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COURT OF APPEAL.

FEBRUARY 26TH, 1913.

*DARKE v. CANADIAN GENERAL ELECTRIC CO.

Master and Servant—Injury to and Death of Servant—Liability—Negligence—Contributory Negligence—Unauthorised and Voluntary Act—Findings of Jury—Evidence—Workmen's Compensation for Injuries Act—Person Intrusted with Superintendence—Defective System.

Appeal by the defendants from the order of a Divisional Court, 3 O.W.N. 817, reversing the judgment of MULOCK, C.J. Ex., 3 O.W.N. 368, and directing that judgment be entered for the plaintiff for $1,800.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A., and LENNOX, J.

G. H. Watson, K.C., for the defendants.

D. O'Connell, for the plaintiff.

The judgment of the Court was delivered by HODGINS, J.A.:—Counsel for the appellants urged very strongly that the acts of Darke, if not actually contrary to orders, were under the circumstances, unauthorised and voluntary. The generator had been set up and finally clamped down by the mechanical department, and had been turned over to the electrical department for testing; and the point raised is, that to allow any one to interfere with and revise the work finished by the proper department, i.e., the mechanical department, would disorganise the working of any industry and lead to unfortunate results, as, undoubtedly, this act of Darke's did. Whether this would be a

*To be reported in the Ontario Law Reports.

complete answer may be doubtful. See Burns v. Poulson, L.R. 8 C.P. 563.

I have studied the evidence with some care to see if this position is justified in fact. The material parts are fairly set out in the judgment of the Divisional Court, and it is not necessary to repeat them.

It is clear that the generator had been set up, and that the foreman of the mechanical department had finally passed it as complete. The motor, which is movable, was moved to and put in its proper position, and the belt attached in order to transmit the power to the generator.

The motor was not, I think, a machine or engine on a railway or tramway, within sec. 3, sub-sec. 5, of the Workmen's Compensation for Injuries Act, as it was fixed and in position, and was not, in the operation of testing, moving or intended to move. The power applied was electricity, which was turned on to the motor by Thompson, and by means of the belt the generator was operated.

What the case must turn upon, in my judgment, is the communication made by Darke to Jeffries, the foreman, and his consequent directions. These were, as stated by Cartner, that Cartner was to stay with Mr. Darke "until the load was on the machine," to see that everything was all right. This, of course, means either the initial application of electricity to the generator or its increase to the full load required; but, in either event, Darke's duties would continue till the switch was turned by Thompson, and Cartner's presence would have been useless unless something antecedent to the test was intended by the express order of Jeffries.

Now, Darke was, according to Cartner, in charge of the machine, i.e., as between the two of them; and Darke had apparently the idea that the machine was not then secure; so that his conversation with Jeffries could only have related either to that present fact, or, as is suggested by the evidence, to his doing anything necessary after the generator had begun to operate. The latter seems a quite inadequate explanation, in view of Jeffries's earlier instructions on that point. Regard must be had to the further fact that Cartner was told to remain, in addition to Darke, for some reason arising out of Darke's conversation and only until the load was on the machine. I think it is fair to infer, as the jury have done, that Jeffries's instructions to Darke were, that he was to be present prior to as well as at the electrical testing, and to do all necessary mechanical work arising during that whole period. If so, what Darke was doing was in the course of his employment, and

pursuant to instructions; and, if he was injured by any act for which the appellants are liable, the respondent is entitled to recover.

As to negligence, the respondent rests this upon two principal grounds: first, that the accident was caused by the negligence of Hamilton, as a person having superintendence intrusted to him, and whilst in the exercise of such superintendence; secondly, that the appellants' system was defective, in that no proper system of signalling was adopted.

Upon the first ground: when the test was being undertaken, Thompson was put in charge of it and of the machine. Thompson's duty was not merely to ascertain whether the generator, when set in motion, produced certain desired electrical results, but included applying electricity to the motor so that it would cause the belt to revolve and thus set the generator in motion. It cannot be said that before he did this he had no duties of superintendence intrusted to him. His helper was there and was under his instructions. Darke and Cartner were also there. It was, I think, clearly the duty of Thompson not to set the mechanism in motion—a purely physical act, such as applying steam to the works of a locomotive—until he had examined and seen that everything was clear and ready. . . .

[Reference to Kearney v. Nicholls, 76 L.T.J. 63; Osborne v. Jackson, 11 Q.B.D. 619; Wilson v. Boulter, 26 A.R. 184.]

If Hamilton comes within the definition of sec. 3, sub-sec. 2, there was evidence that he was guilty of negligence, which could not have been withdrawn from the jury; and, as they have found him negligent, their view must prevail. Cartner says he told him "not to start up, we were going to fix this pillow block."

I think there was some evidence that no proper system of signalling was adopted by the appellants which would justify the jury in making the finding they did. If so, the law would seem to support liability upon that ground: Choate v. Ontario Rolling Mill Co., 27 A.R. 155; Ainslie Mining and R.W. Co. v. McDougall, 42 S.C.R. 420, at p. 426; Fralick v. Grand Trunk R.W. Co., 43 S.C.R. 494, at p. 519.

While I fully appreciate the difficulty which may arise from unauthorised actions, I think that here there was a natural and proper act, based upon instructions reasonably direct, and sufficiently connected with the acts done to bring them within the ordinary and proper course of Darke's employment. In an operation that set in motion a large amount of transmitted power, it is not unfair to insist upon a degree of care that might not be asked in a less dangerous situation.

The appeal should be dismissed.

FEBRUARY 26TH, 1913.

*HUNTER v. RICHARDS.

Water and Watercourses—Saw-mill Owners — Pollution of Stream—Nuisance—Right to Pollute—Implied Grant — Prescription—"Lost Grant"—Evidence—Onus—Estoppel.

Appeal by the defendants from the order of a Divisional Court, 26 O.L.R. 458, 3 O.W.N. 1432, affirming the judgment of LATCHFORD, J., 26 O.L.R. 458, 2 O.W.N. 855, in favour of the plaintiff, in an action to recover damages for injury done to the plaintiff by the defendants in fouling Constant creek, in the township of Grattan, and obstructing the flow of water to the plaintiff's mill by throwing refuse in the creek, and otherwise injuring the plaintiff

The appeal was heard by GARROW, MACLAREN, MEREDITH, MAGEE, and HODGINS, JJ.A.

W. N. Tilley, for the defendants.

Peter White, K.C., for the plaintiff.

The judgment of the Court was delivered by MEREDITH, J.A.:—The judgment pronounced at the trial of this action has been anything but successfully assailed in this Court or in the Divisional Court; it was, as it seems to me, quite right.

It is not open to question that the defendants, through their saw-milling operations, create a nuisance upon the plaintiff's land, and many other lands, as well as in the waters in question, causing very appreciable injury; and a nuisance which becomes more and more objectionable and injurious as the surrounding country becomes more settled, and the lands affected more highly cultivated and more valuable.

The defendants attempt to justify this nuisance and these injuries, in so far as they affect the plaintiff's land, on the ground that they were within their legal rights in all that they have done in the past, as well as in their intention to continue them in the future.

This alleged right is put in three ways: (1) under an implied grant from the plaintiff's predecessors in title; (2) by prescription; and (3) under "a lost grant." But, in my opinion, they have quite failed to establish in evidence—the onus of

*To be reported in the Ontario Law Reports.

proof being, of course, upon them—anything like any one of such rights.

The first of the grounds is based upon the fact that the land of the defendants was purchased from the then owner of it, who was then also owner of the plaintiff's land, on the condition that the purchaser should build a saw-mill and a grist-mill upon it within a specified time. Some years afterward, the saw-mill having been erected and some steps taken towards the erection of the grist-mill, the vendors were satisfied in respect of these conditions and granted the land free from them; as well might be, the grantor having no interest, except the public welfare, in the erection of the mill; and so, so much having been done, the rest was quite reasonably left to the law of demand and supply. At all events, the Crown Lands Department was quite satisfied; and the grant was deliberately and intentionally made free from the conditions imposed under the contract of sale, conditions which, at the time of making the contract, it was intended, should be fulfilled before the grant was made.

In these circumstances, what possible right could the grantees have beyond those expressed in the grant and those which would go with the sale of any land having a mill-site upon it? And assuredly it neither carried the right to commit nor to continue, through all time, a great and a far-reaching nuisance; and one which might perhaps be a crime at common law—for mill-work travels far and is an enemy of navigation. It appears to me that it would be entirely wrong to imply any grant in this case; and that the doctrine of estoppel would be basely used if applied in the defendants' aid. But, assuming that in either way the grantor could not object to any injury affecting the lands now owned by the plaintiff arising from a reasonable use of the mill-stream for the purposes of saw-milling, that would give no everlasting right to continue early-day loose methods, even if early-day necessities made them then excusable; and it is made quite plain upon the evidence that present-day reasonable precautions would prevent all that the plaintiff complains of; and indeed are all that he asks for. . . .

In view of the defendants' testimony alone, it is quite impossible to give weight to the second ground relied on by them. In the year 1896, the defendants paid the plaintiff $100 for the injury caused by his land by the nuisance complained of; for a number of years afterwards they paid him so much a year for removing the mill-waste—also called drift-wood by parties and witnesses—which was the main cause of his complaint; and since that time they have sent their own men to do that work. . . .

The third ground is the extraordinary one that, notwithstanding these things, and though the defendants may have no defence to this action under any statute of limitations, they have under the fiction of a lost grant; and, in order to make a defence in that way, they ask the Court to disregard the present, to disregard all this evidence to the contrary, and to treat this trial as if it were being held before the year 1896, when the $100 was paid; that is to say, that the Court is first to exclude evidence of the greatest weight, and then to determine in the defendants' favour that the case is one of lost grant; and this although it may be that, had the trial taken place over sixteen years ago, evidence not adduced at this trial might possibly have been given which would have as effectually defeated this defence as Harry Richards's testimony did that on the second ground. It would be extraordinary if in this case, obviously failing on their second ground, the defendants could succeed upon the third.

Upon the whole evidence, no one could reasonably find that there was any grant from any one at any time giving the defendants the right now to injure the plaintiff's land as they are doing; nor indeed that, on the whole, there is any reasonable evidence of possession from which such a grant might be presumed.

In dealing with questions of this character, the character of this country in the earlier days of its settlement, and the needs of the earlier civilised inhabitants, must never be overlooked if justice is to be done. . . .

Equally with the other grounds of defence, this ground is, in my opinion, quite untenable.

I would therefore, unhesitatingly, dismiss the appeal.

Appeal dismissed with costs.

FEBRUARY 26TH, 1913.

*REX v. ST. CLAIR.

Criminal Law—Circulating Obscene Printed Matter Tending to Corrupt Morals—Criminal Code, sec. 207—Evidence—Intent to Serve Public Good—Lawful Justification or Excuse—Excess—Onus—Conviction.

The defendant was charged in the County Court Judge's Criminal Court for the County of York, before DENTON, Jun.

*To be reported in the Ontario Law Reports.

Co.C.J., for that he, the defendant, "knowingly and without lawful justification or excuse, did sell, distribute, and circulate," and "did have in his possession for sale, distribution, or circulation, certain obscene circulars, tending to corrupt morals," contrary to sec. 207 of the Criminal Code, as amended by 8 & 9 Edw. VII. ch. 9.

The Judge, after hearing the evidence and declining to receive some of that tendered by the defence, found the defendant "guilty;" and, at the defendant's request, stated a case for the opinion of the Court of Appeal on the following questions:—

1. Was the bulletin in question obscene printed matter tending to corrupt morals, within the meaning of sec. 207, sub-sec. 1 (a), of the Code, having regard to the form in which it was issued and to the manner in which it was proved to have been circulated by the accused?

2. Was there evidence upon which I could reasonably find, as I did find, that the public good was not served by the printing and circulating of the bulletin in question, assuming that the occasion of the printing and circulating was such as might be for the public good?

3. Was there evidence upon which I could reasonably find, as I did find, that, assuming that the public good was served by the printing and circulating of the bulletin in question, there was excess beyond what the public good required, in the manner, extent, or circumstances in, to, or under which the printing and circulating was done?

4. Was the evidence tendered by the accused and rejected by me improperly rejected?

5. If question 4 is answered in the affirmative, was any substantial wrong or miscarriage of justice occasioned at the trial by such rejection?

6. Should the conviction stand?

The case was heard by GARROW, MACLAREN, MEREDITH, MAGEE, and HODGINS, JJ.A.

W. E. Raney, K.C., for the defendant.

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

MEREDITH, J.A.:—I have no manner of doubt that the defendant was rightly convicted.

It is admitted that he prepared, had printed, and had in his possession for publication, a thousand copies of the "special bulletin" in question, which, it is also admitted, contains disgusting details of an obscene character—described in the "bulle-

tin" itself as a "revolting report" and as "unprintable." That these facts, prima facie, constitute the grave crime of which the man has been convicted is obvious, and, indeed, is also admitted.

But it was urged that the publication was (1) not without lawful justification; and also that it was (2) excused by reason of the publication having served the public good, without being in excess of that which the public good required.

The motive of the man is quite immaterial on the question of guilt or innocence; though, of course, of such moment on the question of the penalty to be paid, if guilty.

Neither a good nor a bad motive can alter the character of the act, in such a case as this. If unlawful, a good motive will not make it lawful, nor, if lawful, will a bad motive make it unlawful; good motive and good character may make some things more, rather than less, harmful—give them when inherently they have less or none.

So, too, the truth or falsity of the publication cannot change the character of the words used; it can neither turn decent words into indecent words, nor foul into fair.

Of lawful justification there is no reasonable pretence. The Criminal Code, which defines the crime of which the defendant is convicted, deals with lawful justification expressly in many instances, such as the lawful justification for the acts of those who carry into execution the judgments of the Courts, or execute lawful warrants, reasonable correction of children by parent, person in loco parentis, schoolmaster, or master, and so forth: see the Criminal Code, secs. 16 to 68; so, too, or by analogy, any one whose lawful duty requires him to do that which otherwise would constitute the crime in question, is not guilty, because such duty is such a lawful justification. That the defences lawful justification and public good are two different things is obvious upon the face of the enactment: "lawful justification or excuse:" the Criminal Code, sec. 207; the one justifies, the other excuses, the act.

So that, unless it can be considered that the publication of the grossly obscene words in question served the public good, and were not excessive, the conviction must stand.

That the publication of such disgusting details is an invasion of decency tending to degrade morality seems to me very evident; and the more so because, if the defendant have the right to employ such methods, every one else—including those he attacked—has an equal right to do so; involving a deplorable state of affairs; against which the waste paper basket, or the fire, would not afford complete protection. No one has any

sort of right to offend another's sense of decency and clean mind by placing in his hands, or bringing into his home, such a publication.

We cannot, however, re-try the case here; we can consider only such questions of law as have been reserved by the trial Judge.

It is a question of law, or at least a question for the Court as distinguished from a question for the jury, whether (1) the occasion of the publication was such as might be for the public good; and, if it might and were, then (2) whether there was evidence of excess—publication of obscenity beyond what the public good required; the other questions involved being questions for the jury, or for the Judge exercising the functions of a jury, only.

The onus of proving that the public good was served by the publication of this obscene pamphlet was upon the accused; he must excuse his obscene publication.

His one excuse is, that the interests of morality required the suppression of the play, or performance, the worst features of which were condensed and accentuated in the publication.

Is that really any excuse?

It is said that by that means public feeling might be aroused and such performance stopped. But why send the condensed prurient matter broadcast in a thousand pamphlets, with all the possibilities of leakage beyond those to whom they were to be sent, why indeed put such "unprintable" filth in enduring print at all; and, emphatically, why when the law provides simple and direct methods of accomplishing the desired end? Why not prosecute the offenders, and give them a chance to defend themselves? Why not apply to the proper persons to withdraw the license of the offending house? Why not confer with the Chief of Police, or, if need be, with the Police Commissioners, or even with higher officials—in all cases without contaminating pen or tongue with the condensed disgusting details? To say that that would be ineffectual, I cannot believe to be true. It would be neither fair nor truthful to say it without having first tried and failed; and that was not done. Indeed, as one of the Judges here pointed out, the pamphlet itself bears evidence upon its face to the contrary; no complaint of this nature is made in it; but, on the contrary, the only reference to any peace officer contained in it is of a distinctly complimentary character.

But, even if it could be that a thousand persons should be awakened to a knowledge of an obscene stage performance, surely there could be no need for disgusting details; the de-

fendant's contention that the persons to whom the publication was to be sent could not be aroused to a sense of their duty without a descent to the obscene is very uncomplimentary to them, and is inconceivable to me; it needs much more than the defendant's contention to give me even a suspicion that such men cannot be aroused to a sense of duty as well, indeed much better, by clean and wholesome words. . . .

In my opinion, therefore, this publication, *in so far as it contains obscene matter*, could not in any reasonable way be deemed to have served the public good; and that, even if it could, there was abundant evidence to support the finding of the trial Judge that there was excessive obscenity.

Those who do not think, or do not know the circumstances, may, no doubt, deem it strange that the, said to be, well-meaning man should be convicted, and the ill-acting players escape; but whose fault is that? Plainly the defendant's. He might have had the wrong-doers upon the stage quickly arraigned and tried, and, if guilty, fittingly punished; but rather than do that he chose to condense and emphasise, and put in print to circulate, the very evils he might have restrained; he took the obviously mistaken course of committing a crime himself rather than the open and regular method of preventing, by punishment, the crime of the stage actors, if, after a fair trial, with every reasonable opportunity of defending themselves, they were found guilty.

Whatever his intention may have been, his act was a crime; and, being duly prosecuted and convicted, after being given every opportunity to defend himself, he must take the consequences; and let others take their punishment, but only when likewise prosecuted and convicted.

That the arm of the law is long and strong enough to deal effectually with immoral theatrical performances, the following provisions of the Criminal Code shew (setting out sec. 208).

And the doors of the Courts are always wide open to every reasonable prosecution; a prosecution which may be instituted by any one having reasonable grounds for laying an information.

The first three and the sixth questions reserved by the trial Judge should be answered in the affirmative; the fourth in the negative; the fifth is, consequently, immaterial.

GARROW, J.A., agreed with the opinion of MEREDITH, J.A.

MAGEE and HODGINS, JJ.A., also agreed, with some qualifications, each stating reasons in writing.

MACLAREN, J.A., dissented (except as to the first question), for reasons stated in writing.

Conviction affirmed; MACLAREN, J.A., *dissenting.*

HIGH COURT DIVISION.

MIDDLETON, J. FEBRUARY 25TH, 1913.

*RE MODERN HOUSE MANUFACTURING CO.

DOUGHERTY AND GOUDY'S CASE.

Company—Winding-up—Contributories—Contract with Company to Take Payment for Land in Company-shares—Allotment of Shares—Failure to Transfer Land—Remedy in Damages—Costs.

Appeal by L. M. Dougherty and R. J. Goudy from an order of the Master in Ordinary, upon a reference for the winding-up of the company, placing the appellants' names upon the list of contributories with respect to 1,500 shares.

W. M. Douglas, K.C., for the appellants.
G. F. Shepley, K.C., for the liquidator.

MIDDLETON, J.:—The appellants, whom for convenience I shall call the shareholders, agreed to sell certain property to the company for the price of $5,000 in cash and $6,500 fully paid-up shares, "to be allotted and issued . . . upon the vesting in the company of the title" to the property to be transferred.

The vendors failed to make title to the property; and afterwards a new arrangement was entered into, by which the shares were at once allotted, and a bond was taken in the penal sum of $5,000 conditioned upon the making of title. The shares in respect of which it is sought to hold the appellants liable are part of the 6,500 shares referred to.

The learned Master has taken the view that, inasmuch as the shareholders have never transferred the property, and as they have undoubtedly acted as shareholders of the company with respect to the stock in question, and are now estopped from

*To be reported in the Ontario Law Reports.

denying that they are shareholders, they are liable to be placed upon the list of contributories for the face value of the stock. . . .

After much consideration, I have come to the conclusion that the Master's judgment cannot be upheld. The question in this case, it seems to me, depends upon the contract. . . .

[Reference to Re Wiarton Beet Sugar Co., Jarvis's Case, 5 O.W.R. 542.]

If the promises on the part of the contracting parties are independent, and the shareholders agree to take and pay for the stock, and the company agrees to buy the property offered at an equivalent sum, to be set off, then each contracting party must perform his part of the agreement; but, if there is only, as here, the one contract, by which the shareholders agree to transfer the property, in consideration of the issue of a certain amount of paid-up stock, then, on the breach by either party of its obligation, the defaulter is liable to the other in damages. In such case—where the shareholder has contracted to pay "in meal or malt," and not in money—if he makes default, he is liable in damages for the value of the "meal or malt" that he contracted to deliver; but he cannot be made liable upon a contract which he never made—a contract to pay in cash. . . .

[Reference to Waterhouse v. Jamieson, L.R. 2 Sc. App. 29.]

The shareholders agreed to take stock only on the terms set out in the document, in satisfaction of the price of certain property to be conveyed. The property may have been worth much or little; the only obligation assumed was to convey it; and damages based upon its value is the only liability for the breach. This may be as much as the nominal value of the stock; more probably it is much less, and approximates more nearly to the real value of the stock, which seems to have been much less than par.

This liability cannot be asserted in these proceedings: and this decision is confined to the one question, the shareholders' liability as contributories.

At one time I thought the situation might be different, because the original agreement contemplated the transfer of the property before the issue of the stock. The change made later on, by which the stock was issued first, seems, on consideration, immaterial; and the rights of the parties upon the agreement as varied are as indicated. . . .

[Reference to In re Continental, etc., Co., [1875] W.N. 208; Hartley's Case, L.R. 10 Ch. 157; and Carling's Case, 1 Ch.D. 115.]

While I allow the appeal, there is, I think, ample ground for refusing to give the shareholders costs. The liquidator was justified in his attempt to place the shareholders upon the list, and should be allowed his costs out of the estate.

[Leave to appeal was granted on the 3rd March, 1913.]

MIDDLETON, J. FEBRUARY 25TH, 1913.

*CARTWRIGHT v. CITY OF TORONTO.

Assessment and Taxes—Tax Sale—Mortgage—Part Discharge—Consideration—Agreement with City Corporation—Failure to Prove—Foreclosure—Arrears of Taxes—Land Purchased by City Corporation at Sale—Validating Statute—Defective Description in Assessment Roll—Notice to Owner—Omission to Give—Curative Effect of Statute—Failure to Redeem within Time Limited—Position of Municipality as Purchaser—Absolute Owner.

Action to set aside a tax sale of certain lands in the city of Toronto, which were by deed of the 1st October, 1902, conveyed to the city corporation in pursuance of a sale for taxes held on the 24th April, 1901. The plaintiff, in the alternative, asked for other relief.

George Bell, K.C., for the plaintiff.

E. D. Armour, K.C., and C. M. Colquhoun, for the defendants.

MIDDLETON, J.:—The lands in question, and other lands, were mortgaged by Jane Prittie, then owner, to the late Sir Richard Cartwright, on the 13th February, 1892, for $43,000. Prior to the making of this mortgage, the city corporation had entered upon these lands and constructed through them a main sewer known as the Garrison creek sewer; and the compensation payable to the mortgagor was the subject of a reference to the County Court Judge.

As collateral to the mortgage, the mortgagor assigned $20,000, part of the moneys payable as damages; an award having theretofore been made for $35,000, which was, upon an appeal, after the date of the mortgage, referred back for reconsideration.

*To be reported in the Ontario Law Reports.

Negotiations thereupon took place between Mrs. Prittie and the city corporation, looking to a settlement of her claim. The work leading to the arbitration, and for which these damages had been awarded, had not involved the actual taking of the lands, but the mere construction of the sewer through and under them. The negotiations resulted in the making of an arrangement by which Mrs. Prittie undertook to convey part of the lands to the city corporation absolutely, in consideration of $55,000. This arangement obviously could only be carried out with the assent of the mortgagee; as the mortgagee's title was only subject to the right or easement concerning which there had been the arbitration.

No one is now living who can speak of the negotiations with Sir Richard Cartwright. . . .

Sir Richard Cartwright (the original plaintiff) in his pleadings set up that he agreed to give a part discharge of mortgage, in consideration of $26,000 being paid to him, and all arrears of taxes upon the lands covered by his security being paid, and for the further consideration of all local improvement taxes being commuted, and the commutation sum being paid out of the $55,000.

There is no evidence to support this allegation. Sir Richard received the $26,000 and discharged the mortgage, so far as it affected the lands taken over by the city. Some $5,600 dollars then due to the city for taxes was also deducted from the price; the local improvement rates not accrued due were not computed or deducted; and a small sum due upon some of the lands for taxes for the year 1892 was not included in the taxes deducted by the city—it is said, because of an oversight arising from the fact that some of the rolls had not been returned by some of the collectors.

Nothing in the way of an agreement between Sir Richard and the city corporation is established. The most that is shewn is, that Mrs. Prittie and the city corporation agreed that the taxes due should be deducted. Thereafter taxes continued to be assessed upon the lands, and Mrs. Prittie paid nothing. She also made default in the payment of interest under the mortgage, and she was ultimately foreclosed; the final order being issued on the 8th August, 1894.

Sir Richard made no payment whatever on account of taxes; and in 1898 the lands in question were offered for sale, but were not sold, because there were no bidders at a price equal to the arrears. In 1901, the lands were again offered for sale, and, in supposed pursuance of the authority then possessed by the city corporation, were bought in by the city corporation.

There was grave doubt as to the validity of this sale, owing to the laxity with which the assessment and all other preliminary proceedings had been conducted by the city. As it was thought that the curative provisions found in the general Assessment Act would not suffice to remedy these defects, a special Act was passed to remove all doubt as to the title conferred upon the purchasers at the tax sale in question. This statute, 3 Edw. VII. ch. 86, was the subject of criticism in Russell v. City of Toronto, finally decided by the Privy Council, [1908] A.C. 493. . . .

Counsel for the plaintiff sought to distinguish that case by shewing that the lands in question here were not sufficiently described, in that from the description given of some of the parcels it was impossible to identify them in any way.

I do not think that he succeeded. The description in the assessment roll and collector's roll was, no doubt, very defective; but it was entirely adequate to identify the lands to the owner; and the case is indistinguishable in this respect.

The other point argued is one of much greater difficulty. Under the Assessment Act, if the municipality determines to buy, it is necessary that it must give notice of the intention to the owner. The Assessment Act R.S.O. 1897 ch. 224, sec. 184 (3), gives the right to purchase "if the council of the local municipality before the day of such adjourned sale has given notice in writing of intention so to do." No notice whatever was given to Sir Richard Cartwright. An advertisement was published, and it was assumed that this was a sufficient compliance with the requirements of the statute. That this advertisement ever came to the notice of Sir Richard was not shewn.

In the Russell case their lordships agreed with the Canadian Courts in holding that the notice is required to be given to the owner of the lands. . . . They held . . . that the owner had waived the notice. . . . But I think that the decision of the Privy Council also proceeds upon the ground that the curative effect of the Act covers the defect arising from the omission to give the required notice. . . .

It is to be observed that the legislation is not entirely unfair. The curative statute gives to the owner an opportunity to redeem. Notice was given to him by the city. No redemption was made or attempted within the time limited. Mr. Fleming, the Assessment Commissioner, was seen, and promised to recommend an extension if asked for, permitting redemption within a year further. No application for such an extension was made. After the expiry of the year, Mr. Fleming was again seen, and was

written to; and he stated that in similar cases the council had declined to allow redemption, as in so doing the city was placed in an unfair position. If the property increased in value, there was redemption; if it decreased, the city was allowed to keep the worthless asset.

Following this, no application was made to the city council, although negotiations were entered into some time during 1904—which came to nothing. The writ in this action was issued in 1906, when the property had greatly increased in value.

This branch of the plaintiff's case also fails.

In the alternative, the plaintiff puts forward the theory that, when the city purchases land under the clauses in question, it holds the land as trustee to pay itself the principal amount due for taxes and subject to the obligation to account to the owner for any surplus.

I can find nothing in the statute to justify this. The Legislature gave to the municipality the right to purchase; and, upon the purchase being made and upon the lapse of the redemption period provided, the city becomes the owner, with as absolute a title as any other purchaser at such a sale. This is emphasised by the provision found in the same sub-section, that redemption price is to be, not the purchase-money, but the full amount of taxes due in respect of the lands.

The action fails, and must be dismissed with costs.

MIDDLETON, J. FEBRUARY 25TH, 1913.

RE MARA AND WOLFE.

Will—Construction—Power of Appointment—Beneficiary—Trustees—Title to Land—Power to Convey—Application under Vendors and Purchasers Act.

Motion by the vendors, under the Vendors and Purchasers Act, for an order determining a question arising on the will of the late Ann Mara, as to the ability of Charlotte S. Mara, with the concurrence of the surviving trustee under the will, to make title to land.

W. A. Proudfoot, for the vendors.

L. M. Singer, for the purchaser.

MIDDLETON, J.:—The estate is given to trustees, and the daughter Charlotte S. Mara is given a life estate and a general power of appointment, by deed or by will, and the executors are

directed to convey in accordance with the appointment "in the event of my daughter C.S. dying." If she has made no appointment either by will or deed and dies unmarried, there is a gift over; and, if she dies married and leaving children or their issue, there is a gift to them.

The power of appointment being general and exercisable either by will or deed, the daughter is in substance the sole person beneficially entitled; and, when she conveys her life estate and executes a deed of appointment, she is entitled to call upon the trustees to convey in pursuance of her appointment. They hold in trust for her and her appointee.

The only difficulty arises from the direction in the will that the executors shall convey at her death. There is nothing to prevent the appointment being made at any time, and I think nothing to prevent a conveyance of the legal estate at any time to the appointee, who is solely beneficially entitled. What was really in the testator's mind was the fixing of the death of Charlotte as a time when a new duty would arise in the executors, if she had not made an appointment either by deed or will.

I think a good title can be made by a properly drawn conveyance.

KELLY, J., IN CHAMBERS. FEBRUARY 25TH, 1913.

REX v. DUROCHER.

Criminal Law—Police Magistrate—Jurisdiction—Prohibition—Indictable Offence—Fraudulently Depositing Paper in Ballot Box at Municipal Election—Municipal Act, sec. 193, sub-sec. 1(b), sub-sec. 3—Criminal Code, sec. 164—Act Prohibited by Statute—Specific Remedy—Remedy by Indictment.

Motion by the defendant for an order prohibiting the Police Magistrate for the City of Ottawa from proceeding on an information, on the ground of want of jurisdiction to deal therewith.

The information was laid under sub-sec. 1(*b*) of sec. 193 of the Consolidated Municipal Act, 3 Edw. VII. ch. 19, which provides that "no person shall . . . fraudulently put into any ballot box any paper other than the ballot paper which he is authorised by law to put in." By sub-sec. 3, a person (other than the clerk of the municipality) guilty of any violation of

the section "shall be liable to imprisonment for a term not exceeding six months, with or without hard labour."

G. F. Henderson, K.C., for the defendant.
J. A. Ritchie, for the Crown and the Police Magistrate.

KELLY, J.:—The act prohibited by sub-sec. 1 (b) of sec. 193 is not indictable per se. It is urged on behalf of the defence that sec. 164 of the Criminal Code cannot be applied, as sec. 193 . . . names a punishment; and that, therefore, the Police Magistrate has no jurisdiction.

Section 164 of the Criminal Code declares every one to be guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada or of any Legislature in Canada, by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law.

There are many cases dealing with acts done in contravention of statutes prohibiting the doing of such acts. The subject and the application of numerous decisions are discussed in Russell on Crimes, 7th ed. (1909), p. 11 et seq. It is there stated that where an act or omission, which is not an offence at common law, is made punishable by a statute, the question arises whether the criminal remedies are limited to the particular remedy given by the terms of the statute, or, in other words, whether the remedy given by the statute is exclusive of or alternative to other remedies given by other statutes or the common law; and that where an act or omission is not an offence at common law, but is made an offence by statute, an indictment will lie where there is a substantive prohibitory clause in such statute, though there be afterwards a particular provision and a particular remedy given. The author cites from Clegg v. Earby Gas Co., [1896] 1 Q.B. 592, at p. 504: "Where a duty is created by statute which affects the public as the public, the proper mode, if the duty is not performed, is to indict or take the proceedings provided by the statute." When a new offence is created by statute, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty; but he may proceed on the prior clause, on the ground of its being a misdemeanour: Rex v. Harris, 4 T.R. at p. 205.

In Russell on Crimes, 7th ed., p. 12, it is said: "Where the same statute which enjoins an act to be done contains also an enactment providing for a particular mode of proceeding, as

commitment, in case of neglect or refusal, it has been doubted whether an indictment will lie." The author, however, adds: "But all that the authorities establish on this point is, that where there is a substantial general prohibition or command in one clause, and there is a subsequent clause which prescribes a specific remedy, the remedy by indictment is not excluded."

The question was gone into by the late Mr. Justice Robertson in Rex v. Meehan, 3 O.L.R. 567, both as to the power of the Legislature to enact the Municipal Act and to regulate elections thereunder, and to prescribe the penalty or forfeiture for a wilful breach thereof, and also as to the cases where indictment will lie; some of the authorities there cited have a bearing on the present case.

Lord Denman, C.J., in Regina v. Buchanan, 8 Q.B. at p. 887, declares that wherever a person does an act which a statute, on public grounds, has prohibited generally, he is liable to an indictment. He agrees, however, that where, in the clause containing the prohibition, a particular mode of enforcing the prohibition is prescribed, and the offence is new, that mode only can be pursued; but he explains this by saying that the case is then as if the statute had simply declared that the party doing the act was liable to the particular punishment; and he adds, "But, where there is a distinct absolute prohibition, the act is indictable."

In the present case there is in one clause of the statute a distinct, absolute prohibition, the penalty being provided by a separate and substantive clause.

It appears to me that these authorities are applicable here, and that they are distinctly opposed to the defendant's contention.

In that view the application must be dismissed. I see no reason for relieving the applicant from payment of costs; and the dismissal is, therefore, with costs.

MIDDLETON, J. FEBRUARY 27TH, 1913.

McFARLANE v. FITZGERALD.

Schools—Township Continuation School — Resolution of Township Council—Ultra Vires—Perpetual Injunction—Costs.

Motion by the plaintiffs for an interim injunction to restrain the defendants from acting upon a resolution passed by the coun-

cil of the defendants the Municipal Corporation of the Township of West Nissouri.

See Re Henderson and Township of West Nissouri, 3 O.W.N. 65, 24 O.L.R. 517; Re West Nissouri Continuation School, 3 O.W.N. 478, 726, 25 O.L.R. 550; Re West Nissouri Continuation School, 3 O.W.N. 1623, 4 O.W.N. 497.

The motion was turned by consent into a motion for judgment.

W. R. Meredith, for the plaintiffs.
G. S. Gibbons, for the defendants.

MIDDLETON, J.:—This is another chapter in the unfortunate litigation over the continuation school in West Nissouri. The facts appear sufficiently in the judgments already reported.

Upon a mandamus being sought to compel the school board to apply for the money necessary for the maintenance of the school, it was suggested that the county council might repeal the by-law for the establishment of the school, to which it was answered that it would be contended that the county having created could not destroy, and that it was hoped that, even if it had the power, the county would not repeal the by-law in question.

When that motion was before me, I refused to delay judgment, as the demand had to be made before a day named in the statute; and, being of opinion that the trustees were bound to make the demand, I awarded a mandamus (3 O.W.N. 1623).

An appeal was had; and, pending the appeal, the demand was made without prejudice to the rights of the parties. Upon this appeal judgment was reserved to see what action (if any) the county council might take and to allow the validity of any repealing by-law to be determined. The county took no action, and judgment was then given dismissing the appeal (ante 497).

In the meantime the township council was doing its best to forward its views and secure a repealing by-law from the county, and those interested in the establishment of the school were opposing any such by-law, both upon the ground of absence of power and inexpediency.

The educational committee of the county council reported against any attempt to repeal, "on account of the uncertainty of liability resulting from legal action now pending and judgments already given;" but added that, "as soon as the expense and costs are paid by either the school board or municipal council, the resolution and by-laws should be repealed."

To fortify its position, the township council passed a resolution that the township "guarantee the payment of all legal debts" incurred by the school board, "and that the same be deposited with the county treasurer as soon as ascertained."

This meant that the township intended, instead of obeying the mandamus to pay the $2,000 to the school board, to have an inquiry as to the debts of the board and to pay sufficient to the county treasurer to enable him to pay the creditors. As the mandamus was still in the hands of the appellate Court, this was not intended to be contumacious, and was only intended to be a means of satisfying the county council that, in the event of repeal, the debts would be paid.

As a counter-move the plaintiffs brought this suit to restrain any action upon this resolution.

The county council finally determined to take no action upon the request for repeal, and returned the resolution to the township. There is, therefore, nothing in the action now—beyond the question of costs.

The township had no power to divert the money from the school board or in any way to interfere with its affairs. The school board has the right to receive the money it calls for and to arrange and liquidate its own debts. What the township sought to do, when it proposed to pay to the county sufficient to pay the debts of the board, to be proved before the county treasurer, is quite foreign to anything that is authorised by the Municipal Act, and ultra vires. This ultra vires action of the municipality and improper payment of municipal funds can, I think, be restrained by a ratepayer in a class action.

Looked at from a broader point of view, the costs of this action really form part of the expense of an unsuccessful attempt by the township to get free from an obligation imposed by law; and the fairest disposition of costs is to direct payment out of the township funds rather than to impose the burden on the individual.

For these reasons the injunction may be made perpetual, and the defendant township should be ordered to pay costs.

MIDDLETON, J. FEBRUARY 28TH, 1913.

CARVETH v. RAILWAY ASBESTOS PACKING CO.

Master and Servant—Contract of Hiring—Construction—Right to Dismiss Servant—Failure to Shew Incompetence or Misconduct—Expenses—Right to Sue in Ontario — Assets within Ontario—Con. Rule 162*—Contract Made in Quebec —Election of Domicile—Exclusion of Foreign Court—Public Policy—Wrongful Dismissal—Damages—Costs.*

Action for wrongful dismissal.

D. Inglis Grant, for the plaintiff.
W. N. Tilley and R. H. Parmenter, for the defendants.

MIDDLETON, J.:—The hiring was under a written agreement, dated the 29th March, 1912, made at Sherbrooke, in the Province of Quebec, where the factory of the defendant company is situated.

The agreement is between the company, on the one part, and one King and the plaintiff, on the other part. The company employed King and Carveth to introduce, sell, and dispose of "goods of the plaintiff, being a certain lubricant then about to be placed upon the market, manufactured under a certain patent granted to the president of the company as inventor." The agreement provided that King and Carveth should place and sell 12,000 shares of the company's capital stock at $1 per share before the 1st June, in consideration of which they were to be allowed, jointly, 2,000 shares at par—presumably paid-up. It is then stated that King and Carveth are hired for one year, with the option to the company to extend for a further period of a year, if satisfied with the results of their services and work. A commission is then provided upon the amount of the sales; and it is stipulated that King is to work in the Province of Quebec only, and Carveth in Ontario only. "Legitimate expenses" are to be kept to "a minimum figure;" daily reports are to be sent; and, in addition to the commission, King and Carveth are each to be paid $2,500 per annum, in weekly instalments.

The product in question was not upon the market at all. Some brands of it were suited for use as a lubricant upon railways and street railways. If a railway or large street railway, such as the Toronto Street Railway, could be induced to adopt it, the sales would be very large, and the result would be im-

mensely greater than what could be expected from sales to individual factories or by retail, where the amount required would be, comparatively speaking, insignificant.

King apparently made no success in his endeavours in the Province of Quebec; and, in a few weeks, the defendants made up their minds to dismiss him. Carveth, at this time, was giving entire satisfaction. It was assumed that a failure to sell the 12,000 shares by the 1st June would justify discharge. Carveth was asked not to sell, so that the company might be in a position to get rid of King. He assented. King was got rid of, and Carveth continued; the result being that the terms of the agreement would continue to govern, so far as he was concerned, save that he was removed from the obligation, originally joint, with respect to the sale of the stock.

Carveth, through acquaintances, was able to secure an introduction to the Toronto Railway Company, and to the Canadian Northern Railway Company. He began a series of demonstrations of the efficiency of the lubricant in question. His success was not unqualified, partly because the manufacture was yet in the experimental stages, and the product of unequal quality.

Carveth was sanguine and optimistic, perhaps to an unreasonable degree, and was ready to assume much from any encouragement that he received from those in charge of the affairs of these railways. I think that he honestly did his best to accomplish the introduction of the wares in question; and, while his correspondence is perhaps too rosy and optimistic, I acquit him of any intentional misleading or dishonesty. The importance of securing the adoption of the lubricant by these railways was quite manifest to the company. Carveth was told to devote himself to the street railway and let all else go; and, while in the result nothing was accomplished, I am not sure that he was entirely to blame.

It is to be borne in mind that the hiring was for a year certain, to be continued for another year if the company were satisfied. The position was such, when the dismissal took place in August, that the company might well with perfect honesty say that the situation was not satisfactory; but they had not by the agreement reserved to themselves the right to dismiss at any time if dissatisfied.

I do not think there was any such incompetence or misconduct as would justify dismissal. The result was not as satisfactory as either Carveth or the company hoped for; and the company made up their minds to change the mode of carrying on their buisness and to close the Ontario office and concentrate

their endeavours on the obtaining of a foothold elsewhere. As a matter of business policy this was probably wise; but this did not entitle them to take the course they did with the plaintiff. In every such hiring, where the master does not expressly reserve the right to dismiss at any time, the employee is taken, to some extent, for better or for worse. There must be, as I understand the cases, more than mere dissatisfaction with the result; there must be incompetence or misconduct.

It is significant that in this case there is not, throughout the correspondence, voluminous and extensive as it is, any complaint. The expense accounts were regularly sent in. No doubt, these included expenses for cigars and entertainment to those engaged with the two companies in question. The employees of these companies were, no doubt, put to some inconvenience, and were, no doubt, asked for favours, so these expenditures were not without reason; but, beyond that, they were the very things contemplated by the expression "legitimate expenses," and there never was any objection to what was being done, until the defendants decided to change their plan of operations. The evidence of the defendants' representatives was most unsatisfactory.

The question as to the plaintiff's right to sue in Ontario was raised at an early stage, and a conditional appearance was entered. The existence of assets within Ontario to an amount exceeding $200 was admitted at the trial, though it had been denied on the motion to set aside the service; so there is now no question so far as Con. Rule 162 is concerned.

The right to sue in Ontario is also denied upon another ground. By the contract the parties elect domicile at Sherbrooke, where the contract was made. It is said that this not only permits but compels resort to the local Court at Sherbrooke. The Civil Code of Quebec, art. 85, provides that in such case "demands and suits relating thereto may be made at the elected domicile and before the Judge of such domicile." Article 94 of the Code of Civil Procedure makes it plain that, even within the Province, this does not prevent suit elsewhere, as a defendant may be summoned either before the Court of his domicile or the Court of domicile elected, as well as before the Court where served, or, in certain cases, the Court where the plaintiff resides.

This falls far short of an agreement not to sue in any foreign Court to which the plaintiff might otherwise resort.

Quite apart from this, the right to resort to our Courts is determined by the Rules, which have the force of statutes. This

is so stated in Western National Bank of City of New York v. Perez Triana & Co., [1891] 1 Q.B. 304; and probably any agreement not to resort to our Courts, even when made abroad, would be regarded as against public policy and void.

The plaintiff's claim is exaggerated, and, I think, should be confined within the bounds indicated at the trial, namely, for the period between his dismissal and the date when he secured other employment, plus the $8 due him on expense account: in all $358. I think this should be with County Court costs and without a set-off.

BOYD, C. FEBRUARY 28TH, 1913.

REICHNITZER v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

Guaranty—Fidelity Bond—Defalcation of Employee—Parties—Liability—Ascertainment of Amount—Reference—Costs.

Action to recover from the defendant corporation, $5,000 on a policy to guarantee the plaintiff against loss by reason of the default of his employee, the defendant Munns, and to have the policy reformed so as to express the true intent.

Sir George C. Gibbons, K.C., for the plaintiff.
T. G. Meredith, K.C., for the defendants.

BOYD, C.:—The justice of the plaintiff's claim commends itself; not so the defences raised by the corporation, which savour of technicality. For value paid by the plaintiff, the defendants (the corporation) undertake to guarantee the honest dealing of the defendant Munns in his conduct of the business of the plaintiff in Europe and at Berlin. The agent of the defendants who made the contract knew that the essence of the transaction was to protect the plaintiff, and that the Dressed Casing Company was substantially a synonym for the plaintiff, who had put all the capital in, and merely shared profits with his employee Munns to encourage him to greater exertion and faithfulness. The guarantee company had no reason to suppose or understand that their engagement was other than this.

The evidence leads me to believe that Munns has been guilty of considerable defalcation; the exact extent cannot perhaps be measured till the accounts are taken as to his interest in the

Dressed Casing Company—but, apart from this precision, the circumstances proved indicate that he has dishonestly made away with the money and goods of the plaintiff to the extent of, say, $2,000.

The judgment may be entered for this amount with costs, subject to variation at the instance of either party by reference to the Master. If such reference is desired, and the amount is reduced, costs of reference will be paid by the plaintiff; if it is increased, costs of reference will be paid by the defendant corporation.

The Dominion Dressed Casing Company may be added as a party now or in the Master's office (if there is a reference), and is to be bound by the judgment.

MIDDLETON, J., IN CHAMBERS. MARCH 1ST, 1913.

RE CAMERON.

Infant—Custody—Rights of Father—Welfare of Infant.

Motion by the father of Grace Cameron, a child of seven years, on the return of a habeas corpus, for an order awarding him the custody of the child.

W. A. Henderson, for the applicant.
H. S. White, for the infant's aunt.

MIDDLETON, J.:—The child is seven years of age. The mother died in January, 1906, three weeks after the birth, and the husband married again in April, 1907; but this marriage did not turn out well, and Cameron and his second wife separated in less than six months.

At the time of the death of the mother of this child, Cameron placed it and another child, a boy of a few years older, with his sister, Mrs. Lang, who has had it ever since.

Cameron resumed custody of the boy some three years ago, since which time the boy has been for some considerable part of the time in the Boys' Home.

Cameron has now a house, which is kept for him by a Mrs. Waterman, who acts as his housekeeper. Nothing is said against her in any way, but she is an elderly woman employed as a domestic in charge of the house. Cameron's own affidavit indi-

cates her position: "I believe Mrs. Waterman is well able to look after my house, and is now doing so, and that the said Grace Cameron would receive good care and attention from her. If it should happen that Mrs. Waterman is not the proper person to look after the said Grace Cameron, I will see that some other person is employed who will give her proper care and attention."

The case has given me much anxiety, as I realise the extent of the father's right to the custody of his children, and the responsibility of depriving him of the duty and privilege incident to this right; and I have also present to my mind the disadvantage of separating the two children. Yet the facts of this case, which I refrain from setting forth at greater length, convince me that the welfare of this little girl requires that she should be left in the custody of the aunt, who has stood in the place of her mother almost from the day of her birth, rather than in the custody of the father, who will have to be away from home during most of her waking hours earning his livelihood, so that the real custody and training will devolve upon a hired housekeeper.

It may be the father's misfortune that he has not a better established home to which he can take his child, but he has voluntarily left her with his sister, until now any change must be prejudicial to the child, who has been well cared for so far, and whose present custodians are at least as well off financially as the father.

The aunt must allow all reasonable access to the father and must undertake to do nothing to prejudice the child against the father, who should have liberty to renew this motion if circumstances change.

I do not think costs should be awarded.

REGAN v. McCONKEY—MASTER IN CHAMBERS—FEB. 24.

Pleading—Reply—Departure—Embarrassment — Wrongful Dismissal—Breach of Contract.]—Motion by the defendant to strike out or compel the plaintiff to amend his reply. The action was brought to recover twenty-five weeks' wages of the plaintiff as cutter for the defendant, a tailor, or for damages for wrongful dismissal. The plaintiff and defendant had been parties; the plaintiff sold his interest in the business to the defendant in 1908; and the defendant agreed to employ the plaintiff as cutter for ten years at $40 a week. The plaintiff fell ill,

was unable to work as cutter, and was dismissed by the defendant on the 18th May, 1912. By the statement of defence the defendant admitted the agreement, but said that for many months before May, 1912, the plaintiff was not able to do his work, by reason of illness, and that the defendant was obliged to dismiss him because he was "still wholly incapable of performing his duties under the agreement." By the reply the plaintiff set up that the agreement was primarily and chiefly for the purchase of the firm's business, the right to use the firm name, and the goodwill; that the defendant had had full enjoyment of these benefits; and that this was the consideration for the employment; and, therefore, the plaintiff was still entitled to the $40 a week. The Master said that the defendant treated the action as one for wrongful dismissal, while the plaintiff put his claim on the ground of a breach of contract, as in Caulfeild v. National Sanitarium Association, 4 O.W.N. 592, 732. The reply was not embarrassing or objectionable as a departure from the statement of claim or otherwise; and the application should be dismissed; but, owing to the peculiar facts, the costs should be costs in the cause. The Master referred to Hall v. Eve, 4 Ch. D. 341; MacLaughlin v. Lake Erie and Detroit River R.W. Co., 2 O.L.R. 151; Smith v. Smith, 2 O.L.R. 410. H. S. White, for the defendant. H. E. Irwin, K.C., for the plaintiff

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SHANTZ v. CLARKSON—MASTER IN CHAMBERS—FEB. 24.

Discovery—Examination of Plaintiff—Refusal to Answer—Mental Weakness.]—Motion by the defendants for an order requiring the plaintiff to attend for further examination for discovery and answer questions previously refused. The action was brought by a creditor to set aside a sale of the assets of an insolvent estate, on the ground that one of the inspectors (a brother of the plaintiff) was interested in the purchase, and that the sale was not authorised by the creditors and was made at an undervalue. By the statement of defence the defendant alleged sufficient instructions to sell; that the inspector in question took no part in the arrangements for the sale; and that, if he had any interest in the purchase, the defendant was not aware of it. The defendant also pleaded that the plaintiff had no status to maintain the action. The Master said that he had read the plaintiff's examination: he was plainly mentally affected, though all relevant questions were sufficiently answered. Except

as to his own status as a shareholder, he could not be expected to give any useful information on the issues in this case. As notice of trial had been given for the 4th March, and the defendants were anxious to have the action disposed of then, no good purpose would be served by ordering the plaintiff to be further examined. He must attend and give evidence at the trial, and could then be fully examined. Motion dismissed; costs in the cause. R. H. Parmenter, for the defendants. M. A. Secord, K.C., for the plaintiff.

TOPPER v. BIRNEY—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—FEB. 24.

Trial—Postponement—Terms—Leave to Sell Land pendente Lite.]—Appeal by the plaintiff from an order of the Master in Chambers postponing the trial until after the 17th March. The learned Chief Justice said that the defendant did not ask specific performance, but only damages; and the plaintiff ought not to lose a sale, if he could make one in the meantime. The order should be affirmed, with the added limitation that, if the plaintiff could sell, the sale should be allowed to proceed, but the net purchase-price should go into Court, subject to the order of the trial Judge. Any mortgage might be made to the Accountant. Costs in the cause. W. Proudfoot, K.C., for the plaintiff. H. H. Shaver, for the defendant.

CANTIN v. CLARKE—MASTER IN CHAMBERS—FEB. 25.

Pleading—Statement of Claim—Motion to Strike out Part—Particulars—Costs.]—Motion by the plaintiff for particulars of paragraph 15 of the statement of defence. It was agreed on the argument that these would be given. The plaintiff also moved to strike out paragraphs 16, 17, and 18 of the statement of defence as embarrassing and irrelevant. The Master said that paragraph 16, together with paragraphs 10, 12, 13, and 14, was set up by way of counterclaim, which would render it difficult or perhaps impossible to strike it out. As pointed out in Bristol v. Kennedy, ante 537, "under our present system of pleading, it is difficult to maintain an order striking out a part of a pleading:" per Middleton, J. It could not be said that these paragraphs might not, as against paragraphs 5, 6, and 7 of the

statement of claim, be available as matter of defence. On their face, they seemed to be allegations of facts which might assist the defendant if proved and allowed by the trial Judge, or on a reference, if one should be directed. Motion dismissed upon this branch. The motion having been successful as regards particulars, costs to be costs in the cause. J. M. McEvoy, for the plaintiff. H. J. Martin, for the defendant.

CANADIAN LAKE TRANSPORTATION CO. v. BROWNE—FALCONBRIDGE, C.J.K.B.—FEB. 25.

Principal and Agent—Claim for Moneys Due by Agent—Counterclaim for Breach of Contract—Damages—Preponderance of Evidence—Reference.]—Action to recover a balance of $1,447.72 claimed from the defendants as agents of the plaintiffs. There was no dispute as to the plaintiffs' claim; and judgment was given against the defendants for the amount claimed, with interest from the 19th December, 1911, and costs. The dispute was as to the defendants' counterclaim for: (1) loss to the defendants by reason of the plaintiffs wrongfully unloading a shipment of wire at the wharf of another wharfinger, instead of at the defendants' wharf; (2) $792 for checker's wages for 1908-1910; (3) refusal of the plaintiffs to let their boats use the defendants' dock for 1911 and 1912. The learned Chief Justice finds, without regard to the demeanour of witnesses, that the preponderance of evidence is in the defendants' favour with regard to all these items of counterclaim. In his written opinion, he briefly reviews the evidence, and gives judgment for the defendants on the counterclaim, with a reference to the Master as to all three items, and costs of counterclaim up to this judgment. Further directions and subsequent costs reserved until after report. G. Lynch-Staunton, K.C., and T. Hobson, K.C., for the plaintiffs. E. F. B. Johnston, K.C., and J. G. Gauld, K.C., for the defendants.

BADIE v. ASTOR—MASTER IN CHAMBERS—FEB. 26.

Security for Costs — Increased Security — Sufficiency of Security Given under Præcipe Order—Leave to Renew Motion.]—Motion by the defendant for an order for further security for costs, a præcipe order having been made and satisfied. The plaintiff succeeded at the trial. On appeal the judgment in

his favour was set aside, with costs of the trial and appeal to the defendant in any event, and a reference was directed to take accounts. Nothing had been done further. A bill of costs down to the trial and instructions for appeal had been submitted, which would not exceed on a liberal estimate $150. No bill for the appeal had been suggested. The Master said that, if this was put at an equal amount, the defendant would still have ample security in the bond for $400 given by the plaintiff under the præcipe order. For the reasons given in Stow v. Currie, 13 O.W.R. 997, and cases cited, there should not be any order at present. If, at a later stage, the defendant should think well to do so, he would be at liberty to renew the motion. Motion dismissed, with costs to the plaintiff in the cause on the final taxation. Stanley Beatty (Kilmer, McAndrew, & Irving), for the defendant. R. McKay, K.C., for the plaintiff.

SCOBIE v. WALLACE—LENNOX, J.—FEB. 26.

Fraud and Misrepresentation—Agreement for Purchase of Land—Misrepresentations of Agent of Vendor—Complicity of Vendor—Cancellation of Agreement—Return of Money Paid.] —Action to set aside an agreement for the purchase by the plaintiff from the defendant of lots, represented as being in the city of Regina, Saskatchewan—being in reality outside the limits—on the ground of fraud and misrepresentation, and for a return of the money paid by the plaintiff. The learned Judge said that the plaintiff had not proved all the allegations of his statement of claim, but he had clearly established that he was induced to sign the agreement by representations and statements made to him by the defendant's agent, Michael Bergin, that the lots were "inside lots" in Regina; that they were within one mile and a half of the city post office; that the city was actually built up as far out as these lots, etc. And the learned Judge held that the plaintiff entered into the agreement relying upon the truth of these representations, as the agent knew; and that the representations were false, and were knowingly and fraudulently made. "This," says Lennox, J., "is another instance of western land dealing in which the pre-arranged method of procedure is to be severely condemned. The practice of inducing farmers and others to sign long and intricate agreements wholly in blank, to be filled up and sealed at the office of the vendor, is a dangerous and intolerable practice. And this is another

instance, too, in which the principal cannot shift even the moral responsibility from himself by saying that it was the agent who did it, for we have here again a familiar form of fraud in the papers placed in the agent's hands for distribution." There could be no question of waiver or confirmation in this case. The plaintiff was quieted for a time, but only half convinced, by the defendant. Judgment for the plaintiff declaring that the agreement is null and void and directing that it be delivered up to be cancelled, and for payment by the defendant to the plaintiff of $1,225, with interest from the 3rd August, 1912, and the costs of the action, and dismissing the defendant's counterclaim with costs. A. E. Fripp, K.C., for the plaintiff. G. F. Henderson, K.C., for the defendant.

VANDEWATER v. MARSH—KELLY, J.—FEB. 26.

Building Contract—Mistake in Construction of Foundations—Duty as to Laying out Ground—Authority of Clerk of Works—Powers of Architect—Waiver—New Contract—Non-completion of Work—Withholding of Certificate of Architect—Absence of Fraud or Collusion—Premature Action—Extras—Sanction of Architect—Evidence.]—Action to recover the contract-price and payment for extras for the excavation and concrete work in the erection of certain buildings for the defendants Marsh & Henthorn Limited, in the city of Belleville. The defendant Herbert was the architect for the buildings. The contract was dated the 10th May, 1912; the price to be paid for the work contracted for was $2,400; and, in addition thereto, the plaintiff claimed $761.65 as extras for additions and alterations made, as he alleged, at the request of the defendants. At the time of the trial, nothing had been paid to the plaintiff, but the work was not then fully completed. The contract provided that the buildings should be rectangular, and difficulties arose because the plaintiff had deviated from rectangular. This error in construction resulted from an improper locating of the lines of the buildings. The plaintiff contended that it was the duty of the defendants to lay out the ground, and that he was misled by stakes placed there, as he said, by the defendants. KELLY, J., said that no such duty devolved upon the defendants, either by contract or usage.—The plaintiff further contended that John Marsh designated to him the location of the buildings; but the learned Judge said that there was no evidence that John Marsh

was authorised by the defendants to locate the buildings or to instruct the plaintiff where to place them; and, even if John Marsh were the clerk of the works, his power as such was only to disapprove of material and work, and not to bind the owner of the building by approving of them: Halsbury's Laws of England, vol. 3, p. 163. The proper location could without difficulty have been ascertained from the plans and data which the defendants furnished.—The defendants, to avoid loss and delay, allowed the buildings to proceed, relying for their remedy upon a term of the contract by which the architect should assess the damage for any inferior work, instead of having it removed. The learned Judge was of opinion that what the defendants had done did not operate as a waiver of any of their rights under the contract, or constitute a new contract with the plaintiff; the parties were still bound by the terms of the written contract. —The plaintiff admitted that part of the work under his contract was not completed at the time of the trial. The written contract made the production of the architect's certificate a condition of the plaintiff's being entitled to payment; and no certificate was issued. The learned Judge finds that the certificates were not withheld either through fraud or collusion on the part of the defendant, or with any intent to injure the plaintiff; but rather in an effort to bring the whole matter to as satisfactory a conclusion as possible. The plaintiff had shewn no right of action against the defendant Herbert; and the action as against the other defendants was premature.—The extras claimed for were largely for labour and material in carrying some of the foundations to a greater depth than the plaintiff originally contemplated, and for increased depth of concrete work consequent thereon; a charge of $85.75 was made for extra excavation and $603.90 for increased depth of concrete. The learned Judge said that the evidence convinced him that the plaintiff went to no greater depth than the contract called for, and that, therefore, the two items were not chargeable as extras. Moreover, clause 6 of the contract was fatal to the claim for extras, the sanction in writing of the architect not having been obtained. The remaining item of $72 in the account for extras, though not sanctioned by the architect, was admitted by the defendants, and must be taken into account in a settlement between the parties.—The effect of the judgment was not to disentitle the plaintiff to payment of whatever might be found due to him under the terms of the contract when the work should be completed and when the architect should have performed his duties under the contract and dealt with the matter fairly be-

tween the contractor and the owners. E. G. Porter, K.C., and W. Carnew, for the plaintiff. W. S. Morden, K.C., and W. D. M. Shorey, for the defendant company. W. H. Tilley, for the defendant Herbert.

SWALE v. CANADIAN PACIFIC R.W. CO.—LENNOX, J.—FEB. 27.

Carriers—Sale of Goods to Pay Charges—Negligence and Default of Auctioneers Employed by Carriers—Conversion of Goods—Loss—Failure to Deliver Surplus Goods—Third Parties—Remedy over—Limitation of Amount to be Recovered—Bill of Lading—Endorsement—Judgment—Costs—Set-off.]—Action for an account of goods sold by the defendants or for damages for conversion. The goods were contained in 97 cases of settlers' effects delivered to the defendants in Liverpool, England, to be carried to Toronto, Ontario. The defendants claimed relief over against W. J. Suckling & Co., third parties, the auctioneers who sold the goods for the defendants to pay the charges the latter had against the goods. See the report of the case upon an interlocutory motion and appeals, 25 O.L.R. 492, 3 O.W.N. 601, 633, 664. The learned Judge said that the liability of the defendants arose out of the conduct of the third parties, the auctioneers employed to dispose of the plaintiff's goods; and that the auctioneers' method of handling, caring for, keeping track of, and accounting for the goods intrusted to them by the defendants was negligent and unbusinesslike to a marked degree.—A number of technical objections were raised on behalf of the third parties. One was that recovery was limited by the bill of lading to $5 a package. Held, that this did not apply here. This was a sale under sec. 345 of the Railway Act; and, under sub-sec. 3, "the company shall pay or deliver the surplus, if any, or such of the goods as remain unsold, to the person entitled thereto." The defendants did not take the objection; and it is not an objection that the third parties can set up against their employers.—The third parties also said that the bill of lading had never been properly endorsed. The learned Judge said that this objection was not open to the third parties; and, even if it was, the facts were against them.—The defendants were paid in full when the sale was discontinued on the 21st October, 1909, and the plaintiff was entitled to immediate delivery of the goods now sued for, and would have got them at that time if the third parties had exercised reasonable care and kept a proper record. The transit was completed, the bailment was at an end, the

money owing to the defendants was in the hands of their agents; and the plaintiff thereupon became entitled to an immediate delivery of her goods and payment of the surplus moneys or damages to the extent of their value.—Judgment for the plaintiff against the defendants for $1,066.40 with costs. Judgment for the defendants against the third parties for $1,066.40 and the costs the defendants are to pay the plaintiff, including the costs to be paid to the plaintiff under the order of the 4th March, 1912, but not including the costs payable under the order of Britton, J., of the 13th March, 1911, together with the defendants' costs of defence. Judgment for the defendants against the plaintiff for $152.16, without costs as between these parties, to be set off against the plaintiff's judgment against the defendants. W. M. Hall, for the plaintiff. Shirley Denison, K.C., for the defendants. W. Laidlaw, K.C., for the third parties.

MEREDITH v. SLEMIN—MASTER IN CHAMBERS—FEB. 28.

Security for Costs—Action against Police Officers—1 Geo. V. ch. 22, sec. 16—Statement of Claim—Amendment.]—Motion by the defendants for security for costs under 1 Geo. V. ch. 22, sec. 16. Of the four defendants, three were described as police officers, and the fourth (Ashton) as a physician. The plaintiff, by the statement of claim, alleged that the defendants illegally and without warrant arrested and assaulted her, and conspired to arrest, assault, and falsely imprison her. The defence sworn to by the defendants was, that all that was done to the plaintiff was at her own suggestion and with her consent, and that they never acted or assumed to act as police officers. It was admitted that the plaintiff and her next friend were not good for costs. The Master said that, applying the test given in Parkes v. Baker, 17 P.R. 345, to the statement of claim, the defendants other than Ashton were being proceeded against as police officers in regard to everything charged except the assault and perhaps the conspiracy; and these three defendants could not be denied security; but the defendant Ashton was not entitled to security. Reference to Lewis v. Dalby, 3 O.L.R. 301, 304, and Lane v. Clinkinbroomer, 3 O.W.R. 613. The plaintiff should have leave to amend, if so advised. If the amendment was not made in a week, an order for security for costs of the three police officers, defendants, should issue. In either case, costs to be costs in the cause. Featherston Aylesworth, for the defendants. J. M. Godfrey, for the plaintiff.

MURRAY v. THAMES VALLEY GARDEN LAND CO.—MASTER IN CHAMBERS—MARCH 1.

Pleading—Statement of Claim—Misrepresentations—Particulars.]—After the order made in this case, ante 773, further particulars were delivered. The defendants now moved to strike out paragraphs 4, 5, 6, and 15 of the statement of claim as embarrassing, as well as paragraph 8 or part thereof, and to strike out paragraph 1 of the particulars relating to paragraph 8, and for proper particulars in respect of that paragraph and paragraph 11 of the statement of claim. The Master said that there did not seem to be anything objectionable in the paragraphs of the statement of claim now attacked for the first time, which were mainly historical, but set out facts which the plaintiff relied on. This would, therefore, seem to be an afterthought, and to be put forward rather as a ground for the extension for five weeks of the time for pleading, which was refused on the previous motion, and was now renewed, being supported by an affidavit that this was necessary in order to communicate with the defendant Macdonald, who was absent in England. It was also objected that the particulars in some respects varied from the allegations in the statement of claim. The Master said that, if that were so, the plaintiff would be necessarily confined to the latest statement of his case. At this stage, particulars were really amendments of the statement of claim. The two typewritten pages of details of the misrepresentations relied on, as given in the statement of claim, were now supplemented by further details covering four more typewritten pages. It seemed almost self-evident that the defendenants had all that they required to enable them to plead. If, at a later stage, they should require further particulars for the trial, these could be obtained on discovery, as pointed out in Smith v. Boyd, 17 P.R. 463. Here it was scarcely possible to believe that the defendants could not plead in the way that our practice allows. The full information given was almost equivalent to "seeing the plaintiff's brief." Justice would be done by directing the statements of defence to be delivered in ten days; the plaintiff to be confined to the particulars now delivered unless further or other particulars were delivered not less than three weeks before the trial. The defendants should be at liberty to amend, if they wished to set up anything more than they intended to rely on at present. Costs of this motion to be to the plaintiff in the cause. W. J. Elliott, for the defendants. N. F. Davidson, K. C., for the plaintiff.

MORGAN v. THAMES VALLEY GARDEN LAND CO.—MASTER IN CHAMBERS—MARCH 1.

Pleading—Statement of Claim—Misrepresentations—Particulars.]—This action was similar in its facts to that of Murray against the same defendants, supra. The defendants moved to strike out paragraphs 2 and 3, or parts thereof, of the statement of claim, as embarrassing, and for further and better particulars of paragraphs 3, 5, 7, 8, 9, 11, and 12, and of the claim for $5,000 damages. The Master said that there did not seem to be anything embarrassing in paragraphs 2 and 3 of the statement of claim. They stated shortly the facts which led up to the plaintiff's connection with the defendants' enterprise, as set out in the subsequent paragraphs. It was conceded on the argument that some particulars should be given; and there should be an order similar to that made in the Murray case (so far as applicable) on the 8th February last, ante 773. The defendants to have ten days from the delivery of particulars to plead. Costs of this motion to the defendants in the cause. The Master referred in this case to what he said in his judgment in the Murray case, supra. W. J. Elliott, for the defendants. Gordon Waldron, for the plaintiff.

UNION BANK OF CANADA v. TORONTO PRESSED STEEL CO.—MASTER IN CHAMBERS—MARCH 1.

Judgment—Default of Appearance—Leave to Defend—Defence—Terms—Amendment—Assignment pendente Lite.]—Motion by the defendants the Toronto Pressed Steel Company to set aside a judgment for the plaintiff entered upon default of an appearance in due time, by reason of a solicitor's oversight. The amount involved was over $3,000. Three different defences were suggested, the principal one being that the fact was, as was well understood by the plaintiffs, through their officers, that the cheques sued on were given for the accommodation of one of the co-defendants, and that the defendants the Toronto Pressed Steel Company received no benefit from them. The Master said that the decision on this point might largely depend upon the impression made at the trial by the witnesses on the presiding Judge. It was clear, from the cross-examination upon the affidavits made in answer to the motion, that there were serious difficulties to be overcome by the defence; yet it was the usual practice under Con. Rule 312, in conjunction with Con.

Rule 353, to allow a defendant liberty to have his action tried out, when it could be done without injury to the plaintiff, and on such terms as would ensure to the plaintiff, if successful, fruits of his judgment. Here there was no danger of the plaintiffs failing to realise the amount of any judgment they might recover, as the assets of the defendants the Toronto Pressed Steel Company were in the hands of the assignee, who was willing to deal therewith as might be desired. Following Muir v. Guinane, 6 O.W.R. 64, and cases cited, the Master allowed the defendants the Toronto Pressed Steel Company to put in a statement of defence forthwith, and required them to expedite the trial in every way that the practice would allow and the plaintiffs might desire. The amount of the judgment and interest should be paid into Court, if the plaintiffs wished this to be done. The costs of the motion and of the proceedings should be to the plaintiffs in any event. Any amendment might be made to the style of the cause that was necessary owing to the assignment made by the company since the action began. See Head v. Stewart, 4 O.W.R. 590, affirmed on appeal (not reported); but the defendants should be relieved from giving security, on the ground that they were always entitled to a trial on proper terms, and should not be unduly fettered. In the present case, the plaintiffs would be amply secured by the above provisions. J. H. Spence, for the applicants. H. Cassels, K.C., for the plaintiffs.