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HIGH COURT OF JUSTICE.

MIDDLETON, J., IN CHAMBERS. MAY 18TH, 1912.

RE HART.

Infant—Custody—Rights of Father—Welfare of Child—Evidence—Custody Awarded to Aunt.

Motion by John Hart, the father of the infant Blanche Emily Hart, upon the return of a writ of habeas corpus, for delivery of the infant to the applicant.

R. D. Moorehead, for John Hart.
T. A. Gibson, for Elizabeth Hyde-Powell, maternal aunt.

MIDDLETON, J.:—On the return of this motion it became quite apparent that it was impossible to determine the matter upon affidavit evidence; and the parties consented that I should hear oral evidence and summarily dispose of the case. I accordingly heard the parties and their witnesses. It was then consented to by counsel that I should ask Mr. Kelso, the Superintendent of the Children's Aid Society and of the Government Department having charge of neglected and dependent children, to make personal inquiry into the matter and report to me. This course was suggested by the fact that proceedings had already been had both in the Police Court and in the Juvenile Court concerning this child. The evidence taken before the Commissioner of the Juvenile Court was also put in before me.

In addition to this, I have had two interviews with the child; and, at the request of the father and with the consent of the aunt, have received verbal and written statements from the employers of Hart, respecting his habits and the charge made against him of intoxication.

The matter has caused me much anxiety, because I recognise the importance of giving the greatest possible effect to a father's wishes and desires concerning his child, and his prima facie right to her custody. At the same time, as the result of all this, I am firmly convinced that the welfare of the child renders it imperative that I should leave her with her aunt.

The mother of the infant, the first wife of John Hart, died in June, 1904. Shortly after her death, his present wife became his housekeeper. Her husband was then living, but the husband died in April, 1905. Hart then married the widow; and there has been no issue of this marriage. The second wife had children by her former husband, who are now of age and married, and who do not live with Hart and his wife.

Ever since the death of her mother, the infant has been cared for by her mother's sister, her present custodian. She has from time to time resided with her father and step-mother. There is some conflict as to the length of these visits; but I am satisfied that for the last eight years she has been almost entirely in the charge of this aunt, and that the father has contributed nothing towards her support and up-bringing, except possibly one sum of $10.

Much is made by the father of the supposed difficulty of locating his child, owing to a change of residence of the aunt and her family. As a matter of fact, there is absolutely nothing in this story; because the father has always known where to reach the brother of the respondent, who has been the financial mainstay of the family where the child has been brought up. This family consists of her grandmother, of the present respondent, of another aunt who is an invalid, and this uncle.

The child is now just fourteen years of age, and is very bright and intelligent. She does not appear to be strong physically; and she is exceedingly nervous. She has an impediment in her speech, apparently resulting from her nervousness, and which has prevented her from receiving as good an education as she otherwise would have had; and this impediment in her speech has evidently made her very shy and diffident. She was, however, able to tell me her story very well; and it is quite plain that she fears her father and has the greatest possible aversion to her step-mother. She complains of having been cruelly used while with them; and she seems to have a clear recollection of her life at home during her mother's lifetime, and she thinks that her father was then most unkind to her mother, particularly when he was intoxicated.

It appears that in November, 1911, the infant ran away from her aunt. The aunt, fearing some accident or worse, spoke to

the police, and the child was found in the home of a friend. She was then, strange to say, taken before the Police Magistrate on a charge of vagrancy; and the record of the Children's Aid Society states that, as she appeared to act in an eccentric manner, she was remanded for a week, so that the Children's Aid Society might make inquiries. Finally, she was returned to her aunt. The record of the Children's Aid Society contains statements very damaging to the father.

I asked the child about this episode, and she told me that she ran away because her aunt was going away on a visit, and she feared that her father would get her. The fact that the aunt contemplated a visit appears in the evidence given; and I am convinced that this was the real reason for the child's conduct, and that the eccentric manner noted was merely the result of her nervous condition and of the impediment in her speech; as, apart from this, I find no trace of any eccentricity.

I do not think it desirable to set forth at length the reasons which convince me that the father and the step-mother are not the proper custodians of this young girl. The contemporaneous record of the Children's Aid Society of the occurrence in November, 1911, the fact that the father has a strong will and a temper none too well under control, and the tenor of his two recent letters—of the 5th and 8th April, 1912—indicate his mental attitude; and, with the almost abject terror of the child when the possibility of her being placed in the custody of her step-mother was suggested, compel me to the conclusion that she should be allowed to remain where she now is. This course is that recommended by Mr. Kelso.

I pointed out to her that apparently her father was much better off financially than her aunt; to which she at once replied, "I have come to see that money is not everything." I quite believe that she will be properly cared for and brought up by the aunt and her family, who have sufficient affection for her to be ready to care for her without remuneration.

The motion will, therefore, be dismissed with costs.

MIDDLETON, J. MAY 18TH, 1912.

ONTARIO ASPHALT BLOCK CO. v. COOK.

Account—Reference—Book-accounts—Credits—Absence of Surcharge or Falsification—Payment—Onus—Amounts Received in Excess of those for which Credit Given.

An appeal by the defendants from the report of the Master at Welland, to whom, by the judgment of LATCHFORD, J., it was referred to ascertain the state of accounts between the plaintiffs and the defendant B. A. Cook, and between the plaintiffs and the firm of Langley & Cook or the agent or agents of that firm.

F. W. Griffiths, for the defendants.
D. L. McCarthy, K.C., for the plaintiffs.

MIDDLETON, J.:—The pleadings are not before me; but from what was said, I infer that the action is one to set aside certain conveyances; and the reference is for the purpose of ascertaining whether the plaintiffs were creditors, and, if so, the amount of the indebtedness to them. The judgment provides that the trial shall stand adjourned until after the Master shall have made his report.

Pursuant to this judgment, the parties went before the Master, and the plaintiffs brought in accounts based upon a number of different transactions or contracts, in pursuance of which they had supplied the firm of Langley & Cook with asphalt block and other materials, and giving credit for various sums of money received on account. These accounts were verified by the affidavit of one Carson, the bookkeeper in charge of the plaintiffs' accounts during the period in question. Mr. Carson was not cross-examined upon this affidavit, and no surcharge or falsification was filed; but a document called "requisitions" appears to have been lodged in the Master's office. This document states shortly the defendants' contention with respect to the different accounts. With reference to one particular section of the account—that called "St. Boniface Job No. 2"—the statement is made that the plaintiffs themselves took over and completed this contract, and must give a complete account of all moneys received and paid out in connection therewith.

Upon return of an appointment to hear and determine, Mr. Fleming, the secretary-treasurer of the company, was called, and it was made to appear that a judgment had been recovered against Langley & Cook for some $4,000; and it was stated that this covered only a portion of the indebtedness, which, as shewn by the accounts, amounted to upwards of $16,000. Counsel for the defendants then cross-examined Mr. Fleming at length as to different items in the account; and, when the St. Boniface transaction was reached, it appeared that an assignment had

been made by Langley & Cook to the plaintiffs of the money supposed to be due by the Corporation of the Town of St. Boniface, and that the work done by Langley & Cook was not in accordance with the contract, and that the plaintiffs had received from the town corporation as much as they were willing to pay, and had given credit for the money received. One Bangham, formerly in the employ of the plaintiffs, had assisted Langley & Cook in the second contract with the municipality, and appears to have had some contractual relationship with Langley & Cook; but the agreement between him and that firm was not filed.

After this, Carson, the bookkeeper, was sent to St. Boniface to assist in the adjustment of the accounts with the municipality. The town corporation required wages to be paid, as Langley & Cook had deserted the contract; and it is suggested that part of the moneys passed through Carson's hands. It is not made to appear that he received any more money than was transmitted to the plaintiffs, for which credit is given. It is suggested that the municipal accounts shew that he received some larger amount, and out of it paid the wages; but this is mere suggestion; it is not proved. See questions 154 to 157. Carson is not now available, and the defendants have tendered no evidence whatever going to shew that Carson received a dollar more than the amount for which credit is given.

The defendants now appeal upon several grounds, but before me only argued that relating to the moneys said to have been received and disbursed by Carson; counsel for the defendants stating that the onus was not upon him to attack the account.

In this I think he is entirely in error. I think that the onus is upon him to shew that the plaintiffs have received more than the amounts for which credit has been given. Payment is and always has been a defence; and the onus is upon the defendants; this quite apart from the fact that no surcharge has been filed, as required by the Rules; and possibly, according to strict practice, this issue was not open before the Master. No application is now made for indulgence; the defendants being content to base the appeal entirely on what they concede to be their strict rights.

The appeal is dismissed with costs.

MIDDLETON, J. MAY 18TH, 1912.

RE MERCER.

Surrogate Courts—Jurisdiction—Payment of Infant's Money into Surrogate Court by Administrator—Trustee Act, 1 Geo. V. ch. 26, sec. 37—Surrogate Courts Act.

An appeal by the Official Guardian from an order of the Judge of the Surrogate Court of the County of Oxford, directing payment of money into the Surrogate Court.

F. W. Harcourt, K.C., as Official Guardian, representing the infant John H. Mercer.

C. A. Moss, for the administrator.

MIDDLETON, J.:—Upon the appointment to pass the administrator's accounts, it appeared that the administrator had in his hands $214.33 belonging to the infant; and, the administrator desiring to be discharged from his trust with respect thereto, the Surrogate Court Judge directed that the administrator do pay this sum into the Surrogate Court to the credit of the infant, less $10 allowed for the costs of payment in; this sum to be paid out to the infant upon his attaining his majority.

This direction was made against the protest of the Official Guardian, who contended that the money should be paid into the High Court under the provisions of the Trustee Act, 1 Geo. V. ch. 26, sec. 37, sub-sec. 2; which provides that where a Surrogate Court Judge, in passing accounts before him, finds that an executor or administrator, guardian or trustee, has money or securities in his hands belonging to an infant or lunatic, he may make a "like order;" that is, an order similar to that referred to in sec. 37, sub-sec. 1, permitting the payment into the High Court of the moneys in question.

The Surrogate Court is a Court of probate only; it has no inherent jurisdiction. It is a creature of the statute; its jurisdiction and powers are found in the Surrogate Courts Act. It can grant probate, letters of administration, and letters of guardianship, and can hear and determine questions arising in all causes and matters testamentary; but neither it nor the Court of Probate, which it succeeded, ever had the right to the custody of the property of infants or lunatics; and, although new jurisdiction has recently been conferred upon it, enabling it to pass executors' accounts and deal with certain matters

ordinarily arising in administration suits, no such power as that suggested has yet been conferred.

There is not to be found in the Surrogate Rules any machinery for payment into Court. The Surrogate Court has no accountant and no officer who is entitled to receive and hold the moneys.

I asked counsel what was meant by "paying money into the Surrogate Court;" and he told me that the procedure adopted was the payment of the money into a bank. He did not know whether it was paid to the credit of the person entitled, either solely, or jointly with the Surrogate Registrar or the Surrogate Judge. The bank pass-book is then deposited with the Surrogate Registrar. Upon this deposit being made, the bank allows three per cent. interest.

Apart from the question of the absence of jurisdiction, the practice is most inconvenient and is not in the interest of the infant. The expense of paying money into the Surrogate Court in this way is fully as great as upon payment into the High Court; and the money carries three per cent. interest, instead of four and a half per cent., as now allowed by the High Court. The funds are subject to no supervision or control. There is no audit, and no one is responsible in any way.

The appeal should be allowed, and the order varied by directing payment into the High Court. No costs.

RIDDELL, J., IN CHAMBERS. MAY 20TH, 1912.

PRINGLE v. CITY OF STRATFORD.

Costs—Illegal Exchange of Land Contemplated by City Council—Resolution—Action by Ratepayer—Injunction—Abandonment of Scheme—Costs of Action—Summary Disposition—Appeal.

Appeal by the plaintiff from an order of the Local Master at Stratford refusing to order the defendants to pay the plaintiff's costs of the action, upon a summary application by the plaintiff.

W. H. Gregory, for the plaintiff.
C. A. Moss, for the defendants.

RIDDELL, J.:—On the 20th March, 1912, a proposition was made to the city council of Stratford that the city corporation should buy the property, land, buildings, and machinery of the McD. Thresher Company, for $2,000, and convey to that company a parcel of land in the city. The proposition was referred to a special committee, and the council met on the 25th March to consider the report of the committee. The committee submitted an agreement that the city corporation should convey to the company the said land, in payment for which the company would convey to the city corporation the equity of redemption (subject to a mortgage for $20,000) of the lands of the company, and also the factory premises and plant. The council passed a resolution at the meeting adopting the agreement.

An alderman of the city informed the plaintiff, a ratepayer of Stratford, that it was not the intention of the council to submit the agreement to the people or to pass any by-law, but that it was the intention to buy the land for transfer to the company at once and carry out the agreement forthwith. Thereupon the plaintiff applied to the Local Judge at Stratford and obtained an injunction, served notice of motion to continue the injunction, took out an appointment to examine, etc.

Pending the motion, the city solicitor wrote the plaintiff's solicitor that the McD. company had declined further to proceed with the matter of the agreement—that the agreement had not been executed and would not be executed. "We assume, therefore, that you will not find it necessary to proceed further with your injunction proceedings." The plaintiff's solicitor then replied, saying, amongst other things, "Our client must be assured of his costs if you wish him to drop this at the present juncture"—whereupon the city solicitor said: "When there is nothing left to litigate about except costs, it is improper to proceed with the action. The question of costs can be determined, if not agreed upon, in Chambers."

The plaintiff moved for his costs before the Local Master at Stratford, who did not allow costs to either party. He gave leave to appeal; and the plaintiff now appeals.

The defendants file an affidavit upon the motion setting out that no action was taken by the council except the passing of a resolution adopting the agreement—but there is no denial of the intention to proceed forthwith with the illegal arrangement, although it must have been the allegation of such intention which influenced the Local Judge in granting the injunction order, and although the plaintiff's affidavit sets this up as the reason for moving. It must be taken, then, that such was the intention.

It was argued that the plaintiff cried out before he was hurt —but where a council contemplates an illegal act, a motion for an injunction should be made at the earliest possible moment. Had the plaintiff delayed after receiving the information of the council's act and intention, he might well be found fault with if he came for relief after the council had expended money and labour upon the scheme. Vigilantibus non dormientibus.

The appeal will be allowed and the defendants directed to pay the plaintiff's costs of action, application to the Local Master, and this appeal.

MIDDLETON, J. MAY 20TH, 1912.

*HOUSE v. TOWNSHIP OF SOUTHWOLD.

Highway—Telephone Pole Placed by Unauthorised Person on Highway—Resolution of Municipal Council—Invalidity—Liability of Municipal Corporation for Obstruction of Highway by Stranger—Misfeasance—Nonfeasance—Municipal Act, 1903, *sec.* 606.

Question of law argued (by consent) upon a stated case, before the trial of the action.

The action was for damages for personal injuries sustained by the plaintiff by coming in contact with a telephone pole when driving along the Talbot road. The pole was erected in 1906, by an association which had no statutory or other right to erect poles upon the highway. The township council, on the 5th March, 1906, by resolution purported to grant to the association "the privilege of constructing their telephone lines, as long as they do not cause or have any obstruction in or on the roads and highways of this township."

The action was not brought within the time limited by sec. 606 of the Municipal Act.

J. D. Shaw, for the plaintiff.

Shirley Denison, K.C., for the defendants.

MIDDLETON, J.:—. . . The resolution . . . does not purport to authorise the erection of any pole upon the highway. Moreover, a resolution is not an authorised method of municipal action—a by-law is necessary. . . .

*To be reported in the Ontario Law Reports.

It was not until 1906 that townships first received any authority to deal with the erection of poles and wires upon highways . . . 6 Edw. VII. ch. 34, sec. 20 (O.) This statute came into force on the 14th May, 1906, more than two months after the passing of the resolution . . ; so that, in whatever way the resolution is looked at, it appears to be entirely invalid.

This action is unfortunately not brought within the time limited by sec. 606 of the Municipal Act. . . . The plaintiff, to succeed, must establish misfeasance and not nonfeasance. . .

[Reference to Denton on Municipal Negligence, pp. 28 to 31; Atkinson v. City of Chatham, 26 A.R. 521; and to Pow v. Township of West Oxford, 11 O.W.R. 115, 13 O.W.R. 162, distinguishing it.]

I rest my decision entirely upon the ground that there is no liability on the part of municipalities arising from the placing of obstructions upon the highway by strangers, save the liability arising from the failure to repair, imposed by sec. 606.

So holding, I answer the question submitted by finding that the plaintiff's right of action, if any, is barred by reason of the action not having been brought within three months; and it follows that the action must be dismissed, with costs if demanded.

KELLY, J. MAY 20TH, 1912.

BARTRAM v. GRICE.

Pledge—Transfer of Shares as Security—Agreement—Power of Sale on Default—Improper Exercise—Advertisements for Tenders—Departure from Terms of Power—Dates of Insertion of Advertisements in Newspapers—Computation of Time—Blocks of Shares—Order of Realisation—Purchaser for Value without Notice—Knowledge of Solicitor—Failure to Take Reasonable Means to Prevent Sacrifice—Sale at Gross Undervalue—Suspicion of Collusion.

Action to set aside a sale made by the defendant Grice to the defendant Naylor of 500 shares of the capital stock of the General Construction and Dredging Company Limited.

F. E. Hodgins, K.C., and W. R. Wadsforth, for the plaintiff.

W. M. Douglas, K.C., and J. R. L. Starr, K.C., for the defendants Grice and Naylor.

McGregor Young, K.C., for the defendants the General Construction and Dredging Company.

KELLY, J.:—By an agreement made between the plaintiff and defendant Grice, on the 23rd February, 1910, the plaintiff agreed to transfer to Grice 500 shares of the capital stock of that company as security in respect of another 500 shares which had been purchased and paid for by the defendant Grice. The agreement also provided that the plaintiff should transfer to the defendant Grice a further 100 shares of such capital stock, which Grice was to be entitled to hold for himself absolutely, subject to certain rights of the plaintiff in respect thereto. There is a further provision that, in the event of Grice not having before the 1st April, 1911, received in dividends upon the 500 shares so purchased by him $50,000, he was to be entitled up to, but not after, the 15th April, 1911, to call upon the plaintiff to pay him $50,000 and interest at 6 per cent. from the 1st May, 1909, till the time that such sum should be paid to him, less any dividends received by him prior to such repayment; and on payment of such sums the plaintiff was to have the right to call on the defendant Grice to transfer to him the 500 shares purchased by Grice, the 500 shares transferred to Grice as security, and the other 100 shares above referred to. Further, if the plaintiff failed to pay the sums mentioned within 30 days after being called upon by Grice to do so, Grice was to be entitled to realise on, "first, the 500 shares now held by him in the said company and paid for by him, and secondly, the 50 shares in the company to be transferred by Mr. Bartram to Mr. Grice as security as aforesaid; thirdly, the 100 shares," etc.

The manner in which the shares were to be disposed of was this: "Mr. Grice shall dispose of the shares as follows, that is to say, he shall call for tenders by advertisement to be inserted three times with an interval of a week between each time in the Globe, Toronto, and in some well known London newspaper, and Mr. Grice shall accept the highest tender for cash for the said shares, or shall himself purchase the said shares at the amount of the highest tender, but in no event shall Mr. Bartram be personally liable for the repayment of the $50,000 purchase-money."

There was a still further provision that, "in the event of Mr. Grice not calling on Mr. Bartram for repayment of the $50,000 prior to the 1st April, 1911, and offering to retransfer to Mr. Bartram the full 1,000 shares, then in such event Mr. Grice shall re-transfer to Mr. Bartram the 500 shares held as security, before the 1st May, 1911."

Grice not having received in dividends the $50,000 and interest, he, by his solicitors, issued a notice dated the 28th

March, 1911, to the plaintiff, requiring him to pay $50,000 and interest thereon at 6 per cent. per annum from the 1st May, 1909, to the date of payment, and offering to transfer to the plaintiff, upon such payment, 1,000 shares of the capital stock of the defendant company; and on the 5th April, 1911, a similar notice was issued.

There was some contention between the parties as to whether these notices were properly served on the plaintiff within the time required by the agreement. With this aspect of the case I shall not deal at present; but, even if the notices were duly served, I am of opinion that the sale, for other reasons, cannot be upheld.

The only method of realising on the shares on default in payment, was that given by the power of sale in the agreement.

Advertisements for tenders for the sale of the first 500 shares (that is, the shares which had been purchased by the defendant Grice) were inserted in the Toronto Globe on the 15th, 22nd and 29th July, 1911, and in the London Globe on the 1st, 8th, and 15th August, 1911; and advertisements for tenders for the sale of the other 500 shares were inserted in the Toronto Globe on the 21st and 28th July and the 4th August, 1911, and in the London Globe on the 1st, 8th, and 15th August, 1911.

On the 27th October, 1911, the defendant Naylor made an offer of $100 for the purchase of the second block of 500 shares, namely, the shares held by Grice as security, and his offer was accepted, and the defendant company were called upon to have the transfer to the purchaser entered in their books, but were restrained by injunction from doing so.

I find that the power of sale was not properly exercised. The power required the advertisements for tenders to be inserted "three times with an interval of a week between each time." While this language shews want of care in its preparation, there cannot be any doubt that it means that there was to be an interval of a week between the date of one insertion and the date of the insertion next succeeding it. Inserting the advertisements on the 21st and 28th July and 4th August, and on the 1st, 8th, and 15th August, was not a compliance with the provisions of the agreement, inasmuch as an interval of a week did not elapse between the date of one insertion and the date of the insertion next succeeding it. . . .

[Reference to Regina v. Justices of Shropshire (1838), 8 A. & E. 173; In re Railway Sleepers Supply Co. (1885), 29 Ch. D. 204; Chambers v. Smith (1843), 12 M. & W. 2; Young v. Higgon (1840), 6 M. & W. 49.]

These authorities make it clear that a full week should have elapsed between the dates of any two insertions, that is, that the days of publication must, in the calculation of the week, be excluded.

In another respect also the sale was irregular. The agreement provided that the defendant Grice should first realise on the 500 shares owned and held by him; secondly, on the 500 shares transferred to him as security; and, thirdly, on the 100 shares; but the sale attempted to be made by Grice to Naylor was of the second 500 shares before a sale of the first 500 shares had been effected. Down to the time of action the first 500 shares had not been sold.

It has been contended that the defendant Naylor is a purchaser for value without notice, and is not affected by any irregularities in the manner of exercising the power or conducting the sale.

I think he cannot thus protect himself or uphold the sale. He made his offer of $100 to Grice's solicitor, who, acting for Grice, had issued the advertisements for tenders and who was conducting the sale proceedings. This same solicitor acted for Naylor in the transaction and prepared for him the offer of $100, and Naylor left with him or paid him the $100 offered, which at the time of the trial had not been paid to Grice.

Naylor's solicitor had full knowledge of the requirements of the power of sale, and was familiar with the sale proceedings. The solicitor's knowledge was Naylor's knowledge, and he cannot successfully contend that he was not affected and bound by it.

Even in a case where a power of sale is so framed as to relieve the purchaser from all obligation to make inquiries, yet, if the circumstances which put in question the propriety of the sale are brought to his knowledge, and he purchases with that knowledge, he becomes a party to the transaction which is impeached: Jenkins v. Jones, 2 Giff. 99, at pp. 108-9.

There are other reasons, too, which lead to the conclusion that the sale cannot be upheld.

Naylor's evidence shews that he knew practically nothing about the defendant company, that he knew nothing about its assets, its contracts or its operations, and he says that the defendant Grice told him that its stock was of little value.

Naylor's occupation was that of a plasterer, working at his trade for other people. He had never before been engaged in a transaction of this nature. His brother-in-law, Lawson, was Grice's representative on the board of directors of the defendant

company, and consulted with Grice about the company's affairs, and was to some extent in Grice's service.

Grice's duty was to take reasonable means of preventing the sacrifice of the shares, and to act as a provident owner would have acted: Latch v. Furlong (1866), 12 Gr. 303. It is not clear to my mind that he discharged that duty. Added to all this is the allegation that the sale was at a gross undervalue. While mere inadequacy in price is not of itself a sufficient reason for setting aside a sale, still, in this instance, taken in conjunction with the other circumstances, the price was so small in proportion to the value of the shares sold as to afford some evidence of the impropriety of the sale, and to lead to the assumption that the purchase by Naylor was made at the suggestion of Grice and for his benefit.

Considering, therefore, the want of regularity in the insertion of the advertisements for tenders, the attempt to sell the 500 shares pledged before selling the 500 shares owned by Grice, as required by the agreement, the relationship of Grice, Lawson, and Naylor toward each other, the fact that both vendor and purchaser were represented by the same solicitor, and the price paid, which was but a nominal one as compared with what the evidence shews was the real value of these shares, I am clearly of opinion that the sale cannot be upheld.

I, therefore, direct judgment to be entered declaring invalid and setting aside the sale of the 500 shares by the defendant Grice to the defendant Naylor, cancelling any transfer of these shares and of certificate number 61 representing them made by Grice to Naylor, restraining the defendant Naylor from transferring or otherwise dealing with these shares and certificate, restraining the defendant Grice from doing any act towards completing such sale and transfer, and restraining the defendant company from transferring or consenting to any transfer of these shares and certificate to the defendant Naylor, and from recording him in the company's books as the owner thereof.

The costs of the plaintiff and of the defendant company will be paid by the defendants Grice and Naylor. The counterclaim of the defendant Grice is dismissed with costs.

RIDDELL, J., IN CHAMBERS. MAY 21ST, 1912.

*MacMAHON v. RAILWAY PASSENGERS ASSURANCE CO.

Discovery—Examination of Plaintiff—Action on Life Insurance Policy—Issue as to Age of Assured—Production of Marriage Certificate — Relevancy — Indirect Method of Cross-examining upon Affidavit on Production—Contradictory Affidavit.

Appeal by the plaintiff from the order of the Master in Chambers, ante 1239, requiring the plaintiff to answer certain questions which he refused to answer upon his examination for discovery.

H. E. Rose, K.C., for the plaintiff.
Shirley Denison, K.C., for the defendants.

RIDDELL, J.:—The action is upon a life insurance policy. One of the defences is misrepresentation as to age. Upon the examination for discovery, the plaintiff refused to say whether the marriage certificate of the deceased (which would or might, as it is admitted, assist in proving the age of the deceased) was in the possession of his solicitors.

The ground of the objection is, that the plaintiff had already made an affidavit on production in which he did not mention this document; and it is contended on his behalf that the question which he objected to answer was an indirect method of cross-examining upon that affidavit.

I may say at once that I cannot understand the refusal of the plaintiff or his solicitors to make full disclosure of this document if it exists—if the claim is an honest one. But that does not disentitle him to take full advantage of the law if it is as he claims. . . .

[History of the legislation and practice, referring to 12 Vict. ch. 64(C.); 7 Wm. IV. ch. 2; Chancery Orders of 1850, No. 50; Chancery General Orders of 1853, No. 22, sec. 1 (3 Gr. 28); Chancery General Orders of 1868, No. 138; Nicholl v. Elliott (1852), 3 Gr. 536, 545; Dobson v. Dobson (1877), 7 P.R. 256; Paxton v. Jones (1873), 6 P.R. 135.]

In the Con. Rules of 1888, it was specially provided, Con. Rule 512, that "the deponent in every affidavit on production

*To be reported in the Ontario Law Reports.

shall be subject to cross-examination;" but this was abrogated on the 23rd June, 1894, by Con. Rule 1345, which in 1897 became Con. Rule 490: "A person who has made an affidavit to be used in any action or proceeding, other than on production of documents, may be cross-examined thereon." This is still in force.

No doubt, the exception of the affidavit on production . . . was due to a desire to prevent two examinations and to save costs. See . . . Dobson v. Dobson, supra.

It never was intended to prevent any examination being had or questions asked which could be had or asked otherwise than on an examination on such an affidavit. That it prevented cross-examination on an affidavit on production is beyond question. . . .

[Reference to Dryden v. Smith (1897), 17 P.R. 500, 504.]

So far is this from deciding that the opposite party cannot obtain by an examination for discovery information as to documents supposed to have been left out of the affidavit, that it (as it seems to me) certainly approves of the "usual practice of examining . . . for discovery" and of an application for a better affidavit, based upon the outcome of such practice. . . .

[Reference to Standard Trading Co. v. Seybold (1902), 1 O.W.R. 650.]

That case is far from deciding that information which would otherwise be compellable on an examination for discovery becomes privileged if and when an affidavit on production is made, and the information sought would contradict the affidavit—or, if not contradict, afford a basis for a motion for a better affidavit. It is admitted that such a document could be called for at the trial—and also (unless the affidavit on production interfered) at the examination for discovery.

I think the appeal should be dismissed, with costs to the defendants in any event. . . .

BRITTON, J. MAY 22ND, 1912.

RE GALLAGHER.

Charge on Land—Charge in Favour of Absentee—Sale Free from Charge, on Payment of Amount of Charge into Court—Will—Terms—Payment out.

Application by Martha O'Reilly and Elizabeth Waterston for an order declaring that part of lot 13 on the east side of

Nicholas street, in the city of Ottawa, is free from a charge thereon, upon payment into Court of $300 and interest.

John R. Osborne, for the applicants.

BRITTON, J.:—Margaret Gallagher was the owner of the above-described land. She devised this land, particularly describing it by metes and bounds, to her daughter Anna Mary Gallagher, but subject to a charge of $300 in favour of each of her sons, namely, Philip, Stephen, and Ambrose. The will directed that these sums should be paid to the sons respectively at the expiration of five years from the death of the testatrix, if the property had not been sold in the meantime; but, if the property should be sold within five years from such death, then the sums mentioned should be paid forthwith after such sale. The will further provided that, in the event of the death of any one of the said sons before such sale, or before the expiration of the said term of five years, "the share hereinbefore devised to him out of the said lands shall not be payable and shall lapse."

The will was made on the 24th August, 1899, and the testatrix Margaret Gallagher died on the 19th July, 1900. No part of the land was sold by Anna Mary Gallagher within five years from the death of Margaret Gallagher. On the 30th April, 1904, Anna Mary Gallagher settled with Stephen Gallagher, and procured a release from him. On the 3rd May, 1904, she settled with Ambrose Gallagher, and procured a release from him. Both of these releases were duly registered. In 1906, Anna Mary Gallagher sold parts of these lands to the applicants. As Philip Gallagher could not be found—his relations not knowing whether he was then living or not—these parcels were sold subject to any claim Philip, if living, might have to the sum of $300.

These applicants now desire to sell, and the purchasers are not willing to accept the title unless the lands are freed from the charge mentioned in favour of Philip for the $300. If Philip Gallagher was alive on the 19th July, 1905, he would on that day have been entitled to receive the $300—and so he, as to his interest in the land, will be fully protected by the payment into Court by the applicants of the sum of $383.13. That sum is made up of the $300 charged, interest on that sum at five per cent. from the 19th July, 1905, say six years and ten and a half months to the 4th June, 1912, $103.13, less costs of this application and of payment in, which costs I fix at $20.

Under the circumstances, no claim having been made for the money, and the owners of the land having no knowledge of where Philip Gallagher is, if living, I deem it right that the costs should be deducted from the full amount of the claim.

Upon payment of the said sum of $383.13 into Court in this matter on or before the 4th June, 1912, there will be a declaration that the said lands above-mentioned, being all the lands charged by Margaret Gallagher with the payment of $300 to Philip Gallagher, shall be freed from that charge and incumbrance.

There will be reserved to the applicants, and to each of them, the right to make an application at any time for payment out of Court to them, or either of them, of the said money or any part thereof, whether by reason of the death of Philip Gallagher or for any other cause—upon such facts and material as they may be advised may warrant any such application.

DIVISIONAL COURT. MAY 22ND, 1912.

HOLLAND v. HALL.

Slander—Words not Actionable without Proof of Special Damage—"Held the Town up"—Innuendo—Criminal Charge—Misfeasance in Office—Several Slanders—No Evidence for Jury in Support of some—General Assessment of Damages—New Trial on one Charge—Action Dismissed as to others.

Appeal by the defendant from the judgment of KELLY, J., in favour of the plaintiff in an action for slander, the defendant seeking to have the action dismissed or a new trial ordered.

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

R. McKay, K.C. and J. H. Coburn, for the defendant.

E. S. Wigle, K.C., and J. H. Rodd, for the plaintiff.

The judgment of the Court was delivered by MIDDLETON, J.:—The action is for slander. Five distinct counts are set out in the statement of claim. At the trial the case was submitted generally to the jury, and they returned a verdict in favour of the plaintiff for $1,000. The defendant has throughout contended that the slanders set forth in paragraphs 4, 5, 6,

and 7 of the statement of claim are not actionable without proof of special damage. He moved before the Master in Chambers to have these paragraphs struck out; this was refused; and at the opening of the trial the motion was renewed. Again, before the case went to the jury, the same objection was taken; and, after the charge of the learned trial Judge, the charge was objected to upon the same ground.

The plaintiff was a candidate for re-election to the office of municipal councillor for the town of Walkerville, in January, 1911. At a meeting of the electors the defendant spoke; and all the slanders complained of but one consist of statements said to have been made in the course of that address. The slander contained in the third paragraph of the statement of claim is admitted to be capable of the meaning attributed to it by the innuendo; and it is clearly actionable per se.

The statement complained of in the fourth paragraph is as follows: "Holland held the town up for an exorbitant price for his property when the town wanted to open up Assumption street. He swore that his lot that the town wanted was worth $850, when it was only assessed for $360, and which he bought for $350 the year before, because he heard the town was going to open up the street and wanted that property."

The innuendo is: "That the plaintiff had falsely sworn to the value of his property for the purpose of cheating the municipality of Walkerville and getting money he was not entitled to."

At the time of the transaction referred to, the plaintiff was not a municipal councillor. He owned certain property which the town required for the purpose of opening a street. Expropriation proceedings were taken, and $750 was awarded. During the course of the arbitration the plaintiff stated on oath that the property was worth $850.

It is clear that the slander complained of is not capable of the meaning charged in the innuendo. Perjury is not in any way implied in the statement. The fair meaning of the statement is, that the plaintiff, owning land required by the municipality, which had cost him $350 the year before, sought an excessive price from the municipality, and in support of this claim stated on oath that the property was worth $850.

Upon the argument counsel sought to support the claim by the suggestion that the use of the expression "held the town up" implied some criminal act. We cannot assent to this. It is true that this Americanism has now received recognition in standard dictionaries as being equivalent to "stop and rob

upon a highway;" but it is obvious that in this context the words were not used with that significance, but as a figurative expression to indicate that the plaintiff had availed himself of the necessities of the municipality to drive a hard and perhaps unconscionable bargain. The words, taken in their natural significance, are not capable of a meaning actionable per se.

The same remarks apply to the fifth count. What is there complained of is the statement—somewhat modified in the evidence—that the plaintiff had appealed from the assessment of certain property as being too high and afterwards sold the property for a much larger sum than it had been assessed for. This is described as being "another of his hold-up games." Clearly this is not actionable per se.

What is complained of in the sixth paragraph is a statement that the plaintiff desired "to get back into the council so that he could sell the town some more of his dry goods, as he did in the past. He sold the town all the goods they needed for the Elks' celebration and decorations for the King's funeral, at handsome profits, and now he wants to be mayor."

It may well be that this charges the plaintiff with misfeasance in office; but the plaintiff's own evidence discloses that what is charged is substantially true. The municipal council voted a certain sum to be used for the purpose of decoration. The plaintiff was in charge on behalf of the municipality. He made a contract with a third person. That third person purchased certain of the goods used for the decoration from the plaintiff. This is the very thing prohibited by sec. 80 of the Municipal Act; and it is quite immaterial whether the plaintiff made a profit or not; although it appears from his own evidence that he did sell at a profit."

The truth of the statement complained of being thus established by the plaintiff's own evidence, this count ought not to have been allowed to go to the jury.

The seventh paragraph charges the making on another occasion of substantially the same statement as that already referred to with reference to the street opening.

For these reasons, we think that the learned Judge ought not to have allowed the action to go to the jury except upon the first slander charged—that contained in the third paragraph—and that as to the slander charges in paragraphs 4, 5, 6, and 7, the action should be dismissed; and, as the damages were not separately assessed, there must be a new trial with reference to the remaining charge.

The defendant should have the costs of this appeal in any event, and there should be no costs of the abortive hearing. The other costs of the issues upon which the defendant has now succeeded will be reserved for the trial Judge.

It is to be hoped that the parties will now see the wisdom of adjusting their differences and avoiding the necessity of any further hearing.

DIVISIONAL COURT. MAY 22ND, 1912.

THAMER v. JUNDT.

Will—Testamentary Capacity—Insane Delusions—Finding of Surrogate Court Judge—Appeal.

Appeal by the defendant from the judgment of the Judge of the Surrogate Court of the County of Perth, establishing the will of Henry Thamer, deceased, made on the 3rd February, 1911, and adjudging that it be admitted to probate.

The appeal was heard by BOYD, C., TEETZEL and KELLY, JJ.

J. C. Makins, K.C., for the defendant.

G. G. McPherson, K.C., for the plaintiffs, the executors.

BOYD, C.:—Granted or proved that insane delusions exist in a man's mind, the question is, whether the general faculties of his mind have been so far affected as to render him incompetent to make a testamentary disposition of his property as a whole or of that part in respect of which a delusion exists. That is a practical question depending upon the facts proved; and it is for the tribunal of trial (whether Judge or jury) to come to the proper conclusion upon the evidence. The learned Surrogate Court Judge has in this case found in favour of the testator's capacity—having regard to all the mass of testimony for and against—and the rule is, that, unless he is manifestly and clearly wrong, so much so indeed as to amount to a miscarriage of justice, the appellate Court ought not to interfere. I think all the above positions and propositions are established by the case cited for the respondents of Jenkins v. Morris, 14 Ch.D. 674 (1880), which represents the modern reading of the law on this difficult subject. See also In re Walker, [1905] 1 Ch. 172, 173.

A greater scope of general capacity is needed where the whole of a man's property is being dealt with (as, e.g., by a will)

than when he deals with a single and separate piece of it by way of contract (as in the case cited). Where testamentary capacity is being investigated, the testator should be of reasonably sound mind, memory, and understanding, if the disposition he makes is to be sustained. More matters have to be weighed and considered in dealing with the one case of a part than with the other as to the whole of a man's estate. But always the result arrived at by the first tribunal has to be shewn to be decidedly wrong before it will be disturbed.

Having read over carefully all the evidence taken, including the examination of the parties before an examiner—the whole forming a very large mass of testimony—I see no ground upon which to disturb the carefully considered conclusions of the Judge who heard and saw the witnesses. I would myself have come to the same conclusion that he did upon the merits and upon the capacity of the testator. He has accepted as truthful the account given by the grandchild who drew the will, and that of the son who heard the contents of the will afterwards from his father; from these sources it is evident that the testator wished to change his will, and appreciated what he was doing before, at, and after the date of execution. A natural and reasonable account is given of the way in which it came to be made at the hotel kept by one of the witnesses, and a reasonable account is given of why it was not made public at the time. The total value of the estate is said to be about $3,000, which will be considerably diminished by the drain of this litigation—the costs of which are given to both parties out of the estate.

The changes made by this will from the earlier one, made about three years before 1911, are only in minor details, and are referable to the desire of the testator to make these changes, as shewn in various parts of the evidence. Just before this will was made, he had a quarrel with the defendant, and told her that he was not going to keep her husband in his will as executor, and he also told Mr. Weir and spoke to the witness Bardy about wanting to have all Mrs. Weir's children share, as one had been left out in the former will. In the new will this was made right, and a change was made in the executors, leaving out Jundt. The testator also wished to leave out his daughter, the defendant; but, on talking it over with Weir, who drew the will, her name was mentioned as legatee for $100.

In the earlier will, his wife was to get $100 a year for life; but in the new will she was only to get $300 as a lump sum: in both the adopted son is to get $150. In the new will, after the payments of $300 and $150 and $100 to the defendant, the

residue is to be divided among the son William, the daughter Annie, and the children of his deceased daughter Elizabeth. The former will provided for payment to the adopted son of $150 and payment to the widow of $100 for life, and after her death division equally among the family (except, as I understand, one son of Mrs. Weir, who had been omitted). So that financially little change was made, and the changes made are explained by the situation. He had not got along well with the Normans, and was going to assert his power by changing his will. His wife had been married before, and had a family and some land and a house in which he lived, and she was by no means in destitute circumstances. The daughters had all been married, and had left home for years; so that the will is in all respects officious.

The learned Surrogate Court Judge has dealt liberally with the defendant in allowing solicitor and client costs out of the estate—but I do not think this should be followed as to the cost of an unsuccessful appeal. The appeal should be dismissed and the defendant left to pay her own costs.

TEETZEL, J., concurred.

KELLY, J., also concurred, giving reasons in writing.

MAY 22ND, 1912.

L. M. ERICSSON TELEPHONE MANUFACTURING CO. v. ELK LAKE TELEPHONE AND TELEGRAPH CO.

Sale of Goods—Conditional Sale—Manufactured Goods—Name and Address of Manufacturer—Abbreviated Name—Conditional Sales Act, R.S.O. 1897 *ch.* 149, *sec.* 1—*Bonâ Fide Purchasers for Value without Notice of Lien—New Agreement—Evidence—Liability.*

Appeal by the defendants from the judgment of DENTON, Jun. Co. C.J., York, declaring the plaintiffs entitled to a lien on two telephone switchboards in the possession of the defendants; and appeal by the plaintiffs from part of the same judgment, finding that the defendants were not personally liable for the balance due to the plaintiffs upon the sale of the switchboards to the Norton Telephone Company of Toronto.

The appeal and cross-appeal were heard by MULOCK, C.J. Ex.D., CLUTE and SUTHERLAND, JJ.

George Wilkie, for the defendants.
F. Arnoldi, K.C., for the plaintiffs.

MULOCK, C.J.:—The defendants in partnership operate a telephone system in the Elk Lake District. The plaintiffs are manufacturers of telephone supplies in Buffalo, in the State of New York, and as such made and sold the switchboards in question, partly for cash and partly on credit, to the Norton Telephone Company of Toronto. Part of the purchase-money remained unpaid, and this action is brought to recover the same, and, in default of payment, for a declaration that the switchboards are the property of the plaintiff company.

The Norton company sold the switchboards to the Silver Belt Company, who gave back a mortgage upon them for the unpaid purchase-money. Default having been made by the Silver Belt Company, one Seymour bought the switchboards under the mortgage, and, in turn, sold them to the defendants, who became bona fide purchasers for value without notice of the plaintiffs' alleged lien.

The Norton Company having made default in payment to the plaintiffs, the latter, through their solicitors, notified the defendants of the alleged lien. Thereupon Mr. Reece, one of the partners in the defendants' firm, proceeded to Buffalo, and there had an interview with certain of the plaintiffs' representatives; and it is contended on the part of the plaintiffs that on that occasion an agreement was reached between the parties whereby the plaintiffs agreed to reduce the amount of their claim to $400, and that Reece, for the defendants, agreed to pay the same and to recognise the plaintiffs' alleged lien. The defendants deny any concluded agreement on the occasion in question.

The onus is upon the plaintiffs to establish the alleged agreement, but a careful examination of the evidence fails to satisfy me that Reece made any concluded bargain with the plaintiffs. I, therefore, agree with His Honour that the defendants did not become personally liable; and, therefore, the plaintiffs' appeal should be dismissed.

As to the defendants' cross-appeal that the plaintiffs are not entitled to a lien, reliance is placed upon the Conditional Sales Act, R.S.O. 1897 ch. 149, which enacts (sec. 1) that a condition that the ownership in a chattel shall not pass "shall only be valid as against subsequent purchasers or mortgagees without notice in good faith for valuable consideration in the case of manufactured goods or chattels, which, at the time possession is given to the bailee, have the name and address of

the manufacturer, bailor or vendor of the same painted, printed, stamped or engraved thereon or otherwise plainly attached thereto." The name of the plaintiffs, the manufacturers of the switchboards, at the time of their sale, was "The L. M. Ericsson Telephone Manufacturing Company," and when possession of them was given to the Norton Company there was attached to them a metal plate having stamped thereon the following words:—

"Patented in United States, Canada, England, France, Germany, Russia, Austria, Hungary, Belgium, Spain, Italy, Sweden, Norway, Australia.

"L. M. Ericsson Tel. Mfg. Co.

"Buffalo, N.Y."

If it were permitted to speculate as to the meaning of the words "Tel. Mfg. Co." here used, it might, with reasonable certainty, be assumed that they were intended as abbreviations of the words "Telephone Manufacturing Company," part of the company's name, although the word "Tel." is equally an abbreviation of the words "telegraph" and "telephone." But the statute does not permit synonymous words to be used in lieu of the actual name of the manufacturer, etc., but requires a literal compliance with its provisions. This the plaintiffs have not done, and have, therefore, failed to secure to themselves the benefit of R.S.O. 1897 ch. 149, sec. 1. Thus the title in the switchboards passed to the Norton Company on the sale to them, and is now in the defendants.

I, therefore, think the defendants' appeal should be allowed, and this action dismissed, with costs here and below.

CLUTE, J., agreed. Giving reasons in writing, he referred, upon the question of the lien, to Toronto Furnace Crematory Co. v. Ewing, 1 O.W.N. 467, and Mason v. Lindsay, 4 O.L.R. 365.

SUTHERLAND, J., dissented, for reasons stated in writing. He was of opinion that the appeal of the plaintiffs should be allowed and the defendants held personally liable for $400 and interest, and that the defendants' appeal should be dismissed, each with costs.

Defendants' appeal allowed; and plaintiffs' appeal dismissed; SUTHERLAND, J., *dissenting.*

BROWN v. ORDE—RIDDELL, J., IN CHAMBERS—MAY 20.

Appeal—Leave to Appeal to Divisional Court from Order of Judge in Chambers—Discovery—Slander.] — Motion by the plaintiff for leave to appeal from the order of MIDDLETON, J., ante 1230, dismissing an appeal from the order of MACTAVISH, Local Judge at Ottawa, directing the plaintiff to answer certain questions which he had refused to answer upon his examination for discovery. RIDDELL, J., said that, upon a careful consideration of the whole case, he could see no reason to doubt the soundness of the judgment from which it was desired to appeal; and he refused the application with costs. An unreported case in the Queen's Bench Division, McDonald v. Sheppard, was nearly in point; but he did not think any authority was necessary. The order to be without prejudice to any motion the plaintiff may be advised to make for the amendment of the pleadings, etc., etc. J. King, K.C., for the plaintiff. H. M. Mowat, K.C., for the defendant.

GRICE v. BARTRAM—KELLY, J.—MAY 20.

Contract—Construction—Purchase of Assets of Company—Assumption of Liabilities—Liabilities Assumed "without Corresponding Value"—Surrounding Circumstances and Object—Transfer of Shares—Rectification of Contract—Damages—Loss of Dividends—Counterclaim.]—Two actions were brought by the plaintiff against the defendant in respect of transactions arising out of agreements relating to dredging operations, and were consolidated. The consolidated action was tried before KELLY, J., without a jury, at Toronto. The defendant was interested in a company known as the Cape Breton Dredging Company Limited. On the 26th April, 1909, the plaintiff and defendant made an agreement to the effect that the defendant was to organise and incorporate a new company, to be known as the General Construction and Dredging Company Limited, and to have transferred to it the assets of the Cape Breton company, the plaintiff agreeing to invest money in the enterprise, for which he was to receive shares in the new company. On the 1st May, 1909, this agreement was cancelled and a new agreement of that date substituted therefor, the purport of which was the same, but the terms different. The General Construction and Dredging Company Limited was incorporated on the 4th May, 1909. On the 11th May, 1909, the defendant and the Cape

Breton company made an agreement for the purchase by the defendant of that company's plant and dredging contracts with the Dominion Government, the consideration being the transfer by the defendant to that company of 1,455 fully paid-up shares in the new company and the assumption by the defendant of all existing liabilities of the Cape Breton company. On the same day an agreement was made between the defendant and the new company for the sale by the defendant to that company of what the defendant had acquired from the Cape Breton company, in consideration of the transfer by the new company to the defendant of 2,500 fully paid-up shares and the assumption by the new company of the old company's liabilities. During the season of 1909, dredging operations were carried on by the new company with the plants so purchased. Misunderstandings arose between the plaintiff and defendant relating to the liabilities of the old company; and, in order to settle the differences, an agreement was made between the plaintiff and defendant on the 23rd February, 1910, by which, among other things, the defendant agreed that the assets referred to in the agreement of the 1st May, 1909, should be turned into the new company fully paid and free from all incumbrances, and that any liabilities of the old company "assumed by the (new) company without corresponding value" should be paid by the defendant and should not fall on the company. In the first action the plaintiff alleged that liabilities of the old company to the amount of $34,436.83 were paid by the new company, which, under the agreement of the 23rd February, 1910, the defendant should pay to the new company; and the plaintiff claimed a judgment directing the defendant to make such payment, and $50,000 damages for breach of the agreement. KELLY, J., said that the language of the last agreement ("without corresponding value") was not of itself such as to make it possible to arrive at the intention of the parties; and it was proper to consider the circumstances and the object which the parties had in view: River Wear Commissioners v. Adamson (1877), 2 App. Cas. 743, 763. Upon consideration, he was of opinion that, if any effect or meaning was to be given to the words "without corresponding value," it might reasonably be held that it was contemplated that the liabilities from the time Thompson's inspection was completed (that is, the 18th March, 1909, before the agreement of April, 1909), would be assumed by the new company, and that the liabilities down to that time were liabilities assumed "without corresponding value," and which should be paid and discharged by the defendant. On this basis, and allowing certain credits to the

defendant, the learned Judge find that what the defendant should pay to the new company is the amount sued for, less $22,875.65, and less such parts of the accounts and liabilities of the old company (included in the $34,436.83) as, under a proper apportionment and adjustment, are applicable to the period beginning on the 18th March, 1909. The defendant should also pay interest from the 23rd February, 1910, on any amount payable by him, until the respective times of payment. If the parties fail to make a proper division and apportionment as of the 18th March, 1909, and to arrive at the amount of interest payable by the defendant, there will be a reference to the Master in Ordinary for that purpose.—In the second action, the plaintiff asked for an order directing the defendant to transfer to him 100 shares of $100 each, fully paid-up, of the capital stock of the new company, under a clause in the agreement of the 23rd February, 1910. The defendant asked for a rectification of that clause. The learned Judge said that the defendant had not shewn that there was mutual mistake or misrepresentation or any other ground for having the contract rectified or modified; nor had he established any right to be relieved from the obligation to transfer the 100 shares. The plaintiff was, therefore, entitled to a judgment directing that they be transferred to him.—The learned Judge also said that the only damage that the plaintiff had suffered by reason of the defendant's non-payment of the liabilities was in the loss of dividends; and that would be satisfied, so far as the defendant was responsible for it, by the payment of principal and interest as before directed.—By counterclaim, the defendant made certain claims, one being from an injunction restraining a sale by the plaintiff of shares of the new company. This claim was the subject of another action between the same parties (Bartram v. Grice, ante 1296), and was therein disposed of. Counterclaim dismissed. Further directions and costs reserved until after the Master's report. W. M. Douglas, K.C., and J. R. L. Starr, for the plaintiff. F. E. Hodgins, K.C., and W. R. Wadsworth, for the defendant.

RAINY RIVER NAVIGATION CO. v. ONTARIO AND MINNESOTA POWER CO.—MASTER IN CHAMBERS—MAY 21.

Writ of Summons—Service on Foreign Company—Motion to Set aside—Assets in Ontario—Necessary Party to Action—Con. Rule 162—*Leave to Enter Conditional Appearance.*]—In an action against two companies, the Ontario and Minnesota Power

Company and the Minnesota and Ontario Power Company, the latter, being a foreign company, moved to set aside service upon it of the writ of summons and statement of claim and order therefor. The order was made on the ground that the Minnesota company was a necessary party to the action against it and the Ontario company. The argument on the motion was confined to the question of whether the Minnesota company had any assets in Ontario, either as being part owner of the dam or doing business in this province. In confirmation of the latter ground, a letter was exhibited from the Minnesota company, dated the 5th March, 1912, on which was found the following heading: "Plants Located. International Falls, Minnesota, Fort Frances, Ontario." That letter was signed by Mr. Backus as president, he being admittedly also the president of the Ontario company. That the dam and the works served thereby were to any extent the property of the Minnesota company was denied by its solicitor, speaking from information given to him by Mr. Backus. The Master said that, even if that were so, there remained the fact that the Minnesota company held itself out as having a plant located at Fort Frances. How far this was true, and whether, if true, it would justify the order now sought to be set aside, could not be decided at this stage, on conflicting affidavits. Following the decision in Farmers Bank of Canada v. Heath, ante 682, 805, an order was made dismissing the motion (costs in the cause) and allowing the Minnesota company to enter a conditional appearance. The Master said that it was not improbable that, when the matter had been further elucidated, the action, as against the Minnesota company, might be discontinued. It might then appear that the foreign company was not a necessary party to the action (nor within any other provisions of Con. Rule 162). That was the ground on which the order was made, and one which, if true, would support that order, apart from any question of clause (*h*) of Con. Rule 162. Glyn Osler, for the applicant. Featherston Aylesworth, for the plaintiffs.

GROCOCK V. EDGAR ALLEN & CO. LIMITED—MASTER IN CHAMBERS —MAY 21.

Particulars—Statement of Claim—Breach of Contract—Discovery.]—This action was brought to recover $15,000 damages for alleged breach of a contract made in September, 1910, at Sheffield, England, where the defendants had their head-office—also carrying on business in Ontario. The defendants moved,

before pleading, for particulars of the statement of claim in certain respects, after a request therefor had been refused. The statement of claim set out, in paragraph 2, that the plaintiff was appointed representative of the defendants for Ontario, on the terms set out in a letter from the defendants to the plaintiff dated the 16th September, 1910. In paragraph 3, however, it was said that the plaintiff accepted the engagement "upon the representations made by the directors of the defendant company that the company then had a very large number of customers in Ontario . . . which was untrue, as the directors knew . . . and that the commission to be allowed him on sales in Ontario would, with the monthly salary of $85, amount to such a substantial sum as to warrant the plaintiff accepting the engagement, which he accordingly did." The Master said that, as the plaintiff by this paragraph sought to enlarge and vary the terms of the letter of the 16th September, the plaintiff should state: (1) who were the directors who made the representations; (2) whether verbally or in writing; (3) what minimum was stated which would increase the salary to a substantial sum, and what that was. In paragraph 4 it was alleged that on the plaintiff's arrival in Ontario the defendants' manager (1) refused to allow the plaintiff to act as their representative in or over a large part of Ontario; (2) interfered with him in his negotiations for business; (3) refused and delayed to fill orders which he procured; (4) finally ordered him to cease work for the defendants, and, seven and a half weeks thereafter, dismissed the plaintiff from their employ. Particulars should be given under this paragraph as to the various alleged wrongdoings of the defendants' manager, to shew: (1) if the refusal was in writing or verbal—if the latter what was said and where it was spoken; (2) this may be left for discovery; (3) one or two at least of the most important instances should be given; (4) if this dismissal was in writing or by parol, and, if the latter, then where and in what terms. In paragraph 5 it was said that the defendants had not accounted to the plaintiff for all sales made or contracts taken in Ontario for which the plaintiff was entitled to commission, and had refused to pay to the plaintiff the amount due him. Of this paragraph, the Master said, particulars should be given such as were ordered in the similar case of Blackley v. Rougier, 4 O.W.R. 153. In paragraph 6 it was said that the defendants, in breach of their agreement, did not give the plaintiff the necessary assistance and support which he was to have in order to make sales of the defendants' goods. Particulars of this (if really required) could be had on examination for

discovery. An order should go as above set forth, to be complied with in two weeks; costs in the cause; time for delivery of statement of defence to run only from the delivery of the particulars ordered. H. E. Rose, K.C., for the defendants. C. A. Moss, for the plaintiff.