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CASES DETERMINED IN THE SUPREME COURT OF ONTARIO, APPELLATE AND HIGH COURT DIVISIONS, FROM SEPTEMBER, 1913, TO THE END OF FEBRUARY, 1914.

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APPELLATE DIVISION.

SEPTEMBER 15TH, 1913.

*LUMSDEN v. SPECTATOR PRINTING CO.

Libel—Words Plainly Defamatory—Verdict of Jury—No Libel—New Trial—Evidence—Mitigation of Damages—Criminal Charge—Retractation—Plaintiff Suing in Firm Name.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., upon the verdict of a jury, in favour of the defendants, in an action for libel. The plaintiff, William G. Lumsden, sued in his business name of Lumsden Brothers.

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

G. F. Shepley, K.C., and I. F. Hellmuth, K.C., for the plaintiff.

E. F. B. Johnston, K.C., and J. G. Gauld, K.C., for the defendants.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action is one of libel, and there is no plea of justification on the record. The verdict of the jury, which was for the respondents, must therefore have been based on the view that the matter, the publication of which is complained of, was not a libel of the appellant.

I have reluctantly come to the conclusion that a new trial must be granted. That the plaintiff in a libel action, where the jury has found not to be libellous that which is plainly a libel, is entitled to a new trial, was decided by the Supreme Court

*To be reported in the Ontario Law Reports.

of Canada in Sydney Post Publishing Co. v. Kendall (1910), 43 S.C.R. 461.

I am of opinion that the words of which the appellant complained in the case at bar are not susceptible of any construction which is not defamatory.

Whether or not they charge that the appellant was guilty of a criminal offence, they plainly are defamatory of him and of his business. Indeed, the contrary was not argued by the learned counsel for the respondent.

The facts and circumstances which led to the publication, and to the writer of the report which appeared in the respondents' newspaper believing that the premises in which the candy was found, were the premises of the appellant, were clearly admissible in mitigation of damages, if they had been so pleaded, and the notice required by the Rules had been given.

It is unnecessary to express any opinion as to what the result of the appeal would have been had a plea of justification appeared on the record.

It was, I think, for the jury, and not for the Judge, to determine whether, under the circumstances, the matter complained of involved a criminal charge against the appellant; and it should be open to the respondents upon the new trial to have that question left to the jury, with the further question, if it is found that a criminal charge was not made, whether or not what was subsequently published by the respondents was a full and fair retractation, within the meaning of sec. 8 of the Libel and Slander Act.

The respondents should have leave, if so advised, to plead justification, and also to set up in mitigation of damages the matters on which they relied at the trial as a defence to the action.

The costs of the last trial and of the appeal should be costs in the cause.

It may be well to point out that the action is improperly brought in the name under which William G. Lumsden, the real plaintiff, carried on business. While the Rules permit a single person carrying on business under a firm name to be sued in that name, they do not permit him so to sue. See Holmested & Langton's Judicature Act, 3rd ed., p. 414, and cases there cited.

New trial ordered.

SEPTEMBER 15TH, 1913.

*HAGERTY v. LATREILLE.

Water and Watercourses—St. Lawrence River above Tide Water—Bed of Stream—Riparian Rights—Rights of Crown—Bed of Navigable Waters Act, 1 Geo. V. ch. 6—Filling-in of River in Front of Lot—Interference with Property Rights of Riparian Owner—Trifling Injury—Damages—Appeal—Costs.

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the United Counties of Stormont, Dundas, and Glengarry, dismissing the action.

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

G. A. Stiles, for the plaintiff.

C. H. Cline, for the defendant.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The contest is as to the ownership of a small piece of land lying in front of a lot in the hamlet of Summerstown, belonging to the appellant, which was made by depositing earth and stone in the bed of the river St. Lawrence.

This land is claimed by the appellant as part of his lot, and is claimed by the respondent by length of possession; and the appellant claims, in the alternative, that the filling-in of the river in front of his lot constitutes an interference with his riparian rights, and he seeks a mandatory order for the removal of the earth and stone which have been deposited there.

The learned Judge found that the title to the locus in question was not in the appellant, but in the Crown, and that the prima facie presumption which, according to the decision of this Court in Keewatin Power Co. v. Town of Kenora (1908), 16 O.L.R. 184, exists, that in all non-tidal rivers, whether in fact navigable or non-navigable, the title to the alveus is in the riparian proprietor, was rebutted; and in that conclusion we agree.

That the bed of the river St. Lawrence above tide water is vested in the Crown was decided by the Court of Common Pleas

*To be reported in the Ontario Law Reports.

in Dixson v. Snetsinger (1873), 23 C.P. 235. How far, if at all, the reasoning on which this decision was based is in conflict with what was decided in the Kenora case, it is unnecessary to inquire, as the same conclusion would have been reached on the ground that the prima facie presumption I have mentioned was rebutted in the case of such a river as the St. Lawrence, as undoubtedly it would be in the case of the Great Lakes.

If there were any question as to the correctness of the view of the learned Judge of the County Court, it is removed by the Bed of Navigable Waters Act (1 Geo. V. ch. 6), which declares that "when land bordering on a navigable body of water or stream has been heretofore or shall hereafter be granted by the Crown, it shall be presumed, in the absence of an express grant of it, that the bed" of such a navigable body of water or stream "was not intended to pass to the grantee of the land, and the grant shall be construed accordingly and not in accordance with the rules of the English common law."

There remains to be considered the question whether the appellant is entitled to any relief for the interference with his riparian rights by the filling-in of the river in front of his lot. That this filling-in was an interference with the property rights of the appellant is well settled: Lyon v. Fishmongers Co. (1876), 1 App. Cas. 662; but, in view of the comparatively trifling injury which has been caused to the appellant, and the very considerable expense that the respondent would be put to if a mandatory order were granted requiring him to remove the earth and stone, the case is not, we think, one in which such an order should be made, and the justice of the case will be met by awarding the appellant $5 as damages for the invasion of his rights; and the judgment of the Court below will be varied accordingly.

As the appellant has failed on the main ground on which his action was based, and has now succeeded on a ground that was not presented until the trial and that he was permitted to set up by amendment, there should be no costs to either party in the Court below or of this appeal.

Appeal allowed in part; no costs.

SEPTEMBER 15TH, 1913.

*RE LLOYD AND ANCIENT ORDER OF UNITED WORKMEN.

Life Insurance—Death of one of two Designated Preferred Beneficiaries in Lifetime of Assured—Absence of Fresh Designation—Right of Survivor—"Wife"—Ontario Insurance Act, 2 Geo. V. ch. 33, secs. 2, 89, 178, 179, 181.

Appeal by Alice Lloyd from the order of MIDDLETON, J., in Chambers, 4 O.W.N. 1246.

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

J. M. Ferguson, for the appellant.

G. G. Mills, for Mary Eliza Birtch, the respondent.

HODGINS, J.A.:—The dominating idea underlying the sections of the Ontario Insurance Act, 2 Geo. V. ch. 33, which relate to preferred beneficiaries is, of course, the creation of a trust; which trust withdraws "the insurance money or part thereof" from the estate of the assured and from interference by his creditors.

There are only two ways in which the interest of the preferred beneficiary, when once established, can be affected. In the first place, the assured is given power to restrict, revoke, extend, transfer, limit, or alter "the benefits of the insurance," provided he does not go outside the preferred class, while any of those of its members in whose favour the contract or declaration was made are living. In the second place, the shares of a preferred beneficiary predeceasing the assured, if not dealt with by him, are controlled by statutory provisions.

There is, I think, a clear intention in the Act to control not only the whole of the moneys payable by the contract of insurance, but any part thereof; and to provide that a trust created in favour of a preferred beneficiary of the whole or any part of the insurance money should create a vested interest as to the whole or part respectively, which can be divested only in one of the ways I have mentioned. . . .

[Reference to sec. 178, sub-sec. 2; sec. 179, sub-secs. 3 and 7; sec. 181, sub-sec. 3; sec. 178, sub-secs. 3 and 4; the interpretation section (sec. 2, sub-secs. 6, 36); sec. 89, sub-sec. 2.]

*To be reported in the Ontario Law Reports.

The words of sub-sec. 3 of sec. 178 are, "Where it is stated in the contract that the insurance is for the benefit of the wife only." The question is, therefore, are the words "the insurance" sufficiently explicit to exclude a part of the insurance moneys? In the certificate in question it is provided that the sum of $2,000 shall, at the death of the assured, be paid "to his wife Sarah Ann Lloyd one-half and the other half to his daughter Mary Eliza Lloyd." As to the one-half share, therefore, it is declared to be for the benefit of the wife only. No doubt, the words "the insurance" apply to the whole insurance contract and the moneys payable thereunder, but do they exclude the idea that, if only a part is dealt with for the benefit of the wife, that is not "the insurance" as to her? To hold that they do so exclude would, in my judgment, do away with many of the benefits provided for by the Act, and certainly with many intended, as I think, by the section itself. . . . I do not think the section is so limited or is so wholly out of harmony with the general trend of the other statutory provisions. Subject to what may be said as to the scope of sub-sec. 7, as making the entire body of beneficiaries ("whether an apportionment has been made or not" among them), the successors to benefits in which they did not, under the apportionment itself, acquire an interest, I think that sub-section may well include the designation of part of the insurance moneys. The provisions for the alteration of apportionments and for the exclusion, limitation, and alteration of the benefits of the insurance from one to another and between preferred beneficiaries, point, to my mind, strongly in the same direction.

If, then, that construction is correct, the moneys payable under this contract to the wife are for the benefit of the wife only; and, by force of sub-secs. 3 and 4, the word "wife" means the wife living at the maturity of the contract.

The maturity of the contract in this case is the death of the husband; and, by virtue of the provision of sub-secs. 3 and 4, the insurance contract must be read as creating a trust of one-half in favour of the wife of the assured only, such wife being, by force of the statutory definition, the wife living at the maturity of the contract, notwithstanding that the first wife was designated by name. It must be remembered that the trust exists "so long as any object of the trust remains;" and, construing those words as in Cleaver v. Mutual Reserve Fund Life Association, [1892] 1 Q.B. 144, it may be said that, by force of

statute, the benefit of the named wife, or the wife at the death of the assured, still remains as an object of the trust.

In the judgment appealed from, sub-sec. 7 of sec. 178 has been applied in preference to sub-secs. 3 and 4, construed in the way I have indicated. That sub-section (7) is very wide in its terms, and applies whether an apportionment has been made or not, and deals with the share or shares not only of one but of all the designated preferred beneficiaries in case of their death in the lifetime of the assured. But for the words "whether an apportionment has been made or not," I should have thought that the sub-section might have been construed as dealing with the interests of one or more preferred beneficiaries, either in the entire insurance moneys, if it was given to him or them jointly, or with a part only, if treated as a separate trust for his or their benefit. But the words I have quoted indicate that, even where an apportionment has been made, and where, therefore, individual trusts and interests are created, then, notwithstanding that separation, the right of survivorship exists in those who are interested as preferred beneficiaries in any part of the insurance moneys, subject to the assured's right to declare in favour of himself, his estate, or any one else. It, of course, can be applied in such a case as is presented here, where only one-half of the insurance moneys are dealt with, but it seems to me wide enough to include all cases where preferred beneficiaries exist, though interested in separate parts of the insurance moneys. But I do not think that this is decisive.

I think that this sub-section can be fairly read so as not to interfere with sub-secs. 3 and 4, by limiting it to cases not governed by the explicit provision which treats the wife at maturity as the wife meant, though clearly not the wife described. In other words, sub-sec. 7 can be given full effect by dealing with it as providing for survivorship only where one or more or all of the designated preferred beneficiaries die in the lifetime of the assured, provided there is no wife living at the maturity of the contract. The judgment below treats the present situation as a casus omissus under sub-sec. 3. I would prefer to treat it as a case provided for under those sub-sections, and therefore exempt from the survivorship dealt with in sub-sec. 7. . . .

Hence, until the maturity of the policy it would not be known who were interested in the share: Re Jannison, 4 O.W.N. 1084. At that time the specific provisions of sub-secs. 3 and 4 operate and transfer the right to the wife then living.

On the whole, I am satisfied that this construction of the statute is more in consonance with the spirit of our insurance legislation as to wives and children, and, under the best consideration I can give it, comes within its letter as well.

I would allow the appeal; but I think the costs throughout of each party may well be borne by themselves.

MEREDITH, C.J.O., and MACLAREN, J.A., concurred.

MAGEE, J.A., agreed in the result.

Appeal allowed.

SEPTEMBER 15TH, 1913.

RE OLMSTEAD AND EXPLORATION SYNDICATE OF ONTARIO LIMITED.

Mines and Minerals—Mining Claim—Boundaries—Decision of Mining Commissioner—Evidence—Appeal.

Appeal by George Olmstead from a decision of the Mining Commissioner of the 18th February, 1913.

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

J. Lorn McDougall, for the appellant.

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

MEREDITH, C.J.O.:—The controversy is as to what is the eastern boundary of the mining claim of the respondents.

The claim as applied for is shewn by the sketch which accompanied the application to be rectangular in form; and the "length of the outlines" of it is stated to be 20 chains by 20 chains, and the easterly boundary, as shewn on the sketch, is a straight line from number 1 post to number 2 post.

It is, however, contended by the respondents that the easterly boundary is not this straight line, but that it is the westerly margin of the east branch of the Montreal river, called in the application "Lady Dufferin Lake," which is distant but a short distance easterly of the straight line; and the Mining Commis-

sioner has adopted that view, being of opinion that the application and sketch, and the work on the ground, indicate that the applicant intended to include in the claim he was making the land lying between the straight line and the margin of the river.

The reasons which led the Commissioner to that conclusion were: (1) that the claim is stated in the application to be "northwest side of Lady Dufferin Lake;" (2) that the application was loosely drawn, and, although it described the claim as being 20 chains by 20 chains, it was clearly indicated by one of the stakes that the distance from number 2 to number 3 was 25 chains; (3) that the Mining Recorder treated the claim as extending to the river, and so marked it on his office map; and (4) that the line from number 1 to number 2 post was not blazed.

I am, with respect, of opinion that the Commissioner came to a wrong conclusion, and that the true eastern boundary of the respondents' claim is a straight line drawn from number 1 post to number 2 post.

In addition to the statement in the claim that it is 20 chains by 20 chains, and the fact that the sketch which accompanied it shews it as a rectangular figure, there is the cogent circumstance that, so far from the sketch shewing that the river or lake is the eastern boundary, it shews the contrary. It was supposed by the staker that there was a bend in the river extending into the rectangular figure, and it is plain that he intended that the claim should include that part of the river which lay within the figure. The fact that, instead of there being a bend, the land extended some distance to the east of the rectangular figure, is immaterial on this point of the case, viz., what the application and sketch shewed was intended to be included in the claim. These circumstances, in my opinion, are much stronger against the respondents than are the circumstances relied on by the Commissioner.

As I understand the Mines Act, the foundation of the right which a staker acquires or may acquire is the claim which he files with the Recorder; assuming, of course, that he has complied with the Act as to discovery, staking, etc.; and, therefore, the fact that on the map in the office of the Recorder the claim is shewn as extending to the river, cannot give a right to land not included within the claim as filed.

For the same reason, the granting of the certificate of record does not assist the respondents. It is final and conclusive evidence of the performance of all the requirements of the Act except working conditions in respect to *the mining claim,* up to

the date of the certificate, and thereafter the mining claim is not, in the absence of mistake or fraud, liable to impeachment or forfeiture except as expressly provided by the Act.

It will be observed that the certificate contains no description of the claim, but refers to it only by its number. In order to ascertain what the area of the claim is, reference must, therefore, be had to the application and sketch; and it is the claim as shewn on them, and that only, in respect of which the provisions of sec. 65 can be invoked by the appellant.

I would, therefore, reverse the judgment or decision of the Commissioner, and substitute for it a declaration that the eastern boundary of the respondents' claim is a straight line drawn from number 1 post to number 2 post, and I would make no order as to the costs of the appeal.

MACLAREN, J.A., agreed.

MAGEE and HODGINS, JJ.A., also agreed and referred to the former Commissioner's views as expressed in Re Green, Mining Commission Cases, p. 293.

Appeal allowed without costs.

SEPTEMBER 15TH, 1913.

KELLY v. STEVENSON.

Contract—Shipment of Goods for Sale—Account Sale—Charge for "Commission and Guarantee"—"Guaranteed Advance" —Evidence—Appeal—Costs.

Appeal by the defendant from the judgment of the Judge of the County Court of the United Counties of Northumberland and Durham in favour of the plaintiffs.

The action was brought by a firm of apple-dealers, doing business at Colborne, Ontario, against a commission merchant, of Glasgow, Scotland, to recover $581.92, the price of 242 barrels of applies shipped to the defendant.

Judgment was given at the trial for the plaintiffs for $488.58 with costs.

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

W. L. Payne, K.C., and W. F. Kerr, for the defendant.

J. B. McColl, for the plaintiffs.

The judgment of the Court was delivered by HODGINS, J.A.: —The learned County Court Judge has rejected all the evidence extrinsic to the written memorandum of the 4th October, 1911, as being either equivocal or too conflicting to prove a safe guide.

Neither party asserts that the written document contains all the terms of the agreement.

The respondents shipped their apples direct to the appellant's firm in Glasgow, where they were sold. The earliest account sales is dated at Glasgow, the 27th October, 1911, and the appellant enclosed it in his letter to the respondents of the 9th November, 1911 (exhibit 3), together with a cheque for $847. The terms of the letter indicate that the payment was not intended to be a settlement except subject to the ascertainment of the correct number of No. 3 apples. I do not think that the consent to the use of the account sales is as narrow as counsel for the respondents contends; and the appellant should still have the right to reduce the advance to $1 per barrel on the true number of grade 3 shewn in the account sales. This is 292 barrels, as against 194 estimated in exhibit 6. The number of barrels shipped up to the 9th November, 1911, was 2,202, and after that date 242; a total of 2,444, of which 2,152 were No. 1 and No. 2 and the balance No. 3. Worked out on the basis of the contract, this would require advances of $5,772, of which the appellant has paid $5,214, leaving $558 still unadvanced.

Apart from the oral testimony bearing on the terms of the contract, the course of dealing between the parties may be considered. An earlier transaction, of which the account sales is dated the 4th October, 1911, was on the basis of an advance of $2 per barrel, and either a division of profits or payment of the whole profits to the shippers. According to the appellant, the losses were to be borne equally by both parties; and he claims that a small loss was incurred, for which he did not make a claim.

In the account sales referring to this transaction a charge is made for "commission and guarantee" at the rate of five per cent.; and it is after deducting this percentage, as well as the freight, sale expenses, etc., and insurance, that the net amount of £75 8s. 10d. is arrived at.

In all the account sales relating to the contract now in ques-

tion the same deduction is made for "commission and guarantee," and these documents were sent by the appellant to the respondents, and were put in at the trial as fixing the latter with knowledge of what had been realised from the apples and how the proceeds had been dealt with. The appellant, in answer to the question, "Your firm . . . would sell them out just as they like, then send them a statement, and they were obliged to accept it"? answered, "That is so." To the learned trial Judge the appellant says: "An advance is purely an advance; but a guaranteed advance is a different thing, quite. It means they will never be called on to pay the deficit; there will never be any loss to the shipper." Further, when asked whether anything was said that would put it beyond question—*i.e.*, whether it was or was not a guaranteed advance—the answer is: "I don't know. I would not like to swear to that:" and then he goes on to suggest that the respondents' knowledge of the apple business would suffice to tell them if it were so. The appellant says that he told the respondents what commission he charged, and this the respondents admit.

In the absence of any finding as to the relative merits of the conflicting versions of the real contract, this Court must do its best to ascertain which is most consistent with what the parties actually did.

The basis of the earlier dealing is not agreed upon by the parties. The appellant, who claimed that there was a loss, part of which was to be borne by the respondents, made no mention of it to them. His action in this regard is more consistent with the respondents' account of it than with his own. If, then, the earlier contract was, as the respondents contend—and as the appellant treated it and as the account sales clearly indicate—"a guaranteed advance," it was incumbent upon the appellant to shew that the subsequent agreement was upon a different basis, and was one under which the respondents agreed to become responsible for the whole possible loss upon the shipment of their entire crop of apples in the Picton district. He admits that he cannot establish that the respondents understood this position. In the account sales, his Glasgow house consistently treat it as a guaranteed advance, and each commission deduction specifically includes a charge for "commission and guarantee." The appellant told the shippers that the commission was five per cent.; and by the written statements it is shewn that a commission at that rate included a guarantee. This, coupled with the duty, as I view it, of the appellant, to have explained to the respondents

the difference between the basis of the present bargain and that of the earlier one, should turn the scale in this case.

As enforcing this view, it is evident that up to the 11th November the appellant treated the contract as one requiring him to make advances irrespective of the result of the sales. On the 9th November, he says that he had one account sales only, namely, that for 691 barrels, which shewed a loss. Yet the stipulated advance is made on all the other shipments. Nor is it suggested in his letter of the 1st December, 1911, that he is absolved by losses from making advances; although the letter of the respondents' solicitor, to which it is an answer, distinctly claimed the remaining advances as a right. His suggestion of arbitration, too, is hardly consistent with the appellant's present position.

Taking all the circumstances into consideration, I think that the appellant has failed to shew enough to satisfy an appellate Court that the judgment is so erroneous that it should be set aside.

The judgment should be affirmed, and the counterclaim formally dismissed. The learned trial Judge was correct in deducting the number of barrels shewn to grade as No. 3.

The respondents should have the costs of the appeal. I think that there should be no costs up to and including the trial; as the litigation has been induced either by the carelessness of both parties in the making of their contract, or, if the view of the learned trial Judge is adopted, by a deliberate intent on both sides to leave the terms of the contract at large until they should be determined by a Court.

Appeal dismissed.

HIGH COURT DIVISION.

LENNOX, J., IN CHAMBERS. AUGUST 8TH, 1913.

REX v. GILMOUR.

Liquor License Act—Selling without License—Magistrates' Conviction—Motion to Quash—Time—Service upon Clerk of the Peace—Jurisdiction of Magistrates—Conviction in Absence of Defendant—Adjournment—Penalty—Amount of Fine—Evidence—Suggestion of Prior Conviction.

Motion to quash the conviction of the defendant by magistrates for selling liquor without a license, contrary to the Liquor License Act.

S. S. Mills, for the defendant.
J. R. Cartwright, K.C., for the Crown.

LENNOX, J.:—The motion is to quash a conviction under the Liquor License Act. The defendant was fined $500 and costs. I regret that I cannot do anything for him. I am inclined to believe that the technical objection taken, that "service" includes service upon the Clerk of the Peace, and that defendant's proceedings were too late, is a valid objection; but I prefer to dispose of the case upon the merits; and upon the merits there is no ground here upon which I can give relief. I am not well pleased with the action of the magistrates, but they acted within their jurisdiction; and, although the motion was very ably and strenuously argued, I cannot say that in proceeding to dispose of the matter on the 16th June, in the absence of Gilmour, the Justices acted "contrary to natural justice." The case was set for the 11th June, as Gilmour knew, and it was then adjourned until the 16th, because Mr. Tiffany, his legal adviser—whether counsel for the trial or not—could not be present. There was no valid excuse for his not being represented when the case actually came on for hearing, if he wanted to be.

Still, if I had power to quash the conviction, I would do so, not because I should then be doing complete justice, but because, in my opinion, it would be a nearer approach to justice than a fine of $500. Leaving out the suggestion of a previous conviction—and, in my opinion, it clearly was not left out in

fixing this penalty—I can see no reason why the fine should not be reasonably close to the minimum. There is no evidence distinguishing it from other cases of violation to justify the magistrates in saying that "Gilmour has flagrantly defied the law." Mr. Cartwright states that Angus McDonald, the inspector, is an exceptionally good officer. That may be, but the evidence he gave as to a previous conviction was unfair and should not have been given. The same is true as to the last sentence of Grant's evidence. There is no doubt that this had an effect upon the magistrates, and they in effect deal with the matter as a second offence. But it is a question for the administration, not for me, to deal with. McDonald is their officer, and if, inadvertently, he has been the means of causing too heavy a penalty to be inflicted, the Department can mitigate this. I sincerely trust the Department will give the matter consideration.

The motion is dismissed with costs.

KELLY, J. SEPTEMBER 12TH, 1913.

ITALIAN MOSAIC AND MARBLE CO v. VOKES.

Contract—Work and Labour—Extras — Evidence — Specifications—Knowledge of—Sums Due under Contract—Payment—Condition Precedent—Architect's Certificate—Premature Action—Costs.

Action to recover a sum of money alleged to be due for work done and material supplied by the plaintiffs to the defendants under a contract.

George Wilkie, for the plaintiffs.
Glyn Osler, for the defendants.

KELLY, J.:—The defendants were the contractors for the tile and mosaic work in the erection of the building known as the Toronto General Trusts Corporation building, in Toronto. The plaintiffs were the sub-contractors under the defendants for the terrazzo and mosaic work. The chief item in dispute is a charge of $612.54 for marble and mosaic flooring on the second floor of the building.

The plaintiffs, on the 27th October, 1909, tendered to the architects, Miller & Co., for ceramic floor and setting tile wainscotting, and also, by separate offer, for furnishing and laying terrazzo floors—Roman marble mosaic, and furnishing and setting window sills. On the 10th November, 1909, they sent in another tender for furnishing and laying complete terrazzo floor, terrazzo base, marble mosaics, and setting window sills, according to plans, specifications, and designs; and therein they cancelled their previous proposal. These tenders were not accepted, and the contract above referred to was let to the defendants. The defendants and the architects were desirous of having the mosaic work done by the plaintiffs, and accordingly, on the 15th March, 1911, the plaintiffs submitted to the defendants a written tender as follows: "In reference to terrazzo and mosaic work for the Toronto General Trusts Corporation building, we are pleased to give you our price for all the work according to specifications and the plans as they were originally when we figured on this job;" and then they named the price. Prior to this tender, the plaintiffs' manager accompanied Mr. Vokes to the architects' office and there examined the plans and read the specifications.

The defendants, on the 29th March, 1911, accepted the plaintiffs' tender "for your supplying and applying, according to plans and specifications and details as shewn you, and to the satisfaction of the architects, all marble mosaic and terrazzo work as contained in such plans and specifications," etc.

No exception was taken to the terms of this acceptance, nor was any question raised as to the tender not including the "public space" on the second floor, until several months later, when the defendants called upon the plaintiffs to do that part of the work. The plaintiffs set up that their tender did not include this particular work; they proceeded to do it, however, expressly reserving their right to claim payment for it as extra work. The misunderstanding in relation thereto arose largely from the fact that the architects' working plans, as originally drawn, designated the "public space" on the second floor as "ceramic mosaic flooring." After the preparation and colouring of the plans, the word "ceramic" was struck out. The plaintiffs contend that this change was not made until after they had prepared and submitted their tenders in October and November, 1909; they place reliance upon the form of their tender of the 15th March, 1911, where it was said that the

work was to be "according to specifications and plans as they were when we originally figured on this job;" and they argue that this, taken with what they maintain was the condition of the plans when they tendered in October, 1909, excludes the disputed work from their last tender.

According to the evidence of the architect Miller, the plans were prepared prior to October, 1909, the specifications for the mosaic and tile work were engrossed and in his hands as early as the 13th October, 1909, and immediately afterwards he gave instructions to have them coloured; and he says that they were coloured, and the word "ceramic" was struck out before the tenders were called for. There is other evidence also upon this point, and the conclusion on the whole evidence is reasonable, that this change was made prior to the time that the plaintiffs submitted their first tender to the architects.

On other grounds as well, I think that the plaintiffs' claim as to this item is not sustainable. Their tender of the 27th October, 1909, to the architects, was made "according to plans and specifications furnished by you;" their next tender on the 10th November, 1909, was "according to plans, specifications, and designs." Though they say that they had not examined or seen the specifications until after that time, the form of their tenders recognised the existence of specifications, and they must be taken to have tendered and to have intended to contract with reference thereto and subject to their terms and conditions. Moreover, it is shewn beyond doubt that the specifications for this very work were in the hands of the architects before the tenders were submitted.

The specifications relating to the floor and wall tiling contain the following: "2nd floor plan: The public space . . . will be laid with marble mosaic tile with borders approved (see coloured plan shewing floor space to be tiled)."

The general specifications provide that "the specifications and drawings are intended to co-operate, so that any work or works exhibited on the drawings and not mentioned in the specifications, or mentioned in the specifications and not exhibited on the drawings, are to be executed as if they were mentioned in the specifications and set forth on the drawings to the true intent and meaning of the specifications and drawings without any extra charge whatsoever."

If the plaintiffs, knowing as they must have known of the existence of the specifications, neglected to examine them and

tendered with reference to them, they cannot expect to be relieved from the terms which were thus imposed upon those tendering. They took their chances and must pay the penalty of their neglect. On the whole evidence, I think that they fail as to this item.

This action was commenced on the 7th June, 1912. On the 24th January, 1913, the defendants made a payment to the plaintiffs of a sum which, they contend, was in full of their liability. This payment, on the plaintiffs' own admission, is in full of the remaining part of their claim, except as to two items—one $15 and the other $20. The former of these is a charge for some tiling work ordered by the defendants, to be delivered on request, and which the plaintiffs prepared and laid out in their own premises to await instructions for delivery. Delivery was not asked for, the work not having been required or used in the building; and the plaintiffs charged this sum, which was only a part of the price agreed to be paid for the work when completed. The charge is not unreasonable for the work done, and it should be allowed to the plaintiffs.

The $20 claimed is an amount which the defendants deducted when making payment to the plaintiffs, on the ground that the work it represented was included in the plaintiffs' contract and was performed not by them but by the defendants. I am not satisfied, on the evidence, that the contract included this work, and I think that it should not have been charged to the plaintiffs. They are entitled to payment of the $20.

As to the costs of action, the contract between the parties provided that payments thereon should be made at the same rate and times as those made by the architect (for the proprietors) to the defendants. These terms called for the rendering of an account and the obtaining of the architects' progress certificate that the payment was properly due. The evidence does not establish that this requirement had been complied with at the time the action was commenced.

Looking at all the terms of the contract, my opinion is, that the action was brought prematurely. In that view, the defendants, and not the plaintiffs, are entitled to the costs of the action.

LENNOX, J. SEPTEMBER 15TH, 1913.

BROWN v. THOMPSON.

Charge on Land—Evidence to Establish — Laches — Statute of Limitations—Power of Attorney—Will.

Action for a declaration of right and to enforce a charge on land.

B. N. Davis, for the plaintiff.
G. H. Pettit, for the defendant.

LENNOX, J.:—The plaintiff instituted this action in February last, to have it declared that he is entitled to $333.86 of principal money and $840.42 for interest—the principal money purporting to be secured to Robert Laurie and Isabella Bald under a power of attorney executed in their favour by Caroline Thompson more than 40 years ago, and to have it also declared that this principal money with its 40 years' interest is still a lien and charge upon the land mentioned in the power of attorney. This instrument gave the attorneys or agents therein mentioned power to realise the $333.86 to which they were entitled, out of the rents of certain lands; and, whether it constituted a lien upon the land or not, it was registered against it. The plaintiff asserts that Isabella Bald bequeathed this claim to him, but I have not found such a bequest in the will. She bequeathed him $1,000 to be paid when he erected a monument at the grave of her grandfather, but this he has not done. If he became entitled to this money at all, his benefactress is dead for many years, and he knew within 30 days of her death of the provisions of her will affecting him.

The defendants set up laches, the Statute of Limitations, and other defences. The Court has, in the meantime, while the plaintiff was sleeping upon his rights, if any he had, made a decree vesting the property in a certain claimant, and it has been dealt with by voluntary conveyance on several occasions. Extensive and permanent improvements have been made from time to time. The plaintiff demanded payment in 1876, but never again until he demanded it in this action.

The plaintiff understood that the money had been collected by certain executors who are dead, and he does not know now whether it was in fact paid to them or not. If the property had

been charged in the most formal and specific way, as, for instance, by a mortgage, it would have been relieved of the charge and the mortgage would have been outlawed long ago. Can the informal instrument, now in question, have a longer life?

This is a novel action, and the onus is upon the solicitor and counsel who present such a claim, rather than upon the Court, to discover how it is to be supported. I have not discovered, and counsel has not pointed out, any valid reason for a judgment for the plaintiff.

There will be judgment dismissing the action with costs.

LENNOX, J. SEPTEMBER 15TH, 1913.

RAMSAY v. TORONTO R.W. CO.

Street Railway—Injury to and Death of Person Crossing Track —Negligence—Contributory Negligence—Findings of Jury —Nonsuit—Costs.

Action by the administrator of the estate of Jean Spence to recover damages for her death by reason of the negligence of the defendants, as alleged.

The action was tried before LENNOX, J., with a jury, at Toronto.

J. P. MacGregor, for the plaintiff.

D. L. McCarthy, K.C., T. Herbert Lennox, K.C., and Keith Lennox, for the defendants.

LENNOX, J.:—The plaintiff sues as administrator of Jean Spence, who was killed on the evening of the 11th December, 1911, by coming in contact with one of the defendants' cars, as she and her sister, Lizzie Armstrong, were crossing Bathurst street, at a point between St. Patrick and Robinson streets, in the city of Toronto.

Lizzie Armstrong was the only witness called to testify as to what occurred immediately before and at the time of the casualty. The other testimony was, in the main, theoretic and speculative, and, more often than otherwise, was based upon assumed or unverified premises. Subject to one or two notable exceptions, the jury accepted the evidence of Lizzie Armstrong; and I can

find no good reason why her account of what happened should not be entirely accurate and decide the issues between the plaintiff and defendants.

At the close of the evidence, the defendants' counsel moved for a nonsuit. I refused to withdraw the case from the jury, reserving leave to the defendants to renew the motion for a nonsuit. The defendants then decided not to call evidence, and a number of questions were submitted to the jury.

I am asked to direct that judgment be entered for the plaintiff for $920, upon the following questions and answers:—

1. Was the death of Jean Spence caused by the negligence of the defendants? A. Yes.

2. If you find that the defendants' negligence caused the death, in what did their negligence consist? A. We consider that the car was going at an excessive speed, from the fact of the distance the body was thrown, and also the distance the car travelled before it was stopped, and that the motorman gave no warning when approaching the girls.

3. Did Jean Spence, after stepping from the sidewalk, take any precautions for her safety? A. (as first brought in): We don't know.

The jury, having been instructed to retire and further consider this question and some other questions then unanswered, struck out the answer "We don't know" and said:—

3. From the fact that the witness was in advance of deceased and the night was dark, we don't think that the witness was in a position to know whether the deceased took any precautions for her safety or not.

4. If she did, what precautions did she take? A. Answered by No. 3.

5. If Jean Spence, or her sister, had been on the alert or keeping a look-out for cars and vehicles as they crossed the street, would the accident, in your opinion, have occurred? A. It might have.

6. If, when the whistle was blown, Jean Spence had continued on her course south-westerly across the street, would the accident, in your opinion, have occurred? A. Yes.

7. At the time the whistle was blown, had Jean Spence and her sister crossed over the western track? A. Jean Spence was within the western rail of the western track. Lizzie Armstrong was just clear of the western track.

8. If not, where were they, specifying the position of each when the whistle was blown? A. Answered by No. 7.

9. Could Jean Spence, by the exercise of reasonable care, have avoided the accident? A. We consider that Jean Spence, by looking up and down the street before leaving the sidewalk and seeing no car, exercised reasonable care.

10. If your answer is "Yes," in what did her want of care consist? A. Answered by No. 9.

The damages were assessed at $920 and apportioned. It was with great difficulty and only after the jury had been sent back twice, I think, that answers to some of the questions were obtained.

I have come to the conclusion that, upon these answers, I ought not to direct judgment to be entered either for the plaintiff or the defendants. I am not satisfied with the action of the jury; but, subject to the question of nonsuit later, this would not, of course, justify me in refusing to direct judgment if the answers are sufficient to dispose of all issues raised. Equally of course, that, in my opinion, the jury have reached erroneous conclusions, is not a justification for refusing to give effect to their answers. But the evidence, the Judge's charge, and perhaps even the argument of counsel, is of consequence in ascertaining what the answers of the jury really mean: Rowan v. Toronto R.W. Co., 29 S.C.R. 717, at pp. 731-4. . . .

Here there was no conflict of evidence, and, of necessity, the question "Could the deceased by the exercise of reasonable care, notwithstanding the negligence of the defendants, have avoided the accident?" and the other questions as to the conduct of the deceased, are practically the only matters the jury had to consider and decide Leaving out of sight, then, other questions which have not been disposed of as explicitly as I think they ought to be, have the defendants a right to say that a full and fair trial of this action involves a direct, explicit, and non-argumentative answer to the question of contributory negligence? I think that they have a right to take this position; and (reading some others of the answers in the light of the evidence, I cannot help thinking that the jury were not so much unable as unwilling to answer this question. It is quite a different question from the one left unanswered in Faulkner v. Clifford, 17 P.R. 363, but the principle is the same. An answer in the affirmative here, as an answer in the affirmative there, would render the other answers favourable to the plaintiff of no effect. . . .

For effect of failure to answer material questions, see also Bois v. Midland R.W. Co., 39 N.S.R. 242.

But there still remains the question, have they implicitly answered, or eliminated the necessity for answering, this question, No. 9, by other answers, as was said to be the effect in Rowan v. Toronto R.W. Co.? I think not, but I cannot say that my mind is entirely free from doubt. It certainly was never intended, or thought of, that an affirmative answer to question No. 1 would be taken as obviating the necessity of answering No. 9, much less of being the equivalent of a negative to this question, yet part of the reasoning in the judgments in that case could, with some force, be applied here. The difference, however, in the issues presented, in the way the case was left to the jury, and in the questions themselves, lead me to think that to hold that question number 9 is in effect answered or dispensed with, would be to go beyond the decision in the Rowan case, and that decision goes fully as far as I desire to go. . . .

[Reference to Dublin Wicklow and Wexford R.W. Co. v. Slattery (1878), 3 App. Cas. at pp. 1173-4; Moore v. Grand Trunk R.W. Co., 5 O.W.R. 211.]

I think, too, that the defendants had a right to an answer to the 5th question. See also Coulter v. Garrett, 14 A.R. 685. I will not direct judgment to be entered for the plaintiff.

The defendants renew their application for a nonsuit. I am now of opinion that I should not have allowed the case to go to the jury. Amongst other things, it was strenuously argued at the trial, and is now argued again, that there is no evidence of negligence upon the part of the defendants. I have not changed my mind upon this branch of the case. If there are any circumstances which could be counted for negligence against the defendants, and there is a primâ facie case in other respects, then these circumstances must be left for the consideration of the jury. I then thought and still think that there were circumstances deposed to, and theories advanced by the experts from which, although falling far short of what would satisfy my mind, a jury might infer negligence; and, therefore, matters proper to be weighed and pronounced upon by the jury. But, in the circumstances of this case, it was not, necessarily, enough that the plaintiff should give evidence of the defendants' negligence; he must shew that the deceased was acting reasonably, or rather he must at least close his case without disclosing that the deceased was the author of her own disaster.

If, in any case, the only evidence for the plaintiff is that the

person injured desired to be injured, or, recklessly indifferent as to whether he is injured or not, knowingly puts himself in the way of the danger, there can, of course, be no recovery, although the defendant is shewn to be negligent as well.

As I said, Lizzie Armstrong is the only witness as to the facts, and she discloses not only that she and her sister knew of the danger, and that it was increased by the absence of street lighting at that place, but also such a careless and negligent use of the highway and such an absence of reasonable and ordinary care, or any care, that, in my opinion, they must be held to have brought this trouble upon themselves. Instead of crossing at a regular crossing or at right angles to the sidewalk, and so being in danger only while they crossed over two sections of the street of the width of a car, and must almost inevitably see a car going either north or south, they turn their backs upon the southern-bound cars, and, without ever looking after leaving the sidewalk, take a course diagonally from the park gate to Robinson street, shutting out the chance of even seeing the cars on the track where the injury occurred, and exposing themselves to contact with vehicles of all kinds for a distance of possibly 20 rods. . . .

[Quotation from the testimony of Lizzie Armstrong.]

It is suggested that Lizzie Armstrong might not know of all her sister did. It is enough to say that she is the witness upon whose evidence the plaintiff depends, and she professed to know. Further, if the deceased had looked, she would, as Lizzie says, have seen the car, and would, of course, have given the alarm. . . .

[Reference to Dublin Wicklow and Wexford R.W. Co. v. Slattery, 3 App. Cas. at pp. 1156, 1194, 1216; Skelton v. London and North Western R.W. Co., L.R. 2 C.P. 631; Rocke v. Kerrow, 24 Q.B.D. 463; and Myers v. Toronto R.W. Co., tried by Mr. Justice Middleton without a jury in April last.]

The defendants should not ask for costs; and, if they should not ask for them, it is some reason why I should not give them. I direct that a judgment of nonsuit be entered without costs to either party.

HODGINS, J.A., IN CHAMBERS. SEPTEMBER 15TH, 1913.

RE STRONG AND CAMPBELLFORD LAKE ONTARIO AND WESTERN R.W. CO.
RE STRONG AND ONTARIO AND QUEBEC R.W. CO.

Railway—Expropriation of Land—Application for Warrant for Immediate Possession—Defective Material—Amendment—Dismissal of Application—Costs.

Motion by the railway companies, under the Dominion Railway Act, R.S.C. 1906 ch. 37, sec. 217, for the issue of a warrant for immediate possession of land.

C. W. Livingston, for the applicants.
H. M. Mowat, K.C., for the land-owner.

HODGINS, J.A.:—The notice of this motion and the notice of expropriation are given on behalf of the Ontario and Quebec Railway Company; while the affidavit on which the motion is founded is intituled "In the matter of the Campbellford Lake Ontario and Western Railway Company."

In the notice of expropriation the land is stated to be required by the Ontario and Quebec Railway Company for the purposes of their railway; and in the affidavit in support it is sworn to be required to be taken for the Campbellford Lake Ontario and Western Railway Company.

In answer to the motion it is shewn that no plan has been filed in the registry office of the county of Lanark indicating that the land in question is required for the purposes of the Ontario and Quebec Railway Company. The affidavits in answer do not expressly negative the filing of a plan by the Campbellford Lake Ontario and Western Railway Company; and there is a general statement in the affidavit of the engineeer of construction of that railway that all statutory and other requirements to entitle that company to expropriate the lands in question have been complied with.

The material is defective, whether one railway company or the other is the applicant—the Ontario and Quebec Railway company having nothing to support their motion for a warrant for lands required for their company, while the other railway company have given no notice for a warrant for possession of lands required in their construction work.

The real dispute is, whether the land in question is for additional land for a railway already in operation—*i.e.*, the Ontario and Quebec Railway Company—as to which sec. 178 would seem to apply; or whether it is required for the right of way of the Campbellford Lake Ontario and Western Railway, now under construction. It is said that the amount to be paid into Court will be considerably increased if the land to be taken will, in connection with the Ontario and Quebec Railway lands, form a railway yard.

I do not see that I can amend the proceedings; and must dismiss the application; the costs of which will be—following the order of the learned Chancellor in Re Kingston and Pembroke R.W. Co. and Murphy, 11 P.R. 304—to the land-owner in any event of the arbitration.

RE THERRIAULT AND TOWN OF COCHRANE—LENNOX, J.—SEPT. 3.

Municipal Corporation — By-law — Tax Rate — Separate Schools—Assessment Act, sec. 188—*Separate Schools Act, sec.* 55(5).]—Motion by Louis P. Therriault, a ratepayer of the Town of Cochrane, for an order quashing that part of by-law No. 81, passed by the town council on the 19th June, 1913, fixing the tax rate on property liable for separate school purposes, on the ground of excess. LENNOX, J., said that the council acted in good faith. They had pursued the same system in regard to the public and separate schools; and the allegation was made that, judged by the experience of other assessments, it would take the 23 mills to produce the sum requisitioned. It was barely possible that the council had not the strict legal power to do what they had done; but the learned Judge inclined to think otherwise; and, at all events, no substantial wrong would be done by allowing the matter to stand as it was. All the money realised would be paid to the school board, and would enable them to demand less next year. The incidence of the tax varied from year to year; but this was a little matter as compared with the inconvenience of quashing the part of the by-law in question. But the applicant was acting in a public capacity (as representing the Separate School Board) and, no doubt, in good faith too. It could not be said that the law was clear. The case of Grier v. St. Vincent, 13 Gr. 512, was no

guide to what was here in question. It was not quite easy to reconcile sub-sec. 5 of sec. 55 of the Separate Schools Act and sec. 188 of the Assessment Act, particularly since the exception in the new section (188) was not confined to taxes on personal property as formerly. Motion dismissed without costs. F. Day, for the applicant. S. Alfred Jones, K.C., for the town corporation.

RE BARTHELMES AND CHERRY—LEITCH, J.—SEPT. 5.

Vendor and Purchaser—Objection to Title—Right of Way—Conveyance.]—Motion by the purchaser for an order under the Vendors and Purchasers Act declaring that the purchaser's objection to the title of the vendor to certain land, the subject of a contract of sale and purchase, is a valid one. The learned Judge said that the only outstanding difficulty was a certain right of way, and that was cured by a conveyance made by one Cranfield to Barthelmes, the vendor. A. Singer, for the purchaser. G. Ritchie, for the vendor.

HUTCHINSON CO. v. MCGOWAN—LENNOX, J.—SEPT. 15.

Contract—Purchase of Stock of Goods—Failure of Purchaser to Pay—Damages—Loss on Resale.]—Action for damages for breach of a contract for the purchase by the defendant from the plaintiffs of a stock of goods in a store in Alliston. The learned Judge finds that the defendant was bound to carry out the contract and should have paid the plaintiffs for the goods about the 20th April, 1912. The defendant was not induced to enter into the contract by any of the statements that were made by or on behalf of the plaintiffs; he was a business man, he saw the stock, and judged for himself. He agreed to pay 60 cents on the dollar per invoice prices. The value of the goods on hand when stock was taken per invoice was found to be $7,615.94; and the defendant, therefore, should have paid $4,569.57. The plaintiffs were compelled to resell, and upon the resale they realised $2,588.57, leaving a balance to be paid of $1,981. They were not entitled to charge the defendant with caretaking, stocktaking, advertising, and commission on the resale. The defendant should pay the difference between the amount he was to pay and the sum realised upon the resale. Judgment for the plaintiffs for $1,981 with interest from the 24th May, 1912, and costs. W. G. Fisher, for the plaintiffs. W. S. Morden, K.C., for the defendant.

ST. CLAIR v. STAIR—KELLY, J., IN CHAMBERS—SEPT. 18.

Appeal—Leave to Appeal to Appellate Division from Order of Judge in Chambers—Discovery—Affidavit on Production.]—Application by the plaintiff for leave to appeal from the order of FALCONBRIDGE, C.J.K.B., in Chambers, 4 O.W.N. 1580, allowing an appeal by the defendants, the "Jack Canuck" Publishing Company Limited from an order of the Master in Chambers, 4 O.W.N. 1437, requiring the defendant company to file a further and better affidavit on production. To support his application, the plaintiff relies on two grounds: (1) that the claim of privilege for the documents in question was defective and insufficient in law; and (2) that the dates of the reports (the documents referred to) and the names of the authors should have been given. KELLY, J., said that the application was not sustainable on the latter ground. In the schedule to the affidavit on production, the documents were described as "a quantity of reports fastened together, numbered 1 to 77 inclusive, initialled by this defendant." This fell clearly within the authority of the three cases cited in the judgment of the learned Chief Justice of the King's Bench, namely: Taylor v. Batten (1878), 4 Q.B.D. 85; Bewicke v. Graham (1881), 7 Q.B.D. 400; and Budden v. Wilkinson, [1893] 2 Q.B. 432. In the last-named of these cases, where the description of the documents was to the same effect as used here, the Court adopted the principle of decision laid down in Taylor v. Batten, "that the object of the affidavit is to enable the Court to make an order for the production of the documents mentioned in it, if the Court think fit so to do, and that a description of the documents which enables production, if ordered, to be enforced, is sufficient," and held the affidavit in that respect to be sufficient. Following these cases, the reports mentioned in Rogers's affidavit were sufficiently identified.—On the other ground, however, the learned Judge thought it desirable that the leave asked for should be granted. The plaintiff relied upon Swaisland v. Grand Trunk R.W. Co., 3 O.W.N. 960, where Mr. Justice Middleton expressed the view that the claim for privilege should have been more clearly and specifically stated, and that the affidavit should have stated that the reports there referred to were provided solely for the purpose of being used by the defendants' solicitors in the litigation, etc. The rule requiring the use of the word "solely" was not of universal application; and, while it might be argued that the present case was distinguishable from Swaisland v. Grand

Trunk R.W. Co., that decision, coupled with the fact that the learned Chief Justice of the King's Bench, from whose order it was sought to bring the appeal, was reported to have expressed some diffidence in reaching his conclusion, gave ample ground for granting the leave. Leave granted. Costs of the application to be disposed of on the appeal. S. H. Bradford, K.C., for the plaintiff. R. McKay, K.C., for the defendants the "Jack Canuck" Publishing Company.

LECKIE v. MARSHALL—KELLY, J.—SEPT. 18.

Judicial Sale—Realisation of Vendor's Lien on Mining Properties—Abortive Sale—Resale—Reserved Bid—Conduct of Sale—Liability for Deficiency of Purchase-money.]—Motion by the plaintiffs for an order for a resale of the mining properties in question in the action, and for directions as to the conduct of the sale, and for judgment against Sullivan and Alrich for payment of the deficiency, if any, which may arise upon the resale. KELLY, J., said that the parties all agreed that the property should again be offered for sale, and that the order or direction to that effect made by the Master in Ordinary on the 28th July, 1913, and the advertisement in pursuance thereof for sale on the 1st October, 1913, should be confirmed, except as to the provision that the sale should be subject to a reserved bid, to which term the plaintiffs took exception. The necessity for a resale arose because the person who, at the sale by the Master on the 8th July, 1913, was declared the purchaser, made default in payment of the required deposit and in complying with the other terms of the sale. Following upon so much delay in bringing about the sale, the learned Judge thought it proper that the order or direction of the Master for another sale, as well as all proceedings in pursuance thereof, should be confirmed and the sale proceeded with accordingly. This included the term that the sale shall be subject to a reserved bid. The learned Judge could not agree with the plaintiffs' contention that, owing to what took place at the attempted sale on the 8th July, the coming sale should not be made subject to such reserve. He could not disregard the views held by the Court of Appeal in the judgment of the 6th March, 1913 (4 O.W.N. 913). The fact that the reserved bid fixed by the Master for the sale on the

8th July had been divulged, did not interfere with that view. The Master should fix a reserved bid for the coming sale; whether the amount thereof would be the same as at the sale on the 8th July, or more, or less, was for him to determine, on the facts before him and the knowledge he possessed of the matter. That part of the application which asked judgment against Sullivan and Alrich for any deficiency at the coming sale, should be left to be disposed of after the sale on the 1st October, and after notice to them of the result thereof and of the application to hold them liable for any deficiency; such notice might, without further order, be served upon them in the same manner as was directed for the service of notice of the present application. The vendors' costs of this application to be allowed as part of the costs of the sale. James Bicknell, K.C., for the plaintiffs. George Bell, K.C., for the defendants William Marshall and Gray's Siding Development Limited. J. A. Worrell, K.C., for the Royal Trust Company.