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CARTWRIGHT, MASTER. NOVEMBER 26TH, 1906.

CHAMBERS.

MILLER v. BAYES.

Venue—Motion to Change—Convenience— Expense — Speedy Trial—Residence of Parties and Solicitors—Costs.

Motion by plaintiff to change the venue from Sault Ste. Marie to North Bay.

W. N. Ferguson, for plaintiff.

W. E. Middleton, for defendant.

THE MASTER:—This case comes under Rule 529 (b). The facts, which are not in dispute, are as follows. The parties and their witnesses (with one or two exceptions) all reside at Webbwood . . . a station on the Canadian Pacific Railway distant from Sault Ste. Marie 131 miles and from North Bay 127 miles. The train facilities are about equal to either town. It is said that defendant has one witness who lives at Massey, which is a little nearer to Sault Ste. Marie than to North Bay. The number of witnesses is not given by either party. The only thing else to remark is that, contrary to the rule, the affidavit on defendant's behalf is made by the solicitor and not by the client: see Leach v. Bruce, 9 O. L. R. 380, 4 O. W. R. 491. It also states that the sheriff or his deputy from Sault Ste. Marie will be a necessary witness and will have to come nearly 26 miles. This would cost about $20.

The ground on which plaintiff relies is that if the venue is changed the action can be tried at the ensuing non-jury sittings at North Bay which begin on 10th December next. If the ordinary time is chosen for the next sittings at Sault Ste. Marie, it will not be held before the early part of June.

Now, in the present case we have it admitted that the solicitors of both parties live at Sudbury, which is nearly 50 miles nearer to North Bay than to Sault Ste. Marie. There will be no difference in expense, except in regard to the sheriff. . . .

In these circumstances, I think the order should properly be made, following Mercer Co. v. Massey-Harris Co., 16 P. R. 171, which is a case very similar in its facts. The fact of an earlier trial was considered a reason of weight by the Chancellor in McArthur v. Michigan Central R. W. Co., 15 P. R. 77,79. . . .

[Reference also to Servos v. Servos, 11 P. R. 135.]

It is not stated what the sheriff is to prove. Perhaps plaintiff can safely make such admissions as will render his attendance unnecessary. If this cannot be done, then the extra expense of the trial at North Bay (if any) will be costs to defendant in any event.

The costs of the motion will be in the cause as usual.

MAGEE, J. NOVEMBER 26TH, 1906.

WEEKLY COURT.

McFARLAN v. GREENOCK SCHOOL TRUSTEES.

Public Schools — Change in School Site — Expenditure of Money — Special Meeting of Ratepayers — Taking Poll — Right of Farmers' Sons to Vote—Public Schools Act—Injunction—Motion for Judgment.

Motion for an interim injunction.

G. H. Kilmer, for plaintiff.

A. W. Ballantyne, for defendants.

MAGEE, J.:—The injunction is asked upon the ground that the special meeting of ratepayers called by the trustees

to consider the new school site selected by them, decided against its adoption, and that meeting having so decided there was no power to hold a poll, and that at the polling the adoption was carried by reason of persons entered on the assessment roll only as "farmers' sons" being allowed to vote in its favour.

The present Public Schools Act is ch. 39 of the statutes of 1901 (1 Edw. VII. ch. 39), which has not been amended in any respect affecting this question.

The difficulty arises over the use of the word "ratepayer" in the 24th section as to changing site, and its definition in sec. 2, which does not include "farmers' sons," and the fact that by sec. 13 not only every ratepayer, but "every person qualified to vote as a farmer's son under the Municipal Act," is entitled to vote at any election for school trustee or on any school question whatever. The plaintiff urges that only ratepayers as defined in sec. 2 are entitled to be heard under sec. 34. The defendants say that under sec. 13 and sub-sec. 4 of sec. 15 the votes of farmers' sons were properly received.

The present Act is in these respects the same as the Public Schools Act of 1896 (59 Vict. ch. 70), which consolidated the Public Schools Act to that date. In the previous consolidating Act of 1891 (54 Vict. ch. 55) no such difficulty arose. "Ratepayer" was there defined as at present, but there was no provision as to farmers' sons: see secs. 2, 15, 16, 22, 64, 66. The Act of 1896 introduced the provision enabling "farmers' sons" to vote, and altered the form of declaration required to be made by a voter at the poll so that it could be made by that class, and also qualified them if resident to be trustees: see secs. 2, 9, 14, 31. It would thus seem as if their qualification to vote or to be a trustee was an innovation in 1896. But going back to the Public Schools Act in the Revised Statutes of 1887, ch. 225, in sec. 2 the word "ratepayer" was at that time defined as including "any person entered on the assessment roll as a farmer's son," and in sec. 21 the voter could declare himself qualified as a farmer's son. The Act of 1896 was therefore merely a return to the policy of allowing that class to vote which had been omitted or discarded in 1891.

The words used in sec. 13 of the present Act are very broad, and give the right to vote "at any election for school

trustee or on any school question whatsoever." But for the plaintiff it is urged that sec. 34 of the present Act deals with a specific matter, and the specific course therein pointed out should be followed, and that the word "ratepayer" used should only have the meaning expressly given to it by sec. 2, and especially as it deals with a question of important outlay, the burden of which will fall on that class. Without considering whether the franchise was not conferred on them because they do in fact bear the incidence of taxation, though not property owners, a reference to that section of the Act may enable us to get at the intention of the legislature.

Although the right of voting is conferred on "farmers' sons," they are not mentioned in the Act anywhere but in secs. 13 and 15. Elsewhere the reference is only to "ratepayers," and, although farmers' sons are expressly given the right to vote at elections of trustees, yet sec. 14 only directs a meeting of ratepayers for such an election, and sec. 15 directs the secretary to enter in the poll book the names of the "ratepayers" offering to vote. To hold that because only the word "ratepayers" is used, the intention expressed in sec. 13 shall not be given effect to, would manifestly carry us too far and render that section wholly nugatory. If then in sec. 15, sub-sec. 2, the word "ratepayers" does not exclude farmers' sons, it will require some other argument to make it so restrictive in sec. 34.

Section 2 only defines the meaning of the word "ratepayer," "unless a contrary intention appears." In my view, a contrary intention does appear where the word is used in relation to those who have the right to vote, and there it must be taken to include all, or rather not to exclude any, having such right. It may not be necessary to give the same interpretation to it where it is not a matter of voting, but only a matter of requirement or demand, as, for instance, petitioning for union of school sections, calling a meeting of ratepayers, or requiring the calling of a meeting of trustees, or perhaps demanding a poll.

A narrower construction of sec. 34 is perhaps also open, which does not any more accord with the plaintiff's view. The trustees are to call a special meeting of the ratepayers. If at such meeting school questions are to be voted on, and farmers' sons have the right to vote on all such questions,

they must be at liberty to attend the meeting. It is not necessary for the trustees to call a meeting of ratepayers and farmers' sons. The meeting of ratepayers being called, under the Act the farmers' sons have the right to be present and are bound by the notice. Then the meeting being so called, no change of school site shall be made without the consent of "the meeting," that is, of those authorized to attend it.

In the rural school sections it is apparently the intention of the legislature that questions shall be disposed of as quickly and with as little inconvenience to those who are interested as possible. Section 15 allows a poll to be demanded by any two ratepayers at any meeting for the election of trustees or the settlement of any school question, and the poll is to be forthwith granted by the chairman, and apparently proceeded with at once, and the chairman and secretary are to count up the votes and announce the result. If the question submitted be adopted, the chairman so declares it, and in case of a tie he gives the casting vote. The voting is apparently part of the meeting as much so as voting at a meeting of shareholders of a company, and intended to go on at once when the poll is granted. The annual meetings commence at 10 a.m. (sec. 14), and the poll closes at 4 p.m. (sec. 15), and a copy of the minutes and of the poll book must be sent to the inspector.

If farmers' sons are to be given the right to vote on all school questions, they must have the right to attend the meetings, whether there is a poll or not, for voting need not be by a poll unless demanded (sec. 15 (1)), and it is the consent of the majority of the meeting which is required.

But then it is said that the provisions of sec. 15 as to a poll do not apply to a question of change of school site under sec. 34, but only to the annual meetings referred to in sec. 14. It is urged in behalf of this contention that under sec. 15 there must be a chairman to grant a poll and announce the result, and a secretary to prepare the poll book and enter the votes, and that it is only in sec. 14 that a chairman and secretary are spoken of. But sec. 15 expressly refers to any meeting, and sub-sec. 3 of sec. 14 authorizes a chairman and secretary "at any school meeting." In the Act of 1891 that sub-section was a separate section (sec. 19), and the mere re-arrangement does not

afford sufficient reason to restrict the meaning of the words employed.

It is also argued that, as sec. 34 requires the appointment of arbitrators "then and there," it cannot be intended that there should be a poll. But the fact that the polling is part of the meeting is a sufficient answer to that objection, though indeed it implies that the voters shall remain till the close of the poll so as to take part, if necessary, in choosing an arbitrator.

Another objection to the poll was that it was granted on the demand of two persons, one of whom, William Alexander, was a farmer's son, and not a ratepayer. It is said on the other side that he is a ratepayer. The only documentary evidence offered is not conclusive. Whether he comes within the definition of ratepayer in sec. 2 makes, I think, no difference. It appears from the affidavit of Robert Russell, filed on behalf of the plaintiff, that the poll was granted by the chairman on a show of hands, so that apparently the chairman did not act only upon the demand made by two persons, but also upon the desire of the majority of the meeting. No objection upon this score was made at the time, nor any objection made to the inspector within 20 days, as prescribed by sec. 15.

As I consider that the poll was proper and a part of the special meeting, and that farmers' sons were entitled to vote, the plaintiff's objections to the result of the vote fail, and I am unable to grant the injunction on the grounds on which it was asked, against the change of site or removal or completion of the school. . . .

I refuse the motion, with costs in the cause to defendants, unless the trial Judge otherwise directs. I may say that I have dealt with the matter as I have because it was practically a question of construction of the statute, on which the evidence at the trial could throw no additional light. If the parties desire it may be turned into a motion for judgment.

The parties consenting that the motion for injunction herein be turned into a motion for judgment, the action is dismissed with costs (including the costs of the motion for injunction), for the reasons given for the refusal of the injunction asked for.

NOVEMBER 26TH, 1906.

DIVISIONAL COURT.

RE WILSON AND TORONTO GENERAL TRUSTS CORPORATION.

Surrogate Court — Jurisdiction — Reopening Order Made on Passing Executors' Accounts — Fraud or Mistake — Con. Rule 642 not Applicable—Inherent Jurisdiction—Ecclesiastical Courts — Statutory Courts — Surrogate Judge — Persona Designata—Courts of Record.

Appeal by the widow of Sir Adam Wilson from an order of the Judge of the Surrogate Court of the County of York, made in the following circumstances.

The Toronto General Trusts Corporation, as successors of the Trusts Corporation of Ontario, were the executors of the will of Sir Adam Wilson, deceased, bearing date 22nd June, 1891, and letters probate of the will were granted to the corporation on 15th February, 1892.

An application having been made to the Surrogate Judge by the executors for the auditing and passing of their accounts, and for fixing the compensation to be allowed them for their care, pains, and trouble, and time expended in or about the estate, and the Surrogate Judge having audited and passed the accounts, and fixed the compensation to the executors, in the presence of counsel for the appellant (the widow), on 3rd January, 1905, an order was made by which it was found: (1) that the total amount which had come into the hands of the executors down to and including 30th June, 1903, was $95,890.34; (2) that the total amount of the revenue from the estate which had come to the hands of the executors to the same date was $42,-630.43; (3) that the executors had properly paid out and disbursed to the same date out of capital $21,189.63, and out of revenue $86,329.93 in due course of administration, and that the balance in their hands on the same date was $31,001.21; (4) that down to the same date the executors had made investments out of capital on mortgages on real estate and stock, and that on the same date there was outstanding on these investments $24,306.67; (5) that the assets

of the estate on 30th June, 1903, were those set out in a schedule to the order.

The compensation to the executors was fixed by the order at $6,890, which sum, together with the costs of auditing and passing the accounts and fixing the compensation was directed to be allowed and paid out of capital, and, after deducting these amounts, the amount remaining in the hands of the executors was found to be $23,952.41.

On 7th February, 1906, the appellant (the widow) presented to the Judge of the Surrogate Court a petition in which she alleged that she had recently for the first time been informed "that an item of $1,200 was charged against the trust estate in these accounts as of 14th August, 1897, for the purchase of stock in the Scramble Gold Mining Company;" that she had no knowledge of the purchase, and never authorized it; that the stock is of no value; that no certificate for the stock is held by the executors; and that the register of the company shews that no stock was ever issued to the estate of the testator or to her; and that this sum of $1,200 was debited against the estate by the executors in fraud of the estate and of the petitioner.

It was further alleged in the petition that the executors had used money of the estate and lent it and received interest on it to a much larger amount than they had credited the estate with, and had made a profit out of their trust which the estate had not received or been credited with; that the executors had from time to time charged the estate with interest on overdrawn balances at a much higher rate than that at which they had obtained the money, and had taken to their own use and benefit the difference between the lower and the higher rate of interest; that in the inventory there appeared an item shewing as an asset a mortgage from one J. Thompson for $1,000, which did not appear to be accounted for in the accounts filed in the Surrogate Court; that among the assets of the estate which came to the hands of the executors was a mortgage from one Brock for $37,400, covering about 210 lots; that nearly all the lots, including all the best locations, had been sold by the executors, and yet that the indebtedness on the mortgage still stood at $40,000; that the executors, without consulting the petitioner, had sold a residence and lands belonging to the estate, worth upwards of $10,000, for $5,000; that the estate

had been grossly mismanaged by the executors, and that this mismanagement should have been taken into consideration had the attention of the Court been directed thereto when fixing the compensation; that the executors had received moneys by way of commission or rebates from insurance and estate agents, and had kept them for their own use; that large and excessive sums were spent by the executors in necessary and expensive litigation, unauthorized by the petitioner, and that these sums had been charged to the estate; that the petitioner was not notified of the proceedings before the Surrogate Judge, and was not present or represented thereat, and the solicitor for the executors wrongfully assumed to represent her.

The prayer of the petition was that the order of 5th January, 1905, should be set aside and the accounts re-opened and further investigated by the Surrogate Court, without reference to the order.

After a protracted and expensive inquiry before the Surrogate Judge, he made an order on 11th June, 1906, giving leave to the petitioner, upon the next passing of the accounts of the respondents, to charge them with $48.87, "being the sum of $30 in respect of the purchase of Scramble Gold Mining Company's stock," with interest thereon, and $32 for commission or rebates received by the respondents in respect of insurance on properties belonging to the estate, with $8 for interest on that sum, and dismissed the petition with costs to be taxed as between solicitor and client and paid by the petitioner to the respondents.

The appeal was from that order.

F. E. Hodgins, K.C., and D. T. Symons, for the petitioner, appellant.

G. F. Shepley, K.C., and J. H. Moss, for the respondents, objected that there was no jurisdiction in the Surrogate Judge to vacate his order of 5th January, 1903, or to re-open the accounts.

The argument was confined to the objection, the argument upon the merits being postponed.

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

MEREDITH, C.J.:—The jurisdiction of the Surrogate Court was rested by counsel for the appellant upon two propositions: (1) that there is inherent jurisdiction in every Court to vacate an order which has been made by mistake or has been procured by the fraud of the party who has obtained it; (2) that Con. Rule 642 applies to the Surrogate Court, and gives the jurisdiction to the Surrogate Court, if it has not inherent jurisdiction.

Dealing first with the second proposition, I am of opinion that Con. Rule 642 cannot be invoked to support the jurisdiction of the Surrogate Court. . . .

The Rule is taken from Order 330 of the General Orders of the Court of Chancery of 1868, and that Order was substantially a re-enactment of secs. 17 and 18 of Order 9 of the General Orders of 1853. By this latter Order bills of review, bills in the nature of bills of review, bills to impeach decrees on the ground of fraud, bills to suspend the operation of decrees, and bills to carry decrees into operation, were abolished, and for the bill of review was substituted a rehearing of the cause, and for the other bills the proceeding by petition which is now provided for by Con. Rule 642.

The Con. Rule must, I think, be treated as substituting the proceeding by petition for the practice of filing such bills as were abolished by the General Order of 1853, and must, therefore, be confined to cases in which, under the former practice, such relief as is mentioned in the Con. Rule could be obtained by one or other of such bills.

So interpreting the Con. Rule, it can have no application to such a case as that to which the appellant seeks to apply it—the setting aside of an order of the Surrogate Court made on passing the accounts of an executor. . . .

I am, however, of opinion that the Surrogate Judge, acting as the Surrogate Court, has inherent jurisdiction to set aside an order which he has been induced to make by the fraud of the party who has obtained it, and also to set aside or vary an order which he has made by mistake, though not, however, to correct errors which he has made in the judicial determination of any question upon which he has actually passed.

That "the Surrogate Courts of the province are invested with the authority and jurisdiction over executors and administrators and the rendering by them of inventories and accounts conferred in England on the Ordinary under 21 Hen. VIII. ch. 5, except in so far as the same may have been revoked by subsequent legislation or Rules, was held by the Court of Appeal in Cunnington v. Cunnington, 2 O. L. R. 511, 518, and by Divisional Court in In re Russell, 8 O. L. R. 481, 3 O. W. R. 926.

It is open to question whether this authority and jurisdiction was derived from the statute of Henry or was possessed and exercised by the Ecclesiastical Courts in England long before that enactment: see Telford v. Morrison, 2 Addams 319. But, however that may be, the result is the same as to the Surrogate Courts of this province.

No question such as arose in In re Russell was presented on the passing of the accounts of the respondents, for no attempt was then or is now made by the appellant to charge the respondents with assets that were not included in the inventory brought into the Surrogate Court by them, the contest being as to the administration of assets which are admitted by the respondents to have come to their hands.

It is, I think, clear therefore that the Surrogate Judge had jurisdiction, in dealing with the accounts brought in by the respondents, to inquire into and determine all of the matters and questions which are dealt with in the appellant's petition to re-open the accounts, had they been raised before him at that time.

It is also, I think, clear that the acts of the Surrogate Judge in passing the accounts were those of the Court, and not of the Judge as persona designata. In Cunnington v. Cunnington, in In re Russell, and in In re Williams, 31 O. R. 406, they were so treated.

The accounts to be dealt with are spoken of in sec. 72 of the Surrogate Courts Act as accounts filed in the Surrogate Court, and the approval of the Judge referred to in the section must mean, I think, the approval of the Judge sitting as the Court, that is, of the Court. . . .

That the Surrogate Courts are not statutory courts having only those powers which are in terms conferred upon them by the Surrogate Courts Act, follows, I think, from

. . . Grant v. Great Western R. W. Co., 7 C. P. 438, and . . . Cunnington v. Cunnington. . . .

There remains to be considered the question whether the Ecclesiastical Courts had jurisdiction and authority to grant such relief as was sought by the appellant in the Surrogate Court. . . .

[Reference to Harrison v. Mitchell, Fitzgibbon 303; In re Brick's Estate, 15 Abbott P. R. 12; Sipperly v. Baucus, 24 N. Y. 46.]

In In re Brick's Estate, at p. 36, Mr. Justice Daly says: "I have pointed out, so far as it is shewn by the authority of adjudged cases, the extent to which these Courts have exercised this limited power, and the whole may be summed up briefly in the statement that they may undo what has been done through fraud or upon the supposition that they had jurisdiction . . . or correct mistakes, the result of oversight or accident. . . . These are all powers existing of necessity and indispensable to the administration of justice, under which may be embraced any other exercise of jurisdiction of a like nature or character." . . .

It is further to be observed that the Surrogate Courts of this province are courts of record (R. S. O. 1897 ch. 59, sec. 3), and therefore possess the broad general powers to review and correct their proceedings spoken of by Mr. Justice Daly as being possessed by courts of record, which is an additional reason for holding that the Surrogate Courts are possessed of the authority and jurisdiction which I would attribute to them.

The preliminary objection must, therefore, in my opinion, be overruled; but I must not be understood as determining that all or any of the matters referred to in the petition disclose a case for the exercise by the Surrogate Court of the authority and jurisdiction which, in my opinion, were vested in it.

I refer also to Gibson v. Gardner, 7 O. W. R. 474, 8 O. W. R. 526, and to Prudham v. Phillips, referred to in a note to the Duchess of Kingston's case, 20 How. St. Tr. 355, 479.

CARTWRIGHT, MASTER. NOVEMBER 27TH, 1906.

CHAMBERS.

VAN KOUGHNET v. TORONTO TOWEL SUPPLY CO.

Discovery—Examination of Servant of Defendant—Con. Rules 439 (a), 440, 441.

Motion by plaintiff for an order allowing him to examine for discovery, "in place of and on behalf of defendant," one Cowan, a servant of defendant, whose real name was Harvey C. Wheeler, and who resided in Boston, U.S.A., but carried on business in Toronto under the name of the Toronto Towel Supply Co. The statement of claim alleged that plaintiff was injured by a collision with a horse and waggon of defendant, driven by Cowan.

F. J. Roche, for plaintiff.

J. A. McEvoy, for defendant.

THE MASTER:—No authority was cited for the motion. Rules 439 (a), 440, and 441, are the only ones which allow the examination for discovery of any other person than a litigant. Cowan does not come under any of them.

So strictly are the Rules construed that where a defendant resides abroad he can only be examined on commission: see Lefurgey v. Great West Land Co., 7 O. W. R. 738. In the case of a foreign corporation, no such examination can be had: see Perrins v. Algoma Tube Co., 8 O. L. R. 634, 4 O. W. R. 289.

Motion dismissed; costs to defendant in the cause.

CARTWRIGHT, MASTER. NOVEMBER 28TH, 1906.

CHAMBERS.

CANADIAN GENERAL ELECTRIC CO. v. KEYSTONE CONSTRUCTION CO.

Costs—Motion for Better Affidavit on Production of Documents — Production of Document Sought — Costs of Motion.

Motion by plaintiffs for an order requiring defendants to file a further affidavit on production of documents.

G. F. McFarland, for plaintiffs.

J. E. Jones, for defendants.

THE MASTER:—Plaintiffs claim damages for a breach of contract. Defendants allege, among other defences, that they were induced into the contract by plaintiffs' representations that their plan was "the most economical and effective electric lay-out known to modern engineering, and at the lowest possible cost," and that, on finding both these assertions to be untrue, they repudiated and cancelled their contract with plaintiffs.

The president of the defendant company was examined on 4th October. It was admitted that a contract had been made by defendants with another company. The president had not that contract with him, but agreed to leave it with defendants' solicitors, so that plaintiffs could see it. This was not done promptly, and on 3rd November plaintiffs' solicitors wrote asking for its production. On 6th November defendants' solicitors replied that they would "endeavour to procure it and let you have it as soon as we can obtain it."

Plaintiffs were anxious to go to trial at the present non-jury sittings at Toronto, and on 23rd November served notice of the present motion. . . . On the day following the contract had reached defendants' solicitors, before the receipt by them of the notice of motion. The contract was, therefore, in the hands of plaintiffs' solicitors before the return of the motion; so that the only question for decision is as to the proper disposition of the costs.

As to this neither side was prepared to make any concession. . . . Defendants' contention was that the contract was not relevant to the issue, and that production was only given of grace and not as of right. This I cannot agree with. The allegation in the statement of defence above mentioned makes it important for plaintiffs to see if the price to be paid thereunder by defendants is less than it was to have been under their contract. Then, in the circumstances, it cannot be said that the motion was precipitate, when over two weeks had gone by without any word from the other side, and when the sittings was drawing to a close.

The costs cannot be given to defendants unless it can be said that the motion was vexatious and inexcusable. This cannot be truly said, though it might have been better to have given a day's or two days' notice before moving.

Looking at it now from the other side, can it be said that the costs should be to plaintiffs in any event. This is the extreme measure of what is usually given on Chambers motions, and is the penalty of, so to say, contumacious or unexplained default, or if some glaring and inexcusable irregularity. Neither of these charges can be made against defendants. It would seem that the solicitors had been practising on easy terms, and this is not to be discouraged by imposing penalties whenever any little slip or oversight takes place.

Viewing this matter under all the circumstances, I think the proper disposition of the motion will be to dismiss it without costs to either party.

MEREDITH, C.J. NOVEMBER 29TH, 1906.

CHAMBERS.

RE GOODERHAM.

Administrator pendente Lite—Powers of High Court and Surrogate Court as to Appointment of — Removal of Cause from Surrogate Court into High Court.

Motion by the persons named in what was propounded in the Surrogate Court of the County of York as the will of Sarah K. Gooderham, and which was contested by the respondent, to remove the contestation into the High Court, and for the appointment of an administrator of the estate pendente lite.

W. H. Blake, K.C., for the applicants.

H. E. Rose, for the respondent.

MEREDITH, C.J.:—A case is made out for the removal of the cause into the High Court, and an order may go for its removal, but an administrator pendente lite cannot be appointed upon this application. The only authority which the Court has to appoint an administrator pendente lite is that conferred upon it by the Surrogate Courts Act; sec. 56 of which, as interpreted by the Court of Appeal in Beatty

v. Haldan, 4 A. R. 239, gives jurisdiction to the High Court, where an action is pending in it touching the validity of the will of any deceased person, to appoint such an administrator; and it may be that, by force of sec. 35, where a cause is removed into the High Court under sec. 34, the Court has the same jurisdiction vested in it. Such an order should not, however, be made until the cause has been removed into the High Court. In Beatty v. Haldan the order was made in an action instituted in the High Court, and in Bergin v. Leclair (not reported) an action had been instituted in the High Court, and the questions raised in the Surrogate Court were directed to be tried in that action.

Order made removing matter into High Court.

MAGEE, J. NOVEMBER 29TH, 1906.

WEEKLY COURT.

MURPHY v. BRODIE.

Costs—Mortgage Action—Executors—Trustee—Redemption—Set-off.

Hearing on further directions and as to costs.

F. E. Hodgins, K.C., for plaintiff.

W. H. Blake, K.C., for defendants.

MAGEE, J.:—This action was a consolidation of two actions, the first brought by the late Margaret Stuart against John L. Murphy, and the second by John L. Murphy against Hugh Brodie.

In the consolidated action Mr. Murphy claimed repayment by defendant Brodie and the executor of Margaret Stuart's will of $2,123.27, paid by him on a mortgage and judgment in favour of J. T. McLaughlin, and also claimed against the executor $314 due by Mrs. Stuart to him for rent, taxes, etc. By counterclaim the executor alleged that the mortgage to McLaughlin for $2,900 and the mortgage to Mrs. Murphy for $600, were each for too large a sum, and

included unreasonable interest and bonus to the mortgagees, and that the former improperly included $200 for professional charges and disbursements of plaintiff, and that plaintiff had omitted to apply the rents and profits in reduction of the interest on the mortgagees, and the counterclaim asked that plaintiff be ordered to convey the land to the executor on payment of the amount properly due on the mortgages.

At the trial the action was, as against defendant Brodie, dismissed with costs; the mortgages to McLaughlin and Mrs. Murphy were declared to be securities for only $700 and $500 respectively, with interest, thus striking out large bonuses allowed the mortgagees by plaintiff; and accounts were directed; and on payment to plaintiff of any amount found due him a conveyance to defendant was ordered; and further directions and costs were reserved.

After the trial the property was sold by plaintiff, with the consent of all parties, and $3,183.79 received therefrom by plaintiff. It is by reason of this amount that the Master reports a balance of $719.85 owing from him. But for that sale there would have been a large sum due to plaintiff.

The report shews that at the date of the issue of the writ of summons in Stuart v. Murphy, 22nd October, 1901, $340.29 was owing to plaintiff Murphy, besides his account for professional services and disbursements, which was only reduced by taxation from $200 to $197.62. This would be in addition to the sum of $300 and interest owing to Mr. Brodie, for whom plaintiff was to that extent trustee.

On 2nd May, 1902, when the original action of Murphy v. Brodie was commenced, there was owing to plaintiff $778.88 additional, of which $727.12 was principal and interest allowed as properly paid on the McLaughlin mortgage.

At the time of the order for consolidation there was a further sum of $133.97 due to him.

All these sums were irrespective of any moneys due from Mrs. Stuart for rent, taxes, etc., which indeed, if paid to plaintiff, would have gone to reduce his claim. Owing to the sale it was not by the parties considered necessary for the Master to inquire or report as to those. As the action was dismissed as against defendant Brodie, plaintiff

should not, as against the executor, have any costs of the original action of Murphy v. Brodie before or of the consolidation order.

In the original action, Stuart v. Murphy, there was alleged against the defendant therein improper conduct in taking the deed in his own name, and also in mortgaging and making repairs and improvements. Apart from that, it was an action for redemption in effect, but without tender or offer of payment. Those charges were only sustained by the reduction of the amounts of two mortgages. The reductions were, however, substantial, and the arrangements which rendered them necessary were spoken of as extraordinary by the learned Chief Justice who tried the consolidated action. In view of those arrangements, Mr. Murphy should not be allowed costs before or of the consolidation order in Stuart v. Murphy, nor should the estate of Mrs. Stuart, in view of the claim she put forward.

Since the consolidation the action has practically been, as against the executor, a mortgagee's action, in which the mortgagee has recovered the larger portion of his claim, and was not at the trial deprived of costs.

Plaintiff Murphy should have his costs after the consolidation order down to and including the trial judgment, except in so far as the same were increased by the attempt to support the disallowed claims on the two mortgages. The executor should have his costs down to and including the trial, in so far as the costs of defence were increased by the resistance to those disallowed claims.

Plaintiff should also have the costs of the reference and the subsequent costs of the action. I assume that the Master has dealt with the expenses of sale.

The amount $719.85 found by the Master as being in plaintiff's hands, it has been agreed by the parties, shall be reduced by $25, leaving $694.85. He is, so far as is shewn, still trustee for defendant Brodie to the extent of $300 and interest. The exact amount does not appear, but counsel can probably agree upon it. If not, it may be necessary to have proof or inquiry.

Plaintiff's costs on the basis stated will be taxed and those of the executor to the extent mentioned, and the latter set off pro tanto against the former. The difference between the excess of plaintiff's costs and the above sum of

$694.85 shall, if in favour of plaintiff, be payable to him by the defendant executor forthwith after the taxation, and to be levied de bonis et terris testatoris et si non de bonis propriis.

If the difference be against plaintiff, he shall be liable to pay the same, with interest from the date of the report to be calculated at 5 per cent. per annum, unless to the satisfaction of the registrar it is shewn that the $694.85 or a greater portion of the proceeds of sale have been set apart on special deposit in a chartered bank at interest, or otherwise set apart by agreement of the parties, and in such case at the rate of interest actually earned, as fixed by the registrar. The amount shall be payable by plaintiff to defendant Brodie to the extent of the amount due him, and any surplus shall be payable to the executor. If there be not enough to pay defendant Brodie, it may be necessary to make inquiry as to the rents, taxes, etc., due by Mrs. Stuart, and it may be spoken to.

The judgment should be without prejudice to any rights of defendant Brodie against his co-defendant or Mrs. Stuart's estate, if he be not paid in full.

MULOCK, C.J. NOVEMBER 29TH, 1906.

WEEKLY COURT.

RE ROBINSON AND VILLAGE OF BEAMSVILLE.

Municipal Corporations—Local Option By-law—Motion to Quash—Technical Objections — Substantial Compliance with Statute—Delay in Moving—Discretion—Refusal to Quash.

Motion by Robinson to quash a local option by-law passed by the council of the village of Beamsville on 27th February, 1906.

C. H. Pettit, Grimsby, for applicant.

A. Mills and W. E. Raney, for the village corporation.

MULOCK, C.J.:—Various objections are taken to the validity of the law. It was contended that there was dis-

regard of many of the preliminary steps required by the statute, both in connection with the publication of the by-law and the voting thereon. It was conceded by the applicant that it could not be shewn that the irregularities complained of affected the result. The voting took place on 19th February; the by-law was carried by a majority of 6, 109 voting for and 103 against it.

At the Bar it was stated that the population of Beamsville was between 800 and 900. As to the objection that the by-law was insufficiently advertised, it is impossible to suppose that in a small and compact community like the village in question, the fact that the voting was to take place at the appointed time was not fully known to the electorate. The fact of 212 votes in all having been cast establishes this point clearly. It is said that there were in all 293 names on the voters' list, but many of these would doubtless represent absentees, or persons whose names appeared more than once on the lists. The actual total vote cast is a large number out of a total population under 900. Without expressing any opinion as to whether the publication was had in strict compliance with the statutory requirements, it was evidently sufficient to accomplish the object of the Act, namely, to give the electorate due notice of the pending election. The by-law was passed by the council on 27th February, 1906. The minutes shew that it was passed on 22nd February, but I am satisfied from the evidence that the entry of this by-law on the minutes of 22nd February, instead of 27th February, was an error on the part of the clerk.

No steps were taken to quash the by-law until 8th October, and no satisfactory explanation of the delay is forthcoming. The by-law on its face is good, the objections to its validity having reference to matters outside of the by-law. In such a case it is discretionary with the Court to exercise its authority to quash a by-law on summary application: Re Bolton and Town of Peterborough, 16 U. C. R. 389.

The by-law was carried by a majority of 6, and there does not appear to have been an intentional disregard of the formalities required to be observed by the municipality in connection with such voting. On the contrary, the voting appears to have been conducted in accordance with the

principles laid down in the Municipal Act, and the result does not appear to have been affected by any disregard of formalities called for by the Act.

In the course of an able argument Mr. Pettit, for the petitioner, admitted that, on account of the long interval between the time of voting and preparing the material in connection with this application, it was difficult to obtain satisfactory evidence on many matters, the subject of his objections. If prompt action had been taken, this difficulty would not have arisen.

Where a by-law of this nature has engaged the attention of a municipality, and been duly carried and gone into effect, a motion to quash should be promptly made. It is not in the public interest that uncertainty as to conditions affecting the liquor traffic should exist for any considerable period of time. In this instance for nearly 8 months no attack was made upon the by-law; then this motion was launched, and now, for the first time, is argued. Should the by-law be set aside on a technicality, it might be impossible to have another submitted to the electors at the approaching municipal elections, which would not have been the case had the petitioner acted with greater promptitude. No one having for nearly 8 months moved against the by-law, it may be assumed that there is no strong public opinion against it. On account of this delay, the Court should, I think, decline to consider any of the objections in question, none of which, so far as I see, are meritorious, and refuse to quash the by-law, which is legal on its face.

This motion should be dismissed with costs.

MABEE, J. NOVEMBER 29TH, 1906.

TRIAL.

ANDERSON v. ROSS.

Covenant—Restraint of Trade—Termination of Partnership—Covenant not to Carry on Similar Business — Carrying on Business as Agent or Manager for Another.

Action for a partnership account. Counterclaim for damages for breach of a covenant in the partnership articles.

F. H. Keefer, Port Arthur, for plaintiff.

H. Cassels, K.C., and W. F. Langworthy, Port Arthur, for defendant.

MABEE, J.:—The parties agreed at the trial upon a referee who was to take the accounts of the partnership, and consent minutes were filed disposing of that branch of the action.

Plaintiff and defendant had entered into an agreement in May, 1904, whereby defendant admitted plaintiff into partnership with him in the jewelry business at Port Arthur. The terms of the partnership are fully set out. The last paragraph of the agreement is as follows: "12. From and after the determination of this partnership, the said Anderson shall not engage in or be interested in, directly or indirectly, any business in the town of Port Arthur competing or interfering with the business of the said Ross, and the said Anderson covenants and agrees that her husband, the said Adam C. Anderson, shall not, after the determination of this partnership, carry on or engage or be interested, directly or indirectly, in any business in the town of Port Arthur which shall compete or interfere with the business of the said Ross."

At the time this agreement was entered into, the husband, Adam C. Anderson, was largely in debt, and judgments were outstanding against him, so the partnership agreement was made with his wife, Evangeline M. Anderson, the plaintiff, who by it agreed that her husband, Adam C. Anderson, should devote his whole time and attention to the business, and no charge was to be made against the firm for his services.

Upon the termination of the agreement, one D. F. Burke purchased a jewelry business that had been carried on in Port Arthur under the name of the Port Arthur Jewelry Company, and engaged Adam C. Anderson to manage it. Mr. Burke is not a jeweller; he says that he is at the store 3 or 4 times a day, and that Anderson looks after it as a jeweller. Anderson says he manages it, and is paid $175 per month; that he has no money invested in it, nor has his wife; that he learned defendant's private marks upon his goods and the persons from whom he bought while with him, and that he has, since connected with Mr. Burke's business, purchased similar goods from some of the same firms defendant dealt with. Wesley Henders says that Anderson is in charge of the Port Arthur Jewelry Company, and has a couple of boys there under him. Herbert Green-

land, who sold the business to Mr. Burke, says that the negotiations for sale all took place at Anderson's house; that he (Anderson) was always present; and that, so far as he knew, Anderson was carrying on the business.

I have no reason to doubt the statement of Mr. Burke that the business belongs to him, and that Anderson has no money invested in it, and it remains, therefore, to consider whether this state of facts puts the wife in breach of her covenant that the husband should not "carry on or engage or be interested, directly or indirectly, in any business in Port Arthur which shall compete or interfere with the business of the said Ross."

Defendant . . . counterclaims for damages for breach of this covenant, and his evidence is to the effect that the jewelry business which Anderson is now managing is upon the opposite corner to his, and that it interferes with and has injured his business.

Prior to the partnership Anderson had been in the wholesale jewelry business in Toronto, and his knowledge of the retail business and the local conditions connected with it at Port Arthur was gained while he was with defendant under the partnership agreement between his wife and defendant.

It was contended for plaintiff that there was no breach; that the covenant was only against the husband being engaged in or carrying on a business of his own, or in which he had some financial interest, and could not be read to prevent him working for another upon salary or for wages.

. . .

Is it open to Anderson to engage, as he has done, to manage this business as the agent of Mr. Burke, without a breach of the wife's covenant? In most of the cases in our own Courts the covenants coming in question expressly extended to prevent the covenantor from acting as the agent of another in the particular trade or business covered by the agreement: see Cook v. Shaw, 25 O. R. 124; Wicher v. Darling, 9 O. R. 311; Turner v. Burns, 24 O. R. 28; Parnell v. Dean, 31 O. R. 517.

On Roper v. Hopkins, 29 O. R. 580, the covenant was wider than the one in question in this action. . . .

It is stated in vol. 29 of the Am. & Eng. Encyc. of Law, at p. 859, that a covenant not to carry on a certain trade is broken where the covenantor does so as the agent or man-

ager or employee of another, and many American and some English cases are cited. . . They cannot all be regarded as supporting in entirety the rule as stated; indeed many of them are clearly distinguishable. On the other hand, in Allen v. Taylor, 19 W. R. 35, the words were, "exercise and carry on a trade," and it was held that this meant to carry it on upon the defendant's own account. This case was discussed in Palmer v. Mallet, 36 Ch. D. at p. 422, where Cotton, L.J., said: "'Carrying on a trade' implies, to my mind, that the person engaged in it is engaged in it qua trade, that is to say, as a trade producing profit or loss which is to be shared by him, and that is not the case if he is merely a salaried assistant." It is true that this was by way of distinguishing Allen v. Taylor. . . .

[Reference also to Rawlinson v. Clarke, 14 M. & W. 187; Tabor v. Blake, 61 N. H. 83; Jones v. Heavens, 4 Ch. D. 636.]

I think the weight of authority is in favour of the position contended for by plaintiff, and that the engagement of the husband as the manager, at a salary, of the business of Mr. Burke, is not a breach of the covenant.

It was not argued that there could be any injunction, and damages only were claimed.

In the view I have taken, the counterclaim must be dismissed with costs.

NOVEMBER 29TH, 1906.

DIVISIONAL COURT.

REX v. McARTHUR.

Justices of the Peace — Conviction — Liquor License Act — Weight of Evidence—Review on Motion to Quash—Conduct of Magistrates—Costs.

Motion by defendant to make absolute a rule nisi to quash a conviction for selling intoxicating liquor without a license, contrary to the Liquor License Act.

The motion was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

G. H. Kilmer, for defendant.

J. R. Cartwright, K.C., for the magistrates and complainant.

RIDDELL, J.:—A number of objections taken were disposed of on the argument, one of which should be mentioned in view of its bearing upon the question of costs.

The evidence having been given before two justices of the peace, they retired to consider their decision. Before announcing it they sent for and were closeted with the private prosecutor, the license inspector, for a period variously estimated at from 15 minutes to an hour or more. As all three swear that nothing was discussed or mentioned except the amount of costs to which the witnesses were entitled, we thought this was not sufficient to quash the conviction. But the circumstance was suspicious and much to be deprecated. Magistrates should remember that while the most important thing is for them to be impartial and right, it is not much less important that litigants and the public generally should believe in their impartiality and rectitude. I think that conduct of this kind should not be passed over without comment, and that it is sufficient to deprive the magistrates and inspector of costs.

Decision was reserved that we might consider how far the evidence justified a conviction.

It has long been the rule, in this Division at least, that if there were any evidence upon which a conviction could be based, the Court would not consider the weight of evidence. As it has been suggested that this rule has been relaxed, I have gone over the cases with care, and have come to the conclusion that the rule should be reaffirmed. . . .

[Reference to Regina v. Green, 12 P. R. 373, 375; In re Trepanier, 12 S. C. R. 111, 129; Rex v. Wilkes, 12 O. L. R. 264, 266, 7 O. W. R. 854; Regina v. Bowman, 2 Can. Crim. Cas. 410; Rex v. Daun, 12 O. L. R. 227, 235, 8 O. W. R. 173.]

The fact that no appeal lies from the decision of the justices makes no difference. Where the legislature has, of set purpose or otherwise, omitted to give an appeal, we cannot supply the omission.

I cannot find that any case lays down principles leading to a different conclusion.

The analysis of the evidence, then, being qualitative and not quantitative, it is clear that the conviction should stand.

Wakefield testifies as follows: ". . . Was in McArthur's place twice on 12th July. Called there in the morning and had a drink; supposed it was lager beer. I know what beer is; would not swear positively it was beer, but to the best of my knowledge and belief it was beer. I think it was paid for, but do not know who paid for it. Iced water was not mentioned there in my presence. I saw change was given. Saw several glasses on what I took for the bar or counter. I picked one of the glasses up and drank the contents. I did not see where it was taken from. There was a keg of beer in the other rig, and it reached there just ahead of us. Both rigs contained Orangemen going to Paisley to attend the celebration. The keg referred to was not taken out of the rig at McArthur's to the best of my knowledge.

There is enough here to justify the magistrates in finding that a sale had been made to Wakefield in violation of the Act.

Rule discharged without costs.

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

NOVEMBER 29TH, 1906.

DIVISIONAL COURT.

WALKERVILLE BREWERY CO. v. KNITTLE.

Costs—Action by Execution Creditors for Declaration that Land Subject to Execution—Class Suit—Payment of Execution Creditors' Claim—Disposition of Costs.

Appeal by the plaintiffs from the judgment of TEETZEL, J., dismissing without costs an action brought by execution creditors of John Knittle, deceased, against his widow, for a declaration that certain lands conveyed to her in her husband's lifetime were in reality his property and exigible under plaintiffs' execution.

W. R. Smyth, for plaintiffs.

I. Grenizen, Petrolia, for defendant.

THE COURT (BOYD, C., MAGEE, J., MABEE, J.), postponed the determination of the appeal for a certain period in order to allow the defendant to pay the plaintiffs' claim, which she did.

The judgment of the Court was delivered by

BOYD, C.:—In this case, after trial had before Teetzel, J., he dismissed the action without costs. There were reasons why he might well adopt this course as to costs. Plaintiffs now seek to vacate the result of the trial and have a new trial. We could not grant this except on the usual terms as to payment of costs of the futile trial. But at our suggestion we gave opportunity to defendant to settle the claim of the creditors who sue, and this has been done as reported to us. This payment of the creditors who sue representatively is an end of the action if made before judgment: Driffil v. Ough, ante 496. It would leave only the costs incurred up to the date of payment to be disposed of. It does not appear to be of use to have further argument as to this matter of costs. I think substantial justice will be done by letting each party answer his own costs. And that will be the judgment of the Court: no costs, and the suit is ended by payment.

MACMAHON, J. NOVEMBER 30TH, 1906.

TRIAL.

HARVISON v. CORNELL.

Master and Servant—Contract of Hiring—Covenant by Servant not to Enter into Similar Employment at Termination of Engagement—Oppressive and Void Contract—Wrongful Dismissal—Damages — Evidence—Admissibility.

Action by defendant's former employer to recover damages for an alleged breach by defendant of a covenant contained in the contract of hiring, and counterclaim by defendant against plaintiff for breach of the contract by dismissal of plaintiff.

C. A. Masten, for plaintiff.

W. H. Blake, K.C., for defendant.

MACMAHON, J.:—Defendant prior to entering the service of plaintiff had been employed in driving a laundry waggon in the city of Hamilton. About 5th September, 1905, plaintiff, a tea merchant in Hamilton, then owning two delivery waggons for use in his business of selling and delivering tea in and about Hamilton, employed defendant as driver and to sell and deliver tea on one of the routes.

On 2nd October defendant entered into a written agreement to act as salesman and delivery clerk for plaintiff for 12 months, for which he was to be paid $10 a week and a commission of 12 per cent, on cash collected over $75 per week, providing the average was continued for the month.

The following clause was contained in the agreement: "And I, the said party of the second part (defendant), do hereby agree and do accept the position of representative salesman and delivery clerk for the term of 12 calendar months from the date of the agreement, and do solemnly promise, and by virtue of my signature below and in the presence of two witnesses whose names appear at the foot of this agreement, that upon the expiration of this agreement, or its termination at any time for whatsoever reason, not to enter into the employ of any party or parties engaged in the sale of tea, or house to house sale of tea, in the province of Ontario, for the space of 12 calendar months from the expiration of this agreement, nor enter into any partnership with any party or parties directly or indirectly engaged in the tea business as before specified in the said province of Ontario, nor to myself commence the business of selling tea on my own account in the said province of Ontario for the space of 12 calendar months from the expiration of this agreement for whatever reason."

Defendant continued in the employment of plaintiff for 48 weeks, his average wages during that time being $15.11 a week. Early in August, 1906, plaintiff's business was turned into a limited liability company . . . and plaintiff . . . was appointed general manager and treasurer.

A few days before 27th August, plaintiff called defendant into the . . . company's shop, and read over to him an agreement which he desired him to sign, whereby he was to enter the service of the . . . company for a period of 12 months from the date of the document (blanks being left for the date), on the same terms and conditions as those

upon which defendant had been employed by plaintiff, with the exception, defendant said, that the agreement as read to him provided for payment to him of 10 per cent. instead of 12 per cent. commission. Defendant said he would require to consider it . . . On 27th August . . . defendant said he would sign it if his wages were increased by $2 per week. This plaintiff refused to give. Plaintiff then said he had instructions from the president of the company not to let a driver go out unless he signed the contract. Defendant then went outside to the delivery waggon and asked plaintiff if he was discharged. According to plaintiff, his answer was, "No, not discharged, but I have no further work for you." The evidence of John W. Ellitt (a stockholder in the company) and of defendant is, that what plaintiff said was, that he had instructions from the president not to let a driver go out unless he signed the contract. This I regard as the true version of what took place.

Defendant accepted that as a dismissal, and I find that he was justified in so doing. He then procured employment in connection with a similar business in Hamilton.

Defendant, at the time he signed the agreement of 2nd October, 1905, was just 18 years old, and he said that before signing he asked plaintiff what the meaning of the clause commencing "not to enter into the employment of any party," etc., was, and he said that plaintiff told him that it did not matter much, and on that he signed the agreement. That statement remained uncontradicted by plaintiff, so it must be taken that the assurance was given to defendant that that part of the contract was not of any moment.

Defendant, about 6th September, 1906, purchased from one Martin Sickle a small tea business in Hamilton. . . . Plaintiff obtained an injunction on 15th September, and defendant's shop was closed for about a fortnight, when the injunction was dissolved.

The business that plaintiff had in Hamilton was not an extensive one, being carried on at first with two waggons, and after a time a third waggon was employed in the service. The territorial scope of the business was not wide, being 30 miles to the east, at Dunnville, 20 miles to the south, at Caledonia, and 7 or 8 miles to the north, at Waterdown; and it was in contemplation to extend as far west as Brantford, a distance of about 30 miles. . . .

[Reference to Harner v. Graves, 7 Bing. 735; Mallom v. May, 11 M. & W. 667; Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., [1894] A. C. 535; Leather Cloth Co. v. Lorsant, L. R. 9 Eq.; Rousillon v. Rousillon, 14 Ch. D. at p. 369; Underwood v. Baker, [1899] 1 Ch. 300; Badische Anilin und Soda Fabrik v. Schott, [1892] 3 Ch. 487; Haynes v. Doman, [1899] 2 Ch. at p. 24.]

If a person in the same business were to give evidence as to what precautions were required in order to protect his business, he would be stating what he conceived would be a reasonable contract for the protection of his interests; and it is in relation to that that a witness is precluded from expressing an opinion.

Evidence was tendered as to contracts entered into by a tea merchant in Montreal with his salesman and delivery clerk, where the business was extended to Ottawa, Kingston, and other places in Ontario far distant from Montreal. The evidence was also tendered of Mr. Whaley, the president of the Ocean Blend Tea Co. of Toronto. . . . I rejected the evidence in each case because the nature and magnitude of the trade conducted by these establishments would be no guide as to what is customary or what precautions would be required in a small business like plaintiff's. . . .

Not only was the territory over which plaintiff's business was carried on very restricted, but the sales were very limited; so that, in my view of the evidence, it would be preposterous to hold that the clause complained of in the agreement was necessary for the protection of plaintiff's interests, and it is therefore oppressive and void.

Action dismissed with costs. Damages of defendant on his counterclaim assessed at $200, and judgment against plaintiff for that sum with costs.

NOVEMBER 30TH, 1906.

DIVISIONAL COURT.

REX v. SPELLMAN.

Police Magistrate—Jurisdiction—City Magistrate—Appointment of Magistrate for County—Conviction—Motion to Quash.

Motion by defendant to quash his conviction by D. W. Dumble, police magistrate for the city of Peterborough, for

selling intoxicating liquor without a license, in the village of Lakefield, in the county of Peterborough, upon the ground that the magistrate had no jurisdiction.

The motion was heard by FALCONBRIDGE, C.J., BRITTON, J., MABEE, J.

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

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

BRITTON, J.:—On 31st August, 1906, at the city of Peterborough, defendant was convicted by D. W. Dumble, as police magistrate for the city of Peterborough and for the county of Peterborough, of selling intoxicating liquor at Lakefield, in that county, without having a license to sell. Spellman was fined $100.

The objection strongly pressed by counsel for defendant was that Dumble had no jurisdiction to try the accused for the offence, because (a) he is not police magistrate for the county, and (b) as police magistrate for the city he had no jurisdiction to try a man for an offence committed in the county outside of the city, there being a police magistrate for the county, and in this instance Dumble was not acting because of the illness or absence or at the request of that county police magistrate.

Dumble was appointed a police magistrate for the then town of Peterborough on 25th November, 1882. He still holds the office for the city of Peterborough—that is conceded. His appointment as police magistrate for the town was authorized by R. S. O. 1877 ch. 72.

The statute 41 Vict. ch. 4, sec. 9, authorized the appointment of a police magistrate for a county, etc., and on 22nd April, 1886, Dumble was appointed a police magistrate for the county of Peterborough. This sec. 9 was carried into R. S. O. 1887 as sec. 9 of ch. 72.

In 1885, by 45 Vict. ch. 17, sec. 1, provision was made for the appointment of a salaried police magistrate for the county after the passing of a resolution by the county council affirming the expediency of such appointment. This authority is continued by R. S. O. 1887 ch. 72, sec. 8, and by R. S. O. 1897 ch. 87, sec. 15.

George Edmison was appointed a police magistrate for the county of Peterborough on 30th July, 1889. . . .

The appointment of George Edmison cannot, in the circumstances, be considered to be in any way "in the place and stead" of Dumble, and so Dumble's appointment for the county is not revoked.

But, further, I agree with the argument for the Crown that Dumble, as police magistrate for the city, and adjudicating in the present case, was within his jurisdiction.

The powers given to the police magistrate for a town or city by R. S. O. 1877 ch. 72, secs. 4 and 7, are continued by R. S. O. 1897 ch. 87, secs. 27 and 30.

By sec. 27 Dumble is ex officio a justice of the peace for the whole county of Peterborough.

By sec. 30, sitting as a police magistrate he has power to do alone whatever is authorized by any statute in force in Ontario, within the legislative authority of the province, to be done by two or more justices of the peace, and he has that power while acting anywhere within the county for which he is ex officio a justice of the peace.

My opinion is confirmed by sec. 350. . . .

The inference is that a police magistrate for a town or city has jurisdiction in the county and outside of what may be called his limits, if he chooses to exercise it, although he is not bound to do so. Section 17 does not, I think, restrict the action of a police magistrate. Section 20 is restrictive, but only to police magistrates appointed for county or district or part of a county or district. Hunt q. t. v. Shaver, 22 A. R. 202, emphasizes the distinction created by statute between a police magistrate when acting either as such or as ex officio justice of the peace.

The conviction should be affirmed without costs.

FALCONBRIDGE, C.J., gave reasons in writing for the same conclusion, referring to Smyth v. Latham, 9 Bing. 692, 710; Robertson v. Freeman, 22 U. C. R. 298.

MABEE, J., concurred.

NOVEMBER 30TH, 1906.

C.A.

REX v. BURR.

Criminal Law—Seduction of Girl under 16—Evidence—Corroboration—Acquittal—Appeal by Crown—New Trial—Criminal Code, sec. 746.

Case stated by the acting Chairman of the General Sessions of the Peace for the county of Kent, pursuant to the direction of the Court of Appeal, under sec. 743 of the Criminal Code.

The accused was placed on trial at the sittings of the General Sessions of the Peace for Kent in June, 1906, at which the junior Judge of the County Court was presiding as Chairman.

The indictment charged that the accused seduced and had illicit intercourse with a girl of previously chaste character above the age of 14 years and under the age of 16 years, not being his wife.

The girl testified to acts of illicit intercourse between her and the accused, and other witnesses were examined for the purpose of corroborating her testimony.

At the conclusion of the evidence for the Crown, the Chairman ruled that there was not the corroboration required by sec. 684 of the Criminal Code, and he withdrew the case from the jury, and directed the accused to be discharged.

The question submitted was whether the ruling was right.

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

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

O. L. Lewis, Chatham, for the accused.

MOSS, C.J.O.:—Under sec. 684 a person accused of an offence of the nature charged in this case is not to be con-

victed upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused.

This does not necessarily make it incumbent upon the Crown to adduce testimony of another or other witnesses to the acts charged. To do so would be virtually to render a conviction impossible in the majority of cases like the present. It is enough if there be other testimony to facts from which the jury, or other tribunal trying the case, weighing them in connection with the testimony of one witness, may reasonably conclude that the accused committed the act with which he is charged.

In this case it was shewn that the accused was seen taking improper liberties with the girl on more than one occasion, and that he had on at least two occasions expressed a strong desire for sexual intercourse with her.

And there was also given in evidence a statement made by him after the alleged offence from which it might not unreasonably be inferred that he had availed himself of the opportunity afforded him through the absence from home for some days of the girl's parents, during which he was left in charge of the house where the girl and her young brothers and sisters were.

These matters were material to the charge, and pointed to the accused as the perpetrator of the offence, and they should not have been withdrawn from the jury.

The answer to the question, therefore, should be in the negative, and, under all the circumstances of the case, a new trial should be directed.

It may, however, be pointed out that sec. 746 of the Code does not make it obligatory on the Court to direct a new trial in every case which comes before it under the jurisdiction conferred by the Code.

The language of the section is permissive, and the Court, in addition to the other powers conferred upon it, is enabled to make such other order as justice requires. The matter is left to the Court to exercise its discretion in each case as the circumstances seem to require.

It follows that there can be no general rule, and the Court ought not, in any one case, to attempt to lay down what considerations should govern in another. The con-

siderations influencing the exercise of discretion in one class of cases may differ materially from those affecting it in another class. Especially may this be so in cases where the accused has been discharged, and the Crown is appealing. There the same considerations as would govern where the accused has been convicted, and is the appellant, would not necessarily be applicable: Rex v. Karn, 5 O. L. R. 704, 2 O. W. R. 335.

Having regard to the nature of the offence and the circumstances under which it has been sworn it was committed, the present case is one in which the discretion should be exercised in such manner as to afford the Crown an opportunity of once more putting the law in motion against the accused, if it thinks fit to do so.

OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., concurred; OSLER and MEREDITH, JJ.A., giving reasons in writing.

NOVEMBER 30TH, 1906.

C.A.

BALDOCCHI v. SPADA.

Bankruptcy and Insolvency — Transfer of Goods by Insolvent to Creditor — Preference — Presumption—Rebuttal — Absence of Fraudulent Intent—Actual Advance of Money.

Appeal by plaintiffs from judgment of BRITTON, J., at the trial (7 O. W. R. 325) dismissing an action brought by creditors of defendant Spada to set aside a transfer of certain goods by defendant Spada to defendant Garborino, upon the ground that such transfer was made with intent to give to defendant Garborino a fraudulent preference over the other creditors of defendant Spada.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

R. McKay and G. Grant, for plaintiffs.

J. Tytler and R. G. Smythe, for defendant Garborino.

GARROW, J.A.:—The facts are very fully set forth in the careful and well reasoned judgment of Britton, J., and, approving, as I do, of his conclusions, I have very little to add.

The main question was one of fact, namely, did Garborino know, or should he have inferred from the facts and circumstances within his knowledge, that Spada was insolvent at the time the impeached transaction was entered into, No doubt Spada knew, and he may have intended to prefer his old friend and fellow-countryman, but his knowledge and intention alone are not sufficient.

Upon the question of Garborino's knowledge or lack of knowledge much depended upon whether Garborino's own evidence was believed or not, in other words, upon his credibility. Britton, J., evidently regarded him as credible, and based his conclusions of fact upon that assumption. Under these circumstances, it is not, I think, open to an appellate court to reverse his findings unless it clearly appears either that the facts deposed to are in themselves insufficient in law to constitute a good defence, or that unwarranted inferences have been drawn from indirect facts, or other apparent error committed in reaching the conclusion in question. In my opinion, none of these appear. I have read carefully the evidence, and I would, I think, have reached the same conclusions as those of the learned Judge at the trial. Regard must be had to the whole course of dealing, and not to the few isolated remarks, after the event, which fell from defendant Garborino in his examination, about feeling "funny" and "afraid." They were both Italians, Garborino at least with an imperfect knowledge of English. Spada had begun as a dealer in fruits in a small way in the western part of the city, and had prospered until he had an extensive wholesale shop and business much nearer the business centre. Garborino was in a somewhat similar line of business, but in a much smaller way. He appears throughout to have had the utmost confidence in Spada. He had proved this before the transaction in question by making to him from time to time very considerable loans, amounting in all to $2,500, without asking or obtaining any security; and the readiness with which he concurred in Spada's suggested mode of carrying out the transaction now in question shews that his confidence had not been impaired. Spada's business was then to all appearances as flourishing as ever. It was

no unusual thing for a business man, importing large quantities of merchandise from foreign countries, to require at times to borrow money, or even to hypothecate warehoused goods. He saw Spada make a large deposit at the Imperial Bank to release that bank's warehouse receipt, and may well have thought that, with the aid of the $1,900 which he was to advance, Spada's chief liabilities would be satisfied. The matter was gone about very deliberately. There was no apparent haste, no solicitors were employed. There was no pressure or urging on the part of Garborino, except that he very naturally wished to have matters so arranged that his own money deposited in the Dominion Bank might be released. These and other circumstances, all consistent, all go to shew that at least defendant Garborino believed he was dealing with a perfectly solvent debtor, in no real financial difficulty whatever, and had on his part certainly no actual intent in what was being done to obtain a preference over Spada's other creditors.

And, in my opinion, there was, in addition, an actual bona fide advance of the $1,900, within the meaning of sec. 3, sub-sec. 1, of R. S. O. 1897 ch. 147, sufficient to sustain the transaction, as was apparently also the opinion of Britton, J., although he preferred to rest his judgment upon the other grounds. See Campbell v. Roche, 18 A. R. 646, 21 S. C. R. 645.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., dissented for reasons given in writing.

NOVEMBER 30TH, 1906.

C.A.

PARADIS v. NATIONAL TRUST CO.

Contract—Sale of Railway Charter—Share of Promoter in Proceeds—Remuneration for Services—Amount Fixed by Referee—Quantum Meruit—Evidence.

Appeal by defendants from order of a Divisional Court (7 O. W. R. 756) reversing judgment of TEETZEL, J., at the trial, dismissing the action.

Defendants were executors of the will of one Ernest Albert Bremner, who died on 21st June, 1903. The action was to recover from the estate the sum of $4,000 in respect of certain dealings and transactions between plaintiff and Bremner. The trial Judge dismissed the action without costs. The Divisional Court reversed the judgment of the trial Judge and awarded plaintiff $2,000 and costs, with liberty to amend his pleadings as he might be advised, in view of the evidence at the trial. Defendants appealed and asked that the judgment of the trial Judge should be restored.

The appeal was heard by Moss, C.J.O., Osler, Garrow, Maclaren, and Meredith, JJ.A.

W. H. Blake, K.C., for defendants.

C. A. Moss and Featherston Aylesworth, for plaintiff.

Garrow, J.A.:—. . . At the trial Teetzel, J., asked counsel for plaintiff this question: "Are you endeavouring to prove some right of action or indemnity outside of these two documents?" To which counsel replied, "No, my Lord, outside of the two documents, and the award or appraisement." And this formulation of plaintiff's claim was, in my opinion, after a perusal of the whole case and without regard to the strict form of the pleadings, an entirely proper one, for I think it entirely out of the question to construct out of the vague and highly unsatisfactory evidence as to conversations with Bremner and Armstrong an additional oral agreement of any kind. The thing which plaintiff had to sell and which Bremner desired to acquire was plaintiff's interest in the charter as one of the incorporators and provisional directors. By the first of the two documents plaintiff assigned this interest to Bremner for the expressed consideration of $100, and his share in the 30 per cent. interest to be divided among the provisional directors, but, in addition, by the terms of the second document of contemporaneous execution if not of date, he was also to get such additional consideration as might, under the terms of that document, be fixed by Mr. Armstrong. And this second document should, I think, be read with the telegram at once sent by Bremner to Armstrong apprising him of what had been done, put in at the trial by plaintiff. The second document speaks of "the basis" that might be approved of by

Mr. Armstrong, and the telegram adds the term "inside basis, approved by you." . . .

Plaintiff's oral testimony practically agrees with the terms of the telegram, that what was really agreed upon was that he should, notwithstanding the assignment, be put upon the inner circle, or inside basis, with Bremner and others who comprised the circle, to such extent as should be approved by Mr. Armstrong.

It is not difficult, in the circumstances, to assign a meaning to these terms, "inside circle or basis." Indeed they almost speak for themselves. The parties were dealing with that very peculiar property, if it can be called property at all, a railway charter. They had no means to build the railway itself nor any intention to do so. But what they did intend to do, as the evidence shews, was to turn over the charter, for a price, to capitalists who might build; and the price would, when received, be shared in by those on the "inside basis." And, in my opinion, what was referred to Mr. Armstrong, and all that was referred to him, was to fix what portion or proportion of the proceeds of a sale, which would be going to those in the inner circle, should go to plaintiff. If nothing was received, he would, of course, get nothing. If something, then he would get such share as might be awarded either before or after a sale by Mr. Armstrong.

The evidence is, that nothing was received, or rather it might with better propriety, perhaps, be put thus. Plaintiff, upon whom rested the burden of proof, has not proved that Bremner received anything for the charter. So that, even if plaintiff obtained from Mr. Armstrong such an award as he had power to make, which, in my opinion, he has not, his action must for this reason have failed.

No doubt, plaintiff has been in a way hardly dealt with. He has in a large and public spirited way expended both time and a very considerable sum of money upon what is called the tote road. But a tote road, however useful to settlers and others going in, is not a railway, nor even a necessary adjunct to a railway. And in any event that tote road is as much plaintiff's as it ever was. Bremner did not by the transaction in question acquire it, not apparently at any time desire to do so. On the other hand, the evidence shews that plaintiff's actual expenditure in connection with

obtaining the charter was trifling, his whole claim upon the ground of expenditure practically resting upon his tote road expenditure. Considerations such as these induce me to think that a keen business man like Mr. Bremner could not have been so foolish as to entertain, much less to countenance, such extravagant demands for plaintiff's share in the charter as those now put forward by plaintiff and apparently acquiesced in by Mr. Armstrong, to judge by his so-called award.

The appeal should be allowed, and the judgment of Teetzel, J., restored, plaintiff paying the costs of the appeal to the Divisional Court and to this Court.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

OSLER and MACLAREN, JJ.A., concurred.

MOSS, C.J.O., dissented, agreeing with the opinion of the Divisional Court, for reasons stated in writing.

NOVEMBER 30TH, 1906.

C.A.

SCHWOOB v. MICHIGAN CENTRAL R. R. CO.

Master and Servant — Injury to Servant and Consequent Death—Negligence—Common Law Liability — Workmen's Compensation Act—Defect in Engine—Repair— Inspection —Reasonable Care—Person Intrusted with Duty of Providing Proper Appliances — Findings of Jury — Interpretation of—Refusal to Grant New Trial.

Appeal by defendants from judgment of TEETZEL, J., at the second trial of this action, refusing a nonsuit and directing judgment to be entered for plaintiff for $9,000 damages as assessed by the jury. The judgment of a Divisional Court directing the new trial is reported in 5 O. W. R. 157, 9 O. L. R. 86, and was affirmed by the Court of Appeal: 6 O. W. R. 630, 10 O. L. R. 647. The action was brought by

the widow and administratrix of the estate of Robert H. Schwoob, deceased, to recover damages for his death, while in the employment of defendants as a locomotive fireman, from injuries received by the drawing out from the hot water tank on which the deceased was employed, of one of the hot water tubes or pipes, with the result that hot water and steam escaped in large quantities and scalded the deceased. Defendants pleaded that no negligence was shewn and no liability existed at common law nor under the Workmen's Compensation Act.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

I. F. Hellmuth, K.C., and D. W. Saunders, for defendants.

T. W. Crothers, St. Thomas, for plaintiff.

OSLER, J.A.:—. . . The evidence fails to make out a case of common law liability on the part of the company.

The judgment may, however, be supported for damages under the Workmen's Compensation Act, if the findings of the jury, either by themselves or read with the learned Judge's charge and with facts proved or admitted and not denied, come up to what is required by that Act in order to fix liability upon an employer. Upon the whole I think they do.

The case was very fully and carefully explained to the jury in the Judge's charge, and the difference between the liability of the employer at common law and under the statute pointed out to them. It is very evident that they meant, if they could possibly do so, to fasten upon the defendants that ground of liability which would enable them to assess the damages at large. That result cannot stand, but certain of the findings may be referred to to support the judgment for the reduced sum recoverable on the narrower ground.

They found that the death of the plaintiff's husband was caused by reason of a defect in the condition or arrangement of the locomotive on which he was working. Their answer to the second question, as to what such defect consisted in, is that the defect occurred by the defendants "not supplying proper inspection," and, as want of inspection, unless

there was some existing defect which inspection would have disclosed, is not defect, or, by itself, negligence, the answer is not very intelligible until it is remembered that the only defect about which the contest was waged throughout the trial was that the tubes of the engine had not been properly belled, and in the conversation which took place between the trial Judge and the jury, after they had brought in their answers to the first set of questions, this is made clear. They all agreed, they said, that the defect which caused the accident was that the belling of the tube had not been properly done, adding that there should have been some inspection which would have discovered it.

The answers to questions 3 to 6 may be passed over; indeed, it may be more properly said that the jury left these questions unanswered by referring in each instance to their answer to question 2, as making it unnecessary to give specific answers, their finding as to the ground of liability resting upon that. After the discussion referred to, the jury, in answer to further questions founded upon it, said that there was a defect in the way the tube was fixed in the boiler by Jeffers at the time it was put in, and that this defect was that it was not properly belled. Reading these answers with the answer to the first question and the discussion referred to, a case for liability under sec. 3 (1) of the Act is made out, subject to the qualification of sec. 6 (1) being also established, namely, that Jeffers, the person from whose negligence the defect in the locomotive arose, was a person who had been intrusted by the defendants with the duty of seeing that its condition was proper. There is no dispute, there was none throughout the whole course of the trial, and the Judge in his charge referred to it again and again, that Jeffers was the person in the employ of defendants who was so intrusted. We have it, therefore, established that the death of plaintiff's husband was caused by a defect in the condition of the locomotive on which he was working; that this defect consisted in the improper way in which Jeffers fixed the tubes in the boiler of the locomotive; and that he was the person who had been intrusted by defendants with the duty of having this properly done, in other words, the duty of seeing that the condition of the locomotive was proper. This is all that is necessary to fulfil the requirements of the Act in such a case as the present.

I am unwilling to send the case down for a third trial without any prospect of a different result, if by any reasonable interpretation of the answers of the jury, read in the light of the charge and the admitted facts, this can be avoided. If I have been unduly swayed by this consideration I must leave it for a higher tribunal to say so.

See Jamieson v. Harris, 35 S. C. R. 625; Tooke v. Bergeron, 27 S. C. R. 567; Moore v. Grand Trunk R. W. Co., in the Supreme Court of Canada, not reported, and of which the ground of decision is not yet known.

The judgment should, therefore, be varied and the rerecovery limited to the alternative amount found by the jury ($3,240), the method of arriving at which was not complained of.

There will be no costs of the appeal, success being divided.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., agreed, for reasons given in writing, that plaintiff could not recover at common law, but was of opinion that there should be a new trial, limited to the claim under the Workmen's Compensation Act.

NOVEMBER 30TH, 1906.

C.A.

RE McKENNA AND TOWNSHIP OF OSGOODE.

Municipal Corporations — Drainage — Petition for Drainage Scheme—Report of Engineer—Delay in Making—Death of Petitioners meanwhile — Extensions of Time by Council after Time Expired — Invalidity of Report — By-law Founded thereon—Powers of Council—Provisions of Drainage Act—Conditions.

Appeal by the township corporation from the report of the Drainage Referee, made in a proceeding instituted by notice of motion for an order to set aside and declare void

a petition for a scheme of drainage, the report of the engineer of the township, and the resolution of the council adopting the report, and the by-law in reference to the scheme which was provisionally adopted by the township.

The Referee allowed the motion and restrained the corporation of the township from proceeding with the drainage work set forth in the engineer's report.

The township corporation appealed, contending that the Referee's decision should be reversed.

The appeal was heard by Moss, C.J.O., Osler, Garrow, Maclaren, and Meredith, JJ.A.

M. Wilson, K.C., for appellants.

F. R. Latchford, K.C., for respondents.

Moss, C.J.O.:—The record of the proceedings before the Referee discloses a case with some features which are unusual, if not wholly exceptional, in a drainage case. A proposal by a farmer named O'Connor to provide drainage for his farm of 125 acres, by a ditch constructed under the provisions of the Ditches and Watercourses Act, seems to have developed and expanded into a scheme of drainage which involves some 23,000 acres of land and an expenditure of over $13,000.

The township engineer, to whom O'Connor's requisition under the Ditches and Watercourses Act was referred, concluded, as the result of a friendly meeting, that no drainage scheme could be carried out under the Ditches and Watercourses Act, because it would involve an expenditure of more than $1,000. Thereupon he prepared a petition for drainage of an area comprising between 700 and 800 acres of land under the Drainage Act, and handed it to O'Connor to procure signatures. The signatures of 7 persons, forming, it is said, a majority of the owners entitled to petition in respect of the area, were affixed to the petition, and so signed it was presented to the township council in August, 1900, and a by-law was then passed appointing the engineer to make an examination and report. No report was made until 25th February, 1905, and no excuse is shewn for the delay except a statement of the engineer that he was unable, owing to press of other work and lack of assistance, to pro-

ceed with the examination of the area involved. His report was considered by the council on 25th March, 1905, and was referred back to the engineer to amend. The amended report was made on 1st June, and adopted by the council on the 20th of the same month, and on 26th July following the by-law was provisionally adopted.

Before the first report was presented to the council, two of the original 7 petitioners had died. Those of the remaining 5 who attended the meeting of the council at which the report was read on 25th March, 1905, were amazed to discover the magnitude of the proposed scheme and the expense which it involved. They would have been willing to drop proceedings or to withdraw from the petition but for the provisions of the Drainage Act, which, in that event, would impose upon them the engineer's costs and other expenses connected with procuring the report. The total expenses were so large that it was apparent that it would be a saving to them to allow the scheme to be carried through and bear their share of the assessment. But the applicants, who were not petitioners, or interested in the area described in the petition, but are owners of land situate in the vicinity of the drain as it extends from the place of commencement towards its final outlet, and are assessed for benefit and for outlet liability, were dissatisfied and took action before the Drainage Referee.

The chief points in dispute on the appeal were whether, having regard to the area described in the petition, the petition was to be deemed sufficiently signed when the council adopted the engineer's report and provisionally passed the by-law; whether the report was one that could be sustained, having regard to the lapse of time between the appointment of the engineer and the making of his report; and whether the by-law could properly provide for work in a natural stream, with well defined banks, which was made the outlet of the drain. The commencement of the drain was about 4 miles from the point where it entered the natural channel.

It appears that the engineer did nothing within the first 6 months after his appointment. By sec. 9 (8) of the Drainage Act, the council is empowered to extend the time for the engineer making his report, providing it is satisfied that owing to the nature of the work it was impracticable to do it within the 6 months. There were a number of exten-

sions granted, but several of them were after the extended time had expired, so that there were periods when the engineer had no authority or right to proceed with the work, and the council did not act upon the right given it by sub-sec. (9) of sec. 9, to procure another engineer to go on with the work.

These facts raise the important question, whether there was a valid report upon which the council could lawfully pass a by-law for the performance of the work and the imposition of the assessments provided for by the report.

The obvious intent of the Drainage Act is that work to be performed under its provisions shall be proceeded with and brought to a termination with reasonable expedition. The nature of the injury from which relief is sought demands that there shall be no unreasonable delay in supplying the remedy which the owners of the lands to be benefited are seeking.

To unduly delay . . . is almost certain to prove a serious prejudice, not only on account of the withholding of the remedy, but because of the inevitable changes in the title and proprietorship of the lands in the area described in the petition which lapse of time is almost certain to bring about. It is the duty of the council of the municipality, once it has undertaken the prosecution of the drainage scheme petitioned for, to see that it is proceeded with as promptly as the circumstances of the case permit, and to allow no undue delay on the part of the engineer in making and filing his report.

This would be their duty apart from any legislation. But sec. 9 (8) of the Drainage Act provides that "the report of the engineer shall be filed within 6 months after the filing of the petition; provided that upon the application of the engineer, the time for filing the report may be extended from time to time for additional periods of 6 months, when the council is satisfied that, owing to the nature of the work, it was impracticable for the report of the engineer to be completed within the time limited by law." The time limited by law is 6 months from the filing of the petition. If an engineer fails to file his report within that time, and there be no further action of any kind on the part of the council, the petition of necessity falls to the ground. But this result may be averted in one of two ways—either the council, if

satisfied that owing to the nature of the work it was impracticable for the report to be completed within the time limited, may under sub-sec. (8) extend the time, or it may, under sub-sec. (9), employ another engineer to make the necessary report.

The power of extension given can only be exercised, however, under the condition described in sub-sec. (8). It is a limited power to extend for good cause. It is dependent upon inability of the engineer owing to the nature of the work, not upon dilatoriness or supineness on his part.

In this case there is no pretence that there was any good cause for the council assuming to extend the time. Their actions shew that very plainly. And the engineer's only excuse was, as before stated, press of other work and lack of assistance. The council, therefore, had no power and no right to assume to extend the time beyond that limited by law. Moreover, when they did assume to make extensions, the engineer allowed the periods so given to expire, and there were times when there was no authority whatever to the engineer. The petition then lapsed and could only be revived, if at all, by the council employing another engineer. But this was never done. It is said that by again assuming to extend the time for the engineer they in effect employed another engineer. But to so hold would be to countenance a direct violation of the law, and to deprive the petitioners and others interested in the drainage scheme of the protection given by sub-secs. (8) and (9) of sec. 9. If the council may without any excuse or reason retain the services of a dilatory engineer for years after he could and should have made his report, they may retain him until all the petitioners have died or left the area proposed to be benefited, or have from other causes lost all interest in the prosecution of the scheme.

The proper conclusion is, that when the report was made the petition was not on foot, and there was, therefore, no warrant to the council for adopting the report or founding a by-law upon it.

It would appear a very extraordinary thing that a proceeding of this kind, which, from its very nature, demands expedition, should be allowed to remain untouched for a period of nearly 5 years, and then, when the circumstances have changed in several important respects, be brought for-

ward in the form of a scheme of the magnitude of that proposed by the report and by-law. The delay, which is unexcused and inexcusable, and the change of circumstances, should have furnished the council with sufficient reasons for not permitting the matter to proceed further. If there is to be a drainage scheme such as is proposed, it surely ought to be initiated at the instance not of the few persons upon whose petition this large scheme has been promulgated, but upon the petition of a fair majority of those who are proposed to be assessed for benefit. They are the persons who will be vitally interested in its performance.

One remarkable feature of the report is that it seems to shew that the scheme now proposed to be carried out is not one which will materially assist the parties to the petition, but is directed to the drainage of a different area. The report states that "on looking at the assessment plan A, it will be apparent that a large area of low land is at present without sufficient drainage, and it is with a view to improve this land and adjoining properties, which are at present submerged for the greater part of the year, that the present drainage system is proposed."

It surely ought to be the case, if the proposed scheme is really for the purpose of improving this large area of low land, that the owners, who are interested in that project, should be the persons to say whether or not they desire such a scheme; and certainly the parties to the present petition should not be held responsible for a scheme which has so far exceeded their intentions.

The report and by-law should not be allowed to stand; and, that being so, it is not necessary to deal with the other matters urged in support of the Referee's decision, though it is not to be assumed that they are considered of no weight.

Whether the petition ought to be deemed sufficiently signed or not can be of little importance, for it can hardly be supposed that the council of the township would, under the circumstances, assume to procure another report and proceed with another scheme founded upon that petition.

The appeal should be dismissed with costs.

OSLER and MEREDITH, JJ.A., each gave reasons in writing for the same conclusion.

GARROW and MACLAREN, JJ.A., also concurred.

BRITTON, J. DECEMBER 1ST, 1906.

TRIAL.

ANTOINE v. DUNCOMBE.

Negligence—Druggist—Sale of Liniment Containing Poison—Neglect to Label as Poison—Warning to Purchaser—Death of Purchaser by Drinking—Liability of Druggist—Action under Fatal Accidents Act—Expectation of Benefit.

Action by Mary Antoine for damages for the death of her husband, Nicholas, and her son Job, she alleging that the death of each was occasioned by the negligence of defendant, a druggist residing in St. Thomas, in selling to Nicholas Antoine a bottle of poison without labelling the bottle or notifying the purchaser that the contents were poisonous.

A. G. Chisholm, London, for plaintiff.

J. C. Judd, London, and A. Grant, St. Thomas, for defendant.

BRITTON, J.:—Nicholas Antoine was an Indian belonging to the Oneidas and residing upon the reserve near St. Thomas. On Saturday 4th November, 1905, Nicholas, his son Job, and another Indian named Cornelius went into the city of St. Thomas. Nicholas seems to have procured two bottles, and from one or both of these bottles the three drank, and shortly afterwards became seriously ill, and all three died. Job died on Sunday 5th November, Nicholas on Monday 6th, and Cornelius on Tuesday 7th. An inquest was held upon the remains of Job Antoine, and a post mortem was had, with the result that the cause of death was ascertained by Dr. McNeil as being the taking into the stomach of "some narcotic irritant." Dr. McNeil said that

"wood alcohol" or "Columbian spirits," as wood alcohol is called, when purified or deodorized, would produce the condition found in the case of Job Antoine. There was no post mortem in the case of Nicholas Antoine, but, as his death occurred in circumstances similar to Job's, I am warranted in drawing the inference that death was from a like cause.

It is charged that defendant sold to Nicholas on 4th November, 1905, two bottles of something used as a liniment, the principal ingredient of which was wood alcohol, and that these bottles were so sold without labelling them as containing poison, and without notifying Nicholas that the bottles did contain poison.

The case was entered for trial at London, and upon its being called plaintiff asked for and obtained leave to amend her statement of claim by alleging that her deceased husband and her son were in the habit of buying whisky at defendant's drug store, and that Nicholas Antoine went on 4th November, 1906, for the purpose of getting whisky, and defendant sold, instead of whisky, a bottle of poison, that is to say, the bottle of Columbian spirits or wood alcohol, and that this was so sold without labelling the bottle or notifying Nicholas that the contents were poisonous, and that Nicholas, believing that the bottle contained whisky . . . , drank of the contents and gave to his son Job, with the result above stated. The trial was adjourned and the case transferred to St. Thomas.

There is not evidence sufficient to support plaintiff's allegation. The evidence put in by plaintiff is that Nicholas and Job were together on the day named near defendant's drug store; that Nicholas went into the store and came out; that Nicholas and Job, or one of them, had two botltes in an old house in or near St. Thomas. Evidence was given of what defendant said at the inquest, that he had on 4th November sold two bottles like those produced. He admitted that he sold two bottles of liquid, not as whisky, nor to be consumed as such, but to be used as a liniment.

The evidence of the Dockstaders was given with a view to discrediting defendant, but they did not testify to anything that was done on the day in question, or that would impute negligence or any wilful act of defendant which caused the death of either husband or son of plaintiff.

Certain answers of defendant upon his examination for discovery which were put in do not establish anything against defendant beyond a possible suspicion that if the deceased Nicholas was the person to whom defendant sold the liniment, he, being an Indian, might be tempted to drink a medicine or preparation consisting mainly of spirits.

Defendant called a witness named Kelitza Harris, who was present when defendant sold a bottle of liniment to an Indian on 4th November, 1905. From the account she gave of the transaction, I believe that Indian was Nicholas Antoine. She says defendant said to the Indian, "Be sure you don't drink this, it would poison you," and the Indian replied, "Me no drink it, me rub it," and by his motions indicated how and where he would rub. Mrs. Harris seemed a truthful woman. Her manner was good, her evidence clear. She gave a reason for remembering the day and circumstance.

Comment was made upon defendant not giving evidence. He was examined at great length for discovery; he gave evidence at the inquest. His counsel did not think it necessary to call him; I cannot say they were wrong.

This preparation is not one of those mentioned in the schedule to the Pharmacy Act, R. S. O. 1897 ch. 179, as one requiring to be labelled "poison."

As to Job, plaintiff did not shew that she had any pecuniary interest in his life. She had no reasonable expectation of any support from him, so far as appeared.

The action must be dismissed; defendant does not ask for costs.

BOYD, C. DECEMBER 1ST, 1906.

TRIAL.

THOMSON v. MACDONNELL.

Life Insurance—Assignment of Policy—Assignee for Value—"Beneficiary"—Insurance Act—Identification of Policy—Equitable Right—Creditors.

Action by the assignee of a policy of life insurance, to recover the amount paid by the insurers upon the death of the assured to the defendant as trustee.

BOYD, C.:—There is no defence raised as to the policy not being assignable, or that it can only be assigned in some particular manner, or that delivery of the policy or notice of its being assigned before death should be proved. Defendant submits his rights to the Court—he holding the moneys which the company have paid, deducting a claim of the company which arose before notice of the assignment reached the insurance company.

The only matter to be considered is whether there has been in law, upon the above state of the pleadings, a sufficient assignment of the policy to entitle plaintiff to the balance of the proceeds held by defendant.

The statute R. S. O. 1897 ch. 203, sec. 151 (5), declares that nothing in the Act as to particular methods of assignment shall be held to interfere with the right of any person (insured) . . . to assign a policy for the benefit of any one or more beneficiaries in any mode allowed by law. "Beneficiary" is to include every person entitled to the insurance money, and the assigns of any person so entitled: sec. 2 (34.)

In this case the deceased person insured borrowed $2,000 from the plaintiff, and as security gave him a writing under his own hand stating that "for collateral security I have placed aside and assigned to you a policy of insurance in the Standard Life Company for similar amount."

The policy now in question is for $2,000, and is, no doubt, sufficiently identified by this description.

By this writing, which is operative as an assignment of the policy, I think plaintiff became as assignee "the beneficiary" for whose benefit the assignment was made, within the meaning of sec. 151 (5). The written assignment was for valuable consideration, and its effect, as against the deceased and his representative, is to pass the equitable right and title to the policy to plaintiff. Other creditors cannot claim as against plaintiff, for they can take no higher rights than the debtor himself had at the time of his death: Neal v. Neal, 2 C. & K. 672.

Judgment should go for the payment of the fund in hand to plaintiff, less defendant's costs to be taxed as between solicitor and client.

MEREDITH, C.J. OCTOBER 26TH, 1906.

TRIAL.

INDEPENDENT CORDAGE CO. OF ONTARIO v. THE KING.

Crown — Contract — Inspector of Prisons — Employment of Prisoners in Manufacture of Binder Twine— Construction of Contract—Assignments of Contract—Extensions of Time — Modifications — Ratification of Original Contract by Resolution of Legislative Assembly — No Ratification of Assignments and Extensions—Effect of Resolution—Force of Act of Legislature—Authority of Executive Government of Province—Orders in Council—Change in Rates of Payment—Retroactivity—Commission — Interest — Insurance —Accounts.

Petition of right presented to the High Court of Justice for Ontario by the suppliants, an incorporated company, shewing:—

1. That one Patrick Louis Connor on 25th September, 1895, entered into an agreement in writing with the inspector of prisons and public charities for Ontario to manufacture binder twine in the cordage building at the central prison in the city of Toronto.

2. That Connor assigned all his interest in the agreement to one Field, by consent of the Lieutenant-Governor in council, and that Field subsequently, with a like consent, assigned all his interest in the agreement to the suppliants.

3. That Connor and Field carried out the terms of their agreement with the inspector, and all matters between the inspector and Connor and Field were settled and adjusted.

4. That in 1897 the cordage building at the central prison was destroyed by fire, together with the machinery for the manufacture of twine contained therein, and the manufacture of cordage was necessarily suspended for a period of more than a year.

5. That thereupon it became necessary, to provide new machinery for the operation of the plant, and on 28th October, 1898, a new agreement was entered into between the

inspector and the suppliants, which agreement was in writing, and was approved by the Lieutenant-Governor in council, and laid upon the table of the House of Assembly in due course.

6. That thereupon the suppliants, acting upon the terms of the agreement, advanced large sums of money for the purpose of purchasing and installing new machinery and plant, as provided by the terms of the agreement (to which the suppliants prayed to refer), and after the installation of such machinery continued the manufacture of binder twine and cordage from year to year until the termination of the contract on 1st October, 1905.

7. That by a further agreement dated 25th August, 1904, the agreement was extended for a further period of 5 years, upon certain conditions set out.

8. That by the last mentioned agreement it was provided that "if at any time it shall be deemed expedient to resume the plant on government account, the contract may be terminated by the inspector on 1st November in any year, by giving 6 months' notice thereof in writing."

9. That the inspector, presuming to act under this agreement, gave the suppliants notice terminating the agreement on 1st November, 1905.

10. That all matters of account between the suppliants and the inspector were adjusted in December, 1902, up to and including 30th September, 1902, and a balance was then shewn to be due and owing to the inspector on current account, of $5,084.96, which amount was paid by the suppliants to the inspector in full settlement thereof.

11. That in 1903 the accounts were adjusted again up to and including 30th September, 1903, when a balance on current account, was due by the suppliants to the inspector of $1,206.87, which amount was paid by the suppliants to the inspector and accepted in full satisfaction.

12. That in 1904 there was a similar settlement of account between the suppliants and the inspector up to and including 30th September, 1904, when a balance was shewn to be due by the suppliants to the inspector of $674.89 on current account, which amount was paid by the suppliants to the inspector and accepted by him in full settlement.

13. That the suppliants operated the cordage plant from 30th September, 1904, until 1st November, 1905, and there was due by the suppliants to the inspector on current account, in respect of such operation during that period $1,686.42.

14. That the settlement in 1902 shewed a balance due by the inspector to the suppliants in respect of advances made for the purchase of machinery, plant, etc., of $30,705.71.

15. That the settlement in 1903 shewed that the inspector was indebted to the suppliants in respect of such advances in $26,319.75.

16. That the settlement in 1904 shewed that the inspector was indebted to the suppliants in respect of such advances in $17,910.68.

17. That the balance which the suppliants were entitled to on 30th September, 1905, in respect of such advances, amounted to $9,903.10.

18. Deducting from the balance of $9,903.10, the sum of $1,686.42 due by the suppliants to the inspector on current account, leaves the inspector indebted to the suppliants in the sum of $8,216.68.

19. That the suppliants, under the terms of the agreements referred to, deposited $5,000 in the Canadian Bank of Commerce, Toronto, to the credit of the inspector and the Provincial Secretary, as a guarantee to insure the performance by the suppliants of the terms of the agreement.

The prayer of the petition was that the suppliants might be declared entitled to receive the balance of $8,216.68, with interest from 30th September, 1905, and the sum of $5,000 with accrued interest, and costs of suit.

The Attorney-General for Ontario, on behalf of His Majesty, delivered a statement of defence and counterclaim as follows:—

1. All admissions made herein are made for the purposes of this suit only.

2. The Attorney-General for Ontario, on behalf of His Majesty, admits the statement contained in paragraph 1 of the petition of right, the agreement of 25th September, 1905, being as follows (setting it out.)

3. This agreement was duly ratified by resolution of the Legislative Assembly of Ontario on 26th March, 1896, such resolution being as follows: "That this House doth ratify an agreement laid before this House by command of His Honour the Lieutenant-Governor, bearing date the 25th day of September, 1895, and expressed to be made between the inspector of prisons and public charities and Patrick Louis Connor regarding the manufacture of binder twine in the central prison."

4. By the terms of the agreement and its subsequent ratification the same became and was in all respects an agreement between the respondent and Connor, of the same force and effect as if it had been embodied in a statute of the province of Ontario, or had been entered into by the respondent in pursuance of and in strict conformity to a statute of the said Assembly, and the same became a contract binding upon the Crown with the privity and consent of the said Assembly.

5. The Attorney-General for Ontario submits to this Court that the same could not be altered, amended, varied, or added to, by any act of the Crown, unless and until the same had been authorized by a similar privity and assent of the said Assembly.

6. The assignments mentioned in paragraph 2 of the petition are, if the same were made with the assent of the Lieutenant-Governor in council, and only in so far as they were merely assignments of the said original contract, admitted by the Attorney-General for Ontario for the respondent.

7. The Attorney-General for Ontario alleges that the said assignments merely transferred to the several assignees the rights and obligations of Connor, unaltered and unaffected by any act of the inspector or any act of the Crown unauthorized by the terms of the original contract.

8. The Attorney-General for the respondent admits the occurrence of the fire alleged in paragraph 4 of the petition of right, and that manufacture under the original agreement was suspended for about the period mentioned, but denies that the fire altered in any respect, with regard to machinery or otherwise, the relations of the Crown and the contractor. The machinery alleged to have been put in by the suppliants

was the rope-making machinery provided for in paragraph 4 of the original contract, and was paid for by the Crown.

9. So far as the agreement of 28th October, 1898, alleged in paragraph 5 of the petition, merely gave effect to the provisions of clause 4 of the original agreement, and did not alter, vary, or depart therefrom, but no further, the respondent is content to be bound thereby.

10. The Attorney-General for the respondent denies the extension of the agreement alleged in paragraph 7 of the petition, except so far as the same could and did operate under clause 14 of the original contract, and further says that the extensions could not and did not take effect till 1st October, 1900.

11. The Attorney-General for the respondent denies the statement contained in paragraph 9 of the petition, and alleges that the agreement then in force, namely, the original contract, was duly terminated pursuant to the terms of the same.

12. The Attorney-General for the respondent denies the adjustments, settlements, and balances alleged in paragraphs 10, 11, 12, 13, 14, 15, 16, 17, and 18 of the petition, or that the same were valid, legal, or binding on or due from the Crown, or that payments therein alleged were made by or with due authority, or that they are binding upon the Crown.

13. The Attorney-General for the respondent denies that any sum whatever is due to the suppliants, and asks that the petition be dismissed with costs.

By way of counterclaim the Attorney-General for the respondent, repeating the allegations aforesaid, alleges that there is due by the suppliants to the Crown, upon a proper taking of accounts under the original contract, and unaffected by the allowances, charges, and changes purporting to be given and made under unauthorized and illegal orders, adjustments, and alleged settlements, and alleges that the suppliants obtained and used the services of prisoners in the central prison in excess of the number to which they were entitled under the contract, without paying or allowing for the value of their services $69,844.03, and is willing to allow against the same the $5,000 referred to in paragraph 19 of the petition, and the sum of $13,025.79, being the actual cost of the manufactured and unmanufactured material on

the prison premises used in the manufacture of binder twine pursuant to paragraph 8 of the original contract, and there remains due by the suppliants to the Crown $51,818.24, for which the Attorney-General for the respondent claims judgment with costs.

The suppliants delivered a reply in which they alleged that by an order in council approved by the Lieutenant-Governor on 27th May, 1902, it was provided: first, that the charge to the contractor for repairs in keeping the twine and cordage machinery in running order, be at the fixed rate of $1.25 per ton on gross output of the factory; second, that the charge made against William Field for silent time during the term of his contract be remitted; third, that the contracting company continue to be charged on the gross weights of the factory products, as they are put up and prepared for shipping; fourth, that any charges made against William Field during the term of his contract for shortage on the daily output of 4 tons per day be remitted, and that no charge be made against the contracting company for such shortage, should any have occurred, until after 1st June, 1901. The suppliants denied that they were indebted as alleged by the respondent, and asserted a lien for the balance claimed in the petition upon the machinery supplied at the request of the respondent.

The agreement of 25th September, 1895, was made between the inspector of prisons and public charities for Ontario, called "the inspector," for and on behalf of Her Majesty, by virtue of sec. 30 of the Act respecting the Central Prison, of the first part, and Patrick Louis Connor, called "the contractor," of the second part, and was in part as follows:—

1. The government of the province of Ontario shall provide a cordage plant with the main line shafting in the cordage building maintained in motion, as now installed at the central prison of Ontario, but made equal to a capacity to turn out 4 tons or over of binder twine per day of 10 hours, running 550 feet to the pound, and prison labour to operate it, taking the material as it enters and until it leaves the prison, but limited to an average of not more than one prisoner for each 130 pounds of twine made for all purposes, the prisoners supplied to perform the labour to be able-bodied men, who, after having entered on the work, shall

continue in the employment till the expiration of their respective sentences.

2. The government shall give to the contractor the use of the following portions of the central prison: the general railway facilities of the prison; the main room in the basement under the broom shop for storage of twine, fibre, and supplies; the whole of the cordage ship, except the rooms on the ground floor at the north end, etc.; the use of all machines contained in the said cordage shop for manufacturing binder twine.

3. The contractor, for himself, his heirs, executors, administrators, and assigns, hereby agrees: first, that he will, commencing with the pulleys on the main line shafting which transmit power direct to each distinctive machine, and at his own cost, keep all belting and machinery in good repair, being granted for this purpose the facilities of the prison machine shop, to be used with prison labour only, but to pay at the rate of $1 per day for the prison labour, which shall include the use of machinery and tools; second, at all times, at his own cost, to provide all expert labour and instructors necessary in manufacturing, and to supervise and instruct the prisoners in the work required of them in operating the plant, and likewise to provide and deliver to the central prison cordage shop all material necessary, and to manufacture from manilla hemp, or from such other fibre as the inspector and contractor may agree upon, not less than 4 tons of twine on each working day that the full ratio of prisoners specified are provided; third, to pay for all twine and rope manufactured under the provisions of this contract the sum of 82½ cents per 100 pounds on the gross weight of the bales or coils of twine or rope as it comes from the machine, and to pay the amount to the bursar of the central prison on the 20th day of each month as the account is rendered therefor. . . .

12. If at any time it shall be deemed expedient to resume operating the plant on government account, the contract may be terminated by the inspector on 1st November in any year, by giving 3 months' notice thereof in writing, and by paying the actual cost of any merchantable binder twine in stock made under the contract, and for unmanufactured stock useful in the manufacture of good merchantable binder twine, then on hand at the expiry of the notice,

with 10 per cent. advance thereon, but no addition shall be made to the unmanufactured stock after the serving of the said notice, except as may be required to keep the plant in operation for a period not longer than 30 days after the date for terminating the contract.

13. The contractor shall take over at cost all the manufactured twine and binder twine material on hand at the time of entering upon the contract; the twine at a price to be arrived at the same as is provided in making up the selling price of twine by the contractor, and the unmanufactured material at invoice prices with cost of delivery at the prison added.

14. This contract shall, subject to the herein contained provisions as to default and resumption by the government, be in force from 1st October, 1895, until 1st October, 1900, renewable for a further period of 5 years, provided the Lieutenant-Governor in council considers it in the public interest that such further period should be granted. . . .

17. The contractor shall not assign this agreement or sublet the same without the consent of the Lieutenant-Governor in council.

18. It is distinctly understood that this agreement is not entered into by the inspector in his personal capacity, but is binding upon him and his successors as a corporation sole by virtue of sec. 38 of R. S. O. 1887 ch. 238.

19. It is expressly agreed that this contract and everything therein contained shall be void and of no effect unless the same is ratified by resolution of the Legislative Assembly of Ontario at its next session; and should there be a failure to ratify, all material as provided by clause 12 hereof then on the prison premises belonging to the contractor shall be taken over by the inspector.

Provided always that anything obtained or done under the said contract shall nevertheless be paid for in accordance with the terms hereof.

The agreement was under the hand and seal of Connor and under the hand and corporate seal of the inspector.

The cause was tried by MEREDITH, C.J., without a jury, at Toronto, on 25th and 26th October, 1906.

G. C. Gibbons, K.C., and C. A. Moss, for the suppliants.

F. E. Hodgins, K.C., for the respondent.

MEREDITH, C.J. (at the conclusion of the evidence and argument):—This case has been argued upon what is the rule as to Parliamentary practice, and as to the undoubted rule that no money can be paid out of the consolidated revenue, except after its appropriation by Parliament for the particular purpose. With those considerations I have nothing to do in this case; I have simply to determine whether, upon the facts as proved, there is a liability on the part of the province to the suppliants, and it will remain open to the executive and Parliament to take such action with regard to that as in their judgment may seem proper. As I understand that matter, any answer of the Court would be wholly inoperative, so far as any payment to the suppliants of the amount found due is concerned, unless Parliament shall appropriate the money for that purpose.

It is not necessary, I think, for the purpose of the case, to determine whether Mr. Hodgins's argument that the original contract with Connor, having been ratified by vote of the Legislative Assembly, had the force of an Act of Parliament, is sound or not.

The circumstances under which the contract of 1898 were entered into were these. The Connor Company had a contract which had not then expired. In some way both gentlemen who were ultimately interested in this incorporated company, who are the suppliants, had made arrangements for taking over this contract and the benefit to be derived from it. A person by the name of Field, acting for the promoters of the company, had been admitted. Connor had gone out, and Field had been admitted to carry on the business. He had carried it on for several months, and ultimately the company was incorporated.

Now, it is to be borne in mind that there was no obligation on the part of the province to enter into this contract. They were in no way bound to confirm any contract between these parties. It is therefore, I think, obvious that that agreement must be treated as a new one between the new partners, incorporating, it is true, most of the provisions of the old agreement, but modified to some extent. It would be an extraordinary thing morally that where a number of persons in the position of promoters of this company enter into negotiations with the government, upon the faith of which, according to the evidence of Mr. Hobbs, they under-

take obligations which they would not have entered into but for the new agreement—the modifications (as they are called) of the old agreement—it is obvious, it seems to me, that it would be impossible to say that it would not be unjust that the government should recede from the agreement that was then entered into. Therefore, I think the case is not one in which any difficulty (if there be any difficulty at all) would arise by reason of the original agreement having been sanctioned by the House, and therefore, as Mr. Hodgins contends, having the force of an Act of the legislature.

Then, if that be so—if this is to be treated as a new agreement—I have no doubt whatever that it was within the authority of the executive government of the province. The government had charge of this prison. It was part of the policy of the province that the prison labour should be utilized. One of the very objects of the erection of the prison was to avoid what had taken place in the past—prisoners idling in the county gaols — and to provide a place where their labour should, to some extent, at all events, be made remunerative, and relieve the general public from the burden of their maintenance. Therefore it seems to me that it was completely within the authority of the executive government to enter into such an agreement as the first agreement with Connor, and the second also, although the ratification by Parliament was in no sense necessary to give contractual validity to the document. It was, no doubt, submitted to the Assembly, because it was an important part of the administration of the public service of the country, and the government should be desirous that Parliament should state its approval of the kind of policy that it was adopting, before that policy was given effect to. Therefore this agreement provides that it shall not go into operation until it has been submitted to Parliament. Parliament has ratified its terms. Then, if I am right in that view, it gets rid of all the difficulties in the case raised by the Crown except those relating to the orders in council.

I am entirely unable to follow the argument of counsel for the Crown with regard to that matter. If it was competent for the Crown to make the agreement, surely if in the working out of that agreement it became, in the judgment of the advisers of the Crown, desirable that modifications should be made in the terms of the contract, it was within the

power of the executive government to make those changes. It is not necessary, in the view I take of the contract, to say anything further on that question, but it seems to me that, even if this agreement had the effect of a contract—if, in working out its terms relating to the repairs (which provided, it is true, that the repairs should be borne by the contractor, but also provided that they should be done in the central prison and done by the prisoners, the materials and the prisoners' time being charged for), it was found that, according to the report of the inspector, it caused friction, and was very difficult to carry out—it was competent for the Crown and the contractors to modify it. In the course of the discussion of the case it had been pointed out that there is a great deal of difficulty in determining what the exact meaning of the language is, it being that the materials are to be paid for and charged for at the rate of $1 per day for the prison labour. As I understand it, although it does not appear in the inspector's report that that was dealt with by him, the view of the contractors was that that meant $1 for all the prisoners that were employed, and that the view on the other side was, that it was $1 per day for each prisoner who was employed in making these repairs. I think it was perfectly competent to make that modification in the detail of the agreement, not altering the essential terms of it at all, still leaving the contractors to bear the expense of the repairs, relieving the province of the necessity of keeping track, in the way it had been doing, of the materials and of the prison labour, and of the conflicts and disputes as to the amount of time and the amount of material employed, and possibly too, as the evidence indicates, as to what came within the definition of the term "repairs." There was then substituted for that arrangement a provision by which, in lieu of the one I have just referred to, the contractors were to pay a dollar and a quarter for each ton of the output of the factory.

I may as well refer at this point to another position taken by Mr. Hodgins; that the provision with regard to that was not retrospective. The evidence is, that, after that modification was provided for, instructions were given to the central prison officers to recast the accounts from the beginning on that basis, and that was done. Whether, on the construction of the document, that was its meaning, it is not necessary to consider. That arrangement was made,

and the transaction was carried out on that basis between the parties, and it is now entirely too late to raise the objection and ask that all that has been done should be reopened and changed.

Objection is taken to the item of commission. It appears that under the terms of the agreement machinery was to be purchased. The contractors, the suppliants, were directed or authorized by the government to purchase the machinery required for the use of the factory which was being leased, or which it was permitting the contractors to use in the central prison, and it was agreed that there should be paid to them 5 per cent. as a commission for their trouble and expense in arranging and looking up the machinery and in making the contracts for it. I have no doubt from the evidence that that was a fair and reasonable agreement. The amount was but a few hundred dollars, perhaps $300 or $400 more than it was sworn was actually expended for travelling, to say nothing of the time which was employed in travelling throughout the United States and in Europe making investigations with a view to securing the best kind of plant for the purpose required. It is true that there is nothing in the contract that says, that that is to be paid for by the Crown ultimately. The provision is as to the cost. Surely it is no violent straining of the language of the agreement to include 5 per cent. that was paid to W. R. Hobbs & Co.—not charged by the suppliants themselves—as part of the cost of the purchase of the machinery.

Then there is objection taken also to the charges that have been made, and have been allowed in respect of the expenses of Berry and those of some others who were employed, as the parties treated them throughout the accounts, in the installation of the new plant. I think that objection entirely fails also. Upon the evidence it was necessary that an expert should be got from abroad. Possibly the government might not have succeeded in getting the expert the suppliants got. They had such relations with the Plymouth Company, the largest manufacturers, it is said, on this side of the water, at all events, in this line of articles, that they were able to get from them the services of one of their employees, and to get (although this does not bear upon this branch of the case), free of charge, specifications for the new machine. A man of the name of Berry was em-

ployed at $4 a day, and, according to the testimony of Mr. Hobbs (which is uncontradicted), during the whole of the time that he was there, and for which his salary has been charged, he was looking after the installation of the machinery. It is pointed out that the installation of the machinery did not mean simply the fastening of the machines (if they had to be fastened), but castings had to be made from a wooden model, and complicated arrangements had to be made for the purpose of enabling the plant to be put in proper running order. There is nothing that I heard that would justify the disallowance of any part of the charge that is made for the disbursements to Mr. Berry, and nothing has been adduced which would justify, I think, even if it were open to me to do so, the charges in respect of the other persons who were employed about the same job.

Then objection is taken to two other matters that are not covered by the terms of the agreement or by any order in council. One is the question of interest. It is said that interest has been charged on one side, and has not been allowed upon the other, and that there should have been a considerable credit on interest account to the province. The exact amount appears from the statements which Mr. Brown, one of the officers of the audit department, prepared for a calculation made by him. It is a sufficient answer to that position, I think, to say that interest is not something that the parties are entitled to as of right. The question, under our statute, in transactions between party and party where it is payable is whether the money in respect of which it is charged is payable upon a particular day, and on certain other circumstances not applicable to this case. And also it is usual for a jury to allow interest. Now, in this case the practice throughout in the transactions between the parties was not to compute the interest in the way the Crown now seeks to have it computed. The provincial auditor did not deal with the accounts on that basis. I think it is impossible to say that that can be undone, and a charge for interest, such as the Crown now seeks to make, can be allowed.

With regard to the item of insurance, there accompanied the agreement a memorandum written by Mr. Dewart, who was acting for the company, in which he pointed out

that there were certain matters which were understood between the parties and not embodied in the agreement, and he desired to have an assurance from the inspector that they were matters that were arranged between the Crown and the contractors, although they were not inserted in the agreement. One of these was a provision that there should be insurance upon joint account. Now, the machinery that was purchased and put into the prison by the contractors had been insured, and the premiums of insurance had been from time to time allowed in the settlement between the officers of the Crown and the contractors. It was argued by Mr. Hodgins that there was no right to make that settlement—that the property was really the property of the contractors — that it was an insurance for their benefit. I think that is altogether too narrow a view to take of it. Although in form it was their property, although in form they had purchased and the government was to re-purchase, yet the transaction was in substance an advance by the contractors of the money required to purchase the machinery. The province paid 6 per cent. interest upon the amount from time to time remaining due on account of the purchase money by deducting certain payments which had been made depending upon the output and in reference to a probable output. Substantially, I think, that was a purchase by the government, and it was certainly not inequitable that the insurance upon that property should be borne by the government. It was not a thing that would wear out in the time during which the agreement was to be on foot; it was something of a permanent nature; and it would be necessary for the government to have it after the agreement came to an end, in the event of its continuing the work or making with others a similar contract. The government throughout has recognized that right. It has allowed the contractor that insurance in all the accounts that have been passed. It is entirely too late to raise an objection to that item.

The observation I have made with regard to the interest and the insurance are applicable to the other matters.

Accounts were furnished from time to time and balances struck. Not accounts simply furnished by the Cordage Company and accepted by the government, but accounts were furnished, and, after proper checking, entered in the

books of the central prison. These were treated as the accounts between the parties, as evidencing the condition of matters, and the substance of what was done was that the disbursements which are now attacked, which the suppliants were making, were periodically settled by the Crown by the deduction of them from the gross indebtedness on account of the rental (if it may be so called) which the suppliants were to pay. Even in the case of private individuals it would be impossible to disturb a transaction of that kind—no fraud, no concealment, the persons acting at arm's length—and it seems to me an extraordinary proposition to ask the Court to review the discretion which has been exercised by the Crown in regard to these matters, and to substitute its own view of what ought to have been done under the circumstances.

I have nothing to do with the policy of these matters. That is a matter that is wholly outside of this inquiry. These are matters for the executive government of the province to deal with. The remedy, if anything was wrong, is to be found by Parliament acting, and ultimately by going to the final court of appeal—the people of the province.

I think that disposes practically of all the matters that have been discussed except the matter of a payment for prisoners in excess of those that, under the terms of the contract, the contractors were entitled to, and who were engaged in the work. By the terms of the contract each prisoner would turn out 130 pounds in a working day. Of course, if that had been found practicable, the result would have been that a much less number of men would have been required for the purpose of turning out the output which went from the work. But it is manifest from the correspondence, and from the evidence of the inspector, that at the outset it was found it was entirely impracticable to get prison men to do that amount of work, and deductions were made from time to time, with protests on the one side by the inspector, and demands on the other from time to time for more men. It never occurred to anybody that any charge should be made in respect of the additional men. That item of the claim was not very strenuously opposed by Mr. Hodgins, I fancy. He appealed to some very general words of the agreement; but it seemed to me that he had not very much faith in that branch, at all events, of the claim which

has been set up. I think it is impossible to come to the conclusion that those general words amount to a covenant—an agreement entitling the Crown to be paid for the additional men at the rate of 50 cents per day or at any other rate—and that the circumstances entirely rebut any inference that there was an implied contract on the part of the suppliants to pay for the service of the additional men on a quantum meruit.

Now, while I have said it is not necessary, in my view, to determine the large legal question which has been argued by Mr. Hodgins, and argued very ably, still I have a very strong opinion upon the point, and, if it were necessary for the determination of the case, I would not hesitate to determine it upon that opinion.

I entirely disagree with the view that the assent by the House of Assembly to the contract, or the resolution of the House ratifying the contract, made the contract or gave to the contract the force of a statute of the province. It may well be, although you may have to search in ancient times to find them, that there are instances of Acts of Parliament where the assent of the Crown has preceded the action of the other constituent bodies in the legislature, instead of their following it, as is the usual practice. Well, it would be straining the line of decisions upon which Mr. Hodgins bases his argument to apply them to what has been done in this case. There was no idea of passing an Act of Parliament. The forms of procedure which are adopted in the passing of an Act were entirely omitted. A bill is introduced and read three times. It has to pass through all these stages before it finally becomes the ultimate action of the Assembly. Nothing of that kind was done here. The contract is laid upon the table of the House. Notice of motion is given that upon a certain day the Minister in charge will move a resolution approving of and ratifying the contract. I do not think this had any of the elements at all of an Act of Parliament, and, as I have said, there was no intention on the part of anybody that it should have. It was simply an assent — not constitutionally necessary, I think—an assent on the part of the Assembly to a contract which the executive government of the province had entered into, and had stipulated should not become operative until that assent had been obtained.

Nor am I able to agree that, even if the resolution had the effect for which Mr. Hodgins contends, it would not have been open for the executive government to have modified the terms of the agreement. I think it is impossible to come to the conclusion that with an agreement such as that, covering a period of years in which the working out of it might shew that modifications in minor details were necessary, or where, as did happen, the machinery might be destroyed by fire and new conditions arise, the whole of the machinery of the central prison, as far as this industry was concerned, was to be paralyzed until the legislature could be called upon to deal with the matter.

Although the argument ab inconveniente is always a strong one, I simply mention that incidentally. I think it was quite open to the executive government to make the modifications they did make.

It is also to be observed that although, as Mr. Hodgins very properly pointed out, it was an option that the contractors had to supply the additional machinery, they had to supply it at their own expense under the terms of the contract. But what if the time arrived when the contractors said, "Although we have this option we are not going to exercise it, but it is in our interest and in your interest that this additional machinery be installed?" Were matters to stand still? Was there to be no power in the executive government to enter into an agreement by which that could be done? I think not. I think, if the argument that has been adduced on the part of the Crown in this case were given effect to, the executive government would be shorn of many powers that, in my judgment, it possesses, and be very much hampered in carrying on the business of the province.

I repeat I have nothing to do with discussing the question of the policy, or whether the agreement was a judicious agreement to enter into. These are matters for the legislature and the people, not for the Court.

Judgment was pronounced declaring plaintiffs entitled to payment of the full amount of their claim with interest and costs, and dismissing the counterclaim with costs.

SCOTT, LOCAL MASTER. NOVEMBER 28TH, 1906.

CHAMBERS.

CAMPBELL v. CLUFF.

Parties—Joinder of Defendants—Cause of Action—Pleading —Negligence.

Motion by defendants the Corporation of the City of Ottawa, for an order requiring plaintiff to elect against which of the defendants he will proceed.

The case set up by the statement of claim was that the defendants the Cluffs were the owners of the Gilmour Hotel which was destroyed by fire on 14th September last, leaving the front wall, abutting on Bank street, standing to a height of 40 feet, and on 9th October this wall fell to the street, injuring the plaintiff, who was lawfully travelling along the street.

Paragraphs 7 and 8 read as follows:—

7. The defendants were well aware of the dangerous condition of the said wall, and of the fact that its condition rendered the said street or highway unsafe for travel and out of repair, but, nevertheless, wrongfully and negligently permitted the said wall to remain in the condition as aforesaid, and the said street or highway to remain out of repair.

8. Under and pursuant to a by-law of the defendant corporation known as by-law 1079 (and certain amendments thereto) the defendant corporation had power, by its duly appointed officers in that behalf, to take down and remove the said wall, and to put the said street or highway into a proper state of repair, and the defendant corporation was in duty bound to do so, but, notwithstanding the said by-law and its duty as aforesaid, the defendant corporation wrongfully and negligently permitted the said wall to remain standing as aforesaid."

A. E. Fripp, Ottawa, for defendant corporation.

W. Greene, Ottawa, for defendants the Cluffs.

G. F. Henderson, Ottawa, for plaintiff.

THE LOCAL MASTER:—With the question of whether or not as a matter of law a good cause of action is shewn, I have nothing to do. It will be seen that what is complained of is that defendants—all the defendants—wrongfully and negligently permitted the wall to remain in a dangerous condition. It is assumed to have been the duty equally of the owners and of the corporation to have removed it, though the duty is rested in each case on a different basis. The Cluffs are said to be liable as owners of the property, presumably on the principle of Rylands v. Fletcher. The alleged liability of the corporation is put on two grounds, first, non-repair of the highway, and, secondly, a duty said to have been assumed by the passage of the by-laws referred to.

I have carefully examined all of the numerous cases cited on the argument. Cases of the class of Sadler v. Great Western R. W. Co., [1895] 2 Q. B. 688, [1896] A. C. 450, McGillivray v. Township of Lochiel, 8 O. L. R. 454, 4 O. W. R. 193, Hinds v. Town of Barrie, 6 O. L. R. 656, 2 O. W. R. 995, and Grandin v. New Ontario S. S. Co., 6 O. W. R. 553, where the parties sought to be joined were alleged to have been guilty of separate and distinct acts, which combined either to bring about or to augment the damage, have no application, nor do either cases against directors and their companies or cases arising out of contracts afford much assistance. The case most near in circumstances to the present one is Bain v. City of Woodstock, 6 O. W. R. 601; but I think there is a clear distinction between the two. There, as pointed out by the Master, the wrongful placing of the lumber on the highway by the Patricks, and the breach of their statutory duty to remove it on the part of the corporation, were not only quite distinct causes of action, but did not even arise at the same time. Here the act, or rather omission, complained of, on the part of the Cluffs and of the city corporation, is identical, though the duty in the one case depends on a different principle from that in the other. In Hinds v. Town of Barrie, 6 O. L. R. 656, at pp. 661-662, Mr. Justice Osler, after pointing out that the language of the Rule is embarrassing and calculated to mislead a litigant and to promote delay and expense, says: "Probably the phrase 'cause of action' is not to be strictly read in its former technical sense, so that where persons have

been parties to a common act which has caused damage to the plaintiff, they may be joined in the same action, though the nature and extent of the relief to which he may be entitled against them is different." Here the causes of action, though technically different, are practically identical, and the nature and extent of the relief sought is also identical. If the words of Mr. Justice Osler have any application at all, it must be to a case like the present.

The motion will therefore be dismissed, but, as the practice is by no means clear, the costs should, I think, be in the cause.