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APPELLATE DIVISION.

FEBRUARY 5TH, 1914.

PASKWAN v. TORONTO POWER CO.

Master and Servant—Injury to and Death of Servant—Common Law Liability of Master—Negligence—Defective System—Safety Device—Evidence—Findings of Jury.

Appeal by the defendants from the judgment of KELLY, J., upon the findings of a jury, in an action by the widow of John Paskwan, who was killed while working for the defendants at their power-house, to recover damages for his death.

The appeal was heard by Boyd, C., RIDDELL, MIDDLETON, and LEITCH, JJ.

D. L. McCarthy, K.C., for the appellants.

T. N. Phelan and O. H. King, for the plaintiff, the respondent.

MIDDLETON, J.:—The action was brought by the widow of the late John Paskwan, who was killed at the power-house of the defendant company on the 8th February, 1913, to recover damages at common law, and, in the alternative, under the Workmen's Compensation for Injuries Act, for his death.

Although the appeal as launched covers wider ground, upon the argument it was confined to the discussion of the question whether liability at common law had been shewn.

Paskwan was employed as a rigger in the house over the forebay of the power company's works at Niagara Falls. A travelling crane is there erected. This crane travels from end to end of the house. The hoisting apparatus travels across the house at right angles. From the crane are suspended two hooks, the

larger of which is capable of lifting fifty tons, and moves comparatively slowly; the smaller is capable of raising ten tons, and moves with greater rapidity. These hooks are hoisted by steel cables wound upon drums.

On the day of the accident in question, Paskwan was working at some stop-logs, placed at the entrance to the penstocks in the forebay. He and other men had placed cables around these stop-logs, when the crane was signalled, and came from the other end of the premises for the purpose of hoisting them. The foreman signalled his desire to use the larger hook. This was accordingly lowered, and the smaller hook was hoisted so as to get it out of the way. The crane was operated by a man in a cage suspended below it, where he would have a clear and untrammelled view, not only of the crane itself, but of the operations being carried on. The hoisting apparatus was some thirty-five feet from the floor of the building.

Owing to the negligence of the man in charge, he failed to stop the winding-up of the cable raising the smaller hook, with the result that it was carried up to the drum, and, being unable to pass through, such strain was placed upon the cable that it broke, and the hook fell, striking Paskwan on the head, and killing him instantly.

The jury, in answer to questions submitted, has found, in addition to negligence on the part of the man in charge of the crane, negligence on the part of the company, as the master-mechanic had failed to install proper safety appliances. They assess the damages under the Workmen's Compensation for Injuries Act at $3,000 and at common law at $6,000.

Having regard to the evidence given at the trial, the meaning of this answer is plain. It was contended that a safety device could readily have been installed which would have stopped the rotation of the hoisting drum before the hook reached such a position as to place an undue strain upon the cable. The drum was operated by an electric current, and the device suggested was a cut-out mechanism by which the circuit would be broken as soon as the cable was wound upon the drum to the extent necessary to bring the hook to the desired height; thus automatically bringing the machinery to rest in precisely the same way as it would have been stopped by the man in the cage by the operation of the controller under his charge. The controller, it must be borne in mind, is nothing more nor less than a circuit-breaker operated by hand.

In answer to this, the company allege that some two years ago a precisely similar accident happened. Their engineers

were then instructed to look into the desirability of the suggested safety device. It was stated that extensive investigation was then made, and in the result it was found that the device suggested was uncertain in its operation, and undesirable, as it removed from the operator the sense of responsibility which rested upon him when there was no such device in use, and that with the device accidents would more frequently happen than when the machinery was not so equipped.

Upon the hearing of the appeal I was very much impressed by Mr. McCarthy's argument; but a perusal of the evidence has satisfied me that, even assuming the legal validity of the contention, the facts upon which it is based are not so clearly established as to justify taking the case from the jury. I may even go further, as a very careful perusal of the evidence has satisfied me that the jury came to the right conclusion when they thought, as they evidently did, that this defence was not made out on the evidence, as there is no difficulty in adopting a simple mechanical device by which the circuit must inevitably be broken when the hook reaches a certain height.

It was said on argument that this would not bring the hoisting drum to rest, but that it might spin on and by its own momentum bring about the disaster attempted to be guarded against. But, when it appears, as it does here, that the machine is operated by a controller, which, as already stated, is nothing but a circuit-breaker, and that, upon the opening of the circuit, the brakes are applied, it is quite obvious that the contention is nothing but a subterfuge. One of the witnesses suggests that the device would be dangerous, because when once open it would need to be closed by hand, and this might not be done, thus destroying the protection. But any one having merely an elementary knowledge of mechanics can see that it would be perfectly simple to have a device which would be automatically made ready for action as soon as the hook was again lowered.

It was shewn, and not contradicted, that devices of this kind have been successfully installed and are in use upon precisely similar buildings. All this shews that the case could not have been taken from the jury, and we cannot interfere with the jury's findings.

The appeal must be dismissed with costs.

BOYD, C., and LEITCH, J., agreed.

RIDDELL, J.:—This is not the case of employers, in view of an accident, having taken reasonable care to investigate the proper

means to prevent the recurrence of another; and being informed by authority, apparently competent, that the existing system was the best which could be installed.

Nor is it the case of witnesses called for the plaintiff admitting that opinions might well differ as to the scheme suggested by them being better than that adopted by the defendants.

Nor is it the case of machinery being bought of a reputable firm and used without any notice or knowledge of defect.

There is nothing more in this case, as I view it, than a defective piece of machinery, which, certain witnesses swear, may be perfected and rendered safe by a simple and easily understood device; and the defendants' witnesses disputing the efficiency of such device. I see nothing that a jury should not be allowed to pass upon.

I agree that the appeal should be dismissed, and with costs.

FEBRUARY 5TH, 1914.

*PEEBLES v. HYSLOP.

Registry Laws—Agreement for Sale of Timber Standing on Land—Registrable Instrument—Prior Registration of Subsequent Conveyance of Land—Notice to Grantee after Conveyance and Payment of Purchase-money, but before Registration—Priority—Registry Act, 1910, *secs.* 70, 71.

Appeal by the plaintiff and cross-appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of Wentworth in an action in that Court for trespass to land by cutting timber thereon, with a counterclaim by the defendants for damages. The judgment of the County Court Judge dismissed the action with costs and the counterclaim without costs.

The appeal was heard by BOYD, C., RIDDELL, MIDDLETON, and LEITCH, JJ.

J. G. Farmer, K.C., for the plaintiff.

W. E. S. Knowles, for the defendants.

BOYD, C.:—Having read over all the evidence, I see no reason to disagree with the learned Judge in his conclusion of fact

*To be reported in the Ontario Law Reports.

that no actual notice was given of the instrument relating to the timber sold to the defendants in August, 1910, for $500, with six years to remove it, until after the plaintiff had bought the land for $4,000, paid his money in full, and received the conveyance therefor on the 26th March, 1912.

He did get such notice in May, and some days before his deed was registered, which was on the 7th May, 1912.

The agreement with Hyslop for the sale of timber was a registrable instrument, but it was not registered till after this action had passed into judgment, which is dated the 1st November, 1913, and the registration was on the 6th November.

The learned County Court Judge has given judgment dismissing the action, because actual notice came to the plaintiff before his deed was registered. He thought the case was governed by Millar v. Smith (1873), 23 C.P. 47. The section of the Registry Act referred to in that decision (sec. 67) is the one now in force (with some words omitted), and reads as expressed in the Act of 1910, 10 Edw. VII. ch. 60, sec. 71: "Priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument by the person claiming under the prior registration."

Some dicta in Millar v. Smith point as the Judge below has decided, but the judgment of the Court does not so declare the law. The case is authority for no more than this. Where a subsequent purchaser has actual notice of a prior unregistered instrument before the execution of the subsequent deed, and the subsequent deed is obtained for the very purpose of being registered, in order that by the terms of the Act the unregistered instrument may be avoided, it is competent for the Court of law to give equitable relief by virtue of the statute and declare that the Act shall not be used fraudulently in aid of a person with such actual notice.

In Millar v. Smith the plaintiff relied on the 64th section of the Act 31 Vict. ch. 20, which, as then expressed, read: "Every instrument . . . shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration unless such instrument is registered . . . before the registering of the instrument under which such subsequent purchaser or mortgagee may claim." That per se meant, priority of registration shall prevail. But the Court read together secs. 64 and 67, and educed the meaning that priority of registration shall in all cases prevail except as against actual notice. Therefore, the decision was that the effect of actual notice could be dealt with in a Court of law, and not, as was

thought by Richards, C.J., in Bondy v. Fox (1869), 29 U.C.R. 64, that the suitor defeated at law must resort to equity for the protection extended to a purchaser for value without notice.

No doubt both Judges, Hagarty and Gwynne, commented on the literal effect of sec. 67, pointing in terms to the date of registration as the essential time when there should be a lack of actual notice, instead of to the true period when the purchase was completed and the money paid and deed contemporaneously executed. Hagarty, C.J., says (p. 54): "The section is worded so as to refer the notice to the time of registration, instead of the time of purchasing or paying his money." Gwynne, J., expressed his moral conviction that the section, literally construed, does not express the intention of the Legislature (p. 58).

Both Judges agree that "no doubt the mistake has only to be pointed out to the Legislature to be rectified" (pp. 54 and 58.) That was in 1873, but the blemish yet remains on the statute-book.

The Legislature, however, did in that year, 1873 (by 36 Vict. ch. 17, sec. 7), amend the Act, as to sec. 64, by inserting the words "without actual notice" after "consideration," thus giving legislative effect to the Judges' reading of the section in Millar v. Smith; and, so amended, the section is now extant, and is applicable precisely to the appeal in hand.

Read critically, I would say that sec. 71 applies when the registration of *both* instruments is in question, which is not this case.

After judgment had been given and entered up, Hyslop had his written license registered, but in the litigation and before us there is but one registration, i.e., that of the plaintiff. His claim, as pleaded and proved, fits in exactly with the provisions of sec. 70, i.e.: "Every instrument affecting the land or any part thereof shall be adjudged fraudulent and void against any subsequent purchaser . . . for valuable consideration without actual notice, unless such instrument is registered before the registration of the instrument under which the subsequent purchaser . . . claims."

Were we driven to consider sec. 71 as applicable, I do not think that it speaks the last word. If the Legislature does not elucidate the meaning, the Courts will have to struggle to avoid injustice. It would still be open, in my opinion, to consider and give such redress to Peebles as can be claimed by a purchaser who has paid his money and obtained his conveyance and entered into possession without actual notice of the

prior unregistered instrument. Registration is a supplementary thing created by statute, but it is not a pre-requisite for relief, nor an obstacle to relief in the case of one who has paid his money and got his deed without notice. This has been referred to by Mowat, V.-C., in Sanderson v. Burdett (1869), 16 Gr. 119, 127, and approved by Osler, J.A., in Clergue v. McKay (1903), 6 O.L.R. 51, 58, affirmed in Clergue v. Preston (1904), 8 O.L.R. 84.

But this aspect of the appeal need not be pursued. I am content to rest on the section quoted; and would, therefore, reverse the judgment below and enter it for the plaintiff with costs throughout.

RIDDELL and MIDDLETON, JJ., agreed.

LEITCH, J., also agreed, for reasons stated in writing.

The plaintiff's appeal allowed.

FEBRUARY 6TH, 1914.

DURIE v. TORONTO R.W. CO.

Street Railway—Injury to Person Driving on Highway—Negligence — Contributory Negligence — Ultimate Negligence — Findings of Jury—Duty of Company Operating Cars on Highway—Excessive Speed—Insufficient Warning—Infant Suing without Next Friend—Irregularity—Next Friend Added at Trial—Practice.

Appeal by the defendants from the judgment of MEREDITH, C.J.C.P., upon the answers of a jury to the questions submitted to them, in favour of the plaintiff for the recovery of $1,500 and costs, in an action for damages for injuries sustained by the plaintiff by being thrown from a waggon which he was driving, by means of a collision with a car of the defendants upon a public highway.

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

D. L. McCarthy, K.C., for the appellants.

D. O. Cameron, for the plaintiff, the respondent.

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

. . . The accident took place a few minutes past five o'clock in the evening of the 3rd June, 1912, on the east side of Bathurst street, 125 feet north of Robinson street. The plaintiff was driving up Bathurst street at a slow trot. While turning out to pass a rig that was standing on the street close to the kerb on the permanent pavement, his attention was attracted for a moment—three or four seconds—by a boy on roller skates trying to get on the back of his waggon. It was the plaintiff's duty to see that the boy was not hurt by getting on the waggon. While looking back to keep the boy from the back of his waggon, the plaintiff's horse and waggon got over on the car track. As soon as he turned his head and saw where he was, the plaintiff at once pulled his horse to the east to get off the car track away from the car. The car was then from 180 to 225 feet—four or five car lengths—up Bathurst street. There was nothing to prevent the motorman from seeing the plaintiff the whole of that distance. The evidence is that he must have seen him. The car was running down grade at a rate of fifteen or twenty miles an hour. The motorman never slackened speed, the car came right on, and ran three or four car lengths after it struck the plaintiff's waggon. The gong was not sounded. The car struck the hind wheels of the waggon, smashed it, and threw the plaintiff about thirty feet. He received two scalp wounds and a compound fracture of the leg.

The learned trial Judge submitted the following questions to the jury, who returned the following answers:—

(1) Q. Was any negligence on the part of the defendants the proximate cause of the plaintiff's injury? A. Yes.

(2) Q. Or was any negligence of the plaintiff the proximate cause of it? A. No.

(3) Q. Or was it caused by an accident for which neither party was blameable?

(4) Q. If caused by the negligence of either party, what was the negligence, state fully; and, if more than one thing, state fully? A. Not sufficient warning; the high rate of speed.

(5) Q. If by the negligence of the defendants, then might the plaintiff, by the exercise of ordinary care, have avoided it? A. No, the company could have avoided it.

(6) Q. If so, how; state fully; and, if in more than one way, state all fully? A. There was no sufficient warning.

(7) Q. If the plaintiff could, by the exercise of reasonable or ordinary care, have avoided his injury, could the defendants

also, after becoming aware of his danger, have prevented the accident, by exercising ordinary care? A. Motorman could have avoided the accident, but the driver could not.

(8) Q. If so state fully? A. By not ringing the gong in time.

(9) Q. If the defendants are liable to the plaintiff in damages for the injuries which he sustained, what sum of money would be reasonable compensation, under all the circumstances of the case, to be paid by them to him for the injuries which he sustained? A. $1,500 damages.

On the jury's answers to the questions, the learned Judge directed judgment to be entered for the plaintiff for $1,500 damages with costs. The charge to the jury, which was very lucid, was not objected to. The jury expressly found negligence on the part of the defendants, and no contributory negligence on the part of the plaintiff. The negligence attributed to the defendants was, not giving sufficient warning by ringing the gong, and running at a high rate of speed. They further found that the defendants, by the exercise of reasonable care, could have avoided the accident, but that the plaintiff could not. There was ample and undoubted evidence to justify the findings of the jury.

There is no law, under the circumstances of this case, that absolves the defendants. The street car has no right paramount to the ordinary vehicle. Both must travel on the street, and each must exercise its right to use the street with due regard to the rights of the other. The company should keep in mind the possibility of accident incident to vehicular traffic on a crowded street. While the vehicle has no right unreasonably to curtail or interfere with the operation of the cars in the streets, yet we know that vehicles drawn by horses or operated by other motive power meet with accidents, get on the tracks, and obstruct the cars. It is the duty of the company to run their cars under such control, and at such rate of speed, giving such warning, that when an emergency does arise they will be enabled to do everything that reasonable men should do to avoid the accident.

During the trial, whilst the cross-examination of the plaintiff was in progress, it was learned that the plaintiff was under the age of twenty-one years. Application was made by the plaintiff's counsel to amend by adding the plaintiff's mother a party, as next friend. The mother appeared in Court, and, by a writing duly signed, consented. The learned trial Judge allowed the amendment, and the trial proceeded.

It was urged on this appeal that the action was improperly constituted, that it should be dismissed, and that the plaintiff should commence de novo. We cannot give effect to such a contention. We think the learned trial Judge pursued the proper practice. The bringing the action without a next friend, in view of the circumstances, was a mere irregularity. The plaintiff had a good cause of action when the writ was issued. He brought it within the time the law allowed. The proceedings went on without question. The plaintiff's age was not made an issue, was not submitted to the jury. It came out incidentally that he was under twenty-one. The irregularity was cured at the trial, rightfully, we think: Flight v. Boland, 4 Russ. 298; In re Brocklebank, 6 Ch.D. 358.

We think that this appeal should be dismissed with costs.

HIGH COURT DIVISION.

KELLY, J., IN CHAMBERS. FEBRUARY 3RD, 1914.

RE SPINLOVE.

Infant—Custody—Right of Mother to Custody of Illegitimate Child—Failure to Prove Misconduct of Mother—Welfare of Child.

Motion by Mabel Spinlove, on the return of a writ of habeas corpus, for an order for the delivery of the infant Lauretta May Spinlove, the applicant's child, to the custody of the applicant.

W. A. Henderson, for the applicant.
R. G. Agnew, for Phœbe Spinlove, the respondent.

KELLY, J.:—Lauretta May Spinlove, for whose custody this application is made by her mother, was born on the 15th May, 1908.

On the 2nd October, 1903, the applicant, who in these proceedings appears under the name of Mabel Spinlove, was married at Berlin, Ontario, to one Charles H. Dahmer. After about one year of married life together, they separated, and they have since remained apart. A daughter was born of this marriage.

On the 24th May, 1907, the applicant went through the form of marriage (before a Justice of the Peace, she says), at the city of Buffalo, with one Benjamin Spinlove, then a resident of Toronto. From that time till about the 28th June, 1911, they lived together as husband and wife, their place of residence being for part of the time in New York and part in Toronto.

Lauretta May Spinlove is the daughter of the applicant and Benjamin Spinlove. Their life together does not appear to have run altogether smoothly, and, if the applicant is to be believed, Benjamin Spinlove's mother, Phœbe Spinlove, was to some extent accountable for the trouble.

On the 15th June, 1911, and while these parties were living together, Benjamin Spinlove took the child to his mother's house. He alleges in these proceedings that he did so because she had contracted pneumonia and bronchitis, and that she was not properly cared for and was neglected. The applicant objected to the child being left with Phœbe Spinlove, but got no satisfaction from Benjamin Spinlove about having her returned. On her applying to Phœbe Spinlove for the return to her of the child, which she did on more than one occasion, she was met with a refusal, given in a manner indicating determination on Phœbe Spinlove's part, not only not to allow the child to return, but to prevent her mother from further seeing her.

On the 28th June, 1911, the home of the applicant and Benjamin Spinlove was broken up, and he has not since contributed anything to the applicant's support. Soon afterwards, she returned to her former calling as an actress, and has continued to make her living in that way. She has all along been anxious to obtain the custody and care of the child, and promptly made demands to that end both by herself and through her solicitors, but without effect.

There can be no question whatever of her right as against Phœbe Spinlove; for, as between them, she is entitled to the custody of her daughter; and, were it not for the attitude assumed by Benjamin Spinlove and the part he has taken in an attempt to support his mother's refusal to give up the child to the applicant, I would have been content to dispose of the application by granting the custody of the child to the applicant without further going into the matter.

It is quite apparent from his affidavit filed in opposition to the application that Benjamin Spinlove does not wish the applicant to obtain the custody of the child. A perusal of the evidence readily convinces one that little reliance can be placed

upon him in his attempt to make out his mother's case. Many important statements made in his affidavit are effectively contradicted by the evidence of other deponents. Some of these statements he modifies in the cross-examination on his affidavit. His allegation that the child contracted pneumonia and bronchitis as the result of neglect by her mother is not borne out on his cross-examination; there he admits that the child did not have pneumonia.

The applicant denies that the child was neglected; and the evidence of Dr. Sisley, who examined her in June, 1911, about the time when she was taken away by Benjamin Spinlove, corroborates the applicant's evidence. The doctor says that he found the child suffering from a cold, with some symptoms of bronchitis; and he adds that she was neatly dressed and appeared to be well cared for, and shewed no evidence of neglect or abuse. He also says that on other occasions when he called at the house professionally he noticed that the house was in a neat and clean condition and that the applicant had every appearance of being a thoroughly respectable woman.

Benjamin Spinlove in his affidavit makes a further charge of the applicant having been seen, and of his having himself seen her, going around with men late at night in automobiles and travelling on the streets and conducting herself in a manner unbecoming to a decent woman. In his cross-examination this is all narrowed down to a single occasion, within one week prior to his cross-examination, which took place on the 5th July, 1912, when he says that he saw the applicant and others driving at night in King street, Toronto, in an automobile; but in respect of that he admits that he could not see very much, as he was on a street car when the automobile went by. What did happen on this occasion is satisfactorily explained by the applicant and another deponent, who was in her company at the time.

As to the general charge of improper conduct, the applicant has made specific denial. Spinlove's further allegation that during the time he and the applicant lived together she absented herself from her home during the day-time is also satisfactorily answered. In addition to this, there is the evidence of others—one a neighbour—whose statements I have no reason to disbelieve, denying charges of intoxication and of the applicant's having neglected her household duties.

So far, therefore, as the statements and charges made by Benjamin Spinlove are concerned, reading the whole evidence together, I can only conclude that these were trumped up for

the purpose of aiding his mother to resist the application. On the other hand, charges are made under oath by the applicant against Benjamin Spinlove, which he has not denied, and which I would consider sufficiently grave to make his right to interfere with the custody of the child doubtful, even if he had otherwise that right.

The applicant says that, when she went through the form of marriage with him, he was aware that she was then a married woman. He denies this; but, bearing in mind the lightness with which he has treated other statements of his under oath, I have difficulty in believing him. He admits, however, in his affidavit, that, shortly after he went through the form of marriage with the applicant, she told him that she had not been divorced from Dahmer.

I have already stated that there can be no doubt as to the applicant's right as against Phœbe Spinlove. Had the latter any right such as she now sets up, I would hesitate to give effect to her claim, in view of what the uncontradicted evidence shews her views to be in respect to the duties pertaining to maternity. A person expressing such views is not a proper custodian of a young girl.

So far, I have dealt with important facts brought out in the evidence. The principles to be applied on an application for the custody of an illegitimate child are enunciated clearly in Barnardo v. McHugh, [1891] A.C. 388. . . .

In his reasons for judgment Lord Herschell, at pp. 398 and 399, discusses the case of Regina v. Nash, 10 Q.B.D. 454. . . .

There is nothing in the present case to deprive the mother of her rights as against any rights of Phœbe Spinlove, or indeed against any right of the putative father, or to shew that it is or that it will be to the advantage of the child to remain in Phœbe Spinlove's custody. The charges of neglect of the child and misconduct on the part of the applicant are not proven. The child was removed from her custody, not only without her consent, but against her will, and, as I believe, by a pre-arrangement between Phœbe Spinlove and her son, and she has been improperly withheld from the applicant contrary to her desires and against the requests of herself, and her solicitors, for the child's return. The mother is in a position properly to bear the expense of the child's maintenance; she is earning from $20 to $25 per week, while the putative father, who contributes to his mother towards the support of the child—and who, by the way, is no longer a resident of this Province—earns $13 per week.

Criticism is aimed at the applicant's means of livelihood. While there are other walks of life which are in the minds of many people freer from objection, her present occupation does not deprive her of the right to indicate and have effect given to her wishes.

Having reached the conclusion that the applicant is entitled as against Phœbe Spinlove, I hesitate to permit her to take the child with her while she is travelling from place to place, following her present calling. Through her counsel on the argument, an offer was made to have the child placed in the custody of the applicant's married sister or in a convent in Toronto, there to be cared for and maintained at the expense of the applicant. In the interests of the child, I have given careful consideration not only to the present position of the applicant but to the suggestions for the child's care as well; and I think the best interests of the child will be served by having her placed for the time being under the charge of the Sisters of St. Joseph in Toronto, the mother carrying out her desire and intention of maintaining the child there, and having the right to visit her.

Should the applicant change her mode of life, or should other unforeseen conditions arise, she may then make further application to have the child placed in her own personal custody and charge.

An order will go for the delivery over of the child by Phœbe Spinlove to the applicant's representative, to have her placed in charge of the Sisters of St. Joseph.

The applicant is entitled to the costs of the application.

LENNOX, J. FEBRUARY 3RD, 1914.

BECK v. TOWNSHIP OF YORK.

Building Contract—Work Taken over by Municipality—Absence of Justification—Provisions of Contract—Delay—Claim of Contractor for Work Done—Forfeiture—Acquiescence—Quantum Meruit.

Action by a contractor for the building of a bridge to recover damages for breach of contract and wrongful dismissal, or, in the alternative, for payment on a quantum meruit basis for the work done, and also to recover the value of plant and material taken by the defendants, the Corporation of the Township of York.

H D. Gamble, K.C., and A. C. McNaughton, for the plaintiff.

J. R. L. Starr, K.C., and Grant Cooper, for the defendants.

LENNOX, J.:— . . . If the defendants legally took over the work under par. 38 of the specification, the plaintiff is entitled to credit for a completed work upon the footing of contract prices, and the defendants are entitled to set off against this what they have been called upon, under par. 38, to expend in doing what the plaintiff has not done. . . . It would be convenient to take account of the defendants' expenditure and set it off against the plaintiff's claim, . . . and strike the balance. I cannot do this, as, even with the free hand which such a clause will sanction, and even with the witnesses called by the defendants to give it colour, I cannot accept the defendants' account as shewing the actual money honestly expended under this clause. There is abundant evidence, however, . . . to shew me the utmost sum that could be honestly and legitimately expended for the whole work; and for this, less the work and material contributed towards it by the plaintiff, the defendants are entitled to credit against the plaintiff's total claim . . . It will be convenient at this point to ascertain what sum was put into the work by the plaintiff in labour and material. The items are set out in exhibit 11. They include goods not returned and an item for damages. . . . Total contributed by the plaintiff $1,348.51. The defendants got the benefit of these items. . . .

Leaving out gravel, sand, and stone, I find that the actual total cost of this bridge—upon honest expenditure and with reasonable care—could not exceed $4,760.69. . . . Deduct the work done and materials contributed by and allowances to the plaintiff as above, $3,412.18: balance chargeable against the plaintiff, $3,412.18.

The contract being completed the plaintiff is entitled to recover $5,234.01, less expended by the defendants, $3,412.18: balance owing to the plaintiff, $1,821.83. The plaintiff is entitled to judgment for this amount at all events. . . .

I do not think that the defendants were justified in taking the work out of the plaintiff's hands. They were not if the delay was theirs; and . . . it was unreasonable to expect the plaintiff to assemble a large force or begin work before the stone was upon the ground. Under such circumstances, the defendants cannot avail themselves of the provision for dismissal: Lodder v. Slowey, [1904] A.C. 442; Roberts v. Bury Improve-

ment Commissioners (1870), L.R. 5 C.P. 310; Holme v. Guppy (1838), 3 M. & W. 387.

Here time was clearly not of the essence of the contract, as the contract reserves a penalty: Lamprell v. Billericay Union (1849), 3 Ex. 283; Felton v. Wharrie (1906), judgment of Lord Alverstone, L.C.J., reported in Hudson's Laws of Building, 3rd ed., vol. 2, p. 455, at p. 457.

The right was not exercised until the time limited for performance had expired. This, and whether the right to exercise has not ceased to be applicable, are formidable questions confronting the plaintiff: Smith v. Gordon (1880), 30 C.P. 553, and cases referred to in the judgment of Mr. Justice Osler; Halsbury's Laws of England, vol. 3, p. 257; . . . Walker v. London and North Western R.W. Co. (1876), 1 C.P.D. 518.

A forfeiture provision is to be strictly construed: Halsbury's Laws of England, vol. 3, p. 256; and Smith v. Gordon, above quoted; also Farrell v. Gallagher (1911), 23 O.L.R. 130.

I do not interpret what was done by the engineer as a compliance with clause 38. There was no certificate in writing or report of any kind to the municipal council, or action by the municipal council determining that the plaintiff should be dismissed; and, as I read it, the plaintiff had a right to have the municipal council consider and pass upon the question, just as the contractor had the right to the special individual consideration of the owner in the Farrell case.

The plaintiff, by acquiescence, has precluded himself from suing for damages for breach of contract; but, if the right of forfeiture was not exercisable or was not properly exercised, the plaintiff is entitled to be paid for the work done and material used, without reference to what it cost to complete the work; and he is, of course, entitled to payment for what the defendants appropriated or injured and for the use of his plant by the defendants.

Upon the basis of a quantum meruit, I think some of the items struck out of p. 1 of exhibit 11 should be allowed to stand; and the plaintiff would be entitled to something for profit or to be paid upon the basis of ten per cent. or fifteen per cent., added as upon what is called "force account." This, with the proper allowance upon the other items set out in the statement of claim, makes a sum which the plaintiff would be entitled to, if my opinion upon this branch of the case is correct, somewhat greater than the balance above found in his favour. The difference, however, is not very great; and I, therefore, find that the sum

to which the plaintiff would be entitled upon a quantum meruit basis is $1,821.83.

There will be judgment for the plaintiff for $1,821.83 with costs, and the counterclaim will be dismissed with costs to the plaintiff.

SUTHERLAND, J. FEBRUARY 4TH, 1914.

GOULET v. VINCENT.

Husband and Wife—Marriage Contract—Community of Property—Prevalence over Will of Husband as to Ontario Property—Quebec Law.

Action by Sophranie Goulet, widow of Cyrille Goulet, against his executors, for a declaration that she was entitled to the whole of his property under a marriage contract.

J. B. T. Caron, for the plaintiff.
C. A. Seguin, for the defendants.

SUTHERLAND, J.:—On the 15th October, 1877, Cyrille Goulet, a resident of Ottawa, Ontario, and Sophranie Lemieux, a resident of the parish of St. Gervais, in the Province of Quebec, entered into a marriage contract. The document is in French and a written translation was put in at the trial. It contains the following stipulations and agreements:—

"There will be community between the said future husband and wife of all the real property and hereditaments now in possession or that may be acquired, which said real property is hereby converted into personal property for the purpose of getting them as part of the said community.

"There will be no dower either 'prefixe' or 'coutumier,' to which dower the said future wife expressly renounces as well for herself as for the children who may be born of the future marriage. . . .

"And in testimony of the good friendship and affection that the said future husband and wife have for one another and to give each other an evident proof of it, they are making to each other by these presents a gift inter vivos each one to the survivor of them, and the said survivor accepting the same, of all the property whatsoever that the predeceasing may leave at the

time of his or her death for the absolute use and right to dispose by the surviving one as his or her own property forever, notwithstanding the surviving of children born of the said marriage. So it has been agreed and stipulated by the said future husband and wife by common and mutual consent."

The contracting parties, after their marriage, immediately went to reside and continued to reside in the Province of Ontario until the death of the said Cyrille Goulet, which occurred at the city of Ottawa, on or about the 9th April, 1913.

The deceased husband left real and personal property in Ontario at the time of his death, some of which he had acquired subsequent to the marriage. Before his death, on or about the 9th March, 1907, he made his last will and testament, and letters probate thereof duly issued on the 23rd May, 1913, out of the Surrogate Court of the County of Carleton, to Oscar Leclaire and Joseph Ulric Vincent, the executors named therein. . . .

The plaintiff herein, the widow, began an action on the 27th October, 1913, against the executors. . . . She claims to be "entitled to the whole of the estate of her late husband, Cyrille Goulet, after payment of his just debts and funeral and testamentary expenses, and that the defendants should be ordered to deliver to her possession of the whole of the said estate after payment of his just debts and funeral and testamentary expenses."

The defendants in their statement of defence, after admitting the various allegations of fact contained in the statement of claim, "deny the conclusion thereof and maintain that the estate of the said Cyrille Goulet should be distributed as directed by the will of the said Cyrille Goulet, deceased." . . .

[The learned Judge then set out the various provisions of the will, by which an interest in the testator's estate was given to the plaintiff, but not the whole of his estate.]

At the trial, Mr. Auguste Lemieux, an advocate of the Province of Quebec, was called on behalf of the plaintiff and testified that he had read and examined the marriage contract in question, and was of opinion that the covenants contained therein, under the Civil Code of Quebec, were "perfectly legal," and that "the will of one of the consorts could not affect it." His testimony was also to the effect that it would bind after-acquired property if its terms were wide enough. He referred particularly to the following sections of the Code:—

Quebec Civil Code, art. 1257: "All kinds of agreements may be lawfully made in contracts of marriage, even those which, in

any other act inter vivos, would be void; such as the renunciation of successions which have not yet devolved, the gift of future property, the conventional appointment of an heir, and other dispositions in contemplation of death."

Art. 1260: "If no covenants have been made, or if the contrary have not been stipulated, the consorts are presumed to have intended to subject themselves to the general laws and customs of the country, and particularly to the legal community of property, and to the customary or legal dower in favour of the wife and of the children to be born of their marriage. From the moment of the celebration of marriage, these presumed agreements become irrevocably the law between the parties, and can no longer be revoked or altered."

Art. 1264: "All marriage covenants must be made in notarial form, and before the solemnising of marriage, upon which they are conditional."

Art. 1265: "After marriage, the marriage covenants contained in the contract cannot be altered (even by the donation of usufruct, which is abolished), nor can the consorts in any other manner confer benefits inter vivos upon each other, except in conformity with the provisions of law under which a husband may, subject to certain conditions and restrictions, insure his life for his wife and children."

The marriage contract in question was drawn by and executed before a Notary Public in the Province of Quebec. The said advocate also testified that "a marriage contract passed before a Notary Public in Quebec makes proof by itself ipso facto, and that Notaries in that Province are considered as judicial officers whose documents bear the stamp of authenticity."

The case of Taillifer v. Taillifer (1891), 21 O.R. 337, is in point. In it "the plaintiff's husband entered into an antenuptial contract in the Province of Quebec with her concerning their rights and property, present and future. He subsequently moved to this Province and died there intestate: Held, that this contract must govern all his property movable and immovable, though situate in this Province, provided that the laws of this Province relating to real property had been complied with; and that it made no difference whether the matrimonial domicile of the parties at the time of the contract and marriage was in Ontario or Quebec."

In view of the terms of the contract and the law applicable thereto, as found in the sections of the Code already referred to, and as testified to at the trial, it is, I think, clear that the

pre-nuptial contract in question must be held to be a valid and enforceable one, and the plaintiff entitled, as against those claiming under the will, to the whole of the testator's estate, subject to the payment of debts.

Reference also to DeNicols v. Curlier, [1900] A.C. 21; Raser v. McQuade (1904), 11 B.C.R. 161; Cadieux v. Rouleau (1907), 10 O.W.R. 1103; O'Reilly v. O'Reilly (1910), 21 O.L.R. 201, affirmed in Garland Son & Co. v. O'Reilly (1911), 44 S.C.R. 197; Quebec Civil Code, art. 1264; 49 Can. L.J. 653.

The plaintiff in this action makes a claim for the whole of the estate, and the defendants in resisting are representing all defendants antagonistic to such a claim. I think, therefore, that, under Con. Rule 74, they sufficiently represent all parties interested.

The judgment will, therefore, be that the plaintiff is entitled to the whole of the estate of her late husband, after payment of his just debts and funeral and testamentary expenses.

The executors were justified in defending the action, and the costs of all parties will be out of the estate.

BOYD, C. FEBRUARY 3RD, 1914.

*HENEY v. KERR.

Mortgage—Foreclosure—Reference—Report of Master—Subsequent Incumbrancers — Priority — Dates of Mortgages — Dates of Registration—Notice—Registry Act, 1910, *secs.* 70, 71—"*Party*" — "*Person*" — *Costs—Stay of Proceedings after Judgment—Payment by Mortgagor of Principal, Interest, and Costs—Tender—Sufficiency—Rule* 485.

Appeal by the defendant Mitchell from the report of the Local Master at Ottawa in a mortgage action for foreclosure, settling the priority of subsequent incumbrancers; and motion by the defendant Kerr, the mortgagor, to stay proceedings upon payment by him to the plaintiff of the amount due upon the mortgage.

W. C. McCarthy, for the defendant Mitchell.
H. Fisher, for the plaintiff.
J. E. Caldwell, for the defendant Kerr.

*To be reported in the Ontario Law Reports.

BOYD, C.:—The Registrar's abstract shews this state of title. The owner, the defendant Olive Kerr, mortgages to Heney, the plaintiff, for $2,500 (first mortgage). Kerr sells equity of redemption to Amey 16th July, 1912; registered 25th July. Amey mortgages to Kerr 17th July; registered 2*nd August*, 1912. Amey sells to Roche and Hughes 20th July; registered 25th July, 1912. Roche and Hughes mortgage to Amey 20th July; registered 25*th July*, 1912. Amey assigns the Roche-Hughes mortgage to Mitchell 14th August; registered 16th August, 1912. Amey sold to Roche and Hughes subject, as expressed in the conveyance, to the two mortgages, that to the plaintiff and that to his vendor, Kerr. Mitchell, assignee of the third mortgage in point of time, from Roche and Hughes to Amey, claims by priority of registration over the mortgage, second in point of time, from Amey to Kerr.

It is well proved that Mitchell had actual notice at and before the time he took the assignment that he was dealing in respect of a third mortgage. The witness Armour says: "I told Mitchell it was a third mortgage, that there were two others ahead of it. I think I told him the amounts; am positive I told him about two other mortgages and who held them." Another witness, Dunlevie, says the same, and it is not contradicted by Mitchell.

The claim for priority is rested on the statute, the Registry Act, 1910, 10 Edw. VII. ch. 60, sec. 71, which reads: "Priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument by the person claiming under the prior registration."

It is urged that Mitchell is the person claiming under the prior registration (i.e., of the Roche-Hughes mortgage on the 25th July), and that actual notice of the prior mortgage (i.e., of the Amey mortgage to Kerr dated the 17th July) has not been proved against Mitchell.

That is a plausible reading of the Act, which is contributed to by the revised language of the section. But it is in every aspect untenable. When first enacted in 1865 (29 Vict. ch. 24, sec. 65) the provision was that "priority of registration shall in all cases prevail unless before such prior registration there shall have been actual notice of the prior instrument by *the party* claiming under the prior registration." The word "party" has an individualising referential touch, which is lost when it is changed to "person." "Party" is not here synonymous with "person;" it means one who is "party" to the instrument which is being registered, by the registration of which he will, by

virtue of the Act, obtain priority over the instrument earlier in date which has not been registered at the time of his registration.

Mitchell in this case may be said to claim under the original patent, and that is as much to the purpose as to say he claims under the mortgage registered by Amey on the 25th July. Amey, of course, had actual notice that it was a third mortgage, because he himself had given the second to Mrs. Kerr, and had bought subject to the first mortgage to Heney. The status of the mortgage from Amey to Kerr was not affected by and was not made fraudulent and void as against the subsequent mortgage taken by Amey from Roche and Hughes (sec. 70 of the Act of 1910); and it remained a perfectly valid mortgage prior to Mitchell's, because he not only took his assignment with actual notice, but he took subsequent to the Kerr mortgage, which was duly registered on the 2nd August, before he purchased the other mortgage on the 14th August. The time of notice to be regarded is the time at which and before which an interest in the land is being acquired; actual notice at that time affects the status, as it formerly did the conscience, of the purchaser; and, if he goes on, it is at his peril: Mackechnie v. Mackechnie (1858), 7 Gr. 23.

The Master's conclusion in giving priority to the mortgage prior in date, though not registered prior to the mortgage later in date, is well-founded, and should be affirmed with costs. The unsuccessful disputant as to priority in the Master's office should also pay personally forthwith the costs occasioned by his contest, which have been taxed at $95.46. These should not be put as a burden on the land; these are not the sort of costs which an unsuccessful mortgagee is entitled to add to his security. The mortgagor is not responsible for this collateral struggle for priority, and the contestants must fare as other litigants. This is not expenditure arising from a proper attempt to protect and preserve his security as against the mortgagor, but a frustrated attempt to get ahead of a more deserving incumbrancer.

There has also been brought on a substantive motion, referred to me by the Master, on behalf of the mortgagor, the original defendant, Kerr, to pay to the first incumbrancer, the plaintiff, what is now due, and stop proceedings in the action till further default is made.

It is according to the practice of the Court, as recognised by the Legislature in explaining the meaning of the acceleration clause in mortgages, to grant this relief after judgment and

before the final order, upon payment of what is due, to be ascertained by the Master. The delay in moving has led to the bringing in of subsequent incumbrancers; the costs of proving the claims of these, as well as the costs of the plaintiff, should be paid as a condition of staying proceedings. If the Master finds that there was a sufficient tender to the plaintiff of what is due, this motion will be without costs—if insufficient, the applicant will have to pay the costs also of this application. See, on this question, Hazeltine v. Consolidated Mines Limited, 13 O.W.R. 271, 994; and Con. Rule 389 of 1897 (now Rule 485).

MIDDLETON, J. FEBRUARY 5TH, 1914.

*WATSON v. JACKSON.

Water and Watercourses—Lands Bordering on Stream—Bonâ Fide Purchaser of, without Notice of Existence of Old Dam Upstream—Protection of Registry Act—Contemplated Erection by Land-owners on their own Land of New Dam on Site of Old—Creation of Large Pond—Diminution of Flow of Water—Loss by Evaporation and Seepage—Prescription—Lost Grant—Unlawful Use of Dam—"Sensible Injury"—Injunction—Limitation.

Action by the owner of lands on the east side of Yonge street, in the township of Markham, for an injunction restraining the defendants, the owners of lands west of Yonge street, from interfering with the flow of a branch of the river Don across his lands by the construction of a dam on their lands.

The action was tried without a jury at Toronto on the 18th, 19th, 20th, 21st, and 22nd November, 1913.

I. F. Hellmuth, K.C., Wallace Nesbitt, K.C., and N. Sinclair, for the plaintiff.

H. H. Dewart, K.C., and J. W. McCullough, for the defendant.

MIDDLETON, J.:—The plaintiff purchased his lands as a suburban residence, intending to reside upon them during the summer months. The lands, including the improvements to the residence, have cost in all about $60,000. Undoubtedly one of the chief

*To be reported in the Ontario Law Reports.

attractions was the stream or small river which crosses the parcel, and I fully accept the plaintiff's statement that but for this he would not have purchased. The stream, apart from the beauty it gives to the landscape, so far as the plaintiff is concerned, serves no useful purpose beyond being a convenient source of water for domestic and farming purposes.

No doubt, many years ago, there was a dam and a mill-pond on the land now owned by the defendants, but, at the time the plaintiff purchased, the dam had been destroyed for many years, and the site of the pond was so overgrown that I in no way doubt the plaintiff's statement that he had no knowledge that it had ever existed, and that in his passage up and down Yonge street he had never noticed any indication of it upon the ground.

So far as the plaintiff is concerned, he is a bonâ fide purchaser of his lands without any notice of the existence of the old dam or of the defendants' claims, and he is entitled to the protection of the Registry Act.

The defendants have begun the erection of a dam upon their own land, upon the site of the old dam, but of very considerably greater height. This dam, if completed, would form when full a pond of nineteen acres. As the spill-way will be eleven feet above the present water level, and it is intended to have splash-boards above this, this means the impounding of a comparatively large body of water. The average summer flow of the stream is only five cubic feet per second, so that to fill the pond means the retention of the entire flow of the stream for a long time.

The works undertaken by the defendants are costly—the estimate being about $7,000—and it is quite clear to me that the intention cannot be to construct this dam merely for the purpose of making use of the power to be developed from this insignificant flow. The defendants are by no means candid, and I am quite satisfied that they have some other and ulterior motive or plan which has not been disclosed. The statement that all this work has been undertaken to provide power for a small chopping-mill cannot be accepted. . . .

If the dam is to be constructed and the pond filled, in some time of flood, no real or appreciable damage would be done to the plaintiff, if thereafter the water will continue to flow at its normal rate. Save for the temporary obstruction of the flow during the time of filling, no great harm would be done.

The plaintiff contends that the creation of the comparatively large pond contemplated, having regard to the small flow during the summer months, will bring into prominence two factors that can ordinarily be ignored—the loss due to evaporation and

the loss due to seepage. The loss due to evaporation can be ascertained with some certainty, and, standing alone, would not amount to any very serious diminution of the flow in the stream; the loss due to seepage cannot be ascertained in advance. Experts have given opinions, but these opinions are based in large measure upon the nature of the soil and the form of the bed and subsoil. If necessary to form now an opinion as to the probable loss from seepage, my view is, that a loss from this source that will very materially cut down the flow of the stream must be expected, and that the combined loss attributable to evaporation and seepage will be material and substantial in the summer season.

Many years ago Thorn and Parsons owned the pond and ran a grist-mill by its power, but the stream was then of greater magnitude and maintained its volume better through the summer season.

The Thorn and Parsons dam was broken in 1878, and, though twice attempts have been made to replace it, neither attempt succeeded, the violence of the spring floods carrying away the new work.

The dam now being constructed will hold back more water than the old dam, and is more than a reconstruction of the former work.

The defendants contend that they have acquired the right to dam back the water by prescription or by virtue of a lost grant, and, in addition, that all that is contemplated is a lawful user of the stream, which cannot be complained of by the owner of land lower down the stream.

Prescription cannot be relied on, as no matter how long the user of the old Thorn and Parsons dam, this was not for the twenty years next before the bringing of the action: Knock v. Knock (1897), 27 S.C.R. 664; Colls v. Home and Colonial Stores Limited, [1904] A.C. 179, 189; Hyman v. Van den Bergh, [1908] 1 Ch. 167, 173.

There cannot be here any right based upon lost grant, because the plaintiff is a bonâ fide purchaser for value without notice, and the lost grant, if it ever existed, is void as against him, by virtue of the provisions of the Registry Act.

Beyond this, the circumstances are such as to preclude any presumption of a lost grant. What is said by Meredith, J.A., in Hunter v. Richards (1913), 28 O.L.R. 267, is in point here.

The case must be determined on the rights of the parties to the use of the stream in question. . . .

[Reference to Miner v. Gilmour (1858), 12 Moore P.C. 131; Embrey v. Owen (1851), 6 Ex. 353.]

Applying these cases to that in hand, I have no hesitation in holding that any use of the dam by which the flow of the stream is made intermittent and irregular would be unlawful; and, that having regard to the volume of the flow during the summer months, the percolation and evaporation to be expected as the result of the creation of the proposed pond would result in such a serious diminution of the flow as to be an unreasonable and improper use of the stream. This would, in the circumstances, be a "sensible injury" within Baily & Co. v. Clark Son & Morland, [1902] 1 Ch. 649, and Miner v. Gilmour, supra.

The right of the plaintiff to apply at this stage before he has actually sustained injury—the works being on the defendants' own lands—is shewn in Bickett v. Morris (1866), L.R. 1 Sc. App. 47.

I think an injunction should be granted restraining the defendants from in any way interfering with the regular and uninterrupted flow of the stream in question, without sensible diminution or alteration.

I do not think that the injunction should be directed against any works the defendants may see fit to construct on their own lands. There they may do as they please so long as they do not interfere with the plaintiff's rights. See as to the form of injunction Alex. Pirie & Sons Limited v. Earl of Kintore, [1906] A.C. 478, at p. 482.

Costs should follow the event.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 6TH, 1914.

TRUSTS AND GUARANTEE CO. v. GRAND VALLEY R.W. CO.

Receiver—Railway—Appointment at Instance of Second Mortgagee—Position of Receiver—Mortgagee's Bailiff—Rights of First Mortgagee—Application for Leave to Appeal from Order Appointing Receiver—Leave to Take Proceedings to Displace Receiver—Retention of Motion—Appeal.

Motions by the National Trust Company and the Corporation of the City of Brantford for leave to appeal and to extend the time for appealing to the Appellate Division from an order of LATCHFORD, J., of the 29th May, 1912.

J. A. Paterson, K.C., for the National Trust Company.

W. T. Henderson, K.C., for the Corporation of the City of Brantford.

G. H. Watson, K.C., for the Brantford Street Railway Company, the Grand Valley Railway Company, and the receiver.

MIDDLETON, J.:—This is a motion for leave to appeal from the order of my brother Latchford appointing the manager of the plaintiff company receiver of the defendant company under the plaintiff company's mortgage.

The appointment is attacked as improper because the receiver is not impartial, and, it is said, is operating the line in the interests of the plaintiff company, and not adequately protecting the interests of the applicants, the prior mortgagees and the city corporation.

Assuming this to be the case, the motion is misconceived. A receiver under a second mortgage is appointed to protect the mortgagee and those who hold the debentures for which the mortgage is security; and, so long as the mortgagor and second mortgagee are satisfied with his conduct, the first mortgagee and the city corporation cannot complain.

If either the first mortgagee or the city corporation has any rights which it desires to assert, it can take the proper proceedings to enforce such rights.

The receiver, though in some sense an officer of the Court, is really a mortgagee's bailiff, and his possession is in truth the possession of the second mortgagee. So long as the first mortgagee remains satisfied to leave the second mortgagee in possession, or so long as the first mortgagee has not the right to take possession, it cannot complain that the second mortgagee is making the most of its brief harvest-time.

If any leave is necessary for any proceedings that either the first mortgagee or the city corporation may desire to take, looking to the displacing of the second mortgagee and the receiver, that leave is now given; and I hold these motions for the present, so that, if any order that may be made on any such motion is taken to appeal, leave may then be granted to take the order in question before the appellate Court, so that it may have an absolutely free hand in the premises.

I suggested to the parties the wisdom of consenting to a receiver being appointed, to protect the interest of all concerned, who would be impartial and would act on the advice of a committee on which all interests would be represented—subject to an appeal if any party dissented from the majority—or some similar arrangement; but this course is not assented to.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 6TH, 1914.

DELAP v. CANADIAN PACIFIC R.W. CO.

Pleading—Statement of Defence—Motion for Leave to Amend by Alleging Fraud in Bringing of Action—Contract—Discovery—Leave Refused.

Motion by the defendants for leave to amend the statement of defence by setting up that the action was fraudulently brought—the plaintiff well knowing that he had no claim—in pursuance of a fraudulent scheme; and for discovery based upon the proposed amendment.

A. M. Stewart, for the defendants.
R. McKay, K.C., for the plaintiff.

MIDDLETON, J.:—The amendment is in terms vague, but counsel state that what is intended is to charge that the plaintiff and his solicitor have put their heads together and have conspired to bring this action knowing that it has no foundation in fact, relying upon the evidence of the solicitor—an allegation that has no meaning unless it is intended to charge the solicitor, upon whose evidence the case must in great part turn, with the intention to testify falsely.

Under circumstances referred to in my former judgment (ante 667), the defendants have secured copies of certain letters from the plaintiff's solicitor to the plaintiff, which, it is said, justify this charge.

The amendment is sought for the purpose of compelling the production of these letters and enabling discovery to be obtained as to the communication between the solicitor and his client, upon the theory that a charge of fraud such as is now made destroys privilege.

I must have expressed myself most unfortunately when the matter was up before, as this motion is made, it is said, upon a suggestion contained in my judgment on that occasion.

What I meant then to say was that, for the purpose of the motion then before me, the affidavit properly claiming privilege was conclusive, for there was nothing in the pleadings or the case disclosed by it to destroy privilege; and, although the copies of documents might possibly be given in evidence at the trial, they could not be given in evidence upon the motion then in hand for the purpose of contradicting the affidavit.

Mr. Stewart was also under some misapprehension as to my position as to these letters. When I reserved judgment upon the question as to whether they could be read on the motion, I declined to allow them to be put in or read, and said that, if I allowed them to be read, I should hear counsel further. He seems to think that I was to hear further argument if the letters were rejected—but is wrong as to this.

I entertain the widest possible view as to granting amendments generally, but I do not think that I should grant an amendment when what is sought is to set up something which is no answer to the action, merely to allow an inquiry as to communications between solicitor and client.

What is charged is not fraud as to the contract. It is denied that there ever was any contract, but fraud in the bringing of an action, which, the plaintiff knows, ought to fail, and must fail if the truth is told. What is sought is not discovery of the facts and circumstances surrounding the contract, but of some correspondence between the solicitor and his client years after the alleged contract, from which it will be shewn or argued that the evidence of the client and of his solicitor is untrue.

All this may perhaps be gone into at the trial, but it is an issue that cannot be raised upon the pleadings. The issue in the action is contract or no contract, and not the bona fides of the plaintiff in bringing this action.

If this is not the rule, in any accident case based on negligence the plaintiff may have production of the confidential reports in the possession of the railway company by the simple device of alleging that the defendant company and their solicitors well know that there was negligence, but fraudulently conspire to plead "not guilty," and to suppress the evidence in their possession.

This motion should, I think, be dismissed with costs to the plaintiff in any event.

MIDDLETON, J. FEBRUARY 6TH, 1914.

SNIDER v. CARLTON.

CENTRAL TRUST AND SAFE DEPOSIT CO. v. SNIDER.

Will—Construction—Legacy to Niece—General Devise of Lands in Ontario—Lands Standing in Name of Testator in which Niece has Half Interest—Niece not Put to Election—Declaration of Niece's Right to Half Interest—Foreign Executor—Legacy to be Secured upon Ontario Assets—Costs.

Actions for a declaration that the defendant Mabel Carlton had no interest in certain lands in the city of Toronto at the time of the execution by her of a mortgage thereon to the defendant Hillock; that the mortgage was a cloud upon the title which should be removed; and that the interest of the defendant Mabel Carlton had passed to Thomas A. Snider, now deceased.

The two actions were consolidated, and were tried at Toronto, before MIDDLETON, J., without a jury, on the 26th January, 1914.

C. J. Holman, K.C., and F. C. Snider, for the plaintiff Snider.

W. J. Elliott, for the plaintiffs the Central Trust and Safe Deposit Company and Malsbury, and also for the residuary legatees under the will of Thomas A. Snider.

E. D. Armour, K.C., and B. N. Davis, for the defendants Carlton and Hillock.

MIDDLETON, J.:—The late Hannah Snider in her lifetime was the owner of the lands in question in this action, namely, a valuable piece of land situated on Bay street, in the city of Toronto. She died on the 21st July, 1887, having first made her will, by which she devised her property to her husband, the late Martin Edward Snider.

Martin Edward Snider died on the 8th December, 1888, intestate, leaving him surviving as his sole heirs his children Mabel Carr Snider, now Mrs. Carlton, and her brother Thomas E. Snider. Mrs. Carlton was then about twelve years old and her brother about four years old. The brother and sister were taken to live with their uncle, T. A. Snider, in Cincinnati, and Mrs. Carlton lived with him until his death on the 17th June, 1912; the family consisting of Snider, his nephew and niece, and a niece of his deceased wife.

The brother . . . after having received advances from his uncle to the extent of about $800, ultimately—on the 4th September, 1899—conveyed to him his half interest in the Bay street property for a further advance of $500. This transaction was never attacked during the lifetime of Thomas E. Snider, and there was probably nothing in any way unfair about it, as the Bay street property was not then regarded by any of the parties as of any great value. Thomas E. Snider died some years ago; and upon the pleadings the sister, claiming to be his sole next of kin, attacked the conveyance; but at the trial this attack . . . was abandoned.

At the time the uncle obtained the conveyance of the half interest in this property, there was erected upon it an old and dilapidated building, and the outgoings for repairs and taxes consumed the entire income. Mr. Snider came to Toronto to see if matters could not be put upon a more satisfactory footing. He consulted Mr. H. E. Irwin, and as the result of the consultation a letter was written by Mr. Irwin to the niece on the 9th May, 1900. After outlining the situation, Mr. Irwin proceeded:—

"It had, therefore, become clear that the only way to realise the most out of the property was by the erection of a warehouse building suitable for the locality, and your uncle, with great generosity, has had erected a substantial building, at a cost of about $10,000. It has been leased for a term of ten years, at a rental which, after payment of insurance, will, I understand, yield about $80 per month.

"You will further remember that your brother, Thomas Edward Snider, some time ago conveyed his interest in this property to your uncle, who, therefore, at the present time owns the building and a one-half interest in the land, while you are entitled to the other half interest in the land. . . .

"After carefully considering the matter with your uncle and Mr. Hillock, your uncle stated that it was his intention and desire that you should have the benefit of a one-half interest in the property as it now stands with the new building and all, as soon as the property could be put in satisfactory shape.

"I suggested and it was agreed by all three of us that the best way would be for you to make a conveyance at once of your interest in the land to your uncle. This will enable him to complete the lease and have everything with regard to the property finally settled. When this is done, the arrangement is, that Mr. Hillock will continue to look after the property, and will, as the rents are paid, transmit to you monthly one-half

thereof, less any disbursements that have to be made from time to time. This will yield you an income of between $39 and $40 per month from this time forth as long as you live. This we have made secure to you by the execution of a will on the part of your uncle, who devises the property to trustees in trust to continue the payment of one-half of the rents to you for your life, and at your decease to convey a one-half interest in the property absolutely to your heirs.

"The will is so drawn that nothing that can happen will, during your lifetime, interfere with the payment to you of one-half of the rents of the property. The will has been executed and left with Mr. Hillock.

"This means for you that the property, which has not been yielding $40 a year, will yield hereafter $40 per month to you. . . .

"I have prepared a conveyance of your interest to your uncle, and have forwarded it to him at Cincinnati. The several matters here are waiting for the return of this; and, as soon as it is received, the whole matter will be closed up and settled, for, I trust, a great many years to come."

This letter and the deeds were taken by Mr. T. A. Snider to Cincinnati, and his niece then executed them there. The conveyance was a quit-claim deed, in consideration of $1.

The building then erected was destroyed by fire in 1904, and a new building was erected in 1905. Mr. T. A. Snider mortgaged the property to a trust company to secure an advance of $20,000 to permit the erection of this building. This mortgage is still outstanding against this property.

In pursuance of the arrangements embodied in the letter of the 9th May, 1900, Mr. T. A. Snider made his will, by which he gave the Bay street property in trust for the benefit of his niece and his nephew during the period of the natural life of the survivor, and upon the death of the survivor to the issue of the niece as to one-half, the issue of the nephew as to the other half, and, in default of issue of either, to his American executors.

This will was followed by a series of wills, each revoking the prior testament; and, speaking generally, until the last will, each will cut down the provision for the niece. By the last will, dated the 6th June, 1912, the niece is given $20,000 absolutely, and a Canadian executor is appointed, who is directed to realise upon the testator's Canadian estate and to transmit the proceeds to the American executor.

This will differs from some of the preceding wills, which specifically disposed of the Bay street property and which make

the legacy to the niece dependent upon her abandoning all claim to any interest in the Bay street property.

It is said that in 1909 a new arrangement was made, by which the niece abandoned all claim to a beneficial interest in the Bay street property. . . . The letter of 1900 refers to a conversation with Mr. Frank Hillock. . . . He took an active interest in her welfare, and in addition took charge of the Toronto property for Mr. T. A. Snider.

On the 10th May, 1909, Mr. Hillock had an interview with Mr. Snider at Toronto, resulting in another letter to the niece, as follows: "In conversation with uncle T. A. this afternoon, he gave me to understand that, on account of Ed. having died, he is going to make a new will. You will remember that he purchased Ed.'s half share in 78 Bay street and got you to sign over your right to the other half, so that he might put his money in a new warehouse so as to get a return out of the property. The building when completed was leased for ten years to Mr. Westwood at $244.25 per quarter, and, after paying the insurance, one-half, $122.12 per quarter, less your share of the insurance, was paid to you. When the fire occurred, a new arrangement was made with Mr. Westwood, and you were paid $600 per year. He is paying six per cent. for ten years on the land, which was figured at 24 feet at $700 per foot, $16,800 at 6, $1,008—your half share being $504. He is going to pay you as at present $600 per year; and, in consideration of your giving up your claim to your half interest in the land, he will insert in his new will to his executors to pay you at his decease $1,200 per year during your life, and at your decease to your children $20,000. Should you die without children, the $20,000 will go back to his estate for other heirs. He is willing, as well as having it in his will, to sign an agreement to that effect. He says he will be back in Toronto about the middle of June."

To this the niece replied on the 20th May, 1909, as follows:—

"Your first letter forwarded to me from Chicago in regard to the lots. . . . Now the second one, regarding uncle T. A.'s will is quite all right, but the present arrangements I do not think are quite right according to the original agreement.

"I have Mr. Irwin's letter before me now, and, according to the original agreement, if I signed over my share, I was to get one-half the proceeds, which, as you say in your last letter I did receive, one-half of $244.25 per quarter. Now there was a new agreement with Mr. Westwood after the fire, but no different arrangement with me; and, as uncle T. A. has not paid any more money up, the original agreement holds good that I

receive one-half the proceeds, which is one-half the rents, minus insurance, interest on mortgage, etc.; and, according to that, I do not think the present arrangement is quite right. I have lived up to my side of the agreement, and I feel uncle T. A. should live up to his, and I *am still entitled to one-half the proceeds.*

"You say uncle T. A. will continue to give me $600 as at present; well, at present and since the fire, I have only been getting $560, so he cannot continue to give $600 when it has only been $560.

"Because the property has increased in value, I am most assuredly entitled to the benefit of that increase, as well as uncle T. A. I only ask justice. . . .

"Since the fire I have still been entitled to the one-half, and I have not received it, so I wish you to put this before uncle T. A. . . ."

This letter it is now sought to treat as an abandonment of the interest in the Bay street property, in consideration of the provisions suggested by the letter of Mr. Hillock.

I do not think this is the true meaning of the letter. It was not so understood by Mr. Hillock, according to his testimony at the trial, nor was any formal agreement or conveyance drawn up. Moreover, the will executed by Mr. T. A. Snider on the 2nd July, 1909, makes the legacy to the niece conditional upon her making no claim against his estate in respect of any property of her father, whether in respect of No. 78 Bay street or otherwise. In the event of any claim being made, she is to forfeit all interest, even though the claim is unsuccessful. This indicates that at that time Mr. Snider did not regard his niece's claim as extinguished.

Two issues were raised at the trial: first, as to the interest of Mrs. Carlton in the Bay street property; secondly, whether upon the construction of the will she is put to her election.

On the first issue, I think that Mr. Irwin's letter of 1900 governs. Mrs. Carlton is entitled to a half-interest in the Bay street property, subject to one-half of the amount due upon the trust company's mortgage. The letter indicates an intention of the uncle to give her then a half interest in the property as it then stood, and not to make any claim against her for reimbursement for the improvement the uncle had then made.

There is some question as to accounting, as Mrs. Carlton claims not to have received the entire half of the income. The accounts have been well and accurately kept by Mr. Hillock, and this matter can be adjusted before the judgment issues. If there is any difficulty I may be spoken to about it.

The question of election must, I think, be determined from the will itself. I do not think that former wills can be looked at to aid in the interpretation; nor, if looked at, do I think that they would in any way forward the contention of the executors and residuary legatees. The testator has deliberately omitted the express provision putting the niece to her election; and, instead of referring to the Bay street property specifically, he refers merely in general terms to such property as he owns in Ontario.

The will itself is not, I think, sufficient to put the niece to her election, as the only clause in any way relating to the Bay street property is item 7 of the will. By this Mr. Harvey G. Snider is appointed special executor "to settle any and all business matters that I may have on hand at the time of my death in the city of Toronto." To him is given "absolutely and in fee simple . . . any real estate, lands and premises that I may own at the time of my death in the Province of Toronto (sic) Canada" in trust to sell and remit the proceeds to the general executor.

I have read, among others, the cases referred to by counsel, and I find the law so clearly and accurately stated in Halsbury, vol. 13, that it is not necessary to refer to the cases in detail: "To raise a case of election under a will, upon the ground that the testator has attempted to dispose of property over which he had no disposing power, it must be clearly shewn that the testator intended to dispose of the particular property, and this intention must appear on the face of the will, either by express words or by necessary conclusion from the circumstances disclosed by the will. The presumption is, that a testator intends to dispose only of his own property, and general words will not be construed so as to include other property, nor will parol evidence be admitted to shew that the testator believed such other property to be his own so as to allow it to be comprised in the general words. Similarly, where the testator has a limited interest in property, and purports to dispose of the property itself, the presumption is, that he intends to dispose only of his limited interest; and, if it is sought to carry the disposition further, it must be shewn that he intended to dispose of more than that interest."

Reliance is placed upon the fact that the testator speaks of giving property to his executor in fee simple and authorises the execution of deeds to convey to the purchaser the absolute fee simple, and directs the payment of incumbrances out of the proceeds. All this, I think, quite insufficient to rebut the pre-

sumption that the testator is dealing with his own share in the property.

If one were at liberty to look outside of the will, there is nothing in the surrounding circumstances to indicate that the testator did not intend to make a somewhat liberal provision for his niece, who had become practically an adopted daughter.

In the result, the title of Mrs. Carlton to one-half interest in the property should be declared, and it should be declared that the will does not put her to her election. The accounts should be adjusted; and, if some arrangement cannot be made which is satisfactory to the parties, I may be spoken to as to the provisions which may be proper to secure payment to Mrs. Carlton of her legacy, as the proceeds of the testator's share of the Bay street property ought not to be transmitted to the foreign executor until the legacy is paid. It may also be thought desirable that a judgment in the nature of partition should not be pronounced, though I trust the parties may be able to agree upon some method of realisation without the assistance of the Court.

The costs of all parties in both actions may be paid out of the estate. These costs, however, must not include (so far as Mrs. Carlton is concerned) any costs solely occasioned by her unsuccessful attack upon the conveyance by the brother of his share.

LAFONTAINE v. BRISSON—SUTHERLAND, J.—FEB. 4.

Vendor and Purchaser—Agreement for Sale of Land—Mortgage for Part of Purchase-money—Oral Bargain—Term of Mortgage—Evidence—Finding of Fact of Trial Judge—Specific Performance.]—An action by the vendor for specific performance of an agreement for the sale and purchase of land. The agreement was oral. The price for the land and certain farm machinery was $4,350, of which $1,250 was paid by the transfer of other property. The balance of the principal, with interest yearly at five per cent. from the 1st February, 1913, was to be secured by mortgage; interest to be paid on the 1st February in each year along with $100 on the principal, the first payment to be made on the 1st February, 1914. The number of years over which the payments were to extend was in dispute. The Statute of Frauds was not pleaded. The plaintiff and his wife testified that the bargain was, that the defendant was to execute in favour of the plaintiff a mortgage for $3,100, payable $100 a year for fourteen years and the balance at the

end of the fifteenth year. The defendant asserted that the $3,100 was to be payable at the rate of $100 a year for thirty-one years. This was the sole point in dispute. Upon the evidence, the learned Judge found in favour of the plaintiff's version of the bargain. Judgment for the plaintiff with costs for specific performance of the agreement as asked: the defendant to execute a valid mortgage in favour of the plaintiff in the terms indicated, and until such time as the defendant shall do so, the plaintiff is to have a lien upon the lands for the purchase-money. A. E. Lussier, for the plaintiff. C. A. Seguin, for the defendant.

RE GEORGIAN LAND AND BUILDING CO. AND MEDLAND—FALCONBRIDGE, C.J.K.B.—FEB. 5.

Vendor and Purchaser—Title to Land—Sale under Power in Mortgage—Evidence of Default—Short Forms of Mortgages Act, R.S.O. 1897 *ch.* 126, *Schedule, No.* 14—*Requisition on Title—Vendors and Purchasers Act.*]—Motion by the vendor, under the Vendors and Purchasers Act, for an order declaring that an objection to the title of the vendor made by the purchaser, upon an agreement for the sale of land, viz., that a requisition made by the purchaser upon the vendor, to furnish evidence of default in payment of mortgage-moneys, a sale under the power in the mortgage-deed having been made, and the vendor deriving title thereunder, had been satisfactorily answered. The learned Chief Justice said that the evidence of default which had been supplied by the vendor was the best now obtainable, and was sufficient. But, also, the extended form of the proviso in the Short Forms of Mortgages Act, R.S.O. 1897 ch. 126 (p. 1186), No. 14, contains the words "(of which default as also of the continuance . . . the production of these presents shall be conclusive evidence)." The requisition had been satisfactorily answered. Declaration accordingly. No costs. Glyn Osler, for the vendor. J. H. G. Wallace, for the purchaser.

HEIMBACH V. GRAUEL—KELLY, J.—FEB. 6.

Fraud and Misrepresentation—Sale of Land—Action for Deceit—Evidence—Findings of Fact of Trial Judge—Misrepresentation of Value and Character of Land—Reliance on—Acquiescence—Failure to Prove—Damages.]—Action for deceit by the defendants in a sale of land in the Province of Alberta. The

representation as to the soil of the land was, "a black loam with a clay subsoil, in fact, a steam-ploughing proposition." The whole evidence satisfied the learned Judge that the representations made to the plaintiff as to the character and value of the land were in several respects not borne out by the facts; and he had no doubt that there was a deliberate design and intention on the defendants' part to draw the plaintiff into the transaction by creating in her mind a false impression as to the character and value of the land. He also found that she relied upon and was influenced by what the defendants represented.—The defendants alleged that the plaintiff, after she learned the true state of facts, acquiesced in and approved of the transaction, and so debarred herself from the right to object. The learned Judge said that the acquiescence which was necessary to shew a determination not to impeach a transaction was a quiescence in such circumstances that assent might be reasonably inferred from it—or a condition of being content not to oppose: Kerr on Fraud, 4th ed., p. 332. Time alone is no bar to the right to attack, though length of time is evidence of acquiescence, and strengthens the presumption that a transaction is legal and honest. A person may, by his conduct, forfeit his right to rescind, and yet retain his right to sue for damages: Peek v. Derry, 37 Ch.D. 576. And here rescission was not sought, but damages for deceit. The plaintiff's subsequent conduct did not indicate a confirmation of the transaction; and the learned Judge was unable to find that she did acquiesce or confirm or intend that her actions should have the effect of relieving the defendants from the consequences of their conduct towards her in the transaction. She was willing to do whatever was in her power to aid them in reselling the lands, but without abandoning her right to claim against them for her loss.—The learned Judge found the damages sustained by the plaintiff with which the defendants were chargeable to be $5,991.06 and interest from the 16th January, 1911. Judgment for the plaintiff for that amount with costs. R. McKay, K.C., and A. B. McBride, for the plaintiff. E. E. A. DuVernet, K.C., and J. A. Scellen, for the defendants.

OWEN SOUND LUMBER CO. v. SEAMAN KENT CO. LIMITED—FALCONBRIDGE, C.J.K.B.—FEB. 7.

Contract—Manufacture and Sale of Lumber—Refusal to Accept—Defects—Evidence—Time of Delivery—Damages—Resale of Lumber by Vendors—Mode of Selling—Reference.]—Action for the price of lumber or for damages for breach of contract by refusal to accept the lumber. The learned Chief Justice said that the defendants endeavoured to import into the contract a provision as to time, which could not be done. The contract was of their own drawing. The defects charged in manufacture, piling, etc., were not established by the weight of evidence. The plaintiffs' was a country mill, and the defendants had dealt with them before. Judgment for the plaintiffs for $1,862.96 and costs. The defendants complained of the mode adopted by the plaintiffs in selling the lumber, as not tending to get the best price. They did not satisfy the Chief Justice that a better result could have been produced by any other method of disposing of it. But the defendants might have a reference as to damages at their own risk, and in that event further directions and subsequent costs would be reserved. W. H. Wright and J. C. McDonald, for the plaintiffs. F. Smoke, K.C., and F. H. Kilbourn, for the defendants.