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COURT OF APPEAL.

DECEMBER 7TH, 1911.

REX v. LUMGAIR.

Criminal Law—Lottery — Conviction — Evidence — Statements Made by Agents of Defendant, not in her Presence—Inadmissibility—Conversation with Agent—Mistrial—New Trial.

Case stated by the Chairman of the General Sessions of the Peace in and for the County of Wentworth, pursuant to an order of the Court of Appeal.

The defendant was brought to trial upon an indictment containing three counts, the last of which charged that she did, within two years last past, unlawfully manage and conduct a scheme for the purpose of determining who were the winners of certain property disposed of by her, by lots and modes of chance, contrary to the provisions of sec. 236 of the Criminal Code. The Chairman withdrew the first count, and the jury returned a verdict finding the defendant guilty of conducting a lottery. The Chairman treated this finding as a verdict of "guilty" under the third count.

The following was the case as stated:—

"The defendant was tried by a jury before me at the December sittings of the Court of General Sessions of the Peace for the County of Wentworth, upon an indictment charging her with carrying on a business by modes of chance, under sec. 236 of the Criminal Code. The jury found a verdict of 'guilty.'

"The defendant had carried on a business in Hamilton, under the name of the People's Furniture Company, for eighteen or nineteen months. In this business, she employed agents who canvassed different sections of Hamilton and had several people sign contracts. These contracts are in evidence in this case as exhibits numbers 1, 2, 3, 4, 5, 6, and 7.

"The evidence as taken at the trial is made a part of the case stated.

"During the trial, evidence of Jane Goodale, Amelia Hoth, Edith Clark, Edith Ford, and others, as to representations made by agents of the defendant, not in her presence, was admitted by me, upon the ground that, such representations having been brought by these witnesses to the knowledge of the defendant and not contradicted by her, and she having thereafter continued the said agents in her employ without instructing them to discontinue making such representations, the said evidence was admissible as shewing the true course of dealing of the defendant, and from which the jury might infer that such representations, being made with the defendant's sanction and approval, were a true statement of the real scheme of the defendant.

"Pursuant to the order of the Court of Appeal dated the 26th January, 1911, I submit the following questions of law for the opinion of this Honourable Court:—

"1. Was I right in admitting the evidence of Jane Goodale, Amelia Hoth, Edith Ford, Edith Clark, and others, as to statements made by agents of the defendant, not in her presence, under the circumstances hereinbefore stated?

"2. Was I right in admitting the evidence of Mrs. E. Ford as to her conversation with the agent and the father of the defendant, at the defendant's store, as set out on pp. 52, 53, 54, and more especially on p. 55, of the evidence taken at the trial herein?"

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

T. C. Robinette, K.C., for the defendant.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

MOSS, C.J.O.:—It will be observed that the gravamen of the charge was the unlawful carrying on of a business by modes of chance, not that the defendant was fraudulently representing that she was carrying on a business by such modes. Upon the charge preferred, it was incumbent upon the Crown to prove not merely that she represented or permitted representations to be made on her behalf that she was carrying on such a business, but that the business was in fact so carried on. Apart from the alleged representations deposed to by the witnesses, there was no proof of the use of a lottery scheme or of any other method of awarding property to persons agreeing to purchase under the contracts put in evidence which involved selection by lot or chance.

The only direct evidence as to the mode of determining the awards was that of William Lumgair, and it distinctly negatived selection by lot or chance. And there was no evidence of any direct admission by the defendant that selections were made in any such manner. On the contrary, there was evidence of repudiation, in some instances, of the correctness or truth of statements alleged to be made by agents that the selections were made by drawings of names.

In face of this testimony, it lay upon the Crown either to shew actual drawings by lot or some other mode of chance, or to shew facts from which it might reasonably be inferred that the selections were made and the business actually carried on in that manner. It would be possible, no doubt, to prove admissions by the defendant from which the same inference might be drawn; and, to some extent, that was attempted, by shewing representations, made by persons acting as agents, said to have been afterwards brought to the defendant's knowledge and to have not been repudiated by her. In this view, it is quite apparent that the evidence of some of the witnesses who testified for the Crown should not have been received. For instance, the evidence of Jane Goodale, Amelia Hoth, and Edith Clark, who testified to interviews with and statements made by agents which were not communicated to the defendant, could not be received in support of the charge in the indictment. And, while it may be said of the evidence of Mrs. Ford that it was not improperly received, it was in itself such slight evidence in support of an admission that it might well have been submitted with a direction that it would scarcely be safe to convict upon it alone.

In some respects the evidence of Jane Goodale, Amelia Hoth, and Edith Clark, was more favourable than prejudicial to the defendant; but, having regard to the manner in which it was dealt with in connection with the other evidence in the learned Chairman's charge, it is impossible to judge of its possible adverse effect upon the minds of the jury.

The first question should be answered in the negative; and, as that involves the setting aside of the conviction, it is not necessary to make formal answer to the second question.

In the result, there was a mistrial; and the conviction should be set aside; but there should be a new trial, if the Crown desires it.

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

MAGEE, J.A.:—I agree in the propriety of a new trial. The evidence points rather to a fraudulent business than to a merely illegal one of lottery.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. DECEMBER 1ST, 1911.

HAWES GIBSON & CO. v. HAWES.

Evidence — Foreign Commission — Irrelevancy of Evidence Sought to Claim Made by Pleadings—Leave to Amend—Dismissal of Application, without Prejudice to Fresh Application after Amendment—Costs.

Appeal by the plaintiffs from an order of MEREDITH, C.J. C.P., in Chambers.

The plaintiffs applied to the Master in Chambers for an order for the issue of a commission to Edmonton, Alberta, for the examination of certain witnesses. The Master ordered that no commission should issue until after James Hawes, the brother of the defendant and one of the members of the plaintiff firm, had been examined for discovery. Upon appeal, MEREDITH, C.J., amended the Master's order by refusing the commission altogether. This was the order appealed from; leave to appeal having been granted.

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

H. D. Gamble, K.C., for the plaintiffs.

F. R. MacKelcan, for the defendant.

RIDDELL, J. (after setting out the pleadings and proceedings) :—Looking at the pleadings alone, it is apparent that the plaintiffs claim as upon a loan, for the return of the money; the defendant substantially admits an advance, but upon special terms. The issue would then be "loan or no loan;" and no evidence such as is sought from the desired commission would be of advantage. . . . In my judgment, an order for a commission should never issue unless it appears that the evidence sought could be available upon some issue which is raised upon the pleadings. Costs are not to be incurred where there is no reasonable prospect of benefit to be derived therefrom by some one else than the solicitor-recipient; and when a litigant asks for such an order (which is not as of course), he should at least set out in the pleadings some allegation leading to an issue upon which the evidence sought is applicable.

The plaintiffs should, in my view, have leave to amend their pleadings as they may be advised; and, while this appeal should be dismissed upon the record as it stands, the dismissal should be without prejudice to another application upon a different state of the pleadings.

The plaintiffs should pay the costs forthwith.

LATCHFORD, J.:—I agree in the result.

FALCONBRIDGE, C.J. (dissenting):—I have many times, publicly and in private, expressed my regret at having been partly responsible for an order for a preliminary trial of an issue—an order which was attended by most disastrous results.

In all the circumstances of this case, I would make the order for the commission without any condition.

The objection about costs can be completely answered by directing the costs here and below and of the commission to be in the discretion of the trial Judge.

If these proceedings prove to be only quia timet and unnecessary, the Judge can mulct the plaintiffs in the appropriate penalty.

Appeal dismissed; FALCONBRIDGE, C.J., *dissenting.*

SUTHERLAND, J., IN CHAMBERS. DECEMBER 2ND, 1911.

REX v. DEMETRIO.

Criminal Law—Magistrate's Conviction for Keeping Disorderly House—Evidence to Support—Criminal Code, sec. 238—*Absence of Finding in Conviction that Defendant a "Loose, Idle, or Disorderly Person or Vagrant"—Uncertainty—Place of Offence—Amendment—Criminal Code, sec.* 1124.

An application to quash a conviction made on the 7th October, 1911, by the Police Magistrate for the Porcupine Mining Division, in the District of Sudbury, against E. Demetrio, for keeping a disorderly house, bawdy house, and house for the resort of prostitutes.

The grounds upon which the motion was made, as appearing in the notice of motion, were: (1) that there was no reasonable

evidence to support the conviction; (2) and upon other grounds appearing upon the face of the proceedings and from the affidavits and papers filed.

F. Arnoldi, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

SUTHERLAND, J.:—I am of opinion that there was ample evidence to warrant the conviction. The evidence of Piercy with reference to the character of the place in question was, I think, properly receivable in this case. See Regina v. McNamara, 20 O.R. 489; Regina v. St. Clair, 27 A.R. 308.

But, apart altogether from his testimony, the evidence of James Ford and James Lawrence is definite as to facts which would warrant the conviction, and that of the woman Germain Duquette is, I think, conclusive.

It was objected that, on the face of the conviction, it is bad, as not finding the accused guilty within the terms of sec. 238 of the Criminal Code. It was urged that the accused should have been found guilty of being "a loose, idle, or disorderly person or vagrant;" and The King v. Keeping, 4 Can. Crim. Cas. 494, a New Brunswick case, was cited in support of this contention. The view there adopted has not, however, been accepted in this Province, but a contrary view. See Rex v. Leconte, 11 O.L.R. 408, which is in point.

It was also contended that the conviction was bad on the ground of uncertainty, as no place is named therein where the offence charged is shewn to have been committed: Regina v. Cyr, 12 P.R. 24.

But the evidence is clear that the place in question was the house of the accused called and known as the "Nugget Saloon."

Under sec. 1124 of the Criminal Code, there are wide powers of amendment. I have power under this section, I think, to rectify this error, if it is one; and, as I think the evidence fully warrants me in so doing, I order and direct that the conviction be amended by inserting, after the word "Whitney" therein, the following words, "at his house there known as the Nugget Saloon."

The motion will be dismissed with costs.

DIVISIONAL COURT. DECEMBER 2ND, 1911.

*BURNS v. HALL.

Mines and Minerals—Mining Act, 1908, *sec.* 78—*Time for Performance of Work on Mining Claim—"The Three Months Immediately Following the Recording"—Construction.*

Appeal by the plaintiff and cross-appeal by the defendants from a decision of the Mining Commissioner in regard to the validity of certain mining claims.

The appeals were heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

M. K. Cowan, K.C., for the plaintiff.

J. J. Gray, for the defendants.

The judgment of the Court was delivered by BOYD, C.:—We reserved the question as to the meaning of the words used in the Mining Act, 1908, 8 Edw. VII. ch. 21, sec. 78, which provides "that the recorded holder of a mining claim shall perform work thereon . . . during the three months immediately following the recording, to the extent of thirty days," etc. What is meant by "the three months immediately following the recording?" That is, does the time begin to run on the day of the recording or from the next day thereafter?

I think the words "immediately following" are synonymous with "next after," referring (in the words of the Act, later used) to "a period of time," and not to the creation of a term. In other words, the Act does not provide for an extension of time within which the work may be done, but for the limitation of a period for the doing of the required work. . . .

[Reference to Goldsmiths' Co. v. West Metropolitan R.W. Co., [1904] 1 K.B. 1, at p. 5; In re North, [1895] 2 Q.B. 264, at p. 270; Miller v. Wheatley, 28 L.R.Ir. 144, 154; 19 Cyc. 1083.]

I think, for these reasons, that the Commissioner was right, and this appeal should be dismissed.

As we have dismissed the cross-appeal, it will be well to let each party bear his own costs.

*To be reported in the Ontario Law Reports.

MIDDLETON, J., IN CHAMBERS. DECEMBER 4TH, 1911.

RE GORDON.

Will—Legacy—Misnomer of Legatee—Proof of Identity—Interest—Costs.

Motion by Maria Allison (formerly Maria Ryan) for payment out of Court of the amount of a legacy paid in by the executor of Catharine Gordon, otherwise Catharine Ryan, the deceased sister of the applicant. The legatee named in the will was "Maria Gordon," and the applicant contended that she was the person designated as the legatee.

L. F. Heyd, K.C., for the applicant.
A. E. Knox, for the executor.

MIDDLETON, J.:—The material in this case shews that Catharine Ryan had assumed her mother's maiden name of Gordon. When her will was prepared, the solicitor, not being aware of the circumstances, not unnaturally named her sister, to whom $1,000 was left, as "Maria Gordon."

It is singular that in the entry made at the time he called the testator both "Miss Catharine Gordon" and "Miss Ryan;" he has no memory of the matter.

The identity of the applicant with the testatrix's sister is well shewn, in voluminous and carefully prepared material filed; and the residuary legatees make no answer.

The order may go for payment out of Court of the money paid in.

The question of interest was discussed upon the argument, and it was arranged that I should deal with this upon this motion; and I ruled that the applicant should have interest from a year from the death; and it was agreed that this should be at three per cent., the interest that would have been earned had the money then been paid into Court.

No costs are asked against the residuary legatees or the executor, and no order is made. The applicant must adjust her costs with her solicitor in the usual way.

MIDDLETON, J. DECEMBER 4TH, 1911.

RE KENNY.

Will—Construction—Omission of Necessary Words—Ambiguity—Devise of Land—Reservation of House and Grounds for Use of Wife and Daughters—Affidavits as to Intention of Testator—Inadmissibility — Carelessness of Draftsman — Costs.

Motion by May L. Kenny, under Con. Rule 938, for an order determining a question arising upon the construction of the will of James Kenny, deceased.

H. S. White, for the applicant.

B. F. Justin, K.C., for the administratrix with the will annexed.

E. G. Graham, for the assignee of the interests of the testator's sons.

MIDDLETON, J.:—The clause in the will giving rise to this motion immediately follows a devise of the testator's farm to his sons "subject to the following conditions and reservations." It reads: "I also reserve the house I now live in and one-half of the orchard and garden but not to exceed two acres of ground for the use of my wife during her lifetime and the lifetime of my daughters should they remain unmarried and after the marriage or death of my daughters and my wife then the said house orchard and ground to revert to the farm and be the property of my sons." This clause is the work of a careless conveyancer; there is not in the will any indication that he was incompetent; and some words necessary completely to convey the testator's meaning have been omitted. In the result the will is not easy to construe.

There is a direction that the residuary estate is to be sold, and this indicates that the testator intended a complete disposition of the two acres to be found in this clause.

The sons do not acquire any right to possession until "after the marriage or death of my daughters and my wife;" and, using this as the key to the earlier ambiguous part of the clause, I conclude that the testator meant the house to be a home for the use of his wife and daughters so long as they or any of them lived and remained unmarried; and I so declare.

Three affidavits have been filed, one by James McCarty, the draftsman of the will, who states what his instructions were, and that, if the written words are not construed in accordance therewith, "it will be a great miscarriage of justice." The others are by the widow and daughter as to the husband's and father's intentions. Clearly these affidavits cannot be received. The intention must be found in the will itself. The only "miscarriage of justice" in this case arises from my inability to find any means of awarding costs against McCarty—in justice he should pay the costs occasioned by his carelessness.

There will be no costs, as I am told that there is no estate out of which they can be paid, save the lands in question.

MIDDLETON, J. DECEMBER 4TH, 1911.

BINDER v. MAHON.

Trusts and Trustes—Promissory Note—Interest in—Equity Attaching to, in Hands of Holder Acquiring after Maturity—Renewals—Advance—Notice of Claim—Evidence.

An action to recover $2,000, being the plaintiff's alleged interest in a promissory note for $4,000 given to the defendant Mahon in part payment of the purchase-price of the Clyde Hotel, in the city of London, Ontario.

T. G. Meredith, K.C., for the plaintiff.
J. M. McEvoy, for the defendant Mahon.
E. W. M. Flock, for the defendants the José Gatti Co.
E. Meredith, K.C., for the defendant Greig.

MIDDLETON, J.:—W. H. Mahon, at one time the owner of the Clyde Hotel, London, desiring to sell it, made an agreement with George D. Binder, the plaintiff, in April, 1910, by which, if Binder could procure a purchaser at $12,000, he was to have a commission of $2,000 on the sale.

To secure Binder, the by no means unusual course was adopted of giving him an option to purchase at $10,000, under which Mahon was bound to convey to Binder or any person whom he should appoint. It was never contemplated that Binder would himself purchase.

Binder procured a purchaser, James Greig, who was ready to buy at $12,000. When the purchase came to be completed,

Greig was found to be unable to put up the necessary cash, as he was disappointed in not receiving certain insurance money payable in respect of an hotel that he had formerly owned, and which had been burned. The insurance company resisted payment, but in the end had to pay the loss.

Binder had agreed with Greig to advance him $4,000 on the property, and there were other incumbrances; so the balance of the purchase-money, $4,000, over all advances and ready cash expected to be provided from this insurance money, could not be satisfactorily secured on the property.

The sale was to be for cash; so Mahon need not have conveyed under his option unless he desired.

The fact that Binder was to receive $2,000 out of this purchase-price was not disclosed to Greig, and he regarded Mahon as the vendor, and Binder, as in truth he was, as a mere agent.

Finally, it was arranged that the $4,000 should be secured by a note drawn in favour of Mahon, and that this should, as to $2,000, be held by him in trust for Binder, as representing his $2,000 commission. The note was taken in this way to avoid any disclosure to Greig, and was the result of a bargain then made. Binder and Mahon agreed to share the risk incident to the credit agreed to be given Greig in this way.

Greig then agreed that this insurance money should be paid through the solicitors who had been acting for all parties, and thought he had signed a document to this effect. No such document can be found; and I think Greig is in error as to this; but the oral agreement was, no doubt, made.

On the closing of the transaction, Mahon signed a document dated the 6th May, 1910: "When the $4,000 insurance arrives—re Greig—I am to hand $2,000 to Binder."

The note for $4,000 was dated the 10th May, 1910, and was made payable in three months—falling due on the 13th August, 1910.

The litigation as to the insurance was not then over, and Greig was compelled to ask a renewal.

Mahon in the meantime had made, or was about to complete, arrangements to go to Detroit, and his creditors were pressing him for money. Chief among these was Coleman, the active member of the José Gatti Co. and other firms having claims.

Mahon was, at the maturity of the note, still the holder, and did not discount or in any way deal with it till early in September.

The first renewal, as it has been called, was given on the 12th October, 1910. Prior to this—the exact date is not material

—Mahon had handed the past due note to the Gatti company, and they had hypothecated this to the Bank of Nova Scotia to secure an advance to Mahon and the Gatti company's account at the bank. This, I think, was the day when Mahon first parted with any interest in the note.

The amount of the claims of the Gatti company and the other claims in which Coleman was interested and of the advance did not exhaust Mahon's $2,000 interest in the note.

Greig, having been advised of Binder's interest in the note, refused to make the renewal payable to the Gatti company or Coleman, and insisted, in accordance with advice he had obtained, in making the parties the same as on the original note.

After this, at various times, Coleman has paid money to Mahon, and claims to hold this note and a subsequent renewal (as it has been called) and the money which it represents, as against Binder.

I find that Coleman had notice of Binder's interest in this note before he made any of these advances.

I accept the evidence of Greig and of Binder. Mahon, as I said at the trial, is frankly and unblushingly dishonest, and in no way to be relied on. I am not prepared to place Coleman in the same category; but I cannot accept his evidence when in conflict with that of other witnesses; nor do I believe that there ever was any such agreement to make advances as he stated. I do not think the true story of his relations with Mahon, or the advances made in connection with the Detroit business, has been told. When the note was given to Coleman in the first instance, I think that Mahon only intended to deal with his $2,000 interest in it; and the idea that the note could be held for the whole Detroit debt is of much later origin. The advances, made in uncertain amounts and in excess of the face of the note, seem to me to have no relation to the bargain alleged—a sale of the note for $3,900.

When this "first renewal" came due, Greig had not received his insurance, and made the "second renewal" payable to the Gatti company. He probably thus placed himself in a position of some difficulty—but he has been extricated by the course taken. By an order made in this action and in an action by the Gatti company against Greig on the note, on the 7th October, 1911, Greig was permitted to pay $2,000 (and $100 interest) into Court and the balance to the Gatti company; and thereupon he was "discharged from all liability upon the said note."

In the result, I declare that Binder is entitled to receive the $2,100 paid into Court (with any accrued interest), and order

payment of this sum to him, and I award him costs against Mahon and the Gatti company. I give Greig no costs either of this action or of the action of the Gatti company against him, nor do I allow the Gatti company any costs of that action against him.

I should add that my findings involve a disbelief of Mahon's statement that Binder was to indorse any renewal note; and that I do not proceed upon any theory of equitable assignment, but upon the view that Mahon held the note as to $2,000 in trust for Binder, and that Coleman acquired the note after maturity, and this trust was an equity which attached to the note, and that the renewals did not in any way change his position. Beyond this, I have found that, before any advance was made by Coleman (or his company), he had full notice and knowledge of Binder's claim.

MIDDLETON, J. DECEMBER 4TH, 1911.

*PARSONS v. CITY OF LONDON.

Municipal Corporations—Sale of Municipal Lands—City Hall—Market-place—Powers of Council—Provisions of Municipal Act—Property no Longer Required for Municipal Purposes—1 Geo. V. ch. 95, sec. 10(O.)—Power to Sell Definite Parcel—Evidence—Draft Bill and Notices Published—Inadmissibility—Fiduciary Position of Council—Bona Fides—Reasonable and Prudent Sale—Adequacy of Price.

Action by John M. Parsons, on behalf of himself and all other ratepayers of the City of London, for a declaration that the defendants the Corporation of the City of London were not entitled to sell, convey, or in any way alienate a portion of the market-square and arcade which they had contracted to sell to the defendants the Royal Bank of Canada.

Sir George C. Gibbons, K.C., and C. G. Jarvis, for the plaintiff.

T. G. Meredith, K.C., for the defendants the city corporation.

J. B. McKillop, for the defendants the bank.

MIDDLETON, J. (after giving the history of the market site and referring to conveyances and municipal by-laws):—The

*To be reported in the Ontario Law Reports.

Richmond street land was purchased as an addition to the market-place; and, a year afterwards, at the time of the purchase of the lands on King and Talbot streets for a further addition to the market and a site for the town hall, a change was determined upon, and the town hall was built upon the Richmond street lot . . . upon the front portion . . . leaving the rear portion, some 30 feet by 110 feet, open; and this has always been and still is used as part of the market.

The conveyance of the Richmond street lands was not upon condition: the municipality acquired the fee. The circumstances shew the purpose for which these lands were purchased.

In the opinion I have formed, it is not necessary to determine the question whether the readjustment of the municipal plans, made in 1853, by using this land—purchased to enlarge the market—as a town hall site, and at the same time using the King and Talbot street lands—purchased to afford a site, as well as to enlarge the market—for market purposes only, is open to criticism. At present, I think this change was well within the municipal powers: see Kennedy v. City of Toronto, 12 O.R. 211.

The market by-law (757) recognises this space to the rear of the city hall as forming part of the market-square. Other municipal action accords with this.

I am quite satisfied that there never was any intention to divert from its original use any part of these Richmond street lands until the sale in question was contemplated; and, if this was sufficient to determine the case, the matter would be easy.

In the offices of the assessment department, this whole lot, 110 x 110, came to be regarded as the city hall property. . . .

On the 30th January, 1911, the Royal Bank made an offer of $100,000 for "the city hall property, having a frontage of 110 feet on Richmond street by a depth of 110 feet to the market-square. This offer was accepted; and there is no doubt that it was the intention of both parties to deal with the whole parcel. The fact that the parcel was called "the city hall property" does not make any difference in the construction of the agreement. The subject-matter of the agreement undoubtedly was this parcel.

I am, however, satisfied, upon the evidence, that the city council and the bank both thought that this was "city hall property." The council did not intend to deal with the site, or any part of it as a market property. They did not realise that they were selling any part of the market-site; and—if it is in any way material—there was never any determination that this land or any part of it was no longer required for municipal purposes or no longer required for the purposes of the market.

The land to the rear of the city hall is not, perhaps, a very important part of the market-site; but it is, in fact, a part of the site, and serves useful purposes in connection with the market; and, if the authority to sell rested upon the general provisions of the Municipal Act permitting a sale of land no longer required, the sale could not stand, because it has not been made to appear by any municipal action, or by evidence apart from municipal action—if, indeed, that is permissible—that this land is no longer required.

The right to dispose of this land mainly rests upon the Act of 1911, 1 Geo. V. ch. 95, sec. 10 (O.) . . .

This statute seems to me to be plain and free from all ambiguity. Power to sell this precise parcel is given. Had the statute simply given power to sell "the lands upon which the city hall is situate," the case would have been difficult. The definition which follows cannot be ignored, and removes all difficulty.

Counsel tendered, and, subject to objection, I allowed to be received, a draft of the bill and the notices published. These, I rule, are not admissible. I must interpret the statute by what appears upon its face; and any redress that the parties think themselves entitled to, if the Act as passed is wider than the notices published warranted, must be sought from the Legislature, and not from the Courts.

This particular sale is attacked as having been made by the council, who are said to occupy a fiduciary position, without the occupies, as regards corporate property, the position of a trustee, Phillips v. City of Belleville, 9 O.L.R. 732, is relied upon as authority for the proposition that "a municipal corporation occupies, as regards corporate property, the position of a trustee, and is amenable to the like jurisdiction of the Courts as is exercised over trustees generally." . . . I . . . accept this as an accurate statement of the law. At the same time, I think it proper to say that, if the question had been open, I should have great difficulty in assenting to it. No doubt, the councillors occupy a fiduciary position towards the ratepayers, which will render them liable to account for any secret profit they may make out of municipal business. It was so held in Bowes v. City of Toronto, 11 Moo. P.C. 463. But, with deference, it seems to me that this falls far short of determining that all the rules of equity with reference to the conduct of trustees can be applied to a municipal council in the exercise of its statutory powers. . . .

[Further references to Bowes v. City of Toronto, and to Phillips v. City of Belleville, 9 O.L.R. 732, 6 O.W.R. 1, 11 O.L.R. 256.]

In the case before me, without any hesitation, I find perfect good faith, and not only that the council had reason which they might reasonably consider good and sufficient to justify their action, but . . . that in what they did, they acted with prudence and propriety—and, if I may say so, with wisdom.

They received from the bank an offer for the property at a price ($100,000) which, upon the evidence, I find to be not only a good price, but a price equalling or exceeding what would reasonably be expected to be realised. This offer was made upon the express terms that it should be either accepted or rejected, and that it should not be made the basis of competition. The bank were ready to give this sum, if at once accepted, or to take their chance in public competition. The highest offer received for this property, known for some years to be on the market, was $85,000. This was an advance of $15,000. It was, after consideration, accepted. There was some evidence that the Merchants Bank, after their rival had secured this site, would give the same price for the building and the 75 feet in depth on which it stands; but this was put forward after the council was bound in honour, and probably in law, to the defendant bank; and no binding offer was made. Some experts—no doubt, the most optimistic the plaintiff could find—gave an opinion that public competition might bring $110,000; but this is opinion only as against actual money.

On all grounds, the action fails and must be dismissed with costs.

SUTHERLAND, J., IN CHAMBERS. DECEMBER 6TH, 1911.

*RE KEELING AND TOWNSHIP OF BRANT.

Municipal Corporations—Local Option By-law—Petition for—Right of Petitioners to Withdraw Names after Date Fixed by Statute for Presentation, but before Consideration by Council—Liquor License Act, sec. 141, sub-secs. 2, 3—Mandamus to Corporation to Submit By-law to Electors.

Motion by a ratepayer and elector of the township of Brant, in the county of Bruce, for an order of mandamus requiring the township corporation to submit to a vote of the municipal

*To be reported in the Ontario Law Reports.

electors, at the next municipal elections, a local option by-law, in accordance with a petition filed with the clerk of the municipality on or before the 1st November, 1911.

The following facts were admitted by both the applicant and the respondents:—

1. That a petition in writing, purporting to be signed by twenty-five per cent. of the total number of persons appearing by the last revised voters' list of the township of Brant to be qualified to vote at municipal elections, praying for the submission by the township council of a local option by-law, under sec. 141 of the Liquor License Act, for the approval of the electors, was filed with the clerk on or before the 1st November, 1911.

2. That the total number of persons appearing by the last revised voters' list of the township of Brant to be qualified to vote at municipal elections, was 1104.

3. That the petition was signed by 303 persons.

4. That on the 10th November, 1911, the council met and considered the petition, with a second petition mentioned below.

5. That eleven names were struck off the original petition, being the names of persons not qualified to vote at municipal elections.

6. That the number of persons appearing to be qualified to vote, after the eleven names were struck off, was 292.

7. That a petition was produced by those interested in opposing the submission of the by-law, containing the signatures (verified by witnesses) of sixteen persons who had signed the original petition, requesting that their names should be withdrawn from the original petition.

8. That the second petition was presented to and placed in the possession of the council on the 10th November, before any action was taken or any conclusion arrived at upon the subject-matter of either petition.

9. That, at the said council meeting, one Reinhardt, a duly qualified voter, who had signed the original petition, added his name to the second petition, making a total of seventeen persons who desired to withdraw.

10. That the subtraction of seventeen names left the net number of petitioners at 275, which was one less than the 25 per cent. required.

11. That the council refused to submit the by-law, upon the ground that the seventeen had the right to withdraw; and,

therefore, the petition was not sufficiently signed, within the meaning of sec. 141 (3) of the Act.

T. H. Peine, for the applicant.
R. C. H. Cassels, for the township corporation.
J. Haverson, K.C., for the opponents of the by-law.

SUTHERLAND, J. (after setting out the facts and referring to sub-sec. 2 of sec. 141 of the Liquor License Act, as amended by 6 Edw. VII. ch. 47, sec. 24; and sub-sec. 3 of sec. 141, as amended by 7 Edw. VII. ch. 46, sec. 11):—The main contention on behalf of those opposing the motion is, that the petitioners who signed the second petition had a right to withdraw their names from the first petition before action taken by the corporation. Re Halliday and City of Ottawa, 14 O.L.R. 458, 15 O.L.R. 65, is cited in support of this view.

[Quotations from that case, and reference to Re Misener and Township of Wainfleet, 46 U.C.R. 457; In re Robertson and Township of North Easthope, 15 O.R. 423, 16 A.R. 214; Gibson v. Township of North Easthope, 21 A.R. 504, 24 S.C.R. 707; Williams v. Citizens, 40 Ark. 290; State v. Gerhardt, 145 Ind. 439.]

In the present case, it is clear from the admitted facts that on or before the 1st November, 1911, a petition in writing signed by at least 25 per cent. of the total of persons appearing by the last revised voters' list of the municipality to be qualified to vote at municipal elections had been "presented to the council" and "filed with the clerk of the municipality," praying for the submission of such a by-law as is in question herein.

That being so, sub-sec. 3 of sec. 24 provides that, in such circumstances, "it shall be the duty of the council to submit the same to a vote of the municipal electors." There is no provision for a counter-petition or withdrawal of signatures. No action of any kind with respect to the original petition was taken by the council on or after the 1st November until their next regular meeting on the 10th November following. They then considered the petition and scrutinised it, as they had a right to do, to see that the signatures were those of persons qualified to sign, and that they constituted the requisite 25 per cent.

They rejected eleven names of persons not so qualified, as they were also entitled and bound to do. Upon the facts stated and admitted, they further considered the counter-petition of the sixteen persons who thereby asked the council to allow them to withdraw their names from the original petition, and thereby

also attempted to withdraw their names from the petition and to cancel and declare void their execution thereof. Having considered the petition and counter-petition, including the addition to the latter of the name of Joseph Reinhardt . . . they apparently came to the conclusion embodied in the following resolution adopted at the meeting, "that in reference to the petition presented to the council asking for the submission of a local option by-law at the municipal election in January, in the opinion of this council the provisions of sub-sec. 3 of sec. 141 of the Liquor License Act have not been complied with, and we do not feel compelled to submit the same."

The resolution does not in express terms say that the council permitted the seventeen signers of the original petition who attempted to withdraw to do so, nor was any resolution passed by the council to that effect. The statute in question has fixed a date, the 1st November, towards the close of the year, when a petition of the kind in question must, in order to be effective for the purpose intended, be filed with the clerk of the municipality so as to render it obligatory upon the council to pass a by-law to be submitted to the electors. But, even after a proper petition has been filed before the 1st November and the by-law passed by the council, there are certain other formalities required to be observed before the vote can be taken at a definite time, also fixed by statute, viz., that fixed for the ensuing municipal elections.

By the Municipal Act, 1903, sec. 338, sub-sec. 2, the by-law must, before the final passing thereof, be published within the municipality in some public newspaper for three successive weeks. The meeting of the council after the 1st November and the passing of the by-law and its publication consumes much of the time between that date and the date fixed for the election. Those in favour of having a by-law passed to be submitted to the people had undoubtedly, on the admitted facts, complied fully with the law at the date fixed by the statute, viz., the 1st November.

It is contended that persons who have seen fit to change their minds, for some reason not in evidence, before action taken by the council on the original petition have a right to withdraw. I do not think it is open to them to do so under the statute in question. If they can, in what position does it place the matter? This is not a by-law that can be asked for and obtained within a month during any portion of the year, as was the case under consideration in Re Halliday and City of Ottawa. Here, those

desiring the by-law to be passed had secured more than the necessary number of qualified electors before the fixed date in the year mentioned in the statute. Possibly they could have obtained more signatures to it if they had thought there was any danger of such a thing occurring as has occurred. They cannot now, after the date so fixed by statute for filing it with the clerk, obtain further signatures to the petition sufficient in number to legalise it. They would, therefore, be compelled to wait another year before having the matter dealt with. I cannot think that it was so intended. I cannot think that the section, as framed, contemplates or permits of such a result. I think it was the duty of the council, when they ascertained that on the 1st November a petition had been filed with the clerk, which then contained the necessary 25 per cent. of qualified names, to treat the matter, so far as the petition was concerned, as ended, and feel under obligation, as I think they were, to pass a by-law.

The case of Bannerman v. Lawyer, 45 C.L.J. 484, is somewhat in point. . . .

The motion is allowed, and a mandatory order requiring the corporation to submit a by-law as asked is granted, with costs.

BOYD, C., IN CHAMBERS. DECEMBER 6TH, 1911.

BARTLETT v. BARTLETT MINES LIMITED.

Judgment Debtor—Examination of—Con. Rule 900—Scope of Examination—Judgment for Costs—Inquiry as to Means of Debtor before Commencement of Action.

Motion by the defendants, who were judgment creditors of the plaintiff for the costs of this action (see 24 O.L.R. 419), to commit the defendant for refusal to answer questions upon his examination as a judgment debtor.

M. Lockhart Gordon, for the defendants.
H. Cassels, K.C., for the plaintiff.

BOYD, C.:—As to the examination of a judgment debtor, the creditor is entitled to be informed what property or means the debtor had at the time of contracting the debt. It was laid down at an early day that the scope of the examination was not limited to that point of time, but that the inquiry might go into anterior investigation, "no matter how far back:" Ontario Bank

v. Mitchell, 32 C.P. 73, 76 (1881). The order to examine has been recently enlarged (1894) so as to enable the judgment creditor to examine where the judgment is for costs only. It is said in the Rule that the examination is to be as to means the debtor had "at the time of the commencement of the cause or matter:" Con. Rule 900. This amendment and enlargement of the power to examine for the recovery of costs is inserted into the body of the former Rule for the examination of a judgment debtor; and it seems to me that I am bound to give the new part the same construction as the old, and not limit the examination to the time of the beginning of the action. The reasons given by Wilson, C.J., in the case cited, apply as forcibly to a judgment for costs as to any other judgment for the recovery of money.

The debtor must, therefore, be further examined as to the $4,000; but, in regard to the other part of his examination as to the constitution of the firm by whom he is employed, I make no order.

There will be no costs of this application and order.

SUTHERLAND, J. DECEMBER 6TH, 1911.

RE DALE.

Will—Claim against Estate of Deceased Person—Presumption of Satisfaction by Legacy—Rebuttal—Direction to Pay Debts—Estoppel by Deed—Interest—"Sum Certain Payable by Virtue of a Written Instrument at a Certain Time"—Judicature Act, sec. 114*—Bond for Payment of Money—No Time Certain Fixed for Payment—Interest from Date of Demand only.*

An appeal by the National Trust Company, the executors of Robert Fleming Dale, from an order of the Judge of the Surrogate Court of the County of Essex.

On the 22nd August, 1874, one Margery Dale made her last will, wherein, after certain small legacies, she gave all the residue of her estate, real and personal, to Robert Fleming Dale, who was one of her sons, providing that her "aforesaid real and personal property or the proceeds thereof shall be subject to payment of my lawful debts including all mortgages and covenant debts as well as simple contract debts."

Subsequently, on the 30th November, 1874, she executed a

bond for $4,000 in favour of James Dale, another son, in consideration of work and services. It was provided in the bond that, in the event of her death before the $4,000 was paid, James Dale should have a lien on her real and personal property for that sum, and her executors, heirs and assigns, should pay him that sum.

She died on the 29th January, 1876, and letters probate of the will were issued to the executors (Robert Fleming Dale and Alexander Dale) on the 5th April, 1876.

At the time of her death she was residing on a lot in Arthur, the title to which was in her. James Dale expected to become the owner of that lot.

On the 15th November, 1877, James Dale joined with others in executing a quit-claim deed of that lot to Robert Fleming Dale. This deed contained the following recital: "And whereas the said Alexander Dale, as executor as aforesaid, declares that all the debts of the said Margery Dale have been paid, and that the said Robert Fleming Dale is entitled to hold the said lands freed from any claims in respect of such debts."

Subsequently, on the 19th December, 1877, Robert Fleming Dale sold and conveyed the land to one David McLeod for the price of $3,500.

Between the years 1880 and 1903, both inclusive, Robert Fleming Dale paid to his brother James Dale various sums on various dates in amounts from $534, paid on the 11th February, 1880, down to $50, and aggregating between $3,000 and $4,000. Most of these sums, if not all, were entered in books kept by Robert Fleming Dale and are admitted by James Dale to have been paid.

None of these payments are said to have been made on account of interest, nor was any arrangement as to the payment of interest entered into apparently between the brothers.

On the 28th March, 1909, Robert Fleming Dale made his last will and testament, wherein he appointed the National Trust Company to be executors and trustees, and, among other legacies, directed his executors "to pay to my brother James Dale the sum of $1,500." He died on the 7th April, 1909, and letters probate were issued to trust company on the 12th May, 1909.

In the Surrogate Court of the County of Essex, James Dale asserted a claim for the amount due to him under the above-mentioned bond, against the estate of his brother Robert Fleming Dale; and a contestation occurred and evidence was taken before the Judge of the Surrogate Court. The main contention before him on the part of the trust company was, that the claimant was estopped by the quit-claim deed above referred to and

recital therein contained. The learned Judge held that this contention failed. It appeared from evidence which the Judge believed, that the quit-claim deed was given merely for the purpose of enabling Robert Fleming Dale to make title to an intending purchaser, and that James Dale executed it without any intention of releasing his claim under the bond. The Judge also held that the legacy to James was not intended to cover his claim. The amount due, with interest, was much more than the $1,500.

The Judge's order, dated the 21st June, 1911, declared that James Dale was entitled to be paid the amount due him on his claim, upon the proper taking of the accounts between him and the testator, with interest on the balances from time to time; and the appeal was from that order.

Glyn Osler, for the appellants.
W. C. Hall, for the claimant.

SUTHERLAND, J. (after setting out the facts):—The appellants do not attack the finding of the Surrogate Court Judge to the effect that the claimant is not estopped by the quit-claim deed, but is still in a position to prefer his claim under the bond. He does say, however, that the Surrogate Judge, from some calculation he had already made, came to the conclusion that, at the time of the death of Robert Fleming Dale, the amount of the claim was in excess of the legacy. He contends that the learned Judge has erred in directing the account to be so taken, and argues that it should be taken as suggested in Re Curry, 25 A.R. 267.

His contention is, that, if this is done, the amount will be found to be less than the legacy, in which case he asks that upon the reference back, if one is made, there should be a direction that, in such event, the legacy should be treated as a satisfaction of the debt.

I do not think this view could be given effect to, even if it were the fact that the legacy was equal to or greater than the debt at the time of the testator's death. I am of opinion that it could not be held to be a satisfaction of the debt. If there is even a slight indication in the will of a contrary indication to that of its being a satisfaction, the presumption is rebutted. A direction in the will to pay "debts" has been held to rebut such a presumption. In this will there is the following clause: "(5) I direct all my just debts funeral and testamentary expenses to be paid and satisfied by my executor and trustee as soon as conveniently may be after my decease." See Horlock v. Wiggins, 39 Ch. D. 142; In re Huish, 43 Ch. D. 260. Even if it were the

case that the legacy were equal to or greater than the claim, I am of opinion that both should be paid.

Now, as to the payment of interest. No demand for its payment, it is admitted, was ever made until the claim which is in question was filed against the estate of Robert Fleming Dale. It is the case, apparently, of brothers who have gone on in an easy-going way, the one not pressing the other for the claim, the other making payments on account when it seemed to him most convenient. The course of dealing, the relations between the parties, the giving of the legacy, would hardly suggest that it is a case where one would feel strongly called upon to allow interest. Then is this claim under the bond in question one which can be said to be one which is payable by virtue of a written instrument at a time certain? If so, interest may be allowed, although even in such case it is discretionary: Judicature Act, R.S.O. 1897 ch. 51, sec. 114. . . .

But, if it is not so payable at a time certain by virtue of this written instrument, as I think it is not, then interest is not so allowable and payable. It is then only payable after demand made as provided in sub-sec. 2.

The provisions of sec. 114 are founded upon the Imperial Act 3 & 4 Wm. IV. ch. 42, sec. 28. See London Chatham and Dover R.W. Co. v. South Eastern R.W. Co., [1893] A.C. 429.

The bond in question fixes no certain time for the payment of the money on which the claim in question is based. The obligor binds herself to pay it without naming any date when to do so; and, in the event of her death before the payment, gives to the obligee a lien on her property, real and personal, for the amount, and directs her executors, heirs and assigns, to pay it to the obligee. I think, under the section referred to, as no time certain is fixed for payment under the bond, and no demand shewn to have been made for payment of interest until the one made on filing the claim against the estate, interest can run in favour of the claimant only from that date.

The appeal should, therefore, be allowed in part and the order in question varied to read as follows: "That the said James Dale is entitled to be paid the amount due him on his claim, after giving credit thereon for the sums paid by the late Robert Fleming Dale thereon in his lifetime, and with interest on the balance thereof then remaining unpaid from the date when the claim was filed in the Surrogate Court against the estate of Robert Fleming Dale."

The appellants, the trust company, will have their costs of the appeal.

BOYD, C. DECEMBER 7TH, 1911.

*RE STURMER AND TOWN OF BEAVERTON.

Costs—Power of Court to Make Real Litigant Pay Costs—Unsuccessful Application to Quash Municipal By-law—Nominal Applicant—Judicature Act, sec. 119.

Motion by the Corporation of the Town of Beaverton for an order requiring and directing Alexander Hamilton to pay the corporation the sum of $384.14, being the unpaid balance of costs taxed and allowed to the corporation of an unsuccessful motion by Henry Sturmer to quash a local option by-law passed by the corporation and of an appeal from the order refusing to quash. See 24 O.L.R. 65.

W. E. Raney, K.C., for the corporation.
G. Lynch-Staunton, K.C., for Hamilton.

BOYD, C.:—My brother Middleton has already found, on the examination which is in evidence, that the application in the name of Sturmer was a matter for which Hamilton and Overend were responsible (with which I agree). Sturmer is a man of straw; and they feared to appear lest they might be liable for costs: they became responsible to the solicitor who acted for Sturmer for costs, and the proceeding was really an abuse of the process of the Court: Re Sturmer and Beaverton, 2 O.W.N. 1053. The real litigants are these two hotel-keepers, and this application is against one only to make him pay the balance of costs, $384, payable by Sturmer to the corporation, on the dismissal of the application to quash. There is inherent power in the Court to make a person who has set the Court in motion pay the costs of his unsuccessful application, and this though the person be not formally a party, but one who is the instigator and supporter of the movement: In re Bombay Civil Fund Act, 33 Sol. J. 107; Attorney-General v. Skinners Co., C.P. Coop. 1. Under the Judicature Act there is now ample jurisdiction to deal with costs: full power is given to determine by whom and to what extent costs are to be paid: sec. 119; In re Appleton, [1905] 1 Ch. 749; Corporation of Burford v. Lenthall, 2 Atk. 553. . . .

[Reference to the practice in ejectment and to Hutchinson v. Greenwood, 4 E. & B. 326.]

*To be reported in the Ontario Law Reports.

This is a case in which the equitable rule should be applied, in ordering the real applicant, Hamilton, to pay these costs; and that will be the order of the Court.

Order to pay $384 and costs of application to the corporation.

CAMPBELL v. SOVEREIGN BANK OF CANADA—MASTER IN CHAMBERS —DEC. 1.

Practice—Consolidation of Actions—Form of Order—Terms —Costs.]—Motions by Campbell, McNaught, Dyment, and McMillan, who were directors of the Sovereign Bank of Canada, for an order consolidating eight actions, to all of which they or some or one of them were parties, and all of which had to do with shares in the Penman Manufacturing Company and the International Assets Limited; and for an order adding G. T. Clarkson, trustee for the creditors of the bank, as a party to the actions or one or more of them; and for an order adding the bank as a party to four of the actions, to which the bank was not already a party. The Master said that the real question in all these actions was only one and that of a simple character. The directors, either personally or on behalf of the bank, were interested in some dealings with the stock of the Penman company. As a result of these dealings, 100 shares of the preferred and 856 of the common stock were transferred to the directors, and afterwards by them assigned to the bank. The directors now asserted that these shares were their personal property, and that it was on this assumption, and fortified by the opinion of counsel to that effect, that they, not without reluctance and yielding to pressure, subscribed for the International Assets stock. On the other hand, it was contended that these shares were always the property of the bank, and represented the profit arising from its assistance in the dealings with the Penman company's stock.—The Master referred to Nelles v. Niagara Grape Co., 13 P.R. 179, 258, 260, where Osler, J.A., said that, in making an order such as was asked for here, "the object has always been that a single trial may decide that which is, in fact, only a single question, and thus save costs and expense." The Master said that it was plain that eight actions could not be allowed to proceed, when the real point at issue could be disposed of by one trial. The best disposition, in the interests of all parties, would seem to be as follows: Let such one of the directors' actions proceed as they may arrange among them-

selves, they agreeing to be bound by the result of that case. Then the defendants can defend and counterclaim as they proposed to do in their reply to the statement of defence delivered in the actions brought by the International Assets Limited against the directors. If Mr. Clarkson is thought to be a necessary party, the order will give leave to amend to that effect. As this order is made on the directors' application and for their benefit, it would seem a proper term that all should be liable for the costs of the action which goes on, both as between themselves, as substantially joint plaintiffs, and also to the defendants in case of their success. They are thereby subjected to no greater liability than they would be under if their four actions were consolidated, as they might have been, if they all had the same solicitors. If they so agree, this might be the form of the order. Such a joinder of plaintiffs would be allowable under Con. Rule 185, while the claims of the International Assets Limited against them, though differing in amount, are all based on a similar ground. Costs of the motions to be in the cause. F. Arnoldi, K.C., and D. L. McCarthy, K.C., for the directors. W. J. Boland, for the bank and the International Assets Limited.

CLARKE v. BARTRAM—MASTER IN CHAMBERS—DEC. 4.

Evidence—Examination of Witness on Pending Motion—Party Sought to be Added—Questions—Relevancy—Ruling of Examiner.]—On a pending motion by the plaintiff to add one Thomas Crawford as a co-plaintiff, Mr. Crawford was examined by the defendant as a witness. We then stated that he had assigned all his claims to the plaintiff, and that he had no claim outstanding against the defendant. The plaintiff wanted to ask him under what conditions and representations he had settled his claims against the defendant, so as to shew that he had a real cause of action against the defendant. These and similar questions were objected to by counsel for the defendant, but the examiner allowed them; and the defendant appealed against the ruling. The Master said that it was not clear to his mind why this examination was necessary or useful. If Crawford was willing to become a joint plaintiff in the action, and signed a consent, as required by the Rules, it would be very unusual to refuse the motion to have him so added. On the other hand, even if he had already signed the necessary consent (as to which there was no evidence), he could revoke it, if

he so desired. In that case the plaintiff would have to add him as a defendant. At this stage, there did not seem to be any object to be gained by any further examination on the line the plaintiff wished to pursue. If the assignment admitted by Crawford necessitated or justified a refusal to allow him now to become a co-plaintiff, then it would not seem useful to inquire at this stage into any alleged grounds of misrepresentation. These, if they existed, might enable Crawford to revoke the settlement, if he desired to do so. But that would be a necessary preliminary to any such action as the present. On the other hand, if Crawford was willing to act now as co-plaintiff with Clarke, and had not precluded himself from so doing by the documents which he had signed, they could be set up as matters of defence, to which he could reply and counterclaim to have the same set aside. Therefore, from both points of view, there did not seem any advantage in prolonging the examination, which had apparently brought out all that could be usefully adduced on the pending motion of the plaintiff. The order to be made now would, therefore, be, that the questions objected to should not be answered. The costs of this application to be in the cause, as the whole proceeding was of an unusual character. F. E. Hodgins, K.C., for the defendant. J. Shilton, for the plaintiff.

EVEL v. BANK OF HAMILTON—MASTER IN CHAMBERS—DEC. 6.

Practice—Examination of Party for Purposes of Pending Motion—Subpœna Issued from Office in which Proceedings not Carried on—Refusal to Obey.]—The plaintiff, on the 1st December, moved to strike out the defendants' counterclaim as irrelevant and embarrassing. The defendants obtained an enlargement until the 5th December, to have the examination of the plaintiff, for which an appointment had been issued. On the motion coming up on the 5th December, it appeared that the plaintiff had not obeyed the subpoena; and the defendants asked to have the plaintiff's motion dismissed. The proceedings were carried on at Toronto; but the subpoena was issued at Hamilton; and it was contended that this was a violation of Con. Rule 15, that the proceeding was irregular, and the plaintiff justified in not taking any notice of it. The Master said that the principle of Arnoldi v. Cockburn, 10 O.W.R. 641, was applicable, and that service of a subpoena could not be disregarded.

If the party served is paid the necessary conduct money, he should attend at least, and then raise any objections he may have to the regularity of the proceedings. The plaintiff should now attend, at his own expense; and he can then object to such questions (if any) as he considers that he is not bound to answer. Motion against the counterclaim to stand meantime. The question being new, costs of the motion to be costs in the cause. C. A. Moss, for the defendants. Grayson Smith, for the plaintiff.

VANHORN v. VERRAL—MASTER IN CHAMBERS—DEC. 7.

Discovery—Examination of Defendant—Disclosing Name of Witness.]—Motion by the plaintiff to compel the defendant to attend for re-examination for discovery and give further information. It was conceded that the defendant ought to get all possible information as to the facts of the case so as to enable him to answer relevant questions. It was contended, however, that he was not bound to give the name of the chauffeur in charge of his car when the admitted collision took place which led to the action. This was on the ground that the defendant would call him as a witness at the trial. The Master said that cases such as Canavan v. Harris, 8 O.W.R. 325, and Southwell v. Shedden Forwarding Co., 2 O.W.N. 562, shewed that in this kind of action the character of the driver is a very material fact. In Bray's Digest of the Law of Discovery (1904), p. 16, sec. 63, it is said that a party under examination "need not discover the names of his witnesses unless their names form a substantial part of the material facts in the case." In this case the name of the chauffeur was certainly a material fact. The plaintiff should attend for re-examination without further payment, and make discovery on the points inquired into before. Costs of the motion to the plaintiff in the cause in any event. J. W. McCullough, for the plaintiff. W. G. Thurston, K.C., for the defendant.

CORRECTION.

In Stavert v. McMillan, ante 267, the Court which heard the motion was composed of Moss, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.