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COURT OF APPEAL.

DECEMBER 19TH, 1910.

*WHICHER v. NATIONAL TRUST CO.

Contract—Advertisement—Redemption of Bonds—Specific Performance—Mortgage Trust Deed—Breach of Trust—Trustees Acting "Honestly and Reasonably"—62 Vict. (2) *ch.* 15, *sec.* 1 (*O.*)

Appeal by the plaintiff from the judgment of RIDDELL, J., 19 O.L.R. 605, 1 O.W.N. 130, dismissing the action, which was brought for breach of trust by the defendants as trustees, and (by amendment) for specific performance of a contract which the plaintiff alleged had been made, or damages for breach thereof.

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

C. A. Moss, for the plaintiff.

A. W. Anglin, K.C., and R. C. H. Cassels, for the defendants.

MOSS, C.J.O.:—The essential portions of the trust instrument upon the terms of which the plaintiff claims relief in this action are set forth in the judgment of the learned trial Judge. The purpose and object with which it was given by the Dominion Copper Company Limited to the defendants was to set forth to persons who might be desirous of investing in the purchase of first mortgage 6 per cent. gold bonds of which the Dominion Copper Company were proposing to make an issue, the security, terms, and conditions upon which their holdings would be based, and thereby induce favourable consideration of the proposal.

The bonds were to be dated the 1st June, 1905, and be payable in gold or its equivalent on the 1st June, 1915, with interest in

*This case will be reported in the Ontario Law Reports.

the meantime at the rate of 6 per cent., payable semi-annually in each year until payment of the principal. Proposing investors were assured that not only were all the assets and property of the Dominion Copper Company pledged for payment of the principal and interest in respect of such bonds as they might acquire, and for that purpose were vested in the defendants, but that a method was provided whereby at certain periods during the currency of such bonds an opportunity was afforded them of anticipating the time fixed for repayment of the principal moneys.

The provision in question is contained in sec. 12 of art. II. . . Briefly, its effect is that the Dominion Copper Company are, at specified times between the date of the investment and the 1st June, 1914, to pay to the defendants all their surplus profits, less certain deductions, and the moneys so paid "shall be applied to the *retirement* of bonds of the company issued hereunder and secured hereby, and *for that purpose only* as follows"—and then follow two sub-sections of sec. 12, which are the occasion of the chief controversy in this action. There has been much argument as to the meaning and effect of these sub-sections, and especially as to the meaning of the words "and from the bonds offered to it shall purchase these bonds which are offered to it at the lowest price, not, however, exceeding the par value of such bonds . . ," which occur in the first, and the words "if during the prescribed period sufficient . . . bonds are not offered to exhaust said fund at less than par, then and in that event said trustee shall . . . give notice that certain bonds, specifying the same by number to be drawn by lot . . . are called for the purpose of investing therein the moneys paid to the trustee . . . ," which occur in the second.

It is possible, upon this language, to suggest various supposed contingencies in which it might seem to appear that payment to a bondholder for his bonds of a rate exceeding that offered by another bondholder for his bonds, might be deemed a "purchase at the lowest price." But this language of the instrument was intended for the information and guidance of people of plain, ordinary business understanding, who were to read it in connection with its other provisions; and the meaning which it was intended to convey to persons considering it with a view to investing in the bonds ought reasonably to be that which should be given to it.

It would, I think, be a surprise to a great number of people to be told that the taking over of bonds at nearly 87 per cent.

of the par value, when other bonds were offered at 82 per cent., was a purchase at the lowest price.

It is to be observed that the funds in the defendants' hands were to be applied to the retirement of bonds, and for that purpose only, and, although the word "purchase" is used, it is manifest that it was intended to inform proposing purchasers of the bonds that those of them who desired to offer their bonds, under sub-sec. 1 would be entitled to have them retired in the order in which the prices they put on them entitled them to be placed, that is, that if, relatively to the price named by other holders, their bonds stood lower in price, they would be taken up. Thus all that were offered at the very lowest figure would be taken up first, then all offered at the next lowest figure, and so on until the fund or the number of bonds offered was exhausted, whichever first happened. I cannot help thinking that this is the correct meaning of the provision, and that such was the intention of its framers. This was the construction first placed upon it by the vice-president and general manager of the defendants, and apparently acquiesced in by Mr. Untermeyer, one of the general counsel of the Dominion Copper Company. It is said, however, that the fact that the number of bonds offered by Mr. Untermeyer at nearly 87 per cent. of par, added to the number of those offered at lower figures, brought up the whole quantity of bonds offered to an amount beyond the sum in the defendants' hands, and that Mr. Untermeyer was not inclined to or obliged to reduce the number offered by him, justifies a different construction. The reason given is, that the result was that the contingency spoken of in sub-sec. 2 did not occur. But, if Mr. Untermeyer was not prepared to accept the retirement of such a number of his bonds as would exhaust the remainder of the fund left after retirement of the bonds offered at a lower price than his, then he had not made an offer that the defendants could deal with at all, and he was not to be treated as having made an offer within the meaning of the two sub-sections. There is nothing in them to inform proposing purchasers of bonds that their offer to retire their bonds was subject to be cut out by an offer at a higher figure by some larger holder. On the contrary, the whole scope of the instrument is in favour of equality and against discrimination. The obvious intention is to place all holders of bonds, whether large or small in number, upon an equal footing, and to treat all alike. What was actually done was to put upon one side everything that had been done and properly done under the directions of sub-sec. 1, and to enter into

a new transaction for the retirement of the bonds by a process not provided for and not contemplated by the instrument.

The defendants undoubtedly acted in good faith, but, in my opinion, they did not comply with or follow the plain directions of the trust instrument, with the result that the plaintiff was deprived of the position that the defendants should have recognised.

And I am unable to agree with the learned Judge that either the provisions of the trust instrument or the Trustee Act, 62 Vict. (2) ch. 15, sec. 1, shield them from the consequences of their default.

It is plain that sec. 13 of art. IV. of the instrument upon which the defendants rely is designed for the protection of the Dominion Copper Company from actions by bondholders, and is not intended or directed to the protection of the defendants from proceedings against them in the nature of the present action.

Nor do I think that the provisions of sec. 1 of the Trustee Act ought to be given effect to in order to protect the defendants from the enforcement of a remedy for the default of which the plaintiff complains.

In order to avail himself of the benefit of this provision, it is incumbent upon a trustee to make it appear to the Court not only that he has acted honestly, but that he has acted reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter. Here the defendants had no intention to act otherwise than honestly, but can it be said that their action in deciding to deal with and in effect make a bargain not contemplated by the trust instrument, giving to one of the bondholders a position and status different from that to which he was entitled upon his first offer, and seriously affecting the position of the other bondholders who had offered their bonds, without consultation or communication with them, and without taking any other step to ascertain their duty in the circumstances, was reasonable. They were alive to the doubts and difficulties of the position, and seem to have decided to take upon themselves the risk of acting without reference to the other interested parties.

But, as pointed out by their Lordships of the Privy Council in National Trustees Co. of Australia v. General Finance Co. of Australia, [1905] A.C. 373, at p. 381, it is not sufficient to entitle trustees to relief under the Act to establish that they acted honestly and reasonably. They must go further and satisfy the Court that, under all the circumstances, they ought fairly to be

excused. The position of the defendants in the case at bar is not dissimilar to that of the appellants in that case. And it may be said of the defendants here, as was said in that case, that, without saying that the remedial provisions of the section should never be applied to a trustee in the position of the defendants, it is a circumstance to be taken into account, and there is not shewn any fair excuse for the breach of trust or any reason why the plaintiff, who has committed no fault, should lose his money to relieve the defendants: see also Davis v. Hutchings, [1907] 1 Ch. 356.

Whether the plaintiff's action be based on failure to observe the trust, or rests on quasi-contract, there is no reason why he should not recover such loss or damage as he may fairly have sustained, nor why the same measure should not apply. The damage has been ascertained by the learned trial Judge, upon evidence adduced by both parties, and his finding thereon, as a question of fact, should not be disturbed, but should stand as the amount of the plaintiff's loss which he should recover from the defendants.

The appeal should, therefore, be allowed and judgment entered for the plaintiff for $700, with costs here and below.

MACLAREN and MAGEE, JJ.A., concurred, each stating reasons in writing.

GARROW and MEREDITH, JJ.A., dissented, each stating reasons in writing.

DECEMBER 19TH, 1910.

RE TAYLOR AND VILLAGE OF BELLE RIVER.

Municipal Corporations—Closing of Part of Street—Injury to Property not Abutting on—Municipal Act, sec. 447—Property "Injuriously Affected"—Compensation—Special Injury—Depreciation.

Appeal by the village corporation from the order of MULOCK, C.J. Ex. D., 1 O.W.N. 609, dismissing their appeal from an award by compensation to a land-owner for injury to her property by the closing of a road.

The appeal was heard by Moss, C.J.O., Garrow, Maclaren, and Magee, JJ.A.

F. E. Hodgins, K.C., for the appellants.

J. H. Rodd, for the respondent.

Moss, C.J.O.:—The award in this matter appears to me to be quite in conformity with the facts and the law.

Through the action of the council, by means of the by-law in question, the claimant has been deprived of one most important means of access to and from her premises, the existence of which was a material factor in their value. The injury which she sustains in consequence is not one which she suffers in common with the general public. On the contrary, it appears that a special value attached to the premises by reason of their proximity to or relative positions with the highway—part of Tecumseh road—which has been closed up.

The case of Re Shragge and City of Winnipeg, 15 W.L.R. 96, to which we were referred by counsel for the corporation, was decided upon its own special facts and circumstances. The learned Chief Justice who rendered the decision in that case was of opinion that it fell within the rule declared in The King v. McArthur, 34 S.C.R. 570. Here the facts bring the case within the line of cases referred to by the learned Chief Justice of the Exchequer, as well as many others which have been determined in our own Courts.

The appeal fails and should be dismissed with costs.

Magee, J.A., gave reasons in writing for the same conclusion. He cited Chamberlain v. West End, etc., R.W. Co., 2 B. & S. 617; Metropolitan Board of Works v. McCarthy, L.R. 7 H.L. 243; The King v. McCarthy, 34 S.C.R. 570.

December 19th, 1910.

Re CITY OF STRATFORD AND TOWNSHIPS OF SOUTH EASTHOPE AND DOWNIE.

Municipal Corporations—Drainage—New Drain to Empty into Old Drain—Sufficiency of Outlet—Evidence—Report of Engineer—Reversal by Drainage Referee—Restoration by Court of Appeal—Assessment for Outlet Liability.

Appeal by the Corporation of the Township of South Easthope from the judgment of the Drainage Referee setting aside the report of John Roger, an engineer, made under the provi-

sions of the Municipal Drainage Act, in respect of a proposed drain called the Kalbfleisch drain.

The initiating municipality was the appellant township, and the proceedings were duly served upon the other municipalities interested, namely, the City of Stratford and the Township of Downie.

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

G. G. McPherson, K.C., for the appellants.

R. S. Robertson, for the Corporation of the City of Stratford.

M. Wilson, K.C., for the Corporation of the Township of Downie.

GARROW, J.A.:—Several matters were argued before us by the learned counsel who appeared for the various municipalities interested, not all of which, in my opinion, require extended consideration, especially in the view which I take of the main contention, namely, that the Waldie drain is in fact and in law a sufficient outlet for the waters proposed to be brought to it by the proposed drain, as, in my opinion, upon the evidence, it is.

Upon the minor question of the assessments for outlet liability of the lots in the city of Stratford lying to the east of Downie street, amounting in all to a few dollars, I will only say that, although the evidence is not entirely satisfactory, I would not in such a trifling matter, especially where the owners themselves are not complaining, have interfered with the report.

Upon the other or main question some examination of the facts and of the evidence is necessary.

The report of the engineer should stand, unless, upon reasonably clear and satisfactory evidence, it is shewn to be erroneous. And I am quite unable to find such evidence in the case as presented to us.

The Waldie drain was constructed in the year 1902. To that scheme the same three municipalities were all parties. It discharged its waters into what is called Erie creek, a running stream which empties into Romeo creek, and through the later reaches the river Avon in the city of Stratford.

The Waldie drain for some distance occupies what was the course of Erie creek, which is the case at the point at which it is proposed to make the outlet of the Kalbfleisch drain.

As far back as the year 1892 there was what is called an award drain, made under the provisions of the Ditches and Watercourses Act, which emptied at the same point, first, into

the stream, and, after the Waldie drain was constructed, into it. And the Kalbfleisch drain is, as the evidence shews, simply a substitution of it for the earlier award drain. The old drain, which passes through the same territory, is wholly an open ditch. The new one is to be tile in the bottom, covered in, and closed above, until it reaches the highway, after which, while the tile is continued beneath, there is to be above it an open ditch down to the outlet, the whole, as the engineer says, not exceeding in capacity the old open ditch, and not intended to carry and not carrying into the Waldie drain more water than did the old, but which, by reason of its greater depth, will afford facilities for underdraining. And it is apparent that, if that is the correct conclusion of fact, this is in effect only a belated appeal from the Waldie drainage scheme, and ought not to succeed. For, whatever may be the consequences (and I must say I do not share the apprehensions of the learned Referee), the city cannot now be heard to complain of a condition which has continued throughout the period since the Waldie drain was authorised.

The question is, of course, one of evidence, and of expert evidence at that. And we have the quite too common experience of experts on both sides apparently contradicting each other. Mr. Ferguson, the city engineer, and Mr. Baird, are the experts called upon the part of the city corporation; and Mr. Davis, Mr. McCubbin, and Mr. Roger, in support of the report. . . .

[Detail of the testimony.]

Mr. Ferguson, a city employee, knows nothing of the earlier conditions of the old award drain, apparently took no measurements, and made no examination, and yet was willing to pledge his oath that more water will come down—a thing he could not possibly know unless he also knew the capacity of the award drain.

Mr. Baird is not asked, and, so far as appears, knows nothing, about the earlier award drain or of its dimensions. He had not been over the whole ground, at best only the lower and least important part. He had, he says, gone over Mr. Roger's report and looked at the plans, which would not have taken him many minutes, as both are very simple. And, having thus qualified himself, he does not hesitate to indorse the view of Mr. Ferguson, the city engineer.

Opposed to this is the evidence of the engineer, who supports his report in what seems to me a satisfactory manner. He says, and he must know if any one does, that the new drain will not exceed the old in capacity—will indeed have less capacity. It

will operate differently because closing the upper end of the open ditch will retard the rush of water towards Waldie's drain in the spring freshet, and the lower tile drain will meantime be gradually carrying away a part of what would otherwise have gone to swell the freshet. No one suggests danger at any other time, so that anything which moderates the dangerous consequences of freshets is a gain to the city, and not a loss.

Mr. Davis stated that the proposed scheme will not bring any more water, if it brings as much, as did the award drain, especially during the spring freshet. . . .

All this seems to me to be perfectly reasonable and convincing, much more so than the mere ipse dixit of the city's experts. And, in addition, there is the evidence of Mr. McCubbin, also an engineer, who gives his opinion in briefer but similar terms. Asked by the learned Referee, he says he understands the scheme, and he epitomises it very tersely thus: "I don't think the proposed drainage scheme will have any material effect on these culverts (culverts in the city at which danger in times of flood is apprehended), for this reason, the whole of this drainage scheme as proposed consists in putting a 12-inch tile in the bottom of an open drain that is already there."

The mere weight of evidence, to say nothing of its apparent quality, was thus in favour of the report, which, under the circumstances, should not, in my opinion, have been disturbed, especially as the learned Referee expressly declined to reach a conclusion adverse to it upon this vital point. His real objection appears to be, not that more water is to be sent down, but that any should be sent through the middle of a city in an open drain. He does not deny that the exit into the Waldie drain is a sufficient outlet under ordinary circumstances, within the meaning of the statute. The injury he anticipates is further down—about half a mile apparently, where the Waldie drain has merged into the Erie creek. And he adds: "But at the same time (apparently summing up) I find as a fact that the water discharged into the Waldie drain by the present award drain, and the waters which would be discharged by the proposed drain, if it were constructed, would very materially affect the situation at the culverts referred to on Erie street, and would occasion injury at that point."

I confess to some difficulty in understanding what is meant by adding to the waters discharged into the Waldie drain by the award drain those which would be discharged by the new substitutional scheme. There are not to be two systems but one.

The first has existed since long before ever the Waldie drain was made; the other is only intended to take its place. That is the clear result of all the evidence. And, under the circumstances, the only possible question must be the one which I have ventured to propound, and to which the evidence was, as I supposed, directed, namely, will the substituted scheme materially increase the burden of water being carried in the Waldie drain, or will it not? If it will not, the objection of the city to the new scheme is left without any foundation on this point.

For these reasons, I would allow the appeal with costs throughout.

MACLAREN and MAGEE, JJ., concurred, for reasons stated by each in writing.

MOSS, C.J.O., also agreed.

MEREDITH, J.A., dissented, for reasons stated in writing.

DECEMBER 19TH, 1910.

*REX v. YUMAN.

Criminal Law—Neglecting to Provide Necessaries for Wife—Acquittal on Previous Indictment—Evidence then before Court—Admissibility—Ability to Provide Necessaries—Absence of Demand after Acquittal.

Case stated by DENTON, one of the Junior Judges of the County Court of York, after trial before him and a jury in the General Sessions, and conviction of the defendant for neglecting to provide necessaries for his wife.

Three questions were stated: (1) whether evidence was admissible which was before the Court at a previous trial for an earlier like offence upon which the defendant was acquitted; (2) as to whether the jury should have been told that they might find the defendant "not guilty" if they were satisfied that he had not the ability to provide necessaries; and (3) as to whether they should have been told that they might find him "not guilty" if

*This case will be reported in the Ontario Law Reports.

his wife never offered to return and never asked for necessaries after the previous trial.

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

T. J. W. O'Connor, for the defendant.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

MEREDITH, J.A.:—Upon the first two points raised in this case I have no doubt the trial Court erred; and that, in consequence of such error, the prisoner should be discharged.

The third point raises a question which seems to me to have had too little consideration at the trial, and to be one which, with other questions which may arise in cases in which the wife is living apart from the husband, had better be dealt with in a case in which they are better raised and which cannot be fully disposed of without considering them; in this case it is not necessary that the third question should be answered.

As to the admissibility of the evidence, the point is not that it would prove another indictable offence, but is that it would prove and render the prisoner liable to conviction upon another indictable offence of which he had been acquitted. The former acquittal absolved the prisoner from all omissions for which he might have been convicted upon that prosecution. To permit him to be, now, subject to conviction upon any such omission would be to permit a conviction for an offence of which he had been acquitted.

Upon the other point, it is not now contended that ability to perform the duty is not an ingredient of the crime. The ruling of the learned Chairman of the General Sessions upon this point —that inability was immaterial upon any question for the jury, and to be taken into consideration only by him in imposing the punishment in case of a verdict of guilty—was erroneous. It would be extraordinary if one were to be adjudged guilty of a crime for omitting to do that which it was impossible to do, in such a case as this. If the wife were living with the prisoner, and as helpful to him as she could be, it may be that they would have enough for the support of both; but, as it was, the evidence upon the question of the man's ability was such that that question could not properly have been withdrawn from the jury; there was no suggestion at the trial that such was not the case.

In The Queen v. Ryland, L.R. 1 C.C. 94, it was decided that the word "neglect" imported ability, in a case of neglecting

to provide food and clothing for a child: see also Rex v. Chandler, Dears. C.C. 453; Regina v. Rugg, 12 Cox C.C. 16; and Regina v. Shepherd, 31 L.J.M.C. 102.

I would answer the first question "no;" and the second "yes;" and discharge the prisoner.

MOSS, C.J.O., concurred, for reasons stated in writing.

MAGEE, J.A., concurred, for reasons to be stated later.

GARROW and MACLAREN, JJ.A., also concurred.

Conviction quashed.

DECEMBER 19TH, 1910.

*REX v. HAMILTON.

Criminal Law—Father Enticing away Child from Custody of Mother—Decree of Foreign Court Awarding Custody to Mother—Validity in Canada—Unlawful Act of Father—Criminal Code, sec. 316.

Case stated by DENTON, one of the Junior Judges of the County Court of York, upon an indictment and conviction of the defendant for enticing away his own child, who was in the custody of the mother, as follows: "Is the decree of the Superior Court of Marion County, Indiana, awarding the custody of the child in question to the mother of such validity and effect in Canada as to render the father of the child liable, under sec. 316 of the Criminal Code, for taking or enticing away the child with intent to deprive the parent (mother) of the possession of such child?"

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

T. C. Robinette, K.C., for the defendant.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

MEREDITH, J.A.:—The one ground urged in the defendant's behalf, in this Court, was, that the foreign divorce is of no effect here; but, in the face of the findings of the trial Court, such a contention seems to me to be hopeless.

*This case will be reported in the Ontario Law Reports.

It was urged that the divorce was decreed against "natural justice:" a contention which comes with ill grace from one who himself had sought in the same Court and in the same way a like divorce; and one who, instead of complaining at the time of any injustice, seems to have been well content with it, and immediately afterwards took advantage of it to marry another woman. So that I am inclined to think that, had the decree been refused, the defendant would at that time have designated the refusal unnatural injustice; as well as inclined to think that his notion of natural justice is that which will bend to his needs and desires from time to time.

Had the trial Court found that divorce proceedings were a collusive farce, no great mistake, according to my view of them, would have been made: but I am quite sensible of the fact that my notions of the binding character of the marriage tie may in other countries be called antique nonsense: and the parties, having chosen to become domiciled in the State of Indiana, and to seek and obtain divorce there, according to the laws of that State, are bound by the decree which was pronounced. Upon all questions of fact respecting the validity of such decree the parties are bound, in this case, by the findings of the trial Court: there is no appeal to this Court in that respect.

I cannot think that any sort of difficulty, in supporting the conclusion, arises out of this contention.

But the case reserved is much wider than that; it comprises the question whether the 316th section of the Criminal Code, upon which the conviction is based, applies to a case such as this. Whether it does or not depends upon the question whether the child was "unlawfully" taken. The order of the foreign Court gave the custody of the child to the mother, at the time; that order was then in force: if it were deemed that, for any reason, it should be rescinded or curtailed in respect of her right of exclusive custody, the proper cause was to apply to the Indiana Court for relief: it had been once varied in the defendant's favour at his instance; he had no right to disregard. It must, I think, be held that it gave the lawful exclusive custody of the child to the mother, at the time in question.

Then does the enactment apply to a parent taking his or her child? Prior to the first enactment of the Criminal Code, the exception to the legislation in question was: "2. No person who has claimed any right to the possession of such child, or is the mother, or has claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of getting pos-

session of such child or taking such child out of the possession of any person having the lawful charge thereof." The exception now is: "2. Nothing in this section shall extend to any one who gets possession of any child, claiming in good faith a right to the possession of the child." So that the enactment would seem to apply to any one doing any of the things against which it is aimed, unless "claiming in good faith a right to the possession of the child;" and the amendment to have enlarged the character as well as the scope of the legislation. If the defendant really believed that the decree was invalid, he was wrongly convicted; but no question was, or probably could be, in this case, reserved in that respect: see Regina v. Watts, 5 Can. Crim. Cas. 246—in which the legislation in question was held to be applicable in such a case as this. There is, of course, a vast disparity between this case, in which it is said that the child's welfare and the father's natural feelings impelled his act, and that of taking with intent to steal or for other bad purpose: but there is also a vast difference between the punishments which may be inflicted—from seven years to any shorter term, however short, or, with the consent of the Crown, "suspended sentence;" no minimum imprisonment is prescribed.

For aught that appears in this case, the conviction, in my opinion, ought to stand.

MOSS, C.J.O., and MACLAREN, J.A., agreed in the result, for reasons stated by each in writing.

GARROW and MAGEE, JJ.A., also concurred; MAGEE, J.A., to give reasons later.

Conviction affirmed.

DECEMBER 19TH, 1910.

*REX v. McDEVITT.

Criminal Law—Fraudulent Sale of Land Subject to Equity of Redemption—Criminal Code, sec. 421—"Privilege."

Case stated by the Judge of the County Court of Peel, before whom, without a jury, the defendant was tried. The charge was laid under sec. 421 of the Criminal Code, "for that he did, know-

*This case will be reported in the Ontario Law Reports.

ing of the existence of an unregistered privilege, being an equity of redemption in favour of one John Wilson in" certain land, "fraudulently make a sale of the same, with intent to defraud." The evidence was made part of the case stated. The trial Judge convicted the defendant, but reserved for the Court of Appeal the question, "Was there any evidence of any unregistered prior grant, mortgage, sale, hypothec, privilege, or incumbrance, of or upon the said property, within the meaning of sec. 421 of the Criminal Code of Canada, and did the acts of the defendant, as stated in the evidence, constitute any offence within the meaning of the said section?"

Section 421: "Every one is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding $2,000, who, knowing the existence of any unregistered prior sale, grant, mortgage, hypothec, privilege or incumbrance of or upon any real property, fraudulently makes any subsequent sale of the same, or of any part thereof."

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

T. C. Robinette, K.C., for the defendant.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

MEREDITH, J.A.:—That the wrong which the defendant was found guilty of committing was one coming well within that class of mischief which the legislation in question—sec. 421 of the Criminal Code—was designed to prevent, there can be no doubt. That wrong was the selling of the land with the fraudulent intention of defeating the unregistered equity of redemption of Wilson in it.

But that is not the question: the question is, whether that legislation covers the case of an equity of redemption, or is lame in that respect. It covers the case of any "sale, grant, mortgage, hypothec, privilege or incumbrance." But is an equity of redemption, in this province, embraced in any of these words? My answer must be "no." At the trial it was treated as a privilege; but no estate, right, title, or interest in or to lands in this province is so designated. If the words "right or interest," or, as usually expressed, "right, title, or interest at law or in equity," had been added, the legislation would be much more comprehensive, and the case, plainly, would have come within its provisions.

As the legislation is, it must, in my opinion, be held that no offence, against the provisions of sec. 421 of the Criminal Code,

was committed in this case; and that the defendant should, therefore, be discharged.

MOSS, C.J.O., and MAGEE, J.A., were of the same opinion, for reasons stated by each in writing.

GARROW and MACLAREN, JJ.A., also concurred.

The judgment of the Court was that the acts of the defendant, as stated in the evidence, did not constitute an offence within the meaning of sec. 421 of the Criminal Code; and that the conviction be set aside.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. DECEMBER 13TH, 1910.

REX v. TRAINOR.

Liquor License Act—Hotel-keeper—Tavern License—"Quantities of less than One Quart"—One Sale or Two Sales—Evidence—R.S.O. 1897 *ch.* 245, *sec.* 2, *clause* 2.

Appeal by a License Inspector, under sec. 120 of the Liquor License Act, from the judgment of the Judge of the County Court of Halton, quashing the conviction of the defendant on a charge of selling liquor in greater quantity than one quart, contrary to the provisions of sec. 2, clause 2, of the Act.

The defendant, John Trainor, was an hotel-keeper in Georgetown, and was the holder of a tavern license, but not of a shop license within the meaning of the Act. It appeared from the evidence taken before the Justices who convicted the defendant, that one Waldeck, a special officer of the license department, went to the hotel, with Partridge, another officer, and the latter asked the bar-tender for four bottles of ale. The bar-tender replied, "I can't sell you four, I can sell you one each," and put a bottle for each on the bar, for which they paid. The bar-tender then said, "Go out and come back in, and you can get another bottle each." Waldeck and Partridge went out on the verandah, remained a minute or two, went into the bar again, and each bought a bottle as before. Waldeck swore that when they bought the first two bottles, there was "an

understanding" between them and the bar-tender that they were to go out and come back and get two more, and that this understanding was carried out in their second purchase.

On this evidence the Justices before whom the charge was laid, convicted the defendant and imposed a penalty of $30 and costs.

On appeal to the County Count Judge the conviction was quashed with costs, on the ground that there were two sales, each of which was of the proper quantity, and not one sale, as held by the Justices.

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

J. R. Cartwright, K.C., for the Crown, argued that the evidence in the case shewed that the County Court Judge erred in his view that, after the sale of the first two bottles, there was a second sale, not a part of nor in any way connected with the first. It was clear that the two transactions were in no sense independent, and constituted in reality one sale, and the case was thus brought within Rex v. Lamphier and Orr, 17 O.L.R. 244.

James Haverson, K.C., for the defendant, was not called upon.

At the close of the argument the judgment of the Court was delivered orally by BOYD, C., dismissing the appeal without costs, as there did not appear to be sufficient ground for disturbing the decision arrived at by the County Court Judge. It was not, however, a case for awarding costs to the defendant, who was evidently "sailing close to the wind."

MEREDITH, C.J.C.P. DECEMBER 16TH, 1910.

RE MARSHALL.

Will—Construction—Death of Legatee—Gift over—"Time of Distribution or Settlement of my Estate."

Originating notice for the determination of a question arising on the will of a testatrix, dated the 29th January, 1909.

The testatrix died on the 10th November, 1909. By her will she devised and bequeathed to each of twelve named first cous-

ins, one of whom was Homer O. Bates, an equal share of her residuary estate, and after making this disposition of it she provided as follows: "Should any one or more of these beneficiaries named herein (*i.e*, the twelve first cousins) be deceased at the time of distribution or settlement of my estate, his or her share or shares shall be null and void and not succeed or go to the deceased heirs or assigns but divided equally with the surviving first cousins herein named."

Homer O. Bates died on the 10th March, 1910, and at the time of his death no distribution or settlement of the estate of the testatrix had taken place.

M. H. Ludwig, K.C., for the executors.

N. B. Gash, K.C., for the surviving legatees.

No one for the representatives or next of kin of Homer O. Bates.

MEREDITH, C.J.:—The question for decision is whether or not, in the events that have happened, the gift over to the surviving beneficiaries took effect.

A similar question arose in In re Wilkins, Spencer v. Duckworth, 18 Ch. D. 634. The testator by his will gave the residue of his estate equally between four named persons, and provided as follows: that "if either of them should die before the final division of my estate then I bequeath the share of such trust moneys intended for him or her so having died unto his or her children or child if more than one in equal shares for their own use absolutely and if only one child then such only child to take the parent's share for his or her own use absolutely." Mr. Justice Fry in delivering judgment said that there were only two possible periods to which the words "final division of my estate" could relate: "the first," he said, "is the end of the period which the laws allows for the distribution of the estates of deceased persons, that is, twelve months from the death of the testator; the other is the period when the last farthing of the assets has been got in and actually divided;" and the conclusion to which he came was that the words related to the end of the period allowed by law for the distribution of the estates of deceased persons.

This case was referred to with approval by Swinfen Eady, J., in In re Goulder, Goulder v. Goulder, [1905] 2 Ch. 100, 103.

I can see no substantial difference between the expression "final division of my estate" and the words of the testatrix

"time of distribution or settlement of my estate." If there is any difference, the latter words seem to me to lend themselves more readily to the construction adopted by Mr. Justice Fry, and I follow his decision.

The costs of the application will be paid out of the estate in the usual way.

DIVISIONAL COURT. DECEMBER 16TH, 1910.

SILL v. ALEXANDER.

Damages — Quantum — Defamation—Jury—Verdict for Substantial Sum—Refusal of Court to Interfere—Costs—Refusal to Allow to Successful Plaintiff—Good Cause—Discretion—Appeal—Counterclaim Struck out—Provision for Set-off when Established in a New Action—Refusal of Appellate Court to Interfere.

An appeal by the defendant and a cross-appeal by the plaintiff from the judgment of MULOCH, C.J.Ex. D., upon the findings of a jury, in favour of the plaintiff for the recovery of $150 damages in an action for slander. The defendant complained of the amount of the damages and the plaintiff of the the trial Judge's refusal to allow the plaintiff costs.

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

E. E. A. DuVernet, K.C., and W. B. Raymond, for the defendant.

W. N. Tilley, for the plaintiff.

The judgment of the Court was delivered by MIDDLETON, J.: —The trend of decision is in favour of recognising the supremacy of the jury in dealing with the quantum of damages awarded. The Court will not hesitate to interfere if satisfied that the amount is so large that no twelve men could have reasonably given it, or if satisfied that the jury must have taken into account matters which they ought not to have considered, or acted upon a wrong principle: Johnston v. Great Western R.W. Co., [1904] 2 K.B., 251; but, unless the Court is for some good reason so dissatisfied with the verdict as to feel warranted in granting a new trial, then the award of the jury cannot be

interfered with: Watt v. Watt, [1905] A.C. 115. In actions of defamation the jury is peculiarly qualified to deal with this question. They are allowed to award vindictive or exemplary damages, and are by no means confined to the actual damage shewn: Davis v. Shepston, 11 App. Cas. 191. The defendant may be quite right in saying that the only slander proved was that spoken to Brodie, and that the plaintiff still retains Brodie's esteem and friendship; but, while that is a factor, the jury undoubtedly considered it, as much was said by the learned Chief Justice in his charge upon this aspect of the case. The jury cannot be confined to this element—"the jury in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give the verdict. They may consider what his conduct has been before action, after action, and in Court during the trial:" per Lord Esher, M.R., in Praed v. Graham, 24 Q.B.D. 55.

Without in any way adversely commenting upon the course adopted by the defendant in this case, one can easily see that his endeavour to cast aspersions upon the plaintiff, while avoiding pleading in justification, and his attempt to go into outside matters under the notice given of matters intended to be set up in mitigation of damages, may well have influenced the jury. The jury may also have thought that the defendant's explanation of his long silence from the time the agreement of April, 1909, was entered into, till his attack upon the plaintiff in March, 1910, indicated such an absence of good faith as to suggest that his conduct upon that occasion was actuated by some ulterior motive.

Neither at the trial nor upon the appeal was there anything to indicate that the defendant in any way receded from the charges made—the jury, no doubt, took the view that the charges were unjustified, and that the course taken called for substantial damages.

In Hulton v. Jones, [1910] A.C. 20, the Court refused to interfere with an award of £1,750. Fletcher Moulton, L.J. (dissenting), in the Court of Appeal, [1909] 2 K.B. 476, stated: "It is admitted that the defendants were innocent of any defamatory intent, and it cannot be pretended that any actual damage has been suffered by the plaintiff. The verdict of £1,750 is . . so absolutely perverse that on that ground alone the defendants are, in my opinion, entitled to a new trial." Yet no other Judge thought the circumstances called for interference. I would paraphrase and adapt the language of Lord Loreburn,

L.C., [1910] A.C. at p. 24, and say: The damages are certainly heavy, but two things are to be remembered. The jury were entitled to think, in the absence of proof satisfactory to them (and they were the judges of it), that some ingredient of recklessness, or more than recklessness, perhaps even actual malice, entered into the defendant's conduct; and, secondly, the jury were entitled to say that this kind of conduct is to be condemned. There is no tribunal more fitted to decide whether the defendant's conduct, in the original publication and subsequently, bears a stamp and character which ought to enlist sympathy and secure protection. If they think he did not act fairly, and that his course in the action indicated a desire to add to the injury originally done, and that this was reprehensible and ought to be checked, it is for them to say so; and, though the damages are high, I do not think we can interfere. We are not authorised to substitute our own view on matters of this kind for the view of the jury. It would be most unfair to interfere and to give the defendant an opportunity to reconsider his tactics, and, if he so desired, to adopt another course at another hearing. Every trial exposes the plaintiff's character to further attack. It is not merely unpleasant, but the consequences are far-reaching. He should not lightly be twice placed in peril.

Then again, the cost of an additional trial is no small matter. The good of all concerned demands that there should be an end of litigation, particularly litigation of this kind.

Then as to the cross-appeal upon the question of costs. The Chief Justice did not, as I read the notes, refuse costs because he disagreed with the verdict. McNair v. Boyd, 14 P.R. 132, shews that he was bound to accept the finding of the jury upon all matters before them. There was, we think, enough in the plaintiff's conduct to justify the exercise of the very wide discretion given to the Judge under our practice—or at least to make it impossible for us to interfere.

The appeal should be dismissed with costs, and the cross-appeal dismissed without costs.

The defendant, it is said, has a money claim against the plaintiff, and attempted to set up this claim by a counterclaim in the action. In accordance with well-settled practice, this counterclaim was struck out (Central Bank v. Osborne, 12 P.R. 160). We are informally asked to interfere and provide that this judgment shall be set off against the suggested claim when established. Upon the motion to strike out the counter-

claim this matter should have been dealt with. We cannot upon this appeal interfere. We do not pass upon the question whether the defendant has now any redress, but our orders now made is not to prejudice him upon any motion he may make.

DIVISIONAL COURT. DECEMBER 17TH, 1910.

*WARREN GZOWSKI & CO. v. FORST & CO.

Evidence—Telephone Conversation between Parties—Dispute as to—Testimony of Bystander Hearing one Party's Words—Admissibility.

Appeal by the defendants from the judgment of SUTHERLAND, J., in favour of the plaintiffs for the recovery of $2,082 as damages for breach of a contract, and dismissing the defendants' counterclaim.

The principal ground of appeal was that evidence offered at the trial had been improperly rejected by SUTHERLAND, J., who tried the action without a jury.

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

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

F. Arnoldi, K.C., for the plaintiffs.

BOYD, C.:—Communications by telephone are of common occurrence in business, as in other affairs, and the law of evidence is to be fitted into the questions arising by this new method of intercourse. The conversation at each end of the line is as oral converse, and what is said must be admissible though one party may be unable to recognise the voice of the speaker at the other end. Various degrees of weight or relevance may be given to what is communicated and received, but the estimate of such evidence is to be left to the tribunal of trial.

In this case it is in evidence that there were conversations on a given day, at a given time, between the parties; what was said by one is denied by the other. It is sought to elucidate what was said by the defendant by calling witnesses who heard

*This case will be reported in the Ontario Law Reports.

his words as transmitted through the wire, though they cannot affirm to whom he spoke. It seems to me that such evidence is relevant, and therefore admissible—though the value of it may be little or nothing in the judgment of those who pass upon the facts of the case and the points in difference. . . .

In this case prima facie there was a conversation going on at the telephone; part of this, *i.e.*, the defendant's side of the conversation, was heard by the proposed witnesses, and that they can depose to as competent evidence—though it may be that there was no one at the other end so that the alleged conversation was a pretence, or that there was some one speaking other than the person sought to be affected; and so no weight could be given to what was heard by the proposed witnesses. These considerations would not go to the exclusion of the statements, but to their pertinence, in view of contradictory or explanatory facts. According to the contention of the defendants, what was heard by these persons would be part of the *res gestæ*: yet it might all go for nothing and be displaced by the plaintiffs. . . .

[Reference to Miles v. Andrews, 153 Ill. 202; McCarthy v. Peach, 186 Mass. 67; Platon v. Weiler, 6 L.R.A. 1182.]

I have come to the conclusion that the evidence rejected should have been received for what it was worth, and that there should be a new trial on this ground. Costs will be reserved to be dealt with by the trial Judge.

LATCHFORD and MIDDLETON, JJ., agreed, the latter stating reasons in writing.

DIVISIONAL COURT. DECEMBER 17TH, 1910.

*RICE v. TORONTO R.W. CO.

Street Railways—Injury to Person Crossing Track—Crossing behind Car without Looking—Negligence—Excessive Speed—Joint Negligence—Ultimate Negligence—Findings of Jury—Costs.

Appeal by the defendants from the judgment of MEREDITH, C.J.C.P., upon the findings of a jury, in favour of the plaintiffs, the executors of J. J. Rice, deceased, in an action for damages for his death.

*This case will be reported in the Ontario Law Reports.

The deceased alighted from an east-bound car opposite the gate of the Toronto General Hospital, upon Gerrard street in the city of Toronto, and attempted to cross the north track of the defendants, when he was struck by a west-bound car and killed.

The judgment appealed against was given at the second trial of the action, the Court of Appeal (1 O.W.N. 912) having directed a new trial upon appeal from the judgment at the first trial.

The present appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

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

J. MacGregor, for the plaintiff.

BOYD, C.:—According to the findings of fact by the jury, the defendants were guilty of negligence in running their car at an "excessive speed;" the deceased was also guilty of negligence by not looking for the approaching car; and the motorman, after he became aware of the plaintiff's danger, could have prevented the accident by the exercise of reasonable care, but he was negligent therein because of the "too great speed." I read these expressions as to negligent speed as meaning the same thing—the speed of the car was throughout "too great" or "excessive." And the last answer, read in the light of the evidence, indicates (as said by Moss, C.J.O., in Hinsley v. London Street R.W. Co., 16 O.L.R. 250), their opinion that the motorman, apprehending the situation and doing everything in his power, found it impossible to stop in time to avoid the impact of the car because of the extreme rate of speed. . . .

The primary and ultimate negligence of the defendants is one and the same—excessive speed. There is no evidence of other negligence than that of excessive speed which occasioned and was the direct cause of the injury. But that negligence was concurrent with the negligence of the deceased—and in case of joint negligence of plaintiff and defendants there can be no recovery for the plaintiff, according to well-settled rules of English law.

Another way of putting it is, that excessive speed was the risk which the deceased assumed in the attempt to cross the track, and his going on the track was the main and decisive cause of the injury which resulted in death. . . .

[Reference to Brenner v. Toronto R.W. Co., 13 O.L.R. 423, 15 O.L.R. 195, 40 S.C.R. 540; Snow v. Crow's Nest Pass Coal Co., 13 B.C.R. 145, at p. 155; Scott v. Dublin and Wicklow R.W. Co., 11 Ir. C.L.R. 377.]

I would not give costs, for I think it is a monstrous thing that at places like the entrance to the General Hospital the cars should be driven at such a rate as to imperil those who have to cross the track in the visitation of the sick. The car stopping to land people at the gate should be a signal to any other approaching car to come to a halt till the car is unloaded of its passengers.

LATCHFORD and MIDDLETON, JJ., concurred, each stating reasons in writing.

Appeal allowed without costs and action dismissed without costs.

LATCHFORD, J. DECEMBER 19TH, 1910.

RE McCULLY.

McCULLY v. McCULLY.

Devolution of Estates Act—Caution—Order Allowing Administratrix to Register—Application to Vacate—Persona Designata—Power to Rescind—Appeal—Leave—Partition or Sale of Lands of Intestate—Application for—Status of Applicant—Assignment of Interest in Lands—Receiver—Injunction.

Motion by Samuel O. McCully, the father of Mary B. McB. McCully, deceased, to set aside on order allowing the mother to file a caution under the Devolution of Estates Act, and for an order for the partition or sale of lands in which the deceased daughter had an interest (she having died intestate); and motion by the mother for a receiver and an injunction.

J. A. Macintosh, for Samuel O. McCully.

W. Laidlaw, K.C., for the mother and brother and sister of the deceased.

LATCHFORD, J.:—The late Mary B. McB. McCully, at the time of her death intestate and unmarried, on the 6th July, 1906, was the owner in fee simple of the southerly part of lot 26, con.

D., in the township of York, subject to the payment by her to her sister Laura and her brother Kenneth, in equal shares, of one-fourth of the rents and profits of such farm until the sale thereof, and thereafter to the payment to her said sister and brother, in equal shares, of one-fourth the price realised at such sale. The farm at the time of her death was under lease for a term of ten years from the 1st April, 1902, at an annual rental of $400. The heirs of the intestate were her father and mother and the brother and sister mentioned.

The father and mother are living apart. It is alleged by Mrs. McCully that her husband, a physician, left her in 1895, and, after residing for a time in Wisconsin, went to Texas, where he procured what he calls a divorce. Afterwards, he went through the form of marriage with one or two persons. He now resides in Texas. Mrs. McCully applied for letters of administration of her daughter's estate. Dr. McCully filed a caveat in opposition, and himself had application for administration made by the Trusts and Guarantee Co. Pleadings were filed and served, and, upon the trial in the Surrogate Court of the County of York, on the 9th October, 1909, judgment was rendered allowing letters of administration to issue to Mrs. McCully.

In the meantime there had been other proceedings. Mrs. McCully, on the 19th June, began an action for alimony against her husband. On the 28th October an order was made for the payment by Dr. McCully of arrears of interim alimony, amounting to $44, interim alimony at the rate of $16 a month, and interim disbursements to the date of the order, amounting to $50: 1 O.W.N. 95. An appeal from this order was dismissed: ib. 187. The order was not complied with, and writs of execution were issued and placed in the Sheriff's hands.

In January, 1910, Dr. McCully launched a motion under Con. Rule 956, returnable on the 15th February, for the partition or sale of the lands which his daughter owned at her decease.

On the 7th February, upon an ex parte application on behalf of Mrs. McCully, I made an order allowing the filing of a caution by the administratrix under the Devolution of Estates Act, R.S.O. 1897, ch. 127, sec. 14, as amended by 2 Edw. VII. ch. 17, sec. 4.

This was followed on the 11th February by a motion on the part of Mrs. McCully for an order appointing a receiver, on the usual terms, to recover and receive any share or interest Dr. McCully had in his daughter's estate, and for an injunction re-

straining Dr. McCully from selling or interfering with any share or interest he may have in such estate.

Application is now made on behalf of Dr. McCully to set aside the order allowing the filing of the caution; the motion for an order for the partition or sale of the farm is renewed; and Mrs. McCully, on her part, presses for an order appointing a receiver of her husband's interest, and for an injunction.

I see no reason for vacating, had I the power, the order of the 7th February. All the conditions required by sec. 14 of the Devolution of Estates Act had been complied with by Mrs. McCully, and I was satisfied with the propriety of permitting the caution to be registered. The caution was duly registered, and the effect of the registration is that the lands are vested in the administratrix and not in the heirs: sec. 13.

The order was made by me as persona designata by the Act. The statute giving jurisdiction does not authorise an appeal, and I have not, nor has any Judge of the High Court, given special leave to appeal. Even in such an event the appeal must be to a Divisional Court: 9 Edw. VII. ch. 46, sec. 4. I have no power to set aside the order which I made, even if the circumstances warranted such a course—and they do not. The application to rescind the order allowing the caution to be filed is, therefore, dismissed with costs.

In support of the application for an order for partition or sale, an affidavit of Dr. McCully has been filed. It sets forth, in addition to the ordinary allegations, that the deponent, upon the death of his daughter, became entitled to an undivided three-sixteenth interest in the lands I have mentioned. This statement is not disputed. But it is alleged and established that in September, 1909, before the launching of the motion, Dr. McCully had assigned all his interest in the land in question to Herbert D. Smith, of Chatham, Ontario, solicitor, "as collateral security for all costs, charges, counsel fees, and disbursements which are owing . . . or which in future may be owing (by McCully to Smith) in respect of services which have been rendered or may be rendered in the future," in respect of the proceedings in the Surrogate Court and in the alimony action. On payment of all such costs, etc., Smith is to re-assign the property to McCully. This conveyance has not been registered; but, as it is produced by Mr. Smith, it must be assumed to have been delivered. Apart altogether from the effect of the registration of the caution, the right of Dr. McCully to partition or sale did not exist at the time the motion was launched. In fact he was not then, nor is he now, entitled to any interest

whatever in the lands of his deceased daughter. His motion for partition or sale is, therefore, dismissed with costs.

The application of the administratrix for the appointment of a receiver and for an injunction must also fail, and with costs. It is, in my opinion, a wholly unnecessary proceeding at the present time. The farm has not been sold, and the other assets are of little or no value. All are vested in the administratrix. The interest of Mr. Smith in the land is bound by the writs in the Sheriff's office against his assignor, and, with the judgment in Mrs. McCully's favour, afford her ample protection. By paying the judgment Dr. McCully or his solicitor will be able to have the action for alimony brought to trial and disposed of. It will then and only then, I think, be possible to determine the propriety of appointing a receiver. There will probably be but little to receive.

MEREDITH, C.J.C.P. DECEMBER 19TH, 1910.

*WILSON LUMBER CO. v. SIMPSON.

Vendor and Purchaser—Contract for Sale of Land—City Lot—Misstatement as to Depth—"More or Less"—Deficiency—Innocent Mistake—Purchase-money not Fixed according to the Number of Feet—Depth Apparent on Ground—Action by Purchaser for Specific Performance with Compensation for Deficiency.

Action for specific performance of an agreement made with the defendant on the 2nd February, 1910, for the sale by the defendant to them of a lot on Richmond street, in the city of Toronto.

The lot was described in the agreement as "the premises situate on the north side of Richmond street, in the city of Toronto, and known as No. 250 Richmond street, having a frontage on Richmond street of 36 feet more or less by a depth of 110 feet more or less to a lane, together with a right of way over said lane." The lot was a corner lot, bounded on one side by Richmond street, on another by Duncan street, and on the third side by the lane mentioned in the agreement, and the depth of it, i.e., the frontage on Duncan street, was 98 feet six inches, and not 110 as mentioned in the agreement.

*This case will be reported in the Ontario Law Reports.

The sale was effected through an agent of the defendant, who was aware that the plaintiffs contemplated pulling down the building which stood on the lot and erecting a row of five houses, each having a frontage of about 20 feet with a 10-foot stairway leading to the upper storeys; and the plaintiffs, in making their offer, were under the impression that the Duncan street frontage was about 110 feet.

The agent did not communicate to the defendant the information he had as to the purpose of the plaintiffs to erect the houses, and the defendant accepted the offer of the plaintiffs in ignorance of the use to which they contemplated putting the lot.

The purchase-price agreed on was $12,000, and was a bulk sum, and not a sum per foot for the frontage on either street, and the plaintiffs did not arrive at the bulk sum by an estimate of the value of the property at a price per foot.

The defendant acted in good faith in describing the lot as having a depth of 110 feet more or less, and he was led into that error from the lot having been assessed and described in the assessment notices which he received as of that depth.

The plaintiffs claimed specific performance with compensation for the deficiency in depth of the lot, which, they said, should be fixed at $1,500, and the defendant was willing to carry out the agreement, but disputed the right to compensation.

J. J. Maclennan, for the plaintiffs.
K. F. Mackenzie, for the defendant.

MEREDITH, C.J. (after setting out the facts as above):—I was not referred to nor have I found any reported English or Canadian case in which, where, as in this case, in the description of the land which was the subject of the contract, its depth was stated to be greater than its actual depth, but that statement was qualified by the words "more or less," it was held that the purchaser was entitled to enforce the contract and to claim a reduction of the purchase-price sufficient to compensate him for the deficiency.

There are, however, American cases in which the question has been considered and decided. . . .

[Reference to Noble v. Goggins, 99 Mass. 231; Hill v. Buckley, 17 Ves. 394; Winch v. Winchester, 1 V. & B. 375; Townshend v. Stangroom, 6 Ves. 341; Portman v. Mill, 2 Russ. 570; Dart on Vendors and Purchasers, 7th ed., pp. 675, 676; Connor v. Potts, [1897] 1 I.R. 534.]

Connor v. Potts does not bear directly on the question I am considering, and I refer to it only because of the statement of the Vice-Chancellor (Chatterton) that "the general principle applicable to this case is well-established, that where a misrepresentation is made by a vendor as to a matter within his knowledge, even though it may be founded upon an honest belief in the truth of what he states, and the purchaser has been misled by such misrepresentation, the purchaser is entitled to have the contract specifically performed so far as the vendor is able to do so, and to have compensation for the deficiency."

An analysis of the English cases, I think, fully justifies the statement of Mr. Justice Gray (in Noble v. Goggins) that it is difficult to extract from them any consistent principle.

It would, I think, be a novel and startling thing to hold that in this province, where the lands have been surveyed into lots, to which numbers have been given, and the area and dimensions of which are shewn on the maps of the Crown Lands Department or on the plans in the registry offices, on a contract for the sale of such a lot by its number, the statement in the description of it that it contained by admeasurement a stated number of acres or of square feet, "be the same more or less," would come within the general principle mentioned by Vice-Chancellor Chatterton, and would entitle the purchaser to compensation for any deficiency in quantity, if in fact the lot did not contain as many acres or as many square feet as it was said to contain, and there is nothing in any of the decided cases which requires me to hold that that general principle is applicable to such a case.

In the earlier patents from the Crown it was usual to add to the description by number of the lot granted a statement that it contained by admeasurement a stated number of acres more or less; and in numberless conveyances and contracts of sale lots have been similarly described; and, so far as I am aware, it has never been supposed that the statement as to quantity amounted to a representation entitling the purchaser, in the case of a contract of sale, to compensation for any deficiency, if the lot contained less land than the stated quantity.

Similarly I should be of opinion that where, in addition to the description of such a lot, there was added a statement as to the length of its boundary lines, qualified by the words "more or less," the seller would not be bound to make compensation if these lines were not of the stated length.

In saying this, I must not be understood as including a case where the sale is by the acre or by the foot or where the contract

is based upon the supposition that the lot contains the stated area or has the stated frontage or depth, and the fact that it has not is known to the vendor.

I entirely agree in the reasoning of Mr. Justice Gray and in the law as laid down in Noble v. Goggins.

I refer also to Mann v. Pearson, 2 Johns. (N.Y.) 37; . . . Weart v. Rose, 16 N.J. Eq. 290. . . .

In the case at bar, though the lot is not described by its number, it is by the house number.

It is, as I have said, bounded on two sides by streets and in the rear by a lane, so that on three sides its limits were apparent to even a casual observer; and, in my opinion, in accordance with the principle upon which Noble v. Goggins was decided, the words "more or less," added to the statement of the depth, control that statement, so that neither party would "be entitled to relief on account of a deficiency or surplus unless in case of so great a difference as will naturally raise the presumption of fraud or gross mistake in the very essence of the contract;" and, upon the facts of this case, no such presumption is raised.

The plaintiffs are not, in my opinion, entitled to compensation, but, if they choose to take what the defendant owns, they may have judgment for specific performance without costs; and, in the event of their not electing, within ten days, to take such a judgment, the action will be dismissed with costs.

DIVISIONAL COURT. DECEMBER 19TH, 1910.

*MAY v. MAY.

Husband and Wife—Action for Declaration of Nullity of Marriage—Judicature Act, sec. 55(5)—Jurisdiction—Marriage to Brother of Deceased Husband.

Appeal by the plaintiff from the judgment of LATCHFORD, J., ante 68, dismissing an action by a woman against her husband for a declaration under sec. 55, sub-sec. 5, of the Judicature Act, that their marriage was null and void. The plaintiff alleged that the defendant was the brother of her deceased husband, that the defendant had made false statements in procuring the license, and that she was ignorant that such a marriage was within the prohibited degrees of consanguinity.

*This case will be reported in the Ontario Law Reports.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and SUTHERLAND, JJ.

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

The defendant was not represented.

THE COURT held that there had been no remedial legislation so far as the particular bar set up was concerned; no case had gone so far as the Court was asked to go; it would be a great misfortune if the Court should lay down the law to be that a jurisdiction which formerly was exercised in England only by the Ecclesiastical Courts should be exercised by the High Court of Justice here.

Appeal dismissed with costs.

MEREDITH, C.J.C.P. DECEMBER 20TH, 1910.

DIXON v. PRITCHARD.

Fraud and Misrepresentation—Exchange of Shares—Representation that Company Engaged in Manufacturing — Prospectus — Falsity — Reliance upon — Measure of Damages—Scale of Costs—Set-off.

Action for damages for false and fraudulent representations.

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

W. A. Baird, for the defendant Pritchard.

J. F. Hollis, for the defendant Master.

MEREDITH, C.J.:—The plaintiff was the owner of shares in three companies and exchanged them with the defendant Master for six shares in Purity Castile Soap Limited, a joint stock company incorporated by letters patent under the Ontario Companies Act.

The objects for which the company was incorporated, as stated in the letters patent, were: (1) to take over and purchase an invention covered by patent number 110446 for the Dominion of Canada and known as an improvement in apparatus for making soap; (2) to carry on the business of soap manufacturing; and (3) to deal in, make, buy, vend, and dispose of oils and perfumery.

By an agreement dated the 27th August, 1908, and made between the defendant Pritchard and the company, it is recited that Pritchard was the owner of certain options on two patents for improvements in machines for manufacturing castile soap, one of which is the patent mentioned in the letters patent, and the holder of an option for the purchase from one Cook, of Berlin, of a certain machine and all accessories thereto for manufacturing castile soap, and that Pritchard was desirous that the company should take over these options; and the agreement provides that Pritchard, forthwith upon the organisation as defined in an agreement dated the 14th August, 1908, between him and William John Crowe and others, is to sell and assign to the company the options mentioned in the recital, and forthwith exercise the options and purchase the patents and assign them to the company, in consideration of $4,500, to be paid out of the proceeds of sale or otherwise, in stated instalments, and of the transfer and allotment to Pritchard of $46,500 of fully paid-up and non-assessable common stock of the company, and that he shall, for the same consideration, sell and assign to the company any future improvements which he may make, whether patented or otherwise, in respect of machines or other apparatus for the manufacture of hard and soft castile soap. . . .

This agreement was never carried out.

The defendant Master at the time of the transaction in question was the holder of three share certificates, each for two shares of the capital stock of the company. These certificates are dated the 23rd September, 1908, and bear the signatures of the president and secretary of the company, and its corporate seal is affixed to them, and in them the defendant Master is certified to be the owner of the shares.

Nothing appears in the certificates to indicate that the shares are fully paid, and nothing was shewn as to the circumstances under which the certificates came to be issued to the defendant Master, further than the testimony by the defendant Pritchard that Master got the shares from him.

The company never began the manufacture of soap, and this was known to the defendant Master when he entered into the transaction in question. He, nevertheless, produced to the plaintiff and left with him the prospectus of the company.

The prospectus contains statements and certificates which, I think, plainly amount to representations that the company is carrying on the manufacture of castile soap. . . . It may be true that, if a critical examination and comparison of the dates

mentioned in the prospectus had been made, the plaintiff might have discovered that the soap referred to in the latter of these certificates could not have been manufactured by the company, but no such examination was made by the plaintiff, and he doubtless relied upon the representation to which reference has been made, and believed that the company was engaged in the manufacture of what the company represented to be a much improved quality of soap.

The evidence, in my opinion, fully warrants a finding that the plaintiff was induced to enter into the transaction in question by the false and fraudulent representation I have mentioned—and I so find; and the measure of damages is the difference between the price paid for the shares and their actual value: Kerr on Fraud, 4th ed., pp. 406-7; Lamont v. Wenger, 1 O.W.N. 177.

The shares were of no value. The shares which the plaintiff gave in exchange he valued at $350. They were sold by Pritchard for $200 or $210. I think the plaintiff's estimate is too high, and that $280 would be a fair value to place upon his shares; and I assess the damages at $280.

The plaintiff is entitled to judgment against the defendant Master for that sum, with costs. As the action is one within the proper competence of the County Court, the costs will be taxed according to the tariff of that Court, but there will be no set-off to the defendant.

Action dismissed as against the defendant Pritchard without costs.

DIVISIONAL COURT. DECEMBER 20TH, 1910.

LACROIX v. LONGTIN.

Deed—Rectification—Husband and Wife—Agreement by Husband to Convey Wife's Land—Conveyance by Husband—Wife Joining to Bar Dower—Estoppel—Specific Performance—Statute of Frauds.

Appeal by the plaintiff from the judgment of BRITTON, J., 1 O.W.N. 839, dismissing the action.

The appeal was heard by BOYD, C., LATCHFORD and SUTHERLAND, JJ.

H. S. White, for the plaintiff.

J. A. Macintosh, for the defendants.

The judgment of the Court was delivered by BOYD, C.:—This case has been twice tried, and on each occasion the Judge has found that the woman believed that the land being sold was the land of her husband, and that she signed barring her dower under that misapprehension. She says, had she known that she was the owner, she would not have sold on the terms which satisfied her husband. There was a mistake common to both sides: the plaintiff believed that the husband was the owner, and the conveyancer who acted for both vendor and purchaser shared in the mistake. The title was registered, and any search would have disclosed the fact that the husband had, two years before, conveyed to the wife. But I can well understand, from the ignorance of both, that the legal effect of the transfer was not appreciated by either. The wife could have no object in seeking to conceal or to mislead in a matter that was disclosed to the world by the registration—she acted, I think, in simple ignorance of her title.

Now the parties are precisely where they were at the outset—no change of possession, no payment of money, and no action taken by the plaintiff as the result of the wife's silence, calling for the equitable interposition of the Court. He was to buy the land and pay for it by a note of $400 and the assumption of a mortgage which covers this and other lands belonging to husband or wife. The note has been returned to him, and he entered into no written engagement to pay the mortgage. I think it is pretty clear that this term of assuming the mortgage was not explained to or understood by husband or wife. They had the idea that the mortgage was to be cleared off by the purchaser, so that this other land would be free; and they offered to carry out the transaction if this could be adjusted.

The plaintiff cannot seek relief on any other ground than that of estoppel, but, when no tangible detriment has resulted to the plaintiff, I do not think that the defendants should be prevented from proving what was the real transaction. So far as appears, the plaintiff does not suffer in pocket or in prospect from losing the land, and the defendant does not appear to have withdrawn because of any enhanced value in the land. Both parties have blundered, neither has suffered except from this litigation, and the Court should leave them as they are. The deed has not been registered, and the dismissal of this action will leave everything as it was.

At the most, there was here nothing but misunderstanding arising out of ignorant silence on the part of the married woman.

I do not think it has yet been decided that a married woman is to be held bound by an innocent misrepresentation—and the only possible measure of relief to the plaintiff would be that he should get compensation for any loss occasioned by the defendant's silence, but no such loss has been sustained or sought to be proved.

The costs of the appeal should be borne by the plaintiff.

RIDDELL, J., IN CHAMBERS. DECEMBER 21ST, 1910.

JEUNE v. MERSMAN.

Discovery—Examination of Defendant—Place for Examination —Residence—Change pendente Lite—Con. Rule 443*—Practice—Costs.*

Appeal by the defendant from an order of the Master in Chambers directing that the defendant should attend for examination for discovery before a Special Examiner in the city of Toronto, and, in default, that his defence should be struck out.

W. E. Raney, K.C., for the defendant.
T. J. W. O'Connor, for the plaintiff.

RIDDELL, J.:—The statement of claim (para. 2) sets out that the defendant resides in the city of Toronto. The defendant denies all allegations except those set out in certain named paragraphs, including 2. The residence of the parties is wholly immaterial to the issues in the action. The statement of defence is dated the 19th October, 1910, and the defendant was at that time resident in Toronto. On or shortly before the 4th November, 1910, he went to reside at Brantford, and has there resided thence hitherto. The change of residence not being a ground of defence, the defendant could not amend or plead puis darrein continuance under Con. Rule 291.

An appointment for the examination of the defendant was taken out on the 3rd December from Mr. Boomer, one of the Examiners in Toronto. This was served on the defendant in Brantford. The solicitor of the defendant, who resides and practises in Toronto, was also served with a copy of the appointment, and he then and there informed the plaintiff's solicitor that the defendant was then resident in Brantford and could not

attend in Toronto—he refused to accept the $1 tendered for the defendant's witness fee, but the plaintiff's solicitor insisted on leaving the dollar bill on his desk. The defendant did not attend for examination, and the plaintiff moved to strike out the statement of defence. The Master in Chambers made an order that the defendant should, at his own expense, attend before Mr. Boomer for examination, and, in default, the defence was to be struck out.

The defendant now appeals.

There are two main grounds for appeal: (1) the defendant cannot be compelled to submit to examination before an Examiner out of his own county; (2) the conduct money is not sufficient. The defendant expresses his willingness to be examined before an officer of the county of Brant, but is not willing to lose wages and incur expenses in travelling, etc.

The Master considered that he was bound by Dryden v. Smith, 17 P.R. 500, but I think he is in error.

Con. Rule 443 provides for an examination before an Examiner in the county in which the examinee resides. Dryden v. Smith was a case in which the plaintiff (and his family) actually resided in the county of Ontario, but his duties as Minister of Agriculture called him to spend a portion of time, usually from some time on Monday until Saturday morning in each week, in Toronto. An appointment for his examination in Toronto was served upon him in Toronto. Upon motion this was set aside by the Master, and his decision was affirmed by Moss, J.A. The learned Judge, after first pointing out that the plaintiff could only be required to attend for examination before an officer having jurisdiction in the county in which he (the plaintiff) resided, held that where a party plaintiff is so situated as that he may for some purposes be considered to have more than one residence, and he designates one of these residences upon the writ of summons as the place where he resides, that place should be considered his place of residence for the purposes of the action. But there was no decision that if the place named in the writ was not a place of residence of the plaintiff at all, it must be held to be his place of residence.

In the present case the residence of the defendant is clearly Brantford, and it is wholly immaterial that he admitted at one time that his residence at that time (if he did so admit) was in Toronto. The law does not prevent a litigant changing his place of residence; no new species of adscripti glebæ has been intro-

duced into Ontario. To examine a litigant—a proceeding solely the offspring of the Rules—the Rules must be complied with.

The appeal will be allowed. Had the plaintiff made a bonâ fide mistake in the actual residence of the defendant, the costs might well be in the cause, but here the sin is against light, and the plaintiff must pay the costs here and below in any event.

MIDDLETON, J. DECEMBER 21ST, 1910.

McVICAR v. NICHOLSON.

Charge on Land—Legacy—Assignment of, notwithstanding Payment and Release—Fraud—Solicitor—Validity of Charge in Favour of Innocent Assignee—Subsequent Purchaser for Value without Notice—Registry Laws—Equities—Enforcement of Charge.

Action to recover $1,200, the amount of a legacy of which the plaintiff had an assignment, and (in default) to enforce payment by sale of the land charged with payment of the legacy.

J. B. Clarke, K.C., and J. C. Hegler, K.C., for the plaintiff.
J. G. Gibson, for the defendant.

MIDDLETON, J.:—Daniel Lintz died on the 19th June, 1888, and by his will devised the lands in question to his son John Henry Lintz, subject to and charged with the payment of a legacy of $1,200, payable in instalments of $200 per annum, with interest at six per cent., to his daughter May Ann Havenor.

On the 12th May, 1897, the son conveyed this land, subject to certain mortgages, to John Bell Jackson, a solicitor of the Supreme Court, for the nominal consideration of $80. The land was then worth about $5,000, but, in addition to the mortgages mentioned in the conveyance, was charged with the legacy to Mrs. Havenor and other payments under the will.

On the 29th March, 1898, an agreement was made between Mrs. Havenor and Jackson, by which a dispute as to her exact rights under the will was adjusted, and Jackson agreed to pay certain sums upon certain specified dates, in satisfaction of the legacy, and upon receipt of these sums she agreed to give a quit-claim deed.

On the 4th May, 1901, three instalments of $200 and interest

at three per cent. had been paid, and a fourth instalment was due. Jackson then paid Mrs. Havenor in full. Mrs. Havenor went to his office to receive the money, and signed what she supposed was a release or quit-claim. She cannot now say how many papers were executed.

Four documents are now produced, and Mrs. Havenor admits her signature to all. These are: (1 and 2) an assignment of the legacy to the plaintiff in duplicate; (3 and 4) a quit-claim deed in duplicate. She says the signature to the assignment is "more like hers"—but she never intended to sign any document other than a quit-claim or release. Nothing else was asked. She never heard of the plaintiff, and merely signed the papers put before her, assuming the truth of Jackson's statements—the documents not being read over. She received her money, and this was all she was concerned in, and was quite ready to execute any paper to give a good discharge.

One Millie Toull, a stenographer in Jackson's office, witnessed the quit-claim deed, and made an affidavit of execution upon each copy. She signed four times, and, as she filled in the affidavit, her name appears six times in her own handwriting. Her handwriting is peculiar, and there is no variation in the way her name is written. Mr. Gibson, the commissioner, was a partner of Jackson, and has no hesitation in saying that the signature is hers. The quit-claim is dated the 2nd May, 1901, and the affidavit of execution is sworn on the 8th May, 1901. Miss Toull is also witness to one copy of the assignment, Jackson also signing as witness. Her signature is quite different. She is now married and resides in Lethbridge, but, being, in Ontario, was examined de bene esse, and admits her signature to this document. She was not shewn the other, and, as might be expected, has little recollection of the transaction.

Upon the evidence, I must find as a fact that both documents were in fact signed by Mrs. Havenor.

Foster v. Mackinnon, L.R. 4 C.P. 704, is relied upon as shewing that the assignment cannot be looked upon as the deed of Mrs. Havenor. In the view I take of the case, I need not now say if this is correct. Later cases go far to shew that, when the intention is to contract with regard to the property, and the party signing accepts the statement of the one who produces the document as to the nature of its contents, the signer is precluded from asserting that it is not the real contract.

On the 26th April Jackson received from the plaintiff $1,200, to be advanced upon the security of the legacy, which was repre-

sented as being still due and as being a charge upon the land. Jackson was the solicitor for the plaintiff in the transaction, and was to hand over the assignment when registered. The assignment was not registered until the 25th October, 1901, and shortly after this was handed over.

Jackson paid the interest on the $1,200 for the years 1902, 1903, and 1904. It must not be forgotten that, as the owner of the land, it was his duty to pay the legacy if it still subsisted.

Attached to the assignment (in which there is a covenant by Mrs. Havenor that the legacy is a valid and subsisting claim) is a short document signed by Jackson by which he guarantees "the payment of the within-named legacy."

On the 3rd November, 1903, Jackson left Ontario. . . . At this time he was in financial and other difficulties of the most acute description. Among other things, he owed Nicholson (the defendant) over $15,000, and Knight, Nicholson's solicitor, was demanding settlement and threatening criminal proceedings. Ultimately Jackson conveyed to Nicholson the lands in question in part satisfaction of this claim. The sum named as the consideration was $4,000. The conveyance is said to be free of all incumbrances. The existence of the legacy as a charge was not disclosed. Nicholson did not search the title and did not in fact know of the legacy or of the plaintiff's claim till some time later. Jackson did not disclose the existence of the quit-claim deed, but told Knight that his papers would be left in Ingersoll, and that, if any title deeds were at any time wanted and could be found, he (Knight) might have a search made and take them.

The plaintiff having asserted his claim in 1904, a search was made, and, the quit-claim deed being found, it was then registered (23rd April, 1904).

As against the plaintiff, Jackson clearly could not be heard to deny that the legacy was unpaid and a valid charge upon the land. He had so stated, and upon the faith of his statement the plaintiff had advanced the money. The fact that Jackson was the plaintiff's solicitor, it seems to me, can make no difference. The defendant had at that time acquired no rights; and cases dealing with a situation where a solicitor, acting fraudulently, has knowledge of a claim and conceals it, have no application.

The defendant, taking under Jackson can have no greater right than Jackson, unless such higher rate is based upon some equity or some statutory provision.

The Registry Act cannot aid the defendant (indeed, it may protect the plaintiff), as the plaintiff's title was duly recorded long before the defendant acquired any interest in the lands.

The plaintiff is in no way in fault, and has done nothing upon which any equitable claim can be based.

At the hearing I thought there might be an innocent explanation of Jackson's acts, and that the two documents were taken—the assignment to be used if the plaintiff would advance the money—the quit-claim if he would not—but the fact that the money was received by Jackson some days before the documents were prepared—the dates are not blanks filled in—prevents this.

The case of Wigan v. English and Scottish Law Life Assurance Association, [1909] 1 Ch. 291, shews the difficulties in the defendant's way in attempting to establish that he is a purchaser for value. The debt was undoubtedly consideration, but this case indicates that to be regarded as a purchaser for value there must be something more than the mere naked consideration sufficient to create a contract. This seems to be in conflict with Johnston v. Reid, 29 Gr. 293, but, as my judgment does not turn upon this, I content myself with drawing attention to the point.

The plaintiff is entitled to judgment for $1,200 and interest from the 22nd April, 1904, at six per cent. and the costs of the action. The judgment will declare that this is a charge upon the lands and fix a day for payment; in default, sale, etc.

RIDDELL, J. DECEMBER 22ND, 1910.

RE DAVIS AND VILLAGE OF BEAMSVILLE.

Municipal Corporations—By-law—Motion to Quash—Admitted Illegality—Costs—Alleged Misconduct of Applicant not Connected with Illegality—Application to Ontario Railway and Municipal Board—Approval of By-law by Ratepayers—Proposed Validating Act of Legislature—Refusal to stay Judgment on Motion.

Motion by David Davis to quash a money by-law of the village of Beamsville.

A. W. Marquis, for the applicant.

John Jennings, for the village corporation, admitted that the by-law could not stand in law, but urged that the corporation should not be ordered to pay costs, and asked for delay.

RIDDELL, J.:—The by-law is for raising money by debentures. One reason urged against the village corporation paying costs is that the applicant himself was Reeve for 1907, 1908, and 1909, and that it was due to his failure to raise enough money for these years that it became necessary for the village to raise money now by debentures. I cannot look upon this as a reason for refusing him his costs—the Court does not, as a rule, regard the conduct of a litigant dehors the action or proceeding or not closely connected therewith. The rule is, not to punish a litigant for misconduct in other matters unconnected with the litigation or its cause. Here nothing done or left undone by the applicant in his capacity of Reeve, or otherwise, had anything to do with the illegality upon which the by-law must be quashed.

Then it is said that the village council consulted the Ontario Railway and Municipal Board as to the proposed by-law, and the Board answered by saying that "the Board would not have jurisdiction under 8 Edw. VII. ch. 51 to validate your by-law, unless it had been passed by a vote of the qualified ratepayers." Taking this as an intimation that the Board could and would exercise jurisdiction if the by-law were approved by the ratepayers, the council submitted the by-law to the ratepayers, and it was passed accordingly, by a vote of 99 to 37. The by-law was passed by the council, and the Board was asked to validate it. The Board, however, answered that the former letter had been written without an opportunity of examining the proposed by-law—and said that they had no jurisdiction to validate the by-law. The Reeve had always had doubts about the jurisdiction, but had assumed from the first letter of the Board that the jurisdiction existed.

I am unable to give relief to the village on this ground. I assume the utmost good faith, but the by-law is quite plainly bad and outside the purview of 8 Edw. VII. ch. 51. No one can take advantage of ignorance of law—nor, had the language of the Board been more definite and precise than it is, could the village, even then, have been protected by the view of the Board. It is only the court of last resort which can make mistakes with impunity, and their opinion fully protect those who act upon it.

The by-law must be quashed with costs.

It is said that an application is pending for a private Act validating the by-law; and it was urged that I should stay my hand until the legislature had passed upon the matter. I do

not agree. The legislature has its function, a Judge his, and these are quite distinct. Nothing I can do can prevent the legislature doing as it seems proper—validating the by-law or any other Act—but that is law-making. My duty is not to make but to declare the law; and when one comes into Court for law, in most cases he is entitled, and that without delay, to law. It is, in my view, as truly, though perhaps, not so great, an injustice to delay as to refuse justice. The "law's delays" are become a proverb, and they should be made as few and as short as possible. Magna Carta still stands as a rule for the King and the King's Justice—"Nulli vendemus, nulli negabimus aut differemus, rectum aut justiciam." To none will we sell, to none will we deny or *delay*, right or justice.

Of course, there are instances in which a Court would or might not proceed pending legislation already imposed, as in the case of Smith v. City of London, 1 O.W.N. 280, 20 O.L.R. 133, where, when the case came down to trial, a "Government Bill" was actually before the house dealing with the matters at issue. Such a case is quite different from the present, in which a private bill is to be asked for.

DIVISIONAL COURT. DECEMBER 22ND, 1910.

POWER v. MAGANN.

Contract — Work and Labour — Independent Contractor — Liability of Employer for Work Done in Course of Executing Contract—Taking Soil from Neighbouring Land—Liability as between Contractor and Servant—Acts Done in Ignorance—Innocent Trespass—Damages.

Appeal by the defendants Stone and Wellington from the judgment of BRITTON, J., 1 O.W.N. 686.

The appeal was heard by MULOCK, C.J. Ex. D., CLUTE and SUTHERLAND, JJ.

C. C. Robinson, for the appellants.

W. J. Elliott, for the plaintiff.

The judgment of the Court was delivered by CLUTE, J.:— The action is brought for trespass on the plaintiff's land and the

removal of large quantities of black loam and earth and converting the same to the defendants' use.

The defendant Magann contracted with the defendants Stone and Wellington for certain landscape improvements in accordance with plans and specifications submitted by one Maxson, landscape architect in the employment of the defendants Stone and Wellington.

The work was not carried on satisfactorily, owing to the neglect, it is said, of the architect, who was dismissed by the defendants Stone and Wellington, who then engaged the defendant Chambers to oversee and complete the work under the contract, at so much per hour. In completing the work certain extras were required in the way of filling and sodding. In procuring soil for this purpose, the men employed by the defendants Stone and Wellington, with the authority and knowledge of Chambers, entered upon the plaintiff's land and committed the trespass complained of.

The trial Judge found—and the evidence clearly establishes—that in doing the work, and as was necessary for the proper planting and transplanting and changing of terraces, a large quantity of black soil was used. . . .

The defendant Wellington states that Chambers was instructed to go on and complete the job, and that he paid him for actual supervision $1 an hour.

The master is ordinarily liable for the wrongful acts of his servant if these acts are done in the course of his employment. .

[Reference to Ferguson v. Roblin, 17 O.R. 167.]

Mr. Robinson urged that the men were not under Stone and Wellington's control, but under that of Chambers. . . . But the men were under Stone and Wellington's control, though they were not upon the spot, the work being done for them, not by contract, but by day-labour, under the supervision of their appointed overseer. Stone and Wellington could have dismissed the men at any time and directed them in any way they pleased. "Control," in such a case, does not mean the presence of the master . . . but the right to control. . . .

[Reference to Holliday v. National Telephone Co., [1899] 2 Q.B. 392.]

Mr. Robinson strongly urged that Saunders v. City of Toronto, 26 A.R. 265, governed the present case. . . .

I cannot understand how it can be successfully urged that Chambers was in any sense a contractor or had control otherwise than as given by his employers Stone and Wellington. The

reasons in the Saunders case appear to be directly in favour of the plaintiff. . . .

[Reference to Bowstead's Law of Agency, 3rd ed., p. 3; Fleuty v. Orr, 13 O.L.R. 59; Stephen v. Thurso Police Commissioners, 3 Ct. of Sess. Cas., 4th series, 542.]

Appeal dismissed with costs.

MORTON v. FORST—MASTER IN CHAMBERS.—DEC. 16.

Discovery—Action for Value of Services—Quantum Meruit—Better Affidavit on Production—Examination of Plaintiff——Particulars of Statement of Claim—Value Assigned to Services.] — Motion by the defendant for a further affidavit on production of documents by the plaintiff, to compel the plaintiff to attend for further examination for discovery and answer questions which he declined to answer, and for particulars of the prices assigned to the various items appearing in the statement of claim for which the total sum of $1,200 was assigned. The action was, as upon a quantum meruit, for the value of services alleged to have been rendered by the plaintiff to the defendant, at the defendant's request, between the 16th March and the 10th June, 1910. In the statement of claim 45 items of services were set out, but no charges carried out for any of them. The defendant asked for these on the examination of the plaintiff, but the plaintiff said he was not able to affix a value to each specific service. Held, that, as the action was on a quantum meruit, it was not necessary for the plaintiff to comply with this demand. Reference to Re Johnston, 3 O.L.R. 1; Re Solicitor, 14 O.W.R. 2, 80, 707. It was conceded on the argument that the plaintiff must make a further affidavit and submit his diary for inspection. And held, that the plaintiff should attend for re-examination and answer questions 190 and 249, which were relevant, the first to the value of the plaintiff's services, and the other to the question whether he was interested in the Peterson Lake Mine so as to be anxious to effect the change in the management of that company for which he was now seeking to be paid. Reference to 4 Cyc. 994; Re Johnston, supra. Order made for a new affidavit and for further examination; costs of the motion to the defendant in the cause. A. McLean Macdonell, K.C., for the defendant. Harcourt Ferguson, for the plaintiff.

RE WALTON AND BAILEY—MEREDITH, C.J.C.P.—DEC. 16.

Will—Executors—Power to Sell Lands—Limitation of Time—Directory Provision—Concurrence of Residuary Devisees—Title—Vendor and Purchaser.]—Application by the vendors, under the Vendors and Purchasers Act, in respect of objections by the purchaser to the vendors' title. The vendors claimed title through a conveyance from the executors of the will of John Dempster, deceased, to Margaret Shields, dated the 12th December, 1904, of the land which the vendors had sold to the purchaser, and which formed part of the testator's residuary estate. John Dempster died on the 15th July, 1902, and by the 9th paragraph of his will provided: "All the rest and residue of my estate, both real and personal, I hereby direct my said executors and executrices and give them full power and authority to sell, and absolutely dispose of the same, within two years after my decease, and to make and deliver deeds, conveyances, and other assurances of the same to the purchaser or purchasers thereof, and the proceeds thereof I give and bequeath in equal shares to my eight children," naming them, Margaret Shields being one. The purchaser objected to the title on the ground that the executors had no power to sell after the expiration of two years from the testator's death. The Chief Justice said that since the argument it had been ascertained that the question raised was determined by Britton, J., on a similar motion in Re Gardner and Hutson, adversely to the contention of the purchaser, and that it was, by an order dated the 10th February, 1908, declared "that the limitation as to sale by the executors within two years of" (the lands in question there) "contained in the will of John Dempster . . . was merely directory, and that the receipt by the residuary devisees of the proceeds of the sale of the said lands may be taken as concurrence by them in the sale of the said lands by the executors of the said John Dempster." Following that decision, the purchaser's objection was overruled; no order as to costs. W. A. McMaster, for the vendors. J. Douglas, for the purchaser.

GUNN V. MILLER—DIVISIONAL COURT.—DEC. 16.

Sale of Goods—Action for Price—Counterclaim—Interest.]—Appeal by the plaintiff from the judgment of MORGAN, Junior Judge of the County Court of York, in an action in that Court, brought to recover $160.41, the balance alleged to be due upon

the sale of certain live stock. The defendant counterclaimed for a sum of $86.49, and the trial Judge found in his favour. The judgment of the Court (MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ.) was delivered by CLUTE, J., who reviewed the evidence, and said that the result was that there was due to the plaintiff $152.12 on a horse deal, and there was due from the plaintiff to the defendant $219, leaving a balance of $66.88 due to the defendant. No interest should be allowed to either party. Judgment varied by reducing the amount allowed on the counterclaim to $66.88; otherwise appeal dismissed with costs. I. F. Hellmuth, K.C., for the plaintiff. T. H. Lennox, K.C., for the defendant.

PATTERSON v. DART—DIVISIONAL COURT.—DEC. 20.

Mortgage — Redemption — Account — Interest — Insurance Moneys—Expenditure for Rebuilding—Improvements—Lien—Agreement.]—Appeal by the plaintiff from an order of LATCHFORD, J., dismissing an appeal by the plaintiff from the report of the Local Master at Chatham in an action for redemption. By the judgment in the action the plaintiff was declared entitled to redeem, and a reference was directed to the Local Master to take the accounts, making all just allowances to the plaintiff for insurance moneys received by the defendants and all just allowances to the defendant for moneys expended in improvements and rebuilding after fires. The appeal was heard by MULOCK, C.J. Ex. D., CLUTE and SUTHERLAND, JJ. The first ground of appeal was that the Master improperly allowed the defendant interest upon a sum of $3,047.62 found due to the defendant. The Chief Justice, delivering the judgment of the Court, referred to sec. 113 of the Judicature Act and to Smart v. Niagara and Detroit R.W. Co., 12 C.P. 404, and said that, as the amount was liquidated and overdue on the 1st July, 1895, the defendant became entitled to interest thereon; and upon this ground the appeal failed. The second ground was that the Master had charged the mortgagor with compound interest. The Chief Justice said that the Master had done this only in form. An examination of the accounts as passed by the Master shewed that each year the rents and profits received by the defendant exceeded the interest charged, and, as rents and profits are applicable, first, in or towards payment of interest, it follows that the whole of each year's interest was paid out of the year's rent, and

formed no part of the balance carried into the following year, upon which interest was computed. The appeal failed on this ground also. The third ground was that the insurance moneys should have been dealt with as provided in a certain agreement of 1905. The Chief Justice said that apparently what was aimed at was that, if the property were sold in manner provided for in the agreement, and if the defendant, after such sale, should receive any insurance moneys to which up to that time he might be entitled, then he should expend them, first, in payment of the costs of the sale, and then on account of the mortgage debt. No sale, however, was effected, and therefore the clause controlling the application of the insurance money never became operative. The question was, whether the defendant was entitled to charge as part of his mortgage debt the cost of rebuilding. It was admitted that the defendant rebuilt in the honest belief that the land was his own, and he was, therefore, entitled to the protection afforded by the Law and Transfer of Property Act, R.S.O. 1897 ch. 119, sec. 30, which gave him a lien on the lands for the enhanced value caused by his expenditure. The defendant's evidence, which was not contradicted, shewed that the value of the premises was enhanced by the lasting improvements thus placed upon them by the defendant to the amount of the expenditure charged. He was, therefore, entitled to a lien in respect of such expenditure, and the Master was right in so finding. All grounds of appeal failed, and the appeal should be dismissed with costs. Shirley Denison, K.C., for the plaintiff. J. M. Pike, K.C., for the defendant.

RE WALKERTON AND LUCKNOW R.W. CO. AND PUBLIC SCHOOL SECTION NO. 9, GLENELG—RIDDELL, J., IN CHAMBERS—DEC. 21.

Public Schools—Sale of Land by School Board to Railway Company—Order Authorising—R.S.C. 1906 *ch.* 37, *sec.* 184.]—Application by the railway company and the Board of School Trustees for an order giving the Board power to sell, grant, and convey part of their lands to the railway company, the Board having passed a resolution approving of the sale at $400. The application was made under sec. 184 of the Railway Act, R.S.C. 1906 ch. 37. RIDDELL, J., said that it had become unnecessary for him to consider ab origine the necessity or propriety of such an order, FALCONBRIDGE, C.J.K.B., having, on the 1st June, 1909,

in the case of the same railway company and the Board of School Trustees of School Section No. 2, Bentinck, upon a similar application, made an order under sec. 184. Without expressing an independent opinion, RIDDELL, J., followed that case, and made an order similar in terms. G. A. Walker, for the applicants.

KEITEL v. KEITEL—FALCONBRIDGE, C.J.K.B.—DEC. 21.

Deed—Incapacity of Grantors—Inadequate Consideration—Lack of Independent Advice—Setting aside Deed.]—An action to set aside a deed. The Chief Justice finds that the plaintiffs are both weak-minded and were incapable of making the deed with reasonable comprehension of what they were doing; that the consideration was inadequate; and that the plaintiffs were without independent advice. Judgment for the plaintiffs in terms of the prayer of the statement of claim, with costs. All necessary amendments to be made in the statement of claim. Plaintiffs to account for the money received by them from the defendant, less their costs. T. A. O'Rourke, for the plaintiffs. R. H. Greer, for the defendant.

FOUNTAIN v. CANADIAN GUARDIAN LIFE INSURANCE CO.—RIDDELL, J.—DEC. 22.

Life Insurance—Provision for Insured Taking Cash Value—Construction of Policy—Computation of Years—Application—Election—Waiver—Time.]—The plaintiff insured his life for $4,000 in the defendant company, in favour of his wife: a policy was issued, dated the 1st June, 1902, which contained the provision: "3. After the policy has been in force three or more complete years, the company will, in the absence of any statutory or other restriction, and upon the application of the insured being made and received at the head office of the company, while there is no default in the payment of any premium . . . grant cash or loan values for the amount specified in the table on the next page." On the 22nd March, 1910, the plaintiff wrote the defendants that he had decided to take the cash value of his policy. The defendants offered $1,156, the amount mentioned in the table for a policy in force for seven years. The plaintiff claimed the amount for eight years—$1,420—having paid eight annual premiums. The defendants pleaded that

$1,156 was the true amount, a tender of that amount to the plaintiff, and they brought that amount with interest into Court. The plaintiff based his right upon a request before the 1st June, 1910, when the full eight years would expire. The policy made it quite clear that after three complete years the insured became entitled in law to be paid a certain amount of cash, upon his application being made and received at the head office of the defendants. The amount was fixed by the table. RIDDELL, J., said: Remembering that it is only in case of the policy having been in force three complete years that the table applies at all, I am of opinion that there can be no doubt of the interpretation of the table. There is a column of sums payable for "three years"—this must mean "three complete years"—since the table is not intended to apply to any term less than three complete years—and the same interpretation must be given to . . . "seven years," "eight years," etc. . . . Had the plaintiff made an application on or after the 1st June, 1910, it is possible that he should be held to be entitled to the $1,420 he claims. But he carefully avoided making any application. What he did ask for was "papers," that he might "fill out . . . and forward a new application." He asserted that a further application was not necessary. This cannot be considered an application—he might receive the papers, and even fill them out, but change his mind and omit to make any application. Nor can I say that such an application, had it been made, would have been without result, or that there was any waiver by the defendants. The action must be dismissed, and I can see no reason why the dismissal should not be with costs, which may be taken from the sum in Court. The defendants agreed at the trial that the plaintiff might take his position under the policy as though he had not surrendered it, without new medical examination or other proceedings, except paying the premium. That may still be done, with the consent of the beneficiary. B. N. Davis, for the plaintiff. T. D. Delamere, K.C., for the defendants.

CARNEY v. TOWNSHIP OF COLBORNE—BOYD, C.—DEC. 22.

Municipal Corporations—Drainage—Flooding Lands Adjacent to Highway.]—Action for damages for injury to the plaintiff's land from water backed upon it. The plaintiff alleged neglect of the defendants to keep in repair a drain which they

had constructed. The Chancellor held that, upon the pleadings as framed, the plaintiff was not entitled to any relief—the root of the difficulty not having been touched. But he considered that the defendants had not done as much as they might fairly have done to remedy the condition of affairs in the plaintiff's locality. Action dismissed without costs. L. E. Dancey, for the plaintiff. M. G. Cameron, K.C., for the defendants.

McCAUSLAND v. CURRIE—DIVISIONAL COURT—DEC. 22.

Contract—Interest in Mining Claim—Payment of Sum out of Proceeds of Sale—Services—Construction of Contract—Reformation—Amendment—New Trial—Costs.]—Appeal by the plaintiff from the judgment of TEETZEL, J., dismissing the claim with costs. The action was upon an agreement between the parties, dated the 17th April, 1906, which, after reciting that the parties had been interested in prospecting the north-east 40 or 20 acres of lot 8 in the 5th concession of Coleman, and that a valuable discovery of mineral had been made thereon, and a claim staked and recorded in the name of the defendant, proceeded: "Now in consideration of services rendered in developing the claim," the defendant "agrees to hold an undivided twentieth interest in the said claim for" the plaintiff, "and further agrees to pay to the" plaintiff, "as soon as the said discovery is passed by the official Mining Inspector . . . And it is further agreed that should the said property be sold before the said property is passed, the sum of $500 will be paid out of the proceeds of the sale to" the plaintiff. The plaintiff sued for $500. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ. RIDDELL, J., said that, in the event which had happened, the defendant had sold the "said property" to one Lindsey, along with other property, and was to receive $750 for the whole. The learned Judge did not think it open to the defendant to say, by such evidence as was now available, that the $750 was not, at least in part, proceeds of this sale; and in this view the action was wrongly dismissed. But the defendant says that the document, so interpreted, does not express the meaning of the parties—and there seem to be many things which indicate that this may possibly be so. If the defendant pays the costs of this

appeal, he may amend and have a new trial, in which case the costs of the former trial will be reserved to the trial Judge at the new trial, and, unless he otherwise dispose of them, will be costs to the plaintiff only in the cause; otherwise the appeal should be allowed, and the plaintiff have judgment for the sum of $500, with interest from the teste of the writ of summons, and costs here and below. FALCONBRIDGE, C.J., and BRITTON, J., agreed in the result, the latter stating reasons in writing. H. S. White, for the plaintiff. F. E. Hodgins, K.C., for the defendant.