THE
ONTARIO WEEKLY REPORTER

VOL. 25 TORONTO, OCTOBER 30, 1913. NO. 2

HON. MR. JUSTICE MIDDLETON. SEPTEMBER 30TH, 1913.

DAVID DICK & SONS, LTD. v. STANDARD UNDERGROUND CABLE CO. AND HAMILTON BRIDGE WORKS, LTD.

5 O. W. N. 82.

Contract—Default in Delivery of Goods Purchased—Cause of—Evidence—Dismissal of Action—Contingent Assessment of Damages.

MIDDLETON, J., *held*, in an action for damages for non-delivery of goods as ordered that the default was due solely to the actions of the plaintiffs and dismissed the action with costs, but fixed the damages in the event of a successful appeal at $1,000.

Action by contractors of Welland against defendants, a Hamilton Company, for $100,000 damages, alleged to have been cuased by reason of non-delivery of steel to complete their contract and for loss on other contracts, etc. Defendants counterclaimed for $33,197,75, moneys paid on plaintiff's account in connection with completion of said contract.

J. L. Counsell, for the plaintiffs.

D. L. McCarthy, K.C., and G. H. Levy, for the defendants.

I. F. Hellmuth, K.C., and E. H. Ambrose, for third party.

HON. MR. JUSTICE MIDDLETON:—At the hearing all the questions in issue between the plaintiffs and defendants were disposed of, except that relating to the liability of the defendants owing to the delay in the supply of steel necessary for the construction work.

After considering the matter very carefully I can see no reason for discrediting the evidence given on behalf of the third party shewing that the delay in the furnishing of

the steel is to be attributed to the action of Mr. Dick. In the light of this evidence I do not think the plaintiffs can recover.

If the case should go further it may save difficulty if I now assess the damages in the event of my being held to be in error in this view. It is quite plain that the plaintiffs' claim is grossly exaggerated, and that the damage actually sustained was a comparatively small sum. The evidence fails to establish the suggestion that men were kept idle awaiting the arrival of steel. Nevertheless some inconvenience undoubtedly did arise, as the gin pole, scaffolding, etc., had to be moved, and the actual work of construction was no doubt rendered somewhat more expensive, because the material was not all at hand when wanted. I assess the damages as best I can on somewhat meagre evidence, at one thousand dollars.

Upon the accounts verified at the trial, the defendants have paid over and above the contract price, to complete the contract, $15,701.14. Mechanics' liens to a large amount are registered against the property; the validity of these liens is disputed; and it may be that the rights of the parties can be worked out with respect to these amounts in the mechanics' lien proceedings. To avoid any question, leave should be reserved in the judgment to apply in this action with respect to any sums which the defendants may be called upon to pay to lien holders not included in this $15,701.14.

I do not recall anything having been said with respect to interest on this amount. The defendants are, I think, entitled to interest from the time the money was paid. If the account cannot be adjusted on settling the judgment, I may be spoken to.

The defendants are entitled to costs as against the plaintiff in both the action and counterclaim.

The issue as between the defendants and third party has not been discussed. I may be spoken to with reference to it at any time.

HON. SIR JOHN BOYD, C. SEPTEMBER 18TH, 1913.

GOLDSMITH v. HARNDEN.

5 O. W. N. 42.

Will—Power of Appointment—Exercise of—Validity — Subsequent Attempted Exercise of Power — Revocation — Title to Land—Action for Possession.

BOYD, C., *held*, that an appointment made voluntarily and without the knowledge of the appointee was valid even against a subsequent appointee although the appointment was made for valuable consideration.

Sweet v. *Platt* (1886), 12 O. R. 229, discussed.

Action to recover possession of land, tried at Belleville. The facts in the case go back over more than half a century.

In 1846 the late John Platt, a prosperous merchant of Warkworth, made his will appointing the late Thos. Scott of Cobourg, and Adam Henry Meyers of Trenton, his executors. After disposing of other interests, the will purported to give a farm of 100 acres in the township of Cramahe, now Brighton, to his brother the late Daniel Platt, for life; then to the late Homer Platt for life; then to such of Homer Platt's offspring as Homer Platt should appoint and should survive Homer Platt.

The wording of the will was such that it left it open to the contention that Homer Platt took an estate tail instead of an estate for life, and he mortgaged the farm in fee to the late John Eyre, barrister, of Brighton, and afterwards sold the equity of redemption. Homer Platt then, on the assumption that he only had an estate for life, appointed the farm in fee to his daughter Luella Sweet who mortgaged it to the late E. B. Stone, barrister, of Peterboro, and who assigned it to Senator Cox.

Luella Sweet afterwards sold and conveyed the farm in fee simple to the late Dr. Goldsmith then practising in Peterboro, who conveyed to his wife, the plaintiff. After all this in 1900, Homer Platt purported to revoke the appointment to his daughter Luella Sweet, and made a new appointment to two daughters, Mrs. Harnden of Warkworth, and Mrs. Dr. Raulston of New York, for the consideration of $500.

In the case of *Sweet* v. *Platt* (1886), 12 O. R. 229, the late Sir Chas. Moss, acting for Eyre, contended that Homer Platt had an estate in tail, and could convey to Eyre, but

the Chancellor determined that Homer Platt had only a life estate, and that the mortgage to the late John Eyre affected only that life estate. Homer Platt died in 1912.

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

E. Guss Porter, K.C., and George Dreury for the defendants contended that the appointment to Luella Sweet was void and because there was no consideration for it and it was made without Luella Sweet's knowledge at the time.

HON. SIR JOHN BOYD, C.:—The land in question was owned by John Platt, who by his will devised it for life to his brother Daniel Platt, and after his death he devised a further life estate therein to Homer Platt, and in case Homer Platt should leave offspring surviving, the ultimate devise was to such of his offspring as Homer should appoint. On 23rd November, 1880, Homer exercised his power of appointment in favour of one of his offspring, Luella Sweet; who has survived him. In November, 1889, Luella conveyed for value all her rights in the land to P. D. Goldsmith, and he conveyed all to his wife the plaintiff in October, 1901.

Homer, life tenant, died last year, and this action is brought to get possession of the land as against the defendants.

They claim under a subsequent appointment of the same land made by Homer of 28th April, 1900. By the defence the effect of the earlier appointment is sought to be avoided by allegations that the first appointment was not valid and irrevocable, that it was made without consideration and without the knowledge of the appointee and that it is void as against the subsequent appointment which was for valuable consideration.

These matters of defence, whatever their importance, were none of them proved by any evidence. On the present record and evidence there is nothing to invalidate the first deed of appointment made in 1880, and the registered title of the plaintiff under that would seem to be unimpeachable by the defendants.

Apart from this record, however, the defendants in argument set up the invalidity of the plaintiff's title because of the circumstances under which the first deed of appointment was made as disclosed in the report and judgment of the case *Sweet* v. *Platt* (1886), 12 O. R. 229. That happens to be my own decision and the expression is used in the reasons

for judgment that "Untrue representations were made to the appointee and her father which induced the execution of the power of appointment." From this isolated sentence it is urged that the exercise of the power of appointment was nugatory, being exercised in such a way as to invalidate it; this point was raised in that action; it was argued that the appointment was exercised for another purpose than to give the appointee any interest and that the whole transaction should be vacated if any part of it was to be set aside (pp. 231-2). But the decision was the instruments subsequent to the deed of appointment were declared to be inefficacious and the title of the plaintiff as appointee was sustained (p. 235). No doubt the rights of the appointee were contingent on her surviving the life tenant who was to appoint, but on his death her rights to the fee became absolute under the appointment of 1880, which was not invalid and has not been disturbed by the appointor up to the time of his death. This deed of appointment was valid as between appointor and appointee. The misrepresentations were not such as to affect the valid passing of the interest under the control of the life tenant (the appointor).

No good purpose would be served by opening up the transaction and the litigation for another investigation on this aspect of the case. The appointment was good though voluntary and though not disclosed at the time to the appointee, and it was not competent for the appointor, of his own motion, to execute any subsequent appointment which would operate as a revocation of the first.

The plaintiff should have judgment as asked with costs.

HON. MR. JUSTICE LENNOX. OCTOBER 6TH, 1913.

McGREGGOR v. CURRIE ESTATE.

5 O. W. N. 90.

Executors—Action against—Evidence to Establish Contract between Plaintiff and Testator—Corroboration—Laches—Acquiescence—Statute of Limitations—Trust—Company — Shares — Delivery of—Dividends—Appropriation—Waiver—Costs.

Action against the executors of one Currie, deceased, to compel the transfer to the plaintiff of ten shares of capital stock of the Ford Motor Company, pursuant to an alleged contract between the plaintiff and the deceased, or for damages or other relief.

LENNOX, J., gave plaintiff judgment declaring him entitled to the 10 shares, holding that plaintiff had established a definite contract. That the Statute of Limitations had no application. That deceased was trustee for plaintiff of these ten shares, they being specific and ear-marked.

A. R. Bartlett, and Urquhart, for the plaintiff.

A. C. McMaster, for the defendants.

HON. MR. JUSTICE LENNOX:—There seemed to be unanimity of opinion at the trial as to the good character, good faith, and truthfulness of the plaintiff. This does not dispense with the necessity for corroboration; but, granted that this statutory requirement is complied with, the testimony to the plaintiff's unimpeachable character, and my own observation of the manner in which he gave evidence, disinclines me to accept without question the very severe comments now made upon his testimony by counsel for the defendant.

I find that there is sufficient corroboration of the plaintiff's evidence as to the alleged contract. There is quite sufficient in support of the evidence of the plaintiff to induce me to believe that the plaintiff's story is probably true, to believe that it is true; and in fact there is evidence which could hardly be forthcoming except upon the hypothesis of the truthfulness of the plaintiff's story. See *Wilson* v. *Howe*, 5 O. L. R. 323; *Radford* v. *MacDonald*, 18 A. R. 167; *Green* v. *McLeod*, 23 A. R. 676; *Parker* v. *Parker*, 32 U. C. C. P. 113.

But to justify a recovery in this action I must believe that the plaintiff's story of the making of a contract is true, as well as find that there is evidence corroborating it. Naturally enough, it is argued that the plaintiff's inaction for so many years after the time he thought he was entitled to delivery of

the stock at least suggests a doubt as to the *bona fides* of his claim.

I have come to the conclusion, however, that the delay does not shew the non-existence of the alleged contract, and that the plaintiff's acquiescence or submission was induced by the intimate business and social relations then and for many years existing between the two families—the Curries and the McGreggors—and by the close business and personal relations between the deceased and the plaintiff, as well as the consideration of the younger for the older and the deference with which I would expect the plaintiff would probably treat his father's trusted partner and intimate friend. And why not? The money of McGreggor the elder, and of the deceased, had furnished the plaintiff with profitable employment in the past, and was still substantially the basis of his enterprises. I accept the evidence of the plaintiff as being in all essential particulars accurate and trustworthy.

It is argued that the contract was not definite, in that it might mean either shares at par or above or below par. I think it was quite definite, and was for ten shares of the nominal value of a thousand dollars; or, to put it the other way, it was for $1,000 worth of the $2,500 worth of stock the deceased would receive in the transaction—a part of what the deceased would get. This necessarily meant at par, and, being a thousand dollars worth necessarily meant ten shares. And these shares are earmarked; they were allotted as number 54.

Is the claim barred by the Statute of Limitations? I do not think the statute has any application; but, if it has, the plaintiff is not barred. Where a contract is open to more than one construction, and the parties are silent as to one of the terms of the contract, a plaintiff seeking to enforce it must be content to accept the most unfavourable construction if that is the way in which the defendant understood it at the time. Here, when the plaintiff asked for the stock, the deceased did not dispute his right to it, but merely disputed his right to get it then. He said "I was not to give it until the property sold was paid for in full." The plaintiff grumbled, but acquiesced. No time had been mentioned, and both parties recognized what the deceased contended for as the meaning of the contract. This seems reasonable enough, as the deceased was transferring the shares in consideration that he would be profited by what the plaintiff

would bring about, but until the property was paid for his gain was not assured. The plaintiff acquiesced. In the circumstances of this case—in the face of the attitude of the parties then and afterwards—could a Court say that the time claimed by the deceased was not a reasonable time? And, more than this, could the deceased, if alive, be allowed to say that that was not a reasonable time and that, his declaration notwithstanding, the plaintiff was barred? I think not. The property was paid for on the 5th of November, 1908.

But in any case I do not see how the statute applies. The plaintiff's counsel does not contend, and the defendant's counsel denies, that this can be regarded as a trust. All the same, I am of opinion that the deceased Currie was clearly a trustee for the plaintiff of ten of the twenty-five shares first allotted to him. They were partners in a joint adventure, and each was the agent of the other for certain purposes connected with it. The plaintiff was not acting for himself only, when he entered into the contract with the American company; he was, as the agreement says, representing others as well. Before anything was done at all, the plaintiff and the deceased had come together and were acting in unison.

The deceased was an active party throughout. If the transaction was carried through, he was to be handed twenty-five shares out of the company's first payment of stock, and fifteen of these were to be his property, ten being the property of the plaintiff. I see no difficulty in holding that the deceased was a trustee of these ten shares for the plaintiff. The shares are specific and earmarked as I said.

The plaintiff is entitled to have the contract specifically performed by delivery of ten shares of the twenty-five shares first allotted to the deceased or by delivery of the shares of the new company in substitution for them if new shares have been issued. He is also entitled to the dividends, if any, paid in respect of the ten original or substituted shares since Mr. Currie's death.

I have limited the payment of dividends in this way, after a good deal of doubt and hesitation. I am clearly of opinion that the plaintiff was entitled to the dividends which accrued in respect of these shares from the 5th of November, 1908, but the deceased in his lifetime having with the knowledge of the plaintiff appropriated these dividends as his own, without any violent, or even definite or emphatic action on the

part of the plaintiff, I have come to the conclusion that the plaintiff in an action against the estate of the deceased recipient, should be taken to have waived his rights.

I am of opinion, also, that the plaintiff's lack of firmness and his failure to state the facts as early as he should have done, invited this litigation, and that he is therefore not entitled to costs. The executors will be entitled to their costs as between solicitor and client, out of the estate.

There will be a stay of execution for thirty days.

HON. MR. JUSTICE MIDDLETON. OCTOBER 7TH, 1913.

OWEN SOUND LUMBER CO., LIMITED v. SEAMAN KENT COMPANY LIMITED.

5 O. W. N. 93.

Particulars—Statement of Claim — Contract—Damages—Practice—Information Obtainable by Discovery — True Function of Particulars—Supplementary to Pleadings.

MIDDLETON, J., varied order of Master-in-Chambers, 25 O. W. R. 48, by ordering plaintiff to deliver particulars ordered with reference to the making of the contract and to require delivery of particulars of the damages claimed.

Appeal by plaintiffs from an order of the Senior Registrar, sitting for the Master-in-Chambers, dated 24th September, 1913, *ante* 48, directing the plaintiffs to furnish particulars with respect to certain matters before the defendants plead.

H. S. White, for the plaintiffs.

Coyne, for the defendants.

HON. MR. JUSTICE MIDDLETON: — The plaintiffs by the statement of claim allege an agreement by the defendants to purchase lumber to be manufactured by the plaintiffs at certain prices. The plaintiffs, it is said, manufactured the lumber and had the same ready for delivery, but the defendants failed and refused to take delivery or carry out the contract. The plaintiffs sue for the price of the lumber sold, or, in the alternative, for damages for breach of the contract. Upon what the defendants rely, or what the defence is to the action, is not suggested by the material filed, nor indicated by counsel upon the argument.

The defendants sought for particulars as to time and place of the contract and whether it was in writing or not; and no objection to this is taken.

What is complained of is an order requiring the plaintiffs to state the time when the lumber was manufactured, the dates and times and quantities when piled, and the place where piled; to give in detail what is relied upon as constituting the failure and refusal to accept, and saying when the lumber in question was sold, the particulars of the sales, giving the price, date of sale, etc. It is said this was intended to be supplemented by a direction to state whether the lumber has been sold and if so to give these last particulars.

Under our practice I do not think that the order, in so far as it is complained of, can be sustained. No doubt before the trial the defendants are entitled to obtain the fullest possible information touching the plaintiffs' case; but this information is ordinarily to be obtained by discovery; in the first place by the production of documents and in the second place by oral examination. Rule 138, which authorizes the making of an order for particulars, is supplementary to the provisions dealing with pleadings which are embarrassing or tend to prevent a fair trial; and is intended to enable the Court to compel a party pleading to supplement his pleading where it is so bald or vague as to fall short of what is required by the general provision directing the pleading to contain a concise statement of the material facts upon which the party pleading relies. In England the practice as to particulars has gone beyond what is either necessary or desirable here; because there there is not the same facility in obtaining discovery, and it makes little difference whether the information sought is given as particulars or given in answer to interrogatories. Yet even in England the distinction is recognized; see, for example, the decision of the Court of Appeal in *Young* v. *Scottish Union* (1907), 24 T. L. R. 73.

The true function of particulars is well stated in *Millbank* v. *Millbank*, [1909] 1 Ch. 376. It is first to prevent a surprise at the trial—a function that can seldom be relied upon here, with our ample provisions for discovery—and secondly to so define and limit the claim as to bring about a limitation of the evidence at the hearing—again a function that can seldom be relied upon here—and thirdly, as supplementary to the pleadings, in fact, as an amendment to pleadings embarrassing by reason of lack of particularity.

Some particulars are properly required under this pleading, as the alternative claim for damages is too vague. The order should be modified so as to require the plaintiffs to deliver the particulars ordered with reference to the making of the contract and to require delivery of particulars of the damages claimed. Such damages are probably the only remedy the plaintiffs are entitled to, as they do not shew that the property in the lumber in question has passed, and the defendants are entitled to know what damages are sought. If the lumber is not yet sold, this will be the difference between the contract price and the market price. If the lumber has been sold, this may be the difference between the contract price and the sale price. Whatever the claim is, the plaintiffs ought to put it forward in some definite and tangible form, so that the defendants, if so advised, may pay some sum into Court in satisfaction.

Under the circumstances the costs here and below ought to be in the cause.

HON. MR. JUSTICE MIDDLETON. OCTOBER 4TH, 1913.

REX v. JUNG LEE.

5 O. W. N. 80.

Criminal Law—Keeping Common Gaming House—Magistrate's Conviction—Summary Jurisdiction—Criminal Code, secs. 228, 773 (f), 774, 781—Amending Act, 1909—Evidence to Shew Offence—Code, sec. 226—Failure to Shew Keeping of Bank or Gain to Accused—Presumption—Secs. 985, 986—Warrant—Wilful Obstruction.

MIDDLETON, J., *held*, that *Rex* v. *Honan*, 26 O. L. R. 484, is conclusive against the contention that a Magistrate may not proceed to try the accused without giving him an election to go before a jury.

That the locking of a door does not intend to create a presumption of the intention to prevent or obstruct a constable from attempting to enter premises within sec. 986 Criminal Code. The presumption is created when something active is done, amounting to a wilful obstruction or prevention.

Motion to quash conviction made by S. J. Dempsey, Police Magistrate, at Cochrane, for unlawfully keeping a common gaming house.

The only evidence taken was that of the Chief of Police, who, on the night in question, went to the laundry operated by the accused, and found twenty-five men in the room play-

ing cards at a table upon which there was money. There were also cards necessary for playing fan tan and dice. The door was locked, no demand was made for admission, but when one of the men inside came out, the Chief entered and made the arrest.

The conviction was attacked upon the grounds, first that the magistrate proceeded to try without giving the accused his election to go before a jury, and secondly on the ground that there was no evidence to shew the offence.

G. F. McFarland, for the defendant.

W. M. Willoughby, for the magistrate.

HON. MR. JUSTICE MIDDLETON:—The case of *Rex* v. *Honan*, 26 O. L. R. 484, is conclusive against the first contention.

Where a person is charged with keeping a disorderly house as defined by sec. 228 of the Criminal Code, he may be proceeded against by indictment under that section, in which case he is liable to one year's imprisonment; and he may be proceeded against summarily under sec. 773 (*f*), in which case he is liable, under sec. 781, to six months' imprisonment, or a fine not exceeding $100, or both. The jurisdiction to proceed summarily for such an offence is made absolute by sec. 774. Throughout I am speaking of the sections as amended in 1909.

By sec. 226 a common gaming house is defined as a place kept by any person for gain to which persons resort for the purpose of playing any game of chance, or where a bank is kept by one or more of the players exclusive of the others.

The evidence in this case does not shew that a bank was kept or that there was any gain to the accused; and the conviction must therefore be quashed, unless the evidence is aided by the presumption found in secs. 985 and 986.

Sec. 985 creates the presumption only where the premises are entered under a warrant or order, and there was no warrant or order in this case.

Sec. 986 only applies if the constable is wilfully prevented from, or obstructed or delayed in, entering the premises. There was no prevention or obstruction here within the meaning of sec. 986. The door of the room was locked but the Code cannot and does not intend to create a presumption merely because a constable on attempting to enter premises finds the door locked. The presumption is created when some-

thing active is done, amounting to a wilful obstruction or prevention.

Upon the ground of the absence of evidence the conviction cannot be sustained, and must be quashed. There will be an order for protection; and no costs are awarded.

HON. MR. JUSTICE KELLY. OCTOBER 3RD, 1913.

WOLSELEY TOOL & MOTOR CAR CO., LTD. v. HUMPHRIES.

5 O. W. N. 72.

Writ of Summons—Service out of the Jurisdiction—Rule 25 (e)—Contract—Place of Payment—Inference.

KELLY, J., *held*, that it is well established that leave to serve out of the jurisdiction a writ of summons or notice in lieu of a writ is properly granted where, either expressly or by implication, the contract or a part of it is to be performed within the jurisdiction and there is a breach of it or of that part of it, within the jurisdiction.

Thompson v. *Palmer*, [1893] 2 Q. B. 80, followed.

Appeal by the defendant from an order of Holmested, Senior Registrar, sitting for the Master in Chambers, refusing to set aside the service of the writ of summons upon the defendant in Vancouver, British Columbia, and the order permitting the service to be made.

Featherston Aylesworth, for the defendant.

A. McLean Macdonell, K.C., for the plaintiffs.

HON. MR. JUSTICE KELLY:—This application fails. It is well established that leave to serve out of the jurisdiction a writ of summons or notice in lieu of a writ is properly granted where, either expressly or by implication, the contract or a part of it is to be performed within the jurisdiction and there is a breach of it or of that part of it, within the jurisdiction. *Thompson* v. *Palmer* [1893] 2 Q. B. 80 (C.A.), is authority for the proposition that if a proper inference from the contract is that payment is to be made within the jurisdiction then non-payment is a breach within the jurisdiction.

The contract here expressly provides for payment of the price of the auto cars in Toronto, and I think the fair and reasonable inference to be drawn from the contract and the surrounding circumstances is that any other payments

contemplated by the contract are likewise payable here. This term and the effect of this deduction from the contract and surrounding circumstances, are not negatived by the fact stated by defendant that plaintiffs accepted payment for the auto cars by their sight drafts on defendant, through the Bank at Vancouver, which he paid there.

Part of the claim sued upon is for freight upon the cars delivered to defendant under the contract. These items are so connected with the payments contemplated by the contract that I think the two cannot be disassociated, at least in so far as they are involved in this application.

It is not made clear—and perhaps it is not material—whether what defendant paid in Vancouver was the price of the cars plus bank charges on the drafts, thus netting to the plaintiffs in Toronto the price agreed upon, just as if payment were made in Toronto or whether what he paid was the agreed upon price without adding these bank charges.

The application is dismissed with costs.

HON. MR. JUSTICE MIDDLETON. OCTOBER 4TH, 1913.

MARTIN v. McLEOD.

5 O. W. N. 79.

Venue—Change of — County Court Action — Transfer to District Court — Application of one Defendant — Judgment in County Court against the other Defendant—Effect of—Practice.

MIDDLETON, J., *held*, that the fact that judgment has been signed against one defendant does not deprive the other defendants of the right to have the trial at the place which is most convenient. *Berthold* v. *Holton*, 23 O. W. R. 839, distinguished.

Appeal from order of HIS HONOUR JUDGE DENTON, refusing to change the place of trial from Toronto to North Bay under Rule 767.

J. H. Craig, for the defendant J. T. McLeod.

R. G. Agnew, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—Upon the material the action is one which ought to be tried at North Bay, and this was the view entertained by the learned County Judge; in fact, he had made the order sought, but rescinded it upon his

attention being drawn to the decision of my brother Riddell in the case of *Berthold* v. *Holton*, 23 O. W. R. 839; thinking that the effect of this decision was to preclude the making of the order sought because judgment had been signed against the defendant Ada Cameron for default.

I have had the opportunity of discussing the matter with my learned brother, and he agrees with me that his decision has no application to this case and that the fact that judgment has been signed against one defendant does not deprive the other defendant of the right to have the trial at the place which is most convenient. The real effect of the decision in the case in question is that what there took place amounted to such an attornment of the local jurisdiction as to preclude the motion. Upon the papers being transmitted all subsequent proceedings are to be carried on in the Court to which the action is transferred automatically by reason of the change of the place of trial. The action upon the transfer will become an action in the District Court of Nipissing.

The appeal will therefore be allowed and the order made, costs being in the cause.

NOTE.—In transmitting the papers to North Bay the Clerk of the County Court ought to include a copy of the judgment already signed, so that the true state of the cause may appear in the North Bay office.

HON. MR. JUSTICE MIDDLETON. OCTOBER 8TH, 1913.

RE BOYLE & CITY OF TORONTO.

5 O. W. N. 97.

Municipal Corporations—Expropriation by City By-law of Outside Land for Addition to Industrial Farm—"Acquire"—Municipal Act 1913, sec. 6—Special Act 1 Geo. V. ch. 119, sec. 5—Bona Fides—Statutory Powers—Exhausting by Original Purchase—Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (33).

Motion by Boyle, the owner of certain lands sought to be taken by the corporation of the city of Toronto, by by-law No. 6353, intituled, "A By-law to Acquire Additional Lands for the Industrial Farm," to quash this by-law.

MIDDLETON, J., refused to quash the by-law on the ground that it was not intended that the power should be exhausted by a single exercise, *holding* that there was no reason to suppose that the by-law was not an absolutely *bona fide* exercise of the municipal powers. *Re Inglis & Toronto*, 8 O. L. R. 570, distinguished.

Motion by David Boyle, the owner of certain lands sought to be taken by the city of Toronto by By-law No. 6353, entitled "A By-law to Acquire Additional Lands for the Industrial Farm," to quash this by-law. Heard in Weekly Court on the 2nd October.

H. H. Dewart, K.C., for Boyle.

Irving S. Fairty, for Toronto.

HON. MR. JUSTICE MIDDLETON:—By sec. 576 (3), the council of any city or town may pass a by-law "for acquiring any estate in landed property within or without the city or town, for an industrial farm." At the time of the passing of this statute the word "acquire" had not the wide significance now given to it by the Municipal Act of 1913, sec. 6—which provides that the power to acquire shall include the power to acquire by purchase or expropriation—it only enabled the municipality to acquire by purchase.

The city, contemplating the establishment of an industrial farm, and realising the impracticability of securing a site without power to expropriate, applied for a special Act; and, by 1 Geo. V. ch. 119, sec. 5, power was given to expropriate lands within a radius of twenty-five miles from the city and to establish an industrial farm thereon.

Subsequently the city acquired lands for the purpose of an industrial farm, by purchase from several owners. No by-law was passed relating to these purchases, but the purchase was sanctioned by resolution of the city council.

Thereafter, buildings were erected upon this farm, and it has been used now for some time for the purpose contemplated. The proceedings of the city council and its commissioners indicate that throughout there was no intention to confine the ultimate limit of the farm to the parcel first acquired. It was realised that if the undertaking succeeded and met the hopes of its promoters the farm would have to be from time to time enlarged.

On February 10th, 1913, the by-law in question was passed, reciting the special Act, but making no mention of the general Act and that lands had been acquired and an industrial farm had been established thereon, "and that in the opinion of the council it has become necessary to acquire additional lands for the purpose of the farm"; the lands in question are therefore "expropriated and taken for the purpose of an addition to the said farm."

The *bona fides* of the application of the City Council in taking this land is somewhat faintly and quite unsuccessfully attacked by the applicant. I am satisfied that there is no reason to suppose that the by-law is not an absolutely *bona fide* exercise by the municipality of powers which it thinks it possesses.

The necessity and desirability of the purchase are questions entirely for the municipal council, and cannot, in the absence of *mala fides,* be in any way reviewed by the Court.

The question more seriously discussed upon the argument is this: it is said that the powers conferred by the statute were fully exercised once and for all upon the purchase of the original site and that the corporation thereupon became *functus* as to the matter and had no right to acquire, either by purchase or expropriation, any other parcel for the enlargement of the original site. Reliance is placed for this upon the case of *Re Inglis & Toronto,* 8 O. L. R. 570, where MacMahon, J., said, with reference to a street-closing by-law which was void as being passed without the consent of the Dominion Government—that consent being a necessary condition precedent to the exercise of municipal jurisdiction —"it was a void by-law by reason of the consent of the Dominion not having been obtained; and that void by-law, in the passing of which the council had exhausted its powers, could not be given life and rendered valid by the subsequent consent of the Dominion Government and the passing of the amending by-law."

I am inclined to think that the expression "in the passing of which the council had exhausted its powers" was a mere dictum, and that the decision was really based upon the ground that the subsequent consent and amendment of the by-law could not give validity to that which was void in its inception.

But, quite apart from this, there are many other cases in which the question as to whether a power can be exercised from time to time, or only once for all, is discussed. These cases are now of no real value, because, by the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (33), "if a power is conferred . . . the power may be exercised . . . from time to time as occasion requires." This provision is similar to the provision of the English Interpretation Act, 52 and 53 Vic. ch. 63, sec. 32, concerning which Craies states,

p. 243, "the substantial effect of the provision is to rebut the presumption that the power is exhausted by a single exercise."

Even under the old law I would have come to the conclusion, having regard to the subject-matter of the legislation, that it was not intended that the power should be exhausted by a single exercise.

The application in my view fails, and must be dismissed with costs.

HON. R. M. MEREDITH, C.J.C.P. OCTOBER 13TH, 1913.

HEALEY-PAGE-CHAFFONS CO., LTD. v. BAILEY & HEHL.

BAILEY & HEHL v. NEIL AND WIFE.

5 O. W. N. 115.

Vendor and Purchaser—Contract for Sale of Land — Several "Options" upon Same Parcel — Priority — Notice—Husband and Wife—Misrepresentation—Expiry of Time — Pleading—Statute of Frauds — Amendment — Trial in Absence of Defendants—Rescission—Waiver — Evidence—Breach of Contract—Criminal Proceedings—Costs.

First Neil gave an option for sale of land. Wife refused to join. Secondly Neil and wife gave another option on said land at an increased price acting on representation that first option was no good. Thirdly Neil and wife gave a third option on same land, but informed the parties of second option and agreed to notify them if the second option was not taken up. The third option was registered. Plaintiffs in first action procured an assignment of the first and second options and purchased the property from Neil and wife, then brought action to have third option removed from the register.

MEREDITH, C.J.C.P., *held*, that first option had priority over third option.

That the second option had no effect for two reasons: (1) it was procured by misrepresentation and (2) it expired without being acted on.

The second action was by holders of third option for damages for breach of contract to sell, and was dismissed with costs.

The first action was brought to remove from the register a cloud upon the plaintiffs' title to land.

The second action was for damages for breach of contract to sell land.

M. K. Cowan, K.C., and F. D. Davis, for the plaintiffs in first action.

No one appearing for the defendants.

M. K. Cowan, K.C., and A. E. Cleary, for the defendants in second action.

No one appearing for the plaintiffs.

HON. R. M. MEREDITH, C.J.C.P.: — These cases have come on for trial, and have been heard, under circumstances by no means those most conducive to that which ought to be the object of all litigation—a just determination of all matters in question between the parties, speedily.

The first named case was entered for trial at the sittings of this Court, here, beginning on the 23rd day of September last, when the defendants sought, and in more than one way endeavoured to obtain, delay; and eventually, agreeably to all parties, the trial was postponed until this day, here, and the sittings of the Court adjourned accordingly.

One of the reasons for granting the delay was that the other of these two cases was pending, but not ripe for trial; and, as it arose out of the same transactions and depended upon the same facts as those involved in the other case, it was desirable that the two cases be heard together, or at all events at the same sittings of the Court, not only for the purpose of saving expense, time and inconvenience, but also to avoid inconsistent judgments which might be the result and possibly—owing to different evidence at the different trials—the necessary result of such a severence of the trials. And so it was part of the arrangement for delay, agreeable to all parties, that the two cases should be tried here to-day, and they have come on for trial accordingly; but neither counsel for the parties Bailey and Hehl nor either of them in person, is present; nor is any satisfactory reason for their absence given.

In these unsatisfactory circumstances—attributable perhaps to some unlooked for indisposition—after some delay for the purpose of enabling those who represent the other parties to communicate with those who represent the absent parties, and those present being unwilling that the cases should go over until the next sittings of the Court here, the trial of the first mentioned case proceeded, and is now concluded, *ex parte;* and I must now determine it regardless of the fact that there may be an application for a new trial, and a new and full trial of it.

The land in question became suddenly property of highly speculative value, owing to the possibility of the establishment of a large manufacturing industry near it; and land agents of all sorts began to hover about it; the first two to alight procured, in about 15 minutes, they say, from the owner of the land in question—William Neil, one of the de-

fendants in the second of the before mentioned two actions —an agreement to sell it to them; Neil's wife was also applied to, but refused to enter into the agreement. These land agents were not able to pay for, and never had any intention to buy, the land, but took that which they called, and is usually called, "an option" with a view to selling their rights under it at a profit. Soon after another land agent appeared on the scene, and on the misrepresentation that the "option" already given was "no good," because not signed by the owner's wife, procured for himself another option signed by the wife, as well as the owner, at an increase of $500 in the price. The third to approach the owner and his wife were the land agents Bailey and Hehl, parties to both actions; they were told of the second option and that they would be notified in case it was not taken up. It was not, but was allowed to lapse; they were sent for, and came, and entered into the third agreement or "option," which was given by both the owner and his wife. The owner and a witness, James Scott, have both testified that when this agreement was entered into the purchasers were informed of the giving of the first "option," though at this time there can be no doubt the owner thought it of no effect because his wife had refused to become a party to it.

The plaintiffs in the first mentioned action procured an assignment of the first and second "options" and then obtained a deed of the land from the owner and his wife, after paying to them the price mentioned in the first "option;" but all this was done after they had actual knowledge of the third "option."

The third "option" is registered—irregularly, the plaintiffs in the first mentioned action contend—and that action is brought to have the cloud, which they allege such registration creates upon their title, removed.

The second mentioned action is brought by the land agents who obtained the third "option"—Bailey and Hehl —to recover damages from the owner and his wife — the Neils—for breach of their agreement to sell—that is in the event of the plaintiffs succeeding in the first mentioned action.

There was no need for two actions; all questions ought to have been raised, and should be determined, in one; the questions involved in the second mentioned action should have been brought out in third party proceedings.

But each case must now be dealt with as it stands.

According to the evidence adduced, the first "option" has priority, for whatever it, the option, may be worth, over the third.

The second option has no effect, and it is out of the question, for two reasons: (1) it was obtained by misrepresentation; and (2) it expired without being acted upon; both of which objections to it are open to the holders of the subsequent "option."

Notwithstanding the first "option," the owner and his wife might of course sell whatever legal or equitable rights, in, and in respect of, the land, remained in them; so that the holders of the third "option" might take the benefit of any defect in the first option that would have been open to the owner, for instance, a defence under the Statute of Frauds, and that might be a formidable defence to the first named action, but it has not been pleaded and I can deal with this case now only *secundum allegata et probata.* An amendment, raising the question, is not to be made unasked for; whatever might be the case if the defendants were present and seeking it.

Then according to the letter of existing "options," the plaintiffs in the first mentioned action have priority in regard to the husband's contract to sell, whilst the defendants have priority in regard to the wife's. There is nothing in the evidence sufficient to warrant a finding that the defendants were to take nothing under their option unless the holders of the first option failed to avail themselves of it; both husband and wife were and had been from the time of giving the second option, in the belief that the first was "no good"; otherwise they would not have given the second and third, as the withholding of the third until the second had expired, among other things, goes to shew. The most that can be said against the defendants in this respect is that they had notice of the first "option" sufficient to make their "option" subject to any legally enforceable rights under the first one.

The repayment of the cash payment on the third "option" is not strictly proved, and if it were it would not be sufficient evidence of any agreement to rescind or any waiver by both Bailey and Hehl, the joint purchasers, and none the less joint purchasers because, for their convenience, one of them only was named in the option.

My first impression, therefore, was that the plaintiffs in the first action were entitled to priority, under the first "option," only in regard to the rights and interests of the husband in the land; and that the defendants in that action were entitled to priority to the extent of the wife's rights and interests in it; but I now think, and find, that there never was any intention on the part of anyone concerned in the third "option" to sever in any way the rights and interests of husband and wife; that the contract was for all or nothing; and failing to get all they take nothing; just as if an attempt were made to compel them to take the wife's rights and interests in the land only they would have a complete defence in the assertion that it was to be all or nothing; and accordingly the wife was not guilty of a breach of her agreement with these defendants in joining in the deed to the plaintiffs if the husband were bound by the first option to so convey; and in this case, as the pleadings and evidence stand, I must hold that he was.

It ought, therefore, to be adjudged in the first mentioned action that the plaintiffs' deed has priority over the defendants' option; which judgment, duly registered, will clear the title of any cloud that "option" may now be upon it.

It appears that whilst these civil actions were pending criminal proceedings were taken against one of the parties to them in connection with the registration of the third option; and I can have no doubt that such proceedings were taken for the purpose of indirectly affecting the proceedings in these civil actions; a thing much to be deprecated. There seems to be no reason, nor indeed any excuse, for not waiting until the civil proceedings begun were concluded, and the whole circumstances disclosed in evidence, before making the criminal charge.

There will be judgment for the plaintiffs in the first mentioned action as I have intimated; but under all the circumstances of the case, there will be no order as to any of the costs of it.

In the other action, the defendants appearing, and the plaintiffs not appearing, for trial, the defendants have a right to have it dismissed, and they may take that right with costs.

Proceedings in each action, upon this judgment, will be stayed for 30 days.

HON. R. M. MEREDITH, C.J.C.P. OCTOBER 13TH, 1913.

HEALEY-PAGE-CHAFFONS, LIMITED v. BAILEY AND ANOTHER.

5 O. W. N. 113.

Trial—Notice of—Time for—Computation—New Rule 248.

MEREDITH, C.J.C.P., *held*, that Rule 248 means that no case shall be set down for trial until after a 10 days' notice of trial has been given; and then it shall be set down six days before the sittings of the Court. That there was no intention to extend the long standing 10 days' notice.

Motion made on the defendants' behalf, at the Sandwich non-jury sittings, on the 23rd September, 1913, to strike this case out of the list of cases entered for trial, at that sittings, on the ground that it had been irregularly set down.

J. H. Rodd, for the defendants' motion.
F. D. Davis, for the plaintiff. contra.

HON. R. M. MEREDITH, C.J.C.P., 23rd September, 1913. — Mr. Rodd's contention is that, in effect, sixteen days' notice of trial must now be given, and the recent changes in the wording of rule 538, now 248, give some color to that contention. It was quite clear before such changes that ten days' notice of trial was enough, there was then nothing that would give any kind of encouragement to this motion.

The first section of the changed rule requires that "Ten days' notice of trial shall be given before entering an action for trial"; and the 3rd section requires that an action shall be entered for trial "not later than the sixth day before the commencement of the sittings"; and so the 16 days are made up; 10 days before the action is set down and 6 afterwards.

But I can have no manner of doubt that there was no intention thus to extend the long standing 10 days' notice; nor am I compelled by the literal meaning of the new words of the rule to hold that any change in this respect was brought about.

That which the rule means is this: that no case shall be set down for trial until after a 10 days' notice of trial has been given; and then it shall be set down 6 days before the sittings of the Court.

The motion is dismissed; there will be no order as to costs of it; the costs of the action have not been appreciably increased by it; and the point is a new one; and one which would be one of much moment if effect had to be given to it.

HON. MR. JUSTICE LENNOX. OCTOBER 13TH, 1913.

CLARKE v. ROBINET & HEALEY.

5 O. W. N. 143.

Charge on Land — Agreement — Duration—Payment of Claims — Discharge of Land—Payment into Court—Costs.

Action for a declaration that the plaintiff's farm is free from any claim or claims by the defendants or either of them, under what was called "the syndicate agreement" or otherwise. No time was fixed for the duration of the agreement, which was made in September, 1909.

LENNOX, J., *held*, that on return of money paid him, plaintiff was entitled to relief asked, and to costs of action, he having duly tendered the money to defendants.

Wigle, K.C., and Rodd, for the plaintiff.

Mr. Davis, for the defendant.

HON. MR. JUSTICE LENNOX:—What is called the syndicate agreement was entered into to enable the plaintiff through the personal efforts of the defendants and a Mr. Parker, to sell his farm as building lots; the parties joining in this undertaking to share in the receipts after the sales had netted the plaintiff $10,000. This arrangemennt was come to in September, 1909. Four years have elapsed. During all this time the farm has been dotted with surveyor's stakes and there is no evidence that any of the members of this syndicate have done anything to bring about sales. No time was fixed for the duration of this arrangement—probably because all parties anticipated the almost immediate disposal of the property—and it can hardly be argued that it was, or should be allowed to, endure forever. Equally it can hardly be said that the defendants have not been allowed the advantage of the agreement for a reasonable time. The agreement has been registered and, whether it creates an interest in the land or not, it at least constitutes a cloud upon the plaintiff's title.

On the 24th of October, 1912, the plaintiff at the instance of the defendant Healey, and with the concurrence of the other defendant, was induced to sign an option for the sale of his farm, as a farm, to one Adhelme Jaques, and the defendants signed that instrument and therein agreed as follows, namely:

We, Jules Robinet, A. F. Healey, and William Parker, having an agreement with David Clarke, registered against the lands hereinafter described, hereby agree to sign a release of the same at any time on being paid the following amounts:—

Jules Robinet, $47; A. F. Healey, $404, and William Parker, $404.

I have underlined "at any time."

These sums of money with a proper release to be executed have been duly tendered to defendants. It should be mentioned, too, that before the execution of the option referred to, the defendants had frequently expressed dissatisfaction with the syndicate arrangement and a desire to put an end to it and get back the moneys they claimed to have advanced the plaintiff in connection with it. For some time, too, they had left the payment of taxes and other management and control solely to the plaintiff.

It is alleged in the statement of defence and was stated at the trial that Robinet had sold out his interest to one Leo Page, but no assignment or transfer was put in evidence. The defendants at the trial again expressed their desire to be done with the syndicate arrangement, and their willingness to release the plaintiff's land, but only upon the condition that the plaintiff would convey, pursuant to the option above referred to. I have declared by a judgment just handed out, in a suit of Leo Page and Jaques versus this plaintiff, that the option in question is not binding upon him; and I cannot perceive that the defendants have a right to concern themselves in this matter in any way whatever. It was argued that Page and Jaques should be parties to this action; but that question was settled by an interim order of the local Judge. Besides this, it is said that Jaques had assigned to Page, and Robinet says he executed the agreement to release upon the instructions of Page. The syndicate agreement provided for personal services; and Page could not, by assignment, take the place of Robinet. Page might per-

haps become entitled to the money, but Robinet says he has parted with all his interest under the agreement.

I am of opinion that upon the payment of $451, being the aggregate of the claims of the defendants, the plaintiff is entitled to the relief he claims and to the costs of this action. This money has been duly tendered to the defendants.

Let these costs be taxed to the plaintiff and set off against the $451 mentioned, and let the balance of this sum owing the defendants, if it exceeds the taxed costs, be paid into Court by the plaintiff to the credit of this action subject to the further order of this Court.

Upon payment of this money into Court, if it exceeds the costs, or if upon taxation of costs there is no excess, let judgment be entered for the plaintiff declaring that the land in question is released and discharged from the syndicate agreement and from all claims and demands arising out of or connected with it, except the interest or claim, if any, of William Parker, who is not before the Court, and for the balance of the taxed costs, if they exceed $451. I am directing that the money in Court shall be subject to further order, as there may be some question concerning its apportionment and possibly a claim may be made on it by Page.

HON. MR. JUSTICE MIDDLETON. OCTOBER 8TH, 1913.

STANDARD BANK v. BRODRECHT.

5 O. W. N. 142.

Bank—Overdrawn Account—Action on—Compound Interest—Proceeds of Security—Costs—Reference—Report—Appeal.

Action to recover an overdrawn account. Defendant asked for an account. At trial matter was referred to Referee. On appeal from findings of Referee it was shewn that plaintiffs had charged defendant compound interest at 6½ per cent per annum, with monthly rests.

MIDDLETON, J., allowed defendant $107 on account of interest, the amount to be checked.

Appeal by the defendant from the report of HIS HONOUR JUDGE CHISHOLM, of Waterloo, Special Referee, dated 5th September, 1913.

R. S. Robertson, for plaintiffs.

J. A. Scellen, for defendant.

HON. MR. JUSTICE MIDDLETON: — Brodrecht was a customer of the Standard Bank for many years. The action is to recover the amount of his overdrawn bank account.

The defendant sets up in answer that the bank improperly charged in his account two sums, amounting to $406.08, as costs *Re Everatt,* and further that he deposited a number of collateral notes at the bank, which the bank has collected and not accounted for. He asks that an account be taken. At the trial the action was referred, and upon the reference the findings were all in favour of the bank; the referee reporting as due the balance, $1,024.50, that was claimed.

Several questions were argued upon appeal.

First, it is said that the bank has charged compound interest at the rate of six and a half per cent. per annum, with monthly rests. Counsel for the bank now states that attention was not drawn to this matter upon the reference and that he does not attempt to defend the mode of computation. The difference is said to be $107. Subject to this being checked on behalf of the bank, the appeal will be allowed to this extent.

The main controversy is over the proceeds of a certain note known as the Lake and Daniels note. This note was sued in the north-west in the name of the bank. It is said that the money was ultimately remitted to and received by Mr. Miller, a solicitor, now dead. Mr. Miller claimed the right to set this off against certain costs which he claimed Brodrecht owed him. The money never reached the hands of the bank.

The bank disclaims all responsibility for this litigation, and claims that the note was given to Miller, as Brodrecht's solicitor, at Brodrecht's request, and that Brodrecht was allowed to use the name of the bank because one of the parties to the note was a relative of his, and it was thought that the note could be more readily collected if the bank appeared to be the holder.

Miller was examined before the referee, but died before Brodrecht gave his evidence. If Miller's evidence is accepted, the bank's case is made out. Undoubtedly there are difficulties, very forcibly presented by Mr. Scellen, in the story as told by Miller. On the other hand, there are difficulties that appear to me just as great in the story told by Brodrecht, (when he knew that by reason of Miller's death he could not be contradicted). Whatever might have been

the conclusion I would have arrived at in the first instance, I certainly cannot interfere with the finding of the learned referee, who saw and heard the parties.

Then with reference to the costs, which it is said were improperly charged. Before me it was admitted that the proper costs are properly chargeable, but it was said that the costs were charged without taxation. It does not appear that this contention was seriously urged, if urged at all, before the Master. I have looked at the bills, there is nothing in them to justify any interference, and I do not think that I should direct moderation where no beneficial result would follow.

In the result, the appeal substantially fails, and save as to the interest, must be dismissed with cost. I think, in view of this partial success, that $20 should be deducted from the costs which would otherwise be taxable to the bank.

A motion for judgment was made upon the report. Judgment is granted with costs.

HON. MR. JUSTICE MIDDLETON. OCTOBER 8TH, 1913.

RE AMES.

5 O. W. N. 95.

Will—Construction—Legacies Charged on Land—Devisee—Life Estate—Remainder to Children or Issue—Tenants in Common per Stirpes—Rule in Shelley's Case—Settled Estates Act—Gift over—Costs.

Motion by Margaret Ames, a beneficiary under the will of Myron B. Ames, deceased, for an order determining a question arising upon the administration of the estate as to the construction of the will. The will was that upon the death of the widow (which had occurred) Thomas should take during the term of his natural life without impeachment of waste and that Thomas should pay thereout several legacies.

MIDDLETON, J., *held*, that Thomas took only a life estate and that the legacies should be paid by mortgaging the estate under the Settled Estates Act.

J. Harley, K C, for the applicant, Margaret Ames.

W. S. Brewster, K.C., for Thomas Ames.

J. Grayson Smith, for Myron Ames.

J. R. Layton, for John Ames et al.

J. R. Meredith, for infants, and now appointed to represent any unborn children who may be concerned.

HON. MR. JUSTICE MIDDLETON:—The question arises under the will of the late Myron B. Ames, who died on the 21st July, 1881, having made his will dated 19th April, 1881. This will has not been proved, but has been registered.

The testator gives the north half of lot thirty in the second concession to his wife for life, so long as she remains his widow; she to provide for the education of certain of the testator's children so long as they remain at home and assist in farming the lands in question. Upon the death of the widow, (which occurred on the 21st July, 1910), this parcel goes to Thomas "during the term of his natural life, without impeachment of waste he the said Thomas Ames paying thereout the several legacies or sums following, (then follow certain legacies amounting in all to $2,100), all which said four several legacies or sums I charge and make chargeable on the said north half of said lot number thirty . . . and from and after the decease of the said Thomas Ames I give and devise said north half of said lot number thirty in the second concession of the said township of South Dumfries unto such of the children of the said Thomas Ames as shall be living at his decease and to the children or remoter issue then living of any child of the said Thomas Ames as shall be then dead leaving any such issue the same children to take and divide *per stirpes* and the said children and issue of the said Thomas Ames to take among themselves as tenants in common, and subject to the said several devises and charges as aforesaid. I give and devise the said north half of the said lot number thirty in the said second concession of the said township of South Dumfries unto the said Myron B. Ames, Margaret H. Walker, Emily Thomas, Ursula Jane Barger, Amelia Ames, and John Ames, their heirs and assigns forever as tenants in common."

The time for payment of these legacies has now passed, and Margaret, who is entitled to her legacy of $500, makes this application.

There is no doubt that these legacies are charged upon and payable out of the land.

Thomas Ames asks to have it declared that he is entitled to an estate in fee or in tail. If he is, he will have no difficulty in raising and paying the legacies in question. If he is not, and if he is entitled to the life estate only, he asks

that an order may now be made under the Settled Estates Act authorising the mortgaging of the land.

I think that Thomas himself takes a life estate only and that the rule in *Shelley's Case* does not apply so as to give him any greater estate. The testator has not used the word "heirs" nor has he used any other words as equivalent to "heirs." If Thomas himself leaves him surviving children or remoter issue, then such children or issue will take as tenants in common *per stirpes*. If he leaves him surviving no children or issue of children, then the brothers and sisters named will take. I read this gift over as relating to the death of Thomas. This should be so declared, and the order sought should go for the raising of the money under the Settled Estates Act.

The costs of all parties should be paid out of the money so raised. I direct this in preference to directing the costs to be paid out of the estate, because the application is really one in ease of the owners of this particular parcel, and does not affect the testator's general estate. Myron Ames was properly notified as one of those interested in the gift over. The application does not concern in any way the parcel devised to him.

HON. MR. JUSTICE LENNOX. OCTOBER 13TH, 1913.

PAGE AND JAQUES v. CLARK.

5 O. W. N. 143.

Fraud and Misrepresentation—Sale of Farm—Fraud and Conspiracy of Purchasers—Void Agreement — Cancellation — Refusal of Specific Performance—Forfeiture of Deposit—Counterclaim — Damages.

LENNOX, J., dismissed action for specific performance of an alleged contract by the defendant to sell his farm to plaintiffs, or for damages, on the broad ground that the plaintiffs were not entitled to any assistance from the Court, because the so-called contract was induced by fraudulent misrepresentations.

E. D. Armour, K.C., and Bartlett, for plaintiffs.

Wigle, K.C., for defendant.

HON. MR. JUSTICE LENNOX:—The plaintiffs are not entitled to specific performance or damages. If I could find that there was an arrangement honestly brought about by

the plaintiffs for the defendant to sell his farm I would probably come to the conclusion that it was not to become an enforceable contract until Wm. Parker signed it. That has not been done; but my decision is not based upon this nor upon the argument as to the non-assignability of an option. (*Harrison* v. *Robertson,* 21 S. C. R. 402), important as these objections may be. I give judgment for the defendant upon the broad ground that the plaintiffs are not entitled to any assistance from the Court, because the so-called contract was induced by fraudulent misrepresentations of the plaintiffs and their agent, knowingly made to the defendant and in pursuance of a fraudulent scheme. I find that the representations were material and were ignorantly accepted and acted upon by the defendant as true.

It is true that the plaintiff Page did not appear in the matter—he had good reasons for not doing so—and both he and his solicitor, Mr. Healey, studiously avoided disclosing to the defendant that Page had already an assignment of Robinette's interest in the syndicate agreement.

Adhelme Jaques is described in the statement of claim as a gentleman residing in the township of Sandwich West, and so within easy reach of the Court house; yet although flagrant dishonesty on the part of this plaintiff in obtaining the contract was charged, both in the pleadings and in the evidence at the trial, he did not go into the witness-box to explain or deny. The other visible actor in the transaction was Mr. Healey, the confidential friend and business associate of the defendant; and it is to be regretted that he allowed himself to become solicitor or and agent of the plaintiff Page in a transaction which he knew was not what it appeared to be, and this without divulging his change of attitude to the defendant.

Page did not give evidence either, but that is perhaps not significant. I am satisfied that the defendant's evidence is substantially true; and I feel compelled to give credit to it where it conflicts with the evidence of Mr. Healey. All the main statements of fact in paragraphs 4, 5, 6 and 7 of the statement of defence are, in my opinion, well borne out by the evidence at the trial.

The defendant counterclaims, and claims to retain the $200 deposit as damages. If the conclusions I have reached are well founded, the plaintiffs ought not to have the assistance of the Court to get back their money. I think, too, that the defendant, by the delay, the tieing up of his prop-

erty and the disorganisation of his plans, has sustained actual damage to this amount or more. I therefore direct that the money paid be forfeited to the defendant as damages.

The agreement in question will be set aside and delivered up to be cancelled, and the registration thereof vacated. *Beckman* v. *Wallace*, App. Div., 29 O. L. R. 96, may be referred to.

The action will be dismissed with costs.

MR. HOLMESTED, SENIOR REGISTRAR. OCTOBER 7TH, 1913.

DUNN v. DOMINION BANK.

5 O. W. N. 103.

Process—Writ of Summons — Special Endorsement—Statement of Claim Delivered as Well—Irregularity—Setting aside—Form 5 Rules 56, 111, 112, 127—Amendment—Affidavit Filed with Appearance—Statement of Defence—Practice.

MASTER-IN-CHAMBERS struck out a second statement of claim filed, under Rule 111, holding that plaintiff must obtain leave before he can file a second statement of claim.

W. B. Milliken, for defendant.

G. Grant, for plaintiff.

MR. HOLMESTED:—The plaintiff issued a writ indorsed with a claim for several sums of money which he claimed the defendants "held and received" to his use, but which they had wrongfully withdrawn from his account and improperly charged to the plaintiff, purporting to be the amounts of cheques which the plaintiff claims were forgeries. There is a specific statement in the indorsement as to each amount. The writ purports on its face to be "specially indorsed." The claim indorsed is, notwithstanding the allegations regarding the alleged forgeries, in substance a claim for "money had and received" which is a claim which may properly be specially indorsed (see form 5.)

The defendants have accepted the writ as a specially indorsed writ and filed an affidavit with their appearance as required by Rule 56.

Rule 111 provides that "when the writ is specially indorsed such indorsement shall be treated as a statement of claim and no other statement of claim shall be necessary."

Notwithstanding this rule the plaintiff has filed a new statement of claim. This second statement of claim the defendants move to strike out. What the plaintiff has done is in effect to file two statements of claim. This is a practice which is not warranted by the Rules. Where a plaintiff specially indorses his writ that constitutes his statement of claim, and I do not think he is at liberty to deliver any other statement of claim without leave. After a defence has been filed he may amend the indorsement and if need be file an amended statement of claim under Rule 127, but he cannot before defence deliver a new statement of claim or amend the indorsement on the writ without the leave of the Court.

In the present case the new statement of claim appears to be a mere reiteration of the special indorsement, and no reason is suggested why it should be allowed even as an amendment. I therefore conclude that the order should go as asked striking it out and the defendants should have the costs of the motion in any event of the action.

The defendants ask an extension of time for filing a defence, or that the affidavit filed may be ordered to constitute the defence. I do not see anything in the Rules authorising me to declare that the affidavit constitutes a defence. Rule 56 in a certain event constitutes it a defence, but that event has not arisen and Rule 112 appears to require that when that event has not arisen a defence should be delivered as in the ordinary course of an action. In the circumstances I think the defendant should have an extension to file a defence, say for a week from 7th October inst.

MR. HOLMESTED, SENIOR REGISTRAR. OCTOBER 9TH, 1913.

AUBURN NURSERIES v. McGREDY.

5 O. W. N. 104.

Process—Writ of Summons — Service out of the Jurisdiction—Contract — Breaches — Assets in Jurisdiction — Con. Rule 25 (1) (e), (h).

Motion by defendants to set aside an order allowing service of the writ in Ireland and also the writ and the copy and service thereof.

H. W. Mickle, for the defendant.

A. C. McMaster, for the plaintiffs.

MR. HOLMESTED:—The claim of the plaintiffs arises in this way. They made a contract with the defendant in Ireland for the purchase of a certain quantity of roses. They were informed by the defendant that the freight must be paid through to destination and he demanded from the plaintiffs money to enable him to pay this freight. The plaintiffs complied with this demand and sent defendant, as they allege, $977.23 on account. The roses were consigned to the plaintiffs at, it is alleged, the wrong place, viz., Queenston instead of Oakville, how that may be I do not think it is necessary now to inquire; but two breaches of the contract are practically admitted (1) non-payment of freight as to which see *Orient Co.* v. *Brekke,* [1913] 1 K. B. 531; (2) Excessive amount of goods, viz., 1,000 trees more than ordered as to which see *Shipton* v. *Weil,* [1912] 1 K. B. 574. In these circumstances the plaintiffs refused to accept the goods and they claim to recover (1) the amount advanced as above mentioned; (2) freight and duty paid by them in respect of the roses, and (3) for cartage, labour and fertilizer expended by them on the roses by arrangement with the defendant.

The plaintiffs are not, therefore, suing on the contract or for breach of the contract. They say in effect—true it is, there was a contract between us and the defendant, but he failed to carry it out, and we are suing to recover money which we have paid and for which in fact no consideration has been received. This liability arises on an implied contract to refund the money advanced, and on an express contract to pay for the cartage, etc. The debtor, according to the ordinary rule is bound to seek his creditor and the money claimed by the plaintiffs therefore is payable in Ontario and the case therefore seems to be within Rule 25 (1) e. But the plaintiffs also rely on the fact that the defendant has property within the jurisdiction of the value of $200 and more. The property in question consists of the roses which were sent out pursuant to the contract, and the defendant's counsel contended that it is begging the very question in issue in the action to say that they are the defendant's property—the contention of the defendant being that they are now the property of the plaintiffs, and that argument would certainly be entitled to great weight were it not for the fact

that the defendant, according to the correspondence produced, admits that he did not carry out the contract in the particulars above mentioned.

In these circumstances it appears to me the goods are, as the plaintiffs contend, the goods of the defendant, and on that ground also the allowance of service of the writ out of the jurisdiction was justified.

The motion is refused. Time for appearance is extended for a week to enable the defendant to appeal from this order, if so advised. The costs must be to the plaintiff in the action.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. OCTOBER 9TH, 1913.

KING v. LIMERICK TOWNSHIP.

Negligence — Highway — Unsafe Condition — Snowdrifts —Horse Killed—Notice to Municipal Council.

SUP. CT. ONT. (2nd App. Div.) dismissed appeal from judgment awarding plaintiff $125 damages for death of horse killed by reason of neglect of municipal council to make highway passable. Council had six months' previous notice to repair.

An appeal by the defendants from a judgment of HIS HONOUR JUDGE DEROCHE of Hastings County Court, pronounced 5th July, 1913.

This was an action to recover $200, damages for the death of a horse, alleged to be due to injuries received and sustained while endeavouring to make its way along the highway, through snowdrifts allowed to accumulate thereon.

His Honour Judge Deroche, at trial gave plaintiff judgment for $125 and costs.

The appeal to the Supreme Court of Ontario (Second Appellate Division), was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

F. E. O'Flynn, for defendant township, appellants.

W. F. Morden, K.C., and W. D. M. Shorey, for plaintiff, respondent.

Their Lordships' judgment was delivered by

HON. SIR WM. MULOCK, C.J.EX. (V. V.) :—This appeal was argued yesterday. The action was brought for damages against the township of Limerick because of an accident that happened to the plaintiff's horse on a highway of that township.

The learned trial Judge found for the plaintiff. From that judgment the defendants now appeal.

It appears that there is a certain roadway between two villages in the township of Limerick, and that at one point in said roadway there has always been in winter time an accumulation of snow in a cut. The cut in question is about 40 feet in length, near the slope of a hill that falls from the south towards the north. The cut is somewhere between 10 and 20 feet wide, not stated definitely, and deep enough to admit of at least 4 feet of snow.

For many years, owing to the impassable condition of this particular spot during the winter time, it was the custom of the travelling public to go around by a private way, by a far, instead of by the highway.

Owing to a misunderstanding between the owner of that farm and the township, the farmer notified the municipality that he would not allow his farm to be used any longer for this purpose during the approaching winter. Of this the township had notice for at least six months before the accident, that the farm could not be so used.

It appears that the cut runs from the north to the south of the road, and when snow comes it caused more than the average amount of snow to stay in this cut.

On the 12th of March the plaintiff, a farmer, drove in the morning along this road with a pair of horses, sustaining no injury. To all appearances the road was then in good condition.

On returning later on in the day, one of his horses went through the surface of the snow, and in his struggle evidently broke a blood-vessel and died in his tracks.

The action is against the township for non-repair of that highway. It is no duty of the township to clean away snow that does not create a liability, but if the snow becomes dangerous then the question of liability may arise.

Here the defendants' council knew for many months that the public would not be allowed to use the private way and would be compelled to drive by this dangerous way. They

knew that for years the public had avoided the public road because of its dangerous character. They knew the state of the weather and they knew, if they knew anything, that a thaw had set in some days before, that the thaw was general throughout the township, and they must have known quite well that in that season of the year thaws were to be expected and had already begun at that particular time. Nevertheless they paid no attention to the matter and allowed the condition to exist which culminated in the accident.

It appears that it would have cost only a couple of dollars to have made this road safe. The township it is said is a poor one, no doubt that is correct, but it must have been exceedingly poor to be unable to afford that particular outlay of a couple of dollars. It does not appear that the road in other parts of the township were in disrepair. So far as appears this must be the only condition of the kind existing at this spot in the whole township. The rest of the township appeared to be in good repair, because an inspection had been made extensively over the roads of the township. Also a report had been made from time to time of the condition of this cut. We, therefore, impute knowledge to him, (the inspector), and through him to the council as a whole, of the probable dangerous condition. He must have known that the thawing would have brought about this dangerous condition of affairs which caused this accident.

I am also reminded that this was a main road between two villages and was the regular travelled road and was one of the main arteries of travel of the whole township, so that there were special circumstances for keeping it in proper repair.

We, therefore, think this appeal must be dismissed with costs.

HON. SIR G. FALCONBRIDGE, C.J.K.B. OCT. 11TH, 1913.

STEINBERG v. ABRAMOVITZ.

5 O. W. N. 107.

Pleading—Statement of Defence—Leave for Amendment by Defendant—Otherwise Judgment for Plaintiff.

Appeal by the plaintiff from an order of MR. HOLMESTED, Senior Registrar, sitting for Master in Chambers, re-

fusing to grant judgment for plaintiff for $1,500, or to direct the delivery of particulars of the defence to that claim.

G. T. Walsh, for plaintiff.

E. Sugarman, for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Paragraph 2 of the statement of defence is ill pleaded if it is intended as a defence to the $1,500 deposit as well as to the costs and expenses. Defendant has leave to amend within one week so as to include the $1,500—otherwise judgment for plaintiff for $1,500.

Costs of this motion to be costs to plaintiff in any event of the action.

HON. SIR G. FALCONBRIDGE, C.J.K.B. OCT. 11TH, 1913.

BERLIN LION BREWERY CO. v. MACKIE.

5 O. W. N. 107.

Venue—Change Berlin to Belleville—Motion for—Convenience—Undertaking of Plaintiffs to Pay Additional Costs of Trial at Place Chosen by them.

Appeal by the plaintiffs from an order of MR. HOLMESTED, Senior Registrar, sitting for the Master in Chambers, changing the place of trial from Berlin to Belleville.

W. D. Gregory, for plaintiff.

Eric N. Armour, for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—In the present state of the practice there is no sufficient preponderance of convenience or expense or other valid reason for changing the place of trial from Berlin to Belleville.

The plaintiff undertaking to pay the additional costs, if any, incurred by defendant by reason of trial at Berlin, the Registrar's order will be reversed and the place of trial changed back to Berlin. Costs to be costs in the cause.

HON. MR. JUSTICE MIDDLETON. OCTOBER 3RD, 1913.

REX v. GRAY.

5 O. W. N. 102.

Criminal Law—Indeterminate Sentence—Industrial Farm—Municipal Act, 1903, sec. 549a—Prisoner Confined in Central Prison upon Warrant Committing him to Industrial Farm—Habeas Corpus —Discharge of Prisoner Ordered.

Upon return of a *habeas corpus* addressed to the warden and keeper of the Central Prison, defendant moved for his discharge.

H. C. Macdonald, for the prisoner.

No one contra.

HON. MR. JUSTICE MIDDLETON:—The only authority for the detention of the prisoner produced upon the return of the *habeas corpus*, is the warrant issued by Ellis, acting magistrate, committing this man to an industrial farm for two years' indeterminate sentence under 2 Geo. V. ch. 17, sec. 34.

In my view this does not authorise incarceration in the Central Prison. Nothing was produced shewing how the prisoner came to be in the custody of the warden.

I therefore order his discharge.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. OCTOBER 9TH, 1913.

REEVES v. TORONTO RW. CO.

Negligence—Street Railway—Passengers — Alighting—Opening Exit Door.

SUP. CT. ONT. (2nd App. Div.) *held*, that where a street car exit door is opened mechanically by the motorman it is an invitation to the passenger to alight.

An appeal by the defendants from a judgment of HIS HONOUR JUDGE DENTON, of York County Court, pronounced 6th June, 1913.

Plaintiff a married woman brought action to recover $500 damages for injuries for being thrown violently from the steps of the defendants' car, at the corner of Harbord and Borden streets, Toronto, on the 26th December, 1911.

HIS HONOUR JUDGE DENTON, at the trial, gave plaintiffs judgment for $200 and costs.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

J. W. Bayne, K.C., for the defendant railway company, appellants.

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

HON. SIR WM. MULOCK, C.J.EX. (v. v.):—There may not be evidence as to the purpose, but the public have come to have an opinion that the door is there to be opened to allow passengers to alight.

It is under the control of one of the servants of the company. The passenger himself cannot open it, he has to wait until it is opened for him.

Then here the car had been slowed down and was at a standstill apparently, and the passenger was not able to discover any movement when she reached the place to get out, where the door had been opened to allow her to alight; and not being able to feel any motion of the car, and on being directed to the open door, she assumed that now was the time for her to step down, and get off.

We think that that was an invitation for her to alight.

HON. MR. JUSTICE SUTHERLAND (*dissenting*):—I would be strongly inclined to give effect to the appellant's contention.

It seems to me that under the circumstances, on the plaintiff's own evidence, the mere opening of the door of the car when it was slowing down, when the motion was still apparent, should have warned her not to step down until the car had stopped. It need not have been deemed an invitation in itself for her to alight.

Appeal dismissed with costs, Hon. Mr. Justice Sutherland, dissenting.