The
Ontario Weekly Notes

Vol. IV. TORONTO, OCTOBER 25, 1912. No. 6

HIGH COURT OF JUSTICE.

RIDDELL, J., IN CHAMBERS. OCTOBER 14TH, 1912.

GERBRACHT v. BINGHAM.

Jury Notice—Striking out—Practice—Con. Rule 1322—*Action against Surgeons for Malpractice—Question of Fact.*

Motion by the defendant Bingham for an order striking out the jury notice.

E. F. Ritchie, for the applicant.
J. H. Spence, for the plaintiff.
S. G. Crowell, for the defendant Easton.

RIDDELL, J.:—The action is for malpractice against two surgeons. The plaintiff by the statement of claim alleges that the defendants left certain gauze within the plaintiff's body after an operation, which had to be subsequently removed; and he charges negligence and want of skill. Dr. Easton, one of the defendants, says that Dr. Bingham had sole charge of the operation, and that he (Easton) was not negligent; Dr. Bingham says that he performed the operation with skill and in the proper manner.

In Bissett v. Knights of the Maccabees (1912), 3 O.W.N. 1280, I pointed out that, since the change in the Rule,* "the Judge in Chambers is called upon to exercise his judgment as to how the case ought to be tried; he cannot pass that responsibility over to any one else—and, if it appears to him that the case should be tried without a jury, he must—he 'shall'—direct accordingly."

I have no kind of doubt that an action of malpractice against a surgeon or physician should be tried without a jury—and I

*See Con. Rule 1322, passed on the 23rd December, 1911.

am strengthened in that opinion by the almost if not quite universal practice for twenty years.

At the bar, I had very many cases of this kind; and I never saw one tried with a jury since about 1887.

Town v. Archer (1902), 4 O.L.R. 383, Kempffer v. Conerty (1901), 2 O.L.R. 658 (n.), and McNulty v. Morris (1901), 2 O. L.R. 656, may be looked at.

It is said, however, that this case will or may turn upon one simple question of fact, "Did the operating surgeon leave a piece of gauze in the body of the patient?" But, while that may be so as regards one surgeon, it is not so as regards the other—and in any case it may have been good surgery to leave the gauze as it is alleged to have been left.

Even if it were the case that there would be but the one question, and that a question of fact, to try, in addition to the damages, I should still be of the opinion that such a fact should be passed upon by a Judge.

Shortly before leaving the Bar, a case of malpractice, in which I was of counsel, came on for trial before Mr. Justice Meredith at Brampton. The sole question (outside of damages) was one of fact—Did the operating surgeon direct the nurse to fill the rubber bag (upon which the patient was to lie during the operation) with boiling water? Mr. Justice Meredith, the trial Judge, nevertheless, dismissed the jury, and tried the case himself.

The present is by no means so simple a case; and I think the jury notice should be struck out.

Costs in the cause.

RIDDELL, J., IN CHAMBERS. OCTOBER 15TH, 1912.

*RE BAYNES CARRIAGE CO.

Evidence—Witnesses on Pending Motion—Production of Documents—Power to Compel—Company—Winding-up—Petition—Dismissal—Previous Order.

Motion on behalf of the petitioners in a winding-up proceeding for an order that the vice-president and secretary of the company do, upon their examination as witnesses on the pending motion to wind up the company, produce the books of the com-

*To be reported in the Ontario Law Reports.

pany and the statements, etc., of the auditors of the company, and "all other documents and papers in writing of the said company which may be called for on their examination, and that the said company do produce such books, papers and documents."

Grayson Smith, for the petitioners.
H. A. Burbidge, for the witnesses.

RIDDELL, J.:—Upon the argument, much was said by counsel opposing the motion as to the want of good faith on the part of the petitioners or one of them, the fatal defects in the petition, etc., etc. But with all that I have nothing whatever to do. The Chancellor has decided that these witnesses may be examined on this proceeding—ante 30—and, so long as that order stands, it must be held that the examinations are proper. See also Re McLean Stinson and Brodie Limited (1911), 2 O.W.N. 435.

Whatever may be the rule in England, our Con. Rules make it the duty of a person under examination to produce (if called upon) all books, papers, and documents which he would be bound to produce at the trial: Con. Rules 448 sqq., 490, 491, 492. These Rules have been in existence, in substance, for years.

I do not think that the order can be made as asked.

[Reference to Alexander v. Irondale Bancroft and Ottawa R.W. Co. (1898), 18 P.R. 20; Russell v. Macdonald (1888), 12 P.R. 458; In re Emma Silver Mining Co. (1875), L.R. 10 Ch. 194—distinguishing these cases.]

The principle is obvious—a witness is put forward by a party to a proceeding, who makes certain statements under oath; it is desired to shew by his own books or those of the person who puts him forward that his statements are not true. Such books must be produced to test his accuracy; when he is under cross-examination, they will be used for that purpose and to prove that his evidence is not to be relied upon. . . .

These cases are far from deciding that where a party desires to obtain evidence upon a motion, and subpœnas a person to give such evidence, he may also compel him to produce books, etc., to add to what he is to say—or to enable him to become possessed of facts not now within his knowledge.

I think the motion must be refused, with costs payable forthwith, as the witnesses are not parties to the petition.

I am by the company asked to dismiss the petition. This I cannot do. The Chancellor's judgment implies the validity of the petition. If the petition were of such a character as that it could be dismissed for the reasons advanced now by the company,

it was so when the matter was before the Chancellor. If the grounds were not taken or brought to the attention of the Chancellor, the fault does not lie with the Court.

I do not dismiss the petition, but enlarge the hearing of it sine die; either party to bring it on, on two days' notice. Costs of this enlargement to be to the petitioners in any event.

DIVISIONAL COURT. OCTOBER 15TH, 1912.

*ROBINSON v. OSBORNE.

Limitation of Actions—Possession of Land—Successive Intruders—Break in Occupation—Ejectment—Proof of Plaintiff's Title—Possession by Predecessor.

Appeal by the defendant from the judgment of the County Court of the County of Halton, in favour of the plaintiff, in an action to recover possession of a lot of land (10) in the village of Bronté.

The defence was the Statute of Limitations.

The County Court Judge found that the plaintiff proved sufficient paper title in himself to entitle him to have the actual and visible occupation of the land, if his title and right had not been extinguished under the statute; and that the defendant had failed to prove actual, continuous, open, visible, and exclusive occupation of the land, either by himself or those under whom he claimed in succession, for a period of ten consecutive years.

The appeal was heard by RIDDELL, KELLY, and LENNOX, JJ.

W. Laidlaw, K.C., for the defendant.

J. P. MacGregor, for the plaintiff.

RIDDELL, J. (after setting out the facts), said that if the possession of Dobson (the defendant's predecessor as an intruder) had been such as to answer the statute, the defendant could have taken advantage of it, even though his deed covered lot 9 only. . . .

[Reference to Simmons v. Chipman, 15 O.R. 301; Burrows v. McCreight, 1 Jo. & Lat. at p. 203; Dixon v. Gayfere, 17 Beav. 44; McConaghey v. Denmark, 4 S.C.R. 609; Trustees Executors and Agency Co. v. Short, 13 App. Cas. 793;

*To be reported in the Ontario Law Reports.

Armour on Titles, 3rd ed., p. 306; Willis v. Earl Howe, [1893] 2 Ch. 545; Johnson v. Brock, [1907] 2 Ch. 533.]

The law is as laid down by Strong, C.J., in Handley v. Archibald, 30 S.C.R. 130, 137. . . .

If then the defendant could prove a continuous occupation adverse to the owner, his case would be made out. But there is a fatal gap of a whole year during Dobson's time. Neither he nor his tenant Hart exercised any acts of ownership on the land. The very stringent rule in the Short case, supra, must, therefore, be applied, and it must be held that the defence of the statute has not been made out.

Some argument was addressed to us that the plaintiff had not made out his case. But he proved possession by his predecessor in title: that was prima facie evidence of a fee simple: Allen v. Rivington, 2 Wms. Saund. 111; Doe v. Webber, 1 A. & E. 119; Doe v. Billyard, 3 Man. & Ry. 111; Doe v. Barnard, 13 Q.B. 945; Wallbridge v. Gilmour, 22 C.P. 135, 137; Williams and Yates on Ejectment, 2nd ed., p. 250.

KELLY and LENNOX, JJ., agreed in the result, each stating reasons in writing.

Appeal dismissed with costs.

LENNOX, J. OCTOBER 16TH, 1912.

GUNDY v. JOHNSTON.

Solicitors—Costs and Charges—Statute Fixing Amount of Costs of Litigation Payable to Client—2 Geo. V. ch. 125, sec. 6—Construction and Effect—Solicitors Act, sec. 34—Premature Action by Solicitors—Delivery of Bill—Necessity for—Dismissal of Action without Prejudice to another.

Action by a firm of solicitors for the recovery of solicitor and counsel fees.

M. Wilson, K.C., for the plaintiffs.
M. Houston and A. Clark, for the defendant.

LENNOX, J.:—The plaintiffs sue for the recovery of solicitor and counsel fees. They delivered a signed bill of costs on the

8th May last, the principal item of which was set out as follows:—

1912. April 15. Solicitor and client costs in litigation over by-law No. 17 of 1910 of the Township of Tilbury East, concerning the Forbes Drainage Works, both in the High Court and in the Court of Appeal, as settled by agreement between the parties, and fixed by statute of the Province of Ontario passed on or about April 15, 1912, which costs as settled and fixed as aforesaid were by the said statute directed to be paid by the Township of Tilbury East to you.....$1,800.00

There were other items amounting to 84.68

1,884.68

Payments on account are admitted, amounting to ... 575.00

The plaintiffs claim to recover a balance of.....$1,309.68 with interest from the time the Act was assented to, the 16th April, 1912.

The retainer of the plaintiffs is not disputed, nor their right of lien upon the money payable by the Township of Tilbury East; but, as far back as May last, at all events, the defendant demanded and insisted upon the delivery of an itemised bill. A letter of the 8th May to the plaintiffs, from the solicitors then acting for the defendant, defined the attitude of the defendant in this way: "The bill that you gave us this morning is not a detailed bill, and we require a detailed bill from beginning to end so that we can have them (it) taxed. If you refuse to deliver your bill, we shall be obliged to make an application for an order in the usual way under the Rules. If you will read the statute, you will see that Mr. Johnston gets the $1,800, and not you. We again say that we do not deny your lien, and our client is ready and willing to pay you whatever you are entitled to, so soon as the bill is taxed."

There are some minor matters; but, as indicated in the letter quoted from, the substantial question is this: Is the defendant concluded by the provisions of the private Act referred to, or is he entitled to the delivery of a bill of costs shewing how the $1,800 is made up, and to an opportunity for taxation, before being called upon for payment?

Section 34 of the Solicitors Act, R.S.O. 1897 ch. 174, provides that no action shall be brought until one month has elapsed after

delivery of a bill. The section of the statute referred to in the plaintiffs' bill of costs—2 Geo. V. ch. 125—is sec. 6: "The Township shall pay to the plaintiff James Johnston, his costs, as between solicitor and client, in the litigation over the said by-law, both in the High Court and in the Court of Appeal, and such costs are hereby fixed at eighteen hundred dollars."

The plaintiffs submit that this private Act supersedes the ordinary right of the client to have a bill delivered, and an opportunity for taxation, before being called upon to pay; and that it finally fixes the costs in this case at $1,800, not only as between the Township of Tilbury East and the defendant, but between the defendant and the plaintiffs as well.

I am unable to accede to this proposition. It is true that "a statute is the will of the Legislature," and that the will of the Legislature, acting intra vires, whether reasonable or unreasonable, just or unjust, is supreme. If this enactment is to shut out all right of information and inquiry, it is glaringly unjust to the defendant; but, if it is clearly the legislative will, there is no redress except by its repeal: Maxwell on Statutes, 4th ed., p. 5. But the presumption is, that the Legislature intended what is fair, reasonable, convenient, and just; and, if the language is capable of two interpretations, that which avoids an injustice is to be adopted: Maxwell, pp. 285, 299, 300. It is not to be presumed that the Legislature intended to confiscate the property or encroach upon the rights of any one; and, if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt: Western Counties R.W. Co. v. Windsor and Annapolis R.W. Co., 7 App. Cas. at p. 188; Commissioners of Public Works v. Logan, [1903] A.C. 355.

In construing a statute and ascertaining the intention of the Legislature, the preamble, context, history, and object of the enactment is to be taken into account: Maxwell, pp. 37 and 78. It is to be presumed that the Legislature did not intend to interfere with the existing law beyond what it declares or beyond the immediate scope and object of the statute: Maxwell, p. 152.

The services in respect to which the $1,800 is claimed were rendered in connection with the defendant's opposition to a drainage by-law of the Township of Tilbury East, No. 17. The judgment of the Drainage Referee was against the defendant, with costs, and against all the other appellants. The defendant alone appealed, and he succeeded in quashing the by-law in the

Court of Appeal, with costs against the township. This relieved him of assessment in respect of the drainage works.

What, then, was the object of the private Act? The object was the relief of the Township of Tilbury. The municipal council had diverted the general funds of the township, to provide moneys for which only the ratepayers of the drainage area should be liable; and the object was to enable the council to recoup the township.

The defendant occupied a position of exceptional advantage. He was free from the by-law, free from taxation, and the township was liable for his costs. He was not seeking legislation; he was opposed to legislation. He engaged the plaintiffs, and specifically he engaged Mr. Gundy, of the plaintiffs' firm, to prevent legislation, or, failing in this, to see to it that the relief granted to the township did not invade or impair the defendant's rights.

There was no suggestion of interference in any way whatever with the contractual or statutory relations existing between the plaintiffs and the defendant. Such a thing was not contemplated by the parties to this action, was not within the purview of the relief sought by the municipality, and could not be in the contemplation of the Legislature.

The defendant was physically unable to come to Toronto. He sent his son Thomas to supplement the efforts of his lawyers or to assist them. The son was a special agent, with powers limited within the scope of his instructions. He had no power whatever to vary in any way the relations between the parties to this suit, much less to sweep away this beneficent statutory condition precedent to the recovery of costs; and he did not profess and was not asked to do so.

It was the manifest and absolutely imperative duty of Mr. Gundy, acting there in the absence of the defendant, not only to safeguard his client's interest against the municipality, but sedulously to guard him against any collateral embarrassment, inconvenience, or loss arising from careless or slovenly drafting; and, a fortiori, of course, absolutely to refuse an advantage to himself or his partners at the expense of his client. It would indeed be an extraordinary thing, if, while representing the defendant as solicitors and counsel, and bound to protect him, the plaintiffs could by a side-wind and by doubtful implication legislate themselves out of a long-established legislative disability—the inability to sue until a signed bill had been delivered; and I would certainly think it unfortunate if, notwithstanding

the limited scope and object of the Act, the clearness of the language employed compelled me to give effect to the plaintiffs' contention. But it does not. On the contrary, I am clearly of the opinion that the Legislature never intended to do more, and upon a proper construction of the language does not do more, than: (a) provide for the payment *to the defendant* of the defendant's costs as between solicitor and client; (b) determine that as between these parties, and only as between these parties, the sum which the Legislature will compel the municipality to pay and the defendant to accept is to be $1,800.

A statutory contract, in fact, between these parties; the only parties before the Legislature. The solicitors were not acting for themselves; they were there to represent the defendant, and the defendant alone. They had no personal interest in the matter whatever. The money, when paid, is the money of the client; and, if paid to the solicitors, they receive it as trustees and agents of the client: Re Solicitor, 21 O.L.R. 255, affirmed in appeal, 22 O.L.R. 30.

But there was no agreement at all between the plaintiffs and defendant for the Legislature to confirm; and in fact there could be no binding executory agreement between them before delivery of a bill in conformity with the statute: In re Baylis, [1896] 2 Ch. 107; and with this decision Belcourt v. Crain, 22 O.L.R. 591, and the English cases there referred to, do not conflict; nor do any of them relax the vigilance with which the Courts have been accustomed to guard the client's rights concerning taxation. On this latter head, Re Solicitor, 14 O.L.R. 464, and Re Mowat, 17 P.R. 180, may also be referred to.

It is perhaps right to add that my reference to the duty of a solicitor is not to be taken as an indirect reflection upon the conduct of Mr. Gundy, but merely for the purpose of defining how I should approach the interpretation of the private Act in question. On the contrary, I formed the opinion that Mr. Gundy acted throughout the legislative proceedings with the utmost good faith, and with skill and judgment.

In my opinion, the action cannot be maintained. I have not referred to the other items of the bill; but, with the exception of "costs re Hickey," $5, all the charges relate to this drainage matter, and are all included in the same bill. In any event, they constitute one cause of action; and the plaintiffs could only have judgment upon them separately if they were prepared to abandon their other claim. I may say, too, in view of the possibility of an appeal, that, if I were giving judgment upon these items alone, it would be without costs, as the litigation arose in reference to the $1,800 item alone.

The action, then, will be dismissed; and, the parties each standing upon what they assumed to be their legal rights, it will be dismissed with costs. The plaintiffs will have the right reserved to them of suing again. I trust, however, that further litigation may be avoided.

RIDDELL, J., IN CHAMBERS. OCTOBER 17TH, 1912.

ROSCOE v. McCONNELL.

Jury Notice—Action for Declaration of Trust in Respect of Land—Exclusive Jurisdiction of Chancery—Ontario Judicature Act, sec. 103—*Striking out Notice.*

Motion by the defendant to strike out the jury notice filed and served by the plaintiff.

Grayson Smith, for the defendant.
J. P. MacGregor, for the plaintiff.

RIDDELL, J.:—The statement of claim sets out that T. McConnell, the father of the parties, was in his lifetime the owner of certain lands in Toronto; that, suffering heavy losses, he was forced to have "the lands he bought and sold in his . . . real estate business, held in the names of various nominees, as trustees for him, pending their resale; that he bought the lands in question and put them in the name of one J. H. S., an employee of his, as trustee for him; that a mortgage was made by J. H. S. to S. C. S., and the proceeds applied in improving the property, building on it, etc. The mortgage was collateral to certain notes made by T. McConnell, upon which his son, the defendant, was also liable; and the defendant persuaded his father, T. McConnell, to have J. H. S. convey to him, the defendant, the said lands as security against his liability on the notes. This was done, S. C. S., who is a solicitor, preparing the conveyance. It is alleged (somewhat loosely) that this was "for the purpose of making the eldest son (the defendant) holding trustee for him (T. McC.), instead of the said J. H. S., until the said houses could be sold and the said advances repaid, when the father expected to be able from the profits to clear off all his old obligations and hold the remainder of the lands himself."

The plaintiff claims that this conveyance, though absolute in form, was to have the same effect as that to J. H. S., "with the additional proviso that when the said lands were reconveyed, the defendant . . . was to be released from his liability upon the . . . accommodation endorsements . . . ." T. McConnell went on collecting the rents for a time, when the defendant notified the tenants not to pay him any more, and "from that time forward the . . . defendant . . . has asserted all the rights of a mortgagee (sic) in possession." T. McConnell asked the defendant to convey the property to a purchaser, and he "refused so to convey and alleged that his father must first discharge the said liability of the defendant in respect of the said notes;" but he several times agreed to convey, upon payment of the amount charged upon the lands in favour of himself and S. C. S., amounting to less than $9,000. The plaintiff further alleges that the conveyance was procured by duress and misrepresentation. The defendant sold a part of the land to W. W. P. W. for $12,500; but he holds the rest of the property still. T. McConnell died, leaving a widow and issue, the plaintiff, the defendant, and three others. The plaintiff took out letters of administration. She sues on behalf of herself and all other the heirs-at-law of T. McConnell, and claims: (1) "a declaration that the defendant . . . holds the said lands as equitable mortgagee thereof from his father, the said T. McConnell;" (2) an accounting as such mortgagee in possession; (3) sale and division amongst parties entitled; (4) or partition; (5) a declaration as to the rights of all parties; (6) costs; and (7) general relief.

The defendant denies everything, claims estoppel against T. McConnell, etc., by reason of illegality of his alleged scheme, and alleges that the conveyance to him was intended to be an absolute conveyance.

A motion is made by the defendant to strike out the jury notice.

As the defendant has a conveyance of the property in form absolute, it is obvious that to obtain any kind of relief the plaintiff must have a declaration that the defendant is trustee or mortgagee. That kind of declaration never could be had from a common law Court, and it was necessary to apply to the Court of Chancery. The case accordingly comes within sec. 103 of the Ontario Judicature Act; and the jury notice must be set aside; costs to the defendant only in the cause.

The same result would have followed had it been necessary only to apply the new Rule 1322: Bissett v. Knights of the Maccabees, 3 O.W.N. 1280.

DIVISIONAL COURT. OCTOBER 18TH, 1912.

HOME BUILDING AND SAVINGS ASSOCIATION v. PRINGLE.

Mortgage—Judgment for Redemption or Sale—Final Order of Sale — Motion to Reopen Master's Report — Assignees of Equity of Redemption—Parties—Mistake—Sale of Part of Incumbered Estate—Position of Several Purchasers.

Appeal by the defendants Victoria McKillican and David A. Smith from the order of SUTHERLAND, J., 3 O.W.N. 1595.

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

C. H. Cline, for the appellants.

F. A. Magee, for the plaintiffs.

The judgment of the Court was delivered by RIDDELL, J.:— The facts are not fully disclosed, but, so far as they appear and are material, they are as follows.

One Peter Valley, on and prior to the 1st March, 1885, owned a considerable portion of land in the county of Stormont, and he upon that day mortgaged it to the Hamilton Provident and Loan Society for $1,900 and interest. He also on the 1st February, 1886, mortgaged the land to the same company for $150 and interest. Making certain payments, certain portions of the land were released from the mortgage at his request.

On the 26th March, 1887, he made conveyance of a certain lot, part of the said land, to one J.T., by a deed which contained covenants for quiet possession, further assurance, and "that he has done no act to incumber the said lands." The defendant McKillican claims under J.T. On the 24th May, 1887, Valley sold another lot to M.M., giving a similar deed. The defendant Smith claims under M.M.

On the 16th December, 1887, the defendant Pringle bought the equity of redemption under Sheriff's sale, and took a quit claim deed from Valley.

Thereafter, Pringle made deeds in like form of certain lots to individual purchasers. Some of these mortgaged to the plaintiffs, who acquired the position of the Hamilton Provident and Loan Society, the original mortgagees. The plaintiffs sold some of these lots so mortgaged to them, purporting to act under the power of sale in the mortgages made to them by the several

owners—but made a conveyance of the fee to the purchasers and discharged their first mortgage as against these lots. They applied all the proceeds of the sale upon the second mortgages without reference to the first mortgage.

In March, 1908, the plaintiffs brought an action against Pringle and other defendants (including McKillican and Smith) for $631 interest and costs, and, in default of payment, sale, possession, etc. Smith and McKillican defended on the Statute of Limitations, and said further that the plaintiffs had received sufficient to pay their mortgage off, principal and interest.

Judgment was given on the 25th February, 1911, under which a reference went to the Master at Ottawa: and he, on the 6th November, 1911, reported a balance of $819.80 due, including costs, etc.—$460 being the amount found due as principal on the two mortgages.

A motion was made by McKillican and Smith on the 8th June, 1912, to reopen the report, on the ground of mistake, etc. Mr. Justice Sutherland refused, and this is an appeal from such refusal.

The land being admittedly ample security for any amount which may be found due on the mortgages—and no great inconvenience being suggested against such a course—I think, if the appellants have any substantial grievance, they should be allowed an opportunity fully to explain and develope their case, and have such relief as the facts entitle them to—even if the omission to bring all the facts before the Master were due to the default of their own solicitor.

As the facts are not fully disclosed either on the material before us on the argument or on the further material furnished us, I do not think we should determine the rights of the appealing defendants at the present time. We should do no more than call the attention of the learned Master to the rule laid down in Fisher on Mortgages, 6th ed., sec. 1350, fully supported as it is in In re Jones, [1893] 2 Ch. 461; In re Darby's Estate, [1907] 2 Ch. 465: "By the sale of part of an incumbered estate the burden is thrown upon the residue in favour of the purchaser." See also our own cases: Maitland v. McLarty (1850), 1 Gr. 576; Tully v. Bradbury (1861), 8 Gr. 561; Heap v. Crawford (1864), 10 Gr. 442; Henderson v. Brown (1871), 18 Gr. 79; Egleson v. Howe (1879), 3 A.R. 566.

The modification of this doctrine in case of several purchases, spoken of by Christian, L.J., in Ker v. Ker (1869), 4 Ir. Eq. 15,

at p. 28, and by Warrington, J., in In re Darby's Estate, [1907] 2 Ch. at p. 470, may also be of importance.

Upon all the facts being brought out, the Master will be in a position to apply the law. In his report he should set out the facts upon which he proceeds, that in case of an appeal the Court may have all necessary material.

As it may turn out that the new facts are wholly immaterial or should have been brought out by the appellants, I think we should leave the costs of this appeal and of the motion before Mr. Justice Sutherland in the discretion of the Master.

DIVISIONAL COURT. OCTOBER 19TH, 1912.

RE CAMPSALL AND ALLEN.

Mines and Minerals—Recording Mining Claims—Priorities—Dispute — Appeal — Refusal of Mining Commissioner to Consider Merits of Staking—Extension of Time for Doing Work—Mining Act of Ontario, 1908, *secs.* 60, 62, 63, 65, 66, 80, 130, 140.

Appeal by W. Campsall and others from a decision of the Mining Commissioner of the 4th March, 1912.

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

J. J. Gray, for the appellants.

H. E. Rose, K.C., for the respondents.

The judgment of the Court was delivered by RIDDELL, J.:— On the 3rd July, 1911, the Mining Commissioner decided adversely to certain claims which are referred to in Re Burns and Hall (1911), 25 O.L.R. 168. The judgment is said to have been received at the Mining Recorder's office on the 5th July. On the 6th July, the respondents appeared at the Recorder's office with five claims based upon discoveries purporting to have been made that morning. The applications were regular in all respects in point of form; but the Recorder thought they should not be recorded, because the time for appealing to a Divisional Court from the decision of the Mining Commissioner had not run. The claims were accordingly filed under the provisions of sec. 62 (2) of the Mining Act of Ontario, 8 Edw. VII. ch. 21.

It is asserted by the appellants that certain discoveries were made for them on the 1st, 2nd, and 3rd January, 1912; they appeared at the Recorder's office on the 5th January, but were refused record, as they had not their licenses: sec. 60.

The judgment of the Divisional Court in Re Burns and Hall, 25 O.L.R. 168, having been reported to the Recorder, he, on the 6th January, without further application by the respondents, recorded their claims.

On the 16th January, the appellants, having obtained duplicate mining licenses, again tendered their claims, but the Recorder refused.

On the 20th January, an appeal was taken from this refusal, and also from the recording on the 6th January of the respondents' claims.

On the 23rd January, the Recorder granted the respondents an extension of time for the work: sec. 80.

Leave was obtained to appeal also from this extension.

On the 4th March, all three appeals came on before the Mining Commissioner; and he refused to go into the merits of the staking, etc., and dismissed the appeals.

This is an appeal from that decision.

I think the appeal must fail. Section 140 provides that "the Commissioner shall give his decision upon the real merits and substantial justice of the case"—but that means "the case which is properly before him." It does not mean that any claimant may raise an issue before him at any time, without regard to the provisions of the Act—and have the merits of that issue decided.

Section 62 (1) provides that when a mining claim is deemed by the Recorder to be in accordance with the Act, unless a prior application is already recorded, the Recorder must file it with his records; "and every application proper to be recorded shall be deemed to be recorded when it is received in the Recorder's office, if all requirements for recording have been complied with, notwithstanding that the application may not have been immediately entered in the record book." When the respondents presented their claims on the 6th July, they should have been recorded; and must be deemed to have been recorded as of that day.

In any case, they were properly recorded on the 6th January, before the appellants had any right to have theirs recorded.

They should then have proceeded the "dispute" under sec. 63—see secs. 65, 66—and had their dispute passed on by the Recorder under sec. 130 (2).

The Mining Commissioner rightly refused to go into the merits. Nor can we say that the Recorder was wrong in extending the time for doing the work. And it is plain that, the claims of the respondents being recorded, the Recorder was right in refusing to record those of the appellants.

All the appeals should be dismissed with costs.

We do not interfere with the proceedings said to have been taken under sec. 66 of the Act.

AIKINS v. MCGUIRE—MASTER IN CHAMBERS—OCT. 14.

Discovery—Examination of Persons for whose Immediate Benefit Action Prosecuted—Con. Rule 440—Affidavit—Insufficiency.]—In this action for specific performance, the defendant moved for an order, under Con. Rule 440, for the examination for discovery of Poucher and Percy, two persons alleged in the statement of defence to be partners of the plaintiff in the transaction in question. The only evidence in support of the motion was an affidavit of a member of the firm of the defendant's solicitors, which said: "F. B. Poucher and John Percy have admitted to me that they are interested in the lands in question in this action." The allegations as to this interest in the statement of defence were denied in the reply; and, therefore, the Master said, did not afford the defendant any assistance at this stage. It was admitted that the agreement on its face was with the plaintiff alone. And, even if the affidavit was to be given full effect to, it was not sufficient, for two reasons. It might be perfectly true that Percy and Poucher were interested in the lands "in question," without it being possible to hold that they were persons "for whose immediate benefit" the action was being prosecuted. Further, any such admissions by Percy and Poucher were not in any way binding on the plaintiff—nor, in face of his denial in the reply, could they be used against him. Reference to Stow v. Currie, 14 O.W.R. 61, 223, and cases cited; Minkler v. McMillan, 10 P.R. 506; Moffat v. Leonard, 8 O.L.R. at p. 520. Motion dismissed with costs to the plaintiff in the cause. If hereafter the defendant thinks it well to renew this motion, and that he can then support it by sufficient evidence, he may do so. J. T. White, for the defendant. A. F. McMichael, for the plaintiff.

RE HEWARD AND STEINBERG—RIDDELL, J.—OCT. 14.

Vendor and Purchaser—Title.]—Petition by a purchaser under the Vendors and Purchasers Act. The learned Judge, after consideration, said that he thought, on the whole, that the vendor had shewn a good title. Declaration accordingly. No costs. H. H. Shaver, for the petitioner. A. H. F. Lefroy, K.C., for the vendor.

WALLACE v. CANADIAN PACIFIC R.W. CO.—SUTHERLAND, J.—OCT. 14.

Negligence—Infant "Stealing Ride" on Cow-catcher of Railway Engine—Evidence—Nonsuit.]—Action by Edward G. Wallace, an infant, by his father as next friend, to recover damages for injuries alleged to have been caused by the negligence of the defendants in permitting the plaintiff to ride upon the cow-catcher of an engine, from which he fell. At the conclusion of the case for the plaintiffs, a motion was made on behalf of the defendants to dismiss the action. The learned Judge reserved judgment; and, subject thereto, the defendants put in their evidence, and the case went to the jury on questions submitted. The learned Judge now said that, having further considered the motion, he thought that it should be granted. He was unable to see that any evidence was submitted on the part of the plaintiffs from which it could be properly inferred that any of the alleged acts of negligence on the part of the defendants set out in the statement of claim caused or contributed to the accident. But, in any event, upon the undisputed facts as disclosed by the evidence of the plaintiffs, the sole cause of the accident was the deliberate, disobedient, and negligent conduct of the injured boy himself. He had been warned by his parents, the defendants' employees, and others, as to the danger, and appreciated it. He voluntarily assumed the risk of getting on the cow-catcher of the engine, when he saw that those in charge of it were not looking, and remained on it until the engine was put in motion. On then attempting to jump off, he fell, and the accident occurred. Action dismissed with costs, if asked. A. E. Fripp, K.C., for the plaintiffs. D. L. McCarthy, K.C., and W. L. Scott, for the defendants.

SMYTH v. HARRIS—RIDDELL, J.—OCT. 15.

Injunction—Nuisance—Locus Standi of Plaintiffs—Enlargement of Motion for Interim Injunction—Leave to Apply—Speedy Trial.]—Motion by the plaintiffs for an interim injunction restraining the defendants from operating his plant for the consumption of offal, etc., in such a way as injuriously to affect the plaintiffs' enjoyment of their neighbouring properties. RIDDELL, J., said that he had come to the conclusion that at least some or one of the plaintiffs could not be said to have no locus standi. Instead of now disposing of the motion, the learned Judge enlarges it before himself at the opening of the Toronto non-jury sittings on Monday the 4th November; reserving leave to the plaintiffs to bring on the motion sooner if the defendant is delaying in pleading or otherwise, or if for any other reason the plaintiffs may be advised to apply. It is manifest that a trial should be had without delay. H. E. Rose, K.C., for the plaintiffs. E. F. B. Johnston, K.C., and F. E. Hodgins, K.C., for the defendant.

DEUTSCHMANN v. VILLAGE OF HANOVER—DIVISIONAL COURT—OCT. 15.

Highway—Nonrepair—Fall on Sidewalk—Findings of Fact—Liability of Municipal Corporation—Appeal.]—An appeal by the defendants from the judgment of the Judge of the County Court of the County of Grey, in favour of the plaintiffs, in an action in that Court to recover damages for injuries sustained by the plaintiff Lydia Deutschmann by a fall on a sidewalk in the village of Hanover, alleged to be out of repair, and for damages resulting therefrom to her husband and co-plaintiff. Judgment was given for the plaintiff Lydia for $400 and for her husband $50. The appeal was heard by RIDDELL, KELLY, and LENNOX, JJ. RIDDELL, J., said that enough appeared upon the notes of evidence to justify the findings of fact made at the trial, and that the County Court Judge had correctly applied the law. KELLY and LENNOX, JJ., concurred. Appeal dismissed with costs. I. F. Hellmuth, K.C., and W. H. Kirkpatrick, for the defendants. D. Robertson, K.C., for the plaintiffs.

ALSOP PROCESS CO. v. CULLEN—MASTER IN CHAMBERS—OCT. 16.

Pleading—Statement of Defence—Action for Infringement of Patent for Invention—Attack on Patent Process—Offers of Settlement—Venue.]—In an action for an alleged infringement by the defendant of the plaintiffs' patent process for bleaching and ageing flour, the plaintiffs moved to strike out paragraphs 10, 11, 12, and 13 of the statement of defence as being embarrassing and irrelevant.—The 10th paragraph alleged that the plaintiffs' "process has been condemned and prohibited by legislative enactments in Minnesota and other States of the American Union, and has been condemned by public health boards in Great Britain and Europe, as being injurious to the health of the persons consuming the flour so bleached or aged and as being a fraud upon the innocent purchasers of the flour so aged or bleached." The Master said that this attack on the character of the plaintiffs' process was fully set out in the 9th paragraph, which was not objected to by the plaintiffs. The 10th paragraph, therefore, at best only indicated evidence in support of the 9th paragraph; and it did not seem possible that the opinions said to have been given by legislatures or health boards would be receivable at the trial of this action. If the allegations in the 9th paragraph were to be pressed at the trial, they must be supported by the testimony of experts and others given there, and tested by cross-examination and weighed in the judicial balance. For this reason, as well as in view of the decision in Canavan v. Harris, 8 O.W.R. 325, this paragraph should not be allowed to stand. See too Blake v. Albion Life Assurance Society, 35 L.T. R. 269, 45 L.J.C.P. 663, 4 C.P.D. 94.—Paragraphs 11 and 12 alleged certain offers of settlement made by the plaintiffs to the defendant before action. The Master said that these offers (even if admitted) were not relevant to the issues and could not be given in evidence even as to damages.—Paragraph 13 set out that Woodstock should be the place of trial. On a substantive motion (ante 114) effect was given to that contention; and it was now immaterial whether this paragraph was struck out or not. But perhaps it might as well go with the others.—Costs of this motion to the plaintiffs in the cause. R. McKay, K.C., for the plaintiffs. Grayson Smith, for the defendant.

WALKER v. WESTINGTON—BRITTON, J.—OCT. 18.

Water and Watercourses—Diversion of Surface Water by Adjoining Owner — Trespass—Injunction—Damages—Costs.]—Action by one of the co-owners of lot 10 in the 8th concession of the township of Hamilton against the owner of the adjoining lot 9 for an injunction against throwing water upon lot 10 and for damages. At the trial, the plaintiff abandoned the claim for damages, admitting that so far no damage had been sustained. BRITTON, J., said that, no damage being shewn, and the plaintiff asking for general relief and protection, not against any particular thing, such as obstruction in a stream, or continuing an open ditch, but that the defendant be restrained from committing in future any trespass by causing surface water to flow upon the plaintiff's land, an injunction should not be granted. The learned Judge was also of opinion, upon the evidence, that the plaintiff failed upon the main ground of his action, viz., that the defendant wilfully and wrongfully diverted water from its natural course and turned it upon lot 10. The questions were wholly questions of fact. Action dismissed with costs fixed at $100. The learned Judge said that the defendant's conduct before action warranted the relief of the plaintiff from the payment of some portion of the costs. F. D. Boggs, K.C., for the plaintiff. J. B. McColl and J. F. Keith, for the defendant.