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HIGH COURT OF JUSTICE.

BRITTON, J. MARCH 8TH, 1912.

MUNN v. VIGEON.

Contract—Sale of Timber Limits and Assets of Company—Offer or Option—Construction of Document—"Not Completed"—Reformation—Sum of Money Paid by Purchaser—Right of Vendor to Forfeit—Form of Action—Parties—Declaration—Costs.

Action for the recovery of $5,000, which sum, as the plaintiff alleged, was furnished by him to the defendant Vigeon, and by the defendant Vigeon deposited in the Imperial Bank of Canada for the purpose of securing an option for the purchase of certain timber limits and assets of the defendant company, and which sum was so given by the plaintiff upon the express understanding that, if the option to purchase was not exercised by him, it was to be returned to him.

Leighton McCarthy, K.C., for the plaintiff.

C. A. Moss, for the defendant Vigeon.

James Bicknell, K.C., for the defendants the Ontario Lumber Company.

BRITTON, J.:—The defendant company, on the 5th July, 1911, in consideration of $5,000 paid to them by James Bicknell, gave to him an option for the period of 60 days from that date to purchase "all the assets, consisting of limits, mills, dock, plant, etc., but not including the stock in trade in the store at French River nor any lumber . . . piled or stored at the mill at French River or in the yard at Point Edward, or accounts receivable," for the sum of $400,000, payable as follows: $95,000, being the balance of the first payment of $100,000, on or before the expiration of 60 days, and the remainder or balance of $300,000 on completion of transfer. The titles to be

free from incumbrance, and the purchase to be completed at Mr. Bicknell's office on or before the 15th September, 1911. If the option were not exercised on or before the 5th September, 1911, the same was to be void, and the sum of $5,000 paid to the company was to be the absolute property of the company. . . .

The persons behind Mr. Bicknell, and for whom he was acting, having made such inquiries and acquired such information about the property as they deemed necessary, did not desire that the purchase should be made; so the option lapsed.

The plaintiff, then, acting for himself, although no doubt he intended to interest others in a purchase from the company, if a purchase could be made, employed the defendant Vigeon to act for him.

On the 14th September, Vigeon wrote to the company, asking them to reconsider the price, with a view to resubmitting the option for the price of $350,000, cash or part cash, and satisfactory terms. On the same day the company replied, stating that they were not prepared to entertain a proposal at the price named. They stated that it would oblige them very much if the parties interested would let the company know their position and release their rights under the existing option, as they had other persons waiting the outcome of these negotiations and prepared to negotiate for a substantial increase on the amount mentioned in Mr. Bicknell's option. They add: "We cannot emphasise too much that it will be useless for the interested parties to expect to negotiate on a reduced basis."

Notwithstanding this peremptory statement to Mr. Vigeon, which was communicated to the plaintiff, the plaintiff desired to get an option for a few days, but at the price of $350,000. The plaintiff asked Mr. Vigeon to try to get this.

After some communication by telephone between the plaintiff and Vigeon, and between Vigeon and Lawrence, who was acting for the company, the plaintiff and Vigeon met on the 5th October. They met Mr. Lawrence on that day.

I find that it was distinctly understood that day between these three persons, that Vigeon was to have the option for 10 days of purchasing at $350,000, if he—Vigeon—would put up $5,000, which sum, in the event of the option not being accepted, was to be returned. Mr. Lawrence drew up what was called the form. He said that was the only form the lumber company would sign. Vigeon, upon the understanding with Lawrence, acting for the company, that what he—Vigeon—was to sign was for an option, and was not a contract for purchase, signed, at the request of the plaintiff and acting for the plaintiff.

I find that the plaintiff, when he authorised Vigeon to sign the paper, did so believing that it was for an option, and that Mr. Lawrence, in drawing up the paper, understood that the plaintiff thought it for an option, and that, in putting up $5,000, he—Vigeon—was entitled to have that sum returned if the option was not exercised by Vigeon on the plaintiff's behalf, or on behalf of whom it might concern.

The document was drawn by Mr. Lawrence at his own office, neither Vigeon nor the plaintiff being present. It is in form an offer to purchase, but, in my opinion, it is not an unqualified offer—so that the sum of $5,000, represented by the plaintiff's cheque, can be applied as on account of purchase-money, or be forfeited, if purchase not carried out. The document compels the return of the $5,000 "if contract not completed." I must interpret these words "not completed" as if the words were "not carried out." The document now in question, and relied on by the company, makes very clear the distinction between the way of treating the $5,000 paid under option to Bicknell, and the $5,000 deposited by the plaintiff.

The first $5,000 had been forfeited and was to remain forfeited; but the $5;000 put up by the plaintiff, and now in question, was "to be returned, without interest, if contract not completed." If by the completion of the contract was meant getting the company to accept the plaintiff's so-called offer, there was no reason for anything in regard to the return of that money. If the meaning was, that the plaintiff should go on and carry out a purchase under an already completed written contract, then, if the plaintiff failed, he would have no right to a return of this money; but, if the company failed to make title, or if from any cause they failed to carry out their part of the contract through no fault on the part of the plaintiff, then the plaintiff would be entitled, as of right, to a return of the deposit. The return of the money mentioned in the writing does not refer to any such case. As I view this transaction, the money was put up to satisfy Mr. Lawrence that the defendant Vigeon was acting for a person or persons of substance—not men of straw. The return provided for is a return in case the contract is not completed by an actual purchase by Vigeon or persons for whom he was acting, and sale by the defendant company of the property mentioned, upon the terms set out in full. Even if the document is not a mere option, it is at most an executory contract, containing a term or proviso which should be interpreted to mean that, if Vigeon or the plaintiff was not prepared on or before the 20th October, 1911, to pro-

ceed further, he was at liberty to retire, and was entitled to the money he deposited. The deposit of the plaintiff's cheque for $5,000 was made with the Imperial Bank of Canada to a special account. In the body of the cheque, in the plaintiff's writing, are the words "a/c option O.L.Co."

About the 19th October, Mr. Lawrence apparently made up his mind to attempt to force a sale upon Vigeon or the plaintiff, and so wrote to O. F. Rice, manager of the Imperial Bank at Toronto, advising that this money ($5,000) was not to be paid out to any one without the authority and consent of the Ontario Lumber Company.

Mr. Lawrence asserted that Mr. Vigeon was acting for Mr. Sheppard and Mr. Tudhope. Mr. Vigeon denied that he had ever told Mr. Lawrence that he—Vigeon—was acting in this matter for either Sheppard or Tudhope. Vigeon told Mr. Lawrence that he was acting only for the plaintiff.

On the 20th October, Mr. Lawrence had prepared the document called "letter of authority." This is signed and sealed by the company, and is addressed to Vigeon and to Lawrence, authorising them to insert the name or names of persons for whom Vigeon assumed to act as purchasers. I cannot think that the writing of this letter to Mr. Rice and preparation of this authority were in accordance with the real transaction.

To me it appears as if these were written as preparing for a law-suit, not so much to compel a purchase, as to prevent the repayment of the $5,000 to Vigeon or the plaintiff.

I may add that, in my opinion, the insertion in the so-called offer of Vigeon, of the clause in reference to the forfeit of $5,000 paid under the Bicknell option, and which had then already been forfeited to the company, was entirely unnecessary. Giving credit to Vigeon, or assuming to do so, for this $5,000, thus reducing the real price to $345,000, was voluntary on the part of Mr. Lawrence. This was, I think, calculated to mislead the plaintiff and Vigeon.

If the writing in question does not bear the construction I have placed upon it, the plaintiff and Vigeon were, in my opinion, "in essential error" as to the import and effect of it. The plaintiff was induced to have it signed by Vigeon upon representations made by Lawrence acting for the company. The company seek to get the advantage of what Mr. Lawrence did.

If the plaintiff is not, by the terms of the writing itself, entitled to a return of his $5,000, there should be a reformation of these writings to make them conform to the real transaction between the parties.

As to the form of the action, I see no objection to the plaintiff suing in his own name. All the necessary parties are before the Court. The money deposited belonged to the plaintiff, was received by the defendant Vigeon from the plaintiff, and deposited for the plaintiff with the Imperial Bank, where the money still is, on special deposit. The money would have been returned but for the objection of the defendant company. The defendant company treat the action as if by Vigeon, acting as agent for the plaintiff.

The defendant Vigeon admits that the plaintiff is entitled to the money, and consents to its being paid to him. There is no cause of action shewn against Vigeon, so there will be judgment for him, dismissing the action as against him; and I see no reason for withholding costs.

There will be judgment for the plaintiff against the defendant company for $5,000 with interest at 5 per cent. per annum from the 28th November, 1911, and with costs.

There will be a declaration that the $5,000 received by the Imperial Bank of Canada, as the proceeds of the plaintiff's cheque, and interest thereon, if any, and now on deposit with that bank, is the property of the plaintiff. If that money or any part of it is paid to the plaintiff, it will be pro tanto in satisfaction of the plaintiff's judgment herein; if the defendant company pay and satisfy this judgment outside of and apart from the money in the bank on special deposit, as above-mentioned, then that money will belong to the defendant company.

DIVISIONAL COURT. MARCH 8TH, 1912.

*RICE v. GALBRAITH.

Principal and Agent—Agent's Commission on Sale of Land—Employment of Agent to Find Purchaser—Parties Brought together by Intervention of Agent—Sale Effected by Vendor without Knowledge of Agent's Services.

Appeal by the plaintiffs from the judgment of DENTON, Jun. Co. C.J., dismissing an action in the County Court of the County of York for commission on the sale of land.

The appeal was heard by CLUTE, LATCHFORD, and SUTHERLAND, JJ.

G. H. Kilmer, K.C., for the plaintiffs.

J. J. Maclennan, for the defendant.

*To be reported in the Ontario Law Reports.

CLUTE, J.:—The defendant listed the property with the plaintiffs, real estate brokers, in Toronto, for sale. It is clearly established that the plaintiffs brought the property to the notice of Mrs. Rough, who subsequently became the purchaser. The house was examined by her at the instance of the plaintiffs. Mrs. Rough is under the impression that her attention was first brought to the house at the instance of her brother-in-law, Mr. Blackie; and in this, I think, she is mistaken. . . .

Subsequently another brother-in-law of hers got in communication with one of the builders, and so with the defendant, and, acting for Mrs. Rough, finally agreed upon the purchase-price, which was $100 less than the defendant had instructed the plaintiffs to accept. . . .

It may be fairly found, upon the evidence, that the sale would not have been brought about but for the action of the plaintiffs.

But it is said—and the judgment below proceeds upon this sole ground—that the sale was in fact made by the defendant without knowing at the time that the attention of the purchaser had been brought to the premises by the plaintiffs. Upon this ground, the trial Judge found for the defendant, following Locators v. Clough, 17 Man. L.R. 659 (C.A.) Phippen, J.A., by whom the judgment of the Court was given, says: "I have no doubt that, had the defendant sold with knowledge that the property had been introduced to Forrest by the plaintiffs, he would be liable for some commission. I cannot, however, hold that the mere introduction of the property to Forrest, without endeavouring to negotiate or in fact negotiating a sale, is itself an earning of the agreed commission, the owner effecting a sale on terms less favourable than those expressed in the commission contract, in ignorance of the plaintiffs' action, and under circumstances which did not place him upon inquiry."

I do not take this to be the law. A number of the cases bearing upon this point are referred to in Sager v. Sheffer, 2 O.W.N. 671. . . . "If the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him:" Green v. Bartlett, 14 C.B.N.S. 681; Street v. Smith, 2 Times L.R. 131. . . . Mansell v. Clements, L.R. 9 C.P. 139; Wilkinson v. Alston, 48 L.J.Q.B. 736; Burchell v. Gowrie and Blockhouse Collieries Limited, [1910] A.C. 614; Stratton v. Vachon, 44 S.C.R. 395.

The plaintiffs having brought the parties together and a sale having been effected by their intervention, it is not sufficient,

in my opinion, to disentitle them to a commission, to say that the vendor had proceeded with his negotiations with the purchaser without the knowledge that the agents had been instrumental in bringing the parties together.

I think this point was involved in the decision of Wilkinson v. Alston, supra . . . The decision of the Commission of Appeal, New York, in Lloyd v. Matthews, 51 N.Y. 125, is to the same effect. . . .

With respect, I think the judgment appealed from should be set aside and judgment entered for the plaintiffs for the amount of their commission, with costs here and below.

LATCHFORD, J., gave reasons in writing for the same conclusion.

SUTHERLAND, J., also concurred.

Appeal allowed.

DIVISIONAL COURT. MARCH 8TH, 1912.

DARKE v. CANADIAN GENERAL ELECTRIC CO.

Master and Servant—Injury to and Death of Servant—Liability—Negligence—Contributory Negligence—Findings of Jury—Evidence—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 2; sec. 2, sub-sec. 1—Person Intrusted with Superintendence—Extended Meaning of.

Appeal by the plaintiff from the judgment of MULOCK, C.J. Ex.D., ante 368, dismissing the action, which was brought by the widow of Hugh Darke to recover damages for his death while in the employment of the defendants, in their works at Peterborough, as a machinist's helper.

The appeal was heard by CLUTE, LATCHFORD, and SUTHERLAND, JJ.

D. O'Connell, for the plaintiff.

G. H. Watson, K.C., and L. M. Hayes, K.C., for the defendants.

CLUTE, J.:— . . . Darke was a workman in the defendants' employ, under Jeffries, the foreman of the mechanical

department. An electrical generator had been set up by Darke and his fellow-workmen and fastened to the floor ready to be tested by Thompson, the electrical expert.

Thompson considered the machine insecurely attached to the floor, and mentioned the matter to the foreman, Jeffries, who directed Cartner to remain with Darke while the machine was being tested by Thompson.

Anson was Jeffries's superior officer. One of the defences raised is, that, after the machine was set up, it was examined by Jeffries and Anson, who pronounced it complete and ready for inspection. Darke was ordered to some other work, and had no right further to meddle with the machine without instructions from a competent authority, which, it is alleged, were never given; it was said that, without authority, he as a volunteer, took it upon himself with Cartner further to secure the machine to the floor, and in doing so placed himself upon the belt in order to reach the work he was engaged upon; and, while he was in that position, Thompson having completed the connection, without the knowledge of Darke's position, turned on the power, which caused the belt to move and drew Darke under the wheel, which caused his death.

[The learned Judge then set out the findings of the jury, which are given on pp. 368 and 369, ante, and summarised the reasons of the trial Judge for dismissing the action. Findings 9, 10, and 15 were as follows: (9) The accident was caused by the negligence of a person in the service of the defendants who had superintendence intrusted to him whilst in the exercise of such superintendence. (10) Such person was Thompson, and his negligence was, that he did not make a careful examination of the machine and surroundings immediately prior to applying the power. (15) The deceased, while endeavouring further to secure the machine, just prior to the accident, was acting under Jeffries's general order to look after the machine. The jury made no assessment of damages at common law, but assessed $1,800 under the Workmen's Compensation for Injuries Act.]

The principal question argued at bar was as to whether there was any evidence which ought properly to have been submitted to the jury in support of questions 9, 10, and 15. It was argued that, Jeffries having inspected the job and passed it over to Thompson, Darke voluntarily and officiously interfered without authority, and against his duty; that his duty did not begin until the test by Thompson commenced; that he was not subject to Thompson's orders, nor was Thomp-

son a superintendent under sec. 3, sub-sec. 2, as defined by sec. 2, sub-sec. 1, of the Act.

If the facts are as suggested, the judgment is, in my opinion, right; but it is, upon the other hand, strongly urged by the plaintiff's counsel that the evidence shews what in effect the jury have found; that Darke was properly engaged in making the machine more secure at the moment when Thompson turned on the power which caused his death; that Thompson was a person having superintendence, within the meaning of the Act; and that it was owing to his negligence in not taking reasonable care, under the circumstances, to ascertain that all was clear before he turned on the power, that Darke came to his death.

The evidence upon this point depends upon a number of witnesses and the meaning to be ascribed to their evidence and the inference to be drawn from it.

It will be seen that, on the findings of the jury in answer to questions 1, 2, 3, 4, and 5, Darke's work upon the machine to be tested was complete; that he was put upon another job; that he was afterwards taken off that job and sent back to be present at the testing; and that his duties on such occasion were "to do all necessary mechanical work." We thus have the position that Darke, having mechanical knowledge, was present at the machine with Thompson and his assistant to do any mechanical work necessary during the testing.

The case turns, I think, upon what took place after Thompson had arrived, and while Darke was waiting to do such mechanical work as he might be called upon to do. . . .

[Extracts from the evidence.]

A fair result of the evidence bearing upon the question of Darke being lawfully where he was and doing what he did at the time of the accident, may be shortly stated thus. He had been engaged under Jeffries during the day, setting up the machine. About half-past five it was inspected and pronounced complete and ready for the test by Jeffries and his superior officer, Anson. Darke was then put upon another job, but ordered to return to be present at the testing about half-past nine; both Darke and Thompson thought the machine insecure, and both Thompson and Darke communicated with Jeffries. Exactly what is disclosed does not clearly appear; but, in consequence of these communications, Cartner was sent back with Darke to be present with Darke during the testing. Jeffries, while denying that he gave Darke specific instructions to put on the clamp at which he was working at the time of

the accident, yet admits that Darke had a certain discretion in work of this kind; and, if it was discovered before the power was applied that a nut was insecure, he might tighten it; and, from his evidence, I think it a fair inference, upon which the jury might have acted, that, as Darke and Cartner were persons who understood and to whose charge had been committed the duty of setting up the machine and securing it ready for the test, they might reasonably and properly act upon their own discretion further to secure the machine, if they thought, and Thompson, who had charge of the test, thought, it was insecure. Thompson, being an electrical engineer, must have had better knowledge of the security required for the power to be applied than any one else; and it appears to me that neither he nor Darke would have been reasonably discharging their obvious duty, if, knowing the machine was insecure, and that men were there competent to make it secure, the proper means had not been taken further to secure it.

I think, therefore, this was evidence which could not have been properly withheld from the jury, and that their finding in answer to question 15 . . . was well warranted by the evidence; that Darke was not a volunteer in any sense, but was at work in discharge of his duty at the time of the accident; and this I take to be the meaning of this finding.

Then was there evidence to support the answers to questions 9 and 10? . . .

The first question that arises is as to whether or not Thompson was a superintendent, within sec. 3, sub-sec. 2, as explained by sec. 2, sub-sec. 1. It was strongly urged that, under sec. 2, sub-sec. 1, the superintendence must be of a person under whose authority Darke was acting, that is, having superintendence over him. I do not think this to be the meaning of the section. It should be remembered that, under sec. 8 of the English Act, the expression "person who has superintendence intrusted to him" means a person whose sole or principal duty is that of superintendence and is not ordinarily engaged in manual labour.

The effect of sec. 2, sub-sec. 1, is not to limit the word "superintendence" as found in the Imperial Act, but to extend it. In the Imperial Act, superintendence is limited to persons not ordinarily engaged in manual labour. By sub-sec. 1 of sec. 2, the word "superintendence" is enlarged to mean any person who has general superintendence over workmen such as is exercised by a foreman or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour. It does not mean

that the person having superintendence must have such superintendence over the person who is injured; but that, wherever there is a general superintendence over workmen such as is exercised by a foreman or a person in a like position to a foreman, then sec. 2, sub-sec. 1, applies, whether such person is or is not ordinarily engaged in manual labour. It, in effect, extends the application of the Act to cases not included, owing to the limitation in sec. 8, within the Imperial Act. . . .

[Reference to Kearney v. Nicholls, 76 L.T.J. 63.]

This case does not appear to have been questioned. It is referred to in Ruegg's Employers' Liability Act, 1880, p. 132, where he says: "The superintendence under sub-sec. 2 need not be exercised over the injured person. It is sufficient to render the employer liable that a servant who has superintendence, whilst exercising such superintendence, causes injury to a workman in the service of the same master."

I, therefore, think that Thompson was a person having superintendence, within the meaning of sec. 3, sub-sec. 2, as explained by sec. 2, sub-sec. 1.

Then, was there any evidence that could properly be submitted to the jury of negligence on the part of Thompson? Thompson was an electrical engineer employed by the defendants, to whom was intrusted the duty of superintending the final testing of the generator, and having under him an assistant for that purpose. It is part of the defendants' case that Thompson was a man competent for his position. He knew what power was to be applied; what pull would be exerted on the machine when that power was applied; and he knew or ought to have known whether or not the machine was sufficiently secured to resist the power. In his opinion, it was not sufficiently secured. This opinion was supported by Darke and Cartner. So fully did he realise this fact, that he communicated with Jeffries. He states in his evidence that he considered it his duty to examine the machine and to see that all was clear before he applied the power, and states that he went around the machine twice for that purpose. It was after he had made these examinations, he says, that he saw Jeffries, and that Cartner came, in answer to his request for another man; and Cartner, he knew, was in the act of fixing the machine immediately before the power was turned on. He says that he did not know where Darke was, and the jury so find. He says that he understood that Cartner gave him a signal, a nod, that all was clear. Cartner says he gave no such signal, and that he knew of no signal of that kind to be given. Cartner says the

power was to be turned on at 10 p.m.; and, notwithstanding that, Cartner told Thompson that "we" (meaning himself and Darke) "were going to fix the clamp," and went immediately to do so; yet Thompson turned on the power before 10 o'clock, without ascertaining if all was clear. Was Thompson justified in a case of that kind in turning on the power without further examination or ascertaining for a certainty that everything was clear and ready for the power to be turned on? After going over the evidence with great care, I cannot say that there was not evidence that ought to have been submitted to the jury. I think there was evidence upon that question, and that there was sufficient to support the jury's finding that Thompson was guilty of negligence. If Cartner's evidence is to be believed, there was no code of signals, and no signal was given. From the undisputed facts, the jury might infer, if they believed Cartner, that Thompson carelessly took it for granted that all was clear when he saw Cartner standing there, and negligently and carelessly turned on the power, without satisfying himself where Darke was, or whether all was clear.

With great respect, therefore, I am unable to agree with the finding of the Chief Justice that there was no evidence to support the answer to question 9.

With the view I take of the case, it is not necessary to consider whether there was evidence to support the answer to question 8 in regard to a code of signals, or whether the jury received a wrong impression from the observations of the Judge and the defendants' counsel as to whether the accident was caused by reason of the negligence of any person in the service of the defendants who had charge or control of any point, signal, locomotive, engine, machine, or train.

The judgment below should be reversed, and judgment entered for the plaintiff for $1,800, with costs here and below.

LATCHFORD, J., gave reasons in writing for the same conclusion.

SUTHERLAND, J., also concurred.

DIVISIONAL COURT. MARCH 8TH, 1912.

DELYEA v. WHITE PINE LUMBER CO.

Master and Servant—Injury to and Death of Servant—Action under Workmen's Compensation for Injuries Act and Fatal Accidents Act—Negligence of Person Intrusted with Superintendence—Damages—Parents' Expectation of Benefit from Continuance of Son's Life—Reduction of Damages where Case Tried without Jury.

Appeal by the defendants from the judgment of CLUTE, J., in favour of the plaintiff, in an action tried at Sudbury without a jury.

The action was brought by the administrator of the estate of Frederick Delyea, deceased, under the Workmen's Compensation for Injuries Act and Lord Campbell's Act, to recover damages for Frederick Delyea's death. The deceased was a young man sixteen years of age, employed as a teamster at the defendants' lumber camp.

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

R. McKay, K.C., for the defendants.

A. G. Browning, K.C., and Heffernan, for the plaintiff.

The judgment of the Court was delivered by MIDDLETON, J.:—The defendants desired to construct a machine called a log jammer. This machine consists of a heavy sled, to one side of which is attached a derrick, consisting of two booms some twenty-five feet in length, united at the apex and separated about six feet at the base. The lower ends are attached by hinges to the edge of the sled, and the derrick is supported as raised by a gin pole hinged at about half height, resting upon the ground. The derrick is also, when in use, supported by guy ropes attached to the apex and fastened to trees or other convenient objects near by. A pulley is attached to the apex, and the machine is used for loading and unloading timber. When it is desired to move the machine, the derrick is inclined over the sled, and there supported by the gin pole, which rests upon the opposite side of the sled.

Rumley, the camp blacksmith, was instructed by the defendants to construct the machine. He had no previous experience in constructing such a machine, but was directed to copy a similar one in use at the camp. There does not appear to have

been any defect in his work. In completing the construction, it was necessary to raise the derrick so that it would be supported by the gin pole. Rumley had the right to call upon men working at the camp to assist him in this operation; and, when the machine was ready, he called the deceased and others to help him. Upon the evidence it is clear that, although the deceased might have objected to undertake this work, yet it was right and proper that he should respond when called upon by Rumley.

I think the learned trial Judge was quite right in holding that Rumley, quoad this job, was a person who had superintendence intrusted to him, and also was a person to whose orders or direction the deceased, at the time of the injury, was bound to conform. Once having acceded to Rumley's request, and having undertaken to assist him in raising the derrick, it became the duty of the deceased to obey Rumley's instructions. I do not think the fact of Rumley allowing the officious Fournier to assume the more prominent part relieved Rumley from the responsibility which was justly his.

The men engaged in lifting the free end of the derrick did so by stages. It was allowed to rest upon supports while they changed their position so as to be able to lift more effectively. First a box was used, then a sleigh bunk, and finally the weight was supported by a piece of inch board in the hands of Fournier and a pole in the hands of the deceased. These were placed under the derrick, near its apex, and rested upon the frozen ground, snow and ice. As soon as the weight of the derrick was allowed to come upon these two supports, something slipped, and the derrick fell, striking Delyea upon the head and fatally injuring him. The exact cause of the slipping cannot be ascertained.

The board and pole were quite insufficient for their purpose; and it is clear that there was negligence in not providing better supports. When the derrick came to be lifted on the following day, pike poles were used, with proper spikes, so that there was no danger of slipping, and the derrick was raised without difficulty or danger.

At the time of the accident, a guy rope was not attached to the top of the derrick; but the apex of the derrick had not then been lifted more than ten or twelve feet, and a guy rope would not at that stage of the work have afforded any protection.

The appeal is based mainly upon the two cases of Garland v. City of Toronto, 23 A.R. 238, and Ferguson v. Galt Public School Board, 27 A.R. 480. These cases are well distinguished

in Shea v. John Inglis Co. Limited, 11 O.L.R. 124, and 12 O.L.R. 80, not cited upon the argument. There it was held that the superior servant had been in effect intrusted with the superintendence of the whole operation, and that the infant plaintiff was bound to conform to his orders; thus the case was brought within the statute. The Court of Appeal accepted the reasons for judgment as given in the Divisional Court by Mr. Justice Anglin, where speaking of the cases relied upon, he says: "In the former case the injured man was on an equal plane with the workman who gave the direction. Neither the nature of the work in hand nor any exigency arising in its performance required that the other workman should in that case direct the labour of the injured man. It was a case of pure assumption by a senior workman of an authority which he clearly did not possess over his junior. In the latter case the direction to bring the mortar, given by the mason, was held not to be an order or direction within the meaning of the statute. It amounted to nothing more than an intimation by one workman to another that the work of their common employer had reached a stage at which the latter was called upon to fulfill his own well-defined duty to such employer."

The cases of McManus v. Hay, 9 Rettie 425, and Brow v. Furnival, 23 Rettie 492, afford no assistance. The holding in each case was that negligence had not been established. The fall of the article there being lifted was, upon the evidence, a mere accident and not the result of negligence.

I have more difficulty with the second branch of the appeal. The learned Judge has awarded $1,300 damages. The deceased was earning $30 a month and his board. His father and mother, on whose behalf the action is brought, are people in a humble walk of life; the father earning $2 a day and his board. The age of these parents is not given; all that appears is that the deceased was the eldest of a family of six.

The amount awarded is almost equivalent to the capitalised value of one-half of the young man's earnings for the lifetime of his parents, assuming them to be fifty years of age. Having in mind the risks of life, the possibility of the marriage of the deceased, and endeavouring to apply the principles laid down in Stephens v. Toronto R.W. Co., 11 O.L.R. 19, and London and Western Trusts Co. v. Grand Trunk R.W. Co., 22 O.L.R. 263, I think the damages should be reduced to $950. Subject to this, the appeal should be dismissed with costs.

I think we have the right to reduce the damages without directing a new trial, the case having been tried by a Judge and not by a jury.

DIVISIONAL COURT. MARCH 8TH, 1912.

*RICH v. MELANCTHON BOARD OF HEALTH.

Public Health Act—Services of Physician Employed by Local Board of Health—Remuneration—Action to Recover from Board—Jurisdiction—County Court—Prerogative Writ of Mandamus—Absence of Reasons for Judgment of Court below—Costs.

Appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Dufferin dismissing an action brought in that Court by a physician to recover $30 for services performed under the direction of the Board of Health of the Township of Melancthon. The plaintiff sought a personal judgment and a mandatory order to enforce it.

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

W. H. Harris, for the plaintiff.

W. C. Chisholm, K.C., for the defendants.

BOYD, C.:—This is an unfortunate bit of litigation for the plaintiff. He is entitled to be paid $30 for his medical services, rendered at the instance of the Board of Health, but cannot recover it by this method. The miscarriage is not to be wondered at, considering the state of the cases and the vague and rather embarrassing clauses of the Public Health Act — which invite, and are, I understand, about to receive, clarifying amendments: R.S.O. 1897 ch. 248.

It is now pretty well settled that the members of the Board are not constituted a corporation, though they have been judicially spoken of as a quasi-corporation; and it is also settled that the Board as a whole is not personally liable nor are the component members thereof individually liable to be sued for the recovery of medical claims as for a private debt. The remedy is to be sought against the Board as a public body, if payment cannot be otherwise obtained—by seeking the grant of a writ of mandamus requiring the Board to issue an order upon the municipality for the amount of the claim in order that payment may be made out of the funds applicable thereto.

The writ is the high prerogative writ, so-called, available in cases where there is no right of action for the recovery of the

*To be reported in the Ontario Law Reports.

claim, and relief is to be sought against a public body who fail to perform statutory or other public duties imposed upon that body, for the benefit of the applicant. This plaintiff by his pleading seeks a personal judgment for the amount, and also asks for a mandatory order to enforce it, and for that purpose sues the public body under the name of the Board of Health for the Township. The personal judgment he cannot get, and for this reason he cannot get the mandatory order. Nor could he, in any circumstances, get the mandatory order of the character required from an inferior Court, such as the County Court. The prerogative writ of mandamus, which is the appropriate method of relief, can only be issued by the High Court. Originally confined to the King's Bench alone, it may now be issued by any of the Divisions of the High Court, as was explained in the case reported in 19 P.R. 329, 332, Toronto Public Library Board v. City of Toronto (1900).

The case of Bibby v. Davis, 1 O.W.R. 189 (1902), which may have misled the plaintiff, is not now to be followed in the light of later decisions: Sellars v. Village of Dutton, 7 O.L.R. 646; Ross v. Township of London, 20 O.L.R. 578, affirmed in appeal, 23 O.L.R. 74. See, also, as to the writ, City of Kingston v. Kingston, etc., Electric R.W. Co., 28 O.R. 399, and, in appeal, 25 A.R. 462 (1898).

There is an inherent lack of jurisdiction in the County Court to deal with this claim; but the matter was not contested on the line above indicated on the appeal before us. We are all in the dark as to what took place on the trial below; the only judgment given being that the action is dismissed with costs. This curt disposal of appealable cases has often been commented upon as unfair to the suitors and to the Court of Appeal. When reasons are given for the judgment, it enables the dissatisfied litigant to judge whether he shall appeal or not, and these reasons are a material assistance to the appellate Court. In brief, when reasons for the judgment exist, they should be given; when they are not given, it may be that the rule "de non apparentibus," etc., will excuse.

The defendant raised an issue disputing the claim which was vexatious, and did not take the vital point on which we decide; so that, while the appeal is disallowed, we think the proper order to make is to dismiss both action and appeal without costs.

This is to be without prejudice to the plaintiff prosecuting his claim as he shall be advised—if the municipality does not provide means for payment.

LATCHFORD, J., concurred.

MIDDLETON, J., also agreed, and explained at length the reason why an action for a mandamus or a mandatory order is not the proper or a permissible remedy, referring to the history of the prerogative writ and the mandatory jurisdiction of Equity. He cited Regina v. Lambourn Valley R.W. Co., 22 Q.B.D. 463; Smith v. Chorley Local Board, [1897] 1 Q.B. 332; Baxter v. London County Council, 63 L.T.R. 771; Glossop v. Heston, 12 Ch. D. 102, 122; Mayor of Salford v. Lancashire, 25 Q.B.D. 384.

DIVISIONAL COURT. MARCH 9TH, 1912.

*WADSWORTH v. CANADIAN RAILWAY ACCIDENT INSURANCE CO.

Accident Insurance—Death Claim—Cause of Death—Burning of Building—Injuries Caused by Fire—Fire Resulting from Assured Having a "Fit"—Efficient Cause—Quantum of Indemnity—Terms of Policy—Construction.

Appeal by the plaintiff from the judgment of MIDDLETON, J., who tried the action without a jury at Ottawa, in so far as it was against the plaintiff.

The action was brought to recover the amounts due under two policies of accident insurance issued by the defendants to John Allen James Wadsworth in favour of his wife, the plaintiff.

The two policies were in the same form. The insurance was stated to be "against bodily injuries caused solely by external, violent, and accidental means," as specified in a schedule, and "against disability from sickness." The principal sum of each policy was stated to be, in the first year $5,000, with 5 per cent. increase annually for ten years, amounting to $7,500. Under "Schedule of Indemnities," it was stated in "Part A" that "if any of the following disabilities shall result from such injuries alone, within ninety days from the date of accident, the company will pay in lieu of any other indemnity . . . for loss of life, the principal sum." For loss of both hands, loss of entire sight, etc., the principal sum was also payable. "Part C," headed "Double Payments," stated: "If such injuries are sustained while riding as a passenger . . . or are caused by the burning of a building in which the insured is therein (sic) at the commencement of the fire, the amount to be paid

*To be reported in the Ontario Law Reports.

shall be double the sum specified in clause under which the claim arises." "Part G: In case of injuries happening from any of the following causes . . . fits, vertigo, sleep-walking, duelling . . . causing death . . . the company will pay one-tenth of the amount payable for bodily injuries as stated in Part A, ..." "Part H: In case of the happening of injuries mentioned in special indemnity clauses D, E, F, and G, claims shall be made only under said clauses, and the amount to be paid under said clauses shall be the full limit of the company's liability, and such claim shall not be entitled to double benefit as provided in Part C."

The policies were dated respectively the 24th December, 1907, and the 30th July, 1909, and all the premiums were paid by Wadsworth until his death on the 24th October, 1910.

The plaintiff alleged that the case came within "Part C," death being "caused by the burning of a building in which the insured is . . . at the commencement of the fire," and claimed $11,000 and $10,500 under the policies respectively. The defendants tendered $1,075, which was refused. The defendants took the position that "Part G," and "Part H," applied, and that the utmost to which the plaintiff was entitled was $550 under one policy and $525 under the other.

At the trial the judgment in favour of the plaintiff was limited to those amounts; and the plaintiff appealed.

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

H. Aylen, K.C., and R. V. Sinclair, K.C., for the plaintiff.

I. F. Hellmuth, K.C., and J. G. Gibson, for the defendants.

RIDDELL, J.:— . . . In October, 1910, the insured went with other members of a hunting club to their club-house in the township of Hincks. On the 23rd October . . . Wadsworth . . . said he was not feeling well . . . and went and lay down upstairs. About 8.20 or 8.30 p.m. he came downstairs . . . and asked the chore-boy to open a bottle which he had . . . and Wadsworth, dissolving a tablet in some fluid out of this bottle, drank the solution. He then left the room and went outside. A dog was heard barking shortly after, and when the boy went out to investigate he noticed the water-closet on fire. The alarm was raised, and a number of persons ran to the burning building, with water. After the fire was extinguished at least in part, the deceased was found sitting at one end of the building and on the opening of the seat of the closet . . .

leaning back against the wall, his trousers not lowered. He was taken out moaning, apparently in pain, carried . . . to the club-house, and put on a table. He was found to be rather badly burned about the feet, up the back of the buttocks, and around the face and head, and there were also patches on the chest and on the shoulders. He received treatment . . . and was . . . removed to Ottawa . . . where he died the next day, of shock.

The closet was a small building . . . with no front, but wooden sides and back and with two holes in the seat.

Next day the boy found in the . . . pit the side of an ordinary stable lantern . . . and there was one noticed missing next day. . . .

From the evidence . . . my brother Middleton came to the conclusion that the unfortunate man "took a fit when he was in the closet, and that while in that fit he either dropped or knocked over the lantern; the lantern exploded or was spilled or was broken by the fall; the result was, that the oil escaped, and there was almost immediately a very extensive flame which enveloped him and inflicted the very severe injuries from which he died." And the deceased was affected with a "malady . . . known as minor epilepsy or petit mal."

I think my learned brother's conclusion amply sustained by the evidence; and I have arrived at the same conclusion from an independent consideration of the facts as proved.

It seems to me also clear that the injuries were not "caused by the burning of a building" at all. . . . It was a "burning building," within the meaning of the policy, as in law (Regina v. Parker, 9 C. & P. 45, per Parke, B.), it being sufficient that it be scorched and charred in a trifling way. But the condition of "Part C" is not that the injuries be sustained while in a burning building. The language is not the same as in the former part . . . . The words are not "sustained while in a burning building," but "caused by the burning of a building." . . .

[Reference to Houlihan v. Preferred Accident Insurance Co., 145 N.Y. St. Repr. 1048; Northrop v. Railway Passengers Assurance Co., 43 N.Y. 516.]

Whatever may be the law in the case of the burning being caused by the ignition of permanent or quasi-permanent contents of a room, I venture to think that no stretch of language can reasonably make injuries caused by burning oil, which is brought into the room by the insured for a temporary personal purpose only, come within the meaning of the words "caused by the burning of a building."

The claim of the plaintiff is, in my view, not well-founded.

Then as to the application of Parts G, and H. The meaning of G, so far as affects the present case, is: "In case of injuries which happen from fits or vertigo, and which injuries cause death, the company will pay one-tenth of the amount stated in Part A"—the participle "causing" . . . being in the same grammatical relation as the participle "happening." The clause does not mean: "In case of injuries which happen from fits or vertigo, which fits or vertigo cause or causes death," etc.

The only question, then, is, whether the injuries happened from fits or vertigo, because they undoubtedly did cause death. . . .

In view of the law . . . I do not think . . . that there can be said to be any ambiguity or doubt. The injuries which caused the death are the burns. Did these happen from fits or vertigo? . . . No doubt, the fire was caused by the fits and vertigo. Does that make these an efficient cause? . . .

[Reference to Wenspear v. Accident Insurance Co., 6 Q.B.D. 42; Manufacturers Accident Insurance Co. v. Dorgan, 58 Fed. Repr. 945; Laurence v. Accident Insurance Co., 7 Q.B.D. 216; Wicks v. Dowell, [1905] 2 K.B. 225, 228; Mardorf v. Accident Insurance Co., [1903] 1 K.B. 584; Busk v. Royal Exchange Insurance Co., 2 B. & Ald. 73, 80; Mackie v. Maitland, 5 B. & Ald. 171, 175; Bishop v. Pentland, 7 B. & C. 219, 223; Phillips v. Nairne, 4 C.B. 343, 350, 351; Petapseo Insurance Co. v. Coulter, 3 Pet. S.C. 222, 233; Columbia Insurance Co. v. Laurence, 10 Pet. S.C. 507, 517; General M. Insurance Co. v. Sherwood, 14 How. S.C. 351, 366; Waters v. Merchants, etc., Co., 11 Pet. S.C. 213; Boulter v. Canadian Casualty Co., 14 O.L.R. 166; Canadian Casualty Co. v. Boulter, 39 S.C.R. 558.]

The cause of an efficient cause is not itself an efficient cause or causa causans.

I think the appeal should be allowed in part and judgment entered for the plaintiff for $10,750 and interest from the teste of the writ. The plaintiff should also have the costs of the trial. Success being divided, there should be no costs of the appeal.

The following have a more or less indirect bearing upon the matters discussed: Trew v. Railway Passengers Assurance Co., 5 H. & N. 211, 7 Jur. N.S. 878; Reynolds v. Accidental Insurance Co., 22 L.T.R. 820; In re Etherington and Lancashire and Yorkshire Accident Insurance Co., [1909] 1 K.B. 591; Clover v. Hughes, [1910] A.C. 242; Dudgeon v. Pembroke, 2 App. Cas. 284; Accident Insurance Co. v. Crandall, 120 U.S. 527; Canadian Railway Accident Insurance Co. v. Haines, 44 S.C.R. 386.

FALCONBRIDGE, C.J., for reasons stated in writing, agreed that the injuries happened not from the fit but from the fire, and agreed in the result stated by RIDDELL, J.

LATCHFORD, J. (dissenting), agreed with the judgment of MIDDLETON, J., for reasons stated in writing.

Appeal allowed in part; LATCHFORD, J., *dissenting.*

MIDDLETON, J. MARCH 12TH, 1912.

*YOULDEN v. LONDON GUARANTEE AND ACCIDENT CO.

Accident Insurance—Death Claim—Cause of Death—Evidence—Statement of Deceased—Strain from Lifting Heavy Weight—Admissibility—Absence of other Causes—Provisions of Policy—Stipulations as to Notice not Complied with—Renewal Receipt—Fresh Contract—Necessity for Setting out Conditions—Insurance Act, sec. 144*—Incorporation by Reference and Identification of Terms of Policy—Sufficiency of, as Compliance with Statute.*

The plaintiff sued as beneficiary under a policy issued by the defendants, insuring the late Henry Youlden against accident and death from accident.

J. L. Whiting, K.C., for the plaintiff.
W. N. Tilley and C. Swabey, for the defendants.

MIDDLETON, J.:—The deceased had been insured with the defendants for some years, the policy having been issued on the 7th January, 1902, and the renewal premium paid on the 2nd January, 1909.

On the 23rd June, 1909, shortly after his dinner, the deceased—a member of a firm carrying on a foundry business in Kingston—was at the railway station, superintending and assisting in the loading of a retort upon a railway car. . . . For the purpose of making a way for removing the retort, a heavy stick of timber . . . was desired to be used. This weighed from 500 to 600 lbs. Youlden attempted to carry one end of this, while the other end was carried by two men. His partner, Selby,

*To be reported in the Ontario Law Reports.

went to his assistance; and shortly afterwards Youlden remarked to him that he was afraid he had injured himself. He then sat in the shade at the station for a time, and, feeling faint . . . took a glass of whisky and soda, and thereafter did no more work. . . . The same evening, without taking any supper, he went to a garden party. . . . During the evening he partook sparingly of ice-cream, and went home at a little after ten o'clock. . . . During the night he was uncomfortable and restless, could not sleep, and, his wife said, "looked miserable and grey." Nevertheless, he went to the office in the morning, but stayed there only a short time, returning in about half an hour. A doctor was called, and found him weak and in pain. He had then had a violent motion of the bowels, and appeared to be generally collapsed. By the evening his temperature was high, and there was further bowel trouble. The case developed into a case of acute enteritis, which would not yield to treatment, and finally caused his death.

The plaintiff alleges that a strain was caused by the exertion of lifting the timber, and that this strain brought about a physical condition which enabled bacteria in the digestive tract to develope to such an extent that death resulted from his inability to resist their attack, by reason of the reduced vitality following the strain in lifting the timber.

At the trial, I admitted in evidence, against the protest of the defendants' counsel, the statement made by the deceased to his partner Selby, shortly after he had lifted the timber, that he thought he had hurt himself. It is argued that, apart from this, there is no evidence of the existence of a strain. The medical men stated that there was no physical condition indicating a strain; that the injury, if it existed, was internal only; and that the only knowledge they had of its existence would be from statements made to them by the patient of his symptoms and the history of the case. The symptoms made it quite plain that the malady was caused by the invasion of the system by pernicious bacteria. This invasion, in the opinion of the doctors, might well be occasioned by any injury to the system which rendered it unable to manifest the normal resistance of a healthy and uninjured individual; but the result might follow equally from anything which would bring about a marked reduction of vitality, or it might follow from the introduction of pernicious bacteria in the food taken—the latter being the general origin of such a malady. The ice-cream taken the evening before, if impure or tainted, would adequately account for the condition found.

It, therefore, becomes a matter of great importance to examine the propriety of my ruling. . . .

[Reference to Garner v. Township of Stamford, 7 O.L.R. 50; Gilbey v. Great Western R.W. Co., 102 L.T.R. 202; Re Wright and Kerrigan, [1911] 2 I.R. 301; Amys v. Barton, [1911] W.N. 205.]

In Powell on Evidence, 9th ed. (1910), p. 358, the admissibility of statements for the limited purpose of proving the physical condition of the person making the statement is asserted; and, I think, for this purpose, the evidence was properly admitted; and it is sufficient to establish that, shortly after the deceased had been engaged in lifting the timber, he had, as he said, indications that he had been hurt. The statement, perhaps, did not go so far as to indicate that the lifting of the timber was the cause of the injury; but I think that this is an inference which may be drawn from the fact of the injury, and falls within the principle indicated in Evans v. Astley, [1911] A.C. 678. . . . .

Acting upon this principle, I find that the symptoms indicate that the deceased, at this time, did suffer an injury in lifting the timber; and I further find that this injury was the cause of his death. I believe this to be the cause, because, as I understand the medical evidence, it is a possible cause, and it is the only one of the several possible causes which is shewn to have actually existed. There is no evidence that the ice-cream eaten was tainted; and the evidence satisfies me that up to the happening of the accident the deceased appeared to be in perfect health. This brings the case within the decision of the Court of Appeal in In re Etherington and Lancashire and Yorkshire Accident Insurance Co., [1909] 1 K.B. 591.

It is, therefore, necessary to consider the other matters dealt with upon the argument.

The policy issued in 1902 contains provisions and stipulations as to notice which, it is admitted, were not complied with, and which are made conditions precedent to the right to recover.

The plaintiff, contends that the terms of this policy are not binding upon her, because the renewal receipt, as it is called, constitutes a new contract of insurance; and, by sec. 144 of the Insurance Act, "the terms and conditions of the contract" not having been "set out by the corporation in full upon the face or back of the instrument forming or evidencing the contract," "no term or condition, stipulation, warranty, or proviso, modifying or impairing the effect of any such contract made or renewed after the passing of this Act, shall be good or valid, or

admissible in evidence to the prejudice of the assured or beneficiary.''

Is this a new contract, within the meaning of the statute? The original contract, unlike many insurance policies, does not contemplate any renewal. It is an insurance for one year, and for one year only; and, upon the principle acted upon by the Court of Appeal in Carpenter v. Canadian Railway Accident Insurance Co., 18 O.L.R. 388, the contract evidenced by the renewal receipt is to be regarded as a new insurance, depending entirely upon a new agreement between the parties. I do not think that this is at all in conflict with Liverpool and London and Globe Insurance Co. v. Agricultural Savings and Loan Co., 33 S.C.R. 94, where the decision of the Court of Appeal, 3 O.L.R. 127, is reversed.

This new contract is, according to the terms of the receipt, a contract of insurance for a year ''according to the tenor of policy 565996.''

Referring, in the first place, to the statute itself, the intention of the legislature appears to be plain. The contract to insure is to stand, but it is to be purged of all terms and conditions modifying the primary contract in the interest of the company and to the prejudice of the insured, unless the terms are set out upon the face or back of the instrument evidencing the contract. ''Instrument'' must be understood, in the light of the Interpretation Act, as meaning ''instrument or instruments;'' and the contention of the company is, that the reference in the receipt to the original policy constitutes it one of the instruments forming or evidencing the contract, and that its terms are, therefore, binding; and, in the alternative, that the reference to the former policy is a sufficient compliance with the Act. The contention of the assured is, that the Legislature intended to render insufficient a mere reference to some other document . . . This argument is much fortified by subclauses (*a*) and (*b*), which expressly permit the application and the rules of friendly societies to be embodied in the contract by reference. . . .

[Reference to Venner v. Sun Life Assurance Co., 17 S.C.R. 394; Jordan v. Provincial Provident Institution, 28 S.C.R. 554; Hay v. Employers' Liability Assurance Corporation, 6 O.W.R. 459; Elgin Loan Co. v. London Guarantee and Accident Co., 11 O.L.R. 330.]

The judgment of Sedgewick, J., in the Jordan case . . . is an authoritative statement that, notwithstanding the provision of the Act, the section in question is complied with when the

document relied upon is referred to and sufficiently identified in the contract. Had the Supreme Court not seen fit to place its judgment on this ground, I should have thought it apparent that the application might be identified by reference, and that this express provision found in clause (*b*) went far to indicate that this was intended to be an exception to the general rule; . . . but the Court has deliberately refrained from placing its decision upon this ground, and has preferred to adopt a construction of the clause which, I fear, has had the effect of nullifying the intention of the Legislature.

If I am right in this, it is admitted that the plaintiff's action fails, and it is not necessary to consider the other questions argued.

The action is dismissed without costs.

DIVISIONAL COURT. MARCH 13TH, 1912.

McCABE v. McCULLOUGH.

Deed — Reformation — Boundary — Survey — Evidence — Intention — Registry Act.

Appeal by the defendant from the judgment of SNIDER, Co. C.J., in an action in the County Court of the County of Wentworth, brought to recover possession of a small triangular parcel of land.

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

S. F. Washington, K.C., for the defendant.

W. J. O'Reilly, K.C., for the plaintiff.

MIDDLETON, J.:—The Misses Doherty owned lot 65 and part of lot 64 on the south side of York street, Hamilton. Lot 65 was bounded on the east by Davenport street. These streets intersect at an obtuse angle, about five degrees greater than a right angle.

Two pairs of semi-detached houses are constructed upon the lands, fronting upon Davenport street. The boundary fence between the north pair and south pair of houses is erected approximately at right angles to Davenport street. It does not extend to the rear of the lot, but terminates at a barn upon the southerly portion of the lot, where there is a slight jog; and

the northern wall of the barn has heretofore served in lieu of a fence.

On the 10th August, 1903, the Misses Doherty sold the northern pair of houses to the defendant. The conveyance describes the southern boundary of the parcel as running parallel to York street. This, of course, excludes a triangular parcel of the land, enclosed by the fence and barn.

On the 28th August, 1903, the purchaser, realising that this description was erroneous, asked for a confirmation deed, containing a correct description; and the deed of that date was executed; but, unfortunately, the description contained in it is also erroneous, as it describes the southern boundary of the parcel conveyed as being parallel to the southern boundary of lots 64 and 65, which was itself nearly parallel with York street.

The following year, the plaintiff purchased the two southern houses; and on the 12th April, 1904, the Misses Doherty conveyed to her the southern portion of the two lots, giving as the northern boundary of the parcel conveyed the southerly limit of the land conveyed to the defendant.

Upon the evidence it is quite clear that in both these transactions the intention was to convey up to the fence; and this was assumed to be the boundary line, each party occupying to the fence line, until the dispute giving rise to this action, which took place early in 1911.

This dispute was as to the ownership of the few inches of land lying south of the continuation of the fence and north of the barn. For the purpose of determining this dispute, a survey was made, when the mistake as to the location of the boundary was discovered.

This action is brought to recover possession of the small triangular parcel; and the defendant asks to have the conveyances rectified so that the descriptions may conform to the true boundary as she alleges, i.e., the fence line. There is now no dispute as to the plaintiff's title to the few inches north of the barn.

The learned County Court Judge has held the parties bound by the conveyances, thinking that the evidence does not establish with sufficient clearness that the bargains differ from the conveyances.

A very careful perusal of the evidence satisfies me that the bargain with reference to both parcels was a bargain to sell up to the boundary fence.

I refer to the plaintiff's evidence, where she says: "Q. What you bought was what went with the two houses? A. Yes. Q.

And you supposed until a year ago that that was all right? A. It was perfectly right. Q. You took what property was within that fence? A. I found out from the surveyor that the property that side was mine too."

This was when the surveyor was called in on account of the defendant's resistance to the continuation of the fence in a straight line behind the barn, which was the only claim made by the plaintiff up to that time.

This being so, I see no difficulty in directing that the conveyance should be reformed so as to make the boundary between the two parcels the line of the boundary fence and that line produced westerly.

If I had not been able to find, upon the evidence of the plaintiff, that she only intended to purchase the land south of that fence, I would not have thought that we could grant the relief sought, as the Registry Act would have afforded an answer to the defendant's equitable claim to reformation. See Fraser v. Mutchmor, 8 O.L.R. 613.

The cases of Russell v. Davey, 6 Gr. 165, and Utterson Lumber Co. v. Rennie, 21 S.C.R. 218, justify this decision. I do not think there should be any costs; either here or below.

FALCONBRIDGE, C.J., concurred.

BRITTON, J. (dissenting), was unable (for reasons stated in writing) to agree that "upon the evidence it is quite clear that in both these transactions *the intention* was to convey up to the fence; and this was assumed to be the boundary line, each party occupying up to the fence line, until the dispute giving rise to this action." He thought the parties were bound by the survey; and agreed with the findings of the trial Judge.

Appeal allowed; BRITTON, J., *dissenting.*

SUTHERLAND, J., IN CHAMBERS. MARCH 14TH, 1912.

REX EX REL. FROEHLICH v. WOELLER.

Municipal Election — Quo Warranto Application — Practice — Recognizance — Fiat Allowing — Absence of Date — Municipal Act, sec. 220 — Time for Application — Affidavit of Relator — Information and Belief.

A quo warranto application to unseat a member of the Municipal Council for the Town of Waterloo, on the ground that he was at the time of his election an alien.

A. R. Lewis, K.C., for the relator.
J. C. Haight, for the respondent.

SUTHERLAND, J.:—The applicant, in his affidavit, after setting out the election of the respondent as councillor, the signing by him of the usual declaration of qualification, his acceptance of office, his attendance on and taking his seat at council meetings, his voting thereat and otherwise taking part in deliberations of the council, goes on to say: "5. That I am credibly informed and believe that the said Carl W. Woeller was not, at the time of such election or declaration, and is not now, a British subject either by birth or naturalisation."

The relator's affidavit was sworn on the 28th February, 1912, and filed with the Clerk in Chambers on the next day. It states that Woeller was nominated as a candidate for election as councillor on the 22nd December, 1911; and, there being no opposition, was then declared elected by acclamation; and that he took the usual declaration of qualification on the 8th January, 1912. No other material than this affidavit appears to have been filed in support of the motion up to the time of the hearing before me on the 8th instant.

Counsel for the respondent took the following preliminary objections to the motion, viz.:—

1. That the relator had not entered into a recognisance or obtained a fiat of a Judge allowing the recognizance, before service of his notice of motion, or filed any such recognizance before doing so, pursuant to the provisions of the Consolidated Municipal Act, 3 Edw. VII. ch. 19, secs. 220 and 222.

It was admitted by counsel for the relator that no recognizance had been filed. He stated, however, that he had one in his possession, and asked to be permitted to file it upon the motion. As produced, it appears to have been entered into on the 29th February, 1912, and has upon it a fiat of the County Court Judge to the effect that it was allowed. There is no date on this fiat: see Regina ex rel. Chauncey v. Billings, 12 P.R. 404.

2. That the application is too late. It is provided by sec. 220 of the Municipal Act that, "in case within six weeks after an election or one month after acceptance of office by the person elected, the relator shews by affidavit to such Judge reasonable ground for supposing that the election was not legal," etc. Here the election was on the 22nd December, 1911, and the declaration of office and acceptance was on the 8th January, 1912. The notice of motion is dated the 28th February, 1912. The application, therefore, appears to be too late: Regina ex rel. Telfer v. Allan, 1 P.R. 214.

3. That the allegation in the affidavit of the relator that Woeller was not, at the time of such election or declaration, or at the time the affidavit was made, a British subject either by birth or naturalisation, is upon information and belief, and that it is, therefore, inadmissible under Con. Rule 518. See Gilbert v. Stiles, 13 P.R. 121; Dwyre v. Ottawa, 25 A.R. 121, at p. 129; Robinson v. Morris, 15 O.L.R. 649, at p. 653.

Effect, I think, must be given to the objections, and the motion dismissed with costs.

Since the above judgment was dictated on the 12th instant, and before it was delivered to-day, the relator desired to file a further affidavit, which I declined to permit, as too late.

SUTHERLAND, J., IN CHAMBERS. MARCH 14TH, 1912.

REX v. O'CONNOR.

Liquor License Act—Justices' Conviction for Selling without License—Proof of Existence of Local Option By-law—Admission—Amendment—Proof of Sale—Receiving and Placing Order—Amendment of Information—New Offence Charged after Lapse of Thirty Days—Secs. 95 and 104 of Act.

An application to quash a conviction made on the 13th January, 1912, by Justices of the Peace.

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

SUTHERLAND, J.:—The charge as originally laid in the information on the 27th December, 1911, was, that the accused did on the 27th November, 1911, "sell liquor without the required license." After one adjournment, the case came on for final hearing and disposition on the 8th January, 1912. On that date the information was amended so as to read that the accused "did on the 2nd day of December, 1911, canvass for or receive an order for liquor."

Three objections were taken to the conviction.

The first was, that, as made, it did not state that the offence was committed in a township in which a by-law had been passed under sec. 141 of the Liquor License Act. It appears that the

conviction, when originally made and signed by the Magistrates, did not mention this fact. It also appears by a memorandum attached to the papers returned to the Court by the convicting Magistrates as the record in the matter, that "Mr. Clay admits that the local option by-law is in force in said township." Mr. Clay was counsel for the accused at the trial. Mr. Cartwright, the Deputy Attorney-General, had the conviction sent back, and thereupon the Magistrates appear to have added the following words: "Such township being one in which there was at the time a by-law in force passed under section 141 of the said Act prohibiting the sale of liquor by retail therein."

Under these circumstances, and with the admission of counsel aforesaid, I think the amendment was justified; and, if necessary, it could now be amended in the way it was.

The second objection was, that sec. 19 of the Act to Amend the Liquor License Laws, 6 Edw. VII. ch. 47, under which the amended information was framed, as amended by the Act to Amend the Liquor License Act, 9 Edw. VII. ch. 82, sec. 39, does not apply to a case such as this. The facts appear to be as follows. The accused is a telegraph operator at the village of Harrow. One Perry Lipps, having been told that he might be able to get some liquor through the accused, went to him and asked him if he had any liquor. He was told by the accused that he had not, but that he could telegraph up and get a bottle. A telegram was sent, in the presence of Lipps, by the accused, for a bottle of Imperial whisky, and it come down from Walkerville to Harrow by train, whereupon Lipps paid O'Connor $1.25 for it, and received the bottle from him. Lipps says that he went to the station to get O'Connor to telegraph for the bottle of liquor for him, and intrusted him with the money to send for it, and that the bottle came down addressed to him, Lipps, and he took it away. He did not know the name of the liquor merchant who supplied the bottle of whisky except from the shipping bill. I am inclined to think that, upon this evidence, and apart from any disposition of this case on the further objection to the conviction, with which I will deal later, it could be sustained. The liquor was got through O'Connor, who was active in the matter. Lipps did not know to whom to send. It does not appear upon the face of the proceedings that the telegram was sent in Lipps's name. An affidavit is filed by the accused's solicitor in which the following statements appear: "I acted for the defendant, and on his cross-examination I procured from the Canadian Pacific Railway Company's office the telegraph message which the witness Perry Lipps said was sent for him and which the

witness acknowledged. I asked to put it in as an exhibit, but it was refused by the Justices. Hereunto annexed, marked exhibit A., is the telegram referred to. No reference to the same appears in the proceedings before the Justices." The telegram is made an exhibit to the affidavit and reads as follows: "Harrow, 12. 2. 1911. C. J. Stogell, Walkerville, Ontario. Please send me bottle Imperial whisky first train. Perry Lipps." Counsel for the Crown objected to the admission of this affidavit; but, even if it were admitted, I do not think it carries the case much farther. O'Connor assumed to hand over the bottle and take the pay for the liquor under the circumstances in question. I think he acted in the matter more than in the mere capacity of a telegraph operator. If Lipps had come there, and, without discussion, had written out the telegram himself and handed it to the operator, that might be a different matter. I think the evidence sufficient to warrant the Justices in the conclusion that O'Connor did receive an order and place it with Stogell.

But a third objection was taken to the conviction, on the ground that, when the amendment to the information was made on the 8th January, 1912, it was too late. Section 95 of the Liquor License Act provides that "all informations or complaints for the prosecution of any offence against any of the provisions of this Act, shall be laid or made in writing (within thirty days after the commission of the offence or after the cause of action arose and not afterwards)," etc.

In this case the information was first laid on the 27th December for an alleged violation of the Act on the 27th November, 1911. The information was then amended on the 8th January, 1912, and a different and substituted charge laid for an alleged violation of the Act on the 2nd December, 1911. Section 104 provides as follows: "At any time before judgment, the Justice, Justices, or Police Magistrate may amend or alter any information, and may substitute for the offence charged therein any other offence against the provisions of this Act; but if it appears that the defendant has been prejudiced by such amendment, the said Justice, Justices or Police Magistrate shall thereupon adjourn the hearing of the case to some future day, unless the defendant waives such adjournment."

The contention of the accused upon this application is, that sec. 104 did not empower the Justices to amend the information in such a way as to substitute a different offence for the one originally charged, unless it were done within thirty days from the date of the commission of the offence, and in any event not

so as to enable a different offence to be charged on a different and later date more than thirty days before said amendment was made. Here the amendment made on the 8th January, 1912, was long after thirty days from the time when the original offence was said to have been committed, viz., on the 27th November, 1911. It goes further, and states that the substituted offence was committed on a later date more than thirty days before the said amendment was made. There is no doubt that the offence substituted by the amendment is a different offence from that originally charged in the information.

Under these circumstances, had the Magistrates power, after the thirty days, to make the amendment in question? . . .

[Reference to Rex v. Ayer, 17 O.L.R. 509; Rex v. Guertin, 19 Man. L.R. 33.]

These two judgments are not in accord. In Rex v. Ayer, the effect of the amendment allowed was, as stated in the judgment of Meredith, C.J., at p. 512, "merely to add words necessary to describe the offence intended to be charged in the informations which were insufficiently because incompletely described in them." See also The Queen v. Hawthorne, 2 Can. Crim. Cas. 468.

I think the two sections of the Act must be read together, and, so reading them, have come to the conclusion that the amendments made to the information in the present case on the 8th January, 1912, substituting a different charge on a different date, more than thirty days after the alleged commission of such different and substituted offence, were not properly made. I think they were made too late. The original charge was apparently abandoned, and the substituted charge laid too late under the statute.

The motion will, therefore, be allowed with costs. The usual order will go for the protection of the Magistrates.

DIVISIONAL COURT. MARCH 14TH, 1912.

GALLAGHER v. KETCHUM & CO. LIMITED.

Trover—Conversion of Automobile—Joint Tort-feasors—Damages—Lien for Repairs.

Appeal by the defendants from the judgment of BRITTON, J., ante 573.

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

A. J. Russell Snow, K.C., for the defendants.

W. C. McCarthy, for the plaintiff.

The judgment of the Court was delivered by MIDDLETON, J.:—We reserved judgment upon the question of the amount of damages.

The defendants were authorised to make repairs to the amount of $350 only, and were bound to return the machine to the plaintiff when demanded, and had no claim against the plaintiff or the machine for more than this sum.

Having converted it to their own use, they must answer for its value at the time of the conversion, and cannot reduce the liability by any increased selling value attributable to the unauthorised repair. Had they returned it, as was their obligation, the amount spent in repairs beyond the sum authorised would have been lost to them, and they cannot better their position by the further unlawful act of conversion.

Faulkner v. Greer, 14 O.L.R. 360, 16 O.L.R. 123, and 40 S.C.R. 399, is in point.

Appeal dismissed with costs.

POWELL-REES LIMITED v. ANGLO-CANADIAN MORTGAGE CORPORATION—MASTER IN CHAMBERS—MARCH 8.

Writ of Summons—Foreign Corporation Defendant—Service on Person in Ontario—Motion by Person Served to Set aside—Affidavit Denying Connection with Company—Insufficiency—Practice.]—It was stated that the defendants were incorporated in England, but as yet had not a license to do business in this Province. The action was on a judgment recovered in England against the company, for over $15,000, on the 9th February, 1912. The writ of summons was served on E. R. Reynolds, who moved to set it aside, supporting his motion by his own affidavit in which he said that he was not an officer of the defendant company nor in any way authorised to accept service for them. There was no affidavit in answer, and an offer to enlarge the motion so as to allow of Mr. Reynolds's cross examination was declined. It was contended that the motion must fail on two grounds: (1) because it should have been made by the company; and (2) that the affidavit filed was insufficient because it did not say that, *at the time of service*, the

deponent was not an officer of the defendant company. Counsel for the plaintiff asserted that Mr. Reynolds was the president, and that the plaintiff had dealt with him for the past two or three months on that understanding. The Master agreed with the contention that the motion could only be made on behalf of the company. He referred to Burnett v. General Accident Assurance Corporation, 6 O.W.R. 144; Mackenzie v. Fleming H. Revell Co., 7 O.W.R. 414. This was not, he pointed out, the case of substituted service, when, in some cases, it may be permissible to move (see Taylor v. Taylor, 6 O.L.R. 545), or take the steps suggested in Bound v. Bell, 9 O.W.R. 541. Here, if the service had been improperly made, the plaintiff would proceed at his peril. But he must be left to do as he might be advised. The second objection, the Master said, was also well taken; and the motion could not succeed, and should be dismissed. Costs reserved until the case has proceeded further, and light has been obtained as to the relations (if any) between the applicant and the defendant company. John MacGregor, for the applicant. M. C. Cameron, for the plaintiff.

HUCKELL v. POMMERVILLE—SUTHERLAND, J.—MARCH 8.

Building—Erection Close to Boundary Line of Lot—Injury to Adjacent Property—Water from Roof—Injunction—Damages—Destruction of Line Fence—Nuisance—Costs.]—The plaintiff is and for years past has been the owner of the easterly part of lot No. 37 on the north side of Cooper street, a residential street in the city of Ottawa, upon which is erected a substantial brick house, the easterly wall of which extends to or very close to the westerly limit of lot 38 adjoining. The defendant in August, 1910, bought lot 38, which also has on it, towards the easterly side, a brick residence. There was between the two houses a considerable space of vacant ground, which, before the purchase by the defendant, had been a lawn. Later, the defendant sold the easterly part of lot 38 and the brick house thereon to one Frazer. In the spring of 1911, the defendant began to excavate the westerly or vacant portion of his lot to erect an apartment house thereon, but was stopped. Later, he erected a building or buildings running north from Cooper street, close to or on the line between the two lots, as shewn on a plan. The first building, marked on the plan "office," is of wood, with metal sheeting, having a frontage on Cooper street of 22 feet by a

depth of 16 feet. Immediately north, is a long wooden shed, metal-sheeted, and open to the east. Immediately north, is a large wooden stable, metal-sheeted. The west walls (or wall) of these three buildings forms a continuous line running north from the north line of Cooper street, and begins at a point a number of feet in front of the southerly face of the verandah on the south or front side of the plaintiff's house. There had been a fence for years on or near the line between the two lots, which each party asserted to be on his property. It was torn down by the defendant or his men in excavating for the apartment house. On the 24th June, 1911, the defendant executed a lease in writing in favour of one Duklow of part of lot 38, being the part at the rear having the stable upon it. Duklow, when the stable was completed, went into possession about the 1st August, 1911, and continued therein for upwards of two months. He carried on business as the keeper of a livery stable or boarding and exchange stable. The plaintiff claimed, in respect of the fence and excavation, damages to the amount of $100. He also alleged that the buildings were so erected by the defendant that water from the roofs is thrown on to the plaintiff's property and is affecting the foundation of his dwelling-house and the reasonable use and enjoyment of his verandah and property. He also alleged that, by reason of the odours from the stable, his use of his dwelling-house is seriously interfered with and he has sustained loss and damage. The plaintiff further alleged that the defendant acted improperly and maliciously in the matter of the erection of the buildings, and with a desire and intention of compelling the plaintiff to purchase the westerly 33 feet of his lot at an exorbitant price. And he sought an order compelling the defendant to remove the buildings erected by him on the property in question, restraining him from discharging rainwater from the roofs of his buildings to the detriment of the plaintiff and his property, and from carrying on or permitting to be carried on the livery business. SUTHERLAND, J., said that, while the defendant's conduct does not appear to have been very neighbourly, and while the buildings were certainly not such as one would expect to see erected on a residential property, he could not see that the defendant was not within his right in erecting them. It appeared that, subsequent to the issue of the writ, Duklow was obliged to discontinue his livery or exchange business, through some action taken by the municipal authorities. He was permitted by the defendant to give up his lease. The building that was being used as a stable is apparently now a garage. The office building was naturally distasteful

to the plaintiff, and very much curtailed the view along the street in an easterly direction from his verandah. Upon the whole evidence, the learned Judge found that the fence was a line fence between the two lots, and had been so considered and used by the parties to the action and their predecessors in title. The defendant was not warranted in taking the fence down and destroying it, as he did, without the consent of the plaintiff. The value of the fence was not very satisfactorily proved at the trial. The excavation of which the plaintiff complained was filled up again, and apparently he suffered no damage in consequence thereof. At the request of counsel, the learned Judge had a view of the property, and came to the conclusion, from that and the evidence adduced at the trial, that the buildings of the defendant were so constructed as existing as to shed water upon the plaintiff's verandah and against his house. The damage and inconvenience thus far caused to the plaintiff in respect to this had not been great; but he was entitled to have the defendant enjoined from a continuance of it. Judgment for the plaintiff against the defendant as follows: (1) restraining the defendant from discharging rain-water from the roofs of his buildings upon the plaintiff's property and for $5 damages for the injuries already sustained in this connection; (2) for $20 damages for the destruction of the plaintiff's share of the fence, less $15 paid into Court by the defendant; (3) for the plaintiff's costs of suit on the High Court scale.

CROCKFORD v. GRAND TRUNK R.W. CO.—FALCONBRIDGE, C.J.K.B. —MARCH 11.

Master and Servant—Injury to Servant—Negligence—Condition of Premises—Dangerous Work—Infant—Absence of Warning—Contributory Negligence—Findings of Jury.]—Action by a servant of the defendants, employed in their roundhouse at London, to recover damages for personal injuries caused, as alleged, by the defective condition of the platform of the turn-table. The Chief Justice said that the jury had the advantage of inspecting the locus in quo, and saw the condition of the ways, which was practically the same at the time of the view as at the time of the accident, and had expressly found negligence in regard to the same. They had also found negligence of the defendants by reason of the failure properly to instruct the plaintiff, an infant engaged in a dangerous work;

and they expressly negatived negligence of the plaintiff. It could not be said that there was no evidence to support all these findings; and the plaintiff was entitled to judgment for $1,500 with full costs. Sir George Gibbons, K.C., and G. S. Gibbons, for the plaintiff. I. F. Hellmuth, K.C., and W. E. Foster, for the defendants.

McIntosh v. Grimshaw—Master in Chambers—March 12.

Trial—Order to Expedite—Plaintiff not in Default—Con. Rule 243—*Costs.*]—Motion by the defendant, under Con. Rule 243, for an order expediting the trial. An action by the vendor for cancellation of an agreement for the sale of land and for possession of the land. The action was begun on the 21st February, 1912. The Master said that it was open to the defendant to have commenced an action for specific performance of the agreement nearly three months ago; and there was no reason given for his not having done so. Counsel for the plaintiff stated that he had been expecting this to be done; and had commenced the present action only in order to have the matter brought to a termination. The plaintiff was not in any way adverse to a speedy trial, and offered to have the case tried by a Referee—an offer which counsel for the defendant was not prepared to accept. Armstrong v. Toronto and Richmond Hill Street R.W. Co., 15 P.R. 449, shews that an order such as is asked here may be granted in a proper case; but, when the plaintiff is not in any default, it cannot lightly be made against his protest. As, however, the plaintiff did not object, an order should be made for delivery of the statement of claim in a week or ten days, and with such other terms as the plaintiff might concede. Costs to the plaintiff in the cause. A. J. Russell Snow, K.C., for the defendant. K. F. Mackenzie, for the plaintiff.

Binder v. Mahon—Divisional Court—March 13.

Trusts and Trustees—Promissiory Note—Interest in—Equity Attaching to, in Hands of Holder Acquiring after Maturity—Renewals—Advance—Notice of Claim—Evidence.]—An appeal by the defendants the José Gatti Company from the judgment of Middleton, J., ante 318. The appeal was heard by Mulock, C.J.Ex.D., Clute and Sutherland, JJ. The Court dismissed the appeal with costs. J. M. McEvoy and E. W. M. Flock, for the appellants. T. G. Meredith, K.C., for the plaintiff.

MACDONALD v. SOVEREIGN BANK OF CANADA—MASTER IN CHAMBERS—MARCH 14.

Evidence—Foreign Commission—Application for—Affidavit—Information and Belief—Rule 518*—Unnecessary Testimony—Admission.*]—This action was brought for a declaration that the plaintiff was not the owner of 70½ shares of the stock of the defendant bank standing in his name, alleging that the defendants were and always had been the real owners of the same. The statement of defence denied the plaintiff's allegations, and set up that the shares in question were all duly transferred to the plaintiff by the previous holders. The matters in question are thoroughly elucidated in the cognate action of Stavert v. McMillan, 21 O.L.R. 245, 24 O.L.R. 456. The defendants now moved for a commission to Los Angeles, in California, to take the evidence of one A. E. Webb, a broker formerly doing business in Toronto, whose name appears in the evidence in Stavert v. McMillan. The Master said that there was no intimation of what Webb was expected to prove. The only affidavit in support of the motion was one by the defendants' solicitor, in which he said of A. E. Webb: "Who, I am informed and believe, purchased the stock which is the subject of the action for Randolph Macdonald, the father of the plaintiff." No grounds of such information and belief were given; and the affidavit was, therefore, not strictly admissible (Rule 518). But, waiving that objection, a very full affidavit was filed in answer by the plaintiff's solicitor, setting out the whole transaction, as given in the appendix in the McMillan case, and shewing that the shares in question had passed into the name of the plaintiff before Webb appeared in this connection. The whole onus was on the plaintiff, and he was willing to admit that none of the shares, the subject-matter of this action, were transferred from A. E. Webb & Co. to the plaintiff, or to any of his alleged predecessors as holders of the shares now in question. This, the Master said, rendered it unnecessary to issue the commission; and, according to the judgment of a Divisional Court in Hawes Gibson & Co. v. Hawes, 3 O.W.N. 312, it should, therefore, not be granted. Motion dismissed with costs in the cause to the plaintiff. W. J. Boland, for the defendants. G. H. Kilmer, K.C., for the plaintiff.

CORRECTION.

In McConnell v. Vanderhoop, ante 800, 801, the defendant's name should be *Vanderhoof;* and the amount for which judgment was given should be $250, not $2,500.