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APPELLATE DIVISION.

NOVEMBER 9TH, 1914.

COWPER-SMITH v. EVANS.

Master and Servant—Wages—Wrongful Dismissal—Assault—Damages—Counterclaim—Costs.

Appeal by the plaintiff and cross-appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., 6 O.W.N. 722.

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

W. C. Mikel, K.C., for the plaintiff.

E. G. Porter, K.C., for the defendant.

THE COURT dismissed the appeal as to the plaintiff's claim, but reduced the amount allowed on the defendant's counterclaim by $41.50, and dismissed the cross-appeal. No costs of appeal or cross-appeal.

NOVEMBER 12TH, 1914.

*SEILER v. FUNK.

Gifts—Condition—Intended Marriage — Contract Broken off—Recovery of Gifts made in Contemplation of Marriage—Limitation.

Appeal by Idessa Funk, the defendant, from the judgment of the Junior Judge of the County Court of the County of Waterloo in favour of Leslie Seiler, the plaintiff, in an action to recover certain articles given or lent by the plaintiff to the defendant during a period when there was an engagement to marry existing between them. The articles claimed were: the engagement-ring, a $5 gold piece, a watch, a watch-fob, glass-ware, and silver candelabra.

*To be reported in the Ontario Law Reports.

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

J. A. Scellen, for the appellant.

A. B. McBride, for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O., at the close of the argument, holding, upon the evidence, that the engagement was broken off by the defendant for good cause; that the plaintiff was not entitled to recover the ring or other articles which were personal gifts to the defendant; but the plaintiff was entitled to have articles or money lent and articles purchased for the house that the plaintiff and defendant contemplated having when they were married.

Reference was made to Halsbury's Laws of England, vol. 15, para. 835; Robinson v. Cumming (1742), 2 Atk. 409; and Ryan v. Whelan (1901), 21 C.L.T. Occ. N. 406.

The judgment below was varied by confining the plaintiff's recovery to the candelabra, watch, watch-fob, and gold piece, and by providing that there should be no costs of the action to either party. No costs of the appeal were allowed to either party.

NOVEMBER 13TH, 1914.

*GREER v. CANADIAN PACIFIC R.W. CO.

Railway—Burning Worn-out Ties on Right of Way—Damage by Spread of Fire—Negligence—Common Law Liability—Statutory Time-limit on Action—"Injury Sustained by Reason of the Construction or Operation of the Railway"—Railway Act, R.S.C. 1906, ch. 37, sec. 306—Duty Imposed by sec. 297.

Appeal by the plaintiff from the judgment of MIDDLETON, J., 31 O.L.R. 419, 6 O.W.N. 438.

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

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

Shirley Denison, K.C., for the defendants, respondents.

*To be reported in the Ontario Law Reports.

The judgment of the Court was delivered by MEREDITH, C.J.O., who, after briefly stating the facts, referred to Prendergast v. Grand Trunk R.W. Co. (1866), 25 U.C.R. 193; McCallum v. Grand Trunk R.W. Co. (1870-1), 30 U.C.R. 122, 31 U.C.R. 527; Ryckman v. Hamilton Grimsby and Beamsville Electric R.W. Co. (1905), 10 O.L.R 419; Auger v. Ontario Simcoe and Huron Railroad (1859), 9 C.P. 164, 169; Carpue v. London and Brighton R.W. Co. (1844), 5 Q.B. 747, 757; Grant v. Canadian Pacific R.W. Co. (1904), 36 N.B.R. 528; Smith v. Denver and Rio Grande R.W. Co. (1913), 54 Col. 288; Canadian Northern R.W. Co. v. Robinson (1910), 43 S.C.R. 387, [1911] A.C. 739, 745; and concluded as follows:—

None of the cases relied on by counsel for the appellant appears to me to support his contention.

In my opinion, the injury done to the appellant by setting out the fire and failing to prevent its spread to his lands was as much an injury caused by the operation of the railway as the injury caused by the negligent omission of the defendants in the McCallum case to remove the inflammable material on the line "which was ignited by the hot ashes that fell from the locomotive and to prevent the spreading of the fire to the plaintiff's lands" was an injury by reason of the railway.

By sec. 297 of the Railway Act the duty is imposed upon railway companies of at all times maintaining and keeping their right of way free from dead grass, weeds, and other unnecessary combustible matter, and it was in performing that duty that the injury to the appellant was done. That the mode in which the work was done was a negligent one, or even, having regard to the statute, unlawful, is beside the question. If it was negligent, as it has been found to have been, or unlawful, the respondents were answerable for the damage which the appellant suffered; but the act was, in my opinion, none the less an act done in the course of the operation of the railway, and the injury to the appellant none the less an injury sustained by the "operation of the railway."

The performance of the duty imposed by sec. 297 is recognised by the Act itself as part of the operation of the railway; as the group of sections of which that section is one is headed "Operation." This indicates, I think, that the phrase "operation of the railway" was not used in the narrow sense of running trains, but was intended to include such acts as that in which the respondents were engaged, in the doing of which the injury of which the appellant complains was occasioned; and I am of opinion that

the section applies where the damage or injury "arises from the execution or neglect in the execution of the powers given to or assumed by the company for enabling them to construct and maintain their railway:" per Osler, J.A., in Ryckman v. Hamilton Grimsby and Beamsville Electric R.W. Co., 10 O.L.R. at p. 427.

I would dismiss the appeal with costs.

NOVEMBER 13TH, 1914.

*CHADWICK v. CITY OF TORONTO.

Nuisance — Noise and Vibration from Operation of Electric Pumps—Depreciation in Value of Neighbouring House—Evidence — Possibility of Operation of Municipal Waterworks by Steam Power—Statutory Authority—Injunction —Damages—Reference—Scope.

Appeal by the Corporation of the City of Toronto, the defendant, from the judgment of MIDDLETON, J., 6 O.W.N. 167.

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

G. R. Geary, K.C., and Irving S. Fairty, for the appellant corporation.

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

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . The use of electrically-driven machinery, the operation of which occasions the nuisance of which the respondents complain, is not expressly authorised by the legislation under the authority of which the appellant corporation has constructed and is operating its waterworks system. The evidence establishes, no doubt, that for the supplying of water to consumers in the northern part of the city a high level pumping station is essential; and, if it had been shewn that the machinery for pumping could not be operated unless driven by electrical power, I should hold that the use of that mode of operating the machinery at the appellant corporation's pumping station was authorised by the legislation to which I have referred, and that no action lay for such injury as that of which the respondents

*To be reported in the Ontario Law Reports.

complain; and it may be, though it is unnecessary to express any opinion on the point, that if, though not actually impracticable to use any other than electrically-driven machinery, it was commercially impracticable to do so, the same result would follow.

It is not open to question that it is practicable to operate the machinery by means of steam power, and that was the mode adopted and in use until electrical power was substituted for it.

The case seems, therefore, to fall within the principle of the decision in Jones v. Festiniog R.W. Co. (1860), L.R. 3 Q.B. 733, and not that of Vaughan v. Taff Vale R.W. Co. (1860), 5 H. & N. 679. The distinction between the two cases is clearly pointed out by Walton, J., in West v. Bristol Tramways Co., [1908] 2 K.B. 14, 18, 19 (note), 24 Times L.R. 298, and his judgment was adopted by Farwell, L.J., in the Court of Appeal, [1908] 2 K.B. at p. 23.

It was argued by Mr. Geary that the finding of the trial Judge is, that the appellant has done all that is possible without being able to abate the nuisance, and that it is impossible to do anything further; but I do not so understand the finding; and I apprehend that the meaning of the learned Judge is, that it is impossible to do away with the nuisance if the pumps are to be operated by electrical power.

The scope of the reference is, I think, too wide. The compensation or damages which have been awarded should be limited to the injury suffered by the use of the electrically-driven machinery beyond that which would have been sustained if steam power had been used. The use of power for the purpose of pumping is essential to the exercise of the powers which the Legislature has conferred upon the appellant; and if, as has been held, electrical power may not be used, the only alternative is to go back to the use of steam power; and for any inconvenience or injury which the respondents may sustain resulting from the use without negligence of that means of operating the machinery they have no right of action.

Subject to this variation, I would affirm the judgment and dismiss the appeal with costs.

NOVEMBER 13TH, 1914.

*JOSS v. FAIRGRIEVE.

Practice—Ex Parte Order—Rules 215, 216—*Leave to Issue Execution—Extending Time for Moving against Order—Rule* 176—*Discretion—Appeal—Setting aside Order and Execution—Statute of Limitations — Costs — Judgment against Married Woman.*

Appeal by the plaintiff from the order of FALCONBRIDGE, C.J. K.B., 6 O.W.N. 401, extending the time for appealing from an order of the Master in Chambers and setting aside the order and the writ of execution issued pursuant thereto and an appointment for the examination of the defendant as a judgment debtor.

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

M. Wilkins, for the appellant.

A. C. McMaster and O. H. KING, for the defendant, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . The action was brought for the winding-up of a partnership alleged to have existed between the appellant and respondent, who is described in the statement of claim as a married woman, and came on for trial before the late Mr. Justice Street on the 19th April, 1894, when, as appears by the endorsement on the record, he gave judgment by consent for the appellant for $360, each party paying his own costs, and for the payment by the respondent of the partnership debts, she retaining all the partnership assets, and directed that judgment should not be entered for 60 days unless the appellant should satisfy a Judge in Chambers that the respondent was about to dispose of or had disposed of her stock in trade except in the usual course of business.

Judgment was not entered until the 15th April, 1914, when it was entered as a personal judgment, and not in the form of judgment against a married woman on a contract entered into by her during her coverture, as settled in Scott v. Morley (1887), 20 Q.B.D. 120. The appellant applied ex parte to the Master in Chambers for leave to issue execution on the judgment, the application being supported by the affidavit of the appellant in

*To be reported in the Ontario Law Reports.

which he deposed that the judgment remained unsatisfied except as to $20 which had been paid on account; and on that day an order was made giving the leave.

Execution was issued, pursuant to this leave, on the 15th April, 1914.

On the 16th May, 1914, the respondent gave notice that she would on the 20th May apply to the Judge presiding in the Weekly Court for an order permitting her to appeal from the order of the Master in Chambers and for an order setting aside that order, the writ of execution issued in pursuance of it, and an appointment which the appellant had obtained for the examination of the respondent as a judgment debtor, on the grounds that the order was made without notice to the respondent, that it was obtained on insufficient evidence, that it did not revive the judgment, that the writ of execution was improperly issued, and upon other grounds. The motion came on to be heard on the 26th May, 1914, when the order against which this appeal is brought was made.

I have come to the conclusion, not without regret, that the appeal fails and must be dismissed.

I am inclined to think that, had the order in Chambers been made prior to the coming into force of the new Rules, the Master's order would have been supported on the ground that special circumstances existed which warranted the making of it on the ex parte application of the appellant; but I agree with the learned Chief Justice that under the new Rules it was not proper to make the order ex parte.

Rule 215 is explicit as to the necessity of notice of the application being given to the respondent. . . . "Any application in an action or proceeding shall be made by motion, and notice of the motion shall be given to all parties affected by the order."

Mr. Wilkins contended that the order could be supported under Rule 216; but this is not so. The Rule authorises the making of an interim order ex parte if the Court is satisfied that the delay necessary to give notice of motion might entail serious mischief; but the order in question was not an order of that nature.

It was also contended that the time for moving against the Master's order ought not to have been extended; but that was a matter which lay in the discretion of the Chief Justice, and with the exercise of that discretion we cannot interfere. The power to enlarge the time is conferred by Rule 176.

There should be no costs of the appeal. The appellant, as the result of the order which we affirm, may have lost by a slip the possibility of ever enforcing his judgment, if his remedy is barred by the Statute of Limitations or otherwise. If notice of the application for leave to issue execution had been given, the respondent would have had no answer to it, as it is not pretended that the judgment is not unsatisfied except as to $20 which has been paid on account of it; and the respondent may properly be left to bear her own costs of the appeal.

Having come to this conclusion, we need not determine whether, as contended by the respondent's counsel, the judgment as it has been entered is a nullity; but, as at present advised, I do not think that the contention is well-founded.

NOVEMBER 13TH, 1914.

*WATSON v. CANADIAN PACIFIC R.W. CO.

Railway—Carriage of Goods—"Settlers' Effects"—Reduced Rate—Illegal Contract—Dominion Railway Act, R.S.C. 1906 ch. 37, secs. 77, 315, 317, 319, 320, 326, 341.

Appeal by the defendant company from the judgment of the County Court of the County of Kent.

The action was brought for $457.37, being the difference between the amount specified by the defendant company's agent at Mission Junction, British Columbia, as payable on a car-load of settlers' effects shipped by the plaintiff there, and the amount demanded by the defendant company's agent at Chatham, and paid by the plaintiff under protest. The judgment was in favour of the plaintiff for the recovery of $174.75 with costs.

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

W. N. Tilley and J. D. Spence, for the appellant company.

R. L. Brackin, for the plaintiff, the respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—Section 341 of the Railway Act of Canada seems to dispose of this case without reference to the question so fully argued. But for that section the respondent would have had difficulty in

*To be reported in the Ontario Law Reports.

establishing his claim. To recover back what he paid, he would have to set up and prove a contract which, if contrary to the statute, would be void.

The goods carried were "settlers' effects," and are so described in the bill of lading. The contract for their transportation has been fully performed; and, while it is clear that the rate stated was the result of inadvertence, it was within the apparent scope of the agent's authority, and the contract would govern the right of recovery in this case unless it was contrary to the statute and in that way an illegal one.

But it was argued that sec. 341 did not cover the situation here, but applied only to a rate made upon all settlers' effects and open to all persons shipping them. In other words, that "reduced rates" did not include a specific bargain to carry one lot of these goods.

I do not see anything in sec. 341 to refute the contention that a specific reduced rate may be made under it. The design of the Act to compel equality of treatment in the carriage of traffic is explicitly set out in certain sections, but the opening words of sec. 341 exclude these as controlling, inter alia, the carriage of settlers' effects at reduced rates. They provide that "nothing in this Act shall be construed to prevent" such carriage at the reduced rates. How, then, can the Court insist on a construction applying the very sections, relief from which is expressly given?

In the case of City of Toronto and Town of Brampton v. Grand Trunk R.W. Co. and Canadian Pacific R.W. Co. (1910), 11 Can. Ry. Cas. 370, and in the same case in the Supreme Court of Canada, ib. 365, it was held that sec. 77 applied to the issue of commutation tickets under sec. 341. That decision, it was argued, shews that all reduced rates made under sec. 341 must be shewn to be free from undue preference or unjust discrimination; implying thereby that they must be open to more than one person. This would eliminate such a situation as the present.

There are several answers to this, I think. The decision of the Supreme Court was in a case where from its nature tickets must be issued to more than one person. Besides this, if the decision could be read as applying to every case under sec. 341—a conclusion certainly not warranted by the report—it may be fully complied with when the Railway Board's intervention, under the proviso with which sec. 341 concludes, is invoked. Neither 77 nor the proviso operates to prevent the reduced rate being made, but in fact both assume its existence, and only give power to the Board to extend, restrict, limit, or qualify it.

If the rate in question here, when granted and acted upon, was shewn to be limited in its operation to one specific instance, it might be extended by the Board to cover all similar cases; a possible consequence which the railway company must bear in mind when making its bargain. But that falls far short of prohibiting its being made at all.

Then again the carriage of traffic for the Dominion free or at reduced rates necessarily cannot include carriage for any other than the named shipper. Section 77 cannot be applied in the case of free carriage, for it is limited to the charging of lower tolls, and not to cases where no charge is made.

It must also be borne in mind that if a lower and non-discriminating rate for all settlers' effects is what is provided for, then there is no necessity for sec. 341. Section 326, sub-sec. 3, already gives power to lower the tolls on any class or classes of the freight classification, and at the same time that lower rate is subject to sec. 315, which provides for equality of treatment. The use of the words "reduced rates" indicates something less than the usual or normal rates previously fixed or used. The proviso at the end of sec. 341 to which I have referred is, therefore, a wholly unnecessary clause if sec. 319 governs, as it must do if action under sec. 341 is only to be upon the terms of equality to all.

It may be remarked in passing that in the Brampton case the question submitted to the Supreme Court was, whether sec. 341 was modified or affected by sec. 77 *or any other section of the Act*. The answer that sec. 77 is applicable may, therefore, have been intended to exclude the other sections, such as 315, 317, 319, and 320, which relate to the same subject-matter as 77.

These considerations indicate that the section now in question is intended to deal with exceptional cases of traffic upon a wholly different basis from the one underlying the tolls and tariff sections which cover the main general business of railways. Unless, therefore, the section in question is so expressed as to carry into its provisions some inherent disability not derived solely from the other sections of the Act, its plain terms should govern.

It is unnecessary to consider the liability which it was said would flow from erroneous quotation of rates acted upon by the shipper, or the effect of the bargain in this case treated as an illegal contract. But it may be pointed out that by the interpretation section of the Railway Act the word "charge," when used as a verb with respect to tolls, includes "to quote;" so that the statement of the rate, if different from the tariff rate, is pro-

hibited by sec. 315. This seems to weaken somewhat the reasoning upon which Urquhart v. Canadian Pacific R.W. Co., 2 Alta. L.R. 280, 12 Can. Ry. Cas. 500, is founded.

The appeal should be dismissed with costs.

NOVEMBER 13TH, 1914.

*STERLING BANK OF CANADA v. ZUBER.

Promissory Note—Completion and Delivery—Findings of Fact of Trial Judge—Transfer to Bank as Collateral Security for Bill of Exchange Discounted for Customer and Dishonoured—Holder in Due Course—Right of Bank to Recover Amount of Bill and Interest—Special Lien—General Banker's Lien—Agreement—Pledge — Bills of Exchange Act, sec. 54 (2)—Liability of Customer for Costs Incurred by Bank in Respect of other Commercial Paper.

Appeal by the defendant from the judgment of MORSON, Jun. Co.C.J., York, in a Division Court action, condemning the defendant to pay $185.19 on a promissory note for $250, signed by him, and transferred by the payee to the plaintiff bank as collateral security for an indebtedness.

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

E. Meek, K.C., for the appellant.

N. W. Rowell, K.C., for the respondent bank.

The judgment of the Court was delivered by MACLAREN, J.A.:—The defendant admitted his signature, but set up that the note was never completed by him nor delivered as a promissory note. The trial Judge has found against him on this issue, and there is ample evidence to sustain his finding.

The defendant also contends that the plaintiff bank became a holder after maturity only; but the trial Judge rightly finds that the note, which is dated the 12th November, 1912, payable in one month, was given to the bank on the 30th November, for value, without notice of any defect, and that the bank became a holder in due course. The note was put up as collateral secur-

*To be reported in the Ontario Law Reports.

ity to a demand draft for $150, which was discounted by the bank, and the proceeds, $149.60, placed to the credit of the customer. This draft was not accepted or paid.

The trial Judge gave judgment for $185.19, being the amount of the draft and $35.19 costs subsequently incurred by the bank on other paper given it by the customer.

In ordinary circumstances, the bank, as a holder in due course, would have been entitled to recover from the defendants the full amount of the note: Bank of British North America v. Warren (1909), 19 O.L.R. 257. If it recovered more than was its due, it would hold the surplus as trustee for the customer or whoever might be entitled to it: Reid v. Furnival (1833), 1 Cr. & M. 538.

The bank claimed to be entitled under its banker's lien to collect from the defendant and retain the said sum of $35.19, the amount of its costs on other paper given to it by the customer, and the trial Judge allowed the claim. In this I think he was in error. The $150 draft has on its face the following words, embodying the terms on which it was negotiated, and stamped by an official of the bank when it was negotiated: "Surrender documents attached on payment of draft only." The only document attached was and is the defendant's note for $150. There being an express pledging as collateral, and no agreement or intention that the bank should retain the note, but, on the contrary, an agreement that it should at once hand it over to the drawee of the draft in case he paid it, a general banker's lien would be quite inconsistent with the agreement of the parties, and would not attach, in accordance with the principle of the maxim expressum facit cessare tacitum.

The customer was examined as a witness, and admits that he had no right to pledge the note to the bank, but that he should have given it up to the defendant, and there is no evidence to the contrary.

In these circumstances, I am of opinion that the case is governed by sec. 54, sub-sec. 2, of the Bills of Exchange Act, which reads as follows: "Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent for which he has a lien."

The cases are not in accord as to whether a bank, when a special lien has been paid or extinguished, has a general banker's lien on the released securities for its general balance. This point, however, does not arise in this case, as the special lien was never extinguished, but still exists.

There is another point in the case, and one on which, in my opinion, the decision may be properly rested, namely, that there is no evidence that the customer was liable for the costs subsequently incurred by the bank, nor any acknowledgment of them or promise to pay them.

In my opinion, the judgment should be reduced to $164.94, namely, $149.60, the proceeds of the discount of the draft, with interest at the rate of 5 per cent., amounting to $15.34.

There should be no costs of the appeal.

Appeal allowed in part.

NOVEMBER 13TH, 1914.

*REUCKWALD v. MURPHY.

Company—Directors—Action against, to Recover Amount of Unsatisfied Judgment against Company for Wages—Ontario Companies Act, 2 Geo. V. ch. 31, sec. 96—Joint and Several Liability of Directors—Discontinuance of Action against one Director Resident out of the Jurisdiction — Rules 67, 134, 165—Parties—Non-joinder—Contribution or Indemnity.

Appeal by the defendants other than the defendant Kohler from the judgment of the Senior Judge of the District Court of the District of Nipissing in favour of the plaintiff in an action brought in that Court and tried without a jury.

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

G. H. Kilmer, K.C., for the appellants.

H. D. Gamble, K.C., for the plaintiff, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The respondent's action was brought to recover against the appellants and Kohler, as directors of the V. S. M. K. Mining Company Limited, the amount of a judgment recovered by the respondent against the company on the 26th February, 1913, for wages due to the respondent as a workman employed by the company.

*To be reported in the Ontario Law Reports.

Kohler was a resident of the United States of America, and pending the action it was discontinued against him.

The contention of the appellants is, that, by discontinuing the action against Kohler, after the expiration of a year from the date when he and the appellants ceased to be directors, the respondent lost his right to recover against the appellants.

According to the finding of the learned Judge, the appellants and Kohler ceased to be directors on the 18th November, 1912.

This action was commenced on the 5th May, 1913, against the appellant James Edward Murphy the younger; the other defendants were added by order on the 27th October, 1913; and the notice of discontinuance was given on the 26th March, 1914.

The company was incorporated under the Ontario Companies Act, and the liability of the directors depends upon the provisions of sec. 96 of the Ontario Companies Act, 2 Geo. V. ch. 31, now sec. 98 of ch. 178 of R.S.O. 1914. . . .

The liability of the directors being several as well as joint, the respondent was entitled to sue them separately, and was not bound to join all of them as defendants. He was also entitled to sue one or more or all of them in the same action: Rule 67.

The defendant Kohler was not a necessary party to the action to enforce the several liability of the directors; nor, if the liability had been joint only, could the other defendants, under the old practice, if he had not been made a defendant, have taken advantage of his not having been joined, as it was necessary to a plea in abatement for non-joinder of a joint debtor, to shew that he "resided within the jurisdiction of the Court:" Tidd's Practice, p. 319. And the same rule, I apprehend, applies under the present practice where a defendant seeks under Rule 134 to add persons who he alleges ought to have been joined as defendants: Wilson v. Balcarres, [1893] 1 Q.B. 422; Robb v. Murray (1890), 13 P.R. 397, and cases there cited; Aikins v. Dominion Live Stock Association of Canada (1896), 13 P.R. 303.

It was argued on behalf of the appellants that the course taken by the respondent of first joining Kohler as a defendant and then discontinuing as to him, after the year mentioned in sec. 96 had elapsed, had prejudiced the appellants, because, as it was contended, had he not been originally made a defendant, the appellants could have obtained an order under Rule 134 adding him as a defendant for the purpose of obtaining contribution from him.

This contention is not, in my opinion, well-founded. The Rule applies only in the case of a person who ought to have

been joined or whose presence is necessary to enable the Court effectually and completely to adjudicate upon the questions involved in the action; and Kohler was not a necessary party and his presence is not required for the purpose mentioned in the section. If the appellants are entitled to contribution or indemnity from or any other relief over against Kohler, the third party procedure, Rule 165, enables them to take proceedings to enforce their rights, although Kohler is not a party to the action; and, in my opinion, the appellants would not have been entitled to insist upon Kohler being added as a defendant.

If the appellants were right in their contention, the respondent would be in a worse position than he would have been in if the directors' liability had been joint only.

In my opinion, the judgment is right and should be affirmed, and the appeal should be dismissed with costs.

NOVEMBER 13TH, 1914.

*UNITED TYPEWRITER CO. v. KING EDWARD HOTEL CO.

Lien—Innkeepers' Act, 1 *Geo. V. ch.* 49—*Supplementary to Common Law—Lien on Property of Stranger.*

Appeal by the plaintiff company from the judgment of the Senior Judge of the County Court of the County of York dismissing an action brought in that Court to recover goods, the property of the plaintiff company, brought to the defendant company's hotel by a guest, and detained by the defendant company in the assertion of an innkeeper's lien.

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

Gideon Grant, for the appellant company.

H. E. Rose, K.C., for the respondent company.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The question for decision is, whether or not the common law right of an innkeeper to a lien on the property of his guest brought to his inn has been limited by the Innkeepers'

*To be reported in the Ontario Law Reports.

Act, 1 Geo. V. ch. 49, now R.S.O. 1914 ch. 187, so as to deprive the innkeeper of the lien which it is admitted by the appellant he would have had at common law on the property of a stranger brought to his inn by his guest.

In our opinion, the common law right of the innkeeper has not been taken away by the statute. That was the view expressed by Galt, C.J., in delivering the judgment of a Divisional Court in Huffman v. Walterhouse and Broddy (1890), 19 O.R. 186, 188, 189, and was evidently the view of Armour, J., in Newcombe v. Anderson (1886), 11 O.R. 665.

That the statute is a codification of the whole law as to the lien of innkeepers was contended by counsel for the appellant; but the statute contains internal evidence that that was not intended, for sub-sec. 2 of sec. 3 of 1 Geo. V. ch. 49 provides that the persons mentioned in the sub-section, among whom are innkeepers, shall have the rights which the sub-section confers, in addition to all other remedies provided by law.

The provisions of the statute are, in our opinion, supplementary to the common law, and its main purpose was: (1) to extend the right of lien which an innkeeper has to boarding-house keepers and lodging-house keepers, limited in their case to the property of the boarder or lodger; (2) to give, where the lien exists either at common law or by the statute, the right to sell; and (3) to limit the liability of the innkeeper to $40 in certain cases and in certain other cases to $5.

It follows from this conclusion that the respondent is entitled to the lien which it claims, and that the appeal should be dismissed with costs.

NOVEMBER 13TH, 1914.

*RE FINUCANE AND PETERSON LAKE MINING CO. LIMITED.

Crown Patent—Construction—Description of Land—Falsa Demonstratio—Plan—Mining Lease.

Appeal by Finucane from an order of the Mining Commissioner, dated the 19th July, 1914, affirming the decision of the Mining Recorder at Haileybury, dated the 18th April, 1914, refusing the appellant's application to record a mining claim for a small piece of land.

*To be reported in the Ontario Law Reports.

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

C. A. Masten, K.C., and L. C. Outerbridge, for the appellant.

McGregor Young, K.C., for the respondents.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The refusal to record this claim was based on the assumption that the land in respect of which the claim was made, which forms part of the bed of Peterson Lake, had already been granted to the respondents; and the sole question for decision is, whether or not the grant to the respondents covers the bed of the whole of Peterson Lake.

The letters patent by which the grant to the respondents was made are dated the 5th July, 1907, and the land granted is described as "all that parcel or tract of land and land covered with water situate lying and being in the township of Coleman . . . containing by admeasurement 195 acres be the same more or less . . . being composed of mining location S.V. 476 being land covered with the water of Peterson Lake in front of mining locations R.L. 404, R.L. 405, R.L. 406, R.L. 407, and R.L. 408, including also islets therein situate in the said township of Coleman as shewn on plan of survey by Ontario Land Surveyor Ward, of record in the Department of Lands Forests and Mines, heretofore under mining lease 3508 dated May 1st, 1905."

Mining lease 3508 contains the same description except that there is added to the description the words "a duplicate of which plan is attached to these lease letters."

Mr. Ward's plan which, as the letters patent state, is of record in the Department . . . shews that the whole of Peterson Lake is included in mining location S.V. 476; and that is, in my opinion, decisive in favour of the respondents.

It was argued by counsel for the appellant that the controlling words of the description are, "being land covered with the water of Peterson Lake in front of mining locations R.L. 404, R.L. 405, R.L. 406, R.L. 407, and R.L. 408, including also islets therein," and, as it was also contended, the land in question not being in front of these locations, it did not pass by the grant.

In my opinion, neither contention is well-founded. Read even in its narrowest and most literal sense, mining location S.V. 476 is in fact, as shewn on Ward's plan, in front of one or other of the mining locations mentioned in the letters patent. Mining location R.L. 406 is irregular in form and is bounded on its irregular side by the lake, part of the location lying to the north

and the remainder of it to the west of the lake, and the whole of the southerly end of the lake lies in front of the northerly part of the location.

But, if it were otherwise, the contention must fail. The controlling words of the description are those referring to the mining location by its number as shewn on Ward's plan, and the other part of the description, if it is not an accurate description of the mining location as so shewn, must be rejected as falsa demonstratio.

The rule of construction invoked by the appellant's counsel makes against their contention; the cases cited by them establish that where the lands intended to be conveyed are accurately and completely described the description is not controlled by reference to a plan on which they are stated to be shewn.

An illustration of the application of this rule is to be found in Horne v. Struben, [1902] A.C. 454. . . .

This and like cases are but instances of the application of the maxim "falsa demonstratio non nocet;" and, instead of it assisting the appellant, it makes against him, for the description of the land as mining location S.V. 476 as shewn on Ward's plan is clear and unambiguous; and, if the reference to the other locations contradicts this description, it must, applying the maxim, be rejected. . . .

[Reference to Llewellyn v. Earl of Jersey (1843), 11 M. & W. 183, 63 R.R. 569.]

In the case of a grant of a lot in a Crown survey by number, concession, and township, the whole lot would pass notwithstanding that the land was also described by metes and bounds which embraced only part of the lot; and, in my opinion, the case at bar does not differ from such a case. Here the lot is described by its number according to a plan of survey, of record in the Department . . . and therefore adopted as a Crown survey; and, even if the words on which the appellant relies have the meaning which he seeks to attach to them, they must be rejected as falsa demonstratio.

In my opinion, the appeal fails and must be dismissed with costs. . . .

It is unnecessary to determine the question raised . . . as to the competency of the appeal.

Appeal dismissed.

NOVEMBER 13TH, 1914.

*RE BRANTFORD GOLF AND COUNTRY CLUB AND LAKE ERIE AND NORTHERN R.W. CO.

Railway—Expropriation of Land—Taking Part of Golf Course—Compensation—Necessity for Acquiring other Lands—Damages Measured by Cost of Additional Lands—Value of Land Taken—Purpose for which Used—Damages from Severance—Evidence—Loss by Reduction of Area—Additional Items of Damage—Cost of Rearrangement of Course—Damage to Club-house—Smoke, Noise, and Vibration—Award—Appeal—Increase in Amount.

Appeal by the club from an award of arbitrators made on the 5th May, 1914, fixing at $7,240 the compensation for lands of the club expropriated by the railway company and for the injurious affection of lands not taken.

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

W. T. Henderson, K.C., for the appellants.

W. S. Brewster, K.C., for the railway company, the respondents.

The judgment of the Court was delivered by HODGINS, J.A.:—There is a curious absence of evidence dealing directly with the problem presented in this case. The appellants have a well laid-out and interesting golf links, consisting of 76 acres. Part of this is on high level land, and the rest of it consists of a fairly steep hillside, running down at the west end to flat land fronting on the river, while at the east end the slope goes down to the river.

The respondents' railway enters at the east end on the slope and above the river, and runs west for a short distance, then encroaches on the flat land, cutting it in two. The length of the railway on the club property is 2,415 feet, and it takes about 8 acres; 6 acres of the flat land lies to the south of the railway lands and 20 acres to the north under the crest of the slope; the club-house is on top of the high bank just near the east end.

The coming of the railway has, in the appellants' contempla-

*To be reported in the Ontario Law Reports.

tion, ruined the golf links as a course, necessitating the acquiring of other lands on the level to make up. The respondents contend that the land left by them, if 3 holes are rearranged and play goes on across the railway, is ample and convenient for the appellants and that the damage is small. The award is based on this view.

It might be supposed that the value of the adjoining land, which the appellants' golf expert says they will naturally have to acquire, would have been directly stated. . . . Neither side, however, provided the arbitrators with definite information on this point. . . .

In the result, what seems to be the best test to apply in approaching the question was not fully considered by the arbitrators. That the cost of acquiring other premises, suitable and convenient, would be a fair test of the damages suffered by the appellants appears from two cases: The Queen v. Burrow, in the Court of Appeal in England, and in the House of Lords, sub nom. Metropolitan R.W. Co. v. Burrow, reported in the London Times newspaper of the 24th January and 22nd November, 1884, and printed in full in Boyle and Waghorn on Compensation, p. 1052, and in Hudson on Compensation, p. 1521; and City of Edinburgh v. North British R.W. Co., Hudson on Compensation, p. 1530, where the award was made by Lord Shand as arbitrator. . . .

The method approved in both these cases is, of course, not the only way of arriving at the compensation to be paid, but it is the one most likely to do justice between the parties.

The method adopted in the award now in question was as follows. The value of the land actually taken, 8 $\frac{8}{10}$ acres, was fixed as "$300 per acre as part of the club property, including the water-pipes, etc., on it." Then as to the land lying to the south of the railway and between it and the river, 6¾ acres, $600 is allowed as damage by severance. The remainder of the golf course is dealt with thus: "Of the balance of the land north of the railway, only part will sustain damage from the severance and from the purpose for which the land taken is to be used. As damage to this land for its present use, including improvements, excepting buildings, we allow $1,750, being 10 per cent. of what we consider to be its greatest value."

It is to be observed that if the 6¾ acres which was used as part of the golf course is worth $300 per acre, the amount allowed for similar land adjoining and taken, its value would be $2,000, on which damage to the extent of 30 per cent. is given, which does not comprise anything for smoke, vibration, and

noise. For the balance only 10 per cent. is given, including such damage. Nor is it clear to what part this 10 per cent. applies. It is stated to be based on part only of the 61 acres north of the railway, and that part is apparently valued at $17,500. It is impossible to say how many acres this represents, nor what percentage of value has been deducted for damage to the level land, nor indeed for the flat land and hillside.

It will not be disputed, I think, that from the evidence of both golf experts the hillside and flat land beside the river, in combination with the higher level, added to the charm and interest of the golf links as a playing course, both as relieving the monotony of perfectly flat ground and as presenting features of difficulty. . . . The arbitrators have in fact ignored the relation which the land taken, and the land said by them to be injured, bear to the whole 76 acres laid out and used as a complete and entire golf course.

The taking of the $8\frac{8}{10}$ acres and the severance of the $63\frac{3}{4}$ acres have reduced the extent of the links and necessitated enlargement in another direction and a rearrangement of the course. The respondents found the club in possession of and using the whole 76 acres; and each acre, viewed as a necessary part of the course, is equally valuable to it, if its taking so reduces the area as to require a further purchase. The appellants are not bound to put up with such a course as can be laid out on the 67 acres left nor to play over the railway lands. They are entitled to the value of the land to them for the purpose for which they are using it. . . .

[Reference to Cedar Rapids Manufacturing and Power Co. v. Lacoste, [1914] A.C. 569, per Lord Dunedin at p. 572.]

Where, as here, the most advantageous use has been made of the property by its owner, it is that value that the taker must pay, and the taker cannot reduce that value by limiting the damage to what lies immediately near the part taken, if the owner suffers throughout his whole property by its being reduced to an area too restricted to be used to the same advantage as that which the whole afforded. That principle is well-established, and it is just as applicable to golf courses as to a tract of land dedicated to sport, such as a race course or a motordrome, or used as a park or rifle range. See Holt v. Gas Light and Coke Co. (1872), L.R. 7 Q.B. 734; In re Countess Ossalinsky and Manchester Corporation (1883), Browne and Allan's Law of Compensation, 2nd ed., p. 659. The award has completely ignored this aspect, and ought to be revised in the light of it.

If the appellants have to acquire enough land on the level

to compensate for what has been taken, what has been severed, and what has, in the opinion of their golf expert, been rendered useless, they must buy about 35 acres. But it seems unreasonable to hold that it is impossible to use the 20 acres remaining north of the railway in combination with the hillside. This area is large and ought to be available for the purposes of the game. To do without it would deprive the course of a feature rightly prized by golfers; and I prefer to believe that, when the appellants settle down to rearrange their links in view of the changed condition, they will find some good use to which it can be put. If so, it leaves only about 15 acres to be acquired.

This later acreage, at the value placed by the appellants on the level land for residential purposes, would represent $15,000, and at that fixed by the respondents' witnesses $4,500. The total allowed by the arbitrators as representing what is taken and severed and damaged is $4,990.

I think it may fairly, upon the principle of the Burrow and Edinburgh cases, be placed at the higher figure, having regard to the injury done to the appellants' links as an entire and complete golf course. . . .

The argument of the appellants that they should be compensated for the engine and cost of piping and arranging for city water may be well met by the cost of this acquisition of other land, for none of these may be necessary under the altered conditions. Any such new lay-out is bound to bring about a different method of dealing with the supply of water, and I cannot believe that with city water laid down as far as the club property the appellants would continue to depend upon pumping from the river or the spring. They have already contracted for city water, which, if supplied all round, would render their engine useless.

The evidence of the cost of a sewer was, improperly I think, rejected by the arbitrators. . . . There should be an allowance of $159 for the sewer cost and the cesspit. . . .

The cost of laying water mains through the club grounds is not a proper item of damage. . . .

If additional land is to be secured on the level, and the 20 acres of flat land used, the scale of damages, as stated by the golf experts, for the cost of rearranging the holes, forms a basis for the amount to be allowed. The fair amount, if 15 new acres have to be prepared, would be, according to the former, $1,350, while the new and rearranged tees and greens appear from both estimates to run about $100 a-piece. The arbitrators have al-

lowed $1,000, and this should be increased to $1,650, including an allowance for 3 new greens and tees.

The damage to the club-house is stated by the appellants to be so serious as to compel its removal, and in this their golf expert agrees. But its present site is 74 feet above the railway tracks and is about 263 feet distant from them. The arbitrators, having the advantage of a view of the property, have not thought removal necessary, and have allowed as damages $1,250. Upon the conflicting evidence, it is, I think, impossible to say that the award is wrong upon either point, although the amount seems small.

The result is, that the award should be increased from $7,240 to $18,059. . . .

No costs of the appeal should be given, in view of the fact that direct evidence upon what I conceive to be the proper basis for compensation was not given, and that success is divided.

NOVEMBER 13TH, 1914.

*RE MUIR AND LAKE ERIE AND NORTHERN R.W. CO.

Railway—Expropriation of Land—Taking Part of Grounds Surrounding Residence—Compensation—Value of Land Taken—Value of Trees—Injury to Remainder of Property by Taking River Front—Evidence—Price Obtained on Sale of Neighbouring Property—Obstruction of Access to River—Depreciation of Property by Vibration, Smoke, and Noise—Appeal—Increase of Amount Awarded by Arbitrators.

Appeal by Muir from an award of arbitrators fixing at $4,250 the compensation for lands of the appellant expropriated by the railway company and for the injurious affection of lands not taken.

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

G. Lynch-Staunton, K.C., for the appellant.

W. S. Brewster, K.C., for the respondents.

The judgment of the Court was delivered by HODGINS, J.A.:—

. . . The amounts awarded were: (1) for $1\frac{65}{100}$ acres taken,

*To be reported in the Ontario Law Reports.

extending across the whole river front of the property at $1,500 per acre, including trees, $2,475; (2) damage to the remainder, caused by the purpose for which the land is expropriated, $1,775: total, $4,250.

In the first item are included . . . the land, the trees, the cutting off of the ends of springs, and the value, to the rest of the property, of the land taken, as the river front thereof. . . .

The property has a long frontage on Ava road and 348 feet on the river by a depth of about 1,000 feet on the south and 1,300 feet on the north. There is a ravine along the south boundary, containing about 4¼ acres, while the level land runs out into two knolls overlooking the river. . . .

The value of the whole property is variously given. The appellant's house cost $18,000, while the respondents' witnesses valued it at $12,000. The latter treated the 13½ acres as worth only $6,000 or $7,000, while those of the appellant went as high as $43,000 to $46,000. The evidence of these expert witnesses is, to my mind, unsatisfactory. Those called for the appellant displayed no knowledge of actual sales, and depended on inquiries as to properties, none of which were stated to be in any way similar in position or value to the one in question. The respondents' evidence of this class is open to criticism in the same direction. . . .

The property lies 2¼ miles west of the Brantford market-place; and Mr. Schultz owns the adjoining land, 13½ acres, to the west. Beyond this is the Brantford Golf and Country Club. East of the appellant and towards Brantford are: the Van Westrum property, 14 acres; the Stratford property, 41 acres; and the Woodyatt property, 20 acres. Comparison with these lands is reasonable, and the sale of the Woodyatt 20 acres in April, 1914, for $21,000, to a syndicate for subdivision purposes, is really the only reliable evidence of selling value. See Falconer v. The Queen (1889), 2 Can. Ex. C.R. 82. Based on this, the appellant's acreage would give $14,205, which, added to the cost of the house, would total $32,205. The evidence is conflicting as to whether values remained stationary, but there is nothing to shew that on the 31st May, 1913, the property was worth less per acre than the Woodyatt property. . . .

If, therefore, $1,050 per acre is taken throughout as the fair value of the property as a whole for the purposes of the appellant's residence and its amenities—apart from its speculative value subdivided—the $1\frac{65}{100}$ acres taken would represent $1,732, leaving $743 for the trees, springs, and the damage to the remainder of the property by the loss of access to the river front.

It may be that this is not the division of the amount intended by the arbitrators. But they have not in their reasons indicated upon what basis they proceeded; and, if the valuation of $1,050 per acre is reasonable, then, in my judgment, the remaining amount is quite inadequate as damages for loss of access to the river. It is true, no doubt, that to make a good road or path to the water's edge and to build a boat-house would cost the owner a considerable sum of money. But this added cost would be represented by tangible improvements.

The appellant had, in the language of Lord Kingsdown in Miner v. Gilmour (1858), 12 Moore P.C. 131, 156, where the river was non-navigable, the "right to what may be called the ordinary use of the water flowing past his land; . . . but further, he has the right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him." This language is quoted with approval in North Shore R.W. Co. v. Pion (1889), 14 App. Cas. 612, and the right spoken of is treated in Chasemore v. Richards (1859), 7 H.L.C. 349, and Lyon v. Fishmongers Co. (1876), 1 App. Cas. 662, 683, as "a natural incident to the right to the soil itself," i.e., the soil of the adjoining lands.

That the obstruction of the right of access is a proper and important subject of compensation cannot be doubted: Regina v. Buffalo and Lake Huron R.W. Co. (1868), 23 U.C.R. 208.

The damage is, I think, to the whole of the property as such, used as it is and as an entire block; and there seems no good reason to doubt that access by the smaller ravine and to houses built to the south, overlooking the longer ravine, by a way constructed down and through it, might be advantageously had. The principle stated by Burbidge, J., in The Queen v. Carrier (1888), 2 Can. Ex. C.R. 36, that an owner is "not bound to sell, and may reasonably prefer to keep his property for the purposes of his business, and in that case should be indemnified for any depreciation in its value to him for the purposes for which he has been accustomed and still desires to use it," is as applicable to the expropriation of part of the property as to the whole.

The cutting off of the whole river front, in addition to loss of its possible commercial and domestic value, reduces the whole 14 acres from the position of an attractive and unusual property to that of a level lot just as uninteresting as any to be found anywhere on the outskirts of any city.

The estimates of damage to the lots 2, 3, and 4, overlooking

the river, made by some of the witnesses and by the appellant, are, I think, excessive, and it is not easy to arrive at a proper percentage in settling the detriment suffered. . . . The appellant is entitled to be compensated on the basis of the value to him, and not to the expropriaters. The arbitrators have treated it upon the footing of a property incapable of useful subdivision, or as one which, though equipped with a good residence, approximates rather to a farm than a villa property. In so doing, I think, the arbitrators have erred in their application of the principles underlying the question of injurious affection, and have deprived the appellant of an advantage to which he is fairly entitled. See, on this point, Paint v. The Queen (1890), 2 Can. Ex. C.R. 149. . . .

Viewing the value of the house and land at $32,205, and applying what, I think, is the proper principle, it does not seem unreasonable to allow, upon the whole evidence, 10 per cent., or $3,220.50, having regard to and including the loss of access and the attractiveness of a river front with all its beauty and possibilities of use, including the spring interfered with.

The evidence as to the trees is as discordant as that regarding the value of the property. . . . Taking the most conservative view, I think the amount spoken of, $75.20, should be increased to at least $170.

The arbitrators have allowed $1,775 as depreciation for vibration, smoke, and noise. No evidence was given upon this head specifically, except as included in general terms of the whole damage to the property, and it is not possible to disturb the award on this point.

In the award itself it is stated that the arbitrators gained no information by their view on which they relied in making the award. Following the view of Street, J., in Re Macpherson and City of Toronto (1895), 26 O.R. 558, it is competent for the Court, apart from the jurisdiction given by the Railway Act, to act upon its own view of the evidence in dealing with the figures arrived at by the arbitrators.

The result is, that the award should be varied as follows: allowance for land taken, $1,732; for damage by cutting off access to river, $3,220.50; for trees cut, $170; for depreciation due to use of lands taken, $1,775: total, $6,897.50.

As the appellant substantially succeeds upon the points raised before us, he should have his costs of the appeal.

NOVEMBER 13TH, 1914.

*CAMPBELL v. BARRETT AND McCORMACK.

Vendor and Purchaser—Agreement for Sale of Land outside of Province—Assignment by Vendor of Interest in Land after Agreement—Trust—Notice—Obligation of Assignee to Convey to Purchaser — Agreement between Vendor and Assignee—Finding of Fact of Trial Judge—Appeal—Title to Land—Specific Performance—Costs—Form of Judgment.

Appeal by the defendant Barrett from the judgment of LENNOX, J., 6 O.W.N. 360.

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

W. N. Tilley, for the appellant.

R. A. Pringle, K.C., for the defendant McCormack, respondent.

J. A. Macintosh, for the plaintiff, respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—There is a judgment against the appellant for $1,500 and costs, upon the basis, as I understand it, that, having taken an assignment of the respondent McCormack's interest in the lots sold by him to the respondent plaintiff, he became, upon payment for them in full, a trustee for the latter, and is not able or willing to perform the trust. . . .

The plaintiff completed his payments, dealing with McCormack solely, and asked for a deed, which he has been unable to get; and the question upon this appeal is, whether upon that failure he is entitled to specific performance or to get back from the appellant what he has paid to McCormack. The plaintiff in making these payments dealt with McCormack in good faith, and, as to those made after the assignment to the appellant, with the latter's knowledge and consent. . . .

McCormack's assignment included his interest in the lots bought by the plaintiff, and the appellant had previous notice of the sale to the plaintiff and of the amount paid by him. He thereupon held the lands sold to the plaintiff, so far as McCormack could convey them, subject to the obligation to convey them to the plaintiff upon completion of the plaintiff's future

*To be reported in the Ontario Law Reports.

payments therefor, which under ordinary circumstances the appellant would have received.

The evidence of the appellant shews assent to McCormack's receipt of the moneys, and McCormack became thereby his agent for the purpose of the acceptance of performance by the plaintiff of the contract, with or without a liability to account to the appellant. This clearly estops him from denying that the plaintiff has effectively performed his contract by paying what was stipulated for therein. He cannot require further payment from the plaintiff in respect to that contract. Nor can he hold what he acquired free from the correlative obligation, the extent of which is measured not by what he originally got, but by what the plaintiff is entitled to receive under his contract, so far as that may be vested in the appellant, or what he is legally entitled to get in under the contract with Moss and Burgess, at the time he is called on to fulfil the plaintiff's contract. While he cannot be asked to convey until payment in full is made, his right to receive that payment existed, after the assignment, in him alone. As between him and McCormack, the extent of his liability to the latter will of course depend upon their agreement.

There is a distinct contradiction between the appellant and McCormack as to what that agreement was. It was argued on behalf of the former that it was a loan upon certain securities to secure him against payments he agreed to make; while the latter asserts it to be a sale out and out. . . . The learned trial Judge accepts McCormack's story. To reverse his finding, this Court should be clear upon the evidence that he is mistaken. But the documents and the actions of the appellant make in favour of the judgment in appeal. . . .

But the true status of the appellant, whether as absolute owner or as mortgagee with notice of the prior sales, is, that he has acquired, in either capacity, an interest that is subject to an obligation known to him, which binds him to carry out that obligation. . . .

[Reference to Greaves v. Tofield (1880), 14 Ch.D. 563, at p. 577, per Bramwell, L.J.; Taylor v. Stibbert (1794), 2 Ves. Jr. 437, per Lord Loughborough, L.C.; Daniels v. Davison (1811), 17 Ves. 433; Mumford v. Stohwasser (1874), L.R. 18 Eq. 556; Savereux v. Tourangeau (1908), 16 O.L.R. 600; Strathy v. Stephens (1913), 29 O.L.R. 383; Potter v. Sanders (1846), 6 Hare 1.]

The appellant has apparently paid off the original vendors. But, if he has not, he is bound to give this plaintiff the title he

stipulated for. There is no reason why there should not be the usual judgment for specific performance although the lands are situate out of the Province: Montgomery v. Ruppensburg (1899), 31 O.R. 433. If the defendants do not make title, the judgment on further directions will probably give relief similar to that provided by the present judgment. The judgment should be with costs against both defendants, without prejudice, in the taking of the accounts as between them, to the incidence of these costs. The variation in the judgment is one of form, not of substance, and the appellant should pay the costs of both respondents in this Court. Reference to the Master at Cornwall. Further directions and costs reserved until after the Master shall have made his report.

NOVEMBER 13TH, 1914.

*PARKERS DYE WORKS LIMITED v. SMITH.

Covenant—Restraint of Trade—Undertaking not to Enter into Competition with Established Business—Reasonableness—Extent of Territory—Breach—Managing Rival Business—"Agent or otherwise"—Injunction—Scope and Form of—Costs.

Appeal by the defendant from the order of LATCHFORD, J., ante 65, restraining the appellant until the trial or other final disposition of this action "from entering into or continuing in business as a dyer and cleaner in the Province of Ontario, and from entering into competition with or opposition to the business carried on by the plaintiffs or either of them as dyers and cleaners . . . either alone or jointly with or as agent or otherwise for any other person, firm, or company, directly or indirectly."

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

E. B. Ryckman, K.C., for the appellant.

W. R. Cavell, for the plaintiffs, the respondents.

MEREDITH, C.J.O.:— . . . The material before the learned Judge fully warranted the conclusion that this (competing)

*To be reported in the Ontario Law Reports.

business . . . was being carried on under the appellant's management; and that, in my opinion, constituted a breach of her covenant.

None of the cases cited by Mr. Ryckman supports the proposition for which he contended, that the appellant by acting as manager of the competing business did not violate her agreement with the respondents.

It may be that if the covenant had been merely not to enter into competition with or opposition to the business of the respondents, acting as manager of a competing or opposing business would not be a breach of the covenant; but the covenant is far wider than that, and extends also to the act of entering into competition or opposition, as agent or otherwise for any other person, firm, or company; and becoming the manager of a competing or opposing business was, I think, clearly a breach of that part of the covenant, both in its spirit and its letter.

It will, of course, be open to the appellant upon the trial of the action to adduce further evidence which may lead to a different conclusion from that which has been reached upon the present material as to her position with reference to the competing or opposing business which has been carried on under her daughter's name; and it will also be open to the respondents to establish, if they can, that that business is really the business of the appellant.

It was also contended by the appellant that the injunction order was too wide in its terms, and that it ought to have specified the acts from the doing which it was intended that it should restrain the appellant; but that contention is not, I think, well-founded.

As was said by Cozens-Hardy, M.R., in Earl Dysart v. Hammerton & Co., [1914] 1 Ch. 822, 833: "It is not the practice of the Court when a wrong has been established to suggest how or under what circumstances, if at all, the defendant may so far modify his arrangements as not to infringe the injunction." And, as is pointed out in the Law Quarterly, vol. 30, p. 265: "The practice of granting an injunction in general terms and leaving the party enjoined to find out how he might comply with its terms, was familiar practice in the days of Lord Eldon: Lane v. Newdegate (1804), 10 Ves. 192, 7 R.R. 381; and has the authority of the House of Lords: Elliott v. North Eastern R.W. Co. (1863), 10 H.L.C. 333, at pp. 358, 359, 138 R.R. at p. 189. In Curl Bros. Limited v. Webster, [1904] 1 Ch. 685, 73 L.J. Ch. 540, Farwell, J., adopted the same rule in the case of a breach

of contract;'' and in Wood v. Conway, [1914] 2 Ch. 47, this practice was followed.

I think, however, that . . . the injunction order is wider in its terms than it should have been, and that it should be varied by restraining the appellant until the trial or other disposition of the action from, either alone or jointly with or as agent or otherwise for any other person, firm, or company, directly or indirectly entering into competition with or opposition to the business of the respondents or either of them.

The order, with this variation, will be affirmed, and the appeal dismissed with costs.

MACLAREN and MAGEE, JJ.A., concurred.

HODGINS, J.A., in a written opinion, referred to Gophir Diamond Co. v. Wood, [1902] 1 Ch. 950, and North Western Salt Co. Limited v. Electrolytic Alkali Co. Limited, [1914] A.C. at p. 471; and said that the order appealed from should be modified by omitting that part of it which restrained the appellant from entering into or continuing in business as a dyer or cleaner, etc., in the Province of Ontario; that the respondents should undertake to bring the action to a speedy trial; and that the costs of the appeal should abide the result of the trial.

Appeal dismissed with costs, subject to a variation; HODGINS, J.A., *dissenting as to costs.*

NOVEMBER 13TH, 1914.

GRANT CAMPBELL & CO. v. DEVON LUMBER CO. LIMITED.

Contract—Agreement to Cut Timber—Misrepresentation as to Quantity — Election to Continue after True Quantity Known—Rectification of Contract — Payment for Work Done—Evidence—Findings of Trial Judge—Appeal.

Appeal by the defendant company from the judgment of LENNOX, J., 6 O.W.N. 673.

The plaintiffs agreed to cut timber for the defendant company upon a certain territory. They charged that the defendant company misrepresented the quantity of timber upon the

territory, and they claimed payment of the sum of $26,337.96 and a rectification of the agreement.

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

I. F. Hellmuth, K.C., and W. R. Wadsworth, for the appellant company.

R. A. Pringle, K.C., and J. A. Macintosh, for the plaintiffs, the respondents.

The judgment of the Court was delivered by MEREDITH, C.J.O. (after stating the facts and the findings of the trial Judge and reviewing the evidence) :—I am, with great respect, unable to agree with some of the findings of fact of the learned trial Judge. . . . It is clear, I think, upon the evidence, that no representation was made by either Brophy or Bartram (cruisers who estimated the quantity of timber upon the appellant company's limits) as to the actual quantity of timber on the territory embraced in the contract; that the respondents knew that any figures which were mentioned were based on Brophy's estimates and on them only, and were content to rely on these estimates as sufficient for the purpose for which they desired to know the quantity of timber on the territory; that neither the appellant nor the respondents nor Brophy nor Bartram knew what the actual quantity of the timber upon the territory was, and that the respondents, being satisfied that Brophy's estimates had actually been made, were content to enter into the agreement and to take their chances as to the accuracy of these estimates.

The estimates that were made do not, as far as affects the liability of the persons putting them forward, differ from the bills of quantities which are in England prepared for the purpose of being submitted to persons tendering for work which the building owner desires to have done and in respect of which the bills of quantities have been prepared.

The law as to the liability of the building owner for inaccuracies in these bills of quantities is thus stated in Halsbury's Laws of England, vol. 3, para. 321, p. 164: "If the building owner actually guarantees the accuracy of the bills of quantities, he is responsible to the builder for the consequences of any inaccuracy therein; but in the ordinary course of business the building owner or his architect merely forwards the bills of quantities to the builder or contractor for the purpose of a tender. In these circumstances, should the quantities be in-

accurate, the employer will be under no liability to a contractor who has tendered, though the inaccuracy in the bills of quantities may have induced the contractor to tender at an inadequate price to construct a complete work for a lump sum."

I do not understand upon what ground the learned Judge based his judgment. He allowed the respondents at the rate fixed by the contract, $12.50 per thousand, for the quantity of timber actually cut into logs, but whether upon the contract, or, if not, upon what theory, he does not say.

If the alleged representation had been made, and it was a fraudulent representation, the respondents might have brought an action of deceit, but no such claim is made in the pleadings, and, if it had been made, it must have failed in view of the finding that the representation was not fraudulent.

No case was made for the reformation of the contract. There is no pretence for saying that the writing evidencing the contract does not truly set forth the agreement that had been entered into and it was intended to evidence. It is not pretended that the respondents did not agree to cut all the timber of the character mentioned in the contract on the territory described in it and to cut clean upon the land; but their case, as stated in the pleadings and attempted to be proved at the trial, was, that they had been induced to enter into the contract by the false and fraudulent representation of the appellant that the quantity of timber on the territory did not exceed two and a half million feet or thereabout.

The only other ground upon which—fraud being negatived—the respondents could succeed would be that they were induced to enter into the contract by the misrepresentation as to the quantity of timber, and that they were, therefore, entitled to repudiate the contract and recover on a quantum meruit for the work they had done; that too is not the case made by their pleadings.

But, assuming, as the trial Judge has found, that the respondents were induced to enter into the contract by the false representation he has found to have been made, the respondents have lost their right to the relief to which I have just referred. It was their duty, when they became aware that the representation was untrue, to make their election to go on under the contract, or to rescind, and an election once made is final. It is clear, upon the evidence, that the respondents made their election not to rescind but to go on under the contract. It is proved—and indeed is admitted—that as early as the latter part of January or the beginning of February, 1914, the respondents

became aware that the quantity of timber in the territory far exceeded two and a half million feet, and yet they made no attempt to get rid of the contract, but, on the contrary, proceeded with the work under it and continued to cut until the period fixed by the contract for the completion of the work had arrived; and in so doing the respondents made their election not to rescind and affirmed the contract. Not only did they do this, but they increased their equipment in order to enable them to cut all the timber.

For these reasons, I am of opinion that the respondents' case failed and that their action should have been dismissed, and I would allow the appeal with costs and reverse the judgment which has been entered and substitute for it a judgment dismissing the action with costs, but embodying in it, as was agreed upon the argument, an undertaking of the appellant to pay to the Royal Bank the sum which the appellant has become liable to pay to it.

It is but fair to the appellant, in view of the strictures of the learned Judge upon its conduct, to say that I think that the offer which it made to the respondents to extend the time for the completion of the contract so as to include the logging season of 1914-15, retaining in the meantime and until the completion of the contract, of the sum claimed by the respondents, $8,323.42, and then paying them the balance of their claim, was not an ungenerous offer in view of all the circumstances.

Appeal allowed.

NOVEMBER 13TH, 1914.

WEBB v. PEASE FOUNDRY CO.

Building Contract—Contractor Delayed in Performance of Work by Delay of Prior Contractor—Additional Expense Occasioned to Contractor—Change in Circumstances—Implication of New Contract—Quantum Meruit—Evidence.

Appeal by the plaintiff from so much of the judgment of BRITTON, J., 6 O.W.N. 416, as disallowed and dismissed the claim for remuneration for work done and material supplied by the plaintiff for the erection of a foundry building in excess of the price for which he had contracted to do the work and supply the material.

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

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

N. W. Rowell, K.C., and J. M. Langstaff, for the defendants, the respondents.

The judgment of the Court was delivered by MEREDITH, C.J.O. (after setting out the facts at length) :—Up to the 22nd November, 1912, the appellant had done work and supplied material to the value, according to the contract price, of $26,125; and there remained, therefore, work to be done and material to be supplied of the value, on the same basis, of only $3,537; and I doubt whether, in the circumstances of this case, the principle applied in Jackson v. Union Marine Insurance Co. (1873-4), L.R. 8 C.P. 572, L.R. 10 C.P. 125, and in Bush v. Trustees of the Port and Town of Whitehaven (1888), 52 J.P. 392, Hudson's Law of Building, 3rd ed., vol. 2, p. 118, has any application.

That principle, as stated by Brett, J., in the Jackson case, L.R. 8 C.P. at p. 581, is, that "where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have any application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made."

It is, however, unnecessary, in the view I take, to decide whether that principle is applicable to the present case.

Where it is applicable in the case of a building contract, the contract ceases to bind either of the parties; and, if nothing is agreed upon to the contrary, and one of the parties proceeds with the performance of the work with the assent of the other, a new contract by the building owner or employer to pay a quantum meruit for the work subsequently performed, may be implied.

The implication of such a contract does not, of course, arise where the parties agree that, notwithstanding the changed circumstances, the existing contract shall remain on foot and be carried out, or where they enter into a new express contract.

The proper conclusion upon the evidence in this case is, that no contract to pay a quantum meruit is to be implied; and it is abundantly clear that the proper conclusion is, either that the parties agreed that the existing contract should remain on foot and be carried out in the terms mentioned in the respondents'

letter of the 4th March, according to which the question whether the appellant should receive more than the contract price should remain open until the work was completed; and that, if at that time the appellant furnished a statement shewing profit and loss, the respondents would consider what their proper course should be in the circumstances; and that, if any allowance should be made to the appellant, it would be a matter purely voluntary on the part of the respondents.

That this was the assurance given to the appellant is clear from his examination for discovery. . . . And it is clear also from the examination for discovery of the appellant that he went on with the work knowing that he was to be entitled to be paid as of right only according to the terms of the written contract. . . .

For these reasons, I am of opinion that the learned trial Judge rightly held that the appellant was not entitled to be paid for the additional expense to which he was put owing to the delays occasioned by default in the performance of the Salter contract; and that the appeal should be dismissed with costs.

NOVEMBER 13TH, 1914.

QUEBEC BANK v. SOVEREIGN BANK OF CANADA.

Contract—Construction—Guaranty—Payment for Timber—Lien of Bank under Securities—Time at which Liability for Payment Arose—Evidence—Surrounding Circumstances—Acts of the Parties—Conversion—Costs.

Appeal by the defendant bank from the judgment of BRITTON, J., 4 O.W.N. 22.

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

J. Bicknell, K.C., and W. J. Boland, for the appellant bank.

D. T. Symons, K.C., and W. N. Tilley, for the plaintiff bank, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—. . . The action is brought upon an agreement entered into between the parties on the 16th May, 1907, by which, as the respondent alleges, it was agreed that the appellant would

pay to the respondent at the rate of $6 per cord for all spruce wood released from the operation of the securities of the respondent, which should be delivered at the mills of the Imperial Paper Mills of Canada Limited during the currency of the agreement; and the respondent claims to recover for 3,934 cords of spruce wood which, it is alleged, was so released and delivered during the currency of the agreement.

The contest is as to what was the time at which, according to the terms of the agreement, the lien of the respondent on the wood under its securities should cease and the liability of the appellant to pay for it should arise, the contention of the respondent being that the appellant's liability attached when the wood was taken from the boom in the river into which it had been floated and measured, and the contention of the other side being that it did not attach until the wood was taken into the mills for the purpose of being made into pulp or sulphite. . . .

The learned trial Judge treated the transaction as if it were the ordinary case of a sale by the owner to a purchaser of pulpwood to be paid for on delivery at the rate of $6 per cord, and a guaranty by the appellant that the purchase-price should be paid; but that is not, in my opinion, the way in which the transaction is to be viewed, and it entirely disregards the circumstances which existed when the agreement was entered into which may properly be looked at in arriving at a conclusion as to the meaning of the language which the contracting parties have used in putting into writing the agreement to which they had come. . . .

It was contended by counsel for the respondent that the principle of the decision of North Eastern R.W. Co. v. Lord Hastings, [1900] A.C. 260, 263, was applicable, and that the evidence as to the course of dealing under the agreement was not admissible, and that, according to the true construction of the writings, the liability of the appellant attached when the logs reached the company's mill, and at all events when they were put through the cutting mill; but I am not of that opinion. All that was decided in that case was, that the words of a written instrument must be construed according to their natural meaning, and that no amount of acting by the parties can alter or qualify words that are plain and unambiguous; and the case has no application to such agreements as are under consideration in this case, the language of which is, in my opinion, neither clear nor unambiguous.

The rule applicable is, in my opinion, that stated in Mr. Beale's Cardinal Rules of Legal Interpretation, 2nd ed., p. 126:

"The acts of the parties done under the contract can be looked at to ascertain the intention if the words of the contract are ambiguous, or to shew that the contract does not express that which the parties intended to express in it." . . .

I am of opinion that the respondent is not entitled to recover upon the guaranty in respect of the 2,475 cords, and that the judgment should be varied by reducing the amount of the recovery accordingly.

No case is made in this action for recovery of the value of the 2,475 cords on the ground that the appellant has converted them to its own use, and there is no evidence to justify recovery on that basis, nor can effect be given to the contention of the appellant that a large quantity of the wood which, when it reached the mill yard, was treated as wood pledged to the respondent, was not in fact wood so pledged. That contention is not, I think, supported by the evidence; at least there is not sufficient evidence to outweigh that offered by the acts and conduct of the parties in dealing with the wood when it reached the mill yard.

The appellant should, however, not be precluded by the judgment in this action from asserting a claim to the 2,475 cords on that or any other ground, and the judgment should be stated to be without prejudice to the appellant's right to make that claim, and a similar right should be reserved to the respondent in respect of its claim to the wood.

As success on the appeal is divided, there should be no costs to either party.

NOVEMBER 13TH, 1914.

WEDDELL v. DOUGLAS.

Chattel Mortgage—Validity against Execution Creditor of Mortgagors—Intent—Family Partnership—Executor de son Tort—Consideration—Interpleader Issue—New Trial.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., ante 92.

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

I. F. Hellmuth, K.C., for the appellant.

W. L. Payne, K.C., and T. P. Galt, K.C., for the plaintiff, respondent.

THE COURT was of opinion that the evidence upon the question whether the goods seized under the execution were owned by the members of the McQuaid family as a partnership or as tenants in common or otherwise, was unsatisfactory, and allowed the respondent to elect whether he would support the judgment upon the evidence as it stood or take a new trial with the view of adducing further evidence, which appeared to be obtainable; and the respondent electing to take a new trial, and the appellant consenting, an order was made accordingly; costs of the appeal and of the first trial to be costs to the appellant in any event unless the trial Judge should otherwise order.

HIGH COURT DIVISION.

MEREDITH, C.J.C.P. NOVEMBER 9TH, 1914.

RE GIFFORD AND WAGNER.

Vendor and Purchaser—Agreement for Sale of Land—Title—Doubt as to—Will—Construction—Devise—Estate Tail or Fee Simple Subject to Devise over in Event of Death "without Leaving any Issue"—Application under Vendors and Purchasers Act.

Motion by the vendor for an order under the Vendors and Purchasers Act declaring that he has a good title as against the objection of the purchaser upon a contract for the sale and purchase of land.

J. F. Grierson, for the vendor.
A. E. Christian, for the purchaser.

MEREDITH, C.J.C.P.:—One question only was argued, and is raised, in this matter; and that one question is very much narrowed by agreement between counsel upon all points arising in it, except one.

They are agreed in all things except this: whether John Henry Bell took, under the will in question, an estate tail, or took an estate in fee simple subject to a devise over in the event of his death "without leaving any issue;" and they are agreed that the provisions of the Wills Act, upon the subject, are not applicable to this case; and also that, according to the general

rule of construction, this devisee took an estate in tail; and that in such case a good title could be conveyed to the purchaser; but they disagree upon this point, and this point only: whether the general rule of construction, or the exception to it, which embraces all cases in which a contrary intention can be clearly gathered within the four corners of the will, is applicable.

I am of opinion that such an intention does so appear: that, having regard to all the provisions of the will bearing upon the question, it appears with sufficient clearness that the words "die without leaving any issue" have reference to the death of the devisee and not an indefinite failure of issue.

In the first place, the gift is to the devisee, his heirs *and assigns*.

In the next place, there is the provision for the sale of the lands "by my executrix and executors" upon the devisee dying without leaving any issue.

And lastly, there is the provision for a division of the proceeds, of such a sale, equally "between my daughters Hannah, Sarah Ann, Mary Jane, Barbara, and Eliza Elizabeth, or their or either of their heirs, when the youngest of my said daughters shall become of lawful age."

The provision for the sale by his *executrix* and *executors* who are named in the will may be the strongest point in favour of this construction, but the other two provisions which I have mentioned, especially the last, add to its weight, so that my judgment is convinced that the intention of the testator was to fix the death of the devisee as the time at which the final rights, under the will, to the lands in question, would arise.

But, if that be not so plainly—if others might reach a different conclusion—there is, assuredly, so much doubt upon the question that the title should not be forced upon an unwilling purchaser, unless title can now be made in accordance with that construction.

Although it now seems extremely improbable that the devisee shall die without leaving issue living at the time of his death, yet it is possible; and so the purchaser cannot be compelled to carry out his contract to purchase.

It may be declared that the vendor has not yet such a title as the purchaser is bound to take; but, in accordance with an arrangement between the parties, there will be no order as to costs.

LENNOX, J. NOVEMBER 9TH, 1914.

BROOKS v. LEE.

Negligence—Injury to Pedestrians on Highway by Motor Vehicle—Evidence—Onus—Motor Vehicles Act—Findings of Trial Judge—Damages—Stay of Proceedings.

Action for damages for injuries sustained by the plaintiffs through the negligence of the defendant in the operation of his motor car upon a highway, whereby the plaintiffs were run down.

The action was tried without a jury at London.

W. R. Meredith, for the plaintiffs.

E. T. Essery, K.C., for the defendant.

LENNOX, J.:—The plaintiffs being run down and injured by the defendant's automobile upon a highway, the statute throws upon the defendant the burden of satisfying me that he was not negligent. The defendant has not done this. Upon the contrary, the evidence shews that the defendant was guilty of actual negligence.

It is impossible to believe that the casualty occurred in the way or through the causes alleged by the defendant and his witnesses. I do not accept the evidence of Palmer, and he is the only witness who swears positively as to the use made of the service brake. It is not shewn to have been out of order, and the accident could not have occurred if it had been applied at the time he swears to. Even without the application of any brake at all, a car travelling at 5 miles an hour upon the level "heavy" road here described, would have stopped long before reaching the plaintiffs, if the witness had shut the throttle as and when he says he shut it. Furthermore, as he admits, the engine must have stopped within a few feet if he had turned the key connected with the magneto and battery. I do not believe what this witness says. The witness Matthews, sitting in the back seat, was not in a position to see much of what the driver was doing. The defendant gave his evidence in a very unsatisfactory way, and fails to corroborate the driver's account in some important particulars. The defendant could have had very little experience, and even if the brakes did not work properly—which I am very far from believing—it is not shewn that the motor was ever

examined to see if it was in a condition safe to be operated upon the highway.

Again, if I accept the evidence of the defence that the street car was some rods east of the crossing when the collision occurred, the defendant could easily have passed to the south of the plaintiffs, and without injury to them, even if the brakes failed to act properly. This is made very clear by the evidence of Miss Tupholme, if I accepted it; and, less extravagantly put, it is the evidence of all the witnesses for the defence, including the defendant. I am of opinion that the real effort of the driver and the defendant was not to stop the motor, but, by a noisy demonstration, of which the plaintiffs were unaware, to compel the plaintiffs to get out of the way. There are a lot of people who wholly fail to realise that pedestrians are not compelled to scurry out of the way at the peril of being run down. I can find no excuse for not stopping this car before reaching the crossing. I have no doubt about the negligence of the driver. It is not disputed that he could have prevented the leakage of gasoline he speaks of by merely turning the key, and so have stopped the motor long before he reached the plaintiffs. If he did not understand this, he was not a competent driver, and it was negligent to employ him. I find that the throttle was not closed and the service brake was not used as alleged, and in both of these matters there was negligence. I am not at all satisfied, as a matter of fact, that the emergency brake was out of order, and, if it was, it is not shewn that its condition was unavoidable, or could not have been discovered, before leaving the garage, by the exercise of reasonable care.

The negligence of the defendant was the cause of the plaintiffs' injuries. The casualty was not caused by the negligence of the plaintiffs, nor could they by the exercise of reasonable care have avoided the consequences of the defendant's acts. As far as the evidence shews, there was nothing to the west of them except the defendant's motor car; and, knowing nothing of the obstructions south of the car-tracks, they had a right to assume that the defendant would continue to proceed along the south side of the road—the side of the road assigned to vehicles going east.

The assessment of damages has given me more difficulty. There will be judgment for the plaintiffs for $900 with costs—$400 to the husband and $500 to the wife.

I was asked not to grant a stay, and this was not opposed, and I will not, as at present advised, grant it, if applied for, without security to the plaintiffs.

HODGINS, J.A. NOVEMBER 10TH, 1914.

WILSON v. McMORRAN.

Executors—Action against—Claim upon Estate of Deceased Person for Services Rendered and Expenses Incurred—Evidence—Documents Signed by Aged Person Shortly before Death—Lack of Independent Advice—Corroboration—Recovery of Reduced Amount—Costs.

Action by a daughter of Lydia Wallace, deceased, against the executors of the deceased, to recover several sums of money alleged to be owing to the plaintiff by the deceased at the time of her death.

The action was tried without a jury at Belleville.

E. G. Porter, K.C., and W. Carnew, for the plaintiff.

W. B. Northrup, K.C., for the defendants.

HODGINS, J.A.:—The plaintiff sues for several items, none of which are disputed except: (1) note for $175.55; (2) $2,700, amount claimed under document dated the 5th December, 1913; (3) $1,400 claimed under document dated the 8th December, 1913.

The plaintiff is a daughter of Lydia Wallace, deceased, and it is against her estate that the claim is made. All three documents are signed by the mother, the last two being within 18 and 15 days respectively of her death. They were all executed at a time which enabled advantage to be taken of her physical condition; the note the day after an exhausting journey, and the other agreements only a few days before the last two weeks during which, in the language of the plaintiff's main witness, she sank rapidly.

The mother had broken her hip-bone and injured her back by a fall in the kitchen of her home, in the county of Bruce, in August, 1912. The plaintiff went up from the township of Carlow, 100 miles north of Belleville, in September, 1912, and brought her mother down, arriving on the 28th October, 1912. The old lady was brought on a stretcher to the train, and was and continued to be physically helpless until she died on the 23rd December, 1913.

The morning after her arrival, Agnes Wilson, who poses as a nurse, but whose constant visits cannot be attributed to her

so-called profession, was sent for, and in a few hours had, at the plaintiff's request, made up an account and got the old lady to sign the note for $175.55. But she was so exhausted that she could only make her mark. The other and later documents are signed with her full name, which was written by herself.

The explanation given as to the note is unusual and unconvincing. It is that as soon as Lydia Wallace got to another man's house she wanted to start with a clear understanding about expenses from the time the plaintiff's child Lily was brought down, i.e., in February, 1911. Why this should be her immediate care is nowhere explained, and it is peculiar that, while the note includes the expense of the plaintiff's visit to Bruce more than a year before, it does not cover those of the journey down which had just ended. The plaintiff in her examination in chief said that her mother wanted to give her a note for the expense and trouble in going up and bringing her down.

The amounts in it are wholly due to the plaintiff, the mother knowing nothing of the details. Examined by themselves, the items do not, however, appear unreasonable, if the explanation of Agnes Wilson as to the item of $75 is received. There has been no real attack on the note except as evidencing the rapidity with which the plaintiff procured a voucher for expenses as soon as her mother was entirely in her power, and without waiting for recovery from the fatigue of her trip down. It may be that the mother understood that the note covered the expenses of that journey, but I am unable to find that as a fact.

The two later documents stand on quite a different footing. One of them, that of the 5th December, 1913, Mr. Porter did not press in argument, nor ask that effect be given to it. Evidence had, however, been given in support of it which has a bearing upon the one of the 8th December, 1913.

Both are said to have had their genesis in repeated and pressing requests from the mother; the plaintiff goes so far as to say that the mother had the family out of bed sometimes at night in her anxiety to have them drawn. Yielding, as the plaintiff and her husband say, to her importunity, they visited a Mr. Harryett on two different occasions, and had first one agreement drawn, and then later, the other. That which came first is an agreement to pay $15 a month from 1894 to 1909 for helping her mother nurse an uncle afflicted with softening of the brain, and an elder sister who was out of her mind. There had been no definite bargain made in 1894, but the plaintiff asserts that her mother had agreed to pay her a reasonable wage. This

document having been drawn by Harryett, it was brought home, Agnes Wilson being sent for, and was signed either after or before she read it to the old lady. The son-in-law says it was signed before being read over. The family conclave, consisting of the plaintiff, her father-in-law, her son-in-law, her two daughters, and Agnes Wilson, was present, and all agree that she was quite satisfied. The amount of $15 per month for 15 years rather surprised Agnes Wilson, and she says she so expressed herself. But nevertheless the mother signed it. The plaintiff says her mother wanted to make it $20, while she herself thought $10 enough, and explains that Harryett, when drawing the agreement, decided that $15 was sufficient and inserted that amount in it. The bargain as to amount is thus discredited by the plaintiff herself. The other agreement is dated a few days later, i.e., on the 8th December, 1913, and promises to pay $100 a month for the mother's care and keep as long as she lived and remained in the plaintiff's house. Here again the plaintiff and Agnes Wilson depose that the mother wanted to insist on the amount being $150 per month, but agreed to $100 on the plaintiff saying that was enough. The same procedure took place. Agnes Wilson was sent for, and the agreement was duly signed; and a fortnight later the old lady died.

These agreements were intended to be exigible when she died; and, having regard to the near approach of death, should have applied to them much the same scrutiny as is deemed necessary in the case of testamentary dispositions. The plaintiff admits that her mother said that the note was not to be presented until her death, and that as to the agreements she was told by the old lady that the family would likely give her trouble, and advised what to do in that event.

Apart from the isolation from the rest of the family, with no friends—Agnes Wilson calls herself her only friend—a description not borne out by the evidence—the mother was 80 years of age, suffering pain whenever she moved, helpless and bedridden. She saw no one, not even Harryett, who prepared the papers, and had no doctor. Her estate consisted of a farm of 96 acres, worth between $3,000 and $4,000, some cattle and furniture (about $115), money $37, and one-third share of the produce of the farm which her son was working, the amount of which is somewhat problematical. This farm was the subject of an agreement in 1904 and of the mother's will then made, which contained an agreement that it should not be revocable except with the son's consent. It is admitted that these arrange-

ments were not called to her attention, although the plaintiff was aware of them, nor were they ever mentioned by Lydia Wallace. Agnes Wilson did not know, she says, what property the latter had or what it was worth.

It is quite true that the members of the plaintiff's family and Agnes Wilson depose to the old lady's soundness of mind and understanding when she signed these documents; and a Mr. Lumb, who saw her on the 14th December, 1913, agrees with them in regard to her mind on that day. But that is within the period when she was visibly sinking, according to both the plaintiff and Agnes Wilson. The latter says, too, that Lydia Wallace may have had a weak spell about the 1st December.

I cannot think that under these circumstances the agreement to pay $100 a month can be maintained. One can perhaps understand that in her condition, isolated from everybody and separated from her home by a trying journey, she may have been willing to give anything to ensure the attention which she absolutely needed. She was in a frame of mind that called peculiarly for protection against her own fears and the rapacity of those around her. The evidence of the plaintiff's son-in-law may throw some light upon the matter. He says that Lydia Wallace sent him for Agnes Wilson, as she wanted to have the papers signed and "have no further trouble."

No independent advice, however, was permitted to this old lady, who was apparently willing to pay $5 a day to her daughter for a bed in the kitchen dining-room and such attendance as she needed—a task needing strength and constancy, but hardly to be paid for as between mother and daughter at a rate which approximates rather to that of a private hospital than a farm-house in a back township.

There is corroborative evidence, which I cannot disregard, that the old lady was willing to pay for these services. There was as well no denial of a statement made by the plaintiff that the defendant Mrs. McMorran, a sister, told her not to take care of the mother for nothing. Mrs. Bryce, another sister and co-defendant, says that she would have expected pay for the care of her mother. James Wallace, the son, says he thought the plaintiff was entitled to something. While, therefore, the agreement for $100 cannot be maintained, some allowance must be made. I do not accept either Agnes Wilson or Mr. Lumb as competent to measure the value of these services.

I think if the plaintiff is allowed for the 14 months $30 a month, i.e., $1 per day, it will be ample.

Judgment will, therefore, go for the $175.55, for $420 for

nursing, and for the three items as to which there was no contest at the trial, namely, $46.35, $79.75, and $5, all without interest. Upon the settlement of the judgment, the Registrar can ascertain if any of these last three amounts are paid, or, if claimed by others, that they are not allowed twice. The judgment will recite the abandonment of the amount payable under the document of the 5th December, 1913.

I cannot give the plaintiff her costs; for, however necessary it may have been to have this disputed account settled, she has failed upon the case as presented, and her claim of over $4,400 against an estate which hardly totals that amount, and her non-production of these documents before action, seem to me to be a sufficient reason for requiring her to bear her own costs. The defendants will have their costs out of the estate as between solicitor and client.

LENNOX, J. NOVEMBER 10TH, 1914.

HERRINGTON v. COCHRAN.

Malicious Prosecution — Arrest — Jurisdiction of Magistrate — Improper Motive — Bonâ Fide Claim of Right — Damages — Trust — Purchase of Land — Notice — Evidence.

Action for a declaration of the plaintiff's right to an interest in land, and to recover certain moneys, and for damages for malicious prosecution, arrest, and detention.

The action was tried without a jury.

P. H. Bartlett and W. E. Fitzgerald, for the plaintiff.

R. I. Towers, for the defendants.

LENNOX, J.:—The transaction, in the form of a deed and agreement between the plaintiff and defendant John Cochran, if completed, would in law have been a mortgage only, with a right of redemption to the plaintiff; but it was not consummated, owing to the plaintiff's failure to furnish additional money required to clear the title; the instruments were not delivered, and it never became effective or binding upon either of the parties. It was a business transaction only—there was no fiduciary relation created—and the defendant John Cochran did not thereby or by any subsequent act or happening become a trustee for the plaintiff in respect of the land in question.

There is no evidence upon which I could find that the amount claimed upon the Ross mortgages was not due and owing by the plaintiff. There is no evidence to impeach the judgment referred to in the pleadings; nor could either of these claims be effectively questioned in this action, as the parties are not before the Court. Whatever right, if any, the plaintiff might have to question the finality of the deed, absolute in its terms, executed to Mrs. Ross, in an action *inter partes*, he cannot question the title of a party claiming under it in good faith without notice; and the defendant John Cochran, as I find, is a purchaser for value from Mrs. Ross in good faith without notice or knowledge of any right, claim, or equity in the plaintiff. I find as a fact, too, that he did not purchase for the plaintiff, or afterwards represent that he had done so, nor did he mislead the plaintiff in this connection. It is true that he was willing to turn the property over to the plaintiff within a reasonable time without profit; but the plaintiff was unable to raise the money; and there was no consideration for this defendant's offer or promise, and it was not capable of being enforced.

The plaintiff is, therefore, not entitled to a declaration of ownership nor to the incidental rights and moneys claimed.

There will be judgment dismissing the action as to this portion of the claim. The defendant William Cochran was not concerned in this part of the claim, and I am not aware that he was by reason of it put to any costs that he would not otherwise have incurred. He was closely identified with the other matters of claim—in fact the active party—and after discussion it was agreed that I need not sever or adjust the liability as between them upon any part of the plaintiff's claim.

There are three small items together amounting, upon the evidence for the plaintiff, at most to about $90. I allow him $35 in respect of this part of his claim.

It is admitted that he is entitled to damages for malicious prosecution, arrest, and detention, unless the defendants can escape by reason of the arrest being made beyond the territorial jurisdiction of the magistrate. I need not, I think, carefully consider the effect of this point—both parties claim it as operating in their favour. I have not been referred to any authorities, and have not access to any at the time of writing. The defendants (for they have agreed to stand together) instituted criminal proceedings and had the warrant issued for the plaintiff's arrest. They intended that he should be arrested, brought into Court, and committed for trial. They probably expected that he would be imprisoned before and after the hearing in the magistrate's

court. I do not see that the defendants can very well ask to profit by the circumstance that the warrant was illegally or irregularly executed. The defendant William Cochran, without inquiry as to the manner of executing the warrant, appeared and pressed the prosecution in the magistrate's court. In awarding damages I will eliminate all that occurred outside the jurisdiction. I will allow the plaintiff nothing in respect of this. It would not affect the quantum of damages much if I treated it the other way.

The defendants had no justification for their act. It was founded upon an improper motive. It was not a bonâ fide resort to criminal law. They set the criminal law in motion to drive out the plaintiff and obtain possession of the farm. They knew that the plums were gathered and taken by the plaintiff under claim of right. The plaintiff's acts were all consistent with honest belief that he had the right to do the act complained of. It does not yet appear that he did not act bonâ fide, though mistakenly.

I assess the damages at $300. There will be judgment for the plaintiff for $335, with costs according to the tariff of this Court.

INCH V. BROCK—LENNOX, J.—NOV. 9.

Costs—Scale of Costs—Action for Deceit Brought in Supreme Court—Damages Assessed by Jury at $100*—Discretion—County Court Costs—Set-off.*]—Action for damages for deceit. The jury found in favour of the plaintiff with $100 damages. The disposition of the costs was reserved at the trial. The learned Judge now said that to give damages at all the jury had to discard the evidence of the defendant and of the witness Demsey; and, having done this, it was not easy to see why they did not allow the plaintiff a much larger sum than they did. But a jury of farmers were peculiarly well qualified to estimate the amount the plaintiff was entitled to. If, by allowing costs upon the Supreme Court scale, a larger compensation would be secured to the plaintiff, it might be proper to do so. But the mistake of forum, if instructions for the action are honestly given, is the mistake of the solicitor in most cases, and not the mistake of the client; and, generally speaking, the solicitor ought to be contented with the costs of the Court in which the action should have been brought. After giving the question a great deal of thought, the learned Judge was of opinion that the plaintiff

should have costs upon the County Court scale only, and that the defendant should not set off costs. It might be otherwise if the amount awarded reached or nearly reached the limit of County Court jurisdiction. W. R. Meredith, for the plaintiff. O. L. Lewis, K.C., for the defendant.

SCHMIDT v. SCHMIDT—MASTER IN CHAMBERS—NOV. 11.

Pleading—Statement of Claim—Addition of Cause of Action not Endorsed on Writ of Summons — Rule 109 *— Alimony.*]— Motion by the defendant Schmidt for an order striking out part of the statement of claim as disclosing a cause of action distinct from the claim endorsed on the writ of summons. In the part of the pleading complained of, the plaintiff claimed alimony from the defendant Schmidt. In the endorsement on the writ the claim was to have it declared that a certain memorandum of agreement dated the 26th March, 1914, and made between the plaintiff and the defendant Schmidt, was not binding upon the plaintiff, as the execution of the said agreement by the plaintiff was obtained by duress and undue influence, and was contrary to public policy; and also to have it declared that a certain bond, signed by the plaintiff and by the National Surety Company, in pursuance of the agreement, was null and void, and, in the alternative, if it should be held that the plaintiff had committed a breach of the bond, that she be relieved from the penalty thereof, and for an injunction to restrain the defendant the National Surety Company from payment of the amount of the bond to the defendant Schmidt, and for an order declaring that the plaintiff was entitled to the custody of her infant children. The plaintiff relied upon Rule 109, providing that the plaintiff may "alter, modify, or extend his claim as endorsed upon the writ." The Master referred to Muir v. Guinane (1905), 6 O.W.R. 844, and said that the purpose of the writ of summons is to notify the defendant of the claim made against him so that he may know what course to pursue. If he desires, upon being served with a statement of claim, to invoke Rule 109, he must shew that he has been attacked on a ground of which the writ gave him no notice, and that his position has been altered for the worse. The defendant Schmidt had no notice of the intended action for alimony until served with the statement of claim. This was a distinct cause of action, and should be tried separately. The plaintiff must justify the joinder of a distinct cause

of action, and no extra burden should be imposed upon the defendant through the plaintiff needlessly enlarging the area of the dispute: Saccharin Corporation Limited v. Wild, [1903] 1 Ch. 410. In Sandes v. Wildsmith, [1893] 1 Q.B. 771, it was held that a good test as to whether the causes of action should be joined was to ask whether, if separate actions were brought in respect of them, an order to consolidate would be made. The joining of a claim for alimony by the plaintiff in her statement of claim was irregular, and any reference to the claim for alimony in the statement of claim should be eliminated. Costs of the application to be costs to the defendant Schmidt in the cause. A. McLean Macdonell, K.C., for the defendant Schmidt. George Wilkie, for the plaintiff.

MARKS-CLAVET-DOBIE CO. LIMITED v. RUSSELL TIMBER CO. LIMITED—KELLY, J.—NOV. 14.

Chattel Mortgage—Validity—Pressure—Description of Goods—Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. ch. 65, sec. 10—After-acquired Goods—Identification—Assignment of Debt—Right of Assignee to Recover—Reference.]—Action for damages occasioned to the plaintiffs by the defendants taking possession of and removing a quantity of pulpwood which the plaintiffs claimed under a chattel mortgage made to them by one Tripp, and for an injunction restraining the defendants from further dealing with the pulpwood, and for delivery thereof to the plaintiffs. The action was tried without a jury at Port Arthur. At the time the chattel mortgage was made, the wood had not been cut or so separated and set aside or placed as to be capable of identification or of specific designation. The defendants attacked the validity of the chattel mortgage, on several grounds. The learned Judge finds that the intention of both parties to the mortgage was to secure the plaintiffs upon the chattels therein described for the price of supplies purchased by Tripp from them and delivered to him; and that no pressure was exerted upon Tripp in procuring the making of the mortgage. The wood not having been in Tripp's possession, or manufactured at all, at the time the mortgage was given, the plaintiffs' right thereto when so manufactured was questioned: see the Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. ch. 65, sec. 10. The learned Judge said that it was sufficient that the goods, when they came into existence, or when set apart, should answer

the description in the mortgage or be capable of identification as the articles described therein; but the identification must be certain and beyond doubt. And in this case only a small quantity of the wood—12 cords—stood the test; these 12 cords came from Tripp's lands or became his own property. None of the rest of the wood was at any time in his possession nor did he cut or manufacture it, nor was any part of it stamped with any mark to identify it. And, aside from this, is was essential that the wood, if it was to be the subject of a valid mortgage by Tripp, should have been his property, or have become his property, or that he should have had or acquired some beneficial interest therein; and this the evidence failed to establish. On the 28th June, 1913, the plaintiffs obtained from Tripp an assignment in writing of the debt stated to be due to him by the defendants the Russell Timber Company Limited for this wood. In regard to this, the learned Judge said that whatever moneys were due by the Russell company to Tripp at the time of Tripp's assignment to the plaintiffs, less $54 in respect of the 12 cords which belonged to Tripp, and subject to any proper deductions, should be paid by the Russell company to the plaintiffs. For this purpose a reference is directed to the Local Master at Port Arthur. The plaintiffs are declared entitled to the security of the chattel mortgage on the 12 cords, but not otherwise. On payment to the plaintiffs of $54 and interest from the 1st June, 1913, the mortgage will be treated as released. The Russell company counterclaimed damages for injury by this action to their credit and standing. Nothing having been put forward in support, this counterclaim was dismissed. Further directions and costs of the action and counterclaim reserved until after report. Glyn Osler, for the plaintiffs. W. F. Langworthy, K.C., for the defendants.