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CLUTE, J. DECEMBER 9TH, 1905.

TRIAL.

REX v. MASTER PLUMBERS AND STEAM FITTERS' CO-OPERATIVE ASSOCIATION, LIMITED, AND CENTRAL SUPPLY ASSOCIATION OF CANADA, LIMITED.

Criminal Law—Conspiracy—Illegal Trade Combination—Criminal Code, sec. 520—Incorporated Companies—Acts Preceding Incorporation—Adoption after Incorporation—Evidence as to Agreements to Enhance Prices and Stifle Competition—Sentence—Substantial Fine.

Indictment of defendants for conspiracy under sec. 520 of the Criminal Code.

The defendants were tried before CLUTE, J., without a jury, at Toronto.

E. E. A. DuVernet, Crown prosecutor, for the Crown.

J. W. Curry, K.C., also for the Crown.

W. R. Riddell, K.C., and A. F. Lobb, for defendants the Master Plumbers, etc., Association.

G. H. Watson, K.C., and S. C. Smoke, for defendants the Central Supply Association.

CLUTE, J.:—I think an offence has been proven against the defendants for conspiracy under sec. 520 of the Code, and I find the defendants guilty of the offence charged.

As the matter may go to appeal, there being a special provision for an appeal in this case, it may be desirable that I should mention some of the grounds which have led me to the conclusion that the defendants are guilty.

A preliminary objection was taken by Mr. Watson that there could not be a conspiracy between two incorporated companies, and that that particular case was not in contemplation or governed by sec. 520 of the Code. I entirely disagree with that view. I think to take a view of that kind would destroy the intention of the Act, and be contrary to its clear intendment. Under sub-sec. (t) of the interpretation clause, sec. 3, of the Code, "person" is defined to include amongst others "bodies corporate." I think that was the clear intention of the legislature. So that I find, first, that there may be a conspiracy between two corporate bodies.

But it is said, in the second place, that an incorporated company cannot be bound by any acts or circumstances which preceded its incorporation, and that the defendants the Central Supply Association of Canada, Limited, not having been incorporated until September, 1905, all the evidence and facts prior to that can have no bearing upon that company, and that nothing appears since its incorporation which would amount to a trade combination within the Act. I do not take that view. I think the evidence clearly established that there has been a criminal combination within the Act since at least the year 1902, and that the defendants, the present companies, are the successors to that criminal agreement and combination, have adopted it and have become responsible for it, and by their engagements have undertaken to carry out the engagements of the association which previously existed, and that that also applies to the incorporated Master Plumbers and Steamfitters' Co-Operative Association, Limited.

In order to understand in some degree what the relation of these two corporate bodies is to each other, what their object was in incorporation, and how they have attempted to carry out that object, it will be necessary to trace the history of the associations of which they are the successors, whose rights and obligations they have distinctly assumed, and

whose previous acts they have implicitly adopted by appropriating the funds which the previous associations obtained, and by undertaking to carry out their obligations. Taking the Plumbers' Association first. That seems to have been instituted about 1895, but without dealing with the earlier records, and referring to the minutes as they appear subsequently to 1902, we find that a committee, as early as 24th November, 1902, reported with respect to prices, and that those prices at that time were nearly 100 per cent. or nearly double the prices which were paid to union men. It is impossible to read the minutes of the two associations from that time down, one apart from the other, because they continuously have relation to each other, and relation to an agreement that undoubtedly existed between those associations. It will be idle to quote from the minutes the numerous passages that sustain that view. A few references may be made. Reference is made as early as January, 1903, to non-union plumbers that are carrying on plumbing business without a proper business place. One of the members spoke with reference to his report and told the meeting that if it was possible they would have another meeting with the supply men before the next regular meeting. Communications were then read at a subsequent meeting from the various supply houses, and a committee was appointed to deal with the matter at once, and a special meeting was called. All that would be unintelligible, perhaps, from the minutes themselves, were it not that what took place subsequently shewed clearly what it had reference to. There was an arrangement, the exact nature of which is not disclosed, existing between the two associations at this time, and the negotiations that took place had relation to the perfecting of that arrangement. The final agreement that was reached we have before us: that is called the agreement of 1903, agreed to on 6th May. Before referring to the terms of that agreement, it may be convenient to look at the minutes as evidencing the fact that an agreement was understood before that, but that its terms were not explicitly set out, had not perhaps been agreed to by all the members of the Supply Association; but on referring to the minutes of 6th April, 1903, I find it stated that a discussion arose that all members were not charging the 20 per cent. increase "as we had agreed to." It was generally discussed and a conclusion reached that until "we got our secretary and got all

new members to properly understand what we were trying to do it would be hard to get it in every instance." Then on 25th April it was moved and seconded that the time for sending in the notices of jobs to the secretary start on 4th May, and that on and after that date all notices be handed in to the secretary in accordance with the new rule; that a circular be issued to all the members that his office would be open on and after 4th May, and that they would call on him to receive the book and instructions, and then a very important clause in regard to tenders, that members notify the secretary of all tenders submitted by them prior to 4th May; and on 6th May, the date when it is said the agreement came into force, we find that it was decided to have only necessary typewritten copies of price lists for supply houses, and that lists be not printed until further additions, that the secretary prepare lists of members and mail to each supply house that had signed the agreement, and calling their attention to the fact that the agreement went into effect on 6th May, and on motion of Mr. Armstrong, seconded by Mr. Wilson, the report was adopted and the committee discharged. That is the committee that had had in charge the negotiations which resulted in the agreement which was finally assented to on 6th May.

That agreement provides amongst other things and sets forth that negotiations have been under way for some months between parties hereto with a view to improving the condition of the trade generally and to protect the Master Plumbers' and Steamfitters' Association by giving the association a preference over non-members, and all plumbing and steamfitting goods purchased from the undersigned firms.

In other words, here is a plain intimation of the object of the negotiations that had taken place between these two associations, and that the object was simply the carrying out of what had previously existed in less perfect form for some time, probably for over a year prior thereto, as evidenced from the minutes of both of those associations. The agreement provides that the members of the Master Plumbers' and Steamfitters' Association will endeavour to buy all goods for their work from, and will give the preference on all purchases where prices are equal to, the jobbing and supply houses signing this agreement; that the undersigned supply houses will not sell to the general public plumbing goods,

steam, hot-water, or gas fittings, but when prices are asked from them they may quote parties wanting an idea of cost not less than 25 per cent. over the association price, and that the undersigned supply houses will not sell plumbing goods or steam-fitting, hot-water, or gas fittings except steam and pipe fittings, to the trade generally except at the advance of 20 per cent. upon the prices quoted to members of the Master Plumbers' and Steamfitters' Association, and that they will give the said plumbers in good standing, unless otherwise notified by the association, a preference of 20 per cent. on all purchases made by the said members better than the figure at which they will sell a like quantity and quality of similar goods to persons in the trade who are not members of the Plumbers' and Steamfitters' Association. It is interesting to notice how that was received by the association. It was evidently a matter of considerable time before the agreement evidenced by the one read was reached, and I find in the minutes of 21st May that communications were received from the Robertson Company, the Ontario Lead and Wire Co., and the Webb Manufacturing Co., acknowledging receipt of a copy of the agreement and of the price list. The agreement went into effect, and was acted upon by both parties until 26th October, 1904. Reference is constantly made in the minutes shewing the endeavour to enforce that agreement, and the difficulty that was had from time to time to enforce it, and the complaints that were made and the excuses that were given, but speaking generally it was fairly successfully enforced, and I find as a fact that the effect of that agreement was a contravention of sec. 520 of the Code.

But it is said that that agreement was abrogated in October, 1904. Therefore it is necessary to see what was done on that occasion. Turning to the minutes of 26th October, 1904, we find an extraordinary state of affairs. The first thing that takes place is: "Clause 1 was then read, which was to the effect that every member by solemn oath renew his obligation and allegiance to the association, promising fidelity and faithful obedience to the by-laws." Clause 2, "that the agreement or understanding between manufacturers and supply men and our association as to giving preference to members of our association be abrogated, and that the manufacturers and supply men be given a free hand. Each member present signified his individual intention to purchase

goods of manufacturers and supply men who sell to fellow-members of this association in Toronto and vicinity." It may be noticed here that after this agreement was abrogated a new method was adopted, and that was the method which is not clearly set forth, but still, in the light of what took place, is intended by the latter part of clause 2, which states "that each member present signified his individual intention to purchase goods of manufacturers and supply men who sell to fellow-members of this association in Toronto and vicinity." What I have read is treated as a by-law, and at that same meeting provision is made, "that for every evasion or infraction of these by-laws the penalty be immediate expulsion." I do not think there is a shadow of a doubt that the meaning of that was, and it was understood as evidenced by what it said, and, by their subsequent action, each member there understood it to mean, that the members of the Plumbers' Association were to buy from the supply men exclusively as far as that was possible, and that the supply men were to limit their sales to them, because at the same meeting it was moved and seconded that lists of manufacturers and supply men in accord be published and sent to each member. What does that mean? What can it mean except that supply men who were in accord with the Plumbers' Association would sell to them only, and they buy from the supply men only. It was further passed at the same meeting "that a list of the members be published and a copy sent to each of the manufacturers and supply men, and also to each of our members," and it states that the following members, naming them, were present and took the obligation—a very large number being present to take that obligation. The supply lists were published and sent as provided by the resolution. They were followed by directories, which were published and sent out accordingly, and we find in these lists and directories that indication was given to the trade of the supply houses with whom the plumbers are to deal, and the names of the plumbers who are to buy. In other words, the lists in the hands of the members of the supply houses would indicate to them those who were in good standing, and by the stars opposite the names those who are not members or not in good standing in the Plumbers' Association, to whom goods were not to be sold, and we find that that system was endeavoured to be rigidly carried out. Of course, for the

purpose here, it is not necessary that it should be shewn that it was carried out or that it was put in force—the mere combination was sufficient; but as a matter of fact it was so enforced, and so rigidly enforced, that numbers of plumbers who were not members of the association found it impossible to obtain goods except by a roundabout way through other members of the association or by importing them from the United States. I find as a fact that the effect of these proceedings which were carried on by these two associations down to the time of incorporation was a contravention, and was a continuance of that combine and agreement in contravention, of the Act. Then in the spring, I think it was in April of 1905, the Plumbers' Association became incorporated, and the name then adopted was the name of the defendants, and at the time of the incorporation all the assets and property were transferred from the association to the incorporated company, and the members who became the incorporators were the members of the old association. In other words, the Plumbers' Association was the identical organization, including the same members, with the same objects, and adopting the same methods, and was absolutely continuous with the old unincorporated association, and I find as a fact that they did adopt and continue all the methods which had been adopted by the old association to carry out the combination and scheme which was then in existence between them and the Supply Association. The Supply Association continued unincorporated until 6th September, but proceedings were taken for that incorporation in August. The letters from the solicitors and the minutes in their books clearly shew the object of such incorporation, I think. Something had occurred to disturb the felicity of these two companies in the spring. When it was found that certain plumbers could not obtain goods in the market because of this combination, representations were made to the Minister of Customs, and it became necessary then to represent and to make it appear that sales could be made, and were in fact made to any person legitimately in the trade. At first the Supply Association only attended. This gave offence to the Plumbers' Association, and a subsequent interview was obtained, and the result of that interview appears to have been entirely satisfactory; but there was the shadow hanging over them, the danger was manifest. It became perfectly apparent

that if it were known to the Government that matters were as they were, there was danger that what is known as the "dumping clause" might be so far as they were concerned withdrawn, and goods permitted to come in from the United States with the duty removed. How was that to be got around? What was to be done so that a way out for a conscience accustomed to what had occurred in these associations might be able to represent and say without manifest falsehood that they could sell to any plumber and so evade the law? I find that the scheme adopted, the plan introduced and carried out, and carried out, as it appears to me, clearly for that purpose, was that the Plumbers' Supply Association should be incorporated, that they should pass a resolution which was known as the "Chicago Trade Resolution," that that should be put forward, that they would sell to all legitimate plumbers, and that that representation should stand them in stead in case there was any difficulty in regard to the customs. But when that was made known to the plumbers, the plumbers would have none of it, unless something was done to still secure them the advantage which they had enjoyed of being the persons, or the principal persons, to whom the Supply Company would sell, and so negotiations commenced. During all this time I find that the existence of this combination continued, that it was being observed as well as it could be under the circumstances, that both parties relied upon it, and that while under a pretence for use at Ottawa that they were selling to every one equally, as a matter of fact the very firms that were engaged in this business, and who formed the association of plumbers' supplies, were refusing applications of persons who sought to purchase their goods because they were not members of the Plumbers' Association. Then it was thought that if an arrangement could be made by which the Supply Association could become incorporated, it could do what the individual members dare not do, lest they lost the right of having American goods shut out by reason of the tariff, and in that way they might be able to compass their purpose and still satisfy the Plumbers' Association, still retain the plumbers for their best customers, and the Plumbers' Association still look to them to sell only to them. How was that carried out? The scheme was ingenious; but having a knowledge of the facts that had preceded and of what followed, it was perfectly

clear as to the intendment. An agreement between the defendants, known as exhibit 47, was prepared with great skill and care, and was approved of by a resolution of both companies, and that provided and declared: "The Supply Association agree to pay to the Co-operative Association a commission of 7½ per cent. on all purchases that shall be made by members of the Co-operative Association from members of the Supply Association, this commission to be payable every three months to the secretary of the Co-operative Association, the first payment thereof to be made in four months from the date hereof and to be for the first three months."

Clause 2 provided: "The Supply Association agrees to create and maintain a fund equal to five per cent. of the amount of all sales that shall be made to the master plumbers and steamfitters in the city of Toronto who are not members of the Co-operative Association, which fund shall be at the disposal every six months of the joint committee hereinafter provided for." The meaning of that is, that while the Supply Association was not manufacturing, did not own any goods, was not in the business, they undertook to make this arrangement by which, the price being equal to all, a rebate should be given back to the members of the Plumbers' Association who were in good standing, just as effectually as in the earlier agreement provision had been made that any outsiders should be quoted 25 per cent. extra price, any members who were not of the union 20 per cent. Here the minutes shew, in the course of the negotiations which took place which resulted in this agreement and this understanding, that the plumbers claimed 15 per cent., that after a good deal of negotiations the amount was finally got down to 7½ per cent., but the object and the meaning was the same, and to shew that that was so, the 5th clause provided: "The Co-operative Association agrees to use its utmost endeavours to procure its members to give members of the Supply Association the option of meeting any bona fide quotations that may be made by other proposing vendors which are more than 7½ per cent. lower in the aggregate than prices quoted by members of the Supply Association, the secretary of the Supply Association to be satisfied by the Co-operative Association that such quotations are bona fide. If after — days from notice of such quotations the members of the Supply Association shall fail to meet them, the obligation of the Co-operative Association

in respect of such quotations shall be deemed to have been satisfied."

6. "If any member of the Co-operative Association shall fail or omit to purchase all his goods, less said exemptions, from members of the Supply Association, or shall fail or omit to give members of the Supply Association the option above mentioned, of meeting quotations made by other proposing vendors, the Co-operative Association shall not be entitled, notwithstanding anything hereinbefore contained, to receive from the Supply Association any commission in respect to any sales which shall be made to such member of the Co-operative Association by any of the members of the Supply Association, but if such member of the Co-operative Association shall hereinafter desire to purchase his goods, less said exemptions, from members of the Supply Association, and to give them such option, the Co-operative Association shall, upon satisfactory terms to be arranged by the said standing committee, be entitled to the commission in respect of sales made to him thereafter."

Then follow a number of other provisions. The meaning of it all was, that, while the Supply Association was pretending that they were putting all master plumbers upon an equal footing, they were distinguishing by giving a direct advantage of 7½ per cent. to all master plumbers who were in good standing in the association, and in addition thereto paying to them 5 per cent. of sales to outsiders. That agreement was ratified, using that word in the minutes, at the meeting of the two associations; and so far an understanding and agreement was complete; but I point out that I regard that not in itself as constituting the combination and the agreement, but only as evidencing the method which they adopted at this time of putting in force and perfecting the agreement, which was continuous, and which had existed during the time I have mentioned before. That brought the parties down nearly to the time when they ceased operations for reasons that were unavoidable, but during that time, and within 6 weeks of the seizure of the books, it is perfectly manifest that the Supply Association was still carrying out through its members the combination which had all along existed for the purpose of favouring the members in good standing in the Plumbers' Association, and refusing to sell supplies to those plumbers who were not members of the asso-

ciation. This agreement, then existing and continuous, was one that, I think, had the necessary effect of being an infringement and an offence against the statute, and I think that the Central Supply Association are responsible for all that was done by the Plumbers' Association in order to carry out their common purpose, and while they may not have had knowledge of the method of tendering, for instance, they in effect were responsible for that to the extent that that aided the Plumbers' Association and themselves in the more effectually carrying out the intention with which they started. A reference, perhaps, may be made to that. One hardly knows how to express one's self in the face of the disclosures such as we had in regard to that matter. A number of hitherto reputable firms, meeting around a table, and under the pretence of sending in invited tenders, deliberately adopt a method by which, apparently without the slightest compunction, they took from the public, that portion of the public who happened to be interested, money to which they had no possible claim, no more claim than any person meeting another in the street and by force robbing him of what he had. Indeed, I think of the two offences the robbery is the less offensive.

Here they adopted a system of misrepresentation and fraud in order to induce persons inviting tenders to believe that the tenders were reasonable and fair, when from first to last, for at least the last 2 or 3 years, it was admitted in the box that not one single honest tender had come from that association. The system was this, that having come with an estimate which they saw fit to make of the probable expense of material and labour, and having added to that 26½ per cent., and sometimes other additions which I will refer to presently, they put in what was called a tender, not intending that it should go before the architect, not intending that they should be in competition with any others who had made a similar estimate, but, having arrived at these sums, an average was struck, and that was supposed to represent nearly the amount for which the successful tender would be allowed; and then false and fictitious tenders were put in, varying slightly but generally about 10 per cent. above that amount, so as to lead to the supposition that these tenders were honest and real; and in many instances it was evidenced that, not content with these, they put in an additional sum, which was

called a rake-off or a bonus, to cover, forsooth, what was called the time and trouble of these gentlemen assembling together in order to do what they had done, and these sums were distributed among themselves. I can call it by no other name than so much plunder. Then it was provided that if any one claimed the person seeking a tender as his customer, he should have, in a sense, the first right, but, if his tender was higher than the average, he would have to make an allowance to the other person as a sort of solatium for having lost what he would otherwise have been entitled to; and out of these tenders 5 per cent. was charged in each case for the association. We had here in Court some thousands of cases where these cards were put in. Cards were furnished shewing the name of the architect, address of owner, class of work, where it was situated, when the tenders were closed, and by whom notified, and the address. That was the system, utterly destroying competition, utterly doing away with anything like a fair price. It was shewn in one case that the difference between the average tender and an outside real tender amounted to nearly $6,000. But, no matter whether it amounted to more or less, the system was a fraudulent system. It was a combination carrying out their idea of limiting the trade to themselves, the members of the Plumbers' Association, and compelling, by the power which they had, the Plumbers' Supply Association to confine their trade exclusively to them. And, not content with what they might do in one city or town, the ramifications of this method extended throughout Ontario and throughout Canada, and, while the similar associations in the United States from which the idea came, were not affiliated with the defendants in the strict sense of the word, I think they were in such close touch with those associations that they attended their principal meetings, and they found the American association ready to assist them at any time they required assistance, either in keeping out goods or in any other way that might render the working of their system more perfect. There have been numerous exhibits placed before the Court in the way of letters and agreements and correspondence, in addition to the evidence shewing how this scheme and combination was carried out. It is useless to embody them in what I have to say. They may be more readily referred to in case the matter should come up hereafter, but I think there can be

no doubt that the object of these two associations, now called incorporated associations, was one and the same; it was to do the very thing that this statute was intended to prevent, and by this combination I find that the effect of that was to unduly limit the supplying or dealing in the articles or commodities mentioned, and that it did restrain and injure trade and commerce in relation to such articles and commodities as they either manufactured or sold, and that in fact it did unduly prevent and lessen the manufacture and production of such commodities, and that it unreasonably enhanced the price. There was no competition in price. These manufacturers got together and they fixed their own prices, they and the persons who would sell their goods, and who were the only persons to sell their goods. They met from time to time and they revised their price list, and they sold those goods at just what price they pleased, only limited by the danger of putting the price so high that importations might come from the United States. There was no pretence at an honest competition, and I find that they did prevent and lessen competition in the production and in the barter and in the sale, and in the supplying of articles and commodities forming their business.

I therefore find the defendants guilty, and I impose as a penalty $10,000, $5,000 on each of the defendants.

BOYD, C. JANUARY 12TH, 1906.

TRIAL.

REX v. McGUIRE AND OTHERS.

Criminal Law—Conspiracy — Illegal Trade Combination—Criminal Code, sec. 520 — Individual Members of Trade Association—Convictions on Pleas of Guilty—Sentences—Extenuating Circumstances — Solicitors' Advice—Duty of Solicitors—Fines—Suspended Sentences.

A number of individual members of the Master Plumbers and Steam Fitters' Co-operative Association, Limited, were indicted and arraigned for conspiracy in respect of the same

or similar acts to those charged against the association and dealt with in the preceding case. These defendants pleaded guilty.

E. E. A. Du Vernet, for the Crown.

W. R. Riddell, K.C., S. W. Burns, and A. F. Lobb, for defendants.

In sentencing the defendants the following judgment was delivered:

BOYD, C.:—It was a novel spectacle presented last Friday, when scores of men in good standing rose in open court and admitted that they were guilty of acts of criminal misconduct.

The salutary lesson of this case ought to suffice for them and others, so that the country shall have no repetition of such a deplorable scene.

Sydney Smith, speaking in the early days of corporate aggregations, suggested that men individually excellent, when they met in combined commercial action, very often cease to be collectively excellent. "The fund of morality," he says, "becomes less as the individual contributions increase in number."

Whatever fund of truth lurks under the humour, there is no doubt that lawful combinations may easily become unlawful conspiracies. A company of respectable people get together to control a trade; their object in furthering their own ends, obscures or blinds the moral sense as to the fair claims of others. Accordingly, they plan with dulled perception of individual personal responsibility; fair dealing must not come in to lessen the prospect of goodly gain. And so is formed a monopoly which is to them justified by its profitable fruits, but to others it becomes baneful, working harm and loss, stealthily depriving them of money without just value, in brief, cheating them.

It is easy to overpass lawful limits in such an enterprise, and then, sooner or later, comes, inevitably, the shock of being discovered and the calamitous close. Besides the plumbers the legal profession too has been under censorship in this long-drawn case.

The public prints have not been scant in their comments on the legal aspects of the case. It has been put forth also

for the merciful consideration of the Court that the body of defendants had been acting under legal advice.

I have asked for information on that point, but have not received the actual evidence of the advice given. When business men propose to enter on some scheme of importance as to which any doubt exists respecting its propriety or legality, and thereupon seek legal advice to guide them, the usual and proper way is to set forth in a written statement all the facts and the various points on which advice is asked, and to these the counsel responds in a written opinion. These documents can be produced when required, and they will manifest the precise scope of what has been asked and answered.

I assume that no such accurate course has been taken here, for nothing of the sort has been laid before me, though some advice may have been informally or loosely given. But upon this point I dwell no further. However, I must not pass upon the aspect of the case without giving wider currency to a few words spoken by me to the law students last Friday, after leaving the Court, touching the relation of the lawyer to crime.

After explaining to the students about the privilege of secrecy between solicitor and client, I said: "There are exceptional cases, when the privilege does not attach. Thus if the client applies for advice in respect to matters intended to guide or facilitate him in the commission of a fraud or a crime (the legal adviser being ignorant of the purpose), then such communication is not privileged. The client cannot claim to close the lips of the lawyer from telling the truth. He (the lawyer) is not to be left in the serious plight of one suspected of being a party to the wicked scheme without being able to exculpate himself. In this case the true doctrine is that there is no privilege to protect the disclosure of iniquity.

"Again, where the professional man becomes a party to the scheme of fraud or of criminous attempt to evade the law, no protection attaches to what passes between them. Because to contrive wickedness of this sort is no part of the lawyer's duty.

"There is, however, a marked difference between these cases and others common in modern days of business competi-

tion and criticism. A leading newspaper wrote thus, a short time ago: 'Within the four corners of the law men may combine to circumvent the law, to fustrate the purposes of the law, and to make the provisions of the law of none effect.'

"The obvious remedy is to procure an amendment to the law or to enact a law responsive to public opinion, which, by proper and well-worded provisions, will frustrate all attempts at circumvention. The newspaper proceeds thus: 'With the aid of experts skilled in the use of legal technicalities, men may be enabled to do an unlawful thing in a way less dangerous to themselves, but not less extortionate to the public than if done in some other way.'

"Given such conditions what course is the lawyer to take, to speak or to be silent when asked for advice? Now, there are many occasions on which lawyers will be consulted as to matters trenching on crime, in which the greatest circumspection should be used, and a distinction will be made between things which are *mala in se*, misdoings which are recognized to be crimes in all civilized communities, and things which are *mala prohibita*, declared to be unlawful by virtue of by-law or penal statute. In all attempts to get advice to facilitate or to protect a criminal act the lawyer should withhold professional assistance and give his reason for so doing, namely, that his duty is to repress and not to further the commission of crime.

"Again, there are cases wherein questions of degree make all the difference—things which are *per se* legitimate but in which excess brings the actor within the boundary of things prohibited. For instance, a newspaper man may wish to criticize a book on account of its supposed dangerous or immoral tendencies. This he must do within bounds, or he may be guilty of a criminal act of libel. He may rightly seek and rightly obtain advice as to how far he can legitimately go. So where dealers seek to combine to control or enhance prices or to prevent competition, it is a question of less or more as to how far that can go before the combination becomes conspiracy. They do not wish to break the law by acting in direct violation of its prohibitions, but they seek how to circumvent it with a fair prospect of impunity. Granted that they do not consult the lawyer as to the honesty of what is proposed, and but as to its legality. He may advise them as to the area of safety and the area of what is forbidden, but

if he is a worthy member of his profession he will warn them of the danger they run, and strenuously dissuade them from engaging in any undertaking likely to be morally reprehensible, while it may be legally permissible.

"He will enforce Whateley's maxim that people may have a right to do a thing which it is not right to do. This ethical factor he should emphasize as a part of his duty in advising on all aspects of doubtful or dangerous questions, so that the moral side would have to be taken into account. Whatever course is taken by clients the onus rests on them. He at least has delivered his soul and has violated no rule of sound professional ethics."

This is the way in which the students of law are instructed, and this is the way in which the members of the profession are expected to conduct themselves in practice.

I have anxiously considered as to the best manner of imposing fines in the cases of conspiracy to restrict trade and enhance prices which have been admitted. The following considerations and principles have been my guide. From the material laid before me, it has been evident that the larger firms and the leading master plumbers have controlled the men in smaller business, so that they have been forced into the combination to endeavour to make a living, and, in some way, strive to better their condition.

Many of the defendants are hardly able to make headway, having large families and little work.

Many have actually been losers by being driven into the combination.

These classes have been as leniently dealt with as possible.

As to those better off and in a larger way of business, I have scaled or graded so as to impose some fine on those who have received dividends from the illegal prices, but heavier fines are imposed, though far from the maximum of the statute, on those who have made the largest gains from the combination.

I have been limited as to the highest amount imposed by the discretion exercised by Mr. Justice Clute. It seems to me better not to go beyond his highest figure, though I think he erred in the side of leniency.

All the statutory declarations and other papers submitted have been anxiously considered and given effect to so far as seemed possible—having regard to the vindication of the law.

In all cases of fraud under sec. 394, in all of which restitution has been made as appears before me, and was stated in open Court, I have not inflicted the corporal penalty, but have suspended the sentence on the express and emphatic condition that there should be no further or other transgression of the criminal law by the defendants thus inculpated. The sentence thus suspended will never be pronounced unless the defendants bring it upon themselves by further transgressions. But there must be no repetition of the past, and I doubt not that all these men will outlive this blemish on their records, and will so conduct themselves in the future as to warrant the continuance of the confidence and respect of their fellow-citizens.

[Fines varying from $200 to $500 and aggregating $10,000 were imposed upon each of 38 of the defendants, and as to the remaining defendants sentence was suspended.]

CARTWRIGHT, MASTER FEBRUARY 12TH, 1906.

CHAMBERS.

LUMBERS v. DUNDASS.

Costs—Abandoned Motion — Examination of Transferees of Judgment Debtor.

The plaintiff served on two persons who had admittedly received goods from the judgment debtor at some time prior to his making an assignment, a notice of motion for an order under Rule 903 for their examination as transferees.

This motion was abandoned, and the persons served moved for costs, which plaintiff had refused to pay.

George Wilkie, for the applicants.

W. J. McWhinney, for plaintiff.

THE MASTER:—The object of notice in such a case is said in Blakeley v. Blaase, 12 P. R. 565, at p. 567, to be to

give the party an opportunity of shewing why he should not be examined.

If on the return of the motion it was dismissed, then costs could be awarded under Rule 1130 (1). The words "by whom" in that sub-section have been interpreted and applied in In re Appleton, [1905] 1 Ch. 749, in such a way as to make it proper to give costs unless there is some good ground for refusing to do so.

Here plaintiff seems to have been in error in thinking that any ground for examination existed. He was not in any way misled, and the proceeding was a mere experiment.

Had the examination taken place, then there would have been an admission of the right to examine, and no costs would be proper. But where the motion is successfully opposed or abandoned, then it seems proper to give costs, unless there is good cause to the contrary.

I do not see here any reason for refusing costs, and fix them at $10.

MAGEE, J. FEBRUARY 12TH, 1906.

WEEKLY COURT.

RE MORRISON.

Will—Construction—Monthly Allowance to Widow—Payment out of Income or Corpus — Legacies — Postponement—"Balance"—"Extra"—Abatement—Dower—Election.

Petition by the Canada Trust Company, administrators with the will annexed of the estate of James Morrison, for an order determining certain questions arising upon the construction of the will as to the disposition of the estate.

E. W. M. Flock, London, for petitioners and widow.

F. P. Betts, London, for the official guardian.

MAGEE, J.:—The testator left him surviving his widow and 4 children, the 3 youngest being infants under 21 years of age.

The grandson James Allen Morrison named in the will is a son of Robert S. Morrison, the oldest child, and is said to be also an infant.

The estate is said to have stood as follows at testator's death, and it is conceded that it was in substantially the same position at the date of the will. The only life insurance was a policy for $1,000, which by its terms was made payable to the wife. The personal estate, exclusive of the household furniture specifically bequeathed to the wife, realized $8,780, and the real estate was sold to the widow for $2,700, she to be paid her dower thereout if entitled, making a total of $11,480, from which deduct debts paid and expenses paid or to be paid, amounting to $2,880, leaving a balance of $8,600, out of which, or rather out of the $2,700, the widow claims the value of her dower, at 5 per cent., probably about $600, so that the estate would thereby be reduced to about $8,000. In addition to the annuity, the testator gives legacies to the amount of $250, and at either his wife's death or marriage contemplated there would be something left, for he directs "the balance" to be equally divided between his children and the legacies to his son and daughter are "extra." This is the position of the estate.

As to the first question, the provision in the will is direct that the monthly allowance is to be paid to the widow; it is not restricted for its source to income; there is no mention of income, and not even a direction to invest, and, as the testator directs "the balance" at her marriage or death to be divided among the children, the word chosen is at least not inconsistent with the idea that he contemplated a possible reduction of capital. As put by Turner, L.J., in Croley v. Wild, 3 D. M. & G. 993, "the parties are placed by the will in the position of annuitant and residuary legatee, and not in that of tenant for life and reversioner," and, as said by Knight Bruce, L.J., in that case, "if the will ended with the gift of annuity, there would have been no question but that, however great or small the income of the estate might be, the annuity must have been paid in full to the last farthing of the property. If so, does the subsequent language shew a clear intimation to the contrary?" Here the gift of "the balance" conveys no such intimation. I may refer to May v. Bennett, 1 Russ. 370, adopted in Carmichael v. Gee, 5 App. Cas. 588; Wroughton v. Colquhoun, 1 DeG. & Sm. 36;

and Wright v. Callender, 2 D. M. & G. 652; and in our own Courts Almon v. Lewin, 5 S. C. R. 514; Anderson v. Dougall, 15 Gr. 405; Jones v. Jones, 27 Gr. 317; Wilson v. Dalton, 22 Gr. 160; and Re McKenzie, 4 O. L. R. 707, 1 O. W. R. 739.

It will be convenient to deal with the third question. The testator has apparently assumed that his estate would yield a surplus to be divided among his children; a direction to pay the then small legacies at once would not be inconsistent or unlikely. In his mind, so far as we can judge, there would be a reason for postponing their payment till the annuity would cease. He does not direct the whole fund or any to be invested till the wife's death or marriage. Whatever virtue might be in the words "in the first place," as to which see Lindsay v. Waldbrook, 24 A. R. 604, is expended in the direction to pay debts and expenses. No distinction is made as to the sources of the annuity and legacies. The direction for division of "the balance" at the wife's death or marriage goes to shew that all then remaining is to be divided, and if there is to be any reduction of the estate it must take place at an earlier period. I do not consider the word "extra" implies that the legacies to the son and daughter are to be increased payments at the final division. If there were only the bequest to the daughter, the word might more fairly be argued to have that meaning. But the same word is found in relation to the son's legacy as for paying his expenses at a college, which would be inconsistent with postponement till his mother's death. The word should have the same meaning in both places, and only expresses that the sum is not to be in reduction of their final shares. These two legacies are by their juxtaposition evidently on the same footing as the grandson's, against the non-postponement of which nothing could be said were it not in company with them.

There is, however, the question of the possible abatement of these 3 legacies if the estate prove insufficient for both the allowance to the widow and them.

If that allowance is in lieu of dower, it would not be subject to abatement, as the widow would be deemed a legatee for value, and in that case the 3 legacies would have to bear the brunt of the deficiency: Re Greenwood, [1892] 2 Ch. 295, and cases there referred to; and Becker v. Hammond, 12 Gr. 485, at p. 490. If the widow is entitled also to dower, then the annuity and the legacies must abate proportionally:

Wroughton v. Colquhoun, 1 DeG. & Sm. 36, 357; Long v. Hughes, ib. 364; and Carr v. Ingleby, ib. 362, as to which see Re Sinclair, [1897] 1 Ch. 921.

As to the second question. In order to ascertain the testator's intention, let us put ourselves in his position, and it is immaterial whether we do so as at the date of his decease or (as was thought proper in Lapp v. Lapp, 19 Gr. 608), at the date of his will, as it is considered that the estate was practically in the same condition on both dates. After paying debts and expenses, there would be left a fund of $8,600. The testator wishes to provide $250 for legacies and also to provide an annuity of $600 for his wife for the support of herself and their children. The wife's age was stated on this application to be 43 years. The present value, calculated at 5 per cent. per annum, of an annuity of $600 for a person of 43 years, would according to the H. M. (healthy males) tables of mortality, which the legislature has recognized in some instances as a basis of calculation, be $7,887. If calculated at 4 per cent., the value would be $8,843.04. According to the healthy females' tables, the value would be greater. The payments being made monthly would increase the value, as would also the fact of the wife being then younger, and it is well known that institutions selling annuities add a considerable sum to the net value in the tables. The lowest amount that the testator would require for the annuity would thus be $7,887, which would in all probability be much too little. To this add the $250, making $8,137, and there would only be left at the widow's death, if she remained unmarried, $463 for division among the children. At the same age, 43 years, the value of the dower based on the purchase money of $2,700, and calculated at 5 per cent., would, according to the same H. M. tables, be $791.52. Manifestly the fund provided by the testator would be insufficient to pay the widow that sum. Take this in connection with the direction to sell his real estate, the annuity given the wife, and the bequest of household furniture, the confirmation to her of the life insurance—which he could have changed—and the balance expected for his children, and one can have little doubt that it was not in his mind that she would have a claim upon the land for dower, and that it is a proper inference that he intended, if not that she

should not have dower, at least to make such disposition as would be inconsistent with it.

On the authority of Becker v. Hammond, 12 Gr. 485, Lapp v. Lapp, 16 Gr. 159, 19 Gr. 608, Murphy v. Murphy, 25 Gr. 81, and Elliott v. Morris, 27 O. R. 485, it must, I think, be held that the widow must elect. The only question might be whether the same inference should be drawn if the fund is already insufficient for the other requirements without the dower, as arises when it is the dower which creates the insufficiency, but I think the further depletion of an insufficient fund must be considered as also contrary to the testator's intention, if not equally so with a creation of a deficiency. Apart from the insufficiency of the fund, I do not think the other provisions of the will debar the claim of the widow. That insufficiency should be established by proper evidence of the value of the annuity and the age of the wife. It was also understood that evidence would be put in of the arrangement made on the sale of the land that the widow, if entitled to dower, would be allowed the amount.

The first question is, whether the widow is entitled to be paid at once the value of her dower out of the proceeds of the real estate in addition to the provision in the will for the payment of a monthly allowance.

I answer the 1st question: Yes, subject to abatement with the 3 pecuniary legacies if the fund be insufficient, and if she be entitled to dower also.

The 2nd question I answer: If it be shewn that the cash value of the annuity with the $250 legacies and the value of the dower would exceed the amount of the estate after payment of debts and expenses, the widow is not entitled to claim dower in addition to the monthly payments provided by the will—otherwise she is so entitled.

To the 3rd question: The payment of the 3 legacies named is not to be postponed till the death or marriage of the widow, but is to be made in due course of administration as of legacies not so postponed.

Costs of all parties out of the estate.

MABEE, J. FEBRUARY 12TH, 1906.

TRIAL.

LINDEN v. TRUSSED CONCRETE STEEL CO.

Master and Servant—Injury to Servant — Company—Absence of Personal Negligence—Proper Appliances—Competent Foreman—Damages — Workmen's Compensation Act.

Action for damages for injuries to plaintiff by the alleged negligence of defendants while in their service.

The action was tried before MABEE, J., and a jury, at Toronto. The jury found the facts in favour of plaintiff with $2,500 damages.

G. F. Shepley, K.C., and W. Cook, for plaintiff.

J. M. Godfrey and T. N. Phelan, for defendants.

MABEE, J.:—I remain of the opinion expressed at the trial that the liability of defendants is, upon the findings of the jury, under the Workmen's Compensation Act, and not at common law.

I do not think the case of Grant v. Acadia Coal Co., 32 S. C. R. 427, is an authority for common law liability upon the facts of this case. Here defendants, a foreign corporation registered in Ontario, had delegated to their foreman the superintendence of the construction of the frame for the hoist, and the negligence of the foreman was the cause of the accident. I think plaintiff would have been without redress but for the Workmen's Act, as there was no evidence of any personal negligence of the directors or officers of defendant corporation, and anything that may have been improper in the system that the foreman adopted for the construction of the frame cannot be regarded as the negligence of the corporation. The material for the construction of the work was of proper kind and sufficient in quantity, and the foreman was a competent man to place in charge. And so I feel myself prevented from directing judgment for the $2,500 assessed by the jury as common law damages.

Judgment for plaintiff for $1.500 damages and costs of action.

FEBRUARY 12TH, 1906.

DIVISIONAL COURT.

CAMPBELL v. CROIL.

Appeal—Master's Report—Extension of Time—Delay—Explanation—Grounds of Appeal.

Appeal by defendant Croil from order of MEREDITH, C.J., ante 157, affirming order of Master in Chambers, ante 86, dismissing appellant's motion for leave to appeal and to extend the time for appealing from a Master's report of 19th June, 1905, which was confirmed by consent on 27th June.

G. A. Stiles, Cornwall, for defendant Croil.

E. C. Cattanach, for defendant McCullough.

W. E. Middleton, for plaintiff.

THE COURT (BOYD, C., STREET, J., MABEE, J.), dismissed the appeal with costs.

CARTWRIGHT, MASTER. FEBRUARY 13TH, 1906.

CHAMBERS.

BARWICK v. RADFORD.

Discovery—Production of Documents—Motion for Further Affidavit—Practice—Examination—Costs.

Motion by plaintiff for further affidavit on production by defendant Radford.

W. N. Ferguson, for plaintiff.

J. R. Roaf, for defendant Radford.

THE MASTER:—The facts appear sufficiently in the report of the case in 6 O. W. R. 583. There is sufficient ground for making the order: see Compagnie Financière v. Peruvian Guano Co., 11 Q. B. D. 63.

The existence of an agreement in writing made in April, 1904, between the Taylors, Birnie, and Radford, is distinctly

shewn, and appears to have been witnessed by defendant's solicitor. There are also other documents sufficiently indicated in the notice of motion and on the argument which should be accounted for in the affidavit. They must also be produced unless they can be protected either under Bewicke v. Graham, 7 Q. B. D. 400, and Budden v. Wilkinson, [1893] 2 Q. B. 432; or under Southwark and Vauxhall Water Co. v. Quick, 3 Q. B. D. 315.

As one of the defences is that Radford was acting only as agent or in such a way that he never acquired any exigible interest in the land, everything bearing on this point is material, and plaintiff is entitled to have full discovery on everything which may (not which must) assist his case or destroy that of his opponent.

To accomplish this result, parties should always receive all the assistance which can be given under the Rules of procedure as to discovery. Assuming that the further affidavit will contain some new documents, then plaintiff will be entitled to have further examination for discovery. This seems a reasonable inference from the decision in Standard Trading Co. v. Seybold, 7 O. L. R. 39, 3 O. W. R. 40. Such examination should be limited as directed in that case.

An examination for discovery should not be taken before production has been made. The inconvenience resulting therefrom is shewn in the present case. Here it is explained by the order to go to trial on 18th December last, which made it desirable to examine the defendant as soon as possible.

The costs of this motion may therefore in this case be to plaintiff in the cause.

FEBRUARY 14TH, 1906.

DIVISIONAL COURT.

TURNER v. EUSTIS.

Way—Non-repair of Highway—Injury to Person Driving—Municipal Corporation—Real Cause of Injury—Reasonable State of Repair of Country Road.

Appeal by plaintiff from judgment of TEETZEL, J., at the trial, dismissing the action as against defendants the

municipal corporation of Dunwich. The action was brought to recover damages for injuries received by plaintiff owing, as he alleged, to the non-repair of a highway in the township upon which he was lawfully driving when injured.

W. H. Barnum, Dutton, for plaintiff.

C. St. Clair Leitch, Dutton, for defendants the corporation of Dunwich.

The judgment of the Court (BOYD, C., STREET, J., MABEE, J.), was delivered by

BOYD, C.:—I think plaintiff's whole cause of action for injuries arose at the time when the rush of the pig between his horse's feet frightened that animal so that he began to kick and then by his kick injured plaintiff's leg. To protect himself plaintiff swung the horse's head round (according to his evidence at the trial), and the horse rearing came down in the swamp at the side of the travelled road, and thereby pulled or jerked plaintiff out of his rig. At the trial he said his knee was then hurt by the fall, but I think the main hurt to the leg was attributable to the horse's feet, while it was on the highway, whereby the bone was splintered and for which plaintiff was treated by the doctor. The letter of notice gives a different version of the occurrence (written on 6th October, a month after) by saying the horse jumped into the ditch, upsetting the rig, throwing out the driver, the plaintiff, and injuring his leg. That version is negatived by the evidence at the trial, where he says the rig was not upset, and that the bone was splintered by the kick. In the statement of claim he puts it thus, that the pig ran under the horse's feet, causing the horse to jump sideways into the deep ditch, in consequence of which plaintiff was thrown out and suffered from injuries to the leg. If the whole injury was on the highway and from the feet of the horse, there is no right to recover against the corporation

But assume that part of the injury was to the knee by the horse jerking the man out so that he went over the horse's head into the swamp, there would be no right to recover unless plaintiff proves that there was negligence on the part of defendants the corporation in suffering the highway to be out of repair, and that this defect was the cause of his being so injured. Non constat that, had the horse swerved or been pulled to the north instead of the south side of the

road, the same untoward result of plaintiff being jerked out might not have happened. For the traces had become unhitched and both shafts had been broken before plaintiff, hanging on to the reins, was pulled out of the rig.

On the other matter of proof, the trial Judge has passed upon all the evidence with a finding that the road was not out of repair. This is really a question of fact. . . . The local situation of the road was such through the swale that it was laid out originally as a corduroy road some 13 feet wide, and that was in course of time covered over with earth or sand, leaving about 16 feet which might be used by vehicles. . . . This tracked part was in good condition, and this method of construction is proper and usual. Alongside the travelled part and to the south fence on the road allowance was a wet, marshy place, which was always overgrown with swamp willows and other bushes; in summer with leaves about 4 feet above the level of the road, and with branches coming to within 1½ or 2 feet of the wheel tracks. At the point where plaintiff says his horse went in, the depth sloping off about 1 to 1 from the travelled road, was varying from 2½ feet to 22 inches according to the different witnesses. This would be the deepest place, and it was just the natural surface of the depression with no excavation or hole made. . . . The appeal was argued as if this was a concealed danger, the bushes covering up the swale below, and cases were cited in which an invitation was given, express or implied, to go into the dangerous place. These do not seem to be applicable in the circumstances of this case. There was no invitation to go into the bushes, indeed they would be to any one an indication of wet ground being below. And to plaintiff, who had travelled the road for 12 years, passing the place scores of times and at all seasons, knowledge must be attributed that it was a place not yet reclaimed for travel. The Judge has found that the road, as laid out and maintained, was reasonably sufficient for all the requirements of the locality—it was but little travelled upon—there being more important and better maintained gravel roads to the north and south of this one. No mishap had occurred on this road during a period of 20 years since it has been used, and in the opinion of many witnesses it compares favourably with other roads of like character in like localities. Applying the principles of decision as to the repair of roads laid down in the authorities such as O'Connor v. Township of Ottonabee,

35 U. C. R. 73, and Lucas v. Township of Moore, 3 A. R. 602, 606, the Judge might well conclude that the road was in a state of repair reasonably safe and sufficient for the local requirements of the neighbourhood.

The judgment should, in every aspect of the case, be affirmed with costs.

FEBRUARY 15TH, 1906.

DIVISIONAL COURT.

CHAREST AND BRUNET v. CHEW.

Contract—Getting out Logs—Permission to Use Roads—Failure to Furnish Good Road — Oral Representations — Evidence of—Admissibility—Conflict.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., in favour of plaintiffs in an action for damages for breach of a contract. Plaintiffs and defendants on 14th September, 1903, entered into a contract whereby plaintiffs were to get out a large quantity of logs for defendants, delivering them at Vermillion River. This contract contained the following clause: "Also that our (defendants') roads may be used by said contractors (plaintiffs), providing they use the same width of sleighs." The road referred to in this clause was about 3½ miles in length, and the condition of the road and the right to use it were important factors in the price plaintiffs were doing the work for. Before the contract was made, defendants' agent (as stated by plaintiffs) pointed out to plaintiffs where this road would be located, and represented that it would be a first class iced road. The trial Judge admitted this evidence subject to objection, found defendants had not furnished a road of that kind, and directed a reference to assess the damages plaintiffs had sustained by reason of not being able to get the timber out.

The main question upon the appeal was whether plaintiffs could give evidence of the oral statements as to the character of defendants' roads which plaintiffs were obtaining permission to use.

The appeal was heard by BOYD, C., STREET, J., MABEE, J.

F. E. Hodgins, K.C., and F. Grant, Midland, for defendants.

J. H. Clary, Sudbury, for plaintiffs.

BOYD, C.:—Plaintiff Charest said that defendants' agent, Argue, took him and his partner to look over the timber, and Argue shewed him where the main road was going to be, "along the creek all the way down," and Argue said: "I am going to have a first class road, iced road and back road." That is a road where the teams might come back when empty.

No bargain was made that day. Charest and his partner, the co-plaintiff Brunet, went to look at the piece of timber land, and on the way home met Mr. Argue, and a bargain was made at $7.15 a thousand. Plaintiff Charest says, figuring on getting the road he took the contract. The road in question is about 3 or 3½ miles in length. Charest's complaint is that on the road as made by Argue there was too much snow and not enough of ice.

Brunet, the partner and co-plaintiff, speaks of what occurred on the first occasion thus: Argue explained about the main road, where it was going to be, and he said "it cannot help but make a first class road." This was before the bargain. When the contract was being read over and signed, Brunet says in reference to the use of the company's road in the writing, that was the main road, and that Argue said it was going to be a first class road. He is asked, "What do you mean by a first class road?" And he answers, "It was to be a road with lots of water on it, so that we would be able to draw big loads of logs over." His complaint is that there was not enough water put on it to make a good road, i.e., by freezing.

In cross-examination he says the contract was read, and he understood it when he signed it, and that he did not like to make any kick against it at the time.

He says, later on: "The time we were at the tote road, Mr. Argue promised a first class road, and he said it would be early to get a back road; we will give you a back road."

Against this evidence as to what took place at and before the bargain, Argue, the defendants' agent, says: "I took them down to our tote road, where we were going to make our main road, and shewed them the most level place for it, and they said, 'if you are going to make a road, the lumbermen generally make a better road than we do, and if it is

good enough for you it is good enough for us.'" He said: "I did not agree to build any kind of a road for them, or any other jobber; we never do so, but in this case I was satisfied for all the jobbers to use this road." The road in question was one which ran further into the bush, to timber owned by defendants, beyond the place where plaintiffs were to work, and this road went past the place to be worked by plaintiffs, and down to the place of output, then Vermillion River. He also denies promising them a back road, and on this head of claim the Chief Justice has found in favour of defendants. Argue said he had his clerk make out the written contract, and it was handed to Charest to read, who read it and said he was satisfied with it. Argue continues: "I told them if there was anything wrong about it not to sign it till they could go and look this road over, and they just made the remark that if the road was good enough for us it would be good enough for them. They asked if we put water on the road, and I told them we certainly did. In cross-examination he says: 'I never made any particular promise to Brunet at all about what kind of road . . . I expected to make as good a road as we possibly could make. . . . I told him there would be a good road there, and every one was welcome to draw over this road with the conditions (i.e., as to the width of sleighs). I told him I was going to make as good a road as we could possibly make—for our benefit, not for him." He explains how they made the road, and put the tanks on every night, and continued making the road all right, and that they had as good a road as they could build that winter under the circumstances. "I do not say it was a first class ice road, but as good a road as we could make under the circumstances of that winter." "I did not promise any of them an ice road. They asked me if we made an ice road and I told them we did." "I do not know what their expectation was." A witness of much experience in the woods calls this road "a good ice road" as made in that country. Another witness calls it a fair average road, and says that it was a difficult winter for road making and maintaining.

I should hesitate upon this evidence to find it proved that it was promised as a condition of the contract that defendants would construct a first class iced road for the benefit of plaintiffs. There is no clear preponderance of evidence such as is required if you are going to add an oral term to a written contract, and the probabilities were all in favour

of the way it is put by Mr. Argue as against the hard and fast promise to make a first class road spoken of by plaintiffs. Defendants required to have access to their logs lying farther back, and it would be to their interest to construct as good a road as was reasonably possible, to do their own hauling, and they were willing it should be used by the jobbers. This is all that is meant in the written contract in saying "also that our roads may be used." That would import that there should be roads reasonably fit for use, and it is distinctly to add to this term of the contract, if by oral evidence we enhance the obligation or permission so that "first class roads" must be constructed.

Apart from the difficulty of sufficient evidence, I think an insuperable difficulty is raised by the law based on many well-established authorities binding upon this Court. The leading case in our Courts is perhaps Mason v. Scott, 22 Gr. 592. To give effect to this disputed testimony would, to use the words of Moss, J.A., be to "alter, vary, or contradict a written instrument which has been made the appropriate memorial of the whole agreement between the parties:" p. 626. The appeal should be allowed and the action and counterclaim dismissed; but it is not a case for costs.

MABEE, J., gave reasons in writing for the same conclusion.

STREET, J., agreed in the result.

MAGEE, J. FEBRUARY 16TH, 1906.

TRIAL.

DINGMAN v. JARVIS.

Vendor and Purchaser — Contract for Option to Purchase Land — Registration — Failure to Exercise Option — Refusal to Execute Release—Action—Costs.

Action by vendor for a declaration that a contract for the sale of land to defendant was at an end by reason of defendant's default, etc.

MAGEE, J.:—The agreement of 13th May, 1903, was under seal, and purports to be made between plaintiff and defendant, but to be executed only by plaintiff. After reciting that plaintiff had, in consideration of $200 paid by defendant, agreed to sell and convey the land in question and some personal property to defendant, upon the terms and conditions thereinafter contained, plaintiff, in pursuance of that agreement and in consideration of the $200, covenanted with defendant that she would convey the property to him on payment to her of $6,800, less the amount of an existing mortgage, at any time between the date of the agreement and 1st January, 1904. It proceeds: "The purchaser shall pay off the said mortgage according to the terms thereof and save the vendor harmless therefrom;" and a provision is inserted for defendant getting possession before 1st January, 1904, on paying $1,000 before 15th June, 1903.

It is said upon both sides that this was intended to be and was a mere agreement for an option to purchase. Nothing more than the $200 was paid by defendant. He registered the agreement in the registry office on the day after its date. Plaintiff contends that it forms a cloud upon her title which she desires to have removed.

Before action, application was made to defendant to execute a release, and about 10th June, 1905, a quit claim deed was tendered to him for execution. He refused, alleging that he had not exercised his option, and, as he had forfeited the $200, he had nothing more to do with the property, and was not bound to execute a release.

This action was begun immediately afterwards. After the service of the writ of summons and before statement of claim, defendant announced his willingness to sign the quit claim, but not to be liable for any costs. Plaintiff refused to accept it on those terms, but offered to leave the question of costs to the local Judge or to the Master in Chambers. This defendant would not accede to, and the pleadings followed, and the parties came down to trial, nothing being in question but the costs.

The statement of claim asks that it may be declared that defendant has no right to or interest in the lands under the agreement, and that the same may be declared a cloud upon her title, and that defendant may be ordered to execute such document as may be proper to clear her title.

The statement of defence says that the time for payment of purchase money and performance of the agreement expired

on 1st January, 1904, and since that date defendant had no title or interest in the lands, and it admits all the allegations in the statement of claim except the 5th paragraph, which alleges tender and refusal to execute a release of any right defendant might have under the agreement.

Plaintiff joined issue.

No authority was cited as to defendant being bound or not to clear the title or as to the right to costs. The giving of the agreement was plaintiff's own act. The registration of it was the act of defendant, but he was quite within his rights in doing it. According to plaintiff's own view of the agreement, defendant was not bound to pay any more than the $200, nor to complete the purchase. Hence he was not in default. I think he acted unreasonably in refusing to execute a release, and also in his subsequent refusal to leave the question of costs to be decided, when the amount was but small: see Webb v. MacArthur, 3 Ch. Ch. 364.

The action is not one for specific performance of an agreement, but to declare an agreement to be at an end. Defendant's pleading admits that he has no claim, and all allegations except the tender of the release under the agreement. The form of the quit claim deed tendered was a release of all estate, right, title, interest, claim, and demand whatsoever and whether in possession or expectancy, and made no reference to the agreement—but it does not appear to have been objected to on that account. . . .

[Reference to Kingdon v. Kirk, 37 Ch. D. 141, and Kaiser v. Boynton, 7 O. R. 143.]

In the present case I think the proper order will be to declare that defendant did not pay the purchase money in accordance with the registered agreement, and that he has no right or interest in the lands, and that no order be made as to costs.

MULOCK, C.J. FEBRUARY 16TH, 1906.

TRIAL.

KERSTEIN v. COHEN.

Trade Mark—Infringement—Fancy Word—Use of Similar Word by Competitor in Business—Probability of Deception—Judgment in Previous Action—Colourable Imitation—Costs.

Action to restrain defendants from infringing plaintiffs' trade mark.

J. A. Macintosh, for plaintiffs.

J. H. Moss, for defendants.

MULOCK, C.J.:—Plaintiffs are, and for some years have been, engaged in the business of selling, throughout Canada and the United States, optical goods consisting of eye glasses and spectacles, also frames and cases therefor, and in or about the year 1900 they adopted as a trade mark in connection with such business the word "Shur-On," with a hyphen between the letters "r" and "o," registering this trade mark in the United States on 28th July, 1902, and in Canada on 14th April, 1903.

From time to time they put on the market different varieties of eye glasses and spectacles, attaching to each article a tag having printed thereon the word "Shur-On," which was frequently preceded by some other word such as "Ino," "Uno," "Ela," "Trufit," etc., intended to indicate a special variety of eye glass. They also marked the word "Shur-On" on some cases and . . on metal frames. They also in connection with the word "Shur-On" advertised their goods somewhat extensively in the two countries—at times in their advertisements referring to the eye glasses by such words as "On to stay on," "On to stay," "An eye glass that stays on," etc. In these and other ways they endeavoured to associate in the public mind the word "Shur-On" with their goods.

On 16th April, 1903, plaintiffs began an action against the present defendants, charging them with infringements of their (plaintiffs') trade mark by the use of the word "Shur-On" in connection with defendants' business of manufacturing and selling optical goods, and on 24th March,

1904, by the consent of the parties to that action, judgment was entered whereby defendants were "perpetually restrained from infringing plaintiffs' trade mark in question in this action by using the word 'Shur-On,' in any way in connection with the sale or disposal of optical goods."

Subsequent to the entry of this judgment, defendants adopted the word "Staz-On" as a trade mark and trade name in respect of certain kinds of optical goods being manufactured and sold by them, and later on placed the hyphen before instead of after the letter "z," and have since continued to use the word "Sta-Zon" in connection with their business.

Plaintiffs contend that the word "Sta-Zon" so closely resembles the word "Shur-On" that the public in desiring to purchase plaintiffs' goods have been and are liable to be deceived into purchasing goods of defendants, and accordingly have brought this action to restrain defendants from using the word "Sta-Zon," or any other word so similar as to be likely to deceive.

During the trial it was urged that the judgment in the former action extended to the case of a colourable imitation of the word "Shur-On." If it does, why the necessity for bringing this action, which seeks relief only in respect of colourable imitation? The effect of that judgment, I think, is confined strictly to restraining defendants from using the actual word "Shur-On" in connection with their business in optical goods, and possibly, by way of estoppel, to establishing as against defendants the validity of plaintiffs' trade mark; but it leaves undetermined the issue involved in this case, which resolves itself into the simple question whether the word "Sta-Zon" is so similar to the word "Shur-On" that ordinary persons, exercising ordinary caution, desiring to purchase plaintiffs' goods, are, by reason of such similarity, likely to be misled into purchasing the goods of defendants.

No serious effort was made at the trial to prove instances of persons having been misled. It is true that one witness, Mr. Culverhouse, spoke of one or two or three persons in a week making such mistakes, but his evidence on the point appeared to me too loose and indefinite to serve as a foundation on which to rest any general conclusion as to the probable conduct of the ordinary public in ordinary circumstances. Such mistakes may occur and yet be disregarded: Civil Service Supply Co. v. Dean, 13 Ch. D. 512; Marshall v. Sidebotham, 18 R. P. C. 48, 49.

There being no evidence in this case which can be regarded as a safe guide, it remains for the Court to determine the question by consideration of the two words themselves, at the same time bearing in mind that the optical goods of plaintiffs and defendants are very similar in appearance.

The general rule is, that there can be no infringement unless the similarity is so close as to give rise to a reasonable probability of deception: Bradbury v. Beeton, 39 L. J. Ch. 57. This proposition involves the question, what degree of care and intelligence should be exercised by probable purchasers in order to guard against deception? . . .

[Reference to Bradbury v. Beeton, supra; Adams on Trade Marks, ed. of 1874, p. 107; Leather Cloth Co. v. American Leather Cloth Co., 11 Jur. 517; Seixo v. Provezende, L. R. 1 Ch. 196; Browne on Trade Marks, p. 387; Partridge v. Mench, 2 Sand. Ch. R. 622; Payton v. Snelling, 17 R. P. C. 57, [1901] A. C. 308.]

The test then, according to these authorities, is not whether persons of less than ordinary intelligence or exercising less than ordinary care, but whether ordinary purchasers, exercising ordinary care, are liable, because of the similarity of the two words, and also of the goods of plaintiffs and defendants, to purchase those of defendants when desiring to purchase those of plaintiffs. . . .

The words are certainly not the same. Are they substantially the same? I fail to see any resemblance between them. . . .

Not only must there be a likelihood of deception of ordinary purchasers, using ordinary care, but the persons must be those having some familiarity with a trade mark, for obviously a person wholly unacquainted with a trade mark cannot be deceived by a colourable imitation. . . .

In support of plaintiffs' contention it was urged that the words were similar in the following respects: 1. That they each begin and end with the same letters. 2. That they each contain the same number of letters. 3. That they are each hyphenated words. 4. That they each end with the letters "o" "n." 5. That the words are similar in appearance. 6. That the words are similar in sound.

As to the four first mentioned points, it seems to me sufficient to observe that similarity in detail is not the test. . . .

Taking the words in their entirety, I am unable to recognize any similarity in appearance or sound, either at all or within the prohibited limit.

No ordinary person reading the two words could mistake the one for the other. . . .

Perhaps it may be suggested that each trade mark conveys the same idea, namely, that the eye glasses will stay on, but the hyphen after the syllable "Shur" prevents it being sounded like "sure," and leaves the whole hyphenated word as a purely meaningless fancy word coined for the purpose of a trade mark.

Again it was urged that, inasmuch as plaintiffs had in connection with their trade mark "Shur-On" referred to their goods in advertisements by such words as "On to stay on" . . . etc., it was not permitted to defendants to use a word that would be a colourable imitation of any of those sets of words. But it does not appear that plaintiffs have acquired any exclusive rights to use any of these sets of words. Their registered trade mark is in respect of the word "Shur-On" only, and in this action they complain of a colourable imitation of that word only, and that is the only case which defendants are . . . called upon to meet.

For these reasons, I am of opinion that plaintiffs have failed to prove an infringement of their trade mark "Shur-On," and that the action should be dismissed.

In regard to the question of costs, I am of opinion that defendants adopted the trade mark "Sta-Zon" because of plaintiffs having described their goods as "On to stay on," etc., and with the unworthy object of thereby acquiring the benefit of the market which plaintiffs had developed for their goods, and therefore are not entitled to costs.

FEBRUARY 16TH, 1906.

DIVISIONAL COURT.

MURPHY v. BRYDEN.

Promissory Note — Accommodation Makers—Sureties—Renewal—Consideration—Evidence—Promise of Holders as to Non-liability—Failure to Obtain Signature of Principal Debtor as Co-Maker.

Appeal by plaintiffs, a firm of private bankers, from judgment of CLUTE, J., at the trial, dismissing the action,

which was brought to recover $1,650 and interest on a promissory note.

The appeal was heard by BOYD, C., STREET, J., MABEE, J.

M. Wright, Belleville, for plaintiffs.

E. G. Porter, Belleville, for defendants.

STREET, J.:—The evidence shews that defendants James Bryden and James McLuckie, some years before the making of the note sued on, had become parties to a note of which the one sued on purported to be a renewal, as sureties for one Robert Bryden, and that the debt for which they had so become sureties had never been paid. At the time they made the note sued on, McGowan, one of plaintiffs' firm, produced to them a note purporting to be made by them and by Robert Bryden, which was alleged to have been the latest renewal of the original note, and they were asked to give a new note for it, as it was overdue. They say that they denied the genuineness of their signatures to the note produced to them, but that they signed the renewal now sued on, upon the promise of McGowan that, as he only wished to have it to produce to the board, they would never be called on to pay it. One of the defendants says that McGowan also stated that he would get Robert Bryden to sign the renewal—the other defendant does not speak of such a promise.

At that time Robert Bryden was living a few miles away, but he was known to be utterly without means, as he had transferred to plaintiffs all the property he had in the world, to secure this and other debts; he had since moved away to the North-West, and was not present at the trial.

McGowan denies the story told by defendants; says that he went out to obtain the renewal in the usual course of business, and that defendants signed it without his making any promise not to look to them for payment; and that he was not asked to obtain Robert Bryden's signature to it, and did not offer or agree to do so.

In these circumstances, if the only defence to the note had been the absence of consideration, it is clear that that defence could not have succeeded, because the existence of defendants' liability upon the unpaid note given for Robert Bryden's note would have answered that defence; for, even if the debt had been overdue for more than 6 years, that fact could, under the circumstances, have been set up upon the defence of no consideration.

There being, then, a good and sufficient consideration for the note which they signed, defendants cannot be allowed to

set up as a defence the existence of a contemporaneous parol agreement that they should not be required to pay it. See the numerous cases on this point collected in Maclaren on Bills, 3rd ed., pp. 33-4.

The other defence . . . is inconsistent with the story told by both defendants, for, if they were not to be held liable to pay the note, they were not likely to have stipulated that Robert Bryden should sign it. Moreover, Robert Bryden was well known to be worthless, and his becoming a party to it would be a mere useless form. . . .

The defences set up have not been made out.

The judgment for defendants should, therefore, in my opinion, be set aside, and judgment be entered for plaintiffs for the amount of the note with interest and costs.

BOYD, C., gave reasons in writing for the same conclusion, referring to New London v. Meek, [1898] 2 Q. B. 490; Irwin v. Freeman, 13 Gr. 465; Wormall v. Adney, 3 B. & P. 249; Flight v. Reed, 1 H. & C. 716.

MABEE, J., also concurred.