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HIGH COURT OF JUSTICE.

DIVISIONAL COURT. NOVEMBER 25TH, 1912.

RICE v. SOCKETT.

Evidence—Expert Evidence—Building of Silo—Trial by Judge—Refusal of, to Observe 9 Edw. VII. ch. 43, sec. 10—Limitation of Number under—Expert, Definition of—Mistrial.

Appeal by the plaintiff from the County Court of the County of Wellington. Plaintiff sued for $180 as balance of the contract price for the building of a silo on defendant's farm. Defendant denied the allegations in the statement of claim and set up by way of counterclaim that the plaintiff did not build or complete the silo in accordance with the terms of plaintiff's contract with defendant, and that in consequence thereof he suffered loss and damage.

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

R. L. McKinnon, for the plaintiff.

C. L. Dunbar, for the defendant.

FALCONBRIDGE, C.J.K.B.:—The case was tried before the learned County Judge without a jury. He gave judgment dismissing the plaintiff's action with costs and adjudging that defendant should recover against plaintiff on his counterclaim $130 and costs.

From this judgment the plaintiff appeals on several grounds, only one of which, in my opinion, it is necessary to consider, viz., the refusal of the learned Judge to observe the provisions of 9 Edw. VII. ch. 43, sec. 10, which is as follows:—

"10. Where it is intended by any party to examine as witnesses persons entitled according to the law or practice to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the Judge or other person presiding, to be applied for before the examination of any of such witnesses."

The first witness of this class called was A. W. Connor, who is by profession a consulting engineer, and who is admitted by defendant's counsel to be an expert. The second witness was Charles Butler, whose business is that of cement construction. The third witness, who is alleged by plaintiff to be of this character, is Herbert Croft, whose business is concrete work, in which he has been engaged about nine years. The fourth witness is Charles Strange, who stated that his business was general concrete construction. At this stage the plaintiff's counsel pointed out that Mr. Dunbar, defendant's counsel, was limited to three expert witnesses. His Honour overruled the objection, saying simply, "we will take the evidence," and it was taken accordingly. The next witness called was George Day, and the same objection was raised by plaintiff's counsel. This witness is admitted by defendant's counsel to be an expert. The next witness, William Elliott, is a farmer and cattle dealer, who has a silo and professes to know what the object of a silo is, and what people should strive to obtain in order to get a perfect silo, and he passes an opinion upon this particular one.

If these six witnesses are all experts, three witnesses of that class more than the law allows have been examined. Mr. Dunbar contends that the only experts are Connor and Day, arguing, that the statute applies only to one possessed of science and skill —that is, a man of science having a school of science degree or other special technical education on the subject.

I do not find that this is a correct proposition. No authorities on this branch of the case were cited by either counsel.

It is to be observed that while the section in question is headed "expert evidence," and while the side-note says "limit of number of expert witnesses in action," yet the word "expert" is not used in the section itself: the phrase being, "persons entitled according to the law and practice to give opinion evidence."

The term "expert," from experti, says Bouvier, "signifies instructed by experience."

"The expert witness is one possessed of special knowledge or skill in respect of a subject upon which he is called to testify:" Words and Phrases Judicially Defined, volume 3, page 2594.

Dr. John D. Lawson, in "The Law of Expert and Opinion Evidence," 2nd edition, at p. 74, lays down as Rule 22, "Mechanics, artisans and workmen are experts as to matters of technical skill in their trades, and their opinions in such cases are admissible"; citing numerous authorities and illustrations.

"The derivation of the term 'expert' implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation; and one who is an old hunter, and has thus had much experience in the use of firearms, may be as well qualified to testify as to the appearance which a gun recently fired would present as a highly educated and skilled gunsmith": State v. Davis, 33 S.E. 449, 55 S.C. 339, cited in "Words and Phrases Judicially Defined, volume 3, page 2595."

In Potter v. Campbell, 16 U.C.R. 109, the Court of Queen's Bench held that a person not being a licensed surveyor is a competent witness on a question of boundary.

It is quite manifest, therefore, that these six witnesses were persons "entitled according to the law or practice to give opinion evidence."

Defendant's counsel, however, contends that even admitting that the statute has been disregarded there has been no miscarriage of justice. There would, of course, be no question about the matter if the case had been tried with a jury, but as it is I find myself unable to accede to this view. It would be impossible to determine the exact effect which the evidence of the three witnesses whose evidence was improperly admitted had on the mind of the Judge. Day, the fifth witness of this class was admittedly an expert, and a very forcible witness; and the learned Judge seems, on both branches of the case, to have attached great importance to the evidence of Elliott, the last witness who was called.

But, leaving out these considerations altogether, the mere refusal of the learned Judge to obey the plain provisions of the statute, in my opinion, constitutes a mistrial, and defendant's counsel (while it appears to have been unnecessary for him actively to oppose the objections), accepted and profited by the rulings of the learned Judge, and, therefore, there must be a new trial, with costs of the last trial and of this appeal to be paid by the defendant.

BRITTON, J.:—I agree.

SUTHERLAND, J.:—I agree.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 27TH, 1912.

REX v. BEVAN.

Intoxicating Liquors—Liquor License Act—Sec. 111, as Amended by 2 Geo. V. ch. 55, sec. 9—Construction of—Local Option Beer—Beer Pump—"Appliances" and "Signs"—Reasonable Belief—What Constitutes an Offence under the Act.

Motion to quash a conviction made by the police magistrate of Hamilton under section 111 of the Liquor License Act, as amended by 2 Geo. V. ch. 55, sec. 9.

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

MIDDLETON, J.:—Section 111 of the Liquor License Act as it stood before the amendment of 1912 was an eminently reasonable and easily understood provision. In effect it provided that the existence of a bar in any unlicensed premises and the display of liquor therein should be primâ facie evidence of unlawful sale.

The amendment makes that which was theretofore evidence of an unlawful sale "an offence against this Act;" and this makes it necessary to examine the statute with great care to ascertain precisely that which is raised from the rank of mere "evidence," and constituted "crime."

I pass by the very awkward and almost unintelligible form of the section, and endeavour to ascertain the real meaning. The section reads: "The fact of any person . . . shall be guilty of an offence against this Act." I assume that this may be read as though it provided that any person who does the thing mentioned shall be guilty, etc.

The things so rendered unlawful are "the keeping up of any sign . . . or having . . . a bar or place containing bottles or casks displayed so as to induce a reasonable belief that such house or premises is or are licensed for the sale of liquor, or that liquor is sold or served therein . . ."

"Liquor" in this Act means intoxicating liquor; and it is lawful to sell liquors that do not contain more than two and a half per cent. proof spirit, even if such liquors resemble in appearance and taste liquors that ordinarily contain more than the stipulated amount of alcohol. This has led to the manufacture of what in the evidence is called "Local Option beer."

The sole evidence in this case is that in an hotel which was once, but is not now, licensed to sell intoxicating liquor there is a bar, and on the bar a beer pump which pumps Local Option beer, and "all appliances" and "signs," consisting of calendars and advertising matter, that had decorated the bar and premises when the hotel had a license. The hotel still retained its name. The sign "Licensed to Sell" etc. was removed.

It is essential, to constitute an offence, that what is done should "induce a belief that" (a) premises in fact unlicensed are licensed, or (b) that liquor—i.e., intoxicating liquor—is "sold or served therein."

It is not for me to speculate why the Legislature should make it penal to have a bar so equipped as to induce a "reasonable belief" on the part of the thirsty wayfarer that he could therein obtain a beverage which might intoxicate, when there is in fact nothing to be had but beer containing "less than two and a half per cent. of proof spirits;" it may well be that the lack of the desired percentage can only be discerned by a trained and sensitive palate, and the average man seeking intoxication requires protection from such innocuous beverages; or the desire may be to protect the licensed house whose customers are being deluded by this hollow mockery into the belief that they are in a genuine bar. Be that as it may, it seems clear that there must be more than that which is necessary and proper for the sale of Local Option beer, before an offence is committed; some exhibition of bottles and casks such as usually contain real "Liquor," or some such display of suggestive advertising matter as would lead a reasonable man to the belief that in this unlicensed place liquor was sold. Mere "calendars and one thing or another" is not enough. The bottles, not only were not displayed, but were in the cellar, relics of a departed glory; and the "pump" might indicate the innocent "Local Option beer."

The motion should be granted with costs.

The magistrate should be protected.

BOYD, C. NOVEMBER 28TH, 1912.

CITY OF GUELPH v. JULES MOTOR CO.

Principal and Surety—Guarantee Bond—Construction of Agreement—Termination of Grant—Effect of—Variance of Contract to Prejudice of Surety—Meaning of 'Adjudged.'

Action by the City of Guelph against the United States Fidelity Co., as guarantors on a bond for $4,000 for security

for the payment by the Jules Motor Co. to the city of $13,000 under an agreement.

H. Guthrie, K.C., for the plaintiffs.
R. L. McKinnon, for the defendants.

BOYD, C.:—The written agreement contains promises by the Jules Motor Co. to do a number of things, and the breach of the contract as to any of them gives rise to an appropriate action for relief. Then the company failed to make payment of the first instalment of purchase money, and the City of Guelph could sue to recover that, and not insist on a revocation of the whole under the special power conferred by the agreement. The company also failed to keep up and maintain in the manufacturing establishment purchased from the City an adequate quantity and value of plant as provided for by the contract. This term was secured and guaranteed by the bond of the Fidelity company: and it is open to the City to sue for the breach of this contract, independently of the other. The mere fact that the City determined to put an end to the purchase under sec. 14 of the agreement and regain possession of the premises, and gave notice to this effect after the action was begun, does not interfere with the right to recover damages for breach of the bond, or disqualify the City from seeking that method of relief from the Court in addition to the other method of relief as to the property provided for in the mutual written agreement. The one does in no way conflict with the other; the termination of the contract as to the land does not discharge the vested right of action for damages on the bond against the principal and the surety. These two terms of the contract are severable, and the principal debtor has not attempted to defend but lets the claim go by default.

The 14th paragraph of the contract provides that the effect of giving notice to terminate the grant in 30 days declares that thereupon all rights and interests thereby created or then existing in favour of the company shall cease and terminate: but it does not follow that all rights and interests in favour of the City of Guelph, e.g. as to damages for breach, shall also end.

The other defences raised I practically disposed of at the hearing. The application to amend by setting up that the bond was not executed by the Jules Motor Co. should not be entertained, in view of the admission on the record that it was so executed, and when the defect at best is of a most technical character. The other question raised was that the contract be-

tween the principal and the City had been varied to the prejudice of the surety. This alleged variance was a matter contemplated and provided for in the original agreement of which the benefit is claimed by the Fidelity Company and of which that company was cognisant. The property had been mortgaged to the City and had come to its hands by reason of the liquidation of another manufacturing company; all the plant attached to the free-hold passed under the mortgage, but there was a claim as to "disputed machinery" about some articles, alleged to be chattels not important in value but enough to wrangle about. There was mention in the writings about having the claims between the city and the liquidator "adjudged," but with good sense the parties adjusted the matter out of Court at an outlay of $250 paid by the city to the liquidator. The property was sold by the City to the Jules Motor Co. subject to this claim for "disputed machinery" which was then outstanding. The word "adjudged" used by the parties in the agreement and bond is loosely used as contemplating some friendly determination, for in one of the last paragraphs of the agreement it is said that the "disputed machinery" shall be kept in store for the liquidator until such time as "the dispute regarding the same has been settled or disposed of."

The settlement was that the liquidator was owner of the articles and they were bought by the City for $250 and turned over to the Jules Motor Company at the same price. This was no variation of the original agreement: in the adjudication the claim was settled and the transaction is thus set out in the agreement of 23rd November, which is set up as a variation.

The extent of damages recoverable on the breach of the bond was fixed at the trial at $1,370. This is to be paid with costs of action by both defendants, and the Fidelity Company will have the right to recover as much as it can from the Jules Motor Co., which has since gone into liquidation.

LEITCH, J. NOVEMBER 29TH, 1912.

WALLER v. CORPORATION OF SARNIA.

Negligence—Corporation—Repair of Pavement—Use of Dangerous Material—Improper Implement—Independent Contractor—Duty of Corporation.

Action by William Waller and Reginald Waller for damages for injuries caused to the latter through the negligence of the defendants' servants.

R. V. Le Sueur, for the plaintiffs.
J. Cowan, K.C., for the defendants.

LEITCH, J.:—On the 30th December, 1908, the corporation of Sarnia entered into a contract under seal with Frank Gutteridge for paving Front Street from the north limit of George Street to the south limit of Wellington with three-inch creosote wood-block pavement on a concrete foundation.

The work was to be done to the satisfaction and under the supervision of the town engineer.

The contractor, Gutteridge, covenanted with and guaranteed the corporation that the pavement would continue in perfect condition for five years from the date of completion. The contractor further agreed with the corporation that he would repair and make good all settlements, defects or damage to any portion of the pavement occasioned by defective material or workmanship during the said period of five years, upon notification by the Chairman of the Board of Works or by the Town Engineer. The contractor also agreed to give, and did give the town a guarantee surety's bond to the satisfaction of the solicitor for the corporation, guaranteeing the repair and condition of the work for five years.

On the 29th November, 1909, the corporation passed a by-law under the local improvement clauses of the Consolidated Municipal Act to raise $24,405 for the payment of the pavement.

The pavement in the winter of 1909, by reason of defective workmanship and material heaved and became out of repair to such an extent that the defective spots interfered with the street cars.

On the 11th March, 1910, the corporation notified Gutteridge of the defects in the pavement and the necessity for repair. The corporation also notified the United States Wood Preserving Company, who had furnished the blocks to Gutteridge, and who entered into a bond with the corporation of Sarnia, dated 20th February, 1909, guaranteeing the pavement for five years and that the blocks were made of good material and would be in as good condition at the end of five years as they were when the pavement was completed.

The United States Wood Preserving Company undertook the repairing of the pavement, and supplied the plant, labour and material necessary to do the work. A Mr. Sutton was their foreman.

The work of repairing was being done on Front Street near the corner of Lochiel Street. Asphalt pitch, which required to be heated anywhere from 212 to 300 degrees, was poured in the

spaces between the blocks and over them. The pitch was heated in a large caldron which formed part of a furnace. The furnace was located on Lochiel Street about eight or ten feet from Front Street, and two or three feet from the sidewalk. The furnace was just such an object as would naturally attract the attention of a child and arouse his curiosity. Other children were attracted as well as the Waller boy.

The molten asphalt was essentially dangerous.

Byron Spark, the man who was handling the pitch, had had no experience in such work. No precaution was taken to prevent any one from going near the furnace and boiling pitch, or to protect children from accident.

The pitch was ladled out of the caldron and poured into pails with a ladle with a wooden handle which had been made out of a piece of pine board. When the ladle got partially filled with pitch, Sparks put it in the furnace to melt it out. This practice necessarily burned the handle of the ladle and weakened it.

The evidence is that the handle of the ladle should have been made of iron.

In pulling the ladle out of the fire the handle broke off, the ladle was dashed upon a heap of sand, and the boiling pitch was splashed on the child Reginald Waller, whose face was burned severely.

The accident took place on the 12th April, 1912. At that time the boy was under seven years of age.

Front Street near where the furnace was placed and where the pavement was being repaired is a very busy street.

I think the corporation was guilty of negligence in allowing the furnace to be placed on Lochiel Street so close to Front Street with its busy traffic. The corporation should have seen that there was a fence or some barrier to prevent children from going near the furnace and the hot pitch. They should have seen that the ladle with which the pitch was ladled into the pails had an iron handle, so that it could not be burned off or weakened by fire, and that the handling of such dangerous material as boiling pitch was done with a proper implement and by a skilled man.

I do not think that the corporation can absolve themselves from liability by the contention that the work was being done by an independent contractor. They permitted a dangerous implement to be placed in the street and permitted an essentially dangerous substance to be handled in the street without a proper ladle and without adopting any precaution to protect the public. Neither the city engineer nor the road commissioner nor any other official of the corporation paid any attention to the work, or did anything to guard the public.

The evidence is that the injury to the eye, mouth and nose of the boy, Reginald Waller, is permanent. The sight of the eye is not affected, but the lid will not close, so that the eye, when the boy is asleep, remains open. The nose is injured so that his breathing is affected. The doctor did good work in repairing the boy; by skin-grafting he managed to give the face a fairly good appearance, considering the extent of the burn.

There being no injury to his sight or hearing or to his hands, or feet, the boy will be capable of making himself a useful man, even if his looks have been marred.

The father of the boy, William Waller, who sues on his own behalf and as next friend of his son, Reginald Waller, expended $128 for medical attendance and for medicine and hospital fees. In addition to this was the attention to the burns for a considerable time, while they were healing.

I think if the father, William Waller, recovers $200, and Reginald Waller $1,000, the justice of the case will be met.

I, therefore, direct that judgment be entered for William Waller for $200, and for Reginald Waller for $1,000, with costs of suit.

DIVISIONAL COURT. NOVEMBER 29TH, 1912.

EVERLY v. DUNKLEY.

Will—Testamentary Capacity—Claim by Daughter to Moneys Deposited in Bank — Trust — Evidence — Joint Account — Survivorship—Conduct of Bankers.

Appeal by the defendants from the judgment of KELLY, J., reported 3 O.W.N. 1607, where the facts are set out.

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

O. L. Lewis, K.C., for the appellant.

M. Houston, for the respondent.

CLUTE, J.:—The plaintiff, as the executor of Elizabeth Kenny, deceased, brings this action to recover $542.17 from the defendant Esther Dunkley, and the Canadian Bank of Commerce. This sum stood to the credit of the testatrix, Elizabeth Kenny, in the Canadian Bank of Commerce at the time of her death, which occurred on the 27th February, 1912.

On the 9th March, 1912, the defendant, Esther Dunkley, with-

drew this sum from the bank and placed the same to her own credit in the same bank, and now claims it as her own.

The circumstances under which this claim is made, are as follows: The testatrix, Elizabeth Kenny, being ill, gave to her daughter, Esther Dunkley, a memorandum in writing in the following words: "Arrange my money in Esther Dunkley's name so she can draw it. Elizabeth Kenny. Chatham, August 18th, 1911." It is not disputed, as the evidence shews, that this was intended for the local agent of the Canadian Bank of Commerce, at Chatham. This instrument was taken to the bank, and on the 26th August, 1911, the defendant, Esther Dunkley, drew from the bank $5 and gave a receipt therefor in her own name, the money being in the Savings Bank Department. On September 2nd, 1911, Elizabeth Kenny drew $5 from the bank, signing her own name to the receipt, and on the 29th October a further sum of $35, signing her own name to the receipt.

On the 9th March, 1911, the defendant, Esther Dunkley, had the whole amount placed to her credit by signing a receipt therefor to the bank. The defendant claims this money upon two grounds: First, that there was a verbal trust declared in her favour by her father, whereby she was to receive certain moneys, of which this formed a part, after her mother's death. The trial Judge has found against this claim, and I think justly so. The evidence falls far short, in my opinion, of creating a trust in her favour.

A further claim is made that the late Elizabeth Kenny authorised a joint account, and upon her death the right to the money in the bank survived to Esther Dunkley. The memorandum above referred to was signed by Elizabeth Kenny while in the hospital; that on the day it was signed she (Esther Dunkley) took it to the bank, and on its being presented to the accountant at the bank he changed the heading of the deposit account so as to read as follows: "Made joint account August 18th, 1911, Elizabeth Kenny and Esther Dunkley, or either," after which she says she returned to her mother and told her that either of them could draw it, and that the mother was satisfied. The deposit book remained in the possession of the deceased until the time of her death. [Reference to the evidence of Esther Dunkley on these points.]

The first question is whether the money became the joint property of the mother and daughter during the mother's life-time? What is the meaning of the words, "Arrange my money in Esther Dunkley's name so she can draw it?" Draw whose money? Plainly, I think the mother's money, the intention being that the mother desired her money in the bank to be so placed

that the daughter could draw it instead of the mother drawing it. There is no indication or hint of intention to make a gift of the whole or any part to the daughter. The trial Judge says: "The present case is not one where the money became the property of the mother and daughter jointly. It was the mother's, and though the memorandum authorised it being placed in the daughter's name so that she could draw it, it remained the property of the mother, the daughter's power or rights being limited to the power to draw," and he finds that there was no intention on the part of the mother to make the daughter part owner of the money or to give it to her by survivorship. The money continued to belong to the mother, and on her death it became a part of her estate.

[Reference to Re Ryan, 32 O.R. 224, and to Hill v. Hill, 8 O.L.R. 710.]

It appears to me that . . there was no intention to make a present gift of any part of the property in the money so on deposit, to the defendant, the intention from the whole evidence being to authorise her, during her mother's lifetime, to draw from the bank such sums as might be required, and that probably it was her intention that after her death the daughter should have the balance. In Schwent v. Roetter, 21 O.L.R. 112, Hill v. Hill is distinguished, it being held that in the circumstances disclosed in the Schwent case, the money was during the joint lives joint property with right of survivorship. Of this the plaintiff was not able to satisfy the trial Judge, and upon the whole case I agree in the result at which he arrived.

The appeal should be dismissed with costs.

RIDDELL, J., delivered a written judgment in which he concurred in the result above arrived at.

SUTHERLAND, J., agreed with the judgment of RIDDELL, J.

SUTHERLAND, J. NOVEMBER 29TH, 1912.

RE VINE.

Administration—Claim of One to be Daughter of Intestate—Direction of Issue—Representation of Heirs.

Motion by the administrators of the estate of Frances Penton Vine and by William Vine and William Connon for payment out of Court of the shares of the said Vine and Connon.

J. M. Godfrey, for the administrators and two beneficiaries.
R. U. McPherson, for Mary Seagriff.
T. Hislop, for Ellen Agnes Haughton.
E. C. Cattanach, for the infants.

SUTHERLAND, J.:—On the 22nd January, 1910, Frances Penton Vine died intestate in Toronto owning certain real estate on Broadview Avenue, and leaving the following persons alleged by the applicants to be all the heirs entitled to share in the administration of her estate, viz., a son, William Vine; a daughter, Mary Seagriff; the following children of a deceased daughter, Sarah Ann Hibbitt, viz., Henry Hibbitt, George Hibbitt, James Hibbitt, Florence Crump, Edward Hibbitt, Frances Waring, and Edith Robertson, and three infant children of Charlotte Sorace, a deceased daughter of the said Sarah Ann Hibbitt, whose names are not mentioned in the material filed upon the application, but who were represented on the motion by the Official Guardian.

One William Connon has purchased the shares of the said George Hibbitt, James Hibbitt and Florence Crump in the estate. The Trusts & Guarantee Company, Limited, were appointed administrators of the estate.

It is said that all the assets of the estate have been realized and the accounts passed by the Surrogate Court of the County of York. The administrators have paid into Court to the credit of the estate under Rule 1258 the sum of $5,418.35.

This is an application for an order for payment out to William Vine and William Connon of their shares of the said estate.

A difficulty has arisen as to the amounts to which the respective heirs are entitled. It appears that in addition to the heirs hereinbefore mentioned one Ellen Agnes Haughton claims to be a daughter of the intestate and entitled to a one-fourth share in the estate. It was suggested on the application that one-quarter of the said $5,418.35 be allowed to remain in Court together with an additional $500, and that the balance be paid out to the parties claiming to be entitled, other than the said Ellen Agnes Haughton, and that an issue be directed to determine whether she is a lawful heir. I think that perhaps for the present all the money above $3,000 may well be retained in Court and that that sum may be paid out as follows:—

$1,000 to William Vine.

$1,000 to Mary Seagriff, and

$1,000 among the representatives of Sarah Ann Hibbitt in the proper proportions to which they are entitled, the applicant Connon to be paid the shares of the said George Hibbitt, James Hibbitt and Florence Crump.

I direct an issue to determine the fact of whether or not the said Ellen Agnes Haughton is a lawful daughter of the intestate, and in such issue she will be the plaintiff.

The contest now is really between her and the heirs. If the latter can agree upon some one of them to appear and represent all of such heirs, such person may be appointed for that purpose. If not, then all the heirs will be the defendants. The money being now in Court the administrators have practically no further interest in the matter. If it were not for the contention of Ellen Agnes Haughton, the difficulty in the way of the administration of the estate and distribution of the money would not have arisen and the other heirs would be entitled to receive the money. Under these circumstances the costs of the application may well, and properly should be left, I think, until the determination of the issue and then disposed of by the Judge who tries the same.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 30TH, 1912.

POLLINGTON v. CHEESEMAN.

Parties—Third Parties—Motion to Set Aside Third Party Notice—Employers' Liability Insurance—Terms of Policy—Action for Damages for Death of Employee—Dual Object of Third Party Procedure.

Motion by third parties for leave to appeal from the order of Mr. Justice Sutherland in Chambers on the 4th November, dismissing the appeal from the order of the Master in Chambers refusing to set aside a third party notice. See ante pp. 92 and 248.

T. N. Phelan, for third parties.

F. McCarthy, for the defendant.

MIDDLETON, J.:—The action is brought by an employee against the employer for damages by reason of injuries sustained, it is said, in the course of the plaintiff's employment.

The defendant is insured in the third party company against "loss by reason of the liability imposed upon him by law for damages on account of injuries sustained by his employees." The policy contains a number of limitations and provisions; inter alia, a stipulation that "no action shall lie aganst the company to recover for any loss . . . unless it shall be brought by the assured for loss actually sustained and paid by him in money in satisfaction of a judgment after trial of the issue."

There is a bonâ fide dispute as to the liability of the defendant to the plaintiff. The third party also contends that the liability, if it exists, does not fall within the terms of the insurance, and further contends that by reason of the clause quoted no proceedings can be taken against it until after the litigation between the plaintiff and the defendant has been determined and the plaintiff has recovered and the defendant has paid.

The learned Master took the view that the clause in question could not and did not exclude the application of third party procedure, or at any rate that, having regard to the principles laid down in Peettigrew v. Grand Trunk R.W. Co., 22 O.L.R. 23, and Swale v. Canadian Pacific R.W. Co., 25 O.L.R. 492, this question ought not to be determined upon a summary application, but should be left to be raised by the third party as a defence at the hearing. Mr. Justice Sutherland agreed with this view.

Upon the argument of the motion I was very much impressed with the view that the third party notice ought not to be allowed to stand, in so far as that proceeding was in reality an action by the defendant against the third party; as from the contract put forward by the defendant as the foundation of his proceedings it clearly appeared that any action would be premature.

On the other hand it was quite plain that to hold that the third party procedure did not apply, where a provision such as this is inserted in the policy, would be to frustrate one of the principal objects of the practice; the securing of one trial, and one trial only, of the issue between the plaintiff and defendant. The difficulty that existed before this practice was devised, viz., the possibility that there might be discordant findings between the tribunals called upon to pronounce between the plaintiff and defendant, and as between the defendant and the third party, was a real difficulty, and the remedy has been found most beneficial.

The true solution of the matter appeared to me to be found in recognition of the dual object of the procedure. The notice served upon the third party indicates this. He is notified, so that he may, if he wishes, dispute the plaintiff's claim against the defendant, and also that he may dispute, if he desires, his liability to indemnify the defendant; and even if it is clear that the contract with the defendant is so framed as to preclude the bringing of an action upon it before the defendant has actually paid, this does not altogether defeat the jurisdiction of the Court, and the third party procedure may well be invoked for the purpose of making the finding upon the issues as between the plaintiff and defendant binding upon the third party.

I, therefore, suggested to the parties the desirability of consenting to a modification of the order on the lines indicated; and I am now notified by counsel that they consent to the order being so modified. This being so, the order will simply provide for the modification suggested and that the costs of the application and of the third party proceedings be reserved to be determined in any litigation that may hereafter take place between the defendant and the third party. If there is no such litigation, then upon an application to a Judge in Chambers. I would suggest to the parties the desirability of further providing that the question of the liability of the third party to the defendant be reserved to be disposed of upon an issue to be directed in this action; this being less expensive than the bringing of a separate action.

MIDDLETON, J., IN CHAMBERS. DECEMBER 4TH, 1912.

CHARLEBOIS v. MARTIN.

Judgment Debtor—Examination of—Unsatisfactory Answers—Motion to Commit—Reasonable Suspicion.

Motion by the judgment creditor to commit the debtor or for a writ of attachment or ca. sa. against him, upon the ground that on his examination as a judgment debtor he refused to disclose his property and his transactions, and did not make satisfactory answers, and that it appears that he had concealed or made away with his property in order to defeat and defraud his creditors in general and the plaintiff in particular.

Harcourt Ferguson, for the judgment creditor.
A. J. R. Snow, K.C., for the judgment debtor.

MIDDLETON, J.:—The defendant was examined; and upon the first return of this motion it was admitted on his behalf that his examination was unsatisfactory. The matter stood, with the direction that the defendant should in the meantime submit to further examination. The further examination has now been had, and the motion is renewed; the judgment creditor contending that satisfactory answers have not yet been made, and that from the examination it appears that the debtor has concealed or made away with his property.

The examination is in one sense not satisfactory. This is accounted for partly by the fact that the debtor is a foreigner,

partly by the fact that he is an old man and garrulous, partly because he is suspicious of the examining counsel and is not over-candid, and partly by the fact that he does not appear to have the details of his transactions clearly in his mind.

One cannot read the examination without being impressed by the idea that it is quite probable that Richardson was not a creditor and that Richardson holds the money paid to him in trust for the debtor. Nevertheless, the judgment debtor has sworn to his indebtedness and that the payment made to Richardson was in satisfaction of that indebtedness; and whatever suspicions one may entertain, and whatever view one might be inclined to give effect to, if this evidence were the sole evidence upon the trial of an issue, I do not think it would be safe to say that from the statements made by the debtor it appears that a fraudulent disposition had been made of this property.

In the written argument handed in by counsel for the judgment creditor he says that what appears is "at least sufficient to raise a reasonable ground for the suspicion that the debtor has concealed his property or made away with it in order to defeat or defraud his creditors." This is fully as far as the evidence goes, and is not what the rule requires. I cannot commit because I have a reasonable suspicion; I must be prepared to find the fact.

The Richardson transaction appears to me to go beyond the others. Upon the examination I cannot find enough to lead me to a reasonable suspicion of the Douglas transaction.

I have a good deal more doubt as to the payment on the chattel mortgage; and this falls in my mind in the same category as the Richardson transaction.

In reference to the two other transactions I am not able to say—adopting the words in Re Caulfield, 5 I.L.R. 356—that "the statements are of such a nature that no reasonable man could believe them."

The only case cited which goes to indicate a different rule is Wallis v. Harper, 7 U.C.L.J., O.S. 72. This case was decided at a time when imprisonment was a common method of enforcing payment of a debt; and the line of interpretation there suggested has long since been departed from. Robinson, C.J., states the object of the statute as being "not to punish as for a contempt but to place in the power of the creditor such means of coercion as an execution against the person may confer."

The rule as it now stands is for the purpose of discovery; and when discovery is refused, or where as the result of the discovery a fraudulent disposition of the property is disclosed, then the imprisonment follows as a means of punishing contempt.

Then, are the answers satisfactory within the meaning of the rule? Certain answers clearly are not; but when the defendant falls into the hands of his own counsel he does give—it is true with the aid of leading questions and with the aid of a statement which had been prepared for him—a fairly clear account of what has become of his money. Taking the examination as a whole, there is no difficulty in ascertaining what the debtor has done with his property.

I am not prepared to accede to the proposition of the judgment creditor that he is entitled to have a full explanation in answer to his questions. This is the normal course; but if as the result of the whole examination one is able to glean the history of what has been done, that appears to me to suffice. As is said by more than one authority, no arbitrary rule can be laid down, and each case must be determined upon its own circumstances. I think, as was said in Graham v. Devlin, 13 P.R. 245, a full disclosure has been made, which is the thing to be aimed at. Whether the transactions disclosed can be successfully impeached is not the test.

I dismiss the motion, but give no costs.

MIDDLETON, J. DECEMBER 4TH, 1912.

RE STRATFORD FUEL, ETC., CO., LTD.

Principal and Surety—Compromise of Action—Double Ranking—Subrogation.

Appeal by the liquidator from the report of the local Master at Stratford, of November 12th, 1912, allowing claimants Coughlin and Irwin to rank for the sum of $4,800, being an amount paid by them to the Traders Bank, under a guarantee of the indebtedness of the company.

R. T. Harding, for the liquidator.
R. S. Robertson, for the claimants Coughlin and Irwin.

MIDDLETON, J.:—An appeal from the decision of the Master at Stratford, allowing the claimants to rank for the sum of $4,800, being an amount paid by them to the Traders Bank under a guarantee of the indebtedness of the company in liquidation. The claimants are admittedly entitled to rank for a further sum of four hundred dollars.

At the date of the liquidation the company was indebted to the Traders Bank for about forty thousand dollars. The bank held as security for its claim, inter alia, a mortgage upon the real estate and certain other assets of the company for $25,000. They also held a bond, executed by the present claimants and others, by which they jointly and severally guaranteed payment of the ultimate balance due by the company to the bank, and by which they agreed that the bank should be at liberty to compound with the company and to take and give up any security without discharging the claimants as sureties; in all of these matters the bank being at liberty to exercise its own discretion.

After the making of the winding-up order an action was brought by the liquidator attacking the validity of the securities. This action was compromised; and the rights of the parties depend altogether upon the true effect and meaning of this compromise.

At the time of the making of the compromise, by agreement between the parties, the property covered by the mortgage attacked had been sold and had realized $25,000. This sum was held by the bank subject to the litigation. By the compromise the bank repaid $1,000 of this to the liquidator, retaining $24,000. The bank also agreed not to rank upon the estate in the hands of the liquidator; and the bank further reserved its rights against the guarantors of the debt.

The learned Master has held that the effect of this agreement is that the bank retained $24,000 on account of its preferred claim, and that the agreement not to rank was personal to the bank, and that the effect of the reservation of the bank's right against the sureties was to reserve to the sureties the right, upon payment of the balance due, to rank against the estate. He has accordingly allowed the claim.

I do not think that this is the true meaning of the compromise made. It is elementary that there cannot be double ranking in a liquidation. The claim of the bank was entitled to rank once, and once only. If the sureties paid before the claim was filed, they might rank; but after the bank proved its claim the sureties could not also prove, but upon payment they would be subrogated to the bank's rights.

It is true that the agreement is an agreement not to rank; but this is a matter of form only. In substance the transaction was this: The bank had a claim of forty thousand dollars. Of this they claimed a preference to the extent of $25,000, and as to the balance they would be ordinary creditors. They agreed to accept $24,000 in full of all their claims against the liquidator, both as preferred creditors, and as secured creditors. Under the

terms of the guarantee they had the right to make this compromise, and the sureties could not complain. The bank reserved its right against the sureties, but upon payment they can only be subrogated to the rights of the bank at the date of payment, and as the bank had agreed to compound the claim against the liquidator, the sureties can have no higher rights than the bank itself had; and as the $24,000 was paid in satisfaction of all of the claims against the funds in the liquidator's hands, to permit the sureties now to rank would be to violate the rule against double ranking.

The appeal should, therefore, be allowed; and the liquidator should be entitled to his costs against the respondent. There should be no costs of the proceedings in the Master's office, as there success was divided.

DELAP v. CANADIAN PACIFIC R.W. CO.—MASTER IN CHAMBERS—Nov. 26.

Pleading—Particulars—Statement of Claim—Delay in Moving—Con. Rule 268.]—Motion by the defendants for particulars of the statement of claim. Two days before the expiration of the time for delivery of statement of defence the defendants moved for particulars of the statement of claim under 27 different heads, covering three typewritten pages. The motion was supported by an affidavit of the necessity of such particulars before pleading. The motion was argued on the 23rd inst. when the same counsel appeared as on the previous motion for extension of time for pleading—ante 213. The Master said that it was not necessary to add anything to what was said in the previous report as to the facts except that a draft statement of claim substantially identical with that now on file was submitted to plaintiff nearly ten months ago. He further said, that after reconsidering the matter in view of the strenuous argument of defendants' counsel, he did not see any reason for the order asked for. Many of the 27 heads of particulars were not pressed on the argument. As to those which were insisted on, he thought that all the material facts on which the plaintiff relies are fully set out in the voluminous correspondence extending over a period of more than two years, and are also set out in the statement of claim, certainly without undue brevity. [Reference to Smith v. Boyd, 17 P.R. 463, per Boyd, C., at p. 467.] In the present case the whole issue is on the plaintiff, which he may find some difficulty in proving unless there is some documentary evidence on

which he can succeed. In that case it must either be in the defendants' possession or appear in plaintiff's affidavit of documents. In the latter event defendants would easily obtain leave to amend if desired. A further ground for refusing the order is that of delay. On the previous motion all the facts were as fully set out as they are now, especially the verbal arrangements made with Judge Clark, on which most of the present motion was pressed. The judgment proceeds: "I think that if particulars of this are necessary now, they were equally necessary on 25th October, and that all particulars required for pleading should then have been asked for. It is also to be observed that pleadings are now governed by Con. Rule 268, which it would be wise to repeat before settling any pleading.—That rule says: "Pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved." No doubt it is sometimes difficult to decide what are the facts to be proved and what is only evidence of those facts.—The question is often one of degree.—"The difference, although not so easy to express, is perfectly easy to understand," (per Brett, L.J., in Philipps v. Philipps, 4 Q.B.D. at p. 133—see Odgers on Pleading, 5th ed., p. 103. It is always necessary so to deal with a motion for particulars as not to bring back thereby the old form of chancery pleading—a danger which a late learned Judge is said to have foreseen as possible and to be guarded against. The motion will be dismissed with costs to plaintiff in the cause—without prejudice to any motion that defendants may consider necessary after examination of plaintiff for discovery, or before the trial if plaintiff is not examined. The statement of defence should be delivered not later than the 28th inst." Angus MacMurchy, K.C., for the defendants. F. Arnoldi, K.C., for the plaintiff.

CHAPMAN v. MCWHINNEY—LENNOX, J.—NOV. 27.

Sale of Land—Broker's Commission—Evidence.]—Action by the plaintiff, an estate broker, to recover $7,925 as commission on the sale of a property known as the Mulholland Farm, being lots 7 and 8 in the second concession of the Township of York. R. J. Trethewey obtained an option on 157 acres, the property

of Fred Mulholland, at $1,000 an acre; and, subject to the approval of the Official Guardian, an option on 150 acres, the property of the Mulholland estate, for $110,000; and he instructed the plaintiff to dispose of these options for him. In pursuance of these instructions, and before the 27th March, 1912, the plaintiff had set to work to effect a sale, and had communicated with parties in London and Glasgow. The plaintiff asserted that on the 27th or 28th March last, the defendant urged him to abandon the effort to sell in the Old Country, and said, that if he would put him in communication with the holder of the options, and he obtained control of them, he would make it worth a good deal more to the plaintiff than a mere commission. The defendant gave an entirely different account of this initial meeting; but the learned trial Judge believed the plaintiff's account for various reasons stated in the judgment, and came to the conclusion that ultimately the plaintiff and defendant retired to settle the question of the commission; and although when out together the defendant said that he did not see why he should pay the commission, he finally acquiesced in the 2½%, which the plaintiff finally agreed to accept, during the discussion. The learned Judge adds that to all appearance the parties were at one when they returned to Trethewey; and, understanding this, Trethewey and the defendant closed their bargain. He was, therefore, of opinion that the plaintiff had a valid claim for compensation from Trethewey and that the defendant knew this—in fact, it was recognised by the three actors in this transaction that the defendant requested the plaintiff to introduce him to the owner of the options—which he did on the faith of compensation even beyond a commission—that the defendant, knowing the attitude of Trethewey and that the bargain could not otherwise be consummated, agreed to pay a commission of two and a half per cent., and that upon this understanding, the plaintiff accepted the liability of the defendant for the liability of Trethewey; a liability which was in no way in dispute. He did not think that the failure of the defendant to obtain the Mulholland estate property affected the question, or that he had any right to reduce the commission on that account. Judgment for the plaintiff for $6,675, with interest, and costs. A. F. Lobb, K.C., for the plaintiff. J. R. Roaf, and Gordon Waldron, for the defendant.

REX v. DORR—MIDDLETON, J., IN CHAMBERS—NOV. 28.

Intoxicating Liquors — Liquor License Act — Sec. 111 *as Amended by* 2 *Geo. V. ch.* 55, *sec.* 9*—Plea of Guilty—Return of Magistrate.*]—Motion to quash a conviction of the Police Magistrate at Hamilton under sec. 111 of the Liquor License Act as amended. MIDDLETON, J., said that this case was tried by the magistrate immediately after the case of Rex v. Bevan—see ante 400. From the statements of counsel and from memoranda produced by Mr. Haverson, it appeared that there had been some misunderstanding. Apparently counsel intended to admit that the evidence in this case would be similar to the evidence in the Bevan case, and to consent to the matter being disposed of on that basis. The return made by the magistrate shews a plea of guilty. The learned Judge said that he was concluded by the return, and the motion, therefore, fails. Under the circumstances he did not order costs. As stated upon the argument, if the Crown is satisfied that there has been any such mistake as is indicated, no doubt some arrangement will be made by which justice will be done to the accused. J. Haverson, K.C., for the defendant. J. R. Cartwright, K.C., for the Crown.

NORFOLK v. ROBERTS—LATCHFORD, J.—NOV. 28.

Municipal Corporations—Water Works—Board of Water Commissioners—Action against—Arrears of Water Rates before Constitution of Board—Parties—Leave to Add—Terms—Costs.]—Action by A. C. Norfolk, a ratepayer of Brampton, on behalf of himself and all other ratepayers, for a declaration that the resolution, by-laws and regulations of the board of water commissioners, etc., were and are invalid, for a mandatory order requiring the board and the three members to pay, and as members of the board to enforce payment of an equal rate by all users of water, etc., and judgment against defendants Duggan and Algie, executors of Dale estate, etc. The learned trial Judge, after going with great fullness into the evidence and facts in the case, as to which, see 3 O.W.N. 111, 294, came to the conclusion that there should be judgment requiring the defendant municipality to collect from the defendants, the executors of the Dale estate, and requiring the last mentioned defendants to pay to the municipality the sum of $1,591.72. The plaintiff is entitled as against such defendants to the

costs of the action not disposed of by the judgment of the Divisional Court, and, in addition, to the costs of so much of the action as were reserved by that judgment, to be disposed of by the Judge presiding at the second trial. Leave is given to make any amendments of the pleadings that may be thought necessary. W. N. Tilley, for the plaintiff. E. D. Armour, K.C., for the Dale estate. T. J. Blain, for the other defendants.

RAMSAY v. TORONTO RAILWAY CO.—MASTER IN CHAMBERS—Nov. 29.

Discovery—Further Affidavit on Production—Insufficient Material—Inspection of Car.]—Motion by plaintiff for further and better affidavit on production by defendants. On 19th September a similar motion was made and an order granted for inspection of the car in question as well as for further production. This would seem to have given all that plaintiff was entitled to—at any rate he was satisfied to go on and examine the car and has twice delivered to defendants the particulars of defects, etc., on which he relies, as directed by said order. The Master said that under these circumstances, it was probably too late to make the present motion, but it was not necessary to decide this at present, as the motion must fail on the ground that there is no material on which it can succeed. All that is said is in an affidavit of plaintiff that he has been informed by his solicitor and believes "that it is the practice of the Toronto Railway Company to keep a history or record of all inspections or repairs done upon any of its cars and that no reference" as to this in respect of the car in question has been made in the defendants' affidavit on production. As to this, the Master says: "Assuming that this would be sufficient under the English practice to allow the plaintiff to avail himself of Order XXXI., R. 19A(3) (see Bray's Digest of Discovery (1904), 8, 66) it is clearly insufficient under our practice which is as given in Bray, at p. 10, art. 39. I have the less hesitation in dismissing the motion because the defendants' motorman was fully examined as to the condition and equipment of the car at the time of the accident, and the plaintiff's experts could easily see if any and what alterations had been made at the date of the inspection. The material question is, "What was the condition of the car at the time of the accident?" [Reference to Bray's Digest of Discovery, at p. 26, and cases there cited.] Motion dismissed with costs to the defendants in any event. J. P. MacGregor, for the plaintiff. F. McCarthy, for the defendants.

RE HAMILTON MANUFACTURING CO., LTD. HALL'S CASE—MIDDLETON, J.—NOV. 29.

Company—Winding-up—Purchase of Assets from Liquidator—Alleged Misrepresentation—Appeal from Master.]—Appeal by the liquidators and cross-appeal by Hall from the report of the Master at Peterboro, dated 28th August, 1911. A winding-up order was made on the 11th December, 1906. On the 27th April, 1907, Mr. R. R. Hall signed, addressed to the liquidator, a formal "offer to purchase all the assets and property of the William Hamilton Manufacturing Company Limited, which have come or may hereafter come to your hands and which were and are within your power and control as liquidator of the company since the liquidation . . . at or for the price or sum of $192,000." The terms of payment were then set out: $5,000 being payable as a deposit, the other payaments being spread over a time terminating on the 15th of December, 1907. This offer was taken by the liquidator before the Master for his approval, on the same day; and the Master directed it to be submitted to a meeting of creditors. This meeting was held on the 10th of May; and, creditors approving, the offer was accepted. On the 3rd September a further formal agreement was made, reciting the contract, certain payments on account thereof, the purchaser's default, and request for a modification of the terms of payment. The agreement then provided that the purchaser guarantees the collection by the liquidator, out of the accounts receivable, of certain sums particularly specified, and the receipt of other sums from the sale of goods, and provided for the continuance of the business as a going concern in the meantime, the liquidator remaining in possession. This agreement has been supplemented by further agreements, under which the business has been carried on in a somewhat similar way, and the moneys received have been credited by the liquidator upon the purchase price; the balance due according to the contract being in this way brought down to a comparatively small sum. This was the position of affairs when in October, 1909, Mr. Hall presented a petition, complaining that the contract had been induced by certain misrepresentations on the part of the liquidator and its agents, and asking that he be credited on account of his purchase price with $33,540, for short delivery with respect to merchandise, etc., $15,000 in respect to damages with regard to incumbrance on patterns, $2,000 for non-delivery of what has been called the Bertram Rolls, $1,429 for liens for freight, $446 lien for duty, $15,000 with respect to accounts receivable, and "such general or unstated amounts as this Honourable

Court may deem just." During the course of the reference the first claim, as to short delivery with respect to merchandise, etc., was increased to $45,013.79. By an order of MEREDITH, C.J.C.P., this petition was referred to the Master at Peterborough for adjudication. The learned Master, after hearing a vast amount of evidence, found in Mr. Hall's favour in respect of most of his contentions; and awarded him $25,000 as damages in respect of the non-delivery and misrepresentation in relation to the merchandise account, about $11,000 in connection with the Kenora account, and a number of small sums in connection with minor matters; so that in the result the Master finds that Mr. Hall has overpaid the liquidator on account of his purchase $36,000.51, which sum he directs the liquidator to refund. It is from this judgment the liquidator appeals. The cross-appeal seeks to increase the award against the liquidator. MIDDLETON, J., after setting out the facts as above, says that after the best consideration he can give to the matter, he finds himself unable to agree with the learned Master; and, thinks he has approached the matter from the wrong standpoint. The learned Judge then proceeds to give his reasons, and state the facts as they appear to him, at some considerable length. The general conclusion to which he comes is as follows: "I am quite unable to agree with the Master in his finding that any representation made by Smith induced the contract; and I do not think that Smith was put forward by the liquidator as its agent in any such sense as found by the Master. I think Hall purchased on his own judgment; and while he may have used, and doubtless did use, Smith as a source of information, he did not regard any information he so acquired as a statement by the liquidator. This information was sought and obtained quite apart from the negotiations for purchase, and was not embodied in the contract, because it formed no part of it. . . . In the result, the appeal of the liquidator should be allowed (save as to the matters covered by the 9th ground), and the cross-appeal should be dismissed, both with costs. If the account cannot be re-adjusted there must be a reference back." J. Bicknell, K.C., and F. R. Mackelcan, for the liquidator. R. J. McLaughlin, K.C., for Hall.

PARKS v. SIMPSON—SIMPSON v. PARKS—DIVISIONAL COURT—Nov. 29.

Sale of Goods—Bees and Honey—Illegal Detention—Damages.]—Appeal by Reuben Parks from the judgment of the Senior Judge of the County of Hastings, of June 19, 1912. An

action by Parks to recover possession of certain hives of honey bees and honey alleged to have been purchased from Simpson, or $50 damages for their detention, and $50 for other damages, and an action by Simpson for balance of purchase money alleged to have been unpaid by Parks, and a counterclaim for care, pains and trouble in caring for Parks' bees. At the trial the Judge found Parks entitled to a return of all his bees and honey and other chattels bought on Simpson's place and to $25 damages for detention of same, and found Simpson entitled to $165, balance of purchase price, with interest, and no costs to either party in either action. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ. The judgment of the Court was delivered by BRITTON, J. The learned Judge after reviewing the facts came to the conclusion that the learned trial Judge had endeavoured to do substantial justice between the parties, and gave judgment dismissing the appeal with costs. W. B. Northrup, K.C., and A. A. McDonald, for Parks. E. G. Porter, K.C., for Simpson.

ROSCOE v. MCCONNELL—MASTER IN CHAMBERS—NOV. 30.

Pleading—Statement of Defence—Irrelevance—Further Examination Refused—Con. Rules 616, 259, 261.]—Motion by the plaintiff for further examination of the defendant and to strike out certain parts of the statement of defence. The only material mentioned in the notice of motion was "the examination of the defendant and proceedings had herein." The action was by the daughter and administratrix of one Thomas McConnell against her brother to have it declared that a conveyance of land on Yonge St. in December, 1906, by one Simmons who was a bare trustee for the father, to the son was only by way of security for liabilities incurred by the son for the father's benefit. The Master referred to the portions of the defence, which the plaintiff wished to have struck out, and stated his conclusion that they were not irrelevant. As to the motion for further examination of the defendant the Master said that he had already been examined on 3 different days and his disposition cover 136 typewritten pages, the last question being numbered 1304. Prima facie the remarks made in Evans v. Jaffray, 3 O.L.R., pp. 333, 342, would be relevant to this case and may yet be held applicable on taxation if plaintiff is ultimately successful. From a consideration of the depositions and the only issue on the pleadings it does not seem that any further examination should be had, notwithstanding the strenuous and

lengthy contention of plaintiff's counsel otherwise. The defendant appears to have made full production of documents and to have answered all relevant questions. Motion dismissed with costs to defendant in any event. The Master said that he had not overlooked the contention that such parts of the statement of defence should be struck out as to which the defendant says he has no knowledge, but is not aware of any case in which this has been held to be a ground for excision—Even if that was so, the motion cannot be made in Chambers. See Jasperson v. Township of Romney, 12 O.W.R. 115, where the scope and application of Rules 616, 259, and 261 are fully considered. J. P. MacGregor, for the plaintiff. Grayson Smith, for the defendant.

DICKMAN v. GORDON—MASTER IN CHAMBERS—DEC. 2.

Pleading—Particulars—Action for Defamation—Slanderous Words in Foreign Language—Special Damage.]—Motion by the defendant for an order for further and better particulars before pleading. Judgment: "In this action plaintiff sues for alleged spoken and written defamation—both the written and spoken slander being in Yiddish. The defendant before pleading obtained an order for particulars of statement of claim. These have been given, but are now said to be insufficient and incomplete, and further and better particulars are asked for. According to the law laid down in Odgers on Libel, 5th ed., 125, the original and actual words alleged to have been spoken and published must be set out in the statement of claim, and then an exact translation should be added. At the trial the correctness of the translation, if not admitted, must be proved by a sworn interpreter. If any special damage is claimed in respect of the defamatory words, particulars of same should be given. See Odgers, pp. 627, 628, and precedents there referred to. The statement of claim should be amended as indicated above. The defendant will have 8 days from such amendment to plead. The costs of this motion will be to defendant only in the cause. The allegations given in the particulars of the persons to whom the defamatory words were spoken are sufficient for the present. If evidence is to be given of other persons "not now known to the plaintiff," particulars of these should be given at least two weeks before the trial. Welsh (Singer & Singer), for the defendant. Birnbaum (Day & Co.) for the plaintiff.

SMYTH V. BANDEL—MASTER IN CHAMBERS—DEC. 3.

Motion for Judgment—Con. Rule 603—*Contract Containing Proviso as to Local Option.*]—Motion by the plaintiff for judgment under Con. Rule 603, on balance alleged to be due under a chattel mortgage. In May, 1908, the defendant gave to the plaintiff a chattel mortgage to secure $4,800, being balance of purchase of the "Queens Hotel" at Collingwood. It is admitted that there is still something due on this mortgage if plaintiff is entitled te enforce it now; and plaintiff has moved under Con. Rule 603 for judgment. The defendant has made an affidavit in which she says that the contract for the purchase of the Queens Hotel "contained a provision that in case local option would pass that the mortgage would be void and that there would not be any liability thereunder." It is admitted that in 1910, local option was carried at Collingwood. No doubt it came into force on 1st May, in that year. The Master said that the defendant has been cross-examined but does not recede from her position. Her solicitor in the matter was the late James Baird, K.C. A copy of a letter from him to plaintiff is filed on this motion, and verified by Mr. Loftus. It is dated 30th May, 1908, and speaks of an agreement between plaintiff and Mary Bandel as being sent to him with the other papers. What that agreement contained does not appear on this motion. It is not produced. It may have contained the provision on which defendant relies—a provision which under the circumstances then and still existing in respect of the liquor traffic cannot be considered unlikely to have been suggested at least by defendant. See as an instance Hessey v. Quinn, 18 O.L.R. 487. Whether or not such an agreement was made, either verbally or in writing, must be left to be dealt with at the trial in the ordinary way. In taking this course, the Master said he was only following the judgments of the House of Lords in the two similar cases of Jacobs v. Booth's Distillery Co., 50 W.R. 49, 85 L.T. 262, and Codd v. Delap, 92 L.T. 510, cited in Jacob v. Beaver, 17 O.L.R. 501. In both cases the House of Lords set aside the unanimous judgments of the courts below, giving judgment with many strong expressions of astonishment and disapproval. There is less reason to hesitate in this case because, although the action was begun and writ served on 30th May, the present motion was only launched on 31st October last. No explanation of this was suggested on the argument. The motion will be dismissed with costs in the cause. H. S. Murton, K.C., for the plaintiff. J. T. Loftus, for the defendant.

RE BARLEY, DECEASED, AND FAWCETT, A LUNATIC—SUTHERLAND, J., IN CHAMBERS—DEC. 4.

Lunatic — Maintenance — Insufficient Material.]—Motion by the Inspector of Prisons and Public Charities, for an order for payment out of Court of certain moneys for maintenance. The learned Judge said that it was not made to appear upon the material that the amount in Court is or is not the original sum mentioned in paragraph 6 of the affidavit of the applicant, with accumulated interest. If it is, then I think no order can be made, in view of the terms of the trust referred to in said paragraph. If a consent were obtained from those entitled on the death of the lunatic, probably an order would be made. If the fund in Court is in part other moneys to which the lunatic is entitled, to that extent an order might now be made on that fact being shewn by further material. G. M. Willoughby, for the Inspector of Prisons and Public Charities.