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HIGH COURT OF JUSTICE.

RIDDELL, J.

FEBRUARY 3RD, 1911.

REX v. TORONTO R.W. CO.

Criminal Law—Indictment of Street Railway Company for Nuisance—Verdict of "Guilty" on one Count—Disagreement of Jury on Remaining Counts—Postponement of New Trial on these Counts—Terms—Undertakings—Exclusive Jurisdiction of Ontario Railway and Municipal Board—Reservation of Case for Court of Appeal—Deferring of Sentence.

An application by the defendants to postpone the trial of those counts in an indictment for common nuisance against the defendants which the jury failed to pass upon at the trial.

H. L. Drayton, K.C., for the Crown.

W. Nesbitt, K.C., and H. H. Dewart, K.C., for the defendants.

RIDDELL, J.:—The indictment contains six counts. Of these, the first deals with the appliances for protection of life, etc., of persons in the street generally; the second and third with the death of a lad, Goldenberg; the fourth with "Y"-ing or moving reversely; the counts 6 and 6A with overcrowding. The jury found a verdict of guilty on the count charging overcrowding to such an extent as to endanger the property and health of the public; but failed to agree upon that charging overcrowding to such an extent as to endanger health, etc.—why or on what ground or principle I confess my inability to understand—and also failed to agree upon the first four counts. This disagreement on the first four counts is quite intelligible, as the evidence called for the defence indicated that the defendants were not behind, but actually in advance of, any other on this continent in life-saving appliances—while it was sworn by men of great experience in street railway operation that the means suggested

for additional protection when reversing, etc., would increase rather than diminish the danger. Any juryman accepting this evidence would be wholly justified in refusing to join with the majority in a verdict of guilty.

Upon the jury, after many hours of consideration, being found in the condition mentioned, I took the verdict of "guilty" on count 6A, and discharged the jury. Considering the various counts each as a separate indictment under sec. 857 (1) of the Criminal Code, I ordered the remaining counts to be tried upon Monday the 6th February, availing myself of my powers under secs. 858 and 960 of the Code.

An application is now made for a postponement of the trial, based in part upon an affidavit that it would be impossible to obtain the necessary witnesses, and upon the ground of the inconvenience to which the defendants would be put by trial next week.

I may say at once that I am not in the least influenced by this affidavit—there is nothing to shew that the witnesses would be more available at any other time than they would be next week, or that the defendants would be more inconvenienced (even if the latter element could be considered at all). I am firmly of the opinion, formed from many years' observation and experience, that criminal law should be administered as expeditiously as civil law, if not more so; and I adhere to what is said in Rex v. Swyryda, 13 O.W.R. 468, at p. 475. As was said in Re Davis and Village of Beamsville, 2 O.W.N. at p. 425: "It is, in my view, as truly, though perhaps not so great, an injustice to delay as to refuse justice. The 'law's delays' are become a proverb, and they should be made as few and as short as possible. Magna Carta still stands as the rule for the King and the King's Justice—'Nulli vendemus, nulli negabimus aut differemus, rectum aut justiciam'—to none will we sell, to none will we deny or delay, right or justice"—and this in criminal as well as in civil cases.

But there is another consideration of very great importance. It was strenuously contended before me at the assizes that the legislature of the province has placed in the Ontario Railway and Municipal Board (by statutes 6 Edw. VII. ch. 31 and amending Acts) the exclusive jurisdiction to determine such matters as are in controversy in this proceeding—and sec. 17 (3) of the original Act of 1906, viz., 6 Edw. VII. ch. 31, is specially referred to: "The Board shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by the special Act or

by the said Act. . . .'' If this contention be entitled to prevail, the whole proceeding in the Criminal Court is ultra vires. I am satisfied that the law is not as contended for by the defendants; but I am asked to state a case for the Court of Appeal upon that point. Counsel for the Crown, recognising its importance, concedes the propriety of such a case being stated—and such a case will be stated without delay. If the decision of the Court of Appeal be adverse to the Crown, no proceedings at all can be taken upon the indictment—and all parties recognise the absurdity of proceedings being taken, at great expenditure of time and money, which may be wholly nugatory.

This course could not have been taken had it not been that a conviction has been obtained upon one count—that conviction, however, will enable all points of law to be raised and finally determined by the Court of Appeal.

In the meantime, I reserve sentence and other proceedings on the conviction already had. It would not be advisable in the public interest to order the defendants forthwith to obey the direction given some years ago by the city engineer, approved by the council, limiting the number of passengers to be carried on each car. The Ontario Railway and Municipal Board, upon whom the legislature have, by the Act of 1910, 10 Edw. VII. ch. 83, sec. 4, imposed the duty of determining whether a street railway company does not run cars enough, have refused to order the defendants to operate more cars, holding that the only remedy for the overcrowding is obtaining more streets. While I am not at all satisfied (upon the evidence at this trial) that more cars may not be operated by a modification of the routes taken so as to avoid the funnels at King and Yonge and at Yonge and College streets, it would be indecorous, to say the least, for me to direct the abatement of the nuisance found to exist by placing more cars on the routes now in existence.

The defendants by their counsel undertake to experiment (in good faith) with a view of increasing the accommodation by modifying the routes, etc., and that is all, I think, that can be asked at the present time, if another undertaking, also given, in taken into consideration, namely, that the defendants will proceed, with all due speed and expedition, with the opening of other lines so as to relieve the congestion. The results of this congestion notoriously, and as proved in evidence, are scandalous and a disgrace to Toronto and to those responsible, whoever they may be.

The city council may have information—and, if not information, the means of obtaining information—shewing some method of rectifying the present discreditable and even indecent condi-

tion of affairs. If the council have or discover any remedy, or if they decide that the limitation already made by the engineer should be enforced, application may be made to me—and I reserve leave to the Crown to apply. Or, if circumstances change in any way, the Crown may apply—or, if the defendants do not proceed with due diligence in opening other lines, etc., etc.

It is a matter of satisfaction that the verdict of "guilty" on the count 6A establishes overcrowding constituting a common nuisance. The fact that the nuisance has only been found by the jury to endanger property and health, and that the division in the jury prevented a finding that it endangered health also, is only a matter of detail; the nuisance has been found; the consequence is not of importance. All that any Court would think of doing, had the conviction been on the count 6 also, can be done under the conviction as found. If the conviction be sustained, it may well be that no further proceedings will be taken on count 6, and a nolle prosequi entered on that count.

As to the first four counts, no harm can arise from delay in trying these; they are all for past defects. The defendants, through their counsel, undertake to make a careful experiment with every device which was suggested at the trial; and to adopt and use such devices as may prove successful.

If this undertaking be carried out—and the mechanical superintendent swore that he had carte blanche to experiment and try anything which occurred to him or of which he was informed, and to adopt everything, no matter what the cost, which was calculated to increase protection for the public—it may be unnecessary to proceed with the first four counts again. In any event, the adjournment of the present trial will not prevent a bill being laid for the operation of the road since the finding of this bill by the grand jury, even if anything before this date is excluded, which I much doubt.

On the whole, with the undertakings mentioned, I think the further trial of this case may be adjourned to the next sitting at Toronto for the trial of criminal cases.

RIDDELL, J. FEBRUARY 3RD, 1911.

*JONES v. TORONTO AND YORK RADIAL R.W. CO.

Street Railway—Injury to Person Crossing Track—Negligence—Excessive Speed—Failure to Give Warning—Causal Negligence—Contributory Negligence—Ultimate Negligence—Findings of Jury.

*To be reported in the Ontario Law Reports.

The new trial of this action directed by order of a Divisional Court, 20 O.L.R. 71, 1 O.W.N. 267, affirmed by the Court of Appeal, 21 O.L.R. 421, 1 O.W.N. 906, took place before RIDDELL, J., and a jury at Toronto.

The questions put to the jury and their answers were as follows:—

1. Was there any negligence on the part of the defendants which caused or helped to cause the collision? A. Yes.

2. If so, what was the negligence? Answer fully. A. We find with the evidence given the car should have been stopped in a shorter distance.

3. Was there any negligence on the part of the plaintiff which caused or helped to cause the collision? A. Yes.

4. If so, what was the negligence? Answer fully. A. He might have exercised a little more care.

5. Notwithstanding the negligence (if any) of the plaintiff, could the defendants by the exercise of reasonable care have prevented the collision? A. Yes.

6. If so, what should they have done which they did not do, or have left undone which they did? Answer fully. A. He should have seen the man sooner and sounded his gong continuously.

7. If the Court should, upon your answers, think the plaintiff entitled to damages, what sum do you assess as damages? A. $1,200.

John MacGregor, for the plaintiff.

C. A. Moss, for the defendants.

RIDDELL, J.:—I do not think that there is any evidence upon which the jury could properly find as they have done as against the defendants; but, assuming that the findings can be supported, it is apparent, I think, that all the acts of negligence found against them were of such a character as that the jury might have found them as primary negligence. Then the contributory negligence found took place at the same time as the negligence of the defendants—it was not followed by any act of negligence on the part of the defendants, either in point of time or logically. The negligence of the plaintiff was a continuing act up to the very instant of the accident, and consequently the accident was caused by concurrent negligence of both parties.

The case, in my view, is covered by Reynolds v. Tilling, 19 Times, L.R. 539, affirmed by the Court of Appeal, 20 Times L.R. 57. . . .

[Quotations from the judgments in that case; and reference to Purdy v. Grand Trunk R.W. Co., Printed Cases in the Court of Appeal for Ontario, N.S., vol. 150, in the library of the Law Society of Upper Canada; Rice v. Toronto R.W. Co., ante, 405, 406.]

The rules as to contributory and "ultimate" negligence are, it seems to me, based upon nothing more than the proposition that the fact that one acts negligently does not disentitle him to demand that others shall not be negligent toward him.

If, for example, one leave a donkey tied in the road, though that act be negligent or careless, others are not entitled to act negligently toward him or his property: Davies v. Mann, 10 M. & W. 548. And the inquiry must, in all cases in which both parties have been negligent, really be, what was the actual cause of the accident, as distinguished from a mere condition sine qua non?

Where "there has been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendants' negligence, he is entitled to recover:" per Parke, B., in Budge v. Grand Trunk R.W. Co., 3 M. & W. 248; Davies v. Mann, 10 M. & W. 548. But, if he could by the exercise of ordinary care have avoided the consequences of the defendants' negligence, he cannot recover. If he continue his causal negligence up to the very moment of the accident, being able to discontinue it, and if the cessation of such negligence would have avoided all the consequences of the defendants' negligence, his negligence is the causal negligence, and he has no right of action. "The mischief is an instantaneous result of the operation of the joint negligence of the defendant and the plaintiff; in such cases no question of ultimate negligence arises:" per Anglin, J., in Brenner v. Toronto R.W. Co., 13 O.L.R. 423, at p. 439.

The action should be dismissed with costs.

TEETZEL, J. FEBRUARY 3RD, 1911.

SHAVER v. CAMBRIDGE AND RUSSELL UNION SCHOOL SECTION.

Public Schools—Religious Instruction Given by Teacher after School-hours—Resolutions of Board of Trustees—Regulations of the Education Department—Construction—Public Schools Act, sec. 8 (1), (2)—Teacher Acting as Representative of Parish Priest—Exclusive Privilege of one Religious Denomination—Right of others to same Privilege.

The plaintiff sued on behalf of himself and all other ratepayers of the defendant union school section for a declaration that certain resolutions passed by the Board of Trustees of the section were invalid, and for an injunction restraining the Board from continuing to have denominational religious instruction, and in particular the prayers and catechism of the Roman Catholic Church, imparted in their school, and restraining the defendant Thibeault, the teacher, from teaching the same in the school building.

F. B. Proctor, for the plaintiff.
N. A. Belcourt, K.C., for the defendants.

TEETZEL, J.:—Upon the school-register for 1910 there were slightly over one hundred pupils, and all but eight or nine of them professed the Roman Catholic faith.

Prior to April, 1910, the defendant Thibeault had for some time adopted the practice of opening and closing the school by reading the Lord's prayer and two prayers or invocations used in the Roman Catholic Church services, and also, before closing the school in the afternoon, taught the Roman Catholic catechism to the pupils of that faith.

Some complaint having been made and a resolution having been passed on the 20th April, 1910, by the trustees, that the school should be managed according to the regulations and the Public Schools Act, the teacher discontinued all religious instruction or services, except the reading of the Lord's prayer at the opening and closing of school.

On the 5th July, 1910, the trustees passed a resolution in these words: "That the teachers of the school department be allowed to teach catechism to their pupils according to the desire of their parents for half an hour in the afternoon during the class every day." This resolution, being clearly in violation of the Public Schools Act and the regulations of the Education Department, was repealed at a special meeting of the Board on the 22nd August, 1910; and the repealing resolution provides that "the teaching of catechism can be allowed only if the schoolhouse is closed at half-past three o'clock statuted by resolution to shorten the school hours of teaching." At the same meeting a resolution was passed declaring that "the school will be closed every day at half-past three o'clock to allow the teachers to teach catechism to their pupils who desire to be instructed in their faith and religious principles."

Since these resolutions the school has been opened at nine

o'clock and closed at half-past three, the Lord's prayer only being read at the opening and closing. At the closing the Protestant children are allowed to retire, and the Roman Catholic children are detained for instruction in the Roman Catholic catechism by the defendant Thibeault, who has the authority of the Roman Catholic parish priest to give religious instruction to the pupils of that faith.

By sec. 4 of the Education Department Act, 1 Edw. VII. ch. 38, the Education Department was given power, inter alia, to make regulations for the government of public schools, and, pursuant thereto, in August, 1904, the Department approved and issued a number of regulations, in one of which (number 15) the hours of study are provided for as follows:—

"15. Unless otherwise directed by the trustees, the pupils attending every public school shall assemble for study at nine o'clock in the forenoon, and shall be dismissed not later than four o'clock in the afternoon. One hour at least shall be allowed for recreation at mid-day, and ten minutes during the forenoon and afternoon terms, but in no case shall the hours of study be less than five hours per day, including the recess in the forenoon and afternoon, provided always that the trustees may reduce the hours of study for pupils in the first and second forms."

I think it clear from this regulation that the trustees are authorised to change the hours of opening or closing the school, provided that, after making allowance for one hour recreation at mid-day, the hours of study are not made less than five hours per day, including the recess in the forenoon and afternoon.

The effect of the resolution in this case, that the school shall close at half-past three, instead of four o'clock, is, therefore, not in violation of the regulation, as there remain five and one-half hours for study each day, including the two recesses.

The remaining and principal question for determination is, whether the resolutions of the 22nd August, or either of them, violate the Public Schools Act or the regulations in reference to religious instruction in public schools.

Section 8 of the Public Schools Act, 9 Edw. VII. ch. 84, provides: "8 (1). No pupil in a public school shall be required to read or study in or from any religious book or to join in any exercise of devotion or religion objected to by his parent or guardian. (2) Subject to the regulations, pupils shall be allowed to receive such religious instruction as their parents or guardians desire."

In the regulations of the Department No. 100 provides: "100. The clergy of any denomination, or their authorised representative, shall have the right to give religious instruction to the pupils of their own church, in each school-house, at least once a week, after the hour of closing the school in the afternoon; and, if the clergy of more than one denomination apply to give religious instruction in the same school-house, the Board of Trustees shall decide on what day of the week the school-house shall be at the disposal of the clergymen of each denomination, at the time above stated. But it shall be lawful for the Board of Trustees to allow a clergyman of any denomination, or his authorised representative, to give religious instruction to the pupils of his own church, provided it be not during the regular hours of a school. Emblems of a denominational character shall not be exhibited in a public school during regular school hours."

It is plain from the resolution, in the light of regulations 97, 98, and 99, that, subject to the duty of the teachers to open and close school with the Lord's prayer and the reading of portions of the Scriptures, no teacher has the right to give religious instruction to the pupils, unless he is the authorised representative of the clergy of some denomination, and then only after the hour of closing, and that in no case have the trustees the right to require or authorise the teacher, as such, to give religious instruction either during or after school-hours.

The teacher in this case had the authority of a clergyman of the Roman Catholic Church, as his representative, to give religious instruction to the pupils of that faith.

The resolutions in this case, being expressed to "allow the teachers to teach the catechism," cannot, I think, be construed as directing or instructing them to do so, but should be construed as enabling them to do so at the close of the school at half-past three, if authorised by the clergy, as required by the regulations. In other words, I think that the resolutions should be read in the light of the regulations, and, in the absence of express language to indicate such an intention, they should not be construed as conflicting with the regulations, but should be construed as enabling a teacher, qualified as aforesaid, to carry out their provisions.

Mr. Proctor's principal argument against the resolutions was, that, as the privilege is wide enough to permit religious instruction to be given in the Roman Catholic faith *every* school-day after closing, all other denominations are thereby excluded from the privilege.

While it is true that no provision is made for a clergyman or the representative of a clergyman of any other denomination giving religious instruction to any of the pupils of his faith, and that, therefore, the resolutions, as they stand at present, give the right to the representatives of the Roman Catholic Church only, there is nothing to prevent applications by the clergy of other denominations being made for the privilege, and under regulation 100 it would be the duty of the Board of Trustees, in such case, to "decide on what day of the week the school-house shall be at the disposal of the clergymen of each denomination after school-hours; and, if application is made, the Board will be compellable to pass the necessary enabling resolution and to amend the present resolutions accordingly.

Mr. Proctor also urged that a teacher in the school could not also be a representative of the clergy of any denomination for the purpose of giving religious instruction after the closing. So long as there is nothing in the Public Schools Act or in the regulations prohibiting a teacher from giving religious instruction after school-hours, when authorised by the clergy of any denomination to which he belongs, I think he is entitled to do so when so authorised. I cannot see on what principle he may not do so. Prima facie no one would be more suitable for that duty than the teacher, assuming that he possesses the necessary religious fitness, which ought to be presumed where he is expressly requested by the clergyman of the parish to perform that duty.

In the result, therefore, the action must be dismissed, but without prejudice to any proceedings which may be taken to compel an amendment of the resolutions and the adoption of other enabling resolutions, upon application of the clergy of any other denomination, for the privilege of giving religious instruction to the pupils of their faith after school-hours.

In the circumstances, there will be no costs to either party.

DIVISIONAL COURT. FEBRUARY 3RD, 1911.

BREEN v. CITY OF TORONTO.

Highway—Obstruction or Nonrepair—Injury to Pedestrian—Negligence of Municipal Corporation—Boulevard Forming Part of City Street—By-law Prohibiting Use of as Crossing—Foot-path across Boulevard—User by Public—Obstruction—Dangerous Condition—Absence of Warning—Liability.

Appeal by the plaintiff from the judgment of LATCHFORD, J., ante 87, dismissing the action as against the defendants the Corporation of the City of Toronto without costs.

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

J. D. Montgomery, for the plaintiff.

H. L. Drayton, K.C., for the defendants.

MULOCK, C.J.:— . . . The accident in question occurred in Spadina avenue, in the city of Toronto. This avenue, which is a wide street, runs northerly and southerly and is laid out as follows. On the east side is the sidewalk, then comes what the defendants assert is a "boulevard," then a roadway for vehicular traffic, then a second "boulevard," then a reservation for two street railway tracks, then a third "boulevard," then another roadway, then a fourth "boulevard," and, lastly, a sidewalk along the west side of the avenue.

Richmond street extends westerly to the east limit of Spadina avenue, and in line with its southerly limit is a duly established crossing for foot-passengers, which intersects Spadina avenue at right angles. From a point on this crossing where it intersects the first or most easterly "boulevard" is a foot-path running in a diagonal direction north-westerly and leading towards and across the second and third "boulevards" and the intervening railway reservation.

At the time of the accident the defendants the city corporation were making certain repairs, and had taken up a quantity of scoria blocks and temporarily placed them along the easterly edge of the third boulevard, towards which the diagonal path led. There were shade trees growing on this boulevard in the vicinity of these scoria blocks.

On the evening of the 7th September, 1910, the plaintiff was proceeding northerly along the east side of Spadina avenue, and, on reaching the south limit of Richmond street, turned westerly along the regular crossing. The evidence warrants the conclusion that, on his reaching the diagonal foot-path, he proceeded along it until he reached the third boulevard, when he encountered the scoria blocks, and, in consequence of their being in his path-way, met with the accident in question.

The defendants contend that, because of certain municipal legislation, the plaintiff was a trespasser when on the boulevard where the accident happened, and that, therefore, the defendants were not liable, on the authority of Lowery v. Walker, [1909] 2 K.B. 437.

In the view which I take, it is not necessary to determine whether the locus in quo was a "boulevard," within the meaning sought to be assigned to it by the defendants, namely, a place from which the public were excluded.

In Lowery v. Walker, in the Divisional Court and in appeal, it was held that the fact of the defendants' knowledge that the public habitually crossed the defendants' land imposed no duty upon them to take any care for their protection, and that they were not liable to the plaintiff for injury sustained while so trespassing. Following that decision, the learned trial Judge dismissed this action. Since then the decision in Lowery v. Walker has been reversed in the House of Lords, 27 Times L.R. 83.

The facts in this case bring it, I think, within Lowery v. Walker. The foot-path in question was caused by the public making a short diagonal cut across the boulevard between Richmond street and Farley avenue, a street running westerly from Spadina avenue, but lying a short distance north of Richmond street produced. The defendants, by their foreman and servants, scattered blocks of stone along the boulevard in the way of any one following this path, thus creating a trap into which, in the darkness, one might fall and be injured. Whilst some warning lights were placed in the vicinity, none were near enough to disclose the danger of the situation. Further, the shade of the trees helped to shut out the light, and made it more incumbent upon the defendants to adopt such precautions as would make known to any one proceeding along the path the presence of the stones on the boulevard. The work was being carried on by the foreman of the defendants under the direction of their engineer. He was present directing the work and must have seen the path in question. Nevertheless, at the close of the day's work, he permitted these scattered stones to remain in the way of any one taking the path in question. This path having resulted from the habit of the public making the short cut in question, knowledge of its habitual user by the public must be imputed to the defendants. Further, they had such knowledge through their foreman. In these circumstances, the defendants, without notice to the public, made it dangerous for them to continue to use the path. As said by Lord Halsbury in Lowery v. Walker, "People who habitually went by this route were entitled to notice of any probable danger." In the circumstances, the defendants, I think, failed in their duty towards the public by creating, without notice, the dangerous condition which caused the accident in question; and I therefore think that this appeal should be allowed.

The learned trial Judge having assessed the damages at $1,500, judgment should be entered for the plaintiff for that amount, with costs of the action and of this appeal.

BRITTON, J.:—I agree in the result.

SUTHERLAND, J.:—I agree.

MASTER IN CHAMBERS. FEBRUARY 4TH, 1911.

REX EX REL. WARNER v. SKELTON AND WOODS.

Municipal Elections—Quo Warranto Application—Parties—Joinder of Respondents—Grounds of Objection Common to Both—Municipal Act, 1903, *sec.* 225—*Form of Recognisance.*

Motion by the relator, in the nature of a *quo warranto*, to void the election of the two respondents as reeve and councillor respectively of the village of Mimico.

The attack was based on various grounds as against the two respondents; but not on the same grounds in all respects.

On the motion coming on for hearing, J. M. Godfrey, for the respondents, objected that the proceeding was irregular, and asked that the motion should be dismissed.

E. Meek, K.C., for the relator.

THE MASTER:—Mr. Godfrey relied on the construction of sec. 225 of the Municipal Act, 1903 (9 Edw. VII. ch. 19), given by Street, J., in Regina ex rel. Burnham v. Hagerman and Beamish, 31 O.R. 636. It is there laid down, for clear and distinct reasons, in a considered judgment, that it is only where a joint offence or ground of disqualification is alleged that there can be a joinder of respondents. While holding that the respondents were both duly qualified, the learned Judge is careful to add at the close: "The motion must therefore, *upon all grounds*, be dismissed with costs."

It cannot, therefore, be said that the decision on the point in question was merely obiter. Even if it were, such a considered and definite expression of opinion could not properly be disregarded by me. To do so would be a violation of the principle

laid down in Cruso v. Bond, 9 P.R. 111 (at a later stage see report in 1 O.R. 384).

It was also said that in the earlier case of Regina ex rel. St. Louis v. Reaume, 26 O.R. 462, it had been decided that sec. 225 did not bear this interpretation, and that this case was not cited in the Burnham case. But it is not to be supposed that this latter case was unknown to the late Mr. Justice Street, and it is clear that this decision does not conflict with his. All that was decided by the St. Louis case was that where different respondents are attacked in the same proceeding and on the same ground, the section in question does not require that the same judgment must be given as to all. There, as in all the other cases that I can recall, where there was more than one respondent, there has been one main ground of attack against all. When separate grounds have been considered, the present objection was not taken, or, if taken, was not pressed, nor was it ever necessary to decide it. See Rex ex rel. Cavers v. Kelly, 7 O.W.R. 280, where this point as to sec. 225 is mentioned; Rex ex rel. Moore v. Hamill, 7 O.L.R. 600; Rex ex rel. Armour v. Peddie, 9 O.W.R. 393; Rex ex rel. Seymour v. Plant, 7 O.L.R. 467; Rex ex rel. Black v. Campbell, 18 O.L.R. 269; Rex ex rel. Milligan v. Harrison, 16 O.L.R. 475; Rex ex rel. O'Shea v. Letherby, 16 O.L.R. 581.

It is also to be observed that in the present case the recognisance provides only for "such costs as may be adjudged and awarded to the said defendants against the relator." This may be held to mean jointly only, and not to be enforceable in favour of one only. It follows the form given in Biggar's Municipal Manual (1900), p. 240, which seems to favour the construction of sec. 225 submitted by Mr. Godfrey. In some cases the recognisance is made in favour of the defendants "or any of them;" but it is not clear that there is any authority for this change.

However that may be, it seems better to follow the decision in the Beamish case, and leave it to the relator, if dissatisfied, to have this point settled on appeal, so that it may be made clear what sec. 225 really means.

At present, in my opinion, the motion must be confined to such grounds of objection (if any) as are common to both parties, and in which they jointly participated, assuming that this can be done. Otherwise the motion must be dismissed with costs. This would not prevent new proceedings being taken if brought within the statutory period, which has still at least a week to run.

RIDDELL, J. FEBRUARY 4TH, 1911.

McCABE v. BOYLE.

Lunatic—Inspector of Prisons and Public Charities—Statutory Committee—Action for Partition Brought in Name of Lunatic as Plaintiff—R.S.O. 1897 *ch.* 317, *sec.* 56—*Effect of Lunatic Recovering—Subsequent Proceedings by Inspector—Registration of Judgment—Cancellation—Dismissal of Action—Costs.*

Motion by the plaintiff for an order perpetually staying an action or proceeding, begun in the name of the plaintiff, for partition or sale of land, and staying proceedings upon the judgment for partition or sale entered in the action.

R. G. Smythe, for the plaintiff.

F. J. Roche, for the Inspector of Prisons and Public Charities.

C. Kappele, for the defendant.

RIDDELL, J.:—The plaintiff being in the Mimico Asylum for the Insane, and her recovery improbable, the Inspector of Prisons and Public Charities found it necessary to sell a portion of her real estate. He found the title clouded by a claim of the defendant, who asserted that he was a brother of the plaintiff. Acting on the advice of counsel, and with the approval of the Attorney-General, the Inspector began this action or proceeding for partition or sale in the name of the plaintiff; and a judgment for partition or sale was given by the Chief Justice of the Common Pleas on the 21st May, 1907.

Under the judgment the lands were offered for sale by auction in November, 1907, but no sufficient bid was obtained.

Upon the 21st May, 1909, the plaintiff was discharged from the Mimico Asylum. She never had been declared or found insane; and her mental indisposition was temporary only, as it now appears, although the physicians in charge at Mimico had reported that her recovery was improbable. She did not know of the partition proceedings.

In April, 1910, she made an agreement for sale of the land to A. D. C. Questions of title came up, and an application was made by her in June, 1910, to the Master of Titles in Toronto, to be registered as owner of the land. Notice of this claim was served on the defendant, and he appeared and filed his claim. In order to determine the rights of the plaintiff and defendant

in the office of the Master of Titles, the judgment must be got rid of in some way. A certificate of the judgment was registered by Mr. Roche (who had been the solicitor for the Inspector in the proceedings) on the 10th March, 1910, being dated the 5th March, 1910. The Inspector had by this time resigned his position (1st June, 1907), and been appointed Assistant Provincial Secretary, and the concurrence of the Attorney-General was not obtained.

A motion was made before me for an order perpetually staying the action and judgment. Counsel for the defendant agreed that this might be done, but Mr. Roche objected, asserting that the whole object of the motion was to deprive him of his costs. He was offered an order referring his costs for taxation by the Master, and declaring his right to receive them out of the plaintiff's property, but he was not content, saying that a charge of improper conduct had been made against the former Inspector. I can find none, unless it be such a charge to say that he wholly misconceived his rights—but I must dispose of the present motion upon the strict legal rights of the parties.

The statute R.S.O. 1897 ch. 317, sec. 53, makes the Inspector, ex officio and by his name of office, committee of lunatics in a public asylum who have no other committee; and consequently the Inspector became and was committee of the plaintiff. He has, by sec. 48 of the Act, the power, in certain cases, to take possession of the property, real and personal, of the lunatic, and to lease or sell, etc., the same in the name of the lunatic, with the concurrence of the Attorney-General.

There is no warrant for the assumption by the Inspector of any right to bring an action beyond any right any committee would have. The rule is that before an action is brought by a committee the sanction of a Judge is first obtained; and, if this be omitted, the committee proceeds at his own risk: Pope on Lunacy, 2nd ed., p. 269, and cases cited in notes (l) and (m).

Section 56 of the Act enables the Inspector, where he considers it necessary in order to secure, in the manner least burdensome to the estate of the insane person, moneys for his maintenance, to institute proceedings in respect of his estate. And, with much hesitation and doubt, I decide that this suffices to justify the Inspector in taking proceedings by way of partition. But his position (except where the statute makes provision to the contrary) does not differ from that of any other committee; and I am unable to see how this action stands in any other position than if it had been brought by another committee, in respect of its condition upon the plaintiff recovering her sanity. The

leading case of Beale v. Smith (1873), 43 L.J.N.S. Ch. 245, decides that a suit instituted on behalf of a person of unsound mind not so found by inquisition, when he becomes of sound mind, becomes absolutely paralysed—all proceedings thereafter are irregular. In the ordinary case the person constituting himself committee runs the risk of repudiation of his acts. Here the statute, as I have found, prevents him running that risk. But any future act was irregular; and the judgment should not have been registered. It was the registering of this judgment which necessitated the present motion; and the Inspector must pay the costs of this motion.

He is entitled to his costs up to the recovery of the plaintiff, and to those only. The plaintiff is willing to pay these. The costs of the Inspector, properly incurred, up to the recovery of the plaintiff, as taxed by the Taxing Officer, will be paid to the Inspector, deducting therefrom the costs of this motion and of the cancellation of registration. As between the plaintiff and defendant, there will be no costs.

The plaintiff and defendant will submit any special terms of the order to be drawn up. The action will be dismissed out of Court, and the registration of the judgment cancelled; the Inspector to pay the costs of this cancellation.

This order and the cancellation, etc., are not to affect any rights of the plaintiff or defendant.

MIDDLETON, J. FEBRUARY 4TH, 1911.

SCOTT v. SIEMEN.

MURPHY v. TRADERS BANK OF CANADA.

Company—Winding-up—Sale of Assets Hypothecated to Bank—Assent of Bank—Application of Purchase-money—Claims of Guarantors of Company's Indebtedness to Bank—Pledge of Personal Property of Guarantors to Bank as Further Security—Expenses of Liquidation—Deduction from Purchase-money—Costs of Realisation and Preservation—General Costs of Liquidation and Remuneration of Liquidator—Payment Made by Guarantor—Lien—Realisation of Securities—Payment—Suspense Account—Subrogation—Specific Performance of Contract to Purchase Assets—Vesting Order—Payment into Court—Assignment of Collateral Securities.

The first action was brought by the liquidator of the J. E. Murphy Lumber Company, a company in course of winding-up, against Siemen Brothers, the purchasers of the assets of the company, for the balance of the purchase-price, $3,207.56.

In this action Siemen Brothers counterclaimed for a conveyance of the land of the company free from incumbrances, stating their readiness to pay upon getting a conveyance, or for a conveyance of the land subject to the lien of one Murphy for $3,207.56, without further payment.

The second action was brought by Murphy against the bank for a declaration that he had paid the bank all that was due or could become due under a guaranty given by him for the company's indebtedness to the bank, and for a transfer to him of all his securities held by the bank as collateral to the company's indebtedness.

E. F. B. Johnston, K.C., for Scott (the liquidator) and the bank.

G. H. Kilmer, K.C., for Siemen Brothers and Murphy.

MIDDLETON, J.:— . . . The assets of the company were in large part hypothecated to the bank, and those not so hypothecated were mortgaged to Hobson, whose mortgage covered the equity of redemption in the assets pledged to the bank.

Scott was appointed permanent liquidator in August, 1908, and took possession of all the assets.

The bank held as further security the personal guaranty of Murphy and McPherson, two of the directors of the company; and each of these gentlemen had pledged personal property of his own as a further security to the bank.

The bank was at the time of the liquidation of the company, a creditor, in respect of the securities held, for over $15,000; but, by reason of the personal liability of the directors and their property pledged as collateral, felt but little interest in the liquidation, and left the realisation largely to Scott and Murphy.

Both Scott and the bank were quite ready to accept an offer for $10,000 for the assets (other than the book-debts, which the bank also held); but Murphy protested. Ultimately he brought an offer of $15,217 from Siemen Brothers, which was accepted.

The bank had proved no claim and had given no formal consent; but were ready to accept any reasonable offer that Murphy might approve, and readily assented to this sale. . . . Nothing was done by which the bank's position was waived. . . .

The sale made covered certain items not included in the

bank's securities; but, as individual prices for the items were given in the contract, there is no difficulty in apportioning the price. The price of the items with which the bank had no concern is $1,285, leaving $13,932 as the amount realised. Scott says he had Hobson's consent to the sale, and no objection is made by reason of his mortgage.

Siemen Brothers paid divers sums . . . so that the balance due on the 21st July, 1910, was computed . . . to be $3,207.56.

Some controversy having arisen between Scott and the bank as to their rights as regarded the purchase-money, $3,500, a portion of the price paid by Siemen Brothers, had been placed, by an agreement between Scott and the bank, to the credit of a special account, and the balance had been placed to the credit of the Murphy company account, reducing it to a little less than $6,500.

Murphy then appeared upon the scene as an important actor.

If Scott was allowed to retain any part of the proceeds of this sale on account of the expenses of the liquidation, and so reduce the credit which the bank should give the company, Murphy was manifestly prejudiced, for he, as surety, was liable to the bank for the ultimate deficiency upon realisation. . . .

Murphy jumped to the conclusion that the $3,207.56 due by Siemen Brothers on their purchase was the balance due to the bank upon their debt, and paid this sum to the bank in discharge of his (Murphy's) liability as surety, and demanded an assignment of all the bank's securities.

The true state of accounts is shewn by a statement of the bank filed, and, after giving credit for this payment, there was still due to the bank $3,138.67, unless the bank were bound to give credit for the $3,500 in the special account, or for another sum realised from McPherson's securities (discussed later).

Siemen Brothers had not yet paid the balance of their purchase-price, and Murphy notified them that, by reason of his payment to the bank, he had become entitled to a lien upon the assets of the company for the sum so paid.

The situation has become complicated by the fact that, upon the one side, Siemen Brothers and Murphy are represented by one solicitor, and, on the other side, Scott and the bank are represented by one solicitor, and the rights of the several clients and their respective positions have not always been kept clearly in mind, and the sympathy of the parties is indicated by the alliances made.

Siemen Brothers are in possession and have paid most of the purchase-money and have dealt with the property as their own. No objections have been made to this—no conveyances have been drawn. . . .

These actions were tried together, and I propose to consolidate them, and, as I told the parties, endeavour to ascertain and adjust their rights. No objection was taken to this course.

In the first place, the bank cannot be charged with the $3,500; it is yet in Scott's hands, and, though he has deposited it in the bank, it is to his credit in a special account. Of this sum, $1,285 must be taken to represent the goods as to which the bank have no claim; and Scott and Hobson must be left to adjust their rights.

As against the balance, $2,215, Scott may assert whatever right he may have as liquidator against the bank as prior mortgagees. There is no evidence upon which I can find that the bank entered into any agreement with him upon which he can base any claim for special allowances other than those the law gives him in the circumstances.

When a prior mortgagee assents to a sale by the liquidator, the liquidator is entitled, as against the mortgagee, to the "costs of realisation" in priority to the mortgage debt, but the general costs of the liquidation and the liquidator's claim for remuneration have no such priority: Re London Breweries, [1907] 2 Ch. 511. There is a third head under which the liquidator may make claim, *i.e.*, the "costs of preservation." At first sight, there might seem to be some foundation for a claim for priority for these costs. This claim is answered by the decision in In re Regent's Canal, L.R. 3 Ch. 411. The reasoning of James, L.J., at pp. 421, 422, seems to cover the precise point. The payments were made, not as salvage, but as part of the current outgoings of the business he was in charge of, and be expected to be refunded by the ordinary receipts in the result of the litigation. The payments were made, not for the purpose of securing the bank anything, but as part and parcel of the liquidation. . . .

[In re Oriental Hotels Co., L.R. 12 Eq. 126, distinguished.]

It is said that the costs of realisation should not be allowed here, because Murphy brought about the sale, and the liquidator did not; but the costs of realisation include the costs of abortive attempts to realise: Batten v. Wedgewood, 28 Ch. D. 317.

I have no material upon which the sum proper to be allowed can be estimated, but I fix this at $200, with liberty to either party to have a reference at his peril as to costs.

This leaves a balance of $2,015 of the $3,500 free to be carried into the accounting between the bank and the company.

The bank's account down to the 24th June, 1910, . . . shews a balance due the bank of $3,186.67. This sum of $2,015 and, say, six months' interest, $30, should be deducted, leaving $1,093.67 due the bank as of the 24th June last, subject to the discussion of the next matter involved.

The bank held as collateral to McPherson's guaranty certain securities, upon which they have received . . . $1,971.82 . . . This sum, having been received neither from the debtor nor the debtor's collaterals, nor from the surety, but from the surety's collaterals, and having been received by reason of such securities having been paid off according to their tenor, the bank have not treated as payment, but have held in a special account, with the intention of resorting to it if necessary, and of returning to McPherson if the debtor's assets realise sufficient to satisfy the bank's claims. This is not the result of any special agreement made with McPherson, but is simply the intention of the bank based on their own view of the situation. Molsons Bank v. Cooper, in the Privy Council, 26 A.R. (Appx.) 571, shews that as soon as these moneys reached the creditors' hands they were payments, and the bank were bound to treat them as payments made by McPherson on account of his guaranty of the company's indebtedness. . . . The bank have received, or will have received when the $2,015 is set free, considerably more than the total debt. The exact dates of payment can be ascertained and the interest account adjusted by the parties or upon speaking to the minutes.

In ascertaining the amount due by the purchasers, an allowance was made, with Murphy's consent, of $723.26 wages due by the liquidator to Murphy's son and assumed by the purchasers. The liquidator is not, in my view, entitled to pay this out of the purchase-price; but, as Murphy consented . . . no harm is done, so long as Murphy does not seek to charge this sum against McPherson, without his consent, in the adjustment between them.

McPherson is not a party to the suit, and, unless he consents, the balance due by the bank must be paid into Court, subject to further order, to be obtained after notice to him.

The purchasers are ready to carry out their purchase if and when the title is made good. They make no objection by reason of Hobson's mortgage title . . . but they do object because Murphy claims a lien for $3,207.56 paid by him to the bank, as to which he says he is subrogated to the bank's position.

When Murphy paid (subject to the bank's right to receive the balance then due to them), he, no doubt, became entitled to demand and receive the securities the bank held upon the debtor's property; but his right was to take the securities as they then stood; and he could not, by making a payment, even of the whole balance due, displace the consent given by the bank to the sale by the liquidator. . . . The effect of the assent of the bank was to give the purchasers a good title to the property sold and to transfer the bank's claim to the purchase-price; upon this price their lien attached, subject only to the costs of realisation. Murphy's claim to a lien was misconceived, and affords no excuse for the purchase not being carried out. What he acquired by his subrogation was the right to have the bank's lien on the purchase-money transferred to him. What Murphy paid was not enough to satisfy the balance due the bank, because the bank (even assuming that all money received from McPherson was then credited) had not yet recovered from the liquidator the money he was withholding from him.

The liquidator's action, as an action for the price of land sold, was premature. There was no agreement here to pay before conveyance, as in Clergue v. Vivian & Co., 41 S.C.R. 607; but the action may well be treated as an action for specific performance. So treating it, an account may be taken and a day fixed for payment. Upon payment a vesting order will issue, vesting in the purchasers the title of the liquidator, of the bank, and any claim Murphy may have. If necessary, no doubt the liquidator will obtain a formal consent from Hobson or a quit-claim deed. . . .

Unless some arrangement is made between Murphy and McPherson providing otherwise, this balance of purchase-money must go into Court and be subject to further order, to be obtained on notice to McPherson. . . .

At the hearing a claim was put forward by Murphy for an assignment of McPherson's collateral securities. . . . This . . . was abandoned. This claim was quite misconceived . . . Duncan v. North and South Wales Bank, 11 Ch. D., per Jessel, M.R., at pp. 95, 96.

In all the circumstances, no costs should be awarded to any party. None is completely right, and none altogether wrong.

BRITTON, J., IN CHAMBERS. FEBRUARY 6TH, 1911.

McVEITY v. OTTAWA FREE PRESS CO.

Security for Costs—Libel—9 Edw. VII. ch. 40, sec. 12—Nature of Action—Nature of Defence—Property of Plaintiff Available to Answer Costs.

Appeal by the plaintiff from the order of the Master in Chambers, ante 613, directing that the plaintiff give security for the costs of this action.

J. T. White, for the plaintiff.
H. M. Mowat, K.C., for the defendants.

BRITTON, J.:—The defendants are entitled to security for costs only upon a strict compliance with sec. 12, ch. 40, 9 Edw. VII.

They must shew by affidavit of their agent: (1) the nature of the action; (2) the nature of the defence; (3) that the plaintiff is not possessed of property sufficient to answer the costs of the action, in case judgment is given in favour of the defendants; (4) that the defendants have a good defence upon the merits; and (5) that the statements complained of were published in good faith.

Some of these things may be dispensed with, if the grounds of action are trivial or frivolous.

Whatever may be said or thought of an action by a municipal officer because of what he may consider unfair criticism of the way he discharged a public duty, I cannot say that the grounds of this action are either "trivial or frivolous."

The defendants have shewn the nature of the action, as the statement of claim is before me. The affidavit of the agent states that the defence will be as set out in the 3rd paragraph of that affidavit. The substance of the defence is: (1) that the statements of fact, as set out in the articles complained of, are true; (2) that the matters of opinion were fair comment and opinion, and in the public interest; and (3) that the articles were without malice, in good faith, and only published in the ordinary course of the defendants' business.

These allegations would, in my opinion, if established, make out a defence.

In addition to the above, the affidavit states that the defendants have a good defence upon the merits, and that there was reasonable ground to believe, and that the publishers did be-

lieve, that the publication of the articles was for the public benefit. That is stated, and it is not for me to say whether the publication was or was not for the public benefit. In my opinion, what is required of the defendants, as specified above, 1, 2, 3, and 4, as necessary to get security for costs, has, substantially, been complied with.

Then the agent of the defendants states in his affidavit that he has a personal knowledge of the matters deposed to, and (in paragraph 4) that "the plaintiff is not possessed of property sufficient to answer the costs of this action in case a judgment is given in favour of the defendant company." This makes a prima facie case for the order.

The plaintiff by affidavit in reply states that he is possessed of property sufficient, etc.

I have read all the affidavits filed, and also the examination of the plaintiff. There is no doubt that the plaintiff is in possession of a large amount of valuable property, but there are judgments against the plaintiff, for which this property may be liable, and I am unable to say that this property, valuable as it is, is sufficient, considering the claims against it, to answer the costs in case judgment is given in favour of the defendants. It may be sufficient—it may not.

The defendants have made out a case for the order. I am not able to say that the plaintiff has displaced the case so made, and so not able, upon the facts, to reverse the order of the Master. The plaintiff may have four weeks' further time from the date of this order to put in security, should he desire to further prosecute the action. Subject to this, the appeal will be dismissed. Costs to be costs in the cause to the defendants.

RIDDELL, J. FEBRUARY 6TH, 1911.

RE McALLISTER.

Will—Construction—Trust—"Heirs" of Living Person—Legal Estate—Equitable Estate—Use of Income—Executors.

Motion by Harmon McAllister, under Con. Rule 938, for an order determining certain questions arising upon the will of J. J. McAllister, deceased.

E. D. Armour, K.C., for the applicant.
E. F. Lazier, for the executors.
J. R. Meredith, for the infants.

RIDDELL, J.:—The will in question contains the following provisions:—

A gift to the wife of all the testator's real and personal estate "for and during the term of her natural life, it being my intention that she shall receive the net revenue of all my estate . . . Should my executors deem it advisable to do so, they may, at any time during the lifetime of my said wife, apply the proceeds" of a certain life assurance policy in reduction of the principal of a mortgage, etc.

It is argued that this by implication gives the legal estate to the executors, under the principle of Shapland v. Smith (1780), 2 Bro. C.C. 74, and like cases; Jarman, 5th ed., p. 1141, note (*l*).

I do not need to pass upon this, in the view I take of the case.

Then follows:—

"4. Upon the death of my said wife I give devise and bequeath all my real and personal property whatsoever and wheresoever situate, including the principal money of the proceeds of my real estate and of said life insurance, or stocks, bonds, or securities, should the estate be sold and invested as provided under clause (3) of this will, to my children, Harmon, John, and Sarah Annie Greer, share and share alike, subject nevertheless as to the share therein of my son Harmon that he shall hold the same as trustee of his heirs and use the income as he may see fit and that he shall not be accountable for the expenditure of such income, but that it shall be left entirely to his judgment and discretion."

The question for determination is as to the interest of Harmon. The real estate is said to have been all applied in payment of debts.

It seems to me that the effect of this clause is to divide the estate (after the death of the wife) into three equal parts, and that Harmon takes the legal estate in one of these, and "his heirs" take the equitable estate—Harmon having the additional right to use, during his lifetime, the income, as he sees fit, without liability to being called to account. It is, of course, trite law that "Nemo est hæres viventis;" but many wills have left property to the "heirs" of a living person, and yet been considered good. Theobald on Wills, ch. 26, contains a reference to many instances.

It is unnecessary to consider who are the heirs—at present it is sufficient to declare Harmon's rights.

Costs out of the third in dispute.

I have not found the cases helpful, though I have read those cited and others.

RIDDELL, J. FEBRUARY 6TH, 1911.

*RE MORLOCK AND CLINE LIMITED.

SARVIS AND CANNING'S CASES.

Company—Winding-up—Dominion Winding-up Act, sec. 70—"Clerks or other Persons"—Commercial Travellers—Preferred Claims for Wages and Expenses—Assignee of Employee—Assignor a Director—Absence of Authority from Shareholders to Receive Remuneration—Costs.

Morlock and Cline Limited, an Ontario company, being in liquidation under the Dominion Winding-up Act, claims were made (three in all) by Sarvis and Canning against the company, and the claimants insisted that they should be (quoad the amounts of the three claims) collocated by special privilege over other creditors under sec. 70 of the Dominion Winding-up Act.

The Local Master at Guelph, as an Official Referee, disallowed the claims for such collocation, and placed the claimants on the ordinary list.

The claimants appealed.

G. S. Gibbons, for the claimants.
C. L. Dunbar, for the liquidator.

RIDDELL, J.:—Canning was a commercial traveller in the employ of the company. He was entitled under his agreement to receive for his services to the company a fixed sum (apparently per month) and expenses; and he devoted his whole time and attention to the business of his employers. The liquidator contends that (1) Canning is not of the class "clerks or other persons" mentioned in sec. 70 of the Act, and (2), if he is, he cannot claim for expenses. It is not denied that Canning is a "person:" the first argument is that he is not a "clerk;" and the second contention is that "other persons" must be read on the ejusdem generis principle. Whatever the original meaning of "clerk"—it has been very much extended, and a clerk need no longer be a "clericus" or able to handle a pen. Probably a commercial traveller would not be considered a "clerk" in ordinary parlance, and perhaps not in a statute such as this. The question has come up more than once in the Courts of the

*To be reported in the Ontario Law Reports.

United States. . . . The decisions have been fairly uniformly adverse to the possibility of a commercial traveller being considered a "clerk:" In re Greenewald, 99 Fed. R. 705; In re Scanlan, 97 Fed. R. 26, 27; Mulholland v. Wood, 166 Pa. St. 486; State v. Chapman, 35 La. Ann. 75; Weems v. Delta Moss Co., 33 La. Ann. 973; and the like.

It is not wholly without interest to note that in French "clerk" is "commis" and "commercial traveller" "commis-voyageur."

Then as to the doctrine of ejusdem generis, which has, I venture to think, been sometimes abused, and has some sins to answer for. . . .

[Reference to Fraser v. Pere Marquette R.W. Co., 18 O.L.R. 589, at pp. 602, 603.]

Sometimes it has been considered that where some general word follows one or more of a more special signification, the subsequent word is limited in its meaning by what precedes. But that is not always the case; and the application of the supposed principle is more sparing than formerly: *e.g.*, in Anderson v. Anderson, [1895] 1 Q.B. 749 (C.A.) . . . Parker v. Marchant, 1 Y. & C. Ch. 290, 300. . . .

There is no difference in this regard in the interpretation of statute and of deed. It is clear that Anderson v. Anderson correctly expresses the law. I do not find any instance in which its authority or the actual decision or the principle so laid down has ever been questioned. But it is said that the rule there laid down is not applicable to cases in which persons are the subject of the enumeration. . . .

[Reference to Dyer 100, 109, pl. 38, 1 Jones 185, 186; Archbishop of Canterbury's Case, 2 Rep. 46 (*b*); Casher v. Holmes, 2 B. & Ad. 592.]

In Gunnestad v. Price, L.R. 10 Ex. 65, at pp. 69, 70, the law is thus expressed: "The maxim that general words are limited in their application is constantly acted upon. . . . Where they follow an enumeration of particular things, they do not include things of a higher and different character."

The argument of the respondent is, that commercial travellers are "things of a higher and different character" as compared with clerks. No evidence has been submitted of a difference in character or relative superiority in any respect of the two classes. Nor do the authorities assist in the inquiry . . .

[Reference to the Table of Precedence given in Blackstone, vol. 1, p. 404, note (*s*); Table of Precedence for Canada, 3rd November, 1879, Dominion Statutes for 1880, p. XXII.; clerks and commercial travellers are not mentioned.]

Having nothing official to guide the Court in this delicate inquiry, I am forced to rely upon common knowledge—and from that I am wholly unable to say that a commercial traveller, as such, is a thing of a higher character than a clerk—nor can I find any difference in their nature. . . .

Giving full reverence to the cases, I cannot think that they conclude the appellant, and I decide in his favour upon this point.

Then it is argued that at least the sums paid by the commercial traveller for expenses cannot be made a preferential claim. I can see no difference in principle between these sums and the remainder of the wages—the servant was to have a fixed sum and expenses, and his expenses are as much a part of his wages as the fixed sum. . . .

The appeal as to Canning will be allowed with costs here and below (as mentioned at the end). . . .

[Reference to Re Ritchie-Hearn Co., 6 O.W.R. 474.]

Sarvis makes two claims: one for $209.94 salary and expenses as commercial traveller—this is covered by the above remarks. This appeal will also be allowed with costs here and below (as mentioned at the end). . . .

Sarvis further claims, as the assignee of Levi Morlock, for $337.50, three months' wages as commercial traveller. The further objection is taken in this case that the assignor, Morlock, was a director in the company. The answer is made that he was only a "dummy" director; but the law does not draw any distinction between "dummy" and "non-dummy" directors—and one who has accepted the position of director must be so dumb that he cannot say he was not a director. It would never do to allow a director to better his position by asserting that he did not do his duty as a director. Here, however, Morlock seems to have been employed by his company as a commercial traveller; and it does not appear that he took any active part in the management of the company. There is no difficulty arising from the fact that Sarvis is only an assignee; the reasoning in Lee v. Friedman, 20 O.L.R. 49, wholly covers the case . . .: see pp. 53, 55, 56.

But I think I am concluded by the decision of a Divisional Court in Birney v. Toronto Milk Co., 5 O.L.R. 1, to hold that the provisions of the statute are "wide enough to prevent a president and board of directors from voting to themselves, or to any one or more of themselves, any remuneration whatever for any services rendered to the company without the authority of a general meeting of the company:" p. 6. This case was followed

in Benor v. Canadian Mail Order Co., 10 O.W.R. 1091; and Mackenzie v. Maple Mountain Mining Co., 20 O.L.R. 170, 615, does not affect it. . . .

[Reference to remarks at pp. 172, 173; Beaudry v. Read, 10 O.W.R. 622.]

The appeal upon this claim will be dismissed with costs as below stated.

In view of the fact that all the claims and appeals have been conducted by the same solicitors, I think that the costs awarded should be fixed as follows: the appellants may tax one half of all their costs both before the Master and here.

DIVISIONAL COURT. FEBRUARY 6TH, 1911.

PETTIGREW v. GRAND TRUNK R.W. CO.

Railway—Injury to and Death of Brakesman—Disobedience of Rules of Railway Company—Brakesman Standing on Track Run over by Moving Train—Way at Side of Track not Left Clear—Insufficient Packing of Frog—Findings of Jury—Proximate Cause of Injury—Dismissal of Action.

Appeal by the plaintiff from the judgment of MULOCK, C.J. Ex.D., dismissing the action.

John Pettigrew, the plaintiff's husband, was a brakesman in the employment of the defendants, and was accidentally killed at the town of Hanover on the 14th January, 1910, by being run over by one of the cars of the defendants. The plaintiff alleged that the death of John Pettigrew was occasioned by the negligence of the defendants in piling or allowing lumber to be piled so close to the siding upon which a train of the defendants was being backed, that the deceased, whose duty called him to the space between the lumber and track, was obliged to go out upon the track, and, being upon the track and in front of a moving train, in some way had his foot caught, or slipped and fell, and was run over and killed. The plaintiff also alleged negligence in allowing the so-called way between the lumber piles and the track to become defective, unsafe, and insufficient, by reason of the collection there of snow and ice; and also in regard to the want of packing and condition of the packing between the rails in the railway frog and between the guard-rail and the rail of the line; and again, in that the coupling irons

were so defective that the brakesman whose duty it was to have the cars coupled was obliged to descend from his car and use his hands to effect the coupling.

Questions were submitted to the jury, all of which were answered in favour of the plaintiff. The jury found that the negligence which caused the accident to the deceased was, that the lumber piles and snow obstructed the space allowed for employees to perform their duties, and that the frog and guard-rail were not properly packed.

The trial Judge, upon the undisputed evidence, held that, as the deceased lost his life by being struck by a moving car, when he was upon the track in front of the moving train, for the purpose of assisting in the coupling of the dead car with the moving car, and as this was in express violation of one of the defendants' rules, the plaintiff could not recover, and he dismissed the action.

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

A. G. MacKay, K.C., for the plaintiff.

D. L. McCarthy, K.C., for the defendants.

D. Robertson, K.C., and G. H. Kilmer, K.C., for third parties.

BRITTON, J. (after setting out the facts as above) :—I agree that the dismissal of the action was right, for the reason stated by the trial Judge. As was said by Osler, J.A., in . . . Deyo v. Kingston and Pembroke R.W. Co., 8 O.L.R. at p. 597, I feel compelled to say that the death of the husband of the plaintiff was owing to the unfortunate neglect by him of the rules of the company.

Apart from the rule relied upon by the defendants, there are difficulties that seem to me insuperable in the way of the plaintiff's recovery. Admitting that the so-called way between the piles of lumber and the moving train was in an unsafe and almost impassable condition owing to the negligence of the defendants, that negligence was not the proximate cause of the accident; nor was the defective construction or condition of the couplers, if they were so defective, the proximate cause. The deceased fell upon the railway track and was run over by a moving car. No negligence is alleged as to the moving train; so the recovery is absolutely limited to the case of the deceased being rightfully walking upon the railway track in the performance of his duty, and to the accident having happened by reason of some of the things mentioned in sub-secs. 2 and 3 of

sec. 5 of the Workmen's Compensation for Injuries Act. The deceased was voluntarily upon the track. He was not there in obedience to any order or in accordance with any practice known to the defendants to prevail. The deceased took the risk. Then the evidence seems to me just as consistent with an accidental slip and fall by the deceased as a fall by reason of any negligence on the part of the defendants. There was no evidence that could properly be submitted to the jury that the death of the plaintiff's husband was caused by the negligence of the defendants.

How the deceased came to his death can never be known. We can only surmise, and we may be quite wrong. The marks on the body, the torn clothes, the worn rubbers, give no information. The most the jury could do would be to think or guess how the deceased happened to fall or to be caught by the moving car.

The appeal should be dismissed, and with costs if the defendants ask for costs.

RIDDELL, J.:—The facts in this case are fully developed in the discussion at the trial, and, unless we are to overrule Deyo v. Kingston and Pembroke R.W. Co., 8 O.L.R. 588, 4 Can. Ry. Cas. 42, and similar cases, I do not think we can interfere with the decision of the learned Chief Justice.

In my opinion, the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—I agree . . . The third parties were brought before us by the defendants, and the defendants must pay the costs of the third parties, including costs of motion for leave to appeal.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 7TH, 1911.

RE PINNELLE AND THOMPSON.

Appeal—Mining Act of Ontario, 1908, *secs.* 63, 66, 130, 133—*Address of Disputant for Service—Notice—Extension of Time—Mining Recorder—Mining Commissioner—Judge of the High Court.*

Motion by Pinnelle for an order extending the time for appealing from a decision of the Mining Commissioner.

John King, K.C., for Pinnelle.
T. P. Galt, K.C., for Thompson.
H. E. Rose, K.C., for a purchaser from Thompson.

MIDDLETON, J.:—While in this case I think Pinnelle has no one to blame but himself, and that, even if there were power to relieve him from his default, I should not do so, I desire to draw attention to the present provisions of the Mining Act and the possibility of their resulting, in some case, in serious injustice.

On the 16th June, 1910, Thompson made his application to be recorded as owner of a mining claim. On the 13th July, Pinnelle filed a dispute, giving as his address for service "Porcupine P.O."

On the 6th September, 1910, the Mining Recorder fixed the 1st October for the hearing and sent notice of hearing to Pinnelle at Haileybury P.O. This was not delivered, and appears from the P.O. stamps to have been returned to the Mining Recorder from Haileybury on the 1st October, so that it would not reach him until after the hearing.

On the 1st October an order was made, reciting the notice by registered letter to Pinnelle at Haileybury and his non-appearance, and dismissing his dispute. Notice of the decision was mailed by the Recorder to Pinnelle, addressed to him at Porcupine P.O., and a duplicate was sent to him at Haileybury. The notice sent to Porcupine was ultimately returned to the Recorder undelivered. The Recorder says he sent the original notice to Haileybury, instead of to Porcupine, because Pinnelle called upon him and told him he was going there.

Section 63 (3) of the Mining Act of Ontario, 1908, makes it the duty of the disputant to name an address for service not more than five miles from the Recorder's office; and sec. 133 (4) would have justified service upon him by a registered letter sent to that address. The service actually made was quite unauthorised and bad.

The effect of a certificate of record under the statute makes it impossible to regard the action of the Recorder as a nullity; but it may afford some ground for an application under sec. 66.

Notice of the decision is required under sec. 130 (3), and and an appeal from the Recorder to the Commissioner will lie (sec. 133), upon the filing and service of a notice within fifteen days, or within such further time, not exceeding fifteen days, as the Commissioner may allow. The Commissioner may also, in the absence of notice under sec. 130, when it is made to appear that the appellant has suffered some substantial injustice, and has not been guilty of undue delay, allow an appeal at any time.

Pinnelle on the 14th October received the notice sent to Haileybury, and was then in time to launch an appeal, and might then have obtained an extension for fifteen days, but did nothing.

Thompson obtained his certificate of record on the 20th October.

The time limited by sec. 133 expired on the 31st October at any rate, and nothing was done till the 18th November, when the Commissioner—so far as I can see, without any jurisdiction—gave Pinnelle an appointment to hear the application on the 21st December. On this date Pinnelle did not attend, and the Commissioner dismissed his motion. On that occasion he was represented by a friend, but had no evidence of any kind.

No appeal was had from the order within the time limited. A Judge has the power to extend the time for a period of fifteen days. On the last day but one of the time an application was made to me ex parte for an order extending the time. I declined to act ex parte, and directed notice to be given for the next day. By one more bungle, this was not done, and, with much hesitation, I then made an ex parte order, not to issue till notice was served, and reserving the right to consider the whole matter upon hearing both parties. No adequate material was then produced, and the matter again stood, and some informal material has now been placed before me.

Making every allowance for the ignorance of this foreigner . . . it is clear that the case is quite hopeless. The numerous delays are quite unexplained; and, though the Recorder was wrong in not giving the notice required, I do not think a notice sent to Porcupine would have reached the appellant. The notice under sec. 130 did not; and, in any event, the Act seems to attach great importance to the notice of judgment under sec. 130. When this was received, immediate action was required, and this is absolutely wanting.

As at present advised, I think that the Commissioner alone can extend the time, and his decision is, I think, final. The appeal given is not from a discretionary order of this kind, but from a final decision upon the merits. Further, the order of the Commissioner made refusing the extension of time was upon an application made after the expiry of the time limited for an extension under sec. 133.

In any and every aspect of the case, the motion fails.

What I fear is that some time a case may arise in which, like this, no due notice is given of the hearing, and the notice of the decision may be duly given, but may not reach the party

in time, and then he may be found to be without remedy, as the power to extend the time for hearing is unlimited only when notice is not given of the decision, and no provision is made for the absence of notice after original hearing.

Motion dismissed with costs.

SUTHERLAND, J. FEBRUARY 8TH, 1911.

RE LEITCH.

Will—Construction—Legacy—Death of Legatee—Substitution of Infant Legatee—Application of Income for Maintenance—Absence of Direction in Will.

John Archibald Leitch died on the 23rd May, 1908, having first made his will dated the 20th May, 1907, letters probate whereof were duly issued to his son Archibald Durand Leitch as executor on the 15th June, 1908.

The following were the material clauses of the will:—

"5. I direct that the sum of $10,000 be set aside by my executors . . . and that the annual income therefrom be paid to Minnie Leitch, widow of my late son Thomas John Leitch, as long as she remains the widow of my said son.

"6. After the death or marriage of the said Minnie Leitch, whichever event shall first happen, I direct that the said sum of $10,000 be divided equally between my grandchildren John Archibald Leitch and Flora Durand Leitch. Said sum is not to be paid to them until they respectively attain the age of 21 years.

"7. I give and bequeath to my said grandchild John Archibald Leitch the sum of $5,000, to be paid to him when he reaches the age of 25 years; the income in the meantime to be applied towards his support, maintenance, and education. I give and bequeath to my said grandchild Flora Durand Leitch the sum of $5,000, to be paid to her when she attains the age of 21 years; the income in the meantime to be applied towards her support, maintenance, and education.

"8. In the event of the death of either of these my said grandchildren before attaining the age of 21 years and dying without issue, then I direct that the survivor shall take the share of the one so deceased.

"9. In the event of both of my said grandchildren dying before attaining the ages of 21 years, and leaving no issue, then

I direct that the said sums bequeathed to them herein be equally divided between my daughter Flora Boughner Leitch and my son Archibald Durand Leitch."

John Archibald Leitch, grandson therein named, died on the 24th January, 1909, aged four years. The executor Archibald Durand Leitch was the residuary divisee and legatee named in the will under clause 13. The granddaughter Flora Durand Leitch was about four years old, and living with her mother, Minnie Leitch, but no one had applied for letters of guardianship.

On the 26th November, 1910, the solicitors for Minnie Leitch wrote the executor Archibald Durand Leitch as follows:—"Mrs. Leitch finds the income from the $15,000 insufficient for the maintenance of herself and her infant daughter, and is desirous of having it increased. On looking into the provisions of your father's will, it appears to us quite possible that the income from the $5,000 originally bequeathed to her son John Archibald Leitch, and on his death going to her daughter Flora Durand Leitch, may well be applied towards the support, maintenance, and education of Flora Durand Leitch, instead of accumulating such income as now being done . . . ." Again, on the 22nd December, 1910, her solicitors wrote to the solicitor for the executor as follows: "On behalf of Mrs. Minnie Leitch we are about to bring a motion for construction of the will of this deceased and for increased allowance to Mrs. Leitch for maintenance of her infant child Flora Durand Leitch," etc.

Thereupon the executor served an originating notice, in pursuance of R.S.O. 1897 ch. 129, sec. 29, and Con. Rule 938, for an order declaring the construction of the will, etc.

M. F. Muir, K.C., for the executor.
W. S. Brewster, K.C., for Flora Boughner Leitch.
J. R. Meredith, for the official guardian.

SUTHERLAND, J. (after setting out the facts):—Upon the death of the grandson John Archibald Leitch, his share, under clause 7, became vested in his sister Flora Durand Leitch, under clause 8, but subject to be divested under clause 9 if she should die before attaining the age of 21 years and leaving no issue.

It is clear that under clause 7 the testator intended that the income of the $5,000 bequeathed to John Archibald Leitch should, until he attained 25 years of age, be applied to a specific purpose, namely, towards his support, maintenance, and education.

There is no suggestion in clause 8 or elsewhere as to what

should be done with the income as distinguished from the principal sum in the case of his dying before 21. It is not suggested that it should be applied towards the maintenance of Flora Durand Leitch, as it is now contended it should be, or can be.

From the will itself it seems to me that the contrary, if any, inference must be drawn, and for the reason that a definite provision for her support, maintenance, and education is otherwise provided under clause 7. See Williams on Executors, p. 1170, and cases cited.

In these circumstances, I think the will is not open to the construction put forward in the letter quoted, to the effect that the income of the $5,000 bequeathed to John Archibald Leitch under paragraph 7, now that he is dead, can be applied towards the support, maintenance, and education of Flora Durand Leitch, instead of accumulating, as it now is.

The costs of all parties will be paid out of the fund in question.

DIVISIONAL COURT. FEBRUARY 8TH, 1911.

RE BERNARD.

Gift—Donatio Mortis Causa—Cheque on Bank.

Appeal from an order of WINCHESTER, Judge of the Surrogate Court of the County of York, upon passing the accounts of the executors of the will of Matilda Bernard, deceased, disallowing a claim for $1,000 made by one Margaret Frawley, a sister of the testatrix, in the circumstances mentioned below.

The appeal was heard by MULOCK, C.J.ExD., BRITTON and SUTHERLAND, JJ.

J. M. Ferguson, for Margaret Frawley.

M. H. Roach, for the executors.

W. H. Hunter, for Mrs. Davidson, a beneficiary.

E. C. Cattanach, for the official guardian.

MULOCK, C.J.:— . . . The testatrix, Matilda Bernard, intended at her death that her sister, Mrs. Frawley, should benefit out of her estate to the extent of $1,000, and, in order to carry out such purpose, about two months before her death she signed a cheque in the words and figures following:—

"Toronto, March 1st, 1909.

"The Dominion Bank.

"Pay Mrs. Margaret Frawley, or order, on demand, one thousand dollars.

"$1,000. Matilda Bernard."

This cheque the testatrix caused to be placed in her cash box along with a memorandum in her own handwriting and signed by her, which is in the following words and figures: "March 1st, 1909. This note to be presented one month after my death. Matilda Bernard."

The testatrix dleivered the key of the box to her niece, Lillian Gray, with instructions to hand it to her solicitor, Mr. Roach, on her death, at the same time observing that he would know what to do in the matter. A few days afterwards Lillian Gray placed the box in the bank for safe-keeping, and there it remained unopened until after the testatrix's death, when the cheque and memorandum were found in it, and Mrs. Frawley's claim is for the $1,000 covered by this cheque.

The authorities are quite clear that a cheque not paid, either actually or constructively, during the lifetime of the drawer, is not capable of being the subject of donatio mortis causa: Hewitt v. Kay, L.R. 6 Eq. 198; In re Beak's Estate, L.R. 13 Eq. 489; In re Beaumont, [1902] 1 Ch. 889.

A cheque is not a chose in action, but merely a direction to some one, who may or may not have in his possession funds of the drawer, authorising him to pay to the payee a certain sum of money. Death of the drawer before presentation revokes such authority. Thus in this case the claimant is met with two difficulties, each fatal to her claim: one being that the cheque, not having been acted upon by acceptance or payment, never lost its primary character of a mere cheque, which is not a chose in action, and is not the subject of donatio mortis causa; and the other being that the testatrix's death revoked the banker's authority to pay the cheque.

It is not necessary to deal with the further question, whether there ever was any active or constructive delivery of the cheque.

The appeal should be dismissed; costs of all parties out of the estate.

SUTHERLAND, J.:—I agree.

BRITTON, J.:—Upon the argument it was frankly conceded by Mr. Ferguson, counsel for Mrs. Frawley, that he could not hope

to establish her claim to the cheque for $1,000 as a gift causa mortis, unless he could do so by reason of the memorandum, signed by the deceased, which accompanied the cheque. That memorandum opens the door for argument, because, if it amounts to setting apart money of the deceased which she undoubtedly had at the time in the bank on which the cheque was drawn, and which, as I understand, was available one month after her death, then it is very near to being a gift of $1,000 in money.

It has been held that a valid gift of money deposited in a savings bank may be effected by the delivery of a certificate of deposit payable to the order of the donor, and not indorsed.

Again, it has been held that a valid gift of money deposited may be made by delivery of the depositor's pass book issued by a savings bank with intent to give the donee the deposits represented by it; but then the distinction is closely drawn between a savings bank and an ordinary bank of discount and deposit, and the reason for the distinction is that in the latter case the money can be withdrawn on the cheque of the depositor. See 20 Cyc., pp. 1238, 1239.

It comes then to this, under the authorities by which I am bound, that the cheque in the present case, even with the memorandum attached, is not a chose in action—it is, if valid at all, only a mere contract, at most imposing an obligation on the donor, and that cannot be the subject of donation mortis causa.

I agree that the appeal should be dismissed; costs payable out of the estate.

BOYD, C., IN CHAMBERS. FEBRUARY 8TH, 1911.

*RUSSELL v. GREENSHIELDS.

Writ of Summons—Service out of the Jurisdiction—Con. Rule 162 (e)—Both Parties Resident in Another Province—Breach of Trust in Ontario—Proper Forum for Litigation.

Appeal by the plaintiff from the order of the Master in Chambers, ante 563, setting aside an order made under Con. Rule 162 giving the plaintiff leave to serve the writ of summons and statement of claim upon the defendant in the province of Quebec, and setting aside the writ and the service on the defendant effected pursuant to the order. Both the plaintiff and the defendant were resident in the province of Que-

*To be reported in the Ontario Law Reports.

bec; but the plaintiff contended that the case came within clause (*e*) of Con. Rule 162.

I. F. Hellmuth, K.C., for the plaintiff.
W. Nesbitt, K.C., for the defendant.

BOYD, C. (after setting out the facts relating to the transactions from which the alleged cause of action arose):—On the 19th June, 1906, at Ottawa, the defendant, while acting under the authority of the Qu'Appelle Company, and also acting on behalf of the plaintiff, as joint owner in the purchase of the said lands (i.e., lands which the Qu'Appelle Company, under a concession from the Dominion Government, had a right to select from a certain area of public lands in Saskatchewan, from which the Canadian Northern Railway Company had also a right to select lands), assumed to release the Government from all claims to any lands selected by the Canadian Northern Railway Company, whether made before or after the 31st December, 1905. This renunciation is contained in a letter to the Minister of the Interior, signed by the defendant on the 19th June. The Government acted upon this letter and directed the issue of letters patent to the Canadian Northern Railway Company for 157,000 acres which had been selected by that company after the 31st December, 1905, and before the 20th June, 1906, although 126,000 acres of these had before been duly selected on behalf of the Qu'Appelle Company and the parties to this action.

The plaintiff's cause of complaint is that the defendant was corruptly influenced to sign the said renunciation or surrender, and received therefor money or valuable consideration, for which he should account to his co-purchaser, and also, if need be, that he should pay damages for the loss of the more valuable lands so obtained by the rival company.

For the purpose of this litigation, it is not material to consider the precise legal relationship between the parties: they were joint purchasers, and, when the transaction complained of was entered upon and engaged in, the defendant was placed in a position of confidence quoad the plaintiff. He was trusted to negotiate a certain compromise faithfully, instead of which (as alleged) he grossly violated the trust reposed in him. This particular transaction, growing out of the original engagement of joint-purchase, is plainly separable from the general joint relationship. This was a matter originated at the conference held at Toronto on the 22nd May, 1906, in the prosecution of

which new duties and new responsibilities were undertaken by the defendant on the joint account. This special matter was begun and was to be prosecuted and consummated in the province of Ontario, at the seat of Government at Ottawa. Everything was centred there as to making the selection of the lots by the maps, plans, and surveys prepared by the Department of the Interior: it was there the title to the western land was to be dealt with and secured for the joint benefit of the plaintiff and defendant. So that this particular breach of trust began and ended in Ontario and may fairly be regarded as a breach of contract to be performed within Ontario for which damages are sought. The Con. Rule 162 (e) covers the situation. The language of the Rule has always received a liberal construction, and, to my mind, this is a transaction which may well be investigated in this Court. It is a stronger case than a somewhat analogous one reported in Harris v. Fleming, 13 Ch. D. 208.

If the case presented be apparently of a vexatious or oppressive character, the discretion of the Court may rightly be exercised in refusing to grant leave to sue: such was the application in Société Générale de Paris v. Dreyfus Brothers, 37 Ch. D. 215, 226; but, upon the allegations sworn to by the plaintiff, the contrary is here established.

The defendant by his affidavit denies that any corrupt inducement existed which influenced his writing the letter of renunciation, but that is the matter in dispute affecting the merits, not the jurisdiction of the Court. The 4th paragraph of the same affidavit states that no breach occurred within Ontario of any contract not released by a document set out in the 43rd paragraph of the statement of claim. That paragraph implies that there was a contract between the parties and a breach of it within Ontario, which has been released. That again is a matter going to the merits of the defence, because the plaintiff says that, when that document was given, he was in ignorance of the bribe which changed the whole situation and set him at liberty to seek redress.

The writ should be restored, and the action allowed to proceed in due course, and the order of the Master vacated. Costs of application and appeal to be in the cause to the plaintiff.

MIDDLETON, J. FEBRUARY 9TH, 1911.

RE LENZ.

Will—Construction—Avoidance of Intestacy—Indication of Intention to Dispose of whole Estate—Residuary Estate—Division into Shares—Deduction of Insurance Moneys from Shares—Testacy or Intestacy as to Insurance Moneys.

Motion by the executors of the will of C. F. Lenz, deceased, under Con. Rule 938, for an order declaring the true construction of the will.

F. R. Martin, for the executors.
E. D. Armour, K.C., for two sisters of the testator.
I. F. Hellmuth, K.C., for the infant son of the testator.
J. Bicknell, K.C., for the widow.

MIDDLETON, J.:—I accept as the principle governing me that well illustrated by Scale v. Rawlins, [1892] A.C. 342, that it is the duty of the Court to construe the words actually used by the testator, and not to speculate upon what peradventure may have been in the testator's mind. I must be able to ascertain from the will itself some adequate expression of the testator's intention. The will is required to be in writing, and by that which is written the parties must abide—if the testator has unfortunately failed to express his intention, I cannot supplement his written words; there cannot be a "reformation" of a will. At the same time it is clearly my duty to endeavour, if possible, to ascertain, from the words used, the intention of the testator, and to give effect to that intention, if it can be so ascertained.

It is said that the Court leans against intestacy, but that statement is often rashly made and without considering its necessary limitations. When there is in truth an intestacy, the Court must not invent a will merely because it may suspect that, if the events that have come to pass had been present to the testator's mind, he would have provided how his estate should then be dealt with. If he has not made provision for all contingencies, his silence involves intestacy. The warning of Romer, J., in In re Edwards, [1906] 1 Ch. 574, against the undue extension of the rule, is salutary. With the view of avoiding intestacy, you are not to do otherwise than to construe plain words according to their plain meaning. When a man makes a will, he intends to die testate only so far as he has expressed himself in his will. When an intention is clearly

found on the face of the will to deal with all the testator's property, and the difficulty does not arise from events having happened which were not contemplated by the testator, but from the imperfection of the language used, every endeavour must be made to find a meaning in the will to which effect can be given, and only when no such meaning can be found is the Court justified in saying that, in the face of the express intention to die testate, the testator, by reason of his failure adequately to express his intention, died intestate.

In the will before me the testator clearly indicates his intention to dispose of all his estate. He gives his house to his widow and a cottage to his sisters. The bulk of his estate, some $100,000, falls under the residuary clause. "All the rest residue and remainder of my estate real and personal of all and every kind nature and description whatsoever and wheresoever situate" is to be "divided into three equal portions (subject to the provisions hereinafter contained as to insurance moneys)," and "one portion thereof, less the sum of $10,000 represented by a policy or policies of insurance on my life payable to my said wife, if such insurance moneys are paid to her, or less such portion of such insurance moneys as shall be paid to her, be transferred or paid to my wife absolutely," and "one portion thereof, less the sum of $8,000, represented by a policy or policies of insurance upon my life payable by my said sisters, if such insurance moneys are paid to them, or less such portion of such insurance moneys as shall be paid to them, be transferred or paid over to them (my said sisters) absolutely in equal shares." And the remaining "one-third portion" be given to his son absolutely.

The son and widow contend that under this clause the estate must be divided into thirds, and that $10,000 must then be deducted from the widow's share and $8,000 from the sisters'; and that, there being no disposition of this, it passes as upon an intestacy, one-third to the widow and two-thirds to the son.

The sisters, on the other hand, contend that there was no intention to die intestate, and the intention was to so divide the testator's own estate that, regard being had to the insurance paid to the wife and sisters, over which the testator did not attempt to assert any dominion, the result would be equality.

The widow, it is admitted by the sisters and son, is not concerned in the result, as in either case she receives one-third of the $18,000. If the son is right, he takes on his contention two-thirds, and the sisters no portion of this sum. The contest is really between the sisters and the son. Either contention does

more or less violence to the testator's language. The son's argument rejects the words "subject to the provisions hereinafter contained as to insurance moneys," and makes the estate divisible into three equal portions; but far more serious, to my mind, is the fact that the contention, if correct, imputes to the testator an intention which it is, in my view, impossible to think is his real intention, of leaving $18,000 undisposed of as the result of a clause of this kind.

Far more reasonable is the view that the will may be read as though it were written thus: "My residuary estate shall be divided into three portions so that, regard being had to the insurance, there may be equality, and that one portion, reduced by the insurance payable directly to her, be given my wife; one portion, reduced by the insurance payable to them, be paid my sisters; and the remaining portion be set apart for my son." This I believe to be more in accordance with the expressed wishes of the testator. At the same time I am very sensible of the difficulties in this construction, and can only express my regret that the learned draftsman was so far impressed with the idea that the true function of language is to conceal thought as to adopt this peculiar way of expressing this intention.

Upon the argument I refused to admit in evidence paragraphs 4 and 7 of the affidavit filed in support of this motion, and directed these paragraphs to be stricken from the affidavit.

Costs out of the estate.

NATURAL RESOURCES LIMITED v. SATURDAY NIGHT LIMITED—MASTER IN CHAMBERS—FEB. 7.

Pleading—Statement of Claim—Libel—Irrelevancy—Suggestion of Motive—Notice of Action—Striking out Parts of Pleading—Leave to Amend.]—Motion by the defendants to strike out paragraphs 5, 6, 7, 9, and 10 of the statement of claim, or parts thereof, as irrelevant and embarrassing. The action was for libel. The publications complained of were contained in the issues of the defendants' weekly newspaper of the 19th March, 2nd April, 16th April, and 18th June, 1910. The plaintiffs asked for damages and an injunction restraining the defendants from further publication. By the first four paragraphs of the statement of claim the plaintiffs alleged that they carried on a large business in British Columbia, had made large invest-

ments there in real estate, and especially at Fort George; that these lands had become valuable; and that for several months the plaintiffs had been selling and offering for sale certain of the lots into which their lands had been subdivided. Paragraph 5: "For the purpose of attracting the attention of purchasers . . . the plaintiffs have extensively advertised . . . in newspapers throughout Canada, including the province of Ontario and the city of Toronto, *but the plaintiffs did not so advertise in the newspapers published by the defendants.*" The words italicised were those objected to. "6. The defendants have recently published . . . a series of sensational articles upon financial topics, partly for the purpose of increasing the circulation of the said newspaper, and partly for the purpose of blackmailing persons requiring advertising in connection with commercial investments, and for the purpose of compelling such persons to advertise in the defendants' newspaper." "7. The publication of the said series of articles . . . is part of a fraudulent blackmailing plan adopted by the defendants for the purpose aforesaid, and, in pursuance of and as part of the said plan, the defendants have so dealt with their property and assets as to prevent any person recovering a judgment against them for damages from realising thereon." Held, that these parts of the statement of claim could not be supported: Flynn v. Industrial Exhibition Association of Toronto, 6 O.L.R. 635; Gloster v. Toronto Electric Light Co., 4 O.W.R. 532, and cases cited. The facts set out, even if true and capable of being laid before the jury, did not come within Con. Rule 268, not being "material facts upon which the party pleading relies;" and, in order to secure a fair trial, they should be struck out: Canavan v. Harris, 8 O.W.R. 325.—The 8th paragraph set out in extenso the alleged defamatory and injurious articles; and the 9th paragraph began: "Notice of action was duly served upon the defendants in respect of the aforesaid libels, but they have refused to retract the same, and have persisted in their false and malicious libels." This was not objected to; but, by this 9th paragraph, the plaintiffs proceeded to set out the publication of a libel on or about the 3rd July, 1910, in which the previous statements were repeated, and the plaintiffs were in effect invited to bring this action. No notice had been given as to this last publication. Held, following Obernier v. Robertson, 14 P.R. 553, that all reference to the publication of the 3rd July should be struck out. Gurney Foundry Co. v. Emmett, 7 O.L.R. 604, distinguished.—By the 10th paragraph the plaintiffs alleged that "the defendants were well aware that the said articles were false, and

published them maliciously.'' To this there was no objection. But the plaintiffs went on to assign as reasons for the defendants' conduct matters similar to those in the 5th, 6th, and 7th paragraphs. Held, that this part of paragraph 10 must be struck out. The plaintiffs to have leave to amend, if they desired. Costs to the defendants in the cause. G. M. Clark, for the defendants. Glyn Osler, for the plaintiffs.

WILLIAMSON v. BAWDEN MACHINE AND TOOL CO.—FALCONBRIDGE, C.J.K.B.—FEB. 8.

Contract—Breach—Evidence — Corroboration — Return of Money Advanced—Cancellation of Drafts—Chattels Withheld.] —An action for damages for breach of contract, and for the return of $600 advanced and of drafts accepted and of chattel property alleged to be withheld. The Chief Justice said that he did not feel at liberty to disregard the evidence of James Pearson and Christina Bannerman in corroboration of the defendant; and, therefore, found that there was an agreement for payment by the plaintiff as the work progressed. This finding was arrived at after much hesitation and with some reluctance, as there was much in the defence which had a suspicious and even sinister aspect. The plaintiff's action for damages, therefore, failed. But, in all the circumstances, he ought to be repaid the $600 cash advanced to the defendants and to have a return and cancellation of the drafts accepted by him; and $20 as the value of certain chattels withheld from the plaintiff by the defendants. Judgment accordingly without costs. E. E. A. DuVernet, K.C., and W. B. Raymond, for the plaintiff. F. Arnoldi, K.C., for the defendants.

RE STANDARD COBALT MINES LIMITED—SUTHERLAND, J.—FEB. 8.

Company—Winding-up—Contestation of Claim—Stay of Proceedings—Separate Contestation by Liquidator—Discretion —Appeal.]—An appeal by the Cobalt Central Mines Limited from an order of J. A. McAndrew, Official Referee, in the course of a reference for the winding-up of the Standard Cobalt Mines Limited, directing that all proceedings upon the contestation by the appellants of the claim of one Thomas Q. Parker should be stayed until after the determination of the liquidator's contes-

tation of the same claim. The learned Judge said that, upon the material before him, it appeared that the Referee had exercised a wise discretion which ought not to be interfered with. Appeal dismissed with costs. Glyn Osler, for the appellants. H. E. Rose, K.C., for Parker. W. R. Smyth, K.C., for the liquidator.

PINDER v. SANDERSON NEWMAN AND HOUGH—FALCONBRIDGE, C.J.K.B.—FEB. 9.

Trespass—Injury to Neighbouring Premises by Water—Burden of Proof—Cause of Injury—Undertaking to Repair Wall—Dismissal of Action.]—Action for damages for injury to the plaintiff's premises by water brought thereon by reason, as alleged, of the defendants using a large quantity in their business as liverymen upon their premises adjoining the plaintiff's premises and not providing proper means of escape. The learned Chief Justice viewed the premises and directed certain experiments and tests to be made and applied. The evidence, he said, was extremely contradictory, and all that he could say at the end was, that the plaintiff had not succeeded in satisfying the onus of proof to shew that he had appreciably suffered from the defendants' wrongful acts. It is quite true (the Chief Justice continued) that, as a result of the extraordinary and violent test made on the 2nd December, when 30 odd Imperial gallons of water were discharged in five or six minutes against or near the defendants' cracked wall adjoining the hydrant, some water leaked through into the plaintiff's cellar; but the circumstances then were very exceptional, and such as could not exist under ordinary conditions. The dampness in the plaintiff's cellar is more attributable to the lie of the land, the damp strip between the buildings, the percolation arising therefrom, and water falling from the roofs. On the defendants undertaking (if they have not already done so) forthwith to repair the defect in their wall mentioned above, the action will be dismissed without costs. This judgment deals only with the state of affairs existing on the 3rd December last, and is without prejudice to the plaintiff's position if hereafter, by reason of the plaintiff's hopper becoming out of repair, or through any other wrongful act or default of the defendants, the plaintiff should consider that he has suffered actionable damage. A. C. Kingstone, for the plaintiff. G. F. Peterson, for the defendants.