. (3) Notice to the next of kin in Ontario, as they may be interested, in the event of an intestacy. This is required because the Judge owes a duty, not only to the petitioner, but to the province (as he may become a public charge), and to his next of kin. Once satisfied that there has been recovery, the Court will gladly vacate the order and restore full civil capacity. The committee need not attend further. C. Garrow, for the petitioner. W. Brydone, for the committee.

ECKARDT v. HENDERSON ROLLER BEARING CO.—MEREDITH, C.J. C.P., IN CHAMBERS—JUNE 7.

Summary Judgment—Rule 603—Lease—Company—Leave to Defend as to Part of Claim.]—The order of the Master in Chambers, ante 859, was varied on appeal by limiting the judgment to the amount claimed in respect of matters other than power. The defendants to be at liberty as to the claim in respect of power to defend and go to trial in the ordinary way. Costs of the appeal to be costs in the action. A. Ogden, for the defendants. Grayson Smith, for the plaintiff.

FRASER v. ROBERTSON—DIVISIONAL COURT—JUNE 7.

Lunatic—Action Brought in Name of Alleged Lunatic by Next Friend—Inquiry as to Mental Condition of Plaintiff.]—The or-

der of Riddell, J., ante 843 (see also ante 800), was, by consent of counsel, varied by a Divisional Court (BRITTON, CLUTE, and MIDDLETON, JJ.), by directing that the next friend of the plaintiff be at liberty to have medical experts examine the plaintiff as to his sanity, counsel for the plaintiff and defendants undertaking to facilitate such examination; proceedings under the Lunacy Act, 1909, if any, to be launched by the next friend within four days after the medical examination; the costs of the appeal to be costs in the proposed application for a declaration of lunacy. J. King, K.C., for the plaintiff and defendants. A. McLean Macdonell, K.C., for the next friend.

McPHILLIPS v. INDEPENDENT ORDER OF FORESTERS—BRITTON, J. —JUNE 8.

Contract—Services—Evidence.]—Action to recover $2,802.28 as a balance of salary and commission payable to the plaintiff for advertisements obtained by him for a periodical published by the defendants and for writing and other work done for the defendants. The learned Judge reviewed the evidence and found that a contract was established, and that there was due to the plaintiff on the footing of that contract $500. Judgment for the plaintiff for that amount without costs. W. G. Thurston, K.C., for the plaintiff. G. H. Watson, K.C., for the defendants.

SWEENEY v. SISSONS—DIVISIONAL COURT—JUNE 8.

Contract—Timber—Declaration — Injunction.]—An appeal by the plaintiff from the judgment of TEETZEL, J., ante 500, was dismissed with costs by a Divisional Court composed of CLUTE, SUTHERLAND, and MIDDLETON, JJ. McGregor Young, K.C., for the plaintiff. Glyn Osler, for the defendants.

NILES v. CRYSLER—MASTER IN CHAMBERS—JUNE 9.

Summary Judgment—Con. Rule 603 — Promissory Notes—Leave to Defend.]—Motion for summary judgment under Con. Rule 603 in an action upon four promissory notes, aggregating

$18,279.86. The parties were engaged in certain mining ventures, and nearly the whole of the notes in question were given at the time of the execution of two somewhat complex agreements and in pursuance thereof. The agreements dealt with all the notes sued on. The Master said that it was at least an arguable question, under these agreements, whether the notes were given, as the plaintiff alleged, in payment for 330,000 shares in the Crysler-Niles Mining Co. held by the plaintiff and assigned by him to the defendant with power to sell at 5 cents a share, or whether the true agreement was, as the defendant contended, that these notes were given for the defendant's accommodation and with the expectation of both parties that at least the three larger notes (amounting to $16,500) would be met by sales of the 330,000 shares at (at least) 5 cents, the defendant being allowed anything over that price for his trouble. Whatever may be the final determination of the case, it is not so perfectly plain a case that summary judgment should be granted: Farmers Bank v. Big Cities Realty and Agency Co., ante 397. Motion dismissed; costs in the cause. Grayson Smith, for the plaintiff. J. M. Ferguson, for the defendant.