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DIVISIONAL COURT.

NOVEMBER 19TH, 1912.

FEE v. TISDALE.

4 O. W. N. 373.

Debtor and Creditor—Judgment Debtor—Motion to Commit—Alleged Concealment of Property—Alleged Refusal to Answer—Statute-barred Debt—Assets in Hands of Foreigner—Right to Examine before Return of Nulla Bona Made.

Application to commit defendant, a judgment debtor, or in the alternative to have her attend for re-examination on the ground that she had not answered, fully, questions as to her disposition of certain property, and had concealed and made way with the same. The judgment in question, for $412.60, was recovered in respect of plaintiff's share in an estate which was supposed to have come to her for division. Defendant had been entitled to an equal share of the estate and had received such share, but had never actually received plaintiff's share, and refused to obtain same from the trustee in Seattle, in whose possession it was, on the ground that plaintiff was indebted to her in respect of a debt which had become statute-barred, and, that until he paid the same, she would not facilitate him in any way.

DENTON, Co.C.J., dismissed motion.

DIVISIONAL COURT, *held*, that defendant's answers had been full and frank, and that there was no case of concealment of assets, as the moneys in question had never come to her hands.

McKinnon v. *Crowe*, 17 P. R. 291, distinguished.

Appeal dismissed without costs.

Appeal from the judgment of HIS HONOUR, JUDGE DENTON, of the County Court of the county of York, dismissing a motion to commit the defendant, or in the alternative for an order for her re-examination for not disclosing her property, or for having concealed or made away with the same, and insufficient answers upon her examination.

The plaintiff recovered judgment against the defendant for $412.40 for debt and $27.60 for costs. It does not appear that execution was placed in the sheriff's hands or that there was a return *nulla bona*. An appointment, how-

ever, was obtained for her examination as to her estate and effects, and her means of paying the debt in question. She attended and was examined. It would appear from the examination that the defendant and the plaintiff were two of a family of seven, who were entitled to receive as the next of kin some $2,800 from a deceased brother, who had resided in or near Seattle. One J. G. Trenholm, of Seattle, had charge of the business. A portion of the money was paid over to the defendant and she paid out four shares, amounting to $1,600. The plaintiff's action was brought to recover his share. This never actually came to her hands. It is still in the hands of Trenholm, who has charge of the estate. The defendant's own share was paid to her. She stated as the reason why she has not obtained the plaintiff's share from Trenholm and paid it over to him, is because the plaintiff owes her, and has owed her for many years an amount exceeding the share in question, and that the same is outlawed, and she thought she is entitled to retain this money under her control, that at all events she was not bound to assist him by bringing it to Canada, it still being in the hands of Trenholm. She said in one part of the examination that she had received this money, but she explained this.

"Q. You told me a little while ago that you received it? A. It was about the same, but Mr. Trenholm has charge of the business; until they settle with me; when Harry settles with me we will see what will be done, but he owes me a bulk of money all these years and wont pay me; he is sore because Mr. Trenholm did the business, and that is why he had me up here to-day; he borrowed $300 from me, and he has not paid me, and there is $200 of that in my mother's will and he had never paid that, and he is now fighting me for $398, and I would be foolish, I think, to pay him."

She further stated that Mr. Trenholm has the money; that he did the business; that her sister and brother-in-law live in Seattle, and they know about this debt from the plaintiff to the defendant; that the plaintiff actually owes the defendant all this money; that the defendant said to Mr. Trenholm: "You know that these boys owe me this money and would never pay me, isn't there any way I can get my money out of them," and he said, there was only one, if they would sign these deeds.

"Q. What deeds? A. Each one's share."

She further said that she wrote and told them about this money, and asked them to settle, and two of them did settle, and the plaintiff would not. She further stated that she never got any interest on this money, which she lent them, and that it was absolute robbery on their side to try to compel her to pay it; that the two brothers allowed her to retain their share for the money they owed her. She further stated that while the $1,200 still remains in Trenholm's hands, she does not know what has been done with it, except that he holds it for her, but she does not know exactly how.

The appeal to Divisional Court was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE KELLY.

Grayson Smith, for the plaintiff, appellant.

A. B. Armstrong, for the defendant, respondent.

HON. MR. JUSTICE CLUTE:—On reading the examination it leads one to think that the defendant stated the exact facts of the case. It further appears that the money had never come to her hands or under her control. That there is a debt due from the plaintiff to the defendant. That a right of action therefor is barred by the statute. She could not successfully plead this debt due her as a set off against the plaintiff's claim. This could be met by the statute: Pollock on Torts, 5th ed., 685.

Mr. Smith relied upon the case of *McKinnon* v. *Crowe*, 17 P. R. 291. I think that case quite distinguishable from the present. There the judgment debtor hearing the judgment had gone or was about to go against her, turned all the property she had into money and sent it to a friend in a foreign country where it remained, and upon her examination she refused or professed to be unable to give any information as to where it was. After she had ample opportunity to become aware of its position, and had done nothing towards satisfying the plaintiff's claim, an order was made for her committal to gaol for three months. Here the case is quite different. This money never came to the hands of the defendant, although a judgment for the same has been recovered against her. It still remains in the hands of the person who had the division of the estate, with the view of inducing the plaintiff to sign a discharge and so authorise the person holding the money to pay over the same to the

defendant, whom the plaintiff owes as her two brothers had done.

His Honour Judge Denton dismissed the motion, and in doing so we think he was right.

The answers of the defendant were frank and full, giving all the information she had and the reasons for her act. See *Herdman* v. *Fewster*, [1901] 1 Ch. Div. 447. The objection by defendant's counsel that it did not appear that an execution had been placed in the sheriff's hands and *nulla bona* returned, relying upon *Ontario Bank* v. *Trowern*, 13 P. R. 422, is not, we think, well taken, inasmuch as a judgment creditor is *prima facie* entitled to issue an appointment for the examination of his judgment debtor; and, upon a motion to commit the latter for refusal to be sworn, it is for him to shew affirmatively that the issue of the appointment was an abuse of the process of the Court. *Grant* v. *Cook*, 17 P. R. 362.

Under all the facts in this case, this motion should be dismissed with costs.

HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE KELLY, agreed.

COURT OF APPEAL.

NOVEMBER 19TH, 1912.

REX v. MURRAY & FAIRBAIRN.

4 O. W. N. 368.

Criminal Law—Motion for New Trial—Conviction for Burglary—Criminal Code, sec. 1021—Meaning of Term "Verdict"—Two Defendants—Joint Trial—Court not Bound to Consider Cases Together—New Trial in One Case and not the Other.

Motion on behalf of defendants, tried together in the County Judge's Criminal Court in London and convicted of burglary and theft, for a new trial, made by consent of the trial Judge under sec. 1021 of the Code. It was urged on behalf of defendants that if either of them were granted a new trial because of a conviction against the weight of evidence, both must be, as they were tried together.

COURT OF APPEAL, *held*, that the rule above referred to on behalf of defendants, applied to cases of conspiracy only, and the case of each defendant must be considered on its merits.

Reg. v. *Fellowes*, 19 W. C. R. 54, and other cases referred to.

Upon the merits, the Court came to the conclusion that defendant Fairbairn was entitled to a new trial and defendant Murray not entitled, and so ordered.

Quære, if the word verdict, in sec. 1021 of the Code, applies to a decision of a Judge, on the facts, sitting without a jury?

Discussion of question by MACLAREN and MEREDITH, JJ.A.

The two appellants were tried together in the County Judge's Criminal Court at London before the Junior Judge, for burglary and theft, and were both convicted. He granted them leave under section 1021 of the Criminal Code to appeal to this Court for a new trial on the ground that the verdict was against the weight of evidence.

The appeal to Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE LENNOX.

P. H. Bartlett, for the defendants.

J. R. Cartwright, K.C., for the Crown.

HON. MR. JUSTICE MACLAREN:—It was strongly argued on their behalf before us that if the conviction of either of the accused was against the weight of evidence, they should both have a new trial, and a dictum of Robinson, C.J., in *Reg.* v. *Fellowes*, 19 U. C. R. at p. 54, was cited in support of this proposition. It is to be observed, however, that that was a case of conspiracy, as was also *Reg.* v. *Gompertz;* 9 Q. B. 842, where Lord Denman, C.J., laid down the same rule. No authority was cited to us, nor have I found any for such a rule in a case of burglary like the present. If this had been a case of conspiracy it would have necessarily been applicable to them both. In my opinion the general rule is that laid down by Lord Kenyon, C.J., in *Rex* v. *Mawbey*, 6 T. R. (also a case of conspiracy), at p. 368, where he says that the Courts will grant or refuse a new trial according as it will tend to the administration of justice. I do not find anything in the law or in the facts of the present case to prevent the cases of these two appellants being considered separately, each on its own merits, and if the evidence warrants it, different conclusions being arrived at.

According to the evidence the Arva Mill, a short disance north of London was broken into on the night of March 27th, 1912, the safe blown open and two small cheques and $178.15 in cash stolen. The empty cash-box was found in a field close to the road leading to London. Fairbairn gave evidence and said he was a peddler who had sold out his stock in Sarnia and Watford, and had beaten his way to London on a freight train arriving on Monday

March 26th, and that he slept in a barn in London west on Tuesday night, got two cups of tea at the house of the owner about 9 on Wednesday morning, having his own bread; that he met Murray for the first time in the public library and that they were drinking in different hotels. When arrested on Wednesday afternoon he had $3.86 on his person. His story about his breakfast was corroborated and he was seen about 9 o'clock on his way to the city alone. The two prisoners were seen together several times during the day at hotels, a barber shop, etc. At one of the hotels Fairbairn put his hand into Murray's pocket and took out $115 in bills which were taken from him and delivered to the landlady for safekeeping. When arrested late in the afternoon Murray had $17 additional in bills and $22.42 in silver and coppers. When on his way to the police station he said several times that he had $18 when he came to London, but he was in a drunken condition when he said it. The denominations of the bills and the silver corresponded generally with that taken from the cash-box, but none of it was identified except two silver coins—one a ten cent piece worn smooth with a very small hole near the edge, and an English threepenny piece, both of which had lain in the mill cash-box for some weeks. Murray did not go into the witness-box nor produce any evidence as to where he had come from or where he had got these two coins or any of the money, and there was no evidence of his having even been in London until the day after the robbery. In my opinion he has made out no case for a new trial and I think his appeal ought to be dismissed.

As to Fairbairn there is no evidence that the $3.86 found on his formed part of the money stolen, nor is there any evidence that he had ever seen Murray until the forenoon of the day after the burglary. It is difficult to accept his story as to his doings on the day in question, as a considerable part of it is inconsistent with the evidence of the other witnesses, but that may be due in part to the drunken condition in which he then was. He appears to have suffered a prejudice from his familiarity with Murray during the day after the burglary. No special reasons have been given for the granting of the leave to appeal, but it is probably on account of the weakness of the evidence against Fairbairn. On the whole I am of opinion that a new trial should be granted to Fairbairn alone.

I am aware that in entertaining the appeal in this case we are giving to the word "verdict" in sec. 1021 of the Code, a meaning that it does not usually bear. While the general dictionaries, both English and American, mention its use in the popular or philological sense as when one speaks of "the verdict of the people," yet they all so far as I have seen confine its legal meaning to the findings of a jury. The same may be said of the English Law Dictionaries, and also of the American, so far as I know, except that of Rapalje & Lawrence, which defines it as "the opinion of a jury or of a Judge sitting as a jury on a question of fact." This last definition has been approved in *Carlyle* v. *Carlyle*, 31 Ill. App. 338. On the other hand some of the American law dictionaries not only define the word as the finding of a jury, but add that it is inapplicable to the findings of a Judge. Black's Law Dictionary says: "It never means the decision of a Court or a Referee or a Commissioner;" and Abbott's says: "The decision of a Judge or referee upon an issue of fact is not called a verdict, but a finding, or a finding of fact." In *Bearce* v. *Bowker*, 115 Mass. 129, Gray, C.J., says: "None but a jury can render a verdict;" similar language is used in *Otis* v. *Spence*, 8 How. Pr. (N.Y.) 172; *Kerner* v. *Petigo*, 25 Kan. 652; *McCullagh* v. *Allen*, 10 Kan. 154; and *Froman* v. *Patterson*, 24 Pac. Rep. 692.

I do not know of any English statute in which the word has any other meaning than the finding of a jury, nor any Canadian statute where it can be otherwise construed, unless it be in this sec. 1021 of the Code, which we are now considering. Nor am I aware of its being used in any other sense by any English or Canadian Judge or legal writer except by the Master of the Rolls (Jessel), in *Krehl* v. *Burrell*, 10 Ch. D. 40, where in a civil case tried by him without a jury he says: "I give a verdict for the plaintiff, and reserve my judgment for a fortnight." This was said thirty-five years ago, but such use of the word does not appear to have been followed unless it be in the section which we are now construing (possibly because Jessel was more distinguished for his legal acumen than for his exact scholarship). It would have been much more satisfactory if Parliament had used unambiguous words that could have not given rise to the present difficulty. A further argument in favour of confining it to the verdict of a jury might

be that in a case in which the Judge had sufficient doubts to justify him in allowing an appeal, he would ordinarily give the benefit of the doubt to the accused and not convict him. However, as this point was not taken by the Crown, we do not now pass upon it, but reserve the right to do so hereafter in case Parliament should not see fit to change the language of the section and it should come before us for decision.

HON. MR. JUSTICE LENNOX:—I agree.

HON. MR. JUSTICE MEREDITH:—Mr. Bartlett's contention that possession of recently stolen money, without explanation, is no evidence of guilt, though it would be as to goods of any other description, is quite too broad a contention. There may, and generally must be, a great difference in fact between the possession of current coin of the realm, and money of a like character, and possession of, for instance, a horse, or a man's pocket-book with his name upon it. But there may be cases of the possession of money under circumstances which could not but make such possession conclusive, in fact, of guilty, to the mind of ordinary knowledge and intelligence; as also there might be such possession under circumstances which might and should in like manner exclude even any serious suspicion of guilt.

It is all a question of fact governed by all the circumstances of the case; circumstantial evidence weighty or without weight according to the surrounding circumstances.

The possession of the money by Murray on the morning after the mill was broken into and money, very like that which was found upon his person, stolen, in connection with the other circumstances of the case, and wholly unexplained by him, made a very strong case against him. Having regard to the similarity in amount, the number of "coppers" the threepenny bit, and the other similarities, it is rather difficult to understand how the trial Judge could very well have come to any other conclusion than that the money found in the prisoner's possession was the money stolen from the mill; or how, even with the mind filled with knowledge of the freedom of the interchange of money from one to another in a lawful manner, without observation, by the taker, of more than the amount and the genuineness of the money, if that much observation, this

prisoner could have come by it otherwise than by having broken into the mill and stolen it.

At all events it is impossible for me to consider that the finding of guilt of this man was against the weight of the evidence adduced.

In regard to the other prisoner the case is quite different. None of the stolen money was proved to have been in his possession; and if they were "partners in the job" the division of profits was a most uneven one: one would have expected him to have been in possession of a fair share of the spoils.

But the case made against him was one quite sufficient to arouse grave suspicion, if nothing more, of his complicity in the crime; perhaps it was enough to require the jury to pass upon the question of his guilt or innocence if the case had been tried by a jury. However the question we have now to consider is not whether there was any evidence upon which a jury might properly have convicted, but is whether the finding of guilt is against the weight of evidence.

The learned Judge who tried the case must, I think, have had some doubt upon this question: and that doubt was, in my opinion, well founded. This prisoner ought, in my judgment, to have a new trial on this ground.

This application was made under sec. 1021 of the Criminal Code, with the leave of the trial Judge; and although it was firmly opposed, on the part of the Crown, on the merits no objection was made that this section is applicable to a jury trial only. During the argument I suggested that it might not be, and if so this Court would have no jurisdiction to make any order. But further consideration has convinced me that it is. The words are very general:" after the conviction of any person for any offence the Court before which the trial takes place" may give leave to apply to this Court for a new trial on the ground that the verdict was against the weight of evidence. There is certainly no expressed limitation of the power to jury cases; and to rest an implied limitation upon the word "verdict" alone would seem to me to be resting it upon a very frail foundation.

I am not prepared to say that it would be altogether inaccurate to describe the finding of guilty or not guilty, and its indorsements upon any record of a Judge having the power of, and acting in the capacity, of a jury, in a criminal case of a verdict. It would certainly be more convenient if

the same thing should be called the same name, even though done by different bodies, qualifying it wherever necessary by a word indicative of the body whose verdict it was. My impression is that most people would be astonished if they were told that the word verdict was misapplied when applied to anything but a finding of a jury; and referring to their dictionaries would find there among other definitions to justify such surprise the meanings, a decision, or opinion pronounced.

Something more real than mere literal accuracy, however, lies in the fact that unless the section applies to findings of a Court, Judge and magistrate as well as of a jury, there would be a right to apply for a new trial in jury cases, but none in any other under this section; and as neither Judges nor justices are infallible, any more than juries, the provision would seem to constitute an anomaly, and one which would require consideration before any one elected trial without a jury.

If the act had provided for any appeal against the finding of Court, Judge or magistrate in such cases, upon questions of fact, the case would be different; but it does not; it, as I think, puts them all on the same footing with the findings of juries in regard to new trials.

I am unable to see anything in Mr. Bartlett's contention that if either prisoner is entitled to a new trial both must be. The case is one in which one may be guilty and the other innocent; one in which there might have been a separate trial of each; and it is one in which the "verdict" found and recorded against the one is contrary to the weight of the evidence, whilst that found and recorded against the other is not.

I would dismiss the application of the prisoner Murray; and grant that of the other applicant.

RICHARDS v. COLLINS.

4 O. W. N. 375.

Assessment and Taxes — Tax Sales — Indian Lands — Indian Act, R. S. C. 1906, ch. 81, secs. 58-60—Intervention of Superintendent —General—Improvements by Defendant on Lands—4 Edw. VII., ch. 23, sec. 176—R. S. O. 1897, ch. 119, sec. 30—Mistake of Title —General Principles of Equity—Discretion of Judge as to Costs —4 Edw. VII., ch. 23, sec. 228.

Action to set aside a tax sale of certain lands to defendant made in 1901. Defendant counterclaimed for improvements. The lands purporting to have been sold for taxes had not been properly assessed, statutory warning of the sale had not been given, and the sale took place within 3 years of the notice of the tax given the owner of the lands.

BOYD, C. (22 O. W. R. 592; 3 O. W. N. 1479), set aside tax sale with costs, defendant given a lien on the lands in respect of matters set up in his counterclaim, with costs.

Sections 58-60 of the Indian Act, R. S. C. (1906), ch. 81, only apply to the case of an active intervention of the Superintendent-General between the tax purchaser and the original purchaser; where he has remained quiescent of general law applicable to tax sales governs.

DIVISIONAL COURT, *held*, on plaintiff's cross-appeal, that even if defendant's improvements did not come within the statute as to improvements under mistake of title, yet, as a matter of equity, before they would grant plaintiff the relief sought by him, they would compel him to do equity by paying for the outlays made by defendant on the property.

Appeal and cross-appeal dismissed without costs.

An appeal by defendant and cross-appeal by plaintiffs from the judgment of HON. SIR JOHN BOYD, C., 22 O. W. R. 592; 3 O. W. N. 1479.

The appeal was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and HON. MR. JUSTICE RIDDELL, and HON. MR. JUSTICE LENNOX.

A. G. Murray, for the defendant.

F. E. Titus, for the plaintiffs.

HON. MR. JUSTICE RIDDELL:—Upon the argument we dismissed the defendant's appeal entirely agreeing with the Chancellor's view of the law. The plaintiffs' cross-appeal is as follows:—

The defendant counterclaimed for $400 for improvements and for money expended for taxes and statute labour for an account to take the same and for an order declaring a lien on the lands for such amount. The formal judgment de-

clared that the defendant "is entitled to . . . a lien upon the lands . . . for the amount of the purchase money paid by him . . . and interest . . . and for taxes and statute labour paid or performed by him and for the value of any improvements made by the defendant upon the said lands . . . before this action was commenced and for the costs of his counterclaim . . . after deducting . . . the rents and profits received . . . or which might have been received . . . ." And it is referred to the Master at North Bay to determine the amount, leaving the costs of the reference in the discretion of the Master. The plaintiffs contend that this is not justified by the law.

The judgment is said to be based on the Act of 1904, 4 Edw. VII, ch. 23, sec. 176(1), considered in *Sutherland* v. *Sutherland*, 22 O. W. R. 299; but this Act did not come into force till 1st January, 1905. See sec. 229. And this is not a mere matter of procedure or practice, but of substantive rights. I, therefore, think the statute is not retroactive.

We must see how the law stood when the rights of the plaintiffs accrued, which may for the purposes of this action be considered as 1901 or 1902, at any rate, before January, 1905. The statute then in force was R. S. O. (1897), ch. 224, sec. 212, but that applies only when the sale "is invalid by reason of uncertain and insufficient designation or description"—which is not the case here. We may, however, apply the statute R. S. O. (1897), ch. 119, sec. 30, if necessary. This comes from (1897), 36 Vict., ch. 22, sec. 1.

"In every case in which any person has made or may make lasting improvements in any land under the belief that the land was his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of such land is enhanced by such improvements . . . ."

This statute very much extends the application of the principle of remuneration by the true owner of the land to one who under a mistake of title has made permanent improvements upon it—the former Act going as far back as 1819, 59 Geo. III., ch 14, by sec. 3 providing for the case of mistake in boundaries occasioned by unskilful surveys, which were by no means uncommon in those days of dense forest, deep morasses and cheap whiskey. This statute is in substance repeated as R. S. O. (1897), ch. 119, sec. 31.

The relief granted by sec. 30, however, is much more restricted than that given by the Act of 1904. But, I think, in the present instance, we are entitled to go beyond sec. 30 in aid of the defendant.

It is a well recognized principle of equity: "He who seeks equity must do equity." In many instances this contains a pun on the word "equity," and means nothing more than "He who seeks the assistance of a Court of Equity must in the matter in which he so asks assistance, do what is just as a term of receiving such assistance." "Equity" means "Chancery" in one instance and "Right" or "Fair Dealing" in the other.

Accordingly while a plaintiff asserting a legal right in a common law Court would receive justice according to the common law, however harsh or unjust the law might be—yet if he required the assistance of the Court of Chancery to obtain his rights according to the common law, he would—or might—not be assisted unless he did what was just in the matter toward the defendant.

This case was represented, on the argument, as a simple case of ejectment—and it might well be a simple action in ejectment. Had it been such, I think, we would have had great, if not insuperable, difficulty in giving the defendant any relief beyond what the statute, sec. 30 gives him—and that is why one of us said on the argument that had he been solicitor for the plaintiff, he would have brought the action in that way. There could on the facts have been no defence at law, the deed under which the defendant claims being void at law as well as in equity. The action, however, is not a simple ejectment as it might have been. The statement of claim sets out the facts as in ejectment indeed, but in the prayer in addition to possession, etc., a claim is made for "5. Such further relief as the nature of the case may require." This is ambiguous and might mean only relief as at the common law, or it might mean equitable relief. We accordingly look at the judgment the plaintiffs have taken out and are insisting upon, holding clause 2 of the judgment declares "that the sale for taxes . . . and the deed . . . made to the said defendant . . . are, and each of them, is invalid, and that the same should be set aside and vacated, and doth order and adjudge the same accordingly." No appeal is taken by the plaintiffs against this clause, but on the contrary they attend to support it in this Court. This relief the plaintiffs asked for and received,

could not have been granted by a common law Court, but the plaintiffs must have come into equity for it.

They cannot now be allowed to change their position; and they have come into a Court of Equity for equitable relief, not grantable in a common law Court.

They must, therefore do equity, *Paul* v. *Ferguson* (1868), 14 Gr. 230 is directly in point. The head note reads: "Where the Court is called upon to set aside a tax sale which is equally void at law and in equity the Court does so, if at all, only on such terms as are equitable." At p. 232, the Chancellor (Van Koughnet) speaking of putting the machinery of the Court in motion to aid a harsh legal right, says that in certain cases this will not be done, continues thus "and when the Court in its discretion does interfere it does so only on such terms as it deems equitable . . . The Court says: You need not have come here at all. The deed is void at law, and here and cannot be enforced against you in any tribunal; but if you wish for your own purposes to have your title cleared of the cloud which this deed casts upon it, we will aid you only on terms.'" It is not at all necessary to cite other cases to establish the principle, but if desired the many cases may be looked at referred to in Story's Equity Jurisprudence, 2nd Eng. edition (64 e); Snell, 16th ed., p. 14 (6); Josiah W. Smith's Manual of Jurisprudence, 14th ed., p. 30 IX.; and notes on the several works.

What is equitable in this case; fair play? justice? I can find nothing inequitable, but on the contrary what is wholly equitable in the statute rate laid down in 1904. The Legislature is definite and unmistakable terms have said what they thought was fair—with that commendable tenderness for vested rights which characterizes a responsible and representative Parliament, they have refrained from making the statute retrospective, but there is no reason why the Court untrammelled by authority should not adopt the statutory role as its own. I think, therefore, this ground of appeal without merit.

He is also complained of by the plaintiffs that the judgment contains no order for possession—that is the fault of the plaintiffs themselves so far as appears—they take out an order and judgment, which should be such as satisfies them. If there be any omission, *e.g.*, if the trial Judge has not passed upon any matter which it is thought should be passed upon, the matter should be brought to his attention before being made a ground of appeal. There can be no objection

to the judgment containing an order for possession, not, however, to be made effective "until the expiration of the month thereafter nor until the plaintiff has paid into the Court for the defendant the amount," for which the defendant is declared to have a lien, 4 Edw. VII., ch. 23, sec. 176 (2) first clause. It is also objected that the judgment should not have left the costs of the reference in the discretion of the Master, and R. S. O. (1897), ch. 224, sec. 217 (1) (2), is cited in support of that proposition.

This section was repeated as of 1st January, 1905, by 4 Edw. VII., ch. 23, sec. 228, Schedule M., first item. What is provided for in this sec. 217 (1) (2), is practice and procedure and not substantive right—and accordingly the section must go; but it is found repeated in the new Act, sec. 181. Sub-section 2 provides that "if on the trial it is found that such notice (*i.e.*, a notice which the defendant is by sub-sec. 1 authorized to give at the time of appearing") or (adding other cases) the Judge shall not certify, and the defendant shall not be entitled to the costs of the defence, but shall pay costs to the plaintiff . . ."

The prerequisite for the application of this section is that on the trial it must be found that such notice was not given. The Chancellor did not so find; he was not asked to so find; there was no scrap of evidence offered upon which he could so find—the plaintiffs claiming some right following such a finding, the onus was upon them to establish the fact, and they failed to do so. *De non ap parentibus et de non existentibus eadem est ratio.* It is of no avail for counsel to tell us on the argument that no such notice was served—that is not evidence, and we do not even have an affidavit of the fact if it is one.

In any event, the plaintiffs have been awarded the costs of the action—the statute does not compel the Court to award all costs of reference so to the plaintiff—the word used is "costs." The defendant is literally ordered to (I use the words of the statute) "pay costs to the plaintiff"—and in my view awarding the costs of the action to the plaintiffs as has been done sufficiently complies with the statute without awarding also the costs of a reference which it is possible may be caused or rendered necessary by the unreasonable demands or conduct of the plaintiffs themselves.

Both appeal and (with the trifling modification spoken of) the cross-appeal fails; but must be dismissed. And as

success has been divided, there should be no costs of the appeal or cross-appeal.

Of course, we express no opinion as to the effect (if any) of any action by the Supt. Genl. under the provisions of the Indian Act, R. S. C. (1906), ch. 81.

COURT OF APPEAL.

WOOLMAN v. CUMMER.

4 O. W. N. 371.

Negligence—Collision—Pedestrian and Bicycle Rider—Busy Street—Non-suit—New Trial—Res Ipsa Loquitur—Burden of Proof—Absence of Evidence.

Action for damages for personal injuries sustained by plaintiff, a pedestrian, from a collision with defendant, who was riding a bicycle, about noon-hour, on a much frequented street in the city of Hamilton. Plaintiff, who was blind in one eye, was crossing the street in a diagonal direction and was struck partially from behind by defendant. There was no evidence as to the actual speed at which defendant was riding, but there was evidence that he saw plaintiff before the collision, which was unusually severe. Plaintiff tendered no other evidence of positive negligence.

RIDDELL, J., non-suited plaintiff with costs.

DIVISIONAL COURT directed a new trial of action.

COURT OF APPEAL (MEREDITH, J.A., *dissenting*), *held*, that the facts as shewn constituted *res ipsa loquitur*, and the onus had been shifted to defendant of rebutting the presumption of negligence.

Appeal from judgment of Divisional Court dismissed, with costs.

Appeal by defendant from judgment of a Divisional Court reversing a judgment of nonsuit at the trial before Riddell, J., and a jury, and directing a new trial.

On the 28th of September, 1911, the plaintiff, aged 55 years, was crossing a street in the city of Hamilton at about noon, when he was run into by a bicycle upon which the defendant was riding, and knocked down and very severely injured. At the time, the plaintiff was crossing the street diagonally, with his back somewhat turned towards the direction from which the defendant came. There was some evidence that the defendant saw the plaintiff immediately before the contact, and that he ordered him to get out of the way. There was no direct evidence by any eye-witness as to the speed at which the defendant was riding, but it was shewn by his examination for discovery put in by the plaintiff at the trial, at what time he left his place of business, the distance from there to the place of collision, and also the time at which the plaintiff left the place where

he was employed, and the time which he probably consumed in arriving at the place of collision. In his examination for discovery, the defendant admitted striking the plaintiff and knocking him down.

Under these circumstances RIDDELL, J., held that the plaintiff had not given any reasonable evidence of negligence, and upon this ground withdrew the case from the jury.

The Divisional Court was of a different opinion and directed a new trial, against which the defendant now appeals.

The appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE KELLY.

D. L. McCarthy, K.C., and E. F. Appelbe, for the defendant.

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

HON. MR. JUSTICE GARROW:—The judgments in the Divisional Court were it is said orally delivered, and all that appears in the appeal-book is in the form of a note of what was said, from which it appears that the Court was of the opinion that enough had been shewn to place the onus upon the defendant, a conclusion with which I entirely agree.

The defendant was not approaching directly towards the plaintiff, but rather from the opposite direction. It was midday, and so far as appears there was nothing to prevent the defendant from seeing the plaintiff. He was certainly in a better position to see the plaintiff than was the plaintiff to see him. The evidence indeed shews that the defendant did see the plaintiff before the actual collision, long enough at least to order him out of the way. These circumstances even apart from the great violence of the collision seem to me to call, and to call rather loudly I would have thought, for justification or excuse by the defendant rather than for more evidence from the plaintiff.

The facts *prima facie* at least, indicate a case of trespass, in which the element of negligence is not a necessary ingredient: see *Sadler* v. *South Staffordshire, etc., Co.*, 23 Q. B. D. 17. But even, if it were otherwise, it is in my opinion a case clearly calling for the application of the maxim *res ipsa loquitur*.

I would dismiss the appeal with costs.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE KELLY, concurred.

HON. MR. JUSTICE MEREDITH (*dissenting*):—This is another of those cases in which the plaintiff's advisers seem to have chosen to leave the facts very much in the dark, entrusting to the jury the task of "helping a lame dog over the stile." It is easy to say that further evidence was not procurable; it is much more difficult for anyone of ordinary intelligence to give credit to the assertion. It is very difficult to believe that of the good many persons who must have seen all that occurred, not one could be found to testify as to the facts; of course, it may be that none could be found whose testimony would help the plaintiff; and it is quite certain that one might have called the plaintiff and have compelled him to testify and might have examined him thoroughly on all points as an adverse witness; and so have given the Court and jury the benefit of a connected story of the whole occurrence from one who must know the whole truth of the matter. Of course, that that course might have given the defendant the last word to the jury—if the case went to the jury—ought to be, obviously, no sort of reason for letting the case go to the jury without the plaintiff having given any evidence upon which reasonable men, acting conscientiously, could find in his favour.

And, as the plaintiff's advisers chose to thus leave his case, I have no doubt that the learned trial Judge was right in "nonsuiting" him.

The onus of proof that the defendant was guilty of a breach of some legal duty, which he owed to the plaintiff, and that such breach of that duty was the proximate cause of the plaintiff's injury, was upon the plaintiff; and that onus was not satisfied in the evidence adduced. It is idle to talk of assault or trespass or of *res ipsa loquitur;* because the plaintiff fared worse in the collision, is no evidence that the defendant was more, or at all, to blame for it; with quite as much reason, or want of reason, the defendant might declaim of assault and of trespass and of *res ipsa loquitur* if he had happened to fare the worse, as of course, might have been the case; nor because the plaintiff was on foot and the defendant on a bicycle; the bicycle was not invading a footpath, the pedestrian was stepping, or had stepped, into the horse road where bicycles had a right to be, and which was stepped into with a knowledge that, at that hour of the day—

the dinner hour—it was very likely that bicycles, automobiles, street cars, horses and waggons and other vehicular traffic would be rapidly passing in any one or more of the four directions the intersection of the streets provided for all such traffic.

Negligence must, therefore, be proved; and where was there any proof of it? Accidents may happen without actionable negligence on the part of anyone; this accident might have happened in that way; or it might have been caused by the negligence of the plaintiff or by the negligence of the defendant; but again in what is there any proof of it? It was said, for the plaintiff, in the fact that the defendant was proceeding at an excessive rate of speed; but, as the trial Judge plainly pointed out, that argument assumes the fact of excessive speed, which has not been proved; evidence of excessive speed at or near the place of collision is entirely absent, and having regard to police supervision as well as of every reasonable man's care to avoid injury to himself as well as to others, ought to have been unlikely in this busy spot at that busy hour; but, in any case, if a fact, it has not been proved nor is there any such evidence in the fact that the defendant's bicycle ran on ten or twelve feet after the collision and before the defendant dismounted. The blow was merely a glancing one, the shoulders of the two men only coming in contact. Nor does the fact that the plaintiff was thrown down and sustained a severe injury to one of his eyes prove it; the fall on the hard pavement, however that fall may have been caused, might be enough to cause all the injury and more.

Nor is there any evidence of negligence or wilful injury, in the words it is said the defendant some time after the accident admitted having made use of at the time of the accident; either they would indicate that the plaintiff was in the wrong. A rider about to negligently run down a pedestrian does not generally add insult to injury; such "expressions" as those said to have been used are more likely to come from one in danger by such invasion. Nor in the statement said to have been also made by the defendant, sometime after the accident, that it was a case of either going into the man or going into a street car; there was no statement that the defendant had a deliberate choice of the one or other and chose the man; but if there had been it would all come back to the question, whose fault was it that put the defendant in that predicament; for there is no law that requires a

man to run into a street car, and possibly break his own neck rather than run into the man who has negligently got in his way and forced the choice upon him.

It all comes back to the question of negligence on the part of the defendant, proximately causing the accident, of which there is really none.

Looking at the plaintiff's story only it would appear as if the collision had happened just after he had stepped off the sidewalk to cross diagonally this much used intersection of two main horse roads, at the busiest hour of the day. If the accident so happened then the plaintiff would seem to be blamable for stepping off a place of safety into a place of danger without seeing, or if seeing, without heeding, the bicycle rider then almost upon him. And in any case the plaintiff—blind in one eye—was not adopting a very cautious method in crossing at such a place and time diagonally and so exposing himself to the traffic which might be going in four different directions, instead of crossing each of the streets separately at right angles and upon the crossings made for pedestrians in line with the sidewalks and so coming in contact with vehicular traffic in two ways only on each street, and each of such two ways separately so as to need to look out for danger in one direction at a time only.

As I have said, the accident did not happen upon a foot-path, but did happen upon a horse road which ought to have been approached and crossed by a pedestrian with great care. To step off the sidewalk into the horse road immediately in front of an on-coming bicycle, in the broad daylight does not seem to me to savour of great caution even if dinner-time hunger impel one to back and short-cuts.

But it may be that the plaintiff was not so near the side-walk, as his evidence indicates when the collision took place. The scraps read from the testimony of the defendant, taken upon his examination for discovery, in the first place indicate that he was: "Just as I came about to the corner, the side-walk on the north corner, I just saw a man come out from among the people there, his head was turned towards me, walking towards me, and I struck him on the right shoulder." Further on he says that the plaintiff was not more than a foot and a half from the west rail; but there is nothing to shew how far the west rail was from the sidewalk. And this is but an instance of the hopelessly uncertain state in which the plaintiff has chosen to brave his case, rather than give to the Court and jury all the light he could upon it.

It would be obviously absurd to treat the case—as it was contended for the plaintiff it might be treated—as if it were one of a person on a bicycle, or other vehicle, overtaking and passing a pedestrian, where he had a right to, or might reasonably be, going in the same direction, as for instance a foot path on which both had a right to travel, as the case *Myers* v. *Hinds*, 69 N. W. Rep. 156, was; and to which the statute-law of this province is applicable.

But, though I think the nonsuit was quite right, I also think that the case is one in which a new trial may well be granted, as an indulgence. It is quite clear that the case has not been fully developed; that the plaintiff may possibly have a good cause of action; and he has unquestionably sustained a very serious injury; so that, though the mistrial is the fault of his advisers altogether, he may, I think, not unjustly, be given another chance; but it ought to be on the usual terms only.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 25TH, 1912.

RE WINDATT & GEORGIAN BAY & SEABOARD RW. CO.

4 O. W. N. 395.

Arbitration and Award—Award Set Aside—Misconduct of Arbitrators—Jurisdiction over Costs.

MIDDLETON, J., where both parties attacked an award in an arbitration under the Railway Act and conceded that it could not stand owing to the misconduct of the arbitrators, *held*, that he had no jurisdiction to award costs.

Paitullo v. *Orangeville*, 31 O. R. 192, distinguished.

Motions by each party to set aside the award herein made by the three arbitrators, dated June 25th last.

Both parties attack the award upon the ground of the misconduct of the arbitrators, consisting of *ex parte* interviews, looking towards the bringing about of an adjustiment of the rights of the parties in a somewhat difficult situation.

N. W. Rowell, K.C., for Windatt.

Shirley Denison, for the railway company.

HON. MR. JUSTICE MIDDLETON:—It is conceded by counsel that in view of what took place the award cannot stand; and I have, therefore, no course open to me but to set aside the award. As each party has attacked the award and neither has attempted to support it, I do so without costs.

Counsel for the land owner requests that I make some provision respecting the costs of the arbitration. Counsel for the railway objects to my doing so, on the ground that I have no jurisdiction.

I have come to the conclusion that I have no jurisdiction, and, even if I had, I would not under the circumstances make any order, but would simply leave the parties to their legal rights.

There is no doubt that I have jurisdiction over the costs of proceedings in the High Court, but I can find nothing upon which to found any jurisdiction over the costs of the proceedings before the arbitrators. I am referred to *Pattullo* v. *Orangeville*, 31 O. R. 192, as shewing that I have authority. That case does not establish this, because the motion there was under the provisions of the Municipal Act, where authority is expressly given to the Judge to vary the award; and this is what was done by the Chief Justice.

The whole arbitration concerns the value of a small parcel of land. The award is $1,300, which is much more than the amount really in dispute. The evidence taken before the arbitrators covers nearly three hundred pages.

If the award is wrong, an appeal will lie, but both parties elect to set aside the award; though there was certainly no moral misconduct, on the part of the third arbitrator, who in his desire to end an unreasonably expensive litigation, may have technically erred.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 27TH, 1912.

REX v. BEVAN.

4 O. W. N. 400.

Intoxicating Liquors—Liquor License Act—2 Geo. V., ch. 55, sec. 9—Conviction for Simulating a Licensed House—"Local Option" Beer for Sale—Presence of Beer-pump, etc.—Conviction Quashed.

Motion to quash a conviction under the Liquor License Act as amended by 2 Geo. V., ch. 55, sec. 9, for keeping "a bar or place containing bottles or casks displayed so as to induce a reasonable belief that such house or premises is or are licensed for the sale of liquor, or that liquor is sold or served therein." The evidence shewed that the place in question was formerly a licensed house, but had lost its license. The sign "licensed to sell," etc., had been removed, but the bar, beer pump, advertising matter, etc., was still kept, but used only for the sale of "local option" beer, which is not liquor within the meaning of the Act.

MIDDLETON, J., *held*, that there must be more than what is necessary and proper for the sale of local option beer before an offence is committed.

Conviction quashed with costs, order of protection to magistrate.

Motion to quash a conviction made by the police magistrate of Hamilton, under sec. 111 of the Liquor License Act, as amended by 2 Geo. V., ch. 55, sec. 9.

J. Haverson, K.C., for accused.

J. R. Cartwright, K.C., for the prosecutor.

HON. MR. JUSTICE MIDDLETON:—Section 111 of the Liquor License Act, as it stood before the amendment of 1912, was an eminently reasonable and easily understood provision. In effect it provided that the existence of a bar in any unlicensed premises and the display of liquor therein should be *prima facie* evidence of unlawful sale.

The amendment makes that which was, therefore, evidence of an unlawful sale "an offence against this Act;" and this makes it necessary to examine the statute with great care to ascertain precisely that which is raised from the rank of mere "evidence" and constituted "crime."

I pass by the very awkward and almost unintelligble form of the section, and endeavour to ascertain the real meaning. The section reads: "The fact of any person . . . shall be guilty of an offence against this Act." I assume that this may be read as though it provided that any person who does the thing mentioned shall be guilty, etc.

The things so rendered unlawful are "the keeping up of any sign . . . or having . . . a bar or place containing bottles or casks displayed so as to induce a reasonable belief that such house or premises is or are licensed for the sale of liquor or that liquor is sold or served therein . . ."

"Liquor" in this Act means intoxicating liquor; and it is lawful to sell liquors that do not contain more than two and a half per cent. proof spirit, even if such liquors resemble in appearance and taste liquors that ordinarily contain more that the stipulated amount of alcohol. This has led to the manufacture of what in the evidence is called "local option beer."

The sole evidence in this case is that in an hotel which was once, but is not now, licensed to sell intoxicating liquor there is a bar, and on the bar a beer pump, which pumps local option beer, and "all appliances" and "signs," consisting of calendars and advertising matter, that had decorated the bar and premises when the hotel had a license. The

hotel still retained its name. The sign "Licensed to Sell," etc., was removed.

It is essential, to constitute an offence, that what is done should "induce a belief that" (*a*) premises in fact unlicensed are licensed, or (*b*) that liquor—*i.e.*, intoxicating liquor—is "sold or served therein."

It is not for me to speculate why the Legislature should make it penal to have a bar so equipped as to induce a "reasonable belief" on the part of the thirsty wayfarer that he could therein obtain a beverage which might intoxicate when there is in fact nothing to be had but beer containing "less than two and a half per cent. of proof spirits;" it may well be that the lack of the desired percentage can only be discerned by a trained and sensitive palate, and the average man seeking intoxication requires protection from such innocuous beverages; or the desire may be to protect the licensed house whose customers are being deluded by this hollow mockery into the belief that they are in a genuine bar. Be that as it may, it seems clear that there must be more than that which is necessary and proper for the sale of local option beer, before an offence is committed; some exhibition of bottles and casks such as usually contain real "liquor," or some such display of suggestive advertising matter as would lead a reasonable man to the belief that in this unlicensed place liquor was sold. Mere "calendars and one thing or another," is not enough. The only bottles were not displayed, but were in the cellar, relics of a departed glory; and the "pump" might indicate the innocent "local option beer."

The motion should be granted with costs.

The magistrate should be protected.

MASTER IN CHAMBERS. DECEMBER 2ND, 1912.

DICKMAN v. GORDON.

4 O. W. N. 424.

Defamation—In Foreign Language—Particulars of Damage and Publication Ordered—Actual Words and Translation to be Pleaded.

MASTER-IN-CHAMBERS, in an action for spoken and written defamation in Yiddish, ordered that the exact words complained of and a translation, be set out in the statement of claim; that particulars of special damage be given, and that particulars of all persons to whom the defamation was published be given at least two weeks before the trial.

Costs to defendant in cause.

Motion by defendant for further and better particulars of certain paragraphs of the statement of claim in an action for alleged spoken and written defamation. Both the written and spoken slander being in Yiddish.

Welsh (Singer & Singer), for the motion.

Birnbaum (Day & Co.), for the plaintiff.

CARTWRIGHT, K.C., MASTER:—According to the law laid down in Odgers on Libel, 5th ed., 125, the original and actual words alleged to have been spoken and published must be set out in the statement of claim and then an exact translation should be added. At the trial the correctness of the translation, if not admitted, must be proved by a sworn interpreter.

If any special damage is claimed in respect of the defamatory words particulars of same should be given. See Odgers, pp. 627, 628, and precedents there referred to.

The statement of claim should be amended as indicated above. The defendant will have 8 days from such amendment to plead.

The costs of this motion will be to defendant only in the cause.

The allegations given in the particulars of the persons to whom the defamatory words were spoken are sufficient for the present. If evidence is to be given of other persons "not now known to the plaintiff" particulars of these should be given at least two weeks before the trial.

MASTER IN CHAMBERS. NOVEMBER 29TH, 1912.

RAMSAY v. TORONTO RW. CO.

4 O. W. N. 420.

Discovery—Better Affidavit on Production—Motion for—Insufficiency of Material.

MASTER-IN-CHAMBERS, *held*, on an application for a further and better affidavit on production, that an affidavit by plaintiff that he was informed by his solicitor and believed that it was defendant's practice to keep a record of all car repairs, and that the same in respect of the car in question had not been produced, was insufficient material on which to base the motion.

Reference to Bray's Digest of Discovery, 1904, p. 10.

Motion by plaintiff for further and better affidavit on production by defendants.

J. P. MacGregor, for the motion.

F. McCarthy, contra.

CARTWRIGHT, K.C., MASTER:—On 19th September a similar motion was made and an order granted for inspection of car in question as well as for further production. This would seem to have given all that plaintiff was entitled to, at any rate he was satisfied to go on and examine the car and has twice delivered to defendants the particulars of defects, etc., on which he relies, as directed by said order. Under these circumstances, it was probably too late to make the present motion. But it is not necessary to decide this at present.

The motion must fail on the ground of the objection taken by Mr. McCarthy, that there is no material on which the motion can succeed. All that is said is in an affidavit of plaintiff that he has been informed by his solicitor and believes "that it is the practice of the Toronto Rw. Co. to keep a history or record of all inspections or repairs done upon any of its cars and that no reference" as to this in respect of the car in question has been made in the defendants' affidavit on production.

Assuming that this would be sufficient under the English practice to allow the plaintiff to avail himself of Order XXXI., Rule 19 A. (3) (see Bray's Digest of Discovery (1904), 8, 66), it is clearly insufficient under our practice which is as given in Bray, at p. 10, art. 39. I have the less hesitation in dismissing the motion because the defendants' motorman was fully examined as to the condition and equipment of the car at the time of the accident, and plaintiff's experts could easily see if any and what alterations had been made at the date of the inspection. The material question is: What was the condition of the car at the time of the accident?

The motion should be dismissed with costs to defendants in any event.

In Bray's Digest of Discovery, at p. 26, it is said: "For the purpose of considering whether a further affidavit of documents should be ordered, the affidavit of documents, the documents therein referred to (any documents produced:

Lyell v. *Kennedy*, 27 Ch. D. 20), and the pleadings are according to *Jones* v. *Montivideo Co.*, 5 Q. B. D. 558; *Compagine Financière* v. *Peruvian Co.*, 11 Q. B. D. 63, and *Hall* v. *Freeman*, 29 Ch. D. 319, the only sources."

MASTER IN CHAMBERS. NOVEMBER 30TH, 1912.

ROSCOE v. McCONNELL.

4 O. W. N. 423.

Pleadings—Statement of Defence—Motion to Strike Out Paragraphs—Further Discovery—Pleading of Collateral Facts—Not Objectionable—Lengthy Examination for Discovery—Con. Rules, 616, 259, 261.

Motion to strike out certain paragraphs of the statement of defence, and for further examination of defendant in an action for a declaration that a conveyance to defendant absolute in form was made to him only as mortgagee and trustee, and for an accounting.

MASTER-IN-CHAMBERS refused to strike out the paragraphs complained of on the ground that they furnished the history of, and the collateral circumstances surrounding the impeached transaction, and also refused to order further examination of defendant as he had already been examined at very great length, and plaintiff was not entitled to the information sought, viz., as to defendant's accounts when dealing with the lands in question until she had obtained judgment, and then only on a reference.

Motion dismissed, costs to defendant in any event.

Motion by plaintiff for further examination of defendant and to strike out certain parts of the statement of defence.

J. P. MacGregor, for the motion.

J. Grayson Smith, contra.

CARTWRIGHT, K.C., MASTER:—The only material mentioned in the notice of motion is "the examination of the defendant and proceedings had herein." The action is by the daughter and administratrix of one Thomas McConnell against her brother, to have it declared that a conveyance of land on Yonge street in December, 1906, by one Simmons who was a bare trustee for the father to the son was only by way of security for liabilities incurred by the son for the father's benefit.

Since the phenomenal rise in prices of lands in Toronto such actions are not uncommon. That, however, is no reason for refusing plaintiffs whatever may be their legal

rights in any particular case. The statement of claim in paragraph 5 alleges that this with other lands of the deceased were taken by him in the name of Simmons as a trustee. The reason being given as follows:—

"The said Thos. McConnell had suffered heavy losses—in the early nineties and because of executions against him in respect thereof was obliged to have the lands he bought and sold in the course of his real estate business held in the names of various nominees as trustees for him pending their resale."

The third paragraph of the statement of defence is to the effect that defendant does not know if those statements are true but if they are he submits that Thos. McConnell and those claiming under him are estopped from asserting the present claim.

Plaintiff moves to have this struck out—presumably as irrelevant though no ground is stated in the notice of motion. But it may well be found to be a conclusive answer to the action. Whether that is so held or not, the paragraph cannot be struck out at this stage under the well known authorities and the well settled practice. See once more *Stratford* v. *Gordon*, 14 P. R. 407. Plaintiff also asks to have the last sentence of paragraph 5 and all of paragraphs 8, 9, 10 and 11 of the statement of defence struck out. The last sentence of paragraph 5 states that the mortgage of 26th March, 1906, given by Thos. McConnell through Simmons was only a second mortgage on lands wholly unimproved and was therefore not a sufficient security to the mortgagee. This does not seem in any sense irrelevant. It is part of the history of the case and shews why the defendant became liable at his father's request for the advance then made as well as for future advances on the property. Paragraphs 8 and 9 continue the history of the transaction and shew why in defendants' view it was impossible for his father to do anything with the property which was encumbered through his want of skill or bad fortune so that the second mortgagee had not only to pay off the first mortgage but also mechanics' liens to the amount of several thousand dollars and that in consequence he insisted on defendant making payment on his notes and he in turn as a settlement with his father took an absolute conveyance of the property in December, 1906.

Paragraph 10 stated certain facts incorrectly and defendants' counsel expressed his desire and intention to amend. Such leave is now given and the paragraph so amended will stand as alleging a fact which defendant can tender in evidence at the trial. Neither in this nor in paragraphs 8 and 9 is there any reason for striking them out.

Paragraph 11 states that at the time when the deed of 20th December, 1906, was given to him, his father asked for and was given an option to purchase in 3 months, time being strictly of the essence of the agreement. That this was not exercised within that time and that at his request by writing under seal on 21st March, 1907, it was further extended but was not taken up nor further extended.

There is certainly nothing irrelevant here. These facts if true may be of material assistance to defendant in shewing that the conveyance of 20th December, 1906, was to him absolutely and not in any way as trustee is merely by way of security.

Then as to the motion for further examination of defendant. He has already been examined on 3 different days and his depositions cover 136 typewritten pages the last question being numbered 1304. *Prima facie* the remarks made in *Evans* v. *Jaffray*, 3 O. L. R. pp. 333, 342, would be relevant to this case and may yet be held applicable on taxation if plaintiff is ultimately successful.

From a consideration of the depositions and the only issue on the pleadings it does not seem that any further examination should be had, notwithstanding the strenuous and lengthy contention of plaintiff's counsel otherwise. The defendant appears to have made full production of documents and to have answered all relevant questions—sometimes more than once, as was not surprising in an examination taken on three different days, the 11th, 17th and 21st of October.

The chief point insisted on was that defendant was bound to shew how he had paid all he claims to have paid on account of the liabilities on the property. With this I am unable to agree or with the reason given that defendant must shew that he had paid these sums out of his own money and not from the proceeds of the land in question. So far as I understand the law, plaintiff must prove her own case, assuming that the plea of estoppel is not given

effect to. This claim of hers cannot be assisted by going into the accounts at this stage. That must wait until plaintiff has judgment in her favour.

The motion fails on all points and must be dismissed with costs to defendant in any event.

I have not overlooked the contention that such parts of the statement of defence should be struck out as to which the defendant says he has no knowledge—I am not aware of any case in which this has been held to be a ground for excision. Even if that was so, the motion cannot be made in Chambers. See *Jasperson* v. *Township of Romney*, 12 O. W. R. 115, where the scope and application of Rules 616, 259, and 261 are fully considered.

COURT OF APPEAL.

APRIL 18TH, 1912.

RE FARRELL ESTATE.

3 O. W. N. 1099; 4 O. W. N. 335.

Will—Construction—Codicil—Bequest of Residue—Later Bequest of "Balance" of Estate—Repugnancy—Desire to Avoid Intestacy—Clear Gift Followed in Preference to Vague—Costs.

Motion for construction of a will and codicil. The testator, by his will, clearly disposed of his residuary estate, making due contingencies against intestacy, which he expressed himself as anxious to avoid. By a later codicil he provided "whatever balance may remain to the credit of my estate, whenever the final settlement of the same is made by my trustees, I direct that the same shall be invested by them and paid over to my grandson E. F., after the death of his mother, and in the case of his death, divided equally between his issue, and if no issue, to go to my residuary estate." On behalf of E. F., it was contended that the codicil was repugnant to the earlier grant of the residuary estate and, therefore, as a later gift, should prevail.

TEETZEL, J., *held*, that the word "balance" could not be taken to refer to the residuary estate, and that the clauses in the will were not revoked by the codicil, which might, possibly, be ineffective for the lack of a "balance" to which it might apply.

Costs of all parties out of estate, those of trustees as between solicitor and client.

COURT OF APPEAL dismissed appeal from above judgment.

An appeal by Edward Farrell from the following judgment of HON. MR. JUSTICE TEETZEL.

Glyn. Osler, for the trustees.

I. F. Hellmuth, K.C., for Catharine Forbes and other legatees, and for all infants.

D. L. McCarthy, K.C., for Edward Farrell.

HON. MR. JUSTICE TEETZEL (18th April, 1912):—Motion for construction of the will of the late Dominick Farrell upon which a number of questions were submitted, the most difficult one for determination being question (2), who is entitled to the residuary estate having regard to clauses 17 and 19 of the will and the codicil dated 20th March, 1909.

Clauses 17, 18, and 19 read as follows:—

"17. In further trust after payment of annuities all other bequests and expenses to divide the income to be derived from my residue estate equally between Eva Farrel, Dorothy Farrell and Cyril Farrell the children of my son Vincent F. Farrell and Minnie Finn and Catharine Forbes the children of my daughter Mary Finn and in the event of the death of any such grandchild without issue him or her surviving the parents' share of the capital from which such income was derived to be equally divided among his or her brothers and sisters but to those only above named.

"18. Provided also that my executrices and trustees shall after the death of any of the said children as aforesaid and until their said issue becomes entitled hereunder to receive their said shares pay to the said issue or expend in any way which may be deemed best for their education or support the interest and income from their respective shares in the whole of my estate.

"19. In respect of the said residue of my estate I direct that all or any property and moneys belonging to my estate given or bequeathed to the various parties and objects mentioned herein or not so given which may fall in tail or in any way lapse on account of the death of any person or other cause whether it be in the nature of income or principal shall form part of the said residue and be distributed finally among my said grandchildren or other persons mentioned above upon the principal and according to the provisions hereinbefore set out so as to prevent the possibility of any intestacy as to any part of my estate," and the codicil of 20th March, 1909, read as follows:—

"This is a codicil to the last will and testament of my Dominick Farrell formerly of Halifax, Nova Scotia, but at present residing in Worthing, Sussex, England, Esquire, which will bears date on or about the Thirteenth day of July, one thousand nine hundred and seven.

"Whatever balance may remain to the credit of my estate whenever the final settlement of the same is made by my trustees the National Trust Company of Ontario at Toronto. I direct and it is my will that the same shall be invested to the best advantage by them and paid over to my grandson, Doctor Edward Farrell, after the death of his mother and in the case of his death, divided equally between his issue and if no issue to go to my residuary estate." . . .

The will was dated July 13th, 1907, and within the next three years the testator executed eleven codicils, the above recited codicil being the seventh.

Substantially the answer to question (a) turned upon whether the said codicil revoked the gifts in clauses 17, 18 and 19 of the will, by reason of its inconsistency with those provisions.

In paragraph 3 of his will the testator gave all the rest and residue of his personal estate to his executors and trustees upon certain trusts which are set out in several paragraphs of the will prior to paragraph 17, and which consisted chiefly in making provision for payment out of the income of a number of annuities and also pecuniary and specific legacies.

The provisions in the will subsequently to paragraph 19 chiefly consisted of directions to his trustees.

It is quite plain in perusing the will and the codicils that the testator had constantly before his mind the creation and disposition of a residuary estate, the first reference thereto being in paragraph 4 in which he makes provision that should the legatee therein die without issue the amount given should go "back to my estate to become part of the residue."

In clause 6, he makes similar provision stating that the amount given "shall revert to my estate and become part of the residue thereof."

In clause 8 he uses the words "and if no issue, back to my estate to form part of the residue thereof."

Then it will be observed that in clause 17 he uses the words "residue estate," and in clause 19 "said residue of my estate."

In clause 25 he makes provision that if any legatee shall make any claim against his estate which is not presented in his lifetime or shall institute any legal proceedings

against his estate, etc., he shall be deprived of all participation in the estate and the share or shares to which he would have been entitled "shall form part of my residuary estate and divided *pro rata* among the other legatees." This is the first instance in which he uses the words "residuary estate" but thereafter, in the third codicil he makes provision that certain legacies therein shall "fall into and form part of my residuary estate," and he uses the same words in the fourth and fifth codicils; and in the above recited codicil he makes provision that in default of issue the legacies shall "go to my residuary estate."

Having therefore clearly made provision for residuary estate and a disposition of it under clauses 17 to 19 of his will, the difficulty arises to determine what the testator meant by using the words "whatever balance may remain to the credit of my estate whenever the final settlement of the same is made" in the above recited codicil.

It may be that being anxious to avoid an intestacy as to any part of his estate, as expressed in the 19th clause, and having made so many alterations and substitutions in the preceding six codicils, the testator may have, for greater caution and to avoid intestacy should there be any balance of his estate undisposed of, made the above provision. On the other hand, if he meant thereby to give his residuary estate to Dr. Edward Farrell that gift would be quite inconsistent with the gift of the residue contained in his will; and under the well settled rule that where there are inconsistent gifts the last must ordinarily prevail and operate as a revocation of the first, this codicil would probably have that effect.

I am unable, however, upon consideration of all the provisions of the will, to conclude that the testator meant by the codicil to revoke the bequest of the residue in his will.

In the first place, it seems to me that the use of the words "balance," etc., in the first part of the gift, and providing in the latter part that if there is no issue to take that balance the same is to go to his residuary estate, is quite inconsistent with the view that the testator could have contemplated that the balance referred to was the same as the whole body of the residuary estate disposed of in his will, which, I understand, represented by far the greater portion of his total estate. The codicil treats "re-

siduary estate" as an existing fund and the "balance" as problematical.

Then if the effect of the codicil is to revoke the former gift of the residuary estate, and if there should be no issue of Dr. Edward Farrell, there would happen an intestacy, because outside of the provisions in clauses 17 and 19 of his will and this codicil there is no one named to take the residuary estate, and the contingency of an intestacy was one that from the language of clause 19 the testator was anxious to avert.

Clauses 17 and 19 are clearly so worded as to leave no chance of any balance remaining, although, as I have said, by reason of the testator having in his codicils made other gifts he may have conceived the idea that there was a possibility of a balance; but if it is a fact that under the provisions of the will there is no chance of a balance remaining to the credit of his estate, then this provision is void not for uncertainty but because there is no fund upon which it can attach. It would seem to me to be unduly extending the rule as to revocation by an inconsistent subsequent bequest to hold that the words "balance," etc., necessarily or reasonably mean the residuary estate; for it is also a rule that to cut down or revoke a previous gift by a subsequent one it must be reasonably clear that the testator intended to revoke or cut down the previous gift. It, furthermore, seems to me that if the testator had intended to revoke the residuary gift he would have made his intention more manifest than it can be argued he did from this clause, because in other codicils when the testator desired to revoke a provision in the will he effected the revocation by clear and appropriate language.

The answer to this question will therefore be that the gifts provided for in the 17th, 18th and 19th clauses of the will are not affected by the codicil of the 20th March, 1909.

To question (b) the answer is yes.

Question c: By arrangement this question and question e. were reserved for subsequent application, should events hereafter arise making it necessary.

Question d: The trustees shall set aside a sum at the present time the income on which in their opinion will be sufficient to meet the annuities.

Question f: The income during the period of obstruction to be temporarily suspended only, and is not absolutely lost.

Question g: The expense should be confined to the expenses of obtaining probate.

Question h: Mary Finn is entitled under the codicil of 3rd March, 1910, to the twenty-five shares of stock absolutely.

Costs of all parties out of the estate; those of the trustees as between solicitor and client.

The appeal to Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

The same counsel appeared.

HON. MR. JUSTICE MEREDITH (19th November, 1912):— It is impossible for me to tell, with any feeling of certainty, just what the testator intended should be done, under the provisions of the codicil to his will, in question upon this appeal; but, if I were bound to come to some conclusion upon the subject, my conclusion would accord with that reached by the Judge of first instance, Teetzel, J., and would be reached in much the same way as that in which his conclusion was reached; but I prefer to put another prop, and a firm one, I think, to that conclusion, thus; the gifts contained in the will, given in plain and explicit language, are not to be revoked by the very uncertain language of the codicil, and the less so because the testator used in the same testamentary writings very plain and appropriate words of revocation in other respects. That which is very uncertain ought not to override that which is very certain.

I would dismiss the appeal.

HON. MR. JUSTICE LENNOX. DECEMBER 11TH, 1912.

TRIAL.

DIXON v. GEORGAS BROTHERS.

4 O. W. N. 462.

Partnership — Non-registration of Co-partnership Registration Act— Remission of Penalty — Sale of Business — Misrepresentation— Costs.

Action to recover $1,500 damages for alleged misrepresentations upon the sale of a business by defendants to plaintiff, and $100 statutory penalty from each partner of defendants for non-registration of a co-partnership under the Partnership Registration Act.

LENNOX, J., dismissed former claim with costs, and remitted the penalties imposed by the statute on the defendants, giving plaintiff, on that branch, County Court costs less a set-off on the High Court scale, which costs he fixed at $25 net.

Tried at Cobourg, December 2nd and 3rd, 1912.

W. F. Kerr, for the plaintiff.

W. S. Middlebro, K.C., for the defendants.

HON. MR. JUSTICE LENNOX:—As I intimated at the conclusion of the argument there will be judgment remitting the penalties for non-registration claimed under the provisions of the Partnership Registration Act, pursuant to the powers vested in me to remit the same under statutes of Ontario, 1907, ch. 26.

The statute expressly provides that the costs of the action shall not be remitted. So far as this part of the plaintiff's claim is concerned, he could have sued in the County Court—if not in the Division. In the disposal I shall make of the costs, it is not worth while to enquire, and I express no opinion, as to whether the Division Court has jurisdiction or not. The plaintiff would be entitled to the costs of this branch of his case then on the County Court scale, and the defendants to a set off of the extra costs of being brought into the High Court. The plaintiff could have moved for judgment upon the pleadings, but I do not think any saving would have been effected in that way. There have been no costs incurred in respect of this item beyond a few dollars at most. I shall treat the costs as above indicated, and although on taxation the plaintiff's costs might not exceed the extra costs to be recovered by the defendants I

shall as a matter of convenience adjust them and allow the plaintiff a net sum of $25, to be set off against the general costs of the defence hereinafter provided for.

The claim for penalties was a mere side issue, a peg perhaps upon which the plaintiff hoped to hang costs in the event of failing in his main claim. The whole contest was as to the plaintiff's right to recover damages for fraudulent misrepresentations alleged to have been made by the defendants to the plaintiff inducing him to purchase a business in Port Hope in October, 1911. The claim in respect of this is set out in the first six paragraphs of the plaintiff's statement of claim. I dismiss this portion of the plaintiff's claim with costs to the defendant—these costs to be all the costs of defending the action except such foliage charges as relate specifically to the penalty claim; against these costs when taxed, the plaintiff may set off *pro tanto* the $25 allowed him.

I may say that I am quite convinced that the sale was honestly and fairly entered into and carried out by the defendants. There is no evidence to satisfy my mind that they produced any books or made any representation as to the amount of trade they were doing. They said that they had a good business and so they had; and for that matter, although it does not touch the issue, the plaintiff, all things considered, has enjoyed a good business ever since. There were tons of theory in this case—so many quarts of cream with a hypothetical percentage butter fat will make so many dishes of ice cream in Toronto, and with a different cream, and without test as to butter fat, with other methods of service and varying prices the same profits are to be inferred at Port Hope—lots of evidence of this class—bewildering mountains of it, but only an occasional grain of fact as to the Port Hope business.

As to the main witness for the plaintiff, a busy merchant, who remembers that he sold certain books a year and a half ago, and without records of any kind, remembers that he sold them for $1.85 paid in silver, and remembers that in this money there were two 50-cent coins—as for this witness, in the absence of satisfactory independent evidence that he possesses a memory of the Dr. Johnson type, a prodigy in fact, I am not able, I regret to say, to accept his evidence. I do believe, however, that his meddlesome interference and

his voluntary assertion of the possible extent of a business as to which he had no knowledge whatever, had much to do with inducing the plaintiff to bring this action.

There will a stay for 30 days.

HON. SIR G. FALCONBRIDGE, C.J.K.B. DEC. 6TH, 1912.

TRIAL.

JACKSON v. PEARSON.

4 O. W. N. 456.

Moneys had and Received—Organization of Company—Evidence.

FALCONBRIDGE, C.J.K.B., gave judgment for plaintiff for $1,279.45 and costs, in an action for moneys had and received, finding against defendant's contention that the moneys were advanced for the purposes of a company in course of incorporation.

Action for money lent. The defence was that the plaintiff and defendant were, together with others, interested in the promotion of a company incorporated under the name of The Universal Gas Company, Limited, and that the plaintiff advanced the moneys sued for the purposes of the said company, not as a loan to defendant personally.

Geo. Wilkie, for the plaintiff.

S. C. Smoke, K.C., for the defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I prefer to accept the evidence of the plaintiff as against that of the defendant, and I adopt it as true.

This is entirely apart from any question of the burden of proof, and of the probabilities of the case, which were to my mind, however, largely in favour of plaintiff's contention. It is true that plaintiff was a director of the company, and that he was a subscriber for one $100-share, but the defendant and one Bronder professed to have discovered a valuable process for producing and generating gas, which this company was intended to exploit, and if the company had gone into operation and had proved to be a success these two would have had an allotment of 13,748 shares of fully paid up common stock of the par value of $100 per share, and no

doubt would have made a very large amount of money—enough to make them both, even according to modern standards, wealthy men.

The cheque of 12th October, 1911, for $300 was undoubtedly made payable to "W. H. Pearson, jr. M'g'r. Universal Gas Co." This addition I regard as mere matter of description.

I think Mrs. Pearson must be mistaken in her recollection of what the plaintiff said to her. It is manifest that he could not at that time have said that there was nothing owing to him by the defendant, inasmuch as there was then, in addition to the amount of the claim now being pursued, an indebtedness upon a call loan for which certainly there was abundant security, but which was nevertheless a debt.

There will be judgment for plaintiff for $1,279.45, with interest from the 3rd of September, 1912, and costs.

Thirty days' stay.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 18TH, 1912.

TRIAL.

MILLER v. ALLEN.

4 O. W. N. 346.

Vendor and Purchaser—Option Contained in Lease—Notice of Intention to Exercise—Tender made after Action Brought—Insufficiency of—Acceptance Varies Conditions of Option—No Provision for Cash Payment—Lack of Seal or Consideration.

Action for specific performance of an option to purchase certain property contained in a lease made May 29th, 1911. The option was to continue for a year until June 3rd, 1912, and was for the purchase of the property for $4,500: $1,000 cash, and a mortgage for the balance. On May 9th, 1912, plaintiff wrote that he was exercising his option, asking for a draft deed, making some requisitions on title and stating he would be ready to close "as soon as the papers were in shape." As defendant did not respond to his correspondence, plaintiff issued a writ on May 31st, and on June 1st, made a tender of $1,000 cash, and a mortgage for $3,500, bearing interest from June 1st, 1912.

MIDDLETON, J., *held*, that the letter of May 9th was not an acceptance of the option, as it substituted for cash a payment "as soon as the papers are in shape."

Cushing v. *Knight*, 46 S. C. R. 555.

That, as the tender was made subsequent to the action, it could not be set up, and that, in any case, it was insufficient, as it should have included interest from the date of the alleged acceptance.

Action dismissed with costs.

Action for specific performance, tried on the 8th of November, 1912, at Toronto.

W. C. Hall, for the plaintiff.

Tilley, K.C., and Wm. R. Cavell, for the defendant.

HON. MR. JUSTICE MIDDLETON:—On the 29th May, 1911, a lease for two years was executed, purporting to be in pursuance of the Short Forms Act, and containing the following clause:—

The said lessor further agrees to give the said lessee the option to purchase the above premises for one year, ending the third of June, 1912, for the sum of four thousand five hundred ($4,500), paying $1,000 cash and giving mortgage for balance repayable $100 half yearly, with the privilege of paying more at any time without notice or bonus and with interest at six per cent. per annum."

This lease is not under seal, although it purports so to be.

On the 9th May, 1912, the plaintiff's solicitors wrote the defendant stating that their client (the plaintiff)—"intends to exercise the option of purchasing the premises at $4,500 given him in your lease to him, dated the 29th of May, 1911, and we would be glad if you would kindly accept this as notice of his exercising the option."

This was followed by a request to have a deed prepared and submitted, and some requisitions upon the title, and the statement: "Subject to the above the title appears satisfactory and we think our client will be ready to close as soon as the papers are in shape."

No reply was made to this letter; and on the 23rd of May, the solicitors wrote to the defendant that:—

"Failing to hear from you or your solicitor by Monday with a draft deed we shall take it as an intimation that you do not intend to carry out the transaction and shall be obliged to issue a writ for specific performance."

The writ was issued on the 31st of May.

Up to this time the purchaser had made no tender of either deed, mortgage, or money; and he was in point of fact in default in payment of the rent, the last rent paid being that due on the 3rd of April.

On the 1st of June, the plaintiff and his solicitor attended on the defendant at his place of business and then made a

tender of $1,000 cash and of a mortgage for $3,500, dated on the 1st of June and carrying interest from that date.

The plaintiff's solicitor seeks to avail himself of what then took place, in support of his action. I do not think that this is open to him. His cause of action must be complete before the action is instituted; and if what then took place is relied upon as an acceptance of the offer embodied in the option, the contract was not made until after the action was brought.

The letters which I have referred to are put forward as constituting an acceptance. I do not think that they are sufficient. The case of *Cushing* v. *Knight,* 46 S. C. R. 555, shews that where an option stipulates for a cash payment, the cash payment is a condition precedent to the existence of any contractual rights.

This case affords a good illustration. The vendor stipulated for cash. The purchaser accepts, and substitutes for cash a payment "as soon as the papers are in shape."

There is another aspect of the case that also presents difficulty. Before the plaintiff can justify his action he must shew not only a contract, but that the defendant is in default. Clearly the defendant was not called upon to do anything until the tender was made.

Also, the tender was insufficient, if based upon the theory that the letter of May 9th constituted an acceptance. Interest ought to have been paid on the cash, and the mortgage ought to have provided for interest running from that date.

That renders it unnecessary to consider the other defences relied upon.

In dealing with the case, I have considered myself bound by the decisions in *Davis* v. *Shaw,* 21 O. L. R. p. 474, and in *Maltezos* v. *Brouse,* 19 O. W. R. 6. To regard the clause in question as a mere offer or option, quite distinct from the lease and not founded upon any consideration. Were it not for these cases I would have found myself unable to answer the question put in *Hall* v. *Center,* 40 Cal. 63, "How is it that the Court would thus compel the lessor to part with an estate for years at the mere option of his tenant, but would at the same time permit him to violate his agreement to part with the fee, if the tenant elect to purchase it?" For I take it to be clearly established by a series of English cases that the Court will decree specific performance of an agreement to grant a renewal of a lease.

Even if this were so, the plaintiff would yet fail in this action, for the reasons I have given. The action must, therefore, be dismissed with costs.

HON. MR. JUSTICE MIDDLETON. DECEMBER 7TH, 1912.

CHAMBERS.

RE SMITH.

4 O. W. N 457.

Appeal—Leave to—Interpleader—Interlocutory Application—Suggestion of Delivery of Pleadings by Consent.

Motion for leave to appeal from judgment of RIDDELL, J., 23 O. W. R. 186; 4 O. W. N. 188.

MIDDLETON, J., granted leave, if the parties so chose, but suggested that the parties deliver pleadings on consent, setting out their full contentions.

Costs of motion to be in appeal.

Motion for leave to appeal from the order of RIDDELL, J., in Chambers, 30th October, 1912, 23 O. W. R. 186.

McGregor Young, for Dixon.

R. C. H. Cassels, for the Art Museum.

HON. MR. JUSTICE MIDDLETON:—The order of my learned brother determines a very substantial question touching the merits of the dispute, and I think that the parties should be at liberty to obtain the view of an appellate Court upon this question. The policy to which effect has been given for many years is that the merits of a controversy should not be dealt with piecemeal on interlocutory applications, but should be disposed of in their entirety at the trial.

The form in which the issue is settled may necessarily dispose of matters that ordinarily, and I think more properly ought to be left to the hearing. Therefore, I suggest to the parties the desirability of considering whether an order might not well be made now, upon consent, by which the issue should be raised by the delivery of pleadings in which each side should be entirely at liberty to present its contentions in such manner as it sees fit, and in that way the whole matter could be more satisfactorily disposed of when the facts are ascertained at the hearing.

If this is assented to, the costs throughout should be in the cause. If it is not assented to, the costs of this motion will be in the appeal.

The appeal should be brought on during the present sittings.

DIVISIONAL COURT.

NOVEMBER 13TH, 1912.

OLSON v. MACHIN.

4 O. W. N. 287.

Company—Directors—Judgment for Wages—7 Edw. VII., ch. 34, sec. 94—Boarding-house Keeper—Equitable Assignment—Board Bills to be Deducted from Time Checks—Acceptance of Note—Change in Character of Debt—Scope of Statute—Addition of Extraneous Claim.

Action by a boarding-house keeper against the directors of the Kenora Mines, Limited, for $2,125.94, the amount of a judgment obtained against the company for costs and interest, under the provisions of 7 Edw. VII., ch. 34, sec. 94, which makes directors liable for wages due by the company under certain conditions. The company and plaintiff had entered into an agreement by which the company were to furnish a boarding-house and heat free for plaintiff, who was to operate it for the company's employees, furnishing them free lodging and meals at 25 cents a head. The sums due for meals were to be deducted from the men's wages by the company, and carried to plaintiff's credit in the company's books. The men were notified of the arrangement and accepted the situation. On May 15th, 1911, the company were indebted to plaintiff for $2,396.55, in respect of the above arrangement, and $132.55, in respect of other matters, a total of $2,529.10. They paid $500 in cash and gave their note for $2,029.10, the balance. The note was unpaid on maturity and plaintiff recovered judgment against the company for the amount and thereupon sued the defendant, claiming to be an equitable assignee of the workmen's claims for wages.

LATCHFORD, J., *held*, that plaintiff could not recover, as the judgment included $132.55, which was not for wages, which took the whole claim outside of the statute.

Action dismissed with costs.

DIVISIONAL COURT, *held*, that the amount due was never due as "wages," being never due to the workmen, but directly to plaintiff under his contract with the company, and that, therefore, there could be no equitable assignment to plaintiff.

That even if the moneys due could, at any time, be regarded as "wages," they changed their character when plaintiff accepted, from the company, a payment on account and a note for the balance.

Semble, that the mere addition of the $132.55 for extraneous matters to a proper claim on account of wages, would not invalidate it.

Lee v. *Friedman*, 20 O. L. R. 49, distinguished.

Appeal from judgment of LATCHFORD, J., dismissed with costs.

An appeal from the judgment of HON. MR. JUSTICE LATCHFORD, pronounced at the trial on 24th June, 1912, dismissing the action without costs.

The appeal to Divisional Court was heard by HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE MIDDLETON.

H. A. Burbidge, for the appeal.

C. A. Masten, K.C., contra.

HON. MR. JUSTICE MIDDLETON:—The action was brought by a boarding-house keeper at the Kenora mine against the directors of the Kenora Mines Limited, to recover $2,125.54, being the amount of a judgment obtained against the company, with costs and interest, under the provisions of 7 Edw. VII., ch. 34, sec. 94, which makes directors of a company jointly and severally liable to the labourers, servants, and apprentices thereof for all debts not exceeding one year's wage due for services performed by the company while they are directors.

By an agreement in writing, dated July, 1910, between the company and the plaintiff, the plaintiff undertook to operate a boarding-house owned by the company at the mines, upon the terms therein set out. Shortly, this agreement provided that the plaintiff should have the premises rent free, the company should heat the building in winter, the plaintiff on his part undertaking to provide meals for the employees at 25 cents per meal, the men to be entitled to live in the boarding-house rent free. This agreement provided that the plaintiff "shall have the money due him by the men collected through the mine office, and before any man receives his time cheque from the mine manager, the contractor (*i.e.*, the plaintiff), shall notify in writing the said manager the amount due by the men to the contractor, and the company shall only be liable for the amount so written."

After the making of this agreement the men were notified, and, upon the evidence, accepted the situation. The amount due by the men for their meals was deducted from their time cheques and carried to the credit of the plaintiff in the company's books.

The company was also indebted to the plaintiff, in respect of other matters, for $132.55. On the 15th May, 1911,

the total indebtedness was $2,529.10. In settlement of this the company gave its note for $2,029.10 and a cheque for $500, which was ultimately paid. The note was not met at maturity, and an action was brought against the company upon it, and judgment was recovered in due course on the 29th July, 1912.

At the hearing, Mr. Justice Latchford took the view that the plaintiff could not recover, by reason of the proviso at the end of clause 94, which prevents the bringing of an action against the directors "before an execution against the company has been returned unsatisfied in whole or in part," and further provides that "the amount due on such execution shall be the amount recoverable with costs against the directors." The learned trial Judge thought that the execution issued upon this judgment was insufficient, because the judgment was upon a note given for the balance of an account originally including not merely the amount due for wages, but the $132.55 due in respect of entirely other matters.

With this I am unable to agree; but I think that the plaintiff has to face a far more serious and radical difficulty. The action as brought is based upon the agreement to which I have referred, under which the company undertook to collect for the plaintiff and to account to him for the amount due by the men for board. I think that the right of action must be regarded as arising upon this agreement; or possibly the plaintiff's claim might be regarded as a claim for money had and received. If this is the correct view, the plaintiff's claim is not one falling within sec. 94. The plaintiff seeks to bring his claim within the section in question by an artificial process of reasoning, by which he claims to be an equitable assignee of the debts originally by the company to its labourers. I am unable to follow this reasoning. This is clearly not the theory upon which the action was originally brought.

Under the agreement the company became the agent of the plaintiff to collect the debts due by the men. The men agreed to allow this money to be retained from the wages due to them. This money in the hands of the company ceased to be a debt due to the men and became a debt due directly to the plaintiff, not by virtue of any assignment, but by virtue of the contractual relationship existing between the plaintiff and the company, and the assent by the men to the diversion

of a portion of their wages in the manner contemplated by the agreement. The plaintiff's claim arises not under and through the men, but by virtue of the agreement made prior to the hiring of the men, and prior to the performance of their labours in July, 1910.

The right of action is statutory. The statute is for the protection of labourers, servants, etc., of the company; and I do not think that it can be extended so as to cover a claim such as this.

The case of *Lee* v. *Friedman*, 20 O. L. R. 49, is very similar to this; but this aspect of the case does not appear to have been passed upon; and possibly the facts of that case did not really raise the question.

Another aspect presents much difficulty. The plaintiff must allege parol assignments of part of the wages due to the men. See *Foster* v. *Baker*, [1910] 2 K. B. 630.

For these reasons I think the action fails and the appeal should be dismissed.

HON. MR. JUSTICE RIDDELL:—It was strongly urged that the learned trial Judge had in effect refused to follow *Lee* v. *Friedman*, 20 O. L. R. 49 If this were so it is plain that the judgment could not stand.

I do not think the contention well founded—the learned Judge does not purport to disregard (as of course he could not disregard) the judgment of the Divisional Court in that case, but declines to extend that decision and to apply it to the facts of the present case.

The facts in *Lee* v. *Friedman* were different—there the employees of a company were customers of a storekeeper who declined to give them credit until they had got the consent of the company to pay to the storekeeper out of the wages coming to them at the end of the month the amount of their purchases from the storekeeper. The company agreed and the arrangement was carried out for some time, when the company made default. The storekeeper (in an action in which others were joined as plaintiffs in respect of other claims also for wages) sued for the amount owed to him and obtained judgment claiming specifically as assignee of wages due to labourers, etc.

The Divisional Court held (1) that the arrangement was an equitable assignment of a certain part of the wages; (2)

that an assignee of wages stands in the shoes of his assignor, and is entitled to the benefit of the statute, 7 Edw. VII., ch. 34, sec. 94. I think both conclusions were good law.

No difficulty arises from the assignment of part of a claim where the assignment is equitable and not under the statute. *Smith* v. *Everett* (1792), 4 Br. Ch. c. 64; *Lett* v. *Morris* (1831), 4 Sim. 607; *Watson* v. *Duke of Wellington* (1830), 1 Ros. & M. 602, where Sir John Leach, M.R., says p. 605: "In order to constitute an equitable assignment, there must be an engagement to pay out of the particular fund." See also *Morton* v. *Naylor* (1841), 1 Hal e.g. 583, and cases cited.

In *Shaw* v. *Moss* (1908), 25 T. L. R. 190, an assignment of 10 per cent. of salary and moneys to accrue due was supported as an equitable assignment.

I do not enter into the many curious and difficult questions arising out of the precise wording of the statute.

The cases range from *Brice* v. *Bannister* (1878), 3 Q. B. D. 569, C. A., or before to *Foster* v. *Baker,* [1910] 2 K. B. 636, C. A. or after.

In *Lee* v. *Friedman* it was indicated that the result would (or might) be different "under a slightly different state of circumstances," see 20 O. L. R. at p. 55. And in my view the circumstances here are not slightly but materially different.

Here the arrangement originated with the plaintiff and the company—the company gave him premises rent free and kept them insured, they gave him free electric light for 3 months, and supplied him with wood for cooking purposes free, he agreeing to "keep the fires going and the house heated without further charge to the company." It was agreed that he should "charge the sum of 25 cents per meal served to employees," that he should "have the money due him by the men collected through the mine office and before any man receives his time cheque from the mine manager," the plaintiff should "notify in writing to the said manager the amount due by the man to the plaintiff, and the company shall only be liable for the amount so written. Every man living in the boarding house shall live rent free, and he shall furnish his own blankets, towels and soap," while the company was to put up ice each year and allow the plaintiff the free use of the same.

When men were employed they had no option but to board at the house kept by the plaintiff—they were told that "the board so much per day or week would be deducted from them." A pay roll was made out, the entry for each man containing his nominal wages—and a deduction was made from this amount for the amount of the claim of the boarding-house keeper.

I am unable to see how the amount so deducted ever was due to the employee at all. He knew from the beginning that a certain (or perhaps uncertain, but if so, he could make it certain) amount would be due and payable, not to him, but to the boarding-house keeper under an arrangement with which he had had nothing to do and against which he was powerless to contend. It seems to me that out of the sum which represented the supposed value of the labour of the employee, and which would have been "wages" under other circumstances, a part never became due to the employee at all. It would, I think, be an abuse of language to speak of the transaction as an equitable assignment; the relation of debtor and creditor subsisted from the beginning.

But even if this difficulty be got over another remains.

The total sum payable to the plaintiff was ..	$2,396 55
There was also due for provisions	70 00
And for other goods	62 55
In all	$2,529 10

The parties get together, the amount is made up and settled as an account, stated at $2,529.10—$500 is paid generally on account, and a note for $2,029.10 given for the balance. By this transaction, as it seems to me, even if originally the amount due under the agreement had been "wages" the character was changed. If not, how much was now due for wages? Is the $500 a payment on account of wages? or partly so? How much is only in part?

At this stage if not earlier all parties looked upon the amount due as one sum not as composed of two sums differing in quality.

And the action was not as in *Lee* v. *Friedman* brought for wages at all, but upon a promissory note, which had been given as part settlement of an account stated. This is made even the more manifest as Machin is sued as an endorser.

The statute, 7 Edw. VII., ch. 34, sec. 94, is very plain that a director shall not be liable to an action for wages "unless the company has been sued therefor." I do not think it can fairly be said that the company has ever been sued for wages.

For these reasons I think the appeal fails and should be dismissed with costs.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 21ST, 1912.

BARTRUM, HARVEY & CO. v. SCOTT.

4 O. W. N. 389.

Judgment—Motion for—Agreement to Give a Mortgage—Default—Repudiation of Settlement—Costs.

MIDDLETON, J., in an action where the only question left for determination was the disposition of the costs, gave no costs to either party, both having been, at different stages of the controversy, in the wrong.

Motion for judgment upon pleadings and affidavit.

A. C. MacMaster, for the plaintiffs.

J. J. Drew, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—Upon the return of the motion, both counsel agreed that I should determine the question of the costs of the action, there being now nothing other than the costs between the parties.

Prior to April, 1912, the plaintiffs were creditors of the defendant for upwards of $2,500, and they sued to recover their claim.

On the 19th of April, an arrangement was made, embodied in a letter from the defendant's solicitor of that date, by which Scott was to reduce the plaintiffs' claim to $2,000 net, and give a mortgage upon his residence payable in three months. The $500 was paid, a mortgage was drawn by the defendant's solicitor and submitted, the plaintiffs' solicitor suggested some small changes in the terms and returned the mortgage with the suggestion. Nothing further was done in the way of completing the arrangement until after the expiry of the three months arranged for, when the plaintiffs signed judgment in the action, which was still pending,

and issued executions. Thereafter a writ was issued in this action, and the plaintiffs claimed a mandatory order directing the execution of the mortgage. The executions were paid off in October, about the time that the statement of claim was served.

There is no doubt that the defendant is in fault in not having given the mortgage as agreed; but I think that the defendant is right in the contention that upon the making of the default the plaintiffs elected to abandon the agreement when they signed judgment in the former action, and that after having done so they could not revert to the agreement evidenced by the correspondence, and seek to obtain a mortgage which would involve the giving of a covenant for the payment of the debt than represented by the judgment.

In my view both parties were wrong, and the proper disposition of this action is to make no order as to costs.

HON. MR. JUSTICE LATCHFORD. NOVEMBER 28TH, 1912.

NORFOLK v. ROBERTS.

4 O. W. N. 419.

Municipal Corporations—Waterworks—Rate Fixed by By-law—Collector Instructed not to Collect Arrears—Bonus—No Vote of Ratepayers—Discrimination—Judgment for Arrears—Costs.

Action by one Norfolk, a ratepayer of the town of Brampton, for a declaration that the action of the town council, in instructing the collector not to collect arrears of rates for water service from defendants, the Dale estate, carrying on a large wholesale florist business, was invalid, and for an order that the said defendant estate do pay, and the Board of Water Commissioners enforce, payment of such arrears, and that thereafter equal rates be levied on all users of water. The town council had passed a by-law imposing a certain rate upon greenhouses, and had, later, instructed their collector to collect less than this rate from defendants, the Dale estate, but no by-law for a bonus had been submitted to the ratepayers. Acting upon the suggestion of the Divisional Court, 20 O. W. R. 487; 3 O. W. N. 294, plaintiff had added the town as a party defendant.

LATCHFORD, J., *held*, that the town officials had acted illegally, and gave judgment requiring the defendants, the Dale estate, to pay, and the defendants, the town, to collect, the sum of $1,591, arrears. Plaintiff given all costs not disposed of by Divisional Court.

Action by a ratepayer of the town of Brampton, for an order that defendants, the Dale estate, do pay and defendants, the town of Brampton, do collect certain arrears of water rates alleged to be due the town by defendants, the Dale estate.

W. N. Tilley, for the plaintiff.

E. D. Armour, K.C., for the Dale estate.

T. J. Blain, for the other defendants.

HON. MR. JUSTICE LATCHFORD:—The plaintiff adopted the suggestion of the Divisional Court (1912), 20 O. W. R. 487, on appeal from the judgment of SUTHERLAND, J., ib. 139; and elected to add, and did add, the municipal corporation of the town of Brampton as defendants. The case thereupon came before me for trial upon the issue whether the municipality rightly or wrongly abstained from collecting certain arrears of water rates, which the plaintiff contends it was their duty to have collected from the defendants, the executors of the Dale estate, during the period between 1903 and 1910, when the water system of the town passed into the control of commissioners elected under the Municipal Water Works Act.

On May 30th, 1901, the executor of the Dale estate, as a result of a conference with a committee of the municipal council, made a proposition in writing, offering $50 per year for water service instead of $32 then paid, if the town would at its own expense place a four-inch main and hydrant in Vodden street, and would agree that the rate of $50 would not be exceeded in the future even should the premises be extended.

An alternative proposition was also submitted, as follows:—

"On the understanding that the present rate of $32 be increased to $40 per year, and will not be increased now nor in the future, we will do the excavating and filling in and furnish the necessary four-inch iron pipe; you to make the connection, lay the pipe, furnish the hydrant and all else necessary excepting the pipe."

The Water, Fire, and Light Committee of the corporation considered the letter, and on June 3rd, reported to the council in favour of the adoption of the second proposition "excepting the clause 'nor in the future;' and on the same day the council adopted the report as amended."

The municipality thus agreed that in consideration of the carrying out by the estate of the proposed work, the rates be not *now* increased above $40 a year.

It is not suggested that this was not a proper contract on the part of the town under the law as it stood at the time.

The Dale estate expended nearly $1,000 in putting in the main on Vodden street and other mains, some or all of which were afterward tapped by the corporation to supply water to householders. The estate also paid the $40 a year to the town.

By-law No. 272 came into effect on September 30th, 1903, and imposed a heavy burden upon greenhouses. The fame which Mr. Dale had won for the roses and other commercial flowers produced at Brampton continued to increase after his death, under the capable management of the business by his executor, Mr. T. W. Duggan, and it became necessary greatly to extend the area under glass. When Mr. Duggan learned that the town had in contemplation the imposition of the rates subsequently fixed by by-law No. 272—$11.12 for the first 1,000 feet of glass and $1.25 for each additional 1,000 feet—he wrote reviewing the arrangement of 1901, pointing out the importance, growth, and advantages of the industry, and asking for a fixed rate. He suggested at the same time that if any legal difficulties prevented such an arrangement, the matter should be submitted to the ratepayers.

A legal difficulty had arisen owing to the definition of the word "bonus" by the Consclidated Municipal Act of 1903, which came into force on the 27th of June. The supplying of water at rates less than those charged to other persons in the municipality was declared to be included in the word "bonus," sec. 598a, sub-sec. (e); and the granting of a bonus was prohibited unless the assent of the electors is obtained. Section 591, sub-sec. (12a).

There were other greenhouses in Brampton besides those of the Dale estate; and all became subject to the rate imposed by the by-law of the 30th September. By a resolution of the municipal council passed on December 21st, 1903, the collector of water rates was instructed "not to collect from the Dale estate in excess of $50 for the past quarter (except such sums as may be charged for private dwellings), and that the balance of the charge for the current quarter, and future charges, be deferred so as to conform to the by-law passed by this council."

The charge on the greenhouses of the Dale estate, at the rates imposed by the by-law for the quarter referred to, was $111.22, based on an area of 348,000 feet.

How the matter stood in the following year is well stated in a letter which Mr. Duggan addressed to the council on November 7th, 1904.

"You will remember," he says, "that the matter of our water rate was up last year. Up to that time we had been paying forty dollars per annum in terms of a verbal agreement, made with the council when our large extensions were being entered into. After the new by-law of last year our premises were rated at a very much higher figure: The matter was subsequently enquired into by the council, and a recommendation was made by the committee of an increase from forty dollars to two hundred dollars per annum, net, in addition to the rating for the house. I consented to this compromise; but, owing to some technicalities which were in the way, the council were unable to make the arrangement for more than the balance of the year, ending December, 1903. It was intended, however, that no more than that rate should be charged us, but I do not think that the necessary means have been taken to put it in proper shape. Up to the last quarter of this year we were asked to pay only the fifty dollars per quarter, as arranged for; but for the last quarter we have had a much larger bill rendered us, with an item for alleged arrears, which, of course, practically do not exist, but we presume that they appear because of the matter not having been properly disposed of."

The letter closed with a request for an interview. Nothing definite appears to have resulted from the interview, if indeed it was had. But it is clear that no effort was for some years made to collect more than the $50 a quarter, or to dispose of the arrears that had been accumulating upon the collector's roll.

On April 3rd, 1906, the council adopted a report of the Water, Fire, and Light Committee instructing the collector, "not to collect any arrears over fifty dollars per quarter from the Dale estate for water used in their greenhouses;" and instructing the clerk "not to place any amount on the rate book in excess of fifty dollars per quarter."

The estate had paid the $50 quarterly by cheque, and all the cheques are in evidence. The first, January 4th, 1904, is marked "in full of water rates, quarter ending 31st December, 1903." The next two are for "water rate" simply. The third cheque, July 16th, is "in full of water rate for quarter ending 30th of September, 1904." On the next, October 21st, the words "in full" are scored through, and have written over them "on A/c," with Mr. Duggan's initials added. The four cheques of 1905, are respectively

marked "water rates," "on account of water rate," "$50 on a/c Dale Estate," and "$50 on account of Dale greenhouses."

Each of these, with several other cheques, is for $53, $3 being the rate for a house belonging to the estate. The cheque of 10th July, in addition to the memorandum that it is on a/c Dale Estate, is not as "$3 in full of Dale house." A like appropriation is made of the $53 paid January 16th, 1906—"$3 in full of Dale house, $50 on account of Dale estate water rate." When this cheque was so applied there remained upon the book of the collector, as arrears due by the estate, $673.42.

Between 1903 and 1906, additional greenhouses had been erected, but no change in the area of the glass was recorded in the collector's books.

The cheques, when all are taken together, indicate that the quarterly payments were not in full of the rates payable under the by-law. It was not, however, at the time the intention of the municipality to collect more than was actually paid. The business was known to be achieving even greater success than had attended it in the past; but it was also known to be burdened by heavy incumbrances. It was the most important industry of the town, and worthy of all the encouragement the municipality could properly give. Unfortunately for the estate, the requirements of the law were not complied with; and, I think, the estate is still liable to pay this $673.42 in arrear when the cheque of January 16th, 1906, was deducted from the amount then unpaid.

At a meeting of the council held on April 2nd, 1906, a report of the Water, Fire, and Light Committee was adopted, recommending that the collector be instructed not to collect any arrears over $50 a quarter from the Dale estate, for water used in the greenhouses, and that the clerk be instructed not to place any amount on the rate book in excess of $50 a quarter. Thereafter, up to the end of 1909, a charge of but $50 per quarter was entered and collected. The area of the glass assessable was continued upon the roll at 348,000 feet, though in fact new greenhouses had been added every year.

The cheques issued by the Dale estate in payment quarterly of the $50 are marked "in full of water rates," or simply "water rates," and were regarded by the estate and the town as in discharge of all the water rates properly payable on the greenhouses under the resolution of April 2nd, 1906.

The motion then passed is attacked as equivalent to granting a bonus. There can be no doubt that between April, 1906, and the end of 1909, the town supplied the Dale estate with water for its greenhouses at rates less than those charged to other persons in the municipality. This constitutes a bonus, as "bonus" is defined in the Act, and is prohibited unless the consent of the property owners thereto is obtained. The course adopted by the municipality was illegal. The town again as from 1903 to 1906 wrongly abstained from collecting arrears which it was the town's duty to collect. In my opinion the plaintiff has the right to call upon the town to collect, and the Dale estate to pay, not only the balance of $673.42 due on January 16th, 1906, but also the sums in excess of $50 quarterly, which should have been collected and paid between the end of the first quarter of 1906 and the beginning of 1910, or a period of fifteen quarters. Upon the rated area the amount which should have been collected—$1,668.30—exceed the amount actually received—$750—by $918.30.

I am not unimpressed by the evidence that the area of the glass of the Dale estate assessable under by-law No. 272, as stated upon the collector's roll, is less than the actual area. The difference, however, according to the reports submitted to the town council on December 20th, 1909, was not very great. Even were it in fact greater, I could not upon the evidence determine with accuracy what the area was for any year or quarter of a year. The acting executor of the Dale estate has, I think, acted throughout in good faith. He paid all that he was asked to pay. He should have been required to pay more, to the extent of the $673.42 the balance due in January, 1906, and the $918.30 the amount uncollected between that date and the end of 1909, or a total of $1,591.72.

There will be judgment requiring the defendant municipality to collect from the defendant, the executors of the Dale estate, and requiring the last-mentioned defendants to pay to the municipality, the sum of $1,591.72. The plaintiff is entitled as against such defendants to the costs of the action not disposed of by the judgment of the Divisional Court, and, in addition, to the costs of so much of the action as were reserved by that judgment, to be disposed by the Judge presiding at the second trial. Leave is given to make any amendments of the pleadings that may be thought necessary.

Stay of thirty days.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 21ST, 1912.

CHAMBERS.

GIBBONS LTD. v. BERLINER GRAMAPHONE CO.

4 O. W. N. 381.

Process—Writ of Summons—Service out of Jurisdiction — Contract Made in Montreal—To be Performed There—Debts due Defendant in Jurisdiction Exceeding Jurisdiction—Con. Rule 162 (e) and (h)—Discretion of Court—To Restrain Unwarranted Assertion of Extra-territorial Jurisdiction—Action Stayed—Costs.

Application to set aside service of a writ of summons upon defendant, residing in Montreal, and the order permitting same, upon the ground that the case was not one falling within the provisions of Con. Rule 162, and upon the further ground that the Court should exercise its discretion to refuse to permit plaintiff to sue within Ontario. The contract sued upon was a verbal contract made in Montreal upon which, according to the law of Quebec, payment was to be made in Montreal. Defendant had no tangible assets within the jurisdiction, but had many customers in Ontario making payments monthly, the sum total of whose debts must exceed $200. There was, also, evidence to shew that most of these debts would, in all probability, be liquidated prior to judgment, and would be replaced with others. Plaintiff claimed that the above facts brought the case within Con. Rule 162 (*h*), allowing service where the defendant has $200 assets within the jurisdiction.

HOLMESTED, K.C., sitting for M.-in-C., dismissed defendants' application.

MIDDLETON, J., *held*, that even though the case fell technically within Con. Rule 162, the Court would exercise its discretion to refuse permission to sue where the maintenance of an action would be an unwarranted assertion of extra-territorial jurisdiction.

Société Générale de Paris v. *Dreyfus Bros.*, 29 Ch. D. 239; 37 Ch. D. 215, and other cases referred to and reviewed.

That upon the facts of this case, the defendant being resident in Quebec, the contract being made there to be performed there according to the laws of that province, and defendant's assets being substantially all there, plaintiff should be compelled to resort there for his remedy.

Order made staying all proceedings until the conclusion of any action brought in Quebec. Costs reserved until such time.

Appeal from an order made by George S. Holmested, Esq., K.C., sitting for the Master in Chambers on the 11th November, 1912, dismissing an application of the defendant to set aside an order made by the Master in Chambers on September 20th, 1912, permitting the issue and service of a writ of summons out of Ontario.

R. C. H. Cassels, for the defendant.

J. F. Boland, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—The appellant contended not only that the case is not one falling within the provisions of Rule 162, but that in the exercise of discretion

the plaintiff ought not to be permitted to sue within Ontario.

The plaintiff sought to bring this action within the terms of sub-sec. (e) and of sub-sec. (h) of Rule 162. It was said that the action was founded on a breach within Ontario of a contract which was to be performed within Ontario; and in the second place it was said that the defendant had assets within Ontario of the value of more than two hundred dollars which might be rendered liable to the satisfaction of the judgment.

The action was founded upon a verbal agreement made in Montreal, subsequently confirmed by writing. The plaintiff's letter of June 6th stated: "We hereby confirm your verbal agreement with our Mr. Tedman." This verbal agreement was made in Montreal.

HON. MR. JUSTICE MIDDLETON:—According to the law of Quebec, if no place of payment is expressly or impliedly indicated by the contract, payment must be made at the domicile of the debtor. There was no term, express or implied, for payment elsewhere; and payments under this contract are therefore to be made in Montreal.

It is not enough that payment or performance of the contract might be well made within Ontario. The Rule as it now stands does not differ widely in meaning from the former Rule, which contained the words "according to its terms." These words were probably omitted so as to make the Rule apply to implied as well as express terms of contracts. The theory of the Rule is that the stipulation requiring performance within the jurisdiction amounts to an attornment to the local jurisdiction of our Court: *Comber* v. *Leyland*, [1898] A. C. 524.

More difficult is the question as to the application of clause (h). The defendant company carries on business at Montreal. It has customers throughout Canada. Customers in Ontario are indebted to it. No doubt much more than two hundred dollars was owing at the date of the bringing of this action. The contracts with the debtors call for monthly settlement. If the litigation runs its normal course the property which the company had at the bringing of the action will have disappeared long before judgment can be recovered. These debts will no doubt be replaced by other debts; but the company has no fixed or tangible assets within the province.

Apart from authority, I would have thought that the fiction by which the *situs* of a debt is the residence of the debtor ought not to be imported into the consideration of this Rule, which would be abundantly satisfied if confined in operation to cases where the debtor has assets which can be reached under the ordinary writs of execution. But I am precluded from so holding by the case of *Kemmerer* v. *Watterson*, 20 O. L. R. 451, where Meredith, C.J., has given the wider meaning to the Rule. I have therefore to consider the question whether as a matter of discretion the order should be made.

Accepting the principles laid down in *Sirdar Gurdyal Singh* v. *Rajah of Farridkote*, [1894] A. C. 670, as a guide, the normal course is to require resort to the domicile of the defendant, particularly in the case of contracts entered into at the domicile and to be there performed. No doubt the jurisdiction of our Court to entertain an action where the writ is served abroad is to be determined by our Courts upon the terms of Rule 162. The question whether this Rule in any particular case so transcends the limits fixed by comity and amounts to an assertion of extra-territorial jurisdiction entitled to international recognition, is one for the foreign Court whose assistance is invoked to enforce our judgment.

Nevertheless, the more recent cases seem to indicate that in the exercise of discretion in permitting an action to proceed the Court ought to have regard to somewhat the same principles. In the *Societe Generale de Paris* v. *Dreyfus Bros.*, 29 Chy. Div. 239, 37 Chy. Div. 215, the Court emphatically affirms the existence of the discretion. Mr. Justice Pearson thought that the discretion ought to be exercised in favour of allowing the English action to proceed. Upon appeal the Court thought that the English action ought not to be allowed.

In *Logan* v. *Bank of Scotland*, [1906] 1 K. B. 141, an action was brought against the Bank of Scotland and the defendants were served in England. The Court stayed the action, because the action was essentially a Scotch action and ought to be prosecuted before the Scotch Court; the Scotch Court being a convenient and accessible tribunal.

This principle was applied in the case of *Egbert* v. *Short*, [1907] 2 Ch. 205, where the cause of action arose in India and would have to be determined according to the law of

India, although the defendant had been served in England when temporarily within the country.

To the same effect is *Norton* v. *Norton*, [1908] 1 Ch. 471. In *Watson* v. *Daily Record*, [1907] 1 K. B. 853, the case was brought within the Rule because an injunction was sought to restrain the repetition of libels published within England. In the exercise of discretion the Court thought that care ought to be taken that a Scotchman or a foreigner should not be improperly made amenable to the orders of an English tribunal merely because the case was technically within the Rule; and therefore set aside the order allowing service.

It is, I think, a sound exercise of discretion to hold that where the defendant is resident in Montreal, and where the Quebec Court is certainly a convenient forum, and the contract was made in Quebec and is to be interpreted according to the laws of Quebec, and the defendant's assets were all substantially within that province, the plaintiff should be compelled to resort to the Courts of that province for their remedy, when our Courts only acquire jurisdiction by the mere accident of residence within Ontario of a debtor to the defendant.

The order will therefore go, staying all proceedings in this action upon the service made in Quebec until after the conclusion of any action which the plaintiff may bring in that province.

The question of costs will be reserved until any such action is dismissed.

MASTER IN CHAMBERS. NOVEMBER 18TH, 1912.

McNALLY v. ANDERSON.

4 O. W. N. 386.

Pleading—Motion to Strike Out Paragraphs of Defence as Irrelevant —Dower Action—Plea of Tender of Lump Sum in Lieu of Dower —Rights of Dowress.

MASTER-IN-CHAMBERS, in a dower action, struck out certain paragraphs of the statement of defence as irrelevant, which went into the history of the lands out of which dower was claimed, and asserted that defendant had always been willing to pay plaintiff a lump sum in lieu of dower, on the ground that the right of a dowress to dower is an absolute right, and she cannot be forced to take a lump sum or annuity in lieu thereof.

Costs to plaintiff in cause.

Motion by plaintiff to strike out six paragraphs of the statement of defence as irrelevant in an action for dower out of certain land in the town of Aylmer.

E. C. Cattanach, for the plaintiff.

F. S. Mearns, for the defendant.

CARTWRIGHT, K.C., MASTER:—The statement of defence alleged in the second and third paragraphs that the plaintiff's husband gave $500 for the land in question, $350 of said $500 being paid by a mortgage back to the other parties, and that such mortgage remained unpaid during all the time that McNally owned the land.

This, if true, may be a valid defence to the plaintiff's claim under *Re Anger*, 26 O. L. R. 402. Then follows six other paragraphs with allegations as to the condition of the lands at the time when McNally bought them, and going into their subsequent history. It also states that defendant has always been willing to have dower allotted to plaintiff as the said lots were on 22nd October, 1911, the day of the death of plaintiff's husband, "on condition that the same be allotted in such a manner as not to give her any share in the improvements placed on" one part of the land. Paragraph 9 alleges that defendant has tried unsuccessfully to ascertain plaintiff's age, but defendant believes her to be of the age of 65 years and on that basis has offered to pay $75 in satisfaction of her claim and bring same into Court accordingly.

These are the six paragraphs moved against as irrelevant.

The proceedings in dower are now regulated by 9 Edw. VII. ch. 30. This shews that the only issue between the parties must be whether plaintiff is entitled to dower or not. If she is found to be entitled then the proceedings are governed by sec. 24 of above Act, unless some settlement is reached. But there is no power to oblige a dowress to accept a sum in gross or an annuity in lieu of dower against her will.

It must therefore follow that the paragraphs attacked are irrelevant and must be struck out with costs to plaintiff in the cause.

The motion was first argued in the week before the vacation; at my suggestion it stood over to see if such a comparatively small matter could not be settled.

As this has not been accomplished nothing remained but to decide the motion on its merits.

HON. SIR JOHN BOYD, C. DECEMBER 10TH, 1912.

RE HAMILTON.

4 O. W. N. 441.

Will—Construction—Gift to Trustees — Attempted Postponement of Enjoyment—Rule against—Restraint during Coverture—Validity of — Precatory Trust — "I Wish" — Trustee of Settlement — Appointment of.

Motion by trustee for construction of a will. By early paragraphs of the will the testator gives certain property to his daughter when she shall attain the age of 21, and authorises his trustees, in their discretion, to defer payment of the whole or any part of the gift, or to simply pay the income therefrom to the daughter. By a later clause the testator provides: "I wish all my money that my daughter may inherit from me should be settled upon herself so that in the event of her marriage it will be impossible for her or her husband to encroach upon the same."

BOYD, C., *held*, that the daughter became absolutely entitled under the earlier gift at the age of 21, and the provision permitting the trustees to postpone enjoyment at their discretion was inoperative.

Re Johnson, [1894] 3 Ch. 304, and *Re Rispin*, 25 O. L. R. 626, referred to.

That the later provision in the will constituted a valid trust and, therefore, during coverture, the daughter took the gift to her separate use with restraint on alienation by herself or her husband, such restraint to end with coverture.

Tulleth v. *Armstrong*, 1 Beav. 1, distinguished.

The trustee of the will to convey in proper form to a trustee of the settlement, costs of all parties out of estate.

Motion by trustee for construction of the will of Hon. Robert Hamilton, deceased.

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

R. A. Hall and S. T. Medd, for the legatees.

HON. SIR JOHN BOYD, C.:—By the will the testator intends and directs that distribution shall be made of part of his estate when his youngest child attains 21 and his widow remains unmarried, but this was apparently frustrated by the income of the whole estate being required for the use of the widow during her life and only upon her death in May, 1912, has the opportunity for making a division of the estate among the beneficiaries arisen.

By the will the daughter on attaining 21 and after making provision for the widow is to be paid one-fourth part of the remainder of his estate, with this proviso, that if the trustees should think it undesirable for any reason that the share should be paid, the testator authorises them to defer the payment of the whole or any part to such time or times as they may think best and in the meantime to pay only the annual income arising therefrom to the child.

The testator then provides for a further division upon the death of the widow of that part of the estate set aside for her (which in the result proved to be the whole of the estate) and to dispose of it as mentioned in the paragraph preceding and closes with a repetition of the provision that the trustees shall have the right to defer the payment of the shares of the children as in the preceding clauses mentioned.

If these clauses stand alone the situation would be that the trustees are directed to pay to the daughter her fourth share subject to their discretion in deferring the payment and meanwhile paying only the income to the beneficiary.

Upon this part of the will the question was raised whether the daughter has a present right to payment in full of the corpus, ignoring the discretionary power committed to the trustees.

The other question raised arises upon the consideration of a later clause in which the testator thus expresses himself; "I wish all my money that my daughter Annie Seaton may inherit from me should be settled upon herself so that in the event of her marriage it will be impossible for her or her husband to encroach upon the same."

And the further question is still whether notwithstanding this "wish" the money shall still be paid with restriction or condition to the daughter who is now a married woman.

The will of the testator was made in October, 1866; he died in January, 1893; the widow died in May, 1912. The daughter Annie Seaton was born in May, 1873; attained majority in 1894 and married H. C. Hill in December, 1905, (whether there is any offspring does not appear.)

Upon the early clauses of the will as proved and standing *per se*, I think, contrary to my first impression, that the better (view) is that they are inoperative so far as regards any discretionary control of the trustees to defer or withhold the *corpus* of the daughter's share. The law appears to be settled that a sum cannot be given absolutely coupled with a direction that the trustee of the money is to exercise a discretion as to the time and manner of payment. Such a scheme can be carried out effectively only by making the gift or legacy entirely dependent on the discretion of the trustee, or by means of a gift over to some other beneficiary. The matter was discussed as if it were a new point by

Sterling, J., in *Re Johnson*, [1894] 3 Ch. 304; a decision followed in *Re Rispin*, 25 O. L. R. 626, which was affirmed in the Supreme Court of Canada.

But the foundation of the rule is of older standing. The Court of Chancery has always leant against the postponement of a vesting in possession or the imposition of restriction on an absolute vested interest (per Lord Davey, p. 198), and in the same case *Wharton* v. *Materman*, [1895] A. C. at p. 192, Lord Herschell deals thus with the doctrine: "That it was regarded by the Courts as a necessary consequence of the conclusion that a gift had vested that the enjoyment of it must be immediate on a beneficiary becoming *sui juris*, and could not be postponed till a later day unless the testator had made some other destination of the income during the intermediate period."

The next point discussed was whether the married daughter was entitled to receive her full share inrrespective of the provision that "the money inherited" from her father should be "settled upon herself," etc. This later discretion if it conflicts with the earlier one must prevail according to the usual rule. It perhaps does not so much conflict, as deal with this testament of his bounty in another point of view; i.e., the element of marriage is introduced and the desire is expressed to protect the wife from the control or influence of the husband. And what is arrived at is a partial restriction on the enjoyment of the legacy so that it shall not "be encroached upon," i.e., alienated or anticipated during coverture. In this view this clause may well stand with and modify the other. That is to say both yield this meaning: this money representing the share of the estate is to be given to her as her own absolutely provided only that during coverture she shall enjoy it to her separate use (i.e., settled upon herself), and so that it shall not be encroached upon by her or her husband during coverture. After coverture the restriction ends and she has it as if unmarried.

The restraint is annexed to the separate estate only and the separate estate has its existence only during coverture: Lord Langdale in *Tullett* v. *Armstrong*, 1 Beav. 1 and 4 M. & C. R. 377. The words of the will are satisfied if the restraint is limited to the contemplated coverture which is now actually existing and may well end therewith: so that when discovert, she may dispose of the corpus as she pleases.

Of the cases cited for the daughter *Re Hutchinson*, 59 L. T. 490, is really in support of the view that the clause is valid. The gift was in that case to a daughter unmarried with a request that she should not sell or dispose of any part, and it was held that this request did not act in derogation of the absolute gift to the daughter. There was no intention from the words used to indicate "that a restraint upon a relation was meant that would operate" only during coverture—there was no reference to the possible marriage of the daughter in that will. And the Court held that no such limited restraint was in the mind of the testator, but we find just the contrary as to this testator. So *Re Fraser* (1897), 45 W. R. 232, is a case decided with much doubt by Kekewich, J., who held that where a legacy was to be paid to a married woman for her separate use without power of anticipation the cases compelled him to reject these last words and to order the corpus to be paid to her in the peremptory words of the will. He was giving effect to *Re Brown*, 27 Ch. D. 411.

The rule there laid down was that when the bequest is to a married woman for her separate use absolutely with a clause restraining her from anticipation, the question whether that restraint is effectual does not depend upon whether it is a lump sum in cash or an income-bearing fund, but upon whether the testator has shewn an intention that the trustees should keep the property and pay the income to the beneficiary. And the whole decision turned upon the words of the trust which were to pay to a married woman. If these words were found in the latter clause of this will, as they do appear in the earlier one, I should be bound by this case also. But the words are different in the later clause and they are the prevalent words: viz., the money is (not to be paid to her) but, "settled upon her," which, in my opinion, completely differentiates the present will from the others in the citations. Comment has been made on the words used "I wish," as not being sufficient to create a trust: it may carry an obligatory import and it has been used by the testator in the context of the will in that sense: *Re Bunting*, [1909] W. N. 283, per Joyce, J., and *Liddard* v. *Liddard*, 28 Beav. 266, *Potter* v. *Potter*, 5 L. J. N. S. Eq. 98, is by no means as strong a case as this. The other words "settled upon herself" have a well-known testamentary significance. For instance the form of settle-

ment involved is shewn by *Lock* v. *Lock*, L. R. 4 Eq. 122, where the discretion was to "settle" the daughter's share upon themselves "strictly." That was extended by the Court to mean that the property should be so dealt with that the income of the share should for the joint lives of wife and husband be paid to her for life without power of anticipation: that if she should die in the lifetime of her husband, then her share should go and she should by will appoint and in default of appointment to her next of kin exclusively of her husband and that if she should survive her husband then the share should belong to her absolutely.

Some such form is applicable to the present case: there should be a trustee of the settlement provided and proper conveyances settled by the Court or a conveyancing counsel if the parties cannot agree to whom the trustee of the will may discharge himself by a transfer of the fund.

This is a proper case for the estate to bear the costs to be taxed.

HON. MR. JUSTICE LATCHFORD. DECEMBER 13TH, 1912.

TRIAL.

GOWER v. GLEN WOOLLEN MILLS LIMITED.

4 O. W. N. 467.

Negligence — Master and Servant—Infant — Jury Informed that Defendants Protected by Insurance—Jury Dismissed—Workmen's Compensation Act—Action Barred — Factories Act—Pulley and Shaft not Guarded—Common Law—Defective System—Elevator Operated by Belt — Necessity to Replace Frequently — Duty of Employee.

Action by infant through his next friend for damages for personal injuries sustained while in defendants' employ, through alleged negligence of defendants. Plaintiff, a boy of 19, was engaged in defendants' spinning-room on the third storey of their factory, and needed some spools for his work, and, at the same time a messenger came up for yarn from the ground floor. The elevator was the only means of taking the spools up and the yarn down. The elevator was operated by a belt which was connected with a pulley shaft, and which frequently slipped off the pulley. On a prior occasion plaintiff had placed the belt on the pulley at the orders of the foreman, and, on this occasion, finding it off and no one available to replace it, he attempted to replace it. This involved placing a stepladder on a greasy floor and climbing up to the pulley; and, on this occasion, the ladder slipped and plaintiff was drawn into the machinery and seriously injured. Plaintiff was barred from recovery under the Workmen's Compensation Act, as his action was not brought in time.

LATCHFORD, J., *held*, that plaintiff could recover at common law, on account of the system of defendants being defective, and under the Factories Act, by reason of the unguarded condition of the pulley and shaft, which the evidence shewed could have been readily guarded.

Judgment for plaintiff for $2,000 and costs.

Action brought by the next friend of the plaintiff, an infant, against the defendants, an incorporated company, carrying on business as woollen manufacturers in their factory at Glen William, in the county of Halton. Damages were claimed at common law, and under the Workmen's Compensation for Injuries Act, and the Ontario Factories Act, for injuries sustained by the plaintiff on the 15th of December, 1911, when he was in the defendants' employ.

T. J. Blain, for the plaintiff.

E. E. A. DuVernet, K.C., and B. H. Ardagh, for the defendants.

HON. MR. JUSTICE LATCHFORD:—In opening the case to the jury, counsel for the plaintiff mentioned that the defendants' liability was covered by insurance; and I thereupon—following *Loughead* v. *Collingwood Ship Building Company*, 16 O. L. R. 64—required him to elect between a postponement of the trial or the dismissal of the jury. He chose the latter. I then dismissed the jury and proceeded with the trial.

The plaintiff, who was nineteen years of age at the time of the accident, had had five years' experience in England in the same kind of work that he was doing for the defendants in their spinning room on the third storey of their factory.

An elevator ran between the weaving room on the ground floor of the factory, and the room in which the plaintiff was employed. Until a few weeks before the accident the elevator was operated by a belt which ran from the main shaft, suspended from the ceiling of the centre of the weaving room, to a pulley connected with the elevator. Some inconvenience resulted from this, and a jack shaft was installed between the main shaft and the pulley which actuated the elevator. The main shaft was connected to this sub-shaft by a belt. From the sub-shaft to the elevator pulley was a five-inch belt, with a twist in it, so as to give the elevator pulley a reverse motion. The pulley actuating the belt to the elevator pulley was a fixed pulley; and the belt, either because of the twist or—mainly as I find—because the shaft was not properly hung, frequently came off.

The employees with few exceptions were women and children. The evidence of one of the women in the weaving room is that this belt often came off, and that then "anybody

put it on again." When the belt was off, the elevator would not run, and the skips containing the yarn from the spinning room could not be brought down to the weaving floor, nor could the skips containing the emptied spools or carded wool be taken up from the ground floor or the second storey to the third.

Small boys were employed, one of them under fourteen, to take the spools, rolls, and yarn from one storey to another by means of the elevator.

The plaintiff had no experience in putting on belts; but on one occasion had been told by the foreman, Schofield, to take a pole and move the belt off the elevator pulley. Gower reported to Schofield what he had done, and Schofield then sent him back to put the belt on. Schofield denies this; but, having regard to the manner in which he gave his evidence, I think his denial and his testimony generally entitled to no consideration, save when he admits that the belt came off the pulley frequently.

The only method of placing the belt on the elevator pulley was to rest a twelve-foot ladder on the greasy floor of the weaving room, and ascending the ladder until a suitable position was obtained, pull the belt over the pulley.

On the 15th December, the plaintiff was engaged as usual in the spining room. He required empty spools for his mules. The spools were in the weaving room, and could be got up only by means of the elevator. At the moment a boy named Bearman came up the stairs for yarn. The elevator—the only means of taking the yarn down and the spools up—was not running. Bearman asked the plaintiff to put the belt on the elevator pulley. Bearman says that he had previously asked Preston, the only man on the weaving floor, to put on the belt, and that Preston told him he had no time and to ask another man, Eddie Hill. Bearman then asked Hill—who was cleaning cards on the second floor—and Hill also said he had no time. Neither Preston nor Hill was called to deny these statements. It was after Preston and Hill had refused to put on the belt that the request of Bearman to the plaintiff was made.

Gower and Bearman both needed, in the defendants' interest, to use the elevator; Gower to get his spools up and Bearman to bring the yarn down. Without the yarn the weaving could not proceed; nor could the spinning proceed without the spools. While the primary duty of the plaintiff

was to attend to his spinning, he could at times leave his machine to do other work in his employers' interest. The foreman having once ordered him to put on the elevator belt, the urgency of this particular occasion led him to think it was also his duty to connect up the elevator in the only way practiced in the factory. With that intention he went with Bearman down the stairs to the weaving room floor.

There is a conflict of evidence as to whether the ladder should have been rested against the wall or against the projecting end of the shaft in replacing the belt. The shaft, which was ten feet from the floor, was nineteen inches from the wall; and the face of the thirteen-inch pulley would be about a foot from the wall. I find that it would have been so difficult as to be almost impossible for a person using the ladder—the only ladder available—with one end upon the floor and the other end against the wall—to place the belt upon the pulley. With the ladder against the wall in a position of stability to sustain the plaintiff—that is, with its base three or four feet from the wall—there would remain, as a simple calculation will shew, a distance of not more than six inches between the face of the pulley and the upper part of the ladder; a space into which neither man nor boy could squeeze himself for the purpose of putting on the belt.

The proper and safe position would be breast-high to the pulley. If the distance between the ladder in a stable position and the shaft itself is considered, the available space is not more than a foot—a space also inconsistent with safety.

The system adopted in putting on the belt was to rest the ladder against the end of the shaft, which projected eighteen inches beyond the pulley. This position was also dangerous, but was the least dangerous of the only positions available. The ladder was without spikes at its foot to prevent it from slipping on the greasy floor; and Bearman attempted to hold it while Gower ascended.

While standing upon the ladder Gower succeeded in placing the belt upon the pulley. The belt, however, ran off between the pulley and the hanger on the other side. Gower then reached over for the belt, and while he was doing so the ladder slipped upon the floor. Gower fell against the projecting end of the shaft, which, engaging in his clothing, whirled him around between the shaft and the wall, tore off his left arm at the shoulder, and inflicted other serious injuries.

The foreman, the manager, and one of the directors of the defendant company gave Gower immediate attention, and had him conveyed to a hospital. There the torn shoulder was dressed, and all possible care given to the boy, who made a fairly rapid recovery.

The defendant had full knowledge of the accident as soon as it occurred; but no formal notice as required by the Workmen's Compensation for Injuries Act was given to them. Negotiations regarding a settlement were entered into, and protracted—deliberately, I think—until six months had expired, and an action under the Workmen's Compensation for Injuries Act was barred.

In ordinary circumstances it would not be necessary to guard the projecting end of the shaft, far above the heads of the operators in the spinning room; but where, as in this case, it was necessary constantly to replace the belt, the projecting end of the shaft was a source of great danger. Mr. Mackell, a toolmaker and machinist of great experience and high intelligence, testified that it was practicable to guard the pulley and shaft; and I accept his evidence. If the shaft had been so guarded, the accident would not have happened. Want of a guard was the direct and proximate cause of the accident; and the plaintiff is accordingly, in my judgment, entitled to recover under the Factories Act.

I think the plaintiff is also entitled to recover at common law. The system was defective. The shaft undoubtedly was not properly hung. The pulley was set eighteen inches out from a hanger, and no hanger was placed at the other end of the shaft, which was but two and three-eighths inches in diameter. There was consequently nothing to resist the pull which the belt exerted upon the shaft, except the hanger already mentioned. The shaft was therefore constantly sprung towards the driving pulley, and the belt necessarily ran off and had to be frequently replaced.

Then, the ladder used for replacing the belt was wholly unfit for the purpose. The ladder, as well as the floor, was greasy. There were no spikes in the bottom of the ladder to prevent it from slipping. Some employee had from time to time to mount the ladder for the purpose of replacing the belt. Mr. Schofield, the overseer, says that he was there to do that work. But I do not credit his evidence. He himself had lost an arm, and could put on a five-inch belt only with considerable difficulty.

The practice in the factory was for "anyone" to put the belt on; not the little boys or the women, who formed the majority of the employees, but any of the few men who was capable, like the plaintiff, of doing so. The plaintiff had been once ordered to put on the belt, and had not been forbidden at any time to do so.

The plaintiff was not a mere volunteer. His very work in the weaving room itself made spools necessary, and the elevator was the only means of bringing them up. In putting on the belt, he was doing work identical with that which the foreman had, at least upon one occasion, ordered him to do, and was doing it in the only way the system of the defendants rendered possible, and without knowledge of the risk he was running.

The system of the defendants was defective in the respect I have mentioned. The plaintiff was not himself negligent, and, apart from his rights under any statute, is entitled to damages. *Smith* v. *Baker & Sons*, [1891] A. C. 348; *Webster* v. *Foley* (1892), 21 S. C. R. 580.

I assess the damages at $2,000, and direct that judgment be entered against the defendants for that amount with costs.

Stay of thirty days.

HON. MR. JUSTICE MIDDLETON. DECEMBER 14TH, 1912.

TRIAL.

MCBRIDE v. MCNEIL.

4 O. W. N. 475.

Ejectment — Action by Administrator — Lien for Improvements — Promise to Devise Land to Defendant — Estoppel — Increased Value of Land.

Action for possession of certain lands. Plaintiff was the legal son and administrator of the estate of the deceased owner of the lands, one Catherine McNeil, and defendant was the natural son of the deceased who had lived with her on the lands in question since his father's death some 24 years ago. Defendant had made many improvements to the lands and his mother had always promised to make a will leaving him the property, but neglected to do so. Defendant claimed a lien for such improvements.

MIDDLETON, J., *held*, that "where the owner of property stands by and allows a person to spend money thereon in the expectation that he will receive the benefit of it, such person is entitled to a lien for the increased value resulting from the expenditure."

Unity Joint Stock Bank v. *King*, 25 Beav. 72, referred to.

Judgment for possession, defendant given a lien upon the land for $600 for improvements.

No costs to either party.

Action to recover possession of the east half of lot No. 3 in the second concession of Wallace.

Catherine McBride was in her lifetime the owner of the lands in question, by virtue of a Crown patent, dated the 12th August, 1848. She died on the 26th June, 1912. The right of the plaintiff as her administrator to possession of the land was admitted at the trial, although denied in the pleadings.

The defendant claimed to be entitled to a lien upon the land for improvements said to have been made under mistake of title, by virtue of the statute, and also claimed a lien apart from the statute.

G. Bray, for the plaintiff.

J. C. Makins, K.C., for the defendant.

Hon. Mr. Justice Middleton:—The facts giving rise to the present situation are as follows: The deceased and William McNeil lived together as man and wife for many years, but they never intermarried, as they had both been theretofore married and were living separate from their respective spouses. The plaintiff David McBride was the lawful issue of Catherine McBride and her wedded husband. The defendant is one of several children, issue of the unlawful union. As Catherine died intestate, the plaintiff will take her entire estate beneficially.

The late William McNeil, and Catherine, settled upon the lot in question many years ago. The patent for the west half was taken in the name of one of the sons of William. The patent for the east half was taken in the name of Catherine.

In the first place the defendant bases his claim upon the fact, as he says, that he thought the patent to the east half had been taken in his name. He says he inferred this from the fact that the patent for the other half had been taken in his brother's name; but he admits that upon his father's death some 24 years ago, his mother claimed to be entitled to the land in question; and although he says he did not believe that she was entitled, he then made an agreement—or, rather a series of agreements—with his mother by which he occupied the property with her and maintained her upon the property, paying the taxes. He says he made this arrangement because he thought that his mother had a life interest; a statement which is quite inconsistent with the idea that he was the patentee. He also admits that he was the custodian

of his mother's papers, and that he had the patent in his possession for all these years. He said that he did not read the patent until recently.

The defendant had acquired title to the west half by purchase from his brother; and during the 24 years, the whole lot was worked, as it always had been, as one farm. The house was upon the east half, and the barn was upon the west half. A well was constructed upon the west half, close to the boundary. Over the well a windmill was erected; two of the legs of this windmill being planted upon the east side of the boundary. A road was laid out upon the centre line, half upon each side of it; and considerable money and labour was expended upon making this road of value to both halves of the farm. Some clearing was done upon the east half, also some fencing.

I am unable to find that any of the improvements made were made under a mistake of title. I think it is obvious that for many years, probably ever since the father's death, the defendant has known the real position of the title. I am confirmed in this view by the defendant's own statement that he had arranged with his mother to make a will by which she would leave him this property, but that it had been put off from time to time and had been finally neglected.

I think that some of the improvements made upon the property have increased its selling value, and that as a matter of fairness the defendant ought to be allowed a lien for this increased selling value.

I do not think that an allowance should be made for the road, as the proper inference from the evidence is that this road was constructed upon an agreement between the defendant and his deceased mother, which amounted to a dedication of the land used for the road, the purpose being to have a common way, serving both the east and the west half. This may be so declared.

The fencing is an improvement of a permanent nature; so also is the draining.

The repairs to the house I do not think are in the nature of permanent improvements, but were mere repairs.

The replanting of the fruit trees, etc., is a trivial matter, and was in the nature of ordinary husbandry.

No claim can be sustained for pump, well, or windmill, these being on the west half. It was arranged at the trial that the legs of the windmill which rest upon the east half of the land should be allowed to continue as they are.

As to the increased value, the evidence was unsatisfactory. The witnesses entirely failed to apprehend the real question; that is, the increase of the value of the land by reason of the improvements. The plaintiff goes so far as to claim a sum greatly in excess of the cost. Giving the matter the best consideration I can, I think $600 would be a fair sum to allow to cover all improvements made by the defendant.

There is no dispute concerning the defendant's right as to the $143.05, being amounts paid since the death of Catherine McBride, for which a claim ought to have been sent in to the administrator.

The general rule is well stated in Halsbury, vol. 19, p. 19: "A person who has expended money for the benefit of another, or on property in which he has no interest, has as a rule no lien in respect of such expenditure against such other person or against the owner of the property"—a rule which is quite in accord with the recent decision of the Privy Council in the *Indian Treaty Case* (1910), A. C. 637, at p. 646; where it is stated that there is no right to recover "expenditures independently incurred by one party for good and sufficient reasons of his own, but which has resulted in direct advantage to another." See also *Macclesfield* v. *Great Central Railway*, [1911] 2 K. B. 528.

To this general rule there is, I think, an exception, based upon the principle of estoppel. As stated by Halsbury (p. 21): "Where the owner of property stands by and allows a person to spend money thereon in the expectation that he will receive the benefit of it, such person is entitled to a lien for the increased value resulting from the expenditure."

This principle was applied in a case by no means dissimilar from the present one: *The Unity Joint Stock Bank* v. *King*, 25 Beav. 72, where a father owning certain property allowed his sons to have possession of it and to make lasting improvements thereon. At that time he contemplated and intended at some future time to make over the lands to them; but he never did so. They were in truth mere licensees. The sons assumed to convey the lands to the bank, from which they had borrowed the money. It was held by Sir John Romilly, M.R., that the father "could not have taken possession of that land again without allowing to his sons the amount of money they had laid out upon it."

The same principle was acted upon in *Plimmer* v. *Wellington*, 9 A. C. 699; a case arising upon a statute, which

provided that in determining a compensation "the Court should not be bound to regard strict legal rights, but should do what is reasonable and just."

Ramsden v. *Dyson*, L. R. 1 E. & I. 129, recognizes both the rule and the exception, which I think exists. There the estoppel rested upon the fact that the owner stood by and allowed the defendant to spend the money, knowing that he did so upon the mistaken belief that he owned the land.

I think that Sir John Romilly's decision justifies me in holding that the same principle applies where the expenditure is made upon the faith of a statement by the owner of his intention to give the land to the person making the improvement.

In the case in hand, the defendant says that his mother encouraged him to improve the place by telling him that he would ultimately have the benefit of his labour and expenditure; and, although I might not have been disposed to accept the defendant's own statements, because he was manifestly ready to shift his ground as he thought would best serve his purpose, yet the corroboration of his statements by disinterested witnesses leads me to accept them.

I do not think that the defendant is entitled to enforce his lien by retaining possession of the land. Judgment will, therefore, be for possession, and declaring that the defendant is entitled to a lien upon the land for the sum of $600. A time—say three months from the date of the judgment—should be fixed for payment, in default of which payment the defendant ought to be at liberty to proceed to enforce his lien by sale.

The judgment will further declare that the road between the east and west halves has been dedicated as a way between both half lots. It may also be declared that the defendant is entitled to the $143.05 as a creditor.

I think each party may well be left to pay his own costs.

HON. MR. JUSTICE LENNOX. DECEMBER 11TH, 1912.

TRIAL.

TRETHEWEY v. MOYES.

4 O. W. N. 445.

Sale of Goods—Rescission of Contract—Motor Car—Not in Accordance with Specifications—Sale by Sample—Implied Warranty.

Action for rescission of a contract of sale of a motor car, for payment back of $3,300 paid on account thereof, and for delivery up of a second-hand car taken as part payment. The car sold was to be, in all respects, similar to one sold to one Hastings. As a matter of fact, the motor was different, and presumably inferior, and the car would not give satisfactory service, whereas the Hastings car was satisfactory in every way.

LENNOX, J., gave judgment, as prayed by plaintiff, with costs.

Review of authorities.

Action for rescission of a contract of sale of a motor car for return of the purchase-price and delivery up of a car taken in exchange, tried at Toronto non-jury assizes, 22nd and 23rd November, 1912.

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

W. C. Chisholm, K.C., for the defendant.

HON. MR. JUSTICE LENNOX:—There will be judgment:—

(*a*) Rescinding and setting aside the contract in the pleadings mentioned;

(*b*) Directing the defendant to deliver up to plaintiff, upon demand, the Babcock car in the pleadings mentioned; and

(*c*) For payment by the defendant to the plaintiff of the sum of $3,300 and the costs of this action.

The defendant, amongst other things, is a dealer in motor cars. In consideration of the payment of $3,300 in cash, and the delivery to him of the plaintiff's Babcock motor car, the defendant agreed to furnish and deliver to the plaintiff on or about the 15th of January, 1912, a Detroit Electric Brougham Motor Car, the same in all respects (except upholstering) as a car which the defendant had previously sold to Dr. C. J. O. Hastings.

The Hastings car is equipped with a 60 a 4 Edison battery and motor to correspond. It is admitted that the car furnished by the defendant, in alleged pursuance of the

contract, is equipped, not with a 60 a 4, but, with a 40 a 6 Edison battery, and a motor to suit this battery. It is also admitted—or is not denied—that in several minor points the car in question does not correspond with the Hastings car.

It is hardly denied by the defendant, and at all events it is abundantly clear upon the evidence, that for some cause or other the car in question has never worked properly—has never been shewn to be an efficient workable car of the class to which it belongs. And it is shewn by the defendant's own evidence, and by the evidence of his brother, that the defendant deliberately determined, without the knowledge of the plaintiff, to substitute the 40 a 6 for the 60 a 4, battery provided for by the contract. The defendant's alleged reason is that he considered a 40 a 6 battery better than the other.

The defendant's evidence was, I thought, in the main straightforward and candid. Yet at the trial the defendant was, I think, entirely mistaken as to the motive which actuated him in making this substitution. A battery is worth about a thousand dollars. This one was in stock when Burke came to work for the defendant, some two years ago.

The evidence of William Wilkie Moyes as to what took place when he was in Detroit, the correspondence put in, particularly the letter from this witness to the Anderson Company on his return to Toronto (exhibit 9), and the whole trend of circumstances, clearly convinced me that, consciously or unconsciously, the defendant's real motive was to get rid of a battery in stock and thus avoid the purchase of a new one. Motive, however, or even merit or result, is not the question. The defendant has not done what he bargained to do. *Foreman & Co.* v. *The Ship "Liddesdale"* [1900] A. C. 190.

I judge, too, from the circumstances—although I may easily be mistaken as to this—that the defendant intended to keep the plaintiff in ignorance of the difference in the equipment of the two cars. It is a fact, however, that before the car was tried, the plaintiff knew that the batteries were not exactly the same; but it is not suggested that, except by an actual trial and demonstration, he would be able to judge at all as to the relative merits of the two batteries.

It happened in this way. In looking at the car in presence of the plaintiff, Dr. Hastings said to the man representing the defendant that there were not so many cells as there were in his car—or that they were larger—or some words to

this effect. This circumstance has given me a great deal of anxious consideration; although, of course, at most it only touches one of the causes upon which the plaintiff bases his action. The difficulty I have felt is as to whether the silence of the plaintiff at that time, pending the trial, prevents him from now setting up this difference in the two cars as a specific answer, in itself, to the defendant's contention that he has complied with the contract.

Upon the whole, I do not think it should. Even if in some cases it would have that effect, the answer of the man in charge in this case should, I think, prevent such a conclusion. This man's statement was not correct. As I said, there had been no trial. This man in charge said, in substance: "The builders of this car have discontinued the use of the 60 a 4 battery; they think they get better results from this battery; this is a better battery;" whereas the only reason for the change was that it served the defendant's purpose to make a sale of a battery which he had carried in stock for a very long time. As to the time for rejection see *Adams* v. *Richards*, 2 Hy. Blackstone 573; *Herlbutt* v. *Hickson*, L. R. 7 C. P. 438.

Aside, then, from the relative merits of the two batteries and the motors in conjunction with them, and without reference to whether the car is a good workable and serviceable car or not, I am of the opinion that upon the ground of non-performance alone the plaintiff is entitled to the judgment above set out. *Bokes* v. *Shand* (1877), 2 A. C. 455, judgment of Lord O'Hagan, at pp. 479, 480, and Lord Blackburn, pp. 480, 481; *Allan* v. *Lake*, 18 Q. B. R. 560.

But the battery is only one point. Under the specific terms of the contract the plaintiff had not only the right to receive a car duplicating the Hastings car in appearance, equipment, and method of construction, but he had the right to have delivered to him a car equally as good in all respects—as efficient and as satisfactory in operation—as the Hastings car. He was to have a car "like the car . . . sold to Dr. Hastings."

He did not get such a car. A car that will not climb a hill, that must be re-charged every 25 or 30 miles, and that gives constant trouble, is not like Dr. Hastings' car. I have not overlooked the circumstance that towards the end of the trial the defendant made a half-hearted suggestion that the Hastings car gave trouble too; but there was nothing specific, and I give no weight to this casual interjection, seeing that this was not at all the line of defence throughout the trial,

that Dr. Hastings was not even asked as to the working of his car, and that upon the argument it was not even suggested that the Hastings car was not efficient and satisfactory in every respect.

Again, the vendor, as I said, is a dealer in motor cars. This transaction was in a sense a sale by sample—the Hastings car. It is not enough, even if the defendant had been able to do this, to shew that the car furnished was a copy or duplicate of the car sold to Hastings. The defendant was bound to supply a car reasonably fit for the purposes for which it was intended. *Drummond* v. *Van Ingen* (1887), 12 A. C. 284; *Mody* v. *Gregson,* L. R. 4 Ex. 49; *Randall* v. *Newson,* 2 Q. B. D. 102.

What was the cause of this car not running properly, does not clearly appear. The defendant, who was, I think, more competent to speak as an expert than any other witness, said he could not even hazard a guess as to the cause. William Burke, called by the defence to give expert testimony as well as evidence of fact, said that a car of this class should run in cold weather sixty or eighty miles without being re-charged, that such a car, even if half-charged should climb any hill in or about Toronto, and that if the car shewed the lack of power and other deficiencies complained of, there must be something radically wrong.

A good deal of evidence was directed to shewing that the battery was the cause of the trouble, and to controverting this. It does not greatly matter what was the cause. The case is not the weaker for the plaintiff, if the battery were not the cause. But a point developed by the defendant himself, late in the trial, is important: viz., that the car probably never had a proper primary charge—that to properly saturate the cell plates of the battery, would take at least from eighteen to twenty or twenty-four hours, and that without this it could not be expected that the car would work properly. Who should have seen to this? The plaintiff was not even advised of the need of it. The excuse for not properly charging it is that the plaintiff was in a hurry to have possession of the car. How could this be an answer in any case? The time when the plaintiff is said to have been in a hurry was many weeks after the time stipulated for delivery.

There will be a stay of execution for thirty days.

DIVISIONAL COURT.

DECEMBER 13TH, 1912.

FROST & WOOD CO. LTD. v. LESLIE.

4 O. W. N. 472.

Judgment—Con. Rule 425—Acceptance of Amount Paid into Court—Must be in Full Discharge of all Causes of Action—Alternative Claims—Costs—Taxation of—Res Adjudicata.

Appeal by defendant from judgment of Judge of County Court of Bruce, dismissing an appeal from the clerk of the Court who had allowed plaintiffs County Court costs under Con. Rule 425, on moneys taken out of Court in satisfaction of a claim. Plaintiffs had sued upon an open account for $504.29, but alleged that defendant claimed that the account had been settled by the acceptance by plaintiffs of three certain promissory notes, the acceptance of which they, the plaintiffs, denied, but, nevertheless, claimed in the alternative for $180.29, the amount of two of the notes due at the commencement of the action. Defendant, in his defence, pleaded the settlement above referred to and paid into Court $184.39, being the amount of the notes with interest. Plaintiffs thereupon accepted the amount paid in "in satisfaction of their alternative claim," proceeded to tax their costs, which were allowed by the clerk on the County Court scale, and issued another writ for the third note which had, in the meantime, fallen due. The Local Judge dismissed defendants' appeal from the clerk's taxation.

DIVISIONAL COURT, *held*, that in order to bring themselves within Con. Rule 425, plaintiffs must have accepted the amount paid in in full settlement of all causes of action mentioned in the statement of claim.

That plaintiffs must elect either to retain the moneys paid in and their costs as taxed in full settlement and have their later action dismissed with costs, or to repay the money into Court, with interest and the costs of taxation. In either event defendant to have costs of both appeals.

Scope of Con. Rule 425 discussed, and review of authorities.

Appeal by defendant from judgment of the County Judge of the county of Bruce dismissing an appeal from a taxation of costs by the County Court clerk.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE RIDDELL and HON. MR. JUSTICE LENNOX.

T. H. Peine, for the defendant.

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

HON. MR. JUSTICE RIDDELL:—This action was brought in the County Court of the county of Bruce. The statement of claim sets out that the defendant was the agent of the plaintiffs at Hanover on commission, but he was to

obtain such security for the payment of any implements sold by him as such agent as would be satisfactory to the plaintiffs, etc.,—that the plaintiffs shipped him a large quantity of implements accordingly—that a statement was made of accounts on November 9th, 1911, shewing the defendant owed the plaintiffs $504.29—that at the defendant's instance, as he could not pay at once, the plaintiffs' traveller took promissory notes for $480.29 as follows:—

Due January 1st, 1912	$ 80 29	
Due June 1st, 1912	100 00	
Due October 1st, 1912	300 00	$480 29

to submit to the plaintiffs—that the plaintiffs refused to accept them and returned them to the defendant forthwith —that nothing has been paid—that the defendant sometimes asserts that the plaintiffs took the notes in settlement, but this the plaintiffs deny—a statement of the items amounting to the $504.29 is annexed to the statement of claim and the plaintiffs claim "to recover from the defendant the said sum of $504.29 and interest from the 9th November, 1911, or in the alternative to recover from the defendant the sum of $180.29, the amount of two of the three promissory notes and interest thereon." It does not exactly appear whether the plaintiffs are claiming as on an account stated or on the open account—from the items being attached to the record, I presume the latter.

The statement of defence sets up that it was the recognised custom to accept the personal notes of the defendant for any balance due: that the plaintiffs' agent Appleby "settled the balance at $480.24 and insisted and demanded that the defendant should furnish his promissory notes . . . " as mentioned, which he did: that he on June 13th, 1912, paid the plaintiffs the sum of $184.39, being the amount of the first two promissory notes with interest, but the plaintiffs refused to accept it and repudiated the settlement and he brought into Court that sum and said it was sufficient to satisfy the plaintiffs' claim.

The plaintiffs thereupon served a notice in the following terms. "Take notice that the plaintiffs accept the sum of $184.39 paid by you into Court in satisfaction of its alternative claim herein"—and taking the money out of Court proceeded to tax costs. These were allowed by the clerk on the County Court scale and on appeal to the County Judge the clerk's ruling was upheld.

The defendant now appeals.

Since the judgment already spoken of, the plaintiffs have issued another writ for the note for $300 or in the alternative for damages for conversion thereof.

The state of affairs, then, is that the plaintiffs contended that while there may have been a settlement of the amount due them from the defendant, there was no settlement of the account by notes but that he owed them $504.29, i.e., $24 more than the amount of the notes: but if it turned out that the notes were accepted in settlement, then they wanted the amount of the notes. The defendant said that the notes were given in settlement: he did not deny that the notes should be paid but he said that within a week of the writ he "paid" the amount of the notes which were due but the plaintiffs refused to accept the payment and repudiated the settlement. It is perfectly manifest that had the case gone on the only issue to be tried would be whether the notes were accepted as the defendant says they were—with what we know now that would have been determined in favour of the defendant—and the defendant would have been entitled to all the costs subsequent to payment in and to so much as his County Court costs before that time would exceed his Division Court costs. As it is by paying money into Court, the plaintiffs contend that he has enabled them to compel him to pay more costs than he would have paid had the action gone to trial. In other words, the plaintiffs by suing for a claim they cannot support and adding their real and supportable claim as an alternative contend that they may tax costs properly attributable only to the unsupportable claim. This would be a monstrous result and we must examine the rules with care to see if they make such a result necessary.

The Rule C. R. 425: "When the plaintiff takes out money in satisfaction of all the causes of action he may tax his costs of the action and sign judgment therefor, unless the defendant pays them within 48 hours after taxation."

The former rule read "the entire cause of action" C. R. 637—the change being made in order that there could be no doubt that the action was at an end.

Moore v. *Dickinson*, 63 L. T. 371. Here there are two causes of action, alternate indeed but still two. How can it

be said that satisfaction of one cause of action and that the minor one is a satisfaction of all the causes of action?

It is argued that the plaintiffs would be estopped as by matter of record if they were to set up again the original cause of action and consequently that cause of action is at an end (I do not discuss the effect of the new action with which as I think we have nothing to do).

Stirling, J., in *Coote* v. *Ford* (1899), 2 Ch. 93, at p. 99, says: "I do not see how any such proceedings could ever be available as a ground for a plea of *res adjudicata*. If either party were to attempt to open the matter, the appropriate defence of the other would seem to be not a plea of *res adjudicata* but an application to the Court to stay proceedings"—and the learned Judge was there speaking of the cause of action on which specifically money had been paid in. It is *a fortiori* in the case of a cause of action upon which money has not been paid in.

The plaintiffs must, in my opinion, elect either to take the money paid in, in full satisfaction of their claims against the defendant in which case they may retain their taxation of costs in the County Court; *Babcock* v. *Standish*, 19 P. R. 195; *McKelvey* v. *Chilman*, 5 O. L. R. 263; *Stephens* v. *Toronto Rw. Co.*, 13 O. L. R. 363; but must dismiss their other action with costs—or they must be held not to have brought themselves within C. R. 425. In this case they must repay the money into Court with interest and pay the defendant his costs of taxation, of the appeal to the County Court Judge and of this appeal.

If they elect the former alternative they will hold their judgment with County Court costs up to the judgment: but pay to the defendant his costs of the appeal from the taxing officer and of this appeal.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and HON. MR. JUSTICE LENNOX, agreed in the result.

HON. MR. JUSTICE MIDDLETON. DECEMBER 5TH, 1912.

CHAMBERS.

RE CHISHOLM & BERLIN.

4 O. W. N. 431.

Assessment and Taxes—Salary of County Judge—Appeal from Court of Revision—Appellant Disqualified from Interest—Prohibition—10 Edw. VII., ch. 26, sec. 16—Appointment of Disinterested Party—Duty of Judge to Avoid Suspicion of Bias.

Motion for prohibition to the Judge of the County of Waterloo, the respondent, or in the alternative, for an order under 10 Edw. VII., ch. 26, sec. 16, appointing some disinterested person to hear an appeal from the Court of Revision of the city of Berlin, which confirmed an assessment of the respondent's salary. Under the Assessment Act an appeal lies to the County Judge from the Court of Revision, and the respondent served notice of such appeal and notice of appointment to hear the appeal before himself. On his behalf it was urged that he did not intend himself to determine the appeal, but to appoint some other Judge to hear it under the provisions of 9 Edw. VII., ch. 29, sec. 15.

MIDDLETON, J., *held*, that the respondent was disqualified by interest from taking any action whatever in respect of the appeal, and appointed the Chairman of the Ontario Rw. and Mun. Board, as a disinterested party, to hear the appeal.

"A Judge should avoid all suspicion of bias."

Eckersley v. *Mersey*, [1894] 2 Q. B. 671, referred to.

Motion by the city of Berlin for an order prohibiting the Judge of the county of Waterloo, or any deputy or acting Judge thereof, from hearing or disposing of an appeal of His Honour Judge Chisholm from the Court of Revision of the city of Berlin with respect to an assessment of his judicial salary.

His Honour Judge Chisholm, being of opinion that his salary is not subject to municipal assessment, appealed from his assessment to the Court of Revision. This Court confirmed the assessment. Under the Assessment Act an appeal lies from the Court of Revision to the County Judge; and on the 16th November His Honour appealed from the Court of Revision, "to the County Judge of the county of Waterloo, or any deputy or acting Judge thereof, or any Judge who may be sitting for and in the stead of the said County Judge;" and pursuant to this notice His Honour has served an appointment for the hearing of the appeal. "Take notice that I hereby appoint Tuesday the third day of December proximo, at the Judge's Chambers in the court house square, Berlin, at the hour of 11.30 a.m.,

to hear the above appeal. Dated at the city of Berlin this 23rd day of November, A.D. 1912. D. Chisholm, County Judge."

The motion for prohibition was then launched, and an alternative application was made under the provision of 10 Edw. VII. ch. 26, sec. 16, which provides that where any person or the occupant of any office is empowered to do or perform an act, and such person is disqualified by interest from acting, and no other person is empowered to do or perform such act, then he or any interested person may apply upon summary motion to a Judge of the High Court in Chambers, who shall have power to appoint some disinterested person to do or perform the act in question.

Wm. Davidson, K.C., for the city of Berlin.

R. McKay, K.C., for Chisholm.

HON. MR. JUSTICE MIDDLETON:—On the return of the motion it is not contended on behalf of the County Judge that he had the right to hear the appeal himself; and it was not his intention, when he issued the appointment, to attempt himself to deal with his own case; but the position is taken that the Judge, although disqualified, should have the privilege of requesting some other County Judge to sit for him and hear the case. The learned Judge desires to act under 9 Edw. VII. ch. 29, sec. 15; and he proposes to request the Judge of some other county to sit for him upon the hearing of this appeal.

This course is objected to by the city, upon the ground that the Judge proposed to be asked to sit, is himself interested in the very question; one of the Judges named having already successfully appealed from the assessment of his salary, and another name suggested being that of a Judge who now has an appeal pending. It is also objected that in selecting any other Judge to act for him the Judge is really performing a judicial act in connection with his own case.

The appeal authorised by the Assessment Act is to the County Judge of Waterloo; and it is manifest that the County Judge is disqualified by reason of interest. I think that the jurisdiction of a Judge in Chambers immediately arises, and that I have the power to appoint some person under 10 Edw. VII. ch. 26. Moreover, I think the contention of the city is well-founded, that the disqualification by

reason of interest is absolute, and that the learned Judge has no power to do anything in connection with his own appeal.

I do not go so far as to say that if there was no other provision he might not upon the ground of necessity request another Judge to act; but when the statute has pointed out a way in which some disinterested person may be named, then I think that course should be followed.

The power given by the statute to a Judge of the High Court is much wider than the power conferred upon the County Court Judge by the Act of 1909. A County Court Judge can only request the Judge of another County Court to act: the High Court Judge can name a disinterested person. While it is quite true that the Judge of an adjoining county would not be interested in the assessment of the Judge of Waterloo upon his income, yet he is interested in a wider sense; as it is entirely likely that the assessment of judicial incomes in one county will be found to govern the action of the municipal authorities in the adjoining county.

Bearing this in mind, and seeking to apply the principle laid down in many cases that it is important not only that the fountain of justice should be preserved from all impurity but also that it should be protected against any semblance of impurity—or, as put in *Eckersley* v. *Mersey*, [1894] 2 K. B. 671, "Not only must Judges be not biased; but even though it be demonstrated that they would not be biased they ought not to act in a matter where the circumstances are such that people, not necessarily reasonable people, would expect them to be biased"—it appears to be my duty to appoint some entirely disinterested person. I do not in any way reflect upon the learned Judge or upon those whom he contemplated asking to act for him; but it seems to me clear that the interests of justice will best be served by taking this course.

I therefor appoint the Chairman of the Ontario Railway and Municipal Board, under the statute, to hear the appeal. I select him, as that Board has jurisdiction over many matters of assessment.

There will be no costs of the application.

HON. MR. JUSTICE BRITTON. DECEMBER 12TH, 1912.

QUEBEC BANK v. SOVEREIGN BANK. (No. 3.)

4 O. W. N. 463.

Timber—Right to—Findings in Prior Action—Injunction.

BRITTON, J., dismissed, without costs, an action for a declaration that plaintiffs were entitled to certain timber blocks in the yard of the Imperial Paper Mills of Canada, Ltd., in priority to defendants, and for an injunction restraining defendants from removing or interfering with them.

Action commenced on the 4th of December, 1909, being the third action between the parties, and being for a declaration that out of the spruce and balsam blocks in the yard of the Imperial Paper Mills of Canada, Ltd., the plaintiffs are entitled to 400 cords, and that out of the jack pine blocks in the same yard, the plaintiffs are entitled to 5,208 cords in priority to any claim of the defendants, and for an injunction order restraining the defendants from removing or in any way interfering with said jack pine spruce or balsam.

F. E. Hodgins, K.C., and D. T. Symons, K.C., for the plaintiffs.

James Bicknell, K.C., and W. J. Boland, for the defendants.

HON. MR. JUSTICE BRITTON:—By consent of the parties this action was tried with action No. 1. All the facts came out in action No. 1, in reference to the ownership of the jack pine and spruce and balsam mentioned. No special attention was paid either in adducing evidence or upon the argument to this action No. 3. In action No. 1 judgment was given by me on the 11th of September, 1912, in favour of the plaintiffs for the sum of $20,932.45.

After my judgment in action No. 1, I gave to the counsel for the parties herein an opportunity to present any argument, should they desire to do so, in addition to what was said in No. 1 as to the disposition to be made of this case but nothing additional has been presented. All the rights of the parties to the blocks in the yard of the mill, which blocks were claimed by the plaintiffs have been considered, and for the present determined in action No. 1. If that case has gone, or is to

go further, the rights as claimed in this action may be further considered and determined there.

In my opinion this action should be dismissed—but under all the circumstances without costs.

Twenty days' stay.

HON. MR. JUSTICE MIDDLETON. DECEMBER 7TH, 1912.

RUTTLE v. RUTTLE.

4 O. W. N. 457.

Alimony—Subsequent Cohabitation—No Peril to Life or Health—Costs—Con. Rule 1145.

MIDDLETON, J., dismissed an action for alimony where defendant's conduct had been reprehensible, but not such as to endanger plaintiff's life or health, and where there had been cohabitation after action brought, but ordered defendant to pay all costs.

Action for alimony.

J. A. Jackson, for the plaintiff.

J. E. Jones, for the defendant.

HON. MR. JUSTICE MIDDLETON:—The wife has never been in any peril of life or health, nor has she had any real apprehension of danger. The husband has acted badly particularly when under the influence of liquor and has made charges in his defence, which he has in no way attempted to prove.

The wife continued to live with her husband for some two months after action, and cohabited with him. Her action fails, but the husband must pay all costs over which I have control under C. R. 1145.

There does not seem to be any reason why the wife should not live with her husband, if she does not prefer to live with the sons, and it is to be hoped there even yet may be a reconciliation, if good sense is allowed to triumph over temper, and the elder son cease to interfere.

HON. MR. JUSTICE SUTHERLAND. DECEMBER 14TH, 1912.

RE BUTLER AND HENDERSON.

4 O. W. N. 498.

Vendor and Purchaser — Encroachments — Title by Possession — Acceptance of.

SUTHERLAND, J., *held*, that where the property of a vendor has encroached upon his neighbour's lands, the purchaser is bound to accept satisfactory evidence of possession for the statutory period.

A. Cochrane, for the vendor.

T. H. Barton, for the purchaser.

HON. MR. JUSTICE SUTHERLAND:—By written contract dated of October, 1912, William Butler, the owner thereof, agreed to sell to George Henderson "the premises on the west side of Hamilton street in the city of Toronto, known as No. 108." The vendor's paper title appears to comprise the northerly 20 feet 4 inches of lot 28 on the west side of Hamilton street, plan 188. No. 108 is the house number. It appears that the house itself encroaches slightly on the land to the south and the sheds and fences on the land to the north of the above described lands. The extent of these encroachments is shewn on a sketch filed on this motion and admitted to be accurate. The vendor submitted proofs to the vendee by declarations that the lands included in the encroachments have been held in quiet, peaceable and undisturbed possession by him and his predecessors in title for such a period as to establish his title thereto. The vendor tendered, before the motion, a deed of the land hereinbefore described, but not including the land covered by the encroachments. Since the motion a new deed was prepared covering the encroachments also.

I am of opinion that a satisfactory title by possession has been shewn by the declarations furnished by the vendor and that the vendee must now accept the title.

There will be no costs of the motion.