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APPELLATE DIVISION.

JANUARY 27TH, 1913.

RE CANADIAN BUILDING AND LOAN ASSOCIATION AND CITY OF HAMILTON.

Municipal Corporations—Subdivision of Land into Streets and Building Lots—City and Suburbs Plans Act, 2 Geo. V. ch. 43, secs. 4, 6, 7—Construction—Approval of Plan by Ontario Railway and Municipal Board—Objection of City Corporation not Filed within 21 Days—Powers of Board—Appeal—Question of Law—Board Acting without Evidence—Reference back.

An appeal by the association from an order of the Ontario Railway and Municipal Board refusing to certify its approval of the appellants' plan for the laying out of a tract of land into streets and building lots.

Section 6 of the City and Suburbs Plans Act, 2 Geo. V. ch. 43, provides: (1) that notice of an application to the Board for its approval of a plan shall be given to the corporation of the municipality in which the land is situate and to the corporation of the city, and all parties interested shall be entitled to be heard, and may be represented by counsel at the hearing of the application; (2) that a copy of the plan shall accompany such notice.

Section 7 provides: (1) that objections to the plan shall be stated in writing and be filed with the secretary of the Board within 21 days after delivery of the notice and plan; (2) that, if no objection is made within that period, the applicant shall be entitled to have the plan certified as approved, unless the Board of its own motion shall have otherwise directed.

The city corporation did not file objections to the plan

within 21 days; and the association thereupon applied to the Board for a certificate as of right. Before the application was heard, the solicitor for the city corporation notified the Board that the city corporation objected to the plan. The Board decided to hear the objection; and, upon hearing, gave effect to it, and dismissed the association's application.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. P. MacGregor, for the appellants, relied on the language of sub-sec. 2 of sec. 7, "unless the Board of its own motion shall *have* otherwise directed."

H. E. Rose, K.C., for the city corporation.

At the close of the argument, the judgment of the Court was delivered by MEREDITH, C.J.O.:—We think that the objection of Mr. MacGregor that the Board, unless, within the 21 days after service of the notice, it had considered the application and determined not to approve of it, had no power to refuse the certificate if no objections had been filed within the 21 days, is not well taken.

The scheme of the Act would be entirely defeated if any such interpretation were given to the section. There is cast upon the Board not merely the duty that would be imposed upon it by the general terms in which the powers are conferred, but there is an express requirement that, in determining as to the suitability of the proposed plan, or as to the desirability of any change in it, the Board, where the land lies within the city, shall have regard to making the subdivision and roads and streets and their location and width, and the direction in which they are to run, conform, as far as practicable, with any general plan which has been adopted or approved by the council of the city in accordance with which it is contemplated that the city and suburbs shall be laid out or the re-arrangement of the streets and thoroughfares shall be effected, and where the land is situate without the limits of the city, the Board is to have regard to certain other matters which are mentioned in the section (sec. 4).

Now it would be absurd, unless it was absolutely necessary, to give to the statute a construction that would require the Board, within the 21 days—and before, indeed, as far as the requirements of the statute are concerned, the plan was before them at all—to exercise that judgment and act upon the direction of the statute, which would be the effect of Mr. MacGregor's argument.

As to the other point, whether there was proper evidence before the Board upon which it could act, different considerations apply.

Upon a question of fact there is no appeal from the Board; but upon a question of law there is an appeal, if leave is given to appeal.

It is a question of law if the Board acted without any evidence at all, where evidence is required; and I suppose there is no doubt that evidence was required in this case.

We think, therefore, that the proper order to make is, that the case should be remitted to the Board in order that it may deal with it under the powers conferred by the Act; and, in doing that, it is to be understood that the Board is to have the right to take such testimony as it pleases—relevant testimony, of course—with regard to the matter, and to exercise its judgment on the whole case as to whether the plan ought or ought not to be certified.

I do not suppose that the question can arise again. If it goes back to the Board, only questions of fact can arise. There can be no question of law.

MacGregor:—There are a number of questions of law which I have not gone into; one is, that the proposed plan takes about 20 per cent. more of our land.

MEREDITH, C.J.O.:—That is a question as to whether they should exercise their discretion upon such a state of facts.

The order will be that the case be remitted to the Board to deal with, and there will be no costs to either party.

APRIL 29TH, 1913.

WALLBERG v. JENCKES MACHINE CO.

Contract—Construction—Reformation—"Site of the Work"—Cost of Transporting Material—Variation of Judgment.

Appeal by the plaintiff and cross-appeal by the defendants from the judgment of MIDDLETON, J., ante 555.

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

G. H. Kilmer, K.C., and J. A. Rowland, for the plaintiff.

J. Bicknell, K.C., and M. L. Gordon, for the defendants.

THE COURT allowed the appeal and directed that the agreement should be rectified by adding a clause to the effect that the defendants were entitled to have material carried from one tramway to another and to have it distributed where the pipe was to be laid. The plaintiff, by his appeal, claiming only the cost of transporting material from one line to another, the amount of that is to be added to the amount of the plaintiff's judgment as pronounced after the trial; and, if the parties agree, this amount is to be fixed at $400. If the parties do not agree, there is to be a reference to the Master in Ordinary to ascertain the amount, and the amount ascertained is to be added to the judgment without further application to the Court. The judgment below not to be otherwise disturbed. The plaintiff to have the costs of the appeal. Cross-appeal dismissed with costs.

MAY 1ST, 1913.

MAPLE LEAF PORTLAND CEMENT CO. v. OWEN SOUND IRON WORKS CO.

Contract—Sale of Goods—Liability of Vendors or of Agent for Breach—Contract Made through Agent—Correspondence—Conduct—Passivity—Estoppel.

Appeal by the defendants from the judgment of KELLY, J., ante 721.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

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

W. G. Thurston, K.C., for the plaintiffs.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. APRIL 29TH, 1913.

TUCKER v. BANK OF OTTAWA.

Security for Costs—Stay of Proceedings—Motion for—Action by Insolvent Plaintiff after Assignment for Benefit of Creditors—Claims for Damage to Credit, Character, and Business—Personal Damages not Passing to Assignee—Remoteness—Plaintiff Suing for his own Benefit.

Appeal by the defendants from the order of the Master in Chambers, ante 1090, dismissing the defendants' motion to stay the action or for security for costs.

Grayson Smith, for the defendants.

Featherston Aylesworth, for the plaintiff.

MIDDLETON, J.:—The plaintiff alleges that the defendants unlawfully charged to his account certain notes not yet due, and misappropriated certain money the proceeds of certain discounts, whereby he was compelled to assign for the benefit of

his creditors, and so his credit was damaged, for which he claims $60,000; and his character was damaged, for which he claims $60,000; and his business was damaged, for which he claims $30,000—$150,000.

If the statement of claim discloses no cause of action, it cannot be attacked in this way, and Mr. Smith does not base his appeal upon this ground, but contends that, an assignment having been made, the action ought to be stayed. The action is the plaintiff's action; and, be it well or ill founded, there is no ground for saying that he is a nominal plaintiff put forward by others. The first two claims (if they can be enforced), and probably the third, are claims for purely personal damages, such as would not pass to the assignee: White v. Elliott, 30 U.C.R. 253; Dunn v. Irwin, 25 C.P. 111; Smith v. Commercial Union Insurance Co., 33 U.C.R. 529.

Hodgson v. Sidney, L.R. 1 Ex. 313, is a case the parties may well study, as indicating that the damages which the plaintiff here seeks to recover are too remote.

The present appeal fails, and must be dismissed, with costs to the plaintiff in the cause. This will not prejudice any properly conceived motion.

MIDDLETON, J. APRIL 30TH, 1913.

WOOD v. BRODIE.

Reference—Scope—Terms of Judgment at Trial—Reopening in Master's Office Charges Withdrawn at Trial—Report of Accountant—Conclusiveness — Matters Left in Suspense — Duty of Master—Evidence.

Appeal by the plaintiff from an interim certificate of the Local Master at Perth, shewing his ruling upon a question arising in the course of a reference.

C. A. Moss, for the plaintiff and others.
H. M. Mowat, K.C., for the defendant Brodie.
E. C. Cattanach, for the infants.

MIDDLETON, J.:—The action is brought by one of the beneficiaries against Brodie as executor of the late Alexander Wood. In the pleading a number of charges of misconduct are specifically set forth. The judgment, pronounced by consent, re-

moves Brodie from his office, and refers to the Master the taking of an account of the trust estate, and fixes compensation, and directs that, in the taking of the accounts, the certificate of J. D. Watson, chartered accountant, is to be taken by the Master as being conclusive as to the state of the accounts and the balance which is or ought to be in the hands of Brodie.

Watson has now completed the taking of the accounts, and has certified the balance due by Brodie; and Brodie has paid it into Court. This certificate leaves open the question of liability in respect to certain matters placed by Watson in a suspense account. Upon the certificate being taken before the Master, he was asked to allow the plaintiff, and those beneficially interested in the estate, to go into the complaints with reference to previous transactions referred to in the pleadings. The Master has declined to permit this, holding that the certificate of the accountant is conclusive.

Upon the argument it appeared to me entirely improbable that the judgment intended to delegate to the accountant the duty of investigating the matters complained of, and that the judgment must have been pronounced upon the theory that the charges made in the pleadings were expressly withdrawn, although this is not recited in the judgment.

I have spoken to my brother Sutherland, who pronounced the judgment; and he tells me that this is so; and that, when the matter was under discussion before him at the hearing, Brodie, through his counsel, took the position that he would not consent to be removed from the executorship unless the charges were expressly withdrawn. Some discussion then took place, and the judgment was pronounced upon that understanding.

Had the judgment been more carefully drawn, the fact that these charges were withdrawn would have appeared as a recital. This being the case, it is clear that the Master is right in deciding that the matter in question cannot now be reopened in his office.

As to the matters not dealt with by Watson and left by him in suspense, the Master must proceed to dispose of them upon evidence. If necessary, this must be so declared. Otherwise, the appeal is dismissed, with costs to be paid by Mr. Moss's clients.

MIDDLETON, J., IN CHAMBERS. APRIL 30TH, 1913.

CALDWELL v. HUGHES.

Costs—Scale of—Taxation—Amount in Controversy—Set-off—Jurisdiction of Inferior Court.

An appeal by the defendant from the ruling of the Local Master at Belleville that the plaintiff was entitled to tax High Court costs against the defendant.

D. Inglis Grant, for the defendant.
H. E. Rose, K.C., for the plaintiff.

MIDDLETON, J.:—At the trial, the case was referred to the Master, under sec. 121(b) of the Judicature Act; and the costs of the action and reference were directed to be in the discretion of the Master.

By his report, the Master found the plaintiff to be entitled to $3,699.22, and the defendant, under the various items in his set-off and counterclaim, to be entitled to $3,013.62; leaving a balance due to the plaintiff of $685.50, which the plaintiff is entitled to recover, "together with full costs of action."

It is now contended that, the claim of the defendant being, at any rate in part, a set-off, and not a counterclaim, the action might have been brought in the County Court; and that the plaintiff is, therefore, entitled to County Court costs only, with a set-off. The Master has allowed High Court costs, and certifies, quantum valeat, that, if any question had been raised before him as to the scale of costs, he would have awarded High Court costs without set-off.

I think the learned Master is right in the conclusion at which he has arrived. There is nothing to suggest that a set-off had been assented to or agreed upon so as to amount to payment and reducing the plaintiff's claim to a sum below $800. This being so, the case falls within the decisions of In re Miron v. McCabe (1867), 4 P.R. 171; Furnival v. Saunders (1866), 26 U.C.R. 119; Sherwood v. Cline (1888), 17 O.R. 30; and Osterhout v. Fox, 4 O.L.R. 599. These cases establish that the inferior Court has not jurisdiction merely by reason of the existence of a set-off, unless the set-off has been assented to by both parties, so that it in law constitutes a payment. In the absence of such an agreement, a plaintiff, having a claim against which a defendant may, if he pleases, set up a set-off, must sue in the

superior Court; for he cannot compel the defendant to set up his claim by way of set-off, and he cannot, by voluntarily admitting a right to set-off, confer jurisdiction upon the inferior Court.

The case relied upon by Mr. Grant—Gates v. Seagram, 19 O.L.R. 216—turns upon an entirely different point. There a plaintiff was met by a set-off which exceeded the amount of his claim. As set-off constitutes a defence, it was held that the plaintiff had failed in his action and must pay the costs through out, even though all the expense of the litigation was incurred with reference to the claim set up by the plaintiff. There was no discussion there as to the forum to which resort should have been had.

The appeal, therefore, fails, and must be dismissed with costs.

MIDDLETON, J. APRIL 30TH, 1913.

BIGHAM v. BOYD.

Malicious Prosecution—Reasonable and Probable Cause—Evidence—Assault—Damages—Costs.

Action for malicious prosecution and assault, tried before MIDDLETON, J., with a jury, at Woodstock.

W. T. McMullen, for the plaintiff.
No one appeared for the defendant.

MIDDLETON, J.:—The plaintiff is a real estate dealer at Woodstock; the defendant is a real estate dealer residing at Regina.

In July, 1912, the defendant came to Woodstock, endeavouring to float there a subdivision of real estate near Swift Current. He thought that the plaintiff was opposing him and obstructing his attempts at sales, by giving hostile advice to would-be purchasers. Determining to make an end of this, he went to the plaintiff's office with the view of seeking his co-operation. This being declined, an altercation took place; the defendant was asked to leave the office; and, upon his refusing, a struggle took place. After the defendant had left the plaintiff's office, it was found that he had left a bundle of papers, connected with his transactions and contemplated transactions as to the Swift Current property, on the counter in the plain-

tiff's office. The plaintiff, noticing these papers, took them home with him—for safe-keeping, as he says; but he admits that he read them, and, in fact, slept with them under his pillow. When he went to his office in the morning, he forgot to take the documents with him.

The defendant, having discovered that his documents were missing, concluded that he might have left them in the plaintiff's office. He asked a local broker, whose office he shared, to go to the office of the plaintiff and get the documents for him. This gentleman called the first thing in the morning, and asked the plaintiff for the documents. The plaintiff denied that he had them.

In his evidence the plaintiff says that he believed the messenger's statement that he came for the documents, and had no reason to suppose that he had not the authority of the defendant to ask for them, although producing no written instructions.

Thereupon the plaintiff went to his house and obtained the documents. The defendant laid the facts before the Police Magistrate, and a search warrant was issued. When the Chief of Police called upon the plaintiff with the warrant, the plaintiff took the documents from his pocket, and handed them over to the Chief of Police; but he did not then authorise the documents to be handed to the defendant. Thereupon the defendant laid an information before the Police Magistrate, through the Crown Attorney, for stealing, and asked for a warrant. The plaintiff was immediately taken before the magistrate; and, upon a preliminary investigation being had that afternoon, was committed for trial. He elected to be tried before the County Court Judge, and was ultimately acquitted.

I left the question of malice and damages to the jury; reserving the question of reasonable and probable cause. The jury found $500 damages for the prosecution and $25 damages for the assault which took place in the office.

On the facts outlined, I think there was reasonable and probable cause for the prosecution; and, therefore, the action fails as to it.

Judgment will be for the plaintiff for $25 and costs.

MIDDLETON, J. APRIL 30TH, 1913.

PLAYFAIR v. CORMACK.

Brokers—Employment to Purchase Shares for Customer—Relation of Principal and Agent—Agents Selling their own Stock—Non-disclosure to Principal—Stock Exchange Rules—Pleading — Amendment — Undisclosed Principal — Evidence.

Action to recover $4,263.57 alleged to be a balance due to the plaintiffs, as brokers and agents for the defendants, in respect of the purchase of 10,000 shares of the capital stock of the Swastika Mining Company Limited.

W. N. Tilley and Harcourt Ferguson, for the plaintiffs.

R. McKay, K.C., and W. C. MacKay, for the defendant Steele.

G. H. Gray, for the defendant Cormack.

MIDDLETON, J.:—The facts are not complicated. At the time of the occurrences in question, the defendant Steel was treasurer of the Swastika Mining Company. He was also the largest individual stockholder. On the 18th May, an agreement was arrived at between the company, Steele, and the plaintiffs, by which the plaintiffs agreed to buy a large block of stock at 45 cents. This stock they contemplated placing upon the market in such a way that the price would be speedily raised and might possibly reach a dollar. Steele agreed not to market any of his stock except through the plaintiffs.

Steele practised as a physician at Tavistock, in partnership with the defendant Cormack, also a physician. Cormack had only recently come to that village, and was a man of very small means. He had not theretofore had any stock transactions. He found himself surrounded in Dr. Steele's office by an atmosphere of specualtion and optimism. He knew something of Steele's relations to the company, partly from Steele himself, and partly from outside gossip. Yielding to his environment, Cormack determined to augment the $60 per month which he was entitled to draw under his partnership arrangement, by some of the unearned increment which it was thought the public was all too anxious to contribute to the fortunate owners of the stock in question.

On the evening of the 21st May or the morning of the 22nd,

he had some conversation about this with Steele, resulting in a determination to "plunge" either alone, as is said by Steele, or along with Steele, as he says; and Steele telephoned to Martens, the partner of the plaintiff firm having the matter in charge, inquiring whether stock could be purchased, and informing Martens that a medical friend of his was desirous of buying some stock if he could purchase on time. Martens consented, and Cormack sent a telegram on the 22nd May, "Buy for me sixty days five thousand Swastika." It is important to note that no price is named. The brokers, having received this telegram, did not purchase the stock from any outsider, but "put through" a transaction upon the Toronto Stock Exchange. As explained by Martens, this means that, desiring to sell stock which he holds and at the same time having a customer who desires to buy, the broker makes an offer upon the floor of the Exchange to buy or sell at a price named by the broker. No one desiring to sell or buy at that price, the broker himself sells to the secretary of the Stock Exchange, and then buys from the secretary; the transaction thus being regarded as an actual transaction, intended to fix the market-price. This course, it is said, was justified by by-law 26, sec. 7, of the Stock Exchange.

I should have mentioned that when Playfair, Martens, & Co. (the plaintiffs) made the arrangement with the mining company, although the transaction was carried through in their name, they were acting on behalf of themselves and Warren, Gzowski, & Co., and that, as between these two brokerage firms, they were to share equally in the profits and losses of the transaction. This partnership was called in the evidence the "syndicate."

The transaction thus "put through" upon the floor of the Exchange was treated as a sale by the syndicate, and Playfair, Martens, & Co. credited the syndicate with the proceeds; thus treating themselves as purchasers. They then sold to Cormack at this price, plus two and a half cents, to represent their brokerage and carrying charges. In pursuance of this, they sent to Cormack a bought note stating: "We have this day bought for your account and risk 5,000 Swastika at 62, sixty days buyer's option; commission $50; amount $3,150." Playfair, Martens, & Co. in this way profited as members of the syndicate by half the difference between 45 and the price at which the transaction was put through, 59½, in addition to their charges for carrying and brokerage.

No discharge of the fact that they were the vendors was at

any time made by them. They justify this course of procedure by the view that the fact that they offered to buy or sell at this price on the open market can be taken as fixing the market-price.

In a similar way a second purchase of like amount was made by Cormack on the 8th June.

Contrary to expectations, the stock did not go up but steadily went down. Cormack renewed from time to time; and finally, in January, 5,000 shares were sold at 24½, and in February the remaining 5,000 at 23¼ and 23½. The proceeds were credited, leaving the balance now claimed.

These sales are not in any way impeached, and were carried through by a transfer of the stock from the mining company to the purchaser. No stock was issued on the former transaction.

It is conceded that the rule which prohibits an agent employed to purchase from transferring his own property, and from being himself the vendor, would prevent the plaintiffs from recovering if the transaction is to be regarded—as it has been regarded by the plaintiffs—as a brokerage transaction. The plaintiffs seek to take the case out of the operation of this rule, because the defendant Cormack, in his pleading and in an affidavit filed in answer to a motion for judgment, speaks of the transaction as "a purchase of stock from the plaintiffs."

I do not think that this is sufficient. The facts are absolutely plain and free from any uncertainty or controversy; and the pleading ought to be amended so as to conform to the facts. The first telegram constituted the brokers agents to purchase. Throughout they acted as though they were agents, and they cannot divest themselves of that fiduciary relationship without making that full disclosure pointed out as being necessary in Bentley v. Marshall, 46 S.C.R. 477. I do not think that this wholesome rule can be frittered away by any suggestion that the purchaser must have known from the circumstances that it was extremely likely that the agent was transferring to him his own stock. Nothing short of the fullest and most ample disclosure on the part of the agent will suffice to free him from disability. For this reason, I think the action fails.

The plaintiff's claim against Steele is based upon the allegation that when Cormack purchased he purchased in truth as agent for himself and Steele. This claim is not made out. Cormack so states, but is contradicted by Steele; and the circumstances surrounding the transaction, with the inconsistencies in Cormack's evidence, compel me to find that the allegation is not proved. The plaintiff, therefore, fails against Steele on this ground as well.

Cormack claimed indemnity against Steele upon the theory that when the agreement to share the profit was made Steele agreed to bear all the loss. This theory is not supported by the evidence at all. The action will, therefore, be dismissed, with costs to be paid by the plaintiff to both defendants; and Steele will be entitled against Cormack to the costs of the third party proceedings.

MIDDLETON, J. MAY 2ND, 1913.

RE ELIOT.

Will—Construction—Marriage Settlement—Power of Appointment—Guardian of Infants—Appointment by Mother's Will—Invalidity—Trustee—Receipt of Income—Period of Vesting of Estate—Rule against Perpetuities—Result of Offending against.

Motion by Green and Lewis, executors of the will of Frances Ellen Wood Eliot and trustees under her mariage settlement, upon originating notice, under Con. Rule 938, for an order determining certain questions arising upon the will and marriage settlement.

The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto, on the 18th April, 1913.

J. W. Bain, K.C., for the applicants.

F. W. Harcourt, K.C., for the infants other than the eldest, Margery Eliot.

C. A. Moss, for Margery Eliot and her father, Charles A. Eliot.

MIDDLETON, J.:—The testatrix was a daughter of the Honourable John Hamilton, who by his will directed his residuary estate to be divided among his children, and that the portions allotted to the daughters should be set apart and invested, the income being paid over to them until they should marry or attain the age of thirty years, when their portions should be settled, if they are then married, in such a way as to be free from the control of any husband and to be inalienable during her life.

Pursuant to this provision, a marriage settlement was executed on the 5th October, 1891; the property coming to the

testatrix being vested in trustees for the use of the testatrix during her natural life; and, upon her decease, the trustees are directed to divide and apportion the same among the issue of the contemplated marriage in such shares and in such manner as she may by her will appoint.

Mrs. Eliot died on the 11th December, 1905, having first made her will. By it she recites her father's will and the marriage settlement and the power of appointment by will thereunder, also that two sons and two daughters, all of tender years, had been born to her. Pursuant to this power, she directs her property to be divided among the children in equal shares; "the share of each of my sons to be vested in and transferred to him upon his attaining the age of twenty-five and the share of each of my daughters to be vested in her on her attaining the age of twenty-five years or on her marriage previously with the consent of her guardian herein named and not otherwise, whichever event shall first happen."

The will then provides that the share of each daughter shall not, upon the vesting, be transferred to her, but that a settlement shall be executed to secure to the daughter the free use and enjoyment of her share, free from the control of her husband, as provided in the fifth paragraph of the marriage contract of the testatrix—i.e., in trust for the daughter for her life, without power of alienation, and with power of appointment by will among the issue of her marriage, and with appropriate provisions in the event of death without issue or without exercising the power of appointment.

The testatrix next provides that, if either of the sons die under the age of twenty-five years, or either of her daughters die under the age of twenty-five years without having been married, the share of the one who died shall vest in the survivor. The income from the presumptive share of each child is, pending the vesting, to be applied by the trustees for the benefit of the child—"and shall be from time to time paid to the guardian herein appointed of each of my children for and toward his or her maintenance education and support in their accustomed manner and style of living until such share of each of my said children shall be vested;" and she nominates and appoints her husband, Charles A. Eliot, guardian of the children.

The questions raised upon this motion are:—

1. Are the trustees justified in paying the whole income to the father, (a) during minority, (b) after majority, pending the vesting of the estate?

2. Is the father entitled to retain so much of the income

of the children as may not be necessary for their due maintenance and to invest the same for their benefit?

3. Is the share of each child vested on attaining majority or on attaining the age of twenty-five years?

4. When a daughter attains twenty-five is her share absolutely vested, or has she merely a life interest and a power of appointment by will among her issue; in other words, does the provision requiring the trustees to settle the share of the daughter offend against the rule with respect to perpetuities?

5. Does the will of the testatrix itself offend against the rule as to perpetuities in postponing the period of vesting until the children respectively attain the age of twenty-five years?

I have set forth the questions in the form in which they were presented by counsel upon the argument rather than in the form indicated by the notice of motion.

Dealing first with the question as to the position of the father. The mother purports to appoint him guardian of the children. It is clear that she had no power so to do. The effect is, however, to create him a trustee, having the powers conferred upon him by the will. He is, therefore, entitled to receive the entire income arising from the estate in question for the maintenance, education, and support of the children. The fact that the testatrix directs the payment to be made to the husband as guardian indicates to me that she contemplated the guardianship to cease on each child attaining age; and, although the father would be entitled to receive the money until the estate vested on the child attaining twenty-five, he would receive it after each child attained majority merely as trustee for the child. Any surplus received by him during the minority of the infants he would hold in trust for the children, and it should be invested for their benefit. This is the course that has been adopted by the executors and by Mr. Eliot, and it is, I think, in accordance with the provisions of the will. This answers the first and second questions.

On the third question, it is clear that the estate of the children does not vest until they respectively attain twenty-five years of age. The language of the will is plain.

The remaining questions turn upon the law relating to perpetuities. I had recently a somewhat similar case before me, Re Phillips, ante 751; and I need not again review the earlier cases. In In re Thompson, [1906] 2 Ch. 199, Joyce, J., states the rule to be applied when the validity of the exercise of a power of appointment is called in question; and this rule has recently received the approval of the Court of Appeal in

In re Fane, 29 Times L.R. 306—"you must wait and see how in fact the power has been executed, and in order to test the validity of the appointment you must treat the appointment as if written in the original instrument creating the power."

So treating this case, the power was validly executed by the wife, because the appointment she has made is in favour of her children, who were all then more than four years old, and the estate becomes vested in them at twenty-five, within twenty-one years from the date of her death.

Applying the same test to the attempt to confer upon the daughters a power to be executed by them by will in favour of their unborn issue, this provision, for the reasons pointed out in Re Phillips, offends against the rule with respect to perpetuities, and is bad; and, applying here the decision in Hancock v. Watson, [1902] A.C. 14, the same result follows as in Re Phillips, and the daughters take absolutely.

The costs of all parties may be paid out of the estate; costs of the executors as between solicitor and client.

LATCHFORD, J., IN CHAMBERS. MAY 2ND, 1913.

REX EX REL. SABOURIN v. BERTHIAUME.

Municipal Election—Hiring of Team by Successful Candidate—Bribery—Evidence—Municipal Act, 1903, *secs.* 245, 249—*Implied Promise to Pay for Team—Finding of County Court Judge—Appeal—Unseating of Mayor Elect of Town—Disqualification—Procedure—Testimony Taken down by Judge not Read over to and Signed by Witnesses—Municipal Act*, 1903, *secs.* 220, 232—*Con. Rules* 456, 457, 458, 494—*Testimony of Witness not Named in Notice of Motion—Inadmissibility—Imperative Provisions of sec.* 222—*Application of sec.* 248—*Status of Relator—Corrupt Practice Committed by—Notice to Respondent of Charges—Particulars—Cross-appeal—Costs.*

Appeal by the defendant from the order of JOHNSTON, Jun. J. of the County Court of the United Counties of Prescott and Russell, declaring that the election of the appellant as Mayor of the Town of Hawkesbury for the year 1913 was void, and that the appellant was disqualified from being a candidate for any municipal office and from voting at any municipal election or

upon any by-law for a term of two years from the date of the order, the 18th March, 1913.

A. Lemieux, K.C., and E. Proulx, for the appellant.

N. A. Belcourt, K.C., and C. G. O'Brian, K.C., for the relator.

LATCHFORD, J.:—The disqualification results from a finding of the learned Judge that Berthiaume had hired a team from a livery stable keeper for the purpose of conveying electors on the day of the poll.

The principal grounds of the appeal are: that there was no admissible evidence upon which the Judge could properly find that Berthiaume had committed bribery, within the meaning of sec. 245 of the Municipal Act, 3 Edw. VII. ch. 19; that evidence, especially the evidence of the livery stable keeper, Larivière, was wrongly admitted; that the relator was himself guilty of bribery, and, therefore, incompetent to question the validity of the election; and that Berthiaume was not given notice that his disqualification would be sought.

It is also urged that, as the evidence taken down by the County Court Judge, when the witnesses were examined viva voce before him, was not read over to the witnesses and signed by them, the proceedings fail. Sub-section 4 of sec. 220 requires that proceedings before the Judge shall be "entitled and conducted" in the County Court in the same manner as other proceeding in Chambers; and, under Con. Rule 494, examinations for the purpose of a motion must, "unless otherwise ordered, be conducted in accordance with the practice upon examinations for discovery, as far as the same is applicable." Upon such examinations, when the evidence is not taken in shorthand under Con. Rules 457 and 458, the depositions are, by Con. Rule 456, to be taken down in writing by the examiner, and when completed "shall be read over to the person examined, and shall be signed by him in the presence of the parties, or such of them as may think fit to attend."

In answer it is stated—and the statement is not disputed—that the manner of proceeding was with the consent of all parties. But, apart from any question of consent, it seems clear to me that the Rules invoked have no application to a case like this. Section 232 of the Municipal Act prescribes the mode of trying cases of this kind. "The Judge shall, in a summary manner, without formal pleadings, hear and determine the validity of the

election . . . and may inquire into the facts on affidavit . . . or by oral testimony."

Sub-section 4 of sec. 220 and the Rules mentioned seem to me not to impose any obligation upon the Judge to transcribe the testimony and have it read over to and signed by the witnesses. The Judge might, under sec. 232—without taking down any of the evidence—have declared Berthiaume to have committed an act of bribery. He, however, took very full notes, and the perusal of them and of his reasons for judgment greatly facilitates the disposition of the objections raised on this appeal.

In his reasons for judgment, the learned Judge says: "I find that Mr. Berthiaume has been proved to have hired a team from John Larivière, livery stable keeper, for the purpose of conveying electors to the polls," which, by sec. 245, sub-sec. 7, of the Municipal Act, is defined as bribery; and the consequence of this, by sec. 249, is the loss of his seat, and disqualification for two years. The evidence is, only, that Mr. Berthiaume went to Larivière, and asked him to furnish his rig or team, and he said "all right," and sent it with a driver, and it was used to draw voters. Nothing was said one way or the other about payment. Mr. Berthiaume did not ask the price or whether it was volunteered, and Larivière said nothing as to price. I think that the presumption and legal conclusion must be that the rig was hired. If a man goes to a livery stable keeper, whose business is to let out horses and carriages, and says he wants a horse and driver for such a day, and nothing is said about payment, the presumption is, that he is hiring it, and is liable to pay what it is worth. Mr. Berthiaume, indeed, says that he asked the rig from Larivière, because he thought Larivière was strongly in his favour, and also because he has sometimes got rigs from Larivière for nothing, as he had often hired rigs there for funerals (Mr. Berthiaume being an undertaker), and had been good to him; but this, I think, is all too indefinite to rebut the presumption of hiring. The team came and drew voters, and it came in consequence of Berthiaume's asking for it, and not from any offer of Larivière's. Larivière also furnished a team for the relator (a candidate for the office, not of Mayor, but of Reeve), shewing that it was a matter of business with him . . . The great mass of corrupt practice set up dwindles down to this; and it seems too bad to unseat and disqualify Mr. Berthiaume for it, especially as Mr. Sabourin appeared to be just as bad, but I do not see any way out of it. The use of the teams probably did not affect a vote—they drew the voters indiscriminately—but the statute, sub-sec. 7 of sec. 245, is posi-

tive. It leaves no room for discussion as to motive, as do the other sub-sections of this section. It simply and positively defines the hiring of horses, etc., to be bribery; and then sec. 249 declares that any candidate guilty of bribery shall be unseated and disqualified."

While the consequences of the learned Judge's finding are not disputed, it is argued with much force that an act involving penalties so serious should not be held to have been committed, except upon clear and convincing testimony. As was well observed by Mr. Justice Gwynne in the Welland case, H. E. C. 187, if the matters which constitute the offence charged consist of acts or language which are reasonably susceptible of two interpretations, one innocent and the other culpable, a very grave responsibility is imposed upon the Judge to take care that he shall not adopt the culpable interpretation, unless, after the most careful consideration he is able to give to the matter in hand, his mind is convinced that, in view of all the circumstances, it is the only one which the evidence warrants his adopting as the true one.

I am satisfied that the finding of Judge Johnston was reached only after great consideration; and that, having regard to the circumstances and the ordinary course of business between Berthiaume and Larivière, as related by the former, the finding was the only one that could be properly reached upon the evidence. It seems to me fully warranted by the evidence of Berthiaume himself.

It is objected that the evidence of Larivière, which places the fact of the hiring beyond any reasonable doubt, was inadmissible, because Larivière was not named in the notice of motion, as is required by sec. 222 of the Act when viva voce evidence is to be taken. The proceedings are statutory. The provision of the statute that the relator shall name in his notice the witnesses whom he intends to examine is imperative, and must be as strictly complied with as the prior words of sec. 222, which were considered in Regina ex rel. Mangan v. Fleming, 14 P.R. 458, where it was held that the relator, before serving his notice of motion, was obliged to file the affidavits and material upon which he intended to move.

As bribery was alleged on the part of Berthiaume, affidavit evidence was prohibited by sec. 248, and evidence had to be taken viva voce. I do not read sec. 248 as unconnected with sec. 222. The two must, in my opinion, be read together, and no witness can be examined whose name has not been mentioned in the notice of motion.

I, therefore, think that the evidence of Larivière was inadmissible. But, rejecting it wholly, there remains the evidence of Berthiaume himself—amply sufficient, as I have stated, to warrant the finding made.

There is no express finding that the relator was guilty of corrupt practices, nor was that matter in issue. It appears, however, that, like Berthiaume, he had hired a team for carrying electors on polling-day. Though guilty, he would not thereby be disqualified from acting as relator. There were no recriminatory charges against him; and his status as an elector was not in question: The Dufferin Case, H.E.C. 529; Re South Renfrew, ib. 556; and Re N. Simcoe, ib. 617.

Berthiaume was not notified that his disqualification would be sought. But such notice was unnecessary. He received notice of a charge that he had committed various acts of bribery, and in the particulars furnished such acts are stated to include the hiring of teams. Berthiaume, accordingly, had notice of a matter which, if established, results, under sec. 249, in disqualification; and nothing more than the notice given was needed.

The appeal, on all grounds, must be dismissed. A cross-appeal was abandoned upon the argument; and, in any view that presents itself to me, was not material to be considered.

The appeal and cross-appeal failing, I make no order as to costs.

MIDDLETON, J. MAY 2ND, 1913.

GODSON v. McLEOD.

Contract—Formation of—Offer to Sell Machine—Use of Ambiguous Words—Letter Relied on as Acceptance—"In Place"—Attempt to Attribute Special Meaning to—Contract not Made out—Interim Injunction—Undertaking as to Damages—Demurrage—Speedy Trial.

Action to compel delivery of a machine or for damages for breach of an alleged contract to deliver, and for an injunction restraining the defendants from parting with the machine.

The action was tried before MIDDLETON, J., without a jury, at Toronto, on the 1st May, 1913.

James Haverson, K.C., for the plaintiffs.
Britton Osler, for the defendants.

MIDDLETON, J.:—The defendants, the owners of a machine known as a "Brown hoist," having completed the work for which they required it, offered it for sale. The plaintiffs desired such a machine; and negotiations took place, resulting in a verbal offer of $4,800. Throughout the course of these negotiations, it was thoroughly understood that the purchasers were to take delivery of the machine where it stood, and themselves to load it upon the railway cars for removal to their own works. The defendant McLeod desired to communicate with his partner as to the acceptance of this offer. On the 15th April, he wrote the letter of that date, declining to accept $4,800, and stating readiness to accept "$5,000 for the machine in place." On the same day, the plaintiffs wrote a letter as follows: "We accept your fifteen-ton four-wheel Brown machine at the price you name in your letter of to-day now before me, viz., $5,000 in place, which means, we presume, on car. We will advise you in a day or two how we want it shipped."

The defendant McLeod, regarding his offer as meaning $5,000 for the machine as it stood where it was, and regarding the letter of the 15th April as a departure from the terms of that offer and as an attempt to impose upon the vendors the duty of placing the machine upon the cars, interviewed the plaintiffs, pointing out that the letter was not a satisfactory acceptance of the offer, as it purported to add this new term. Some discussion took place with the plaintiff Godson, during which he intimated that he was ready to pay the $5,000, and that his company would itself load the machine; but, when the defendant McLeod asked to have this put in writing, the plaintiff declined to give any further written document, contending that the letter was an adequate acceptance of the offer. Thereupon McLeod sold the machine to another purchaser.

I do not think that the letter in question constitutes an acceptance of the offer. I take the view that it was a deliberate attempt to engraft upon McLeod's letter a meaning which Godson well understood it did not bear, and that the refusal to clear the matter up by giving an unqualified acceptance indicated a desire to leave McLeod in a position which would be embarrassing and would leave it open to the plaintiffs thereafter to have controversy concerning the expense of loading.

When it is borne in mind that this machine weighed between thirty and forty tons, and that McLeod had no apparatus at

hand which would facilitate loading, the seriousness of the controversy is clearly apparent.

Mr. Haverson argued the case with conspicuous ability. His contention is, that the letter can be subdivided; that the first portion of the letter is an unqualified acceptance of the offer; and that all that follows—namely, the words "which means, we presume, on car. We will advise you in a day or two how we want it shipped"—is an erroneous assumption on the part of the purchaser as to his rights under the contract.

I quite agree in the law suggested by Mr. Haverson. I think it is borne out by the case he relied upon, Clyde v. Beaumont, 1 DeG. & S. 397. There may be an acceptance in the true sense of the term, and the parties may thereafter discuss matters in such a way as to indicate a misunderstanding of the agreement without intending to alter or modify the contract.

But that is not the case here. I think this was a deliberate attempt to import into the inapt and ambiguous words used by McLeod a definite meaning, and so to leave it open to the plaintiffs to say to him: "Either there is no contract, or the contract must be construed with the meaning attached by our letter of acceptance." Godson very well knew that the words "in place" in McLeod's letter did not mean upon the car; and by his letter he intended to affix that particular meaning to those words. That being so, on elementary principles, there is no contract.

The principle is well stated in Leake, 5th ed., p. 219: "A written contract may be expressed in such general or ambiguous terms as to admit of different constructions; in which case, though the written contract must be applied, if possible, according to its terms, it is open to either party to allege, consistently with the terms, that he accepted the contract with a different construction to that charged by the other party, so that there is no real agreement between them."

Put as favourably as possible for Mr. Haverson, this means, as applied to this case, that there is no contract; because McLeod intended the words "in place" to mean "where the machine now is." Godson did not accept the expression with this meaning, but sought to attribute to it a totally different signification. He is precluded from saying that he did accept the words as he knew McLeod intended them, because, in his letter, he has stated otherwise.

The action fails, and must be dismissed with costs.

A reference was asked to ascertain damages under the undertaking given upon the injunction motion. The defendants are content to accept the demurrage upon the railway cars. Two

cars were necessary. The demurrage is $2 upon each for the first day and $3 for each subsequent day for each car. This would make a total of $62, which I allow.

This case is an admirable example of the advantage of speedy trial in cases of this character. The dispute arose on the 21st April; the writ was issued on the 23rd; and the case has been disposed of in ten days' time.

BRITTON, J. MAY 2ND, 1913.

PEPPERAS v. LeDUC.

Contract—Agreement under Seal for Division of Proceeds of Sale of Land—Consideration—Cessation of Illicit Cohabitation—Illegality—Breach of Promise of Marriage.

Action for cancellation of an agreeement, for damages for the defendant's breach of an alleged promise to marry the plaintiff, and to recover money expended for and advanced to the plaintiff.

Counterclaim for a declaration that a lot of land at North Cobalt standing in the name of the plaintiff in reality belonged to the defendant, and for possession.

The action was tried before BRITTON, J., without a jury, at North Bay.

J. H. McCurry, for the plaintiff.

G. A. McGaughey, for the defendant.

BRITTON, J.:—The defendant and plaintiff, without being married, lived together for three or more years as man and wife. While so living, the plaintiff, who is a hard-working woman, purchased lot 40 according to plan M. 67 filed in the office of Land Titles at North Bay, which land is situate at North Cobalt.

Upon this lot the plaintiff, out of her earnings, built a house, and she in the main supported the defendant. The defendant did to some extent contribute by his labour to his own support.

The plaintiff, as she states, was anxious that the defendant should marry her, and he repeatedly promised to do so; but, for some reason, he would never fulfil his promise. On the 9th August, 1909, an agreement, under seal, was entered into by the parties. By this instrument the plaintiff agreed, after the

sale of the property, to pay over to the defendant one-half of the proceeds of sale, and that she would not dispose of the property for less than the sum of $1,800 without the written consent of the defendant. The defendant agreed that he would accept one-half of the proceeds of the sale in full of all his claim and interest in the property, and he agreed that he would withdraw any caution filed by him in the office of Land Titles at North Bay. Apparently a caution had been filed, but no proof of such was given at the trial.

After the agreement was entered into, the plaintiff was married to a man named Pepperas, and is now living with him as his wife. The plaintiff brought this action charging that the defendant falsely and fraudulently represented to the plaintiff that he intended forthwith to marry the plaintiff, and by reason of these representations induced the plaintiff to enter into the agreement mentioned. She asks for cancellation of the agreement, for damages for breach of promise to marry, and for money advanced for the support of the defendant, and for money advanced to him for other purposes. The defendant sets up by way of defence that he bought the lot and erected the house at his own expense, and he counterclaims for a declaration that the property belongs to him, and for possession.

I find that the plaintiff purchased the lot, and paid for the erection of the house, and that the defendant has no right whatever to the property—other than what he may have, if any, under the agreement mentioned. There was no consideration in fact for that agreement other than what is implied in the evidence given by the plaintiff. The promise and covenant given by the plaintiff were in consideration of the cessation of illicit cohabitation, and void. In such a case, if the agreement is in the form of a bond or covenant under seal, so that there may be prima facie a valid contract, "if the security is of such a nature as to hold out an inducement or to constitute to either party a motive to continue the connection, the instrument would be void." There is presumption of illegal consideration from the mere fact of continued cohabitation after security is given. See Leake on Contracts, 5th ed., p. 541.

This action to set aside the agreement cannot be successfully prosecuted by the plaintiff. "No claim or defence can be maintained which requires to be supported by allegation or proof of illegal agreement:" Leake, p. 550.

In my view of the law, the defendant cannot enforce this agreement.

The plaintiff's claim for breach of promise of marriage is

absurd, as she has married a person other than the defendant—so that, presumably, she has benefitted by the defendant's breach of that part of his contract.

The plaintiff's action must be dismissed, but without costs, and without prejudice to her right of action for any money claim, if any not vitiated by illegality.

The defendant's counterclaim will also be dismissed without costs.

MIDDLETON, J. MAY 3RD, 1913.

*AUTOMOBILE AND SUPPLY CO. LIMITED v. HANDS LIMITED.

Lien—Motor-car—"Carriage"—Keeper of Garage—1 Geo. V. ch. 48, sec. 3 (4), (5).

Special case stated for the opinion of the Court.

H. E. Rose, K.C., for the plaintiff company.
D. L. McCarthy, K.C., for the defendant company.

MIDDLETON, J.:—The plaintiff company, on the 26th May, 1911, sold to one W. S. Baily an automobile, upon the terms of a conditional sale contract, under which the property in the automobile was not to pass to Baily until paid for. The defendant company owns a garage, where it sells automobile supplies and repairs and cleans and cares for automobiles for any one who may desire it. The owner of an automobile kept at the garage has the right to take the automobile out and return it at pleasure.

On the 1st August, 1911, Baily arranged with the defendant company to keep the car in question at its garage, and it was accordingly kept there; Baily using the wash-rack to wash and clean it, obtaining supplies necessary for its operation, and having repairs made when necessary. The car was used daily by Baily, and each day after using was returned to the garage.

Baily having made default in payment of some of his notes, the plaintiff company, pursuant to the terms of its contract with him, became entitled to take possession of the automobile; but the defendant company refused to allow it to be taken without payment of the amount due to it; claiming to be entitled to a

*To be reported in the Ontario Law Reports.

lien as keeper of a livery stable or a boarding stable within the meaning of the statute 1 Geo. V. ch. 49, sec. 3, sub-sec. 5; and alleging that the automobile is a carriage within the meaning of the statute, and that its garage is a livery stable or boarding stable within the meaning of the Act.

The special case submits three questions:—

1. Whether the defendants had, by virtue of the said Act, a lien upon the automobile in question in this action in respect of the matters set forth in the statement thereunto annexed.

2. Whether the said lien included all items upon the said statement, or whether it included only the items for the keeping of the car and the caring for the car and whether it included the repairs done to the car.

3. Whether it included goods bought to be used in connection with the car, such as gasoline, oil, etc. . . .

[Reference to Robins v. Gray, [1895] 2 Q.B. 501; Allen v. Smith, 12 C.B.N.S. 638; Orchard v. Rackstraw, 9 C.B. 698; 10 Edw. VII. ch. 69, sec. 50.]

The statute 1 Geo. V. ch. 49, sec. 3 (4), provides: "Every keeper of a livery stable or a boarding stable shall have a lien on every horse or other animal boarded at or carriage left in such livery stable or boarding stable for his reasonable charges for boarding and caring for such horse, animal or carriage."

The following sub-section gives a right to sell where there is a lien—"upon a horse, other animal, or carriage for the value or price of any food or accommodation supplied, or for care or labour bestowed thereon"—words differing to some extent from those found in the sub-section quoted. . . .

[Reference to Smith v. O'Brien, 94 N.Y. Supp. 673, 103 N.Y. App. Div. 596; Bevan v. Waters, 3 C. & P. 520; Jackson v. Cummings, 9 M. & W. 342; Thourout v Delahaye, 125 N.Y. Supp. 827; Gage v. Callanan, 113 N.Y. Supp. 227; Grene v. Fankhauser, 137 N.Y. App. Div. 124.]

The New York statute is not precisely the same as our statute; but the reasoning, I think, applies. I do not think that the Legislature, when passing the Act in question, intended to confer, nor did they confer, any rights upon the keeper of a garage. It is true that an automobile may be described as a carriage; but the whole context shews that the Legislature was speaking with reference to livery stables where horses are ordinarily kept. The word "stable" may in time come to have a wide enough secondary meaning to cover a garage. Railway men speak of a round house as a "stable" and of the men who attend the engines there as "hostlers." But it is not in this figurative and

inaccurate sense that the Legislature has used the terms in question.

For another reason, I think the claim fails. The statute does not purport to give to the livery stable keeper as wide a lien as the common law lien of the innkeeper. It would, I think, require express words to give a lien upon the property of a third party. See Harding v. Johnson, 18 Man. L.R. 625.

I, accordingly, answer the first question in the negative, and direct judgment to be entered for the plaintiff company with costs.

KELLY, J. MAY 3RD, 1913.

STORY v. STRATFORD MILL BUILDING CO.

Master and Servant—Injury to Servant—Negligence of Superintendent—Liability—Tort Committed in Province of Quebec—Quebec Law—Workmen's Compensation Act—Damages—Jury.

Action for damages for injury sustained by the plaintiff while working for the defendants, an Ontario company, erecting machinery in a mill in the Province of Quebec, by reason, as the plaintiff alleged, of the negligence of the defendants' superintendent.

The action was tried with a jury.

I. Hilliard, K.C., and W. B. Lawson, for the plaintiff.

R. S. Robertson, for the defendants.

KELLY, J.:—The defendants are an incorporated company carrying on business as general contractors and mill-builders, and having their head office in the city of Stratford.

The plaintiff is a millwright, whose residence is in the Province of Ontario.

In or about August, 1911, the defendants had a contract for the erection of machinery in a mill in Wakefield, in the Province of Quebec. The plaintiff was employed by them on that contract, the work on which was carried on under the sole direction and superintendence of Harry Cox, their foreman.

On the 30th August, while engaged with others in installing the machinery on this contract, and while doing such work in obedience to the commands of Cox, the plaintiff was injured

by the falling of a machine called a dust-collector, which happened, the jury found, through the negligence of Cox in not having sufficiently nailed to the rafters of the building a board from which the dust-collector was suspended while being put in its place. The board was nailed up by another workman, Muller, by the direction of Cox. The jury assessed the damages at $1,500.

The defendants contend that, under these circumstances, they are not liable.

At the trial, counsel agreed that "by the common law of Quebec masters are responsible for damage caused by their servants or workmen in the performance of the work for which they are employed; and that the doctrine of common employment, as stated in the cases of Asbestos and Asbestic Co. v. Durand, 30 S.C.R. at p. 292, Filion v. The Queen, 24 S.C.R. 482, Ruegg, 8th (Can.) ed., p. 975, is not a defence in Quebec.

Counsel also agreed that the Quebec statute 9 Edw. VII. ch. 66, "An act respecting Responsibility for Accidents suffered by Workmen in the course of their Work and the Compensation for Injuries Resulting therefrom," applies.

It is essential to consider the conditions under which the plaintiff is entitled to succeed in an action in this Province for a tort committed outside of the jurisdiction. That question was fully gone into in the case of Carr v. Fracis Times & Co., [1902] A.C. 176, where Lord Macnaghten (at p. 182) states the view, with which the other members of the House unanimously agreed, that "it is well-settled by a series of authorities (of which the latest is the case of Phillips v. Eyre, in the Exchequer Chamber), that in order to found an action in this country for a wrong committed abroad two conditions must be fulfilled. In the first place, the wrong must be of such a character that it would have been actionable if committed in England; and, secondly, the act must not have been justifiable by the law of the place where it was committed."

This is a very plain statement of the conditions under which such an action can be successfully maintained.

Phillips v. Eyre was followed by The M. Moxham (1876), 1 P.D. 107, both of which were referred to in the judgments in the Carr case.

What is necessary is that the act (committed in a foreign country) be wrongful or "not justifiable," not necessarily that it should be the subject of civil proceedings in the foreign country: Machado v. Fontes, [1897] 2 Q.B. 231.

The present inquiry is, therefore, to ascertain whether the

two conditions mentioned in Carr v. Fracis Times & Co. have been fulfilled.

It was argued for the defence that the first condition is not complied with, inasmuch as the Quebec law cannot be enforced here. This is, I think, a misconception of what is really required. It is not a question of enforcing in this Province the provisions of the Quebec law, but of enforcing the law of this Province in respect of a wrong committed in Quebec which is not justifiable by the law of that Province.

What is first to be considered is, was the wrong or the act complained of of such a character that it would have been actionable if committed in this Province? Of that, I think, there is no doubt, under the state of the law in this Province as it existed at the time of the accident, the provisions of which it is unnecessary to review.

The second condition, also, I take to be complied with. The law of the Province of Quebec, as admitted by counsel as being in force, and the facts as found by the jury, shew that the act complained of is clearly not justifiable in that Province.

The statute 9 Edw. VII. ch. 66, sec. 1 (Quebec), above referred to, provides that "accidents happening by reason of or in the course of their work, to workmen, apprentices, and employees engaged in the work of building, or in factories, manufactories, or workshops . . . shall entitle the person injured or his representatives to compensation ascertained in accordance with" the succeeding provisions of the Act.

By sec. 4, it is declared that a foreign workman or his representatives shall not be entitled to the compensation provided by the Act, unless at the time of the accident he or they reside in Canada, etc.

Section 5 provides that no compensation shall be granted if the accident was brought about intentionally by the person injured.

Taken with the above admissions of counsel, this seems to me to make it clear that the casualty was one for which the plaintiff had a right of action in the Province of Quebec, or, in any event, it was not justifiable there; and, therefore, the second condition as laid down by Lord Macnaghten has been complied with.

I have not left out of consideration the case of Tomalin v. Pearson, [1909] 2 K.B. 61, cited for the defence. This deals with a state of facts different from those presented here, and does not conflict with the opinion I have expressed, nor limit or modify the law as laid down in the Carr case.

As to damages: it is stated in Halsbury's Laws of England, vol. 6, p. 250, sec. 372, "that the measure of damages in an action in respect of a tort committed abroad is (it would seem) to be governed by the lex loci actus;" and "it may well be that the rules of the lex fori will be allowed to increase the amount of damages in certain classes of torts."

That aspect of the case it is not necessary to consider further here; counsel, when the matter was brought to their attention at the close of the trial, admitted that the amount of the verdict as returned by the jury was within the amount recoverable in the Province of Quebec.

I direct judgment to be entered in favour of the plaintiff for $1,500, the amount assessed by the jury, and costs.

LATCHFORD, J. MAY 3RD, 1913.

HICKS v. SMITH'S FALLS ELECTRIC POWER CO.

Master and Servant—Injury to and Death of Servant—Dangerous Machinery — Negligence — Defect in Condition of Premises—Common Law Liability—Negligence of Superintendent—Workman Bound to Conform to Orders and Conforming—Liability under Workmen's Compensation for Injuries Act—Damages—Apportionment.

Action by the widow and infant child of Robert Hicks, a workman employed by the defendants, who was killed while working for the defendants, owing, it was alleged, to their negligence.

The action was tried without a jury.

J. A. Hutcheson, K.C., for the plaintiffs.

D. L. McCarthy, K.C., and H. A. Lavell, for the defendants.

LATCHFORD, J.:—Between nine and ten o'clock on the morning of the 20th May, 1912, the deceased, who was twenty-six years old, and in excellent health, and one Jaecle, were engaged with Henderson, the defendants' superintendent, in moving a heavy pulley or fly-wheel from the power-house in which the water turbines and connected shafting and machinery were situated, into a building adjoining, where the defendants were establishing a steam plant auxiliary to their water power

system. The fly-wheel weighed about four and one-half tons. It was forty inches across the face or rim and about four feet in diameter. It had to be moved in the power-house a distance of seven or eight feet, up an incline of approximately eighteen inches, through a narrow space between the end of a shaft and the east wall of the power-house. The space had until January of 1912 been in large part taken up by a stairway leading to the floor above. After the removal of the stairs, the men were in the habit of using the place it had occupied as a passage to a door giving on the engine-room.

Ordinarily during the day-time the shaft was not in motion. But on this occasion it had become necessary to repair the driving-belt of the machine generally used for day power; and, that generator being out of commission, the shaft projecting into the space through which the fly-wheel was being moved had been linked up with one of the turbines, and was rotating at a speed of 160 revolutions a minute. The shaft, which had a diameter of nearly five inches, projected twenty-three inches beyond a pulley, from which a belt led to a generator up-stairs. This projecting end was three feet six inches above the uneven floor of the power-house, and had cut into it a key-seat, a foot or more in length, one and a quarter inches in width, and three-sixteenths of an inch in depth. The shaft had been installed sixteen or seventeen years, and had, when placed in position, the key-seat cut into it—no doubt, as a means of coupling on an additional length of shafting or attaching another pulley. The angles formed by the key-seat with the periphery of the shaft-end were sharp—"auger-like," as one witness described them—and the edges of the key-seat and the end of the shaft itself slightly indented from contact with the tools of the workmen or with other hard bodies.

I credit the testimony of the witnesses who deposed that the passage was dangerous when the shaft was in motion. It is beyond question that the place was extremely dangerous when men were moving through it a wheel of over four tons in weight, requiring on their part very hard labour continued through a period of about an hour. The men were using pinch-bars about five feet in length, and to obtain proper leverage had to lean on the bars in a stooping position at some distance from the fly-wheel. Hicks's position was near the projecting end of the revolving shaft. Henderson, the superintendent, was on the same side of the fly-wheel, and Jaecle near the door leading into the engine-room. All three, by prying and blocking, had succeeded in working the fly-wheel up the inclined plane, and in giving it a

quarter turn on the platform near the engine-room door. Henderson then said, "That's all right boys," and rose from the stooping position which he, like the others, had occupied. Hicks also rose, and, in straightening himself up, stepped, according to Henderson, back towards the projecting shaft, which, engaging the jacket of his overalls, "made a rope of it," as put by Fraser—the joint superintendent with Henderson—and caused injuries of which the man died a few hours later.

The power-house was not a factory as defined by the Factories Act, and no liability under that Act attaches to the defendants. But the defendants are, I think, liable at common law, as well as under the Workmen's Compensation for Injuries Act. It was their duty to take reasonable care that the safety of their servants should not be imperilled, as it undoubtedly was imperilled, by a thing so dangerous as the sharp points on the rotating shaft. The end of the shaft might have been cut off or securely guarded. But the defendants failed to adopt any of the obviously practicable precautions which would have protected their workmen from danger in the narrow passage.

I, therefore, find that there was in use by the defendants a defective and negligent system which caused the death of Hicks.

There was no contributory negligence. The space in which Hicks had to move between the fly-wheel and the end of the shaft was but fifteen or sixteen inches. A slight movement backward, even if it amounted to a step, as Henderson calls it, is not negligence, in the circumstances of this case. It is, I think, unreasonable to expect that Hicks, recovering as he was from the strain and restricted circulation resulting from heavy labour in a cramped position, should have in mind the dangerous shaft-end.

The plaintiffs being entitled to recover at common law, I fix the compensation to which they are thus entitled at $4,000. They would not be entitled to so much under the Workmen's Compensation for Injuries Act, which, in my opinion, also undoubtedly applies.

Hicks's death was caused by a defect in the condition of the machinery and premises used in the business of his employers. Henderson was negligent in having the fly-wheel moved through the passage while the shaft was in motion, and in ordering Hicks, who was bound to conform to his orders, to assist in moving the wheel, and who was so conforming when injured.

Hicks's earnings were from $55 to $60 a month. Others in the same grade in a like employment were earning about the same wages. Upon the basis prescribed by the Act mentioned,

the plaintiffs would be entitled to but $2,000 as compensation. I think, however, they are entitled to the larger amount stated; and I accordingly direct that judgment be entered in favour of the plaintiffs for $4,000 and costs—the compensation to be apportioned two-thirds to the widow and one-third to the child.

WHITE v. HOBBS—MASTER IN CHAMBERS—APRIL 28.

Venue—Change—Witnesses—Convenience—Terms—Withdrawal of Jury Notice.]—The plaintiffs sought in this action to enforce an agreement given by the defendant for the purchase of a traction engine. Default was admitted; but it was said by the defendant that the engine would not do the work required and for which it was bought, to the knowledge of the plaintiffs. The venue was laid in London, where the plaintiff company carried on business. The defendant resided in the township of Scarborough, in the county of York, and moved to change the place of trial to Toronto. The defendant used the engine for a month or six weeks in threshing for neighbouring farmers. He alleged that the engine used an excessive quantity both of coal and water; and, as these were apparently supplied by the customers, this was an injury to his business. He also counterclaimed for $500 damages for loss of profits and of the custom of his former employers. In his affidavit in support of the motion, he stated that he would call three of those who acted as engineers and six of the farmers who employed him to thresh. All the nine would speak of the excessive consumption of fuel and water and of the inability of the machine to do its work properly. These witnesses all lived in the township of Scarborough, except one, a resident of Toronto. The secretary of the plaintiff company made an affidavit in answer, in which he said that the company would require ten witnesses, all resident at London, where also the engine in question was lying, in the Grand Trunk yard. The Master said that, if the matter rested there, the motion must fail. But, since these affidavits were filed, both the deponents had been examined for discovery; and from the depositions it appeared that only three of the witnesses spoken of by the company's secretary were material. These were Lumley, who went down to see the engine after the defendant had complained of its inefficiency; and two experts who had tested it since this motion was launched, and who were prepared to testify to the character of the engine

and as to the quantity of coal and water required during a continuous test of three hours. It appeared from the defendant's examination that the agreement he signed had the force of a chattel mortgage, and was registered as such. This fact and the pending litigation would prevent the defendant from preparing himself for the coming season, if the action were tried by a jury, as there would be no jury sittings, either at Toronto or London, until after the long vacation. The Master said that it was of great importance to the defendant to escape such a long delay; and his counsel offered to have a trial at the May sittings of the County Court of the County of York before a jury; but the plaintiffs did not agree to this. They did not think that they could have a fair trial before a York jury as against a farmer of that county. The jury notice having been given by the defendant, if he was really anxious to have a speedy trial, he could do so by withdrawing the jury notice, and then the case could be transferred and tried at the Toronto non-jury sittings. This would accomplish what would be advantageous to both parties, and would obviate the objection of the plaintiffs to a trial before a possibly adverse jury. Order accordingly; costs in the cause. T. N. Phelan, for the defendant. E. C. Cattanach, for the plaintiffs.

JORDAN v. JORDAN—MASTER IN CHAMBERS—APRIL 29.

Pleading—Statement of Claim—Application to Amend by Adding Claim for Tort—Stale Claim—Bar by 10 *Edw. VII. ch.* 34, *sec.* 49(*j*)—*Previous Action for same Cause—Husband and Wife.*]—This action was begun on the 28th October, 1911. On the 6th December of that year, the writ of summons was amended by adding a claim for assault and false imprisonment against the defendant, the husband of the plaintiff. The writ was amended and re-served. This amendment was not carried into the statement of claim, which was delivered on the 30th January, 1912, by solicitors then acting for the plaintiff. The action never went to trial; and the plaintiff now moved to have the statement of claim amended by adding the claim for assault and false imprisonment. It appeared from the material filed by the defendant that an action for this claim now sought to be added was begun on the 5th January, 1898, but was discontinued by the plaintiff's then solicitors on the 3rd June, 1898, after the defendant had served notice to set aside the

statement of claim as shewing no cause of action. To this view the plaintiff's solicitor apparently acceded, as appeared from an affidavit made in the action then pending for alimony between the same parties. It was admitted on the argument of the present motion that the alleged assault and false imprisonment now sought to be charged were the same as the subject of the action discontinued nearly thirteen years ago. The Master said that the claim was long since barred by 10 Edw. VII. ch. 34, sec. 49(j). To allow the amendment would, therefore, be useless, and of no possible benefit to the plaintiff—apart from the question whether such an action by a wife against her husband would lie: see R.S.O. 1897 ch. 163, sec. 115. For this reason, the motion must be dismissed, with costs to the defendant in the cause, as was done in a similar case of Clark v. Bartram, 3 O.W.N. 691. It should be noted that that plaintiff was examined for discovery as long ago as March, 1912, without any objection to the statement of claim as it then appeared or any question as to the omission of the amendment, either by the plaintiff or the solicitor who appeared for her at that time. The plaintiff, in person. H. E. Stone, for the defendant.

JACKMAN v. WORTH—MASTER IN CHAMBERS—APRIL 30.

Discovery—Inspection of Mine—Relevancy—Pleading—Evidence.]—The facts of this case appear, in part, in the note of a previous motion, ante 911. The fraud with which the plaintiff charged the defendants was, that, in October, 1912, they discovered an extremely valuable vein in the company's property, and then sold the treasury stock or divided it among themselves at about a tenth or less of its real value. The plaintiff now moved for an order for inspection of the mine to see what the vein shewed when it was first struck, in order to strengthen the presumption or proof of the alleged fraud. It was urged by counsel for the defendants that if, as a shareholder and a director of the company, the plaintiff had the right to go on the property, he did not require an order. If this did not give him the right, it should not be given him, in view of his hostile attitude to the controlling interests of the company, and, therefore, to the company. It was urged that the plaintiff might in this way acquire information which it would be injurious to the company to disclose, and so be in a position to prejudice the stock. It was also urged that inspection would not disclose anything that

was relevant to the case as presented on the pleadings. The Master said that the defendants were charged with having knowledge which they were bound to disclose to the other members of the company, and, without having done so, with making allotments of shares at a price infinitely "below their proper value," and without any authority to do so. The point for decision now was only whether inspection would be of assistance to the plaintiff as to any of these alleged facts. The facts of the discovery of the vein in October and of its probable value at that time were not in dispute. But, if it was necessary to shew that the defendants *knew* the value in October, this could not be done by shewing the present value and condition of the mine. The defendant Lyman, the mine manager, being examined for discovery, said that one cannot judge the future in mining; that it is always uncertain how a vein will hold out; that "at present the mine is paying handsomely." He also said: "At no time have we cut the vein in a better place. . . . At no time have we cut that vein with such an encouraging appearance." This defendant had been in charge since the 1st July, and was there when the rich vein was struck on the 10th or 11th October. His was the best evidence obtainable on this point; and far more cogent than anything that could be said by any one visiting the mine now for the first time. Motion dismissed; costs in the cause. T. P. Galt, K.C., for the plaintiff. Featherston Aylesworth, for the defendants.

ANTISEPTIC BEDDING CO. v. GUROFSKY—MASTER IN CHAMBERS—MAY 1.

Discovery—Production of Documents—Motion for Better Affidavit—Production Sought of Documents not Relevant to Case Made on Pleadings—Leave to Amend—Further Discovery—Costs.]—By the statement of claim the plaintiffs alleged that the defendant agreed to obtain insurance for the plaintiffs, and delivered to them policies aggregating $3,600; that the necessary sums to pay premiums were given to the defendant, who did not pay them; that, in consequence, the policies were cancelled; and, two days thereafter, the plaintiffs suffered loss by fire of nearly $3,000; which the defendant was, therefore, called on to pay. The statement of defence was, briefly, that the policies in question were placed through the Insurance Brokerage and Contracting Company Limited, as the defendant had told the plain-

tiffs, and that the defendant paid to that company the premiums received from the plaintiffs, and the defendant denied liability, at the most, for anything more than the premiums. On the examination of the defendant for discovery, it was sought to prove that the defendant and the Insurance Brokerage Company were really the same person, under different names; and production was asked from him of the company's books, which was refused. The examination was thereupon enlarged, and a motion made by the plaintiffs for a further affidavit on production by the defendant, to include these books and other documents, on the hypothesis of the identity of the defendant and the Insurance Brokerage and Contracting Company. No such allegation, however, appeared in the pleading; and, as discovery was relevant only to what appeared there, this motion, the Master said, could not succeed at present. See Playfair v. Cormack, ante 817. The proper course to take was to give the plaintiffs leave to reply so as to set up the present contention, and direct the defendant to file a further affidavit, including these documents in the documents produced, or justifying or accounting in some way for their non-production. The plaintiffs should then be entitled to examine the defendant further, if desired. Costs of the motion to be costs in the cause. F. Arnoldi, K.C., for the plaintiffs. C. A. Moss, for the defendant.

JORDAN v. JORDAN—MASTER IN CHAMBERS—MAY 2.

Evidence—Foreign Commission—Order for—Terms—Payment of Disbursements—Husband and Wife.]—Motion by the defendant for an order for a commission to take evidence at Chicago, Illinois, and Bay City, Michigan, for use at the trial, and for letters rogatory in aid thereof. The facts of the case are stated in the note of another motion, ante 1219. The plaintiff asked to be furnished with means to attend on the examination of the witnesses under the commission, but did not otherwise oppose the motion. This claim was based on the fact that the claims in the action were: (1) to have the previous consent judgment set aside; and (2) for further and increased alimony. No application had at any time been made for interim alimony and disbursements by the solicitors who acted at first on the plaintiff's behalf, although the action was begun in October, 1911, and the statement of defence delivered nearly fifteen months ago. The Master said that, assuming that the plaintiff

could now be treated as making such a motion, it could not be granted. In this case, there were no allegations such as were made in Lafrance v. Lafrance, 18 P.R. 62, at p. 64, line 13. Without them, no doubt, the decision in Atwood v. Atwood, 15 P.R. 425, would have been applicable. There was, therefore, no ground for acceding to the plaintiff's application; and an order must issue as asked by the defendant; costs of the motion to be costs in the cause. Shirley Denison, K.C., for the defendant. The plaintiff in person.

GRILLS v. CANADIAN GENERAL SECURITIES CO.—MASTER IN CHAMBERS—MAY 3.

Discovery—Production of Documents—Practice—Deposit of Documents in Central Office—Motion for.]—The facts of this case appear sufficiently in the note of a previous motion, ante 982. A further affidavit on production was made by the defendants, as directed by the order made upon that motion; but the documents therein set out were not deposited in the central office. The plaintiff now moved to have this done. The Master said that the usual order was made requiring the production of all relevant documents and their deposit with the Clerk of Records and Writs; and the subsequent order did not in any way relieve the defendants from the previous direction. Neither in the first affidavit was there any ground stated why the order should not be obeyed, nor was any such set up in the further affidavit. At least this should have been done, if it was not intended to comply with the order. Instead of so doing, the defendants' solicitors gave notice on the 14th April that the documents produced could be inspected at their office, on the 16th, between 2 and 4 p.m. The plaintiff made affidavit that he attended at that time and at other times before and since, but without any satisfaction, owing to the conduct of the defendants. He also said that he was put off with promises that statements would be prepared; but that such were not forthcoming on the 25th April, and that since the 16th April he had been refused access to the books. It appeared from the affidavit of the defendants' book-keeper, filed in answer to this motion, that the necessary statements would take a long time to prepare, and that he could take this up only after office hours. He estimated the time on the 16th April at ten days or more. On the 26th April he said that the extracts would be ready "early next

week," and "can then be checked over in a short time." The week spoken of was now almost ended, and the promised extracts should be ready. If that is so, then the plaintiff should be given ample time next week to satisfy himself of their accuracy. If they were not ready then, it would seem useless to give the defendants any further time, and the order now asked for would have to be made. Except by agreement there is no such practice here as to deposit of documents as is set out in Bray on Discovery, pp. 240, 241. Here the order must be followed except as to the documents mentioned in the second part of the first schedule as being in constant use. Then the inspecting party can move as on the present occasion, if necessary. As to all that is mentioned in the first part of schedule I., the order must be complied with, if desired by the opposite party, unless it is varied on the application of the party affected. Neither of these courses having been taken in the present case, the motion was rendered necessary, and the costs of it should be to the plaintiff in any event. F. Arnoldi, K.C., for the plaintiff. F. S. Mearns, for the defendants.
