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BOYD, C. OCTOBER 6TH, 1902.

CHAMBERS.

REX EX REL. ROBERTS v. PONSFORD.

Municipal Elections — Irregularities at Poll — Aldermen of City — Election by General Vote — Voters Voting More than Once — Affecting Result.

Appeal by relator from order of Master in Chambers (*ante* 590) dismissing application by relator to set aside the election of eleven persons as aldermen for the city of St. Thomas, at the general election held on the 6th January, 1902, upon the ground that the election was not conducted according to law.

J. M. McEvoy, London, for relator.

E. E. A. DuVernet and W. K. Cameron, St. Thomas, for respondents.

BOYD, C.:—While the matter is somewhat doubtful as to the case of the last successful candidate, Luton, it is very clear that the election of the other ten cannot be effectively impeached.

Luton polled 728 votes, and the next highest vote, of 706, was cast in favour of Price. Taking it that 90 votes, as found by the Master, were illegal—because that number of double votes were cast, contrary to the law as amended by the Municipal Amendment Act of 1901, sec. 9—and that all these votes could be attributed to Luton's total and deducted from it, that would leave Price ahead of Luton. But that would be an improper assumption. The error about double voting was a common one as to all parties. Luton himself was not active in the promotion of his election; he sought no votes in any way; and does not seem to have profited by the duplicate voting. The more reasonable assumption would be that the illegal and irregular votes were divided, and as many cast for Price as for Luton. Other makeweights of alleged irregularities cannot be brought in on the argument, which were not relied upon in the original notice, especially when they

are of comparatively trivial character: sec. 226. I am not disposed to disagree with the Master's conclusions, particularly having regard to the fact that this is a municipal election, good only for a year, of which the greater part has now elapsed.

Appeal dismissed without costs.

OCTOBER 6TH, 1902.

DIVISIONAL COURT.

MACKAY v. COLONIAL INVESTMENT AND LOAN CO.

Writ of Summons—Service out of Jurisdiction—Foreign Company—Transfer of Assets in Ontario to Ontario Company—Action to Set aside—Conditional Appearance—Res Judicata.

An appeal by the defendants from the order of STREET, J., *ante* 592, affirming the order of the Master in Chambers, *ante* 569, refusing defendants' application to set aside proceedings on the ground of want of jurisdiction in the Ontario Court to entertain the action; and an appeal by the defendants, also, from so much of the order of BOYD C., of 26th September, 1902, allowing defendants to enter a conditional appearance, as directed that it should be without prejudice to any right that plaintiffs might have to set up *res judicata*.

The appeal was heard by MEREDITH, C.J., MACMAHON, J., LOUNT, J.

A. B. Aylesworth, K.C., for the defendants the Colonial Investment and Loan Company.

W. M. Douglas, K.C., for the other defendants.

C. D. Scott, for plaintiffs.

THE COURT varied the order of BOYD, C., by striking out the part objected to, and varied the orders of Street, J., and the Master by inserting a clause to the effect that the dismissal of the defendants' motion is to be without prejudice to defendants' right to plead want of jurisdiction.

Costs of appeal to be costs in the cause.

FALCONBRIDGE, C.J. OCTOBER 7TH, 1902.

TRIAL.

WALKERVILLE MATCH CO v. SCOTTISH UNION AND NATIONAL INS. CO.

Insurance—Fire—Contract—Authority of Agent.

Action to recover $3,083.45 under a fire insurance contract in respect of plaintiffs' factory at Walkerville, and contents. The defence was that the defendants had not issued a policy, and that they were not bound by a receipt issued in the name of one Davis, who had been an agent, but had been superseded.

A. H. Clarke, K.C., for plaintiffs.

O. E. Fleming, Windsor, for defendants.

FALCONBRIDGE, C.J.:—The material facts were not in dispute; the question was as to the proper inference from the facts. Davis said he ceased to be agent of the company in February, 1901. The special agent of the company, Rogers, confirmed this. The receipt in question was issued by one Mezger, signed by him in Davis's name, on the 25th April, 1901. The insurance was not entered in the register, the money for the premium did not reach any one who could be called an agent of the company till after the fire, and it did not appear that anything was known about the risk at the defendants' head office at Hartford till after the loss. Under these circumstances, the plaintiffs cannot recover. The doctrine laid down in cases like Trueman v. Loder, 11 A. & E. 589, has not been extended to an insurance contract. Summers v. Commercial Union Assce. Co., 6 S. C. R. 19, seems to be against plaintiffs' contention.

Action dismissed without costs.

OCTOBER 7TH, 1902.

DIVISIONAL COURT.

OTTAWA GAS CO. v. CITY OF OTTAWA.

Costs—Right of Party to Costs against Opposite Party—No Liability to Solicitor—Corporation Solicitor Paid by Salary—Change in By-law of Corporation.

Appeal by plaintiffs from order of STREET, J., in Chambers, reversing decision of local Master at Ottawa that de-

fendants were not entitled to tax profit costs against plaintiffs, defendants being under no liability to pay costs to their solicitor.

H. T. Beck, for plaintiffs.

J. H. Moss, for defendants.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., LOUNT, J.) was delivered by

MEREDITH, C.J.:—Judgment was pronounced in this action on the 14th September, 1901, dismissing the action with costs. The defendants brought in their bill of costs for taxation. It was objected by the plaintiffs that the arrangement between the defendants and their solicitor was such as according to law disentitled the defendants to recover more than disbursements. The local Master and deputy registrar at Ottawa decided in favour of the contention of the plaintiffs. Upon appeal to my learned brother Street, the Master's decision was reversed, that learned Judge being of opinion that the defendants were entitled to their profit costs, as well as to the disbursements.

At the time judgment in the action was pronounced, the arrangement between the defendants and their solicitor was that he was to receive a salary of $1,800 a year, for all services, including the costs of litigation in which the clients should be engaged. The by-law providing for that was passed on the 21st February, 1898. On the 10th July, 1902, a by-law was passed amending the earlier by-law, by providing that, in addition to the salary, the solicitor should be entitled for his own use to the costs of actions which he prosecuted or defended for his clients in which costs were recovered.

My learned brother Street was of opinion that the later by-law was the one which governed the rights of the parties.

Upon the argument before us, Mr. Moss, while not giving up that point, did not strongly urge it, and it seems to us that that position cannot be maintained. The judgment, as I have said, was pronounced on the 14th September, 1901, and the question, as it seems to us, is, what were the rights of the defendants in the circumstances as they existed at that date, and not what they were on or after the 10th July, 1902.

If it were not so, a client might arrange with a solicitor that he should conduct litigation without any charge to him at all, and in the event of success the agreement might be afterwards varied by providing that the solicitor should receive his profit costs as well as his disbursements. The statement of that proposition seems to me to contain the answer

to the position which was given effect to by the judgment in appeal.

Mr. Moss, however, attempted to support the judgment upon another ground argued before Mr. Justice Street, but as to which that learned Judge did not find it necessary to express an opinion. His contention was that the case of Jarvis v. Great Western R. W. Co., 8 C. P. 280, was not applicable to such an agreement as that between the solicitor and client in this case. That case was followed (the late Sir Adam Wilson, dissenting,) in a case of Stevenson v. City of Kingston, 31 C. P. 333, and has been recognized in subsequent cases, to which it is unnecessary to refer, and also by the Legislature in the amendment which it made to the Municipal Act, sec. 320, sub-sec. 3, enabling a solicitor to tax costs under an agreement such as that which was effected between the solicitor and the clients by the agreement authorized by the by-law of the 10th July, 1902.

Mr. Moss in his able argument referred to and relied upon the case of Galloway v. Corporation of London, L. R. 4 Eq. 90, and also upon Henderson v. Merthyr Tydfil Urban District Council, [1900] 1 Q. B. 434.

There is no doubt that the judgment of Vice-Chancellor Wood in the Galloway case is opposed to the decisions in our Courts, and the practice which has prevailed here; and Henderson v. Merthyr Tydfil perhaps is also, although in the latter case reliance was placed upon the provisions of the English Attorneys' Act of 1870, which authorized an agreement between a client and solicitor for compensating the solicitor by a different rate of remuneration from that fixed by the tariff.

It seems to us that we ought to follow what we understand to be the principle of the decision in Jarvis v. Great Western R. W. Co., which, as I have said, has been recognized and acted upon, and which is the well understood rule in this Province. It is true that in that case the agreement differed from the agreement between the solicitor and client in this case. In that case, the agreement was that the solicitor should receive an annual salary for all his services, and that if costs were recovered in litigated matters, he should also receive those costs; and some stress was placed in the judgment upon the fact that there was never any liability upon the part of the client to pay the solicitor these costs. They only became his in the event of their being recovered in the litigation.

In this case the agreement provides that costs which the corporation recovers are to be paid to the treasurer, and they

go, therefore, to reimburse the corporation *pro tanto* for the salary which it pays to its solicitor. Sir Adam Wilson in the Stevenson case, while dissenting from the view adopted by the majority of the Court, was of opinion that a provision such as that was objectionable and contrary to public policy.

In the Galloway case and in the Henderson case, it is said that, where a lump sum is payable as salary for all services, if it can be shewn that the client, as the result of the whole transaction, will have nothing or not as much as the taxed bill to pay, he is not entitled to profit costs, or that the taxed bill must be reduced to what he is liable to pay. It is pointed out that it is generally almost impossible for the opposite party to shew that such a state of things exists, and that, unless he can shew it, the fact that the solicitor is paid an annual salary does not disentitle the client to recover the costs of the litigation in which he has obtained an order for the payment of his costs by the opposite party.

As I have said, we think that we ought to follow the Jarvis case in our own Courts, and to leave it to the appellants, if they are dissatisfied, to take the opinion of a higher Court, where, possibly, the English practice, so far as it differs from ours, may be held to be the true rule.

The order of Mr. Justice Street, in our opinion, must be reversed, and the order of the local Master restored, with costs to the appellants.

OCTOBER 7TH, 1902.

DIVISIONAL COURT.

STANDARD TRADING CO. v. SEYBOLD.

Discovery — Affidavit of Documents — Admission of Possession of Document — Admissions on Examination for Discovery — Re-examination after Examination Closed.

Appeal by defendant Booth from order of BOYD, C., in Chambers, reversing an order of the local Master at Ottawa, and directing defendant Booth to file a further and better affidavit on production and to attend again for further examination for discovery.

D. L. McCarthy, for appellant.

J. H. Moss, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., LOUNT, J.,) was delivered by

MEREDITH, C.J.:—The appellant had filed an affidavit as to documents sufficient to satisfy the order on production. Some months afterwards he was examined for discovery, and was interrogated as to his having executed a certain document, referred to as exhibit 6, upon which the plaintiffs rely for the purpose of establishing their case. So far from there being any admission by the appellant that he had ever had in his possession or then had such a document, according to his recollection as then stated he never signed any such document. In these circumstances it appears to us that no case was made for requiring the appellant to make a further and better affidavit on production.

The affidavit, as I have said, was a sufficient compliance with the order, and, unless it was shewn, either from documents which were produced by the appellant which referred to other documents which were not produced, or from his admissions, that he had other documents, a further and better affidavit on production ought not, according to the practice, to have been required to be made. Contentious matter cannot be used for the purpose of obtaining an affidavit of that kind, nor can a party be cross-examined upon his affidavit on production; and, as was determined by Mr. Justice Moss, in one of the cases referred to (Dryden v. Smith, 17 P. R. 500, 17 Occ. N. 262), the opposite party may not indirectly, by means of an examination for discovery, do that which he may not do directly,—cross-examine upon an affidavit on production.

As to the other part of the order, that requiring the appellant to attend for further examination, we do not see how it can be supported. The respondents deliberately closed their examination, and no case was made, either upon the notice of motion or upon the material before the learned Judge, for directing further attendance,—if it be within the power of the Court to compel a party who has once attended for examination and made sufficient answer to such questions as were put to him, to attend again, which was disputed by Mr. McCarthy, and as to which we say nothing.

We think, therefore, that the order of the learned Chancellor must be reversed, with costs here and below to the appellant in any event of the action.

FALCONBRIDGE, C.J. OCTOBER 8TH, 1902.

TRIAL.

HENRY v. WARD.

Principal and Agent — Purchase of Goods by Agent — Commission — Damages.

Action by Joseph M. Henry and J. J. Kenyon, tobacconists residing at Leamington, against Henry C. Ward, a tobacco dealer and cigar manufacturer, who did business at Leamington, to recover $15,150 for purchasing for the defendant from tobacco growers in the Province of Ontario 2,000,270 pounds of tobacco at a commission of one cent per pound.

J. W. Hanna, Windsor, for plaintiffs.

E. S. Wigle, Windsor, for defendant.

FALCONBRIDGE, C.J.:—The defendant refused or became unable to carry out the terms of his contract with plaintiffs before they had done anything by way of proceedings leading to *ca. re.* or otherwise to impair defendant's chances of being able to fulfil his undertaking with plaintiffs, and through them with the tobacco-growers of the district. If plaintiffs neglected to any extent to superintend the planting, growing, or preparing of the tobacco, no damage resulted therefrom to defendant, but the only result, as matters have turned out, would seem to be that there has been so much the smaller quantity of tobacco of the required quality produced, and plaintiffs' commission will be thereby proportionately reduced. It matters not whether plaintiffs' claim be regarded as commission or damages. Sitting as a jury, I arrive at the amount grown under these contracts as 782,500 pounds, which means $3,912.50 for each plaintiff or $7,825 in all.

Judgment accordingly with costs.

WINCHESTER, MASTER. OCTOBER 9TH, 1902.

CHAMBERS.

ENNIS v. READE.

Pleading—Counterclaim—Striking out—Parties—Action by Execution Creditor of Husband to Declare Wife Trustee of Land for Husband—Counterclaim by Husband for Debt Assigned to Him.

Motion by plaintiff to strike out the counterclaim.

Action by an execution creditor of defendant Edgar S. Reade to have it declared that his co-defendant, who is his wife, holds certain property as trustee for him, and that the same is exigible under the execution, and for the sale of such lands, etc. The defendant did not deny the plaintiff's judgment, but alleged that the property in question was purchased by the wife in her own name and on her own behalf, and that she did not hold it as trustee for her husband. The husband counterclaimed against plaintiff for $250, and submitted to have it set off against the plaintiff's judgment. This amount was claimed under an agreement between plaintiff and the Canada Company, which was the subject of a County Court action by that company against plaintiff some time ago. That action was discontinued. The claim was assigned to the counterclaiming defendant. It was not clear whether the assignment was in trust for the company or not. The consideration was nominal.

J. J. Maclennan, for plaintiff, contended that it would be necessary to add the Canada Company as a party in order to dispose of the counterclaim.

J. R. Roaf, for defendants, contra.

THE MASTER:—Even if the counterclaim were admitted, it would not render the trial of the action unnecessary, as the amount due by the husband under the judgment was much greater than the amount of the counterclaim. The trial Judge, if the plaintiff succeeded, would, no doubt, direct a reference as to the husband's creditors and for the sale of the property, and he would have time to have his counterclaim disposed of in a separate County Court action, in which all the necessary parties could be added without any difficulty. I made an order striking out counterclaim, with leave to the defendant Edgar S. Reade to bring a separate action for the same cause. Costs of motion to plaintiff in the cause.

WINCHESTER, MASTER. OCTOBER 9TH, 1902.

CHAMBERS.

HOWLAND v. PATTERSON.

Security for Costs — Plaintiff out of Jurisdiction — Property within Jurisdiction—Shares in Mining Company—Evidence of Value.

Motion by plaintiff to set aside an order for security for costs obtained on præcipe by defendant company, on the ground that plaintiff, though out of the jurisdiction, was

possessed of sufficient means within the jurisdiction of this Court to answer the costs of the action. In support of the application plaintiff filed his own affidavit, in which he claimed to be entitled to common stock of the defendant company, the Nickel Copper Company of Ontario, of the par value of $147,000 or thereabouts, but he did not state what this stock could be sold for. He also examined the defendant Patterson in support of the application, but the latter stated that the stock could not be sold. In answer to the motion the defendant company filed the affidavits of the vice-president, secretary, and two of the directors of the defendant company, in which they stated that the common stock of the company was absolutely valueless and unsaleable; that the company had heavy liabilities, and creditors had obtained judgments which were unsatisfied. After this motion was launched the solicitor for plaintiff filed, on behalf of associates of plaintiff, a petition for the winding-up of the company.

R. C. Levesconte, for plaintiff.

G. H. Levy, for defendant company.

THE MASTER held that the affidavits of the directors of the company were conclusive as to the value of the plaintiff's stock, and, as he did not appear to have any other means within the jurisdiction, his application failed.

Motion dismissed with costs to defendant company in any event.

MEREDITH, J. OCTOBER 9TH, 1902.

TRIAL.

DOMINION BANK v. EWING.

Promissory Note—Forgery—Notice—No Repudiation — Ratification—Estoppel.

Action upon a promissory note. Defence, forgery.

A. B. Aylesworth, K.C., and W. B. Milliken, for plaintiffs.

H. S. Osler, K.C., and F. B. Osler, for defendants.

MEREDITH, J.:—The note was not made by or with the authority of defendants; but, immediately after it was negotiated, they became aware, through a notice which the plaintiffs sent them, of it, and that the plaintiffs were the holders of it, relying upon its genuineness; and immediately after receiving such notice they communicated with the person who

had negotiated the note, and, at his instance and for his benefit, abstained from repudiating it until about four months afterwards. This they did against the advice of their solicitor, and in the belief that their failing to promptly repudiate would make them liable to pay the note. They took the risk in the expectation that the person who had negotiated the note would be obliged to, and would, take it up before maturity, and in order to screen and accommodate him meantime. Under these circumstances the defendants are liable. Scott v. Bank of New Brunswick, 23 S. C. R. 277, Brook v. Hook, L. R. 6 Ex. 89, McKenzie v. British Linen Co., 6 App. Cas. 82, referred to. Whether there could be ratification, and whether there was ratification, the defendants were estopped from denying the making of the note. Ogilvie v. West Australian Mortgage and Agency Corporation, [1896] A. C. 257, 269, 270, and Merchants Bank v. Lucas, 15 A. R. 573, 587, referred to.

Judgment for plaintiffs for amount of note with costs.

BRITTON, J. OCTOBER 9TH, 1902.

TRIAL.

HOLNESS v. RUSSELL.

Deed—Conveyance of Land—Cutting down to Mortgage—Improvidence—Fraud.

Action by Elizabeth Holness to have a deed of certain houses and land in the village of East Toronto, and a bill of sale of certain chattels, which she executed in favour of defendant, John Russell, on the 13th July, 1893, set aside and declared to be a mortgage only, and for an account of the rents and profits of the land, and a return of the chattels, or their value. She also alleged (in the alternative) that the transaction on her part was an improvident one, and that she acted entirely upon the suggestion and recommendation of defendant and without any independent advice. The defendant denied that there was any agreement that he should make a loan upon the security of the property, and asserted that he purchased both land and chattels for a fair price, $1,200, which he paid to plaintiff.

E. Coatsworth, for plaintiff.

E. F. B. Johnston, K.C., for defendant.

BRITTON, J., after reviewing the evidence, held that, having regard to McMicken v. Ontario Bank, 20 S. C. R. 548, it could not be declared that the deed, absolute on its face,

was intended to operate as a mortgage only. As to the improvidence alleged, he held that the defendant had not taken undue advantage of plaintiff by reason of circumstances such as governed the decision in Slator v. Nolan, Ir. R. 11 Eq. 386, cited in Waters v. Donnelly, 9 O. R. at p. 401. The plaintiff was not at the time of the sale in "distress." She could not be charged with "wildness" or general "recklessness" or want of care. See Wallis v. Andrews, 16 Gr. 624; Evans v. Llewellan, 3 Cox 333; Fry v. Lane, 40 Ch. D. 312. There, no doubt, was undervalue here, but not so gross as in itself to amount to evidence of fraud.

Action dismissed without costs.

OCTOBER 9TH, 1902.

C. A.

SAWERS v. CITY OF TORONTO.

Assessment and Taxes—Distress—"Owner"—Agreement for Purchase—Part Performance—Local Improvement Rates—Abandonment of Distress.

Appeal by plaintiff from judgment of BOYD, C., dismissing action for illegal distress for taxes. The facts are stated in the judgment appealed against, 2 O. L. R. 717.

J. W. McCullough and S. W. McKeown, for plaintiff.

J. S. Fullerton, K.C., and W. C. Chisholm, for defendants.

On the 19th September, 1902, the Court intimated that the appeal was dismissed.

On the 9th October the opinion of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

GARROW, J.A.:—The Chancellor has seen fit, with, I think, probability at least on his side, to accept defendants' version, and to hold that there was no abandonment. We certainly ought not to reverse that conclusion.

Upon the other leading question, namely, whether plaintiff was an "owner," within the meaning of the Assessment Act, I have, after some doubt, come to the conclusion that the judgment appealed against is right in holding that he was an "owner," and not merely a tenant or occupant; and this is, of course, decisive of the action, because, if he was an "owner," his goods and chattels on the assessed premises were liable to seizure for the unpaid taxes, whether his

name is in the collector's roll or not: R. S. O. 1887 ch. 224, sec. 135, sub-sec. 1 (3).

[Re Flett and United Counties of Prescott and Russell, 18 A. R. 1, distinguished.]

Here the inquiry is, who, in the circumstances which exist, is the taxable owner? There must always be such a person somewhere after grant from the Crown. No other property interests are involved, and it, therefore, seems fair to look at the matter as if it were simply one between the vendor and the vendee under such an instrument, and, looking at it in that way, I think the proper conclusion is, that for the purposes of taxation the vendee who is in possession under such a contract as the one in question, is to be regarded as an owner and liable for the taxes. An additional reason for so holding in the present case is, that the plaintiff had agreed with his vendor to pay the taxes.

It was urged that there was no demand of payment, as required by sec. 134. The fair inference, however, is, upon the evidence, that such demand was duly made, as the learned Chancellor has found. Cogent evidence of the demand is, I think, to be found in the fact that plaintiff actually paid the first instalment. True, he now says this was paid in his absence by mistake; but it was paid with his money, and we find no evidence that he made any attempt upon his return to have the mistake rectified and the money refunded before this difficulty arose.

Then it is said the time for the return of the roll had expired, and the collector was therefore *functus officio*. The roll had not in fact been returned, and still at the time of the seizure was in the hands of the collector, who was still collector, and this was long ago determined, properly we think, to be all that is necessary to entitle him to proceed: Newberry v. Stephens, 16 U. C. R. 65; Lewis v. Brady, 17 O. R. 377; McDonell v. City of Toronto, 1 O. W. R. 494.

Appeal dismissed with costs.

OCTOBER 9TH, 1902.

C. A.

HENNING v. MACLEAN.

Will—Construction—Alternative Disposition—Death of Testator and Wife "at the Same Time"—Lapse of Sixteen Days between Deaths—Intestacy.

Appeal by defendants Catherine Isabella Maclean, Minnie MacTavish, and the executors of the will of the deceased

defendant Marianne Ball, from a part of the judgment of a Divisional Court (2 O. L. R. 169) reversing the judgment of FALCONBRIDGE, C.J., at the trial, and declaring that the alternative provisions contained in the second paragraph of the will of the late Thomas Henning, made on the 10th June, 1887, never took effect, and that his estate descended to his next of kin as upon an intestacy, and that the executors appointed by the alternative provisions of the will, to whom probate was granted, became trustees for the next of kin. The testator, by the first clause of his will, gave all his estate to his wife and appointed her executrix. The second clause began: "In case both my wife and myself should by accident or otherwise be deprived of life at the same time, I request the following disposition to be made of my property." And he then went on to divide his estate and appoint executors. The appellants were given life interests in part of his estate, and so was one of the plaintiffs, the testator's brother, John Henning. The executors proved the will, upon the assumption that the testator and his wife died at the same time, and retained the corpus of the estate under their control, paying out the income to the persons named as beneficiaries. The wife of the testator died on the 11th December, 1888, and the testator on the 27th of the same month. Both were ill at the same time, of the disease which caused their respective deaths, but there was an interval of 16 days between the two. The Divisional Court held that they were not "deprived of life at the same time," and, as the other event, of the testator surviving his wife, had not been provided for by the will, that he, in effect, died intestate.

A. B. Aylesworth, K.C., and A. S. Ball, K.C., for appellants, contended that the testator and wife both died, or were both dead, "at the same time," within the meaning of that expression as used in the will.

C. Robinson, K.C., H. J. Scott, K.C., and H. O'Brien, K.C., for plaintiffs.

J. G. O'Donohue, for defendant Clara Henning.

OSLER, J.A.:—I am unable to understand how two persons can, by any reasonable intendment, in the construction of plain language, be said to have been deprived of life "at the same time," no matter what may have been the cause of their deaths, when one of them has survived the other by a fortnight. If, therefore, the event of the testator and his wife being deprived of life at the same time was an event or

condition on the happening of which only the bequests provided for by the second clause of the will were to arise, I think they fail because that event did not happen. On the contrary, the testator survived his wife for the time I have mentioned, and, if that be material, was for the greater part of the period in such a condition as to be capable of making another will.

It is, however, suggested—though the point was not taken below—that, reading the first and second clauses of the will together, the latter should be considered as meaning "in case my wife does not survive me," and that the testator meant by the language he has employed in the two clauses, to provide simply for the two events, that of his wife surviving him and that of her not surviving him. With all respect, I think that to adopt this construction would be to take an inadmissible liberty with the (to me) plain words of the instrument. To paraphrase it in this manner would be to make a will for the testator, and to provide for an event which, for anything we can know, he may have anticipated, reserving his intention to make a different disposition of his property if it should occur. What the testator tells us is practically this: "If my wife survives me, I give her all. If we should die at the same time by accident or otherwise—in which event she will of course take nothing and I shall have no opportunity of making another will—I provide for that event by the following dispositions. There is a third contingency—that of my surviving her—but, if that occurs, it will be time enough for me to consider what testamentary disposition I shall then make of my property."

To read the second clause as merely saying "in case my wife does not survive me," would be to include the two contingencies (1) of the testator and his wife both dying at the same time, which is what is expressly provided for, and (2) of her pre-deceasing him, which is not.

The language of the clause, I repeat, is to me too plain to warrant us in holding that the true contingency guarded or provided against, was the mere non-survival of the wife, and I, therefore, cannot treat the case as being ruled by such authorities as Davies v. Davies, 47 L. T. N. S. 40, and others of that class.

ARMOUR, C.J.O., and MOSS, J.A., gave written reasons for coming to the same conclusion.

MACLENNAN, J.A. (after referring to the terms of the will and the circumstances):—The testator is making his will

in contemplation of his own death. That is what is uppermost in his mind. "I do make this my last will and testament." No contemplation of any subsequent or further will.

The first clause contemplates his wife being alive at his own death. He gives all to her in that case and makes her sole executrix. It is as if he had said: "I give all to her, if she shall be living at my death." He knows that if she should not be then living his gift to her would fail.

That case having been provided for, he next considers the case of her not being then living. That is the case which still remains to be provided for. It is said he has not provided for the general case of her not being then living, but only for one particular and very special instance of the general case, namely, the case of his wife dying at the very same instant as himself. If that is so, it is certainly very strange. However, he does proceed to consider, if not the case of his wife not surviving him, one of the cases of her not doing so, and what is to be done with his property in that case. He himself is dead, and what if his wife shall also be dead at the same time, by accident or otherwise, so as not to take his property as provided in the first clause? The phrase he uses is, "in case both my wife and myself should by accident or otherwise be deprived of life at the same time, I request," etc. "Deprived of life" is equivalent to "dead," and the phrase is as if he had said "in case both my wife and myself should be dead at the same time." It is true, that language is large enough in itself to include the case of the wife dying after him, as well as the case of her dying before him, but he has already in the first clause provided for the first case, namely, that of her dying after him. That is provided for in the first clause, and the second clause will, if possible, be construed so as to be consistent with it. I think it cannot be denied that the event which has occurred is a case of both being deprived of life, that is, dead at the same time. The will is to operate at the testator's death and not before, and at the same time the wife is dead also. I think that is the true construction of the will. Unless it be so construed, the result is intestacy. The testator has failed to do what he intended to do, namely, to dispose of his property at his death. The Court favours a construction which prevents intestacy: Jarman, 5th ed., 809 n. (1).

The scheme of the will is very simple. If his wife survived him, she was to have everything and be sole executrix. If she should not survive him, it was to go partly to his own relatives, partly to the relatives of his wife, and partly to

charity, and two of his wife's relatives were to be executors. He did not intend to die intestate to any extent. It was his last will and testament, and every intendment ought to be made of which the language, used fairly, admits to prevent intestacy. I think the language used admits of that.

In the case of Davies v. Davies, 47 L. T. N. S. 42, in order to give effect to the general scope of a will, Fry, J., held that the words, "in case of my wife dying within twelve months of my own decease," meant the case of her not being alive at the expiration of the twelve months, and so included the case which happened, namely, her having died before the testator.

If it were necessary to the decision of this case, which I do not think it is, to say that the testator's act was irrational and absurd if he meant to confine the disposition made in the second clause of his will to the case of his wife and himself dying at the same moment of time, and that he did not intend to provide for the general case of his wife not surviving him, but, in case of her dying before him, meant to die intestate, I should be compelled to say it was. I think the testator has used words which are capable of a meaning which gives effect to the testator's intention, and, that being so, I think we are bound to adopt that meaning. In the Goods of Hugo, 2 P. D. 73, referred to by the Chief Justice of the Common Pleas in his judgment, was a totally different case from the present. There the testator had made a will, and some years after he and his wife made a joint will expressed to be "in case we should be called out of the world at one and the same time by one and the same accident." It was held to be conditional, and the event not having occurred, inoperative, so as not even to revoke the previous will.

I think the appeal should be allowed.

GARROW, J.A., gave written reasons, to the same effect, for allowing the appeal.

Appeal dismissed with costs; MACLENNAN and GARROW, JJ.A., dissenting.

OCTOBER 9TH, 1902.

C. A.

RE LEACH AND CITY OF TORONTO.

Assessment and Taxes—Local Improvement Rates—Sidewalk—Lessee of Land from the Crown—Dedication of Private Way as Public Highway.

Case stated under the Assessment Act by the Lieutenant-Governor in council for the opinion of the Court.

The question involved was the right to charge lessees of property of the University of Toronto on College street, in the city of Toronto, holding under leases in existence at the date of the agreement between the city corporation and the University, confirmed by and set out in a schedule to 52 Vict. ch. 53 (O.), with a part of the cost of local improvements on College street. McDOUGALL, Co.J., held, affirming the finding of the Court of Revision, that the lessees were chargeable, mainly on the ground that by the agreement in question College street had been made a public highway of the city.

The case was heard by OSLER, MACLENNAN, GARROW, JJ.A.

J. A. Paterson, K.C., for the lessee.

J. S. Fullerton, K.C., and A. F. Lobb, for the city corporation.

OSLER, J.A. (after setting out the facts at length) :—

The question submitted to the Court is whether, in view of the deeds, documents, agreements, and statutes referred to, the said Leach or his interest in the property of the Crown so leased to him, is liable for local rates for the sidewalk in question; or whether the corporation of the city of Toronto is liable, under its covenants and agreements with the Crown, to maintain the sidewalks upon the said street in proper order at the expense of the city of Toronto, and so as to free the said Leach therefrom as a local improvement.

The main argument for the appellant proceeded, I think, upon a misconception of his position in relation to the lease to the city of 1859. He seems to have considered that, as a subsequent lessee of the Crown of lands fronting on the avenues, he had some right or interest in maintaining the conditions created by the earlier lease in respect of the city's obligation to keep the avenues in repair. I think this is a mistake. The appellant had, as lessee of the Crown, a right of access to and from the front of his premises. Of that he could not be deprived, and the city had covenanted with his lessor that he should be permitted to enjoy it. He had no right, as against the city, to compel them to keep the avenues in repair. The Crown had rights in that respect under the city's covenant, but these were rights which it might have released or refused to enforce, and they would come to an end with the forfeiture of the lease.

Short of interfering with his right of access, there was nothing in the situation of all three parties to prevent the

Crown from dealing with the city without regard to the appellant. It might have maintained the forfeiture of the lease, or might have reinstated it, with such variations in its terms as might be agreed upon; and of these, so long as the appellant's access was not interfered with, he would have no right to complain. The latter course was taken, the forfeiture was waived, the lease was set up again, the rental being increased from $1 to $6,000 per annum; and the Crown dedicated to the public, without restriction, the two principal avenues to the park, from Queen street and Yonge street, which the city had by the lease of 1859 agreed to keep in repair. I say without restriction, because the right reserved by the Crown to require the owners of property adjacent to the avenues who had not theretofore acquired rights of access thereto, to pay for the same, does not affect the appellant or the character of the highways so dedicated. The avenues became public highways which, by sec. 601 of the Municipal Act, are vested in the city, and the city is bound by sec. 606 of the Act to keep them as such in repair. The obligation of the city now, therefore, rests upon the statute, not upon its covenant, which ceases to have any application under the new state of things.

It was pressed upon us that the Crown could not, by dedication or otherwise consequent upon a private agreement between itself and the city, alter the character of the right of way which the appellant had over the avenues. The way was simply converted into a public highway, and I am not aware of any legal right of the appellant which was infringed thereby. His right of user of the road was not derogated from or made more onerous, and if new liabilities are or may be cast upon him as an adjoining property owner in consequence thereof, he is in no worse situation than a freeholder adjoining whose property a new street has been opened, or whose private right of way such as the appellant had over the property of another has been enlarged by expropriation or dedication of the land over which it exists as a public highway. The city's covenant with the Crown to permit persons in the situation of the appellant to have "free access through the park and avenues" necessarily came to an end with the forfeiture of the lease. We may suppose that as tenant of the Crown he would still have a right of access through the avenue. But this could not control the right of the Crown to dedicate the avenues as public highways, a right which it exercised in reinstating the lease.

It was also argued by Mr. Paterson that the third clause of the agreement shewed that the intention of the parties was that the estate or interest of existing leaseholders fronting on

the avenues should not become liable to assessment for local improvements. I think this clause is an attempt to provide for the case of future leaseholders, but it goes no further. There is no express exemption of others. They are simply left to the operation of the general law, which in the case of such an improvement as that in question here, viz., a plank sidewalk, appears to be found in sec. 677 of the Municipal Act. But in the case of other local improvements, the power to make which depends upon the consent, expressed or implied, given, or not withheld, of the owners of the property to be benefited, the question whether a person in the situation of the appellant, i.e., a lessee of the Crown under whose covenant "to pay taxes" no liability to pay taxes for local improvements to his lessor can arise or exist, can be regarded as an owner within the meaning of sec. 668 (2), and other clauses of the local improvement code of sections, is one of great importance, and, to my mind, does not admit of an easy solution in favour of the respondents. This, however, is not before us nor involved in the determination of the appeal.

The questions submitted will, therefore, be answered: that the interest of the appellant in the property leased by him from the Crown, on College street, is liable to be assessed for local rates for the plank sidewalk in question, under sec. 676 of the Municipal Act; and that the corporation is not liable under its former covenants and agreements with the Crown, or otherwise than under the Municipal Act, to maintain the same.

MACLENNAN, J.A., gave a written opinion to the same effect.

GARROW, J.A., also concurred.

OCTOBER 9TH, 1902.

C. A.

TOWNSHIP OF LOCHIEL v. TOWNSHIP OF EAST HAWKESBURY.

Way—Public Highway between Townships—Existence and Location of — Boundary Line — Records of Crown Lands Department—Surveys—Field Notes.

Appeal by plaintiffs from judgment of FERGUSON, J., in so far as it was against plaintiffs, in an action brought for a declaration that a government allowance for a public road exists between the plaintiff township, in the county of Glengarry, and the defendant township, in the county of Prescott,

and between the respective gores of the townships, and that such allowance is upon the boundary line between the townships.

The questions upon the appeal were, whether there is a common and public highway between the townships, and if there is, where located.

These questions arise now more than a century after the supposed erection of the highway, and when no proof of any work on the ground can be obtained to aid in their determination.

The appeal was heard before ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.

D. B. Maclennan, K.C., and E. H. Tiffany, Alexandria, for plaintiffs.

J. Leitch, K.C., and C. G. O'Brian, L'Orignal, for defendants.

MOSS, J.A.:—There are now no traces of the actual work upon the ground in the course of the original surveys. The finding as to the existence or not of an original allowance for road on the boundary between East Hawkesbury and Lochiel must depend upon the records in the department of Crown lands, and the proper inferences to be drawn from what is to be there found, taken in connection with the dealings of the department with the lands affected by them. And I think that it ought to be assumed, in the absence of evidence to the contrary, that in providing for and directing the survey of the townships in question, the department did not intend to depart from the usual practice in regard to surveys or to introduce any special or extraordinary features into it. So far as the instructions to Wm. Fortune to survey Hawkesbury can be gathered from the records, it appears that he was directed to conform to the general instructions already in his possession.

There is little reason for doubting that these embraced copies of such of the rules and regulations for the conduct of the land office department as pertained to the form and dimensions of townships, and that Fortune was well aware of the requirements applicable to laying out a township, whether situate on a river, as Hawkesbury was, or otherwise.

It seems clear that the invariable practice of the department, and of surveyors making surveys under the direction of the department, was to leave an allowance for a road between adjoining townships.

No record is shewn of any departure from this practice, unless the case of Hawkesbury constitutes one. Cases are spoken of in which a road only half a chain in width has been left, others where a chain and a half and even a double width or double allowance has been left, but no case of no allowance has been shewn, unless this case furnishes one. But I do not think there is anything in the facts or circumstances of this case to warrant us in assuming that such an unusual course was intended or adopted. Too much weight ought not to be attached to the circumstance that the copy of Fortune's play of survey in the department does not indicate, by the presence of two lines at a distance from each other, which by scale would make the width of a road, the existence of a road on the boundary between Hawkesbury and Lochiel.

The same omission appears with regard to the roads in front of the concessions, although it is quite apparent from the field notes that an allowance for such roads was left in the survey. Rather ought the preference be given to the working plans on record in the department, which do shew the roads in both places. According to the evidence of Mr. G. B. Kirkpatrick, director of surveys in the department of Crown lands, it was not an unusual thing for the early surveyors to omit to shew allowances for roads by two parallel lines in their plans. The absence of lines to mark a roadway on a plan of survey made in the latter part of the 18th century is not inconsistent with a road having been actually provided for in the survey.

And when it is found that the department, in its working plans, compiled from the records of the survey, and such other information as it presumably had at the time, has recognized the existence of roadways, and that numerous patents for lots have issued with reference to the existence of such roadways, it should be taken that they were properly provided for in the survey, unless cogent evidence to the contrary is forthcoming.

The defendants rely strongly upon Fortune's field notes as shewing the absence of any provision for a roadway. I have endeavoured to follow them throughout, and I do not think they lead to the conclusion contended for by the defendants, but rather the contrary.

Upon the whole case I agree in the conclusion that there is a road allowance between the townships, not merely between East Hawkesbury and the gore of Lochiel, but also along the easterly boundary of Lochiel, and I think there ought to be a declaration to that effect. No owner of any of the lots held

under patents containing words of description appearing to carry the lands to the boundary between Hawkesbury and Lancaster, or to the easterly boundary line of Lancaster, or words of similar import, is before the Court, and, so far as this litigation is concerned, such owners are left in possession of whatever rights (if any) such words may give them.

ARMOUR, C.J.O., and MACLENNAN, J.A., gave lengthy reasons in writing for arriving at the same result.

OSLER, J.A., dissented, also giving his reasons in writing.

OCTOBER 9TH, 1902.

C. A.

MUTCHMOR v. WATERLOO MUTUAL FIRE INS. CO.

Fire Insurance—Conditions—Prior Insurance—Subsequent Insurance—Substituted Insurance—Assent—Estoppel—Findings of Jury.

Appeal by defendants from judgment of FERGUSON, J., in favour of plaintiff, upon the findings of the jury, in an action upon a policy of fire insurance.

A. B. Aylesworth, K.C., for appellants.

W. Nesbitt, K.C., and T. A. Beament, Orillia, for plaintiff.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MOSS, JJ.A.) was delivered by

OSLER, J.A.:—The company defend the action on two grounds:—

1. That at the time of the application for the policy sued on, and at the time of issuing it, there was prior insurance upon the insured premises in another company, the Hand-in-Hand, to the extent of $4,000, which was not assented to by defendants, and that no assent thereto by them is indorsed thereon, nor does it appear therein; and, therefore, under statutory condition 8 the defendants are not liable on their policy.

This defence fails. In the application for insurance in defendant company it is stated that there is prior insurance in two companies, specifying the Hand-in-Hand and the Sun Fire, apparently $4,000 in each, with which the insurance applied for is intended to be concurrent. In defendants' policy they refer to the property insured by them as "represented in the application as otherwise insured for $4,000, warranted concurrent," but do not specify the company in

which the insurance exists. They plead only a prior insurance in the Hand-in-Hand, not assented to, saying nothing about the Sun. The application proves notice to them of both, and it must be taken against them that this is the one they intended to assent to in the policy. . . . If there was also further insurance of $4,000 (that is, $8,000 in all), to which defendants' assent was not manifested, as required by the statutory condition, they have not pleaded that as a defence, nor would it be just to allow them now to set it up. It does not seem necessary that the particular company in which the prior insurance exists should be specified in the policy. The amount of such insurance was the important thing, and the application gave the necessary details. I am disposed also to agree that, if defendants did not intend to assent to the existing insurance for $8,000 in all in the Hand-in-Hand and in the Sun, they were bound by the second statutory condition to point out in writing the particulars wherein the policy differed from the application: Smith v. City of London Ins. Co., 14 A. R. at p. 330. . . .

2. The company's next defence arises under the second branch of the 8th condition, which declares that the company are not liable for the loss if any subsequent insurance is effected by any other company, *unless and until* the company (i.e., the former company) assent thereto, or unless the company do not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or do not dissent in writing after that time and before the subsequent or further insurance is effected.

The defendants rely upon two subsequent insurances effected by their insured, but not notified to or assented to by them, one in the London Mutual and the other in the Lancashire. These insurances were proved. As to the London Mutual, the plaintiff's answer is, that the Hand-in-Hand policy was cancelled, for what reason does not appear, and the London Mutual was merely taken in substitution for it.

There is some evidence that the policy in question was taken in substitution for the other. One was dropped or cancelled, and the other for a similar amount put on. There is no suggestion that the Hand-in-Hand Co. cancelled on the ground of fraud or doubtful character of the risk, and I do not see that the fact of the sum insured having been somewhat differently distributed in the later from what it was in the earlier policy, can affect the substance of the matter,

which is a consent once manifested in the prescribed manner, to a prescribed further insurance for a specified amount. I think there was evidence on which the jury could properly have found, as they did, that the one policy was merely taken in substitution for the other, and, that being so, the statutory condition is not infringed, the substituted insurance being covered by the standing consent: Parsons v. Standard Fire Ins. Co., 43 U. C. R. 603, 4 A. R. 326, 5 S. C. R. 233; Lowson v. Canada Farmers' Mutual Fire Ins. Co., 6 A. R. 512; Moore v. Citizens' Fire Ins. Co., 14 A. R. 582; Klein v. Union Ins. Co., 3 O. R. 234, 262.

The insurance in the Lancashire is in a different position. It was, no doubt, strictly a subsequent insurance, and the defendants are not liable on their policy unless they have assented thereto, or have so acted as to estop themselves from saying that their policy is not an existing one. No form of assent is prescribed by the condition, nor any time at which it is to be given. It, therefore, need not necessarily be manifested in writing, and may be given before or after the loss. Where such subsequent insurance has, in fact, been effected without notice, notice of it in writing is not a prerequisite to a valid assent. Such notice is necessary only where the insured intends to effect a further insurance thereafter, and to place the company under the obligation to dissent in writing within the prescribed time if they object to it; their failure to do which is equivalent to an assent. . . .

The jury found that the company's head office was aware, at the time of sending Corey, the adjuster, to the place of the fire, of all the insurances that are now complained of being on the risk; that the company intended by such act to treat the policy as valid and subsisting and binding upon it; and that the assured entered into an appraisal with the company's adjuster, and accepted such appraisal, and altered his position on the faith of it.

These findings are well supported by the evidence, from which also it ought, in my opinion, to be inferred that the defendants assented to the subsequent insurance in the Lancashire. Their defence as to this insurance is, therefore, displaced on the ground either of assent or estoppel, or both.

* * * * * * * * * *

The case is distinguishable in many respects from Western Assce. Co. v. Doull, 12 S. C. R. 446, but mainly on the ground that in that case the insurance company had "no

notice nor any actual cognizance of the further insurance" when they instructed their inspector to adjust the loss. The terms of the condition, too, were very different from and more stringent than those in the case at bar, and the only notice the plaintiffs were able to prove was oral notice to an agent not authorized to receive it.

I refer to the following cases: Smith v. City of London Ins. Co., 14 A. R. 328, 15 S. C. R. 75; Morrison v. Universal Fire and Marine Co., L. R. 8 Ex. 197, 203, 205; New York Life Ins. Co. v. Baker, 49 U. S. App. 691, 697; Missouri v. Note Bank, 77 Fed. Rep. 117, 121; La Fonderie Co. v. Stadacona Ins. Co., 27 L. C. Jur. 194.

Appeal dismissed with costs.

OCTOBER 9TH, 1902.

C. A.

RICHARDSON v. WEST.

Deed—Reformation—Mortgage—Non-conformity with Contract for—Mistake.

Appeal by plaintiffs from judgment of LOUNT, J., dismissing with costs an action for the reformation of a mortgage.

In July, 1899, the plaintiffs and the defendant James H. West signed the following contract: "I, James H. West, agree to purchase from James Richardson the Yarker mill property . . . for . . . $5,500, $1,000 of which I agree to pay down and to give a mortgage thereon for $4,500 at 5 per cent. interest, said mortgage to be paid off in yearly instalments of $1,000; the mortgagor to have the option of pay all cash due at any time without notice. James Richardson agree to above. Possession to be given 1st Sept., 1899, at latest." Although in the body of this contract the vendor was referred to as "James Richardson," it was signed "James Richardson & Sons," and they were the plaintiffs in this action. James Richardson was not a member of the firm.

The deed of conveyance and the mortgage deed were settled, executed, and registered.

The defendant James H. West obtained possession on the 1st September, 1899.

The mortgage deed provided for the whole of the money becoming due in five years from its date, instead of being payable, as in the contract provided, in yearly instalments of $1,000. It was alleged by plaintiffs that the change was made by mistake, and that the mistake was not observed by them or by their solicitor until a year had elapsed.

It was proved, and found by LOUNT, J., that the defendant did not execute the mortgage under any mistake, but that both he and his solicitors observed the change made by plaintiffs' solicitor in the draft mortgage in the terms of payment, but had no objection thereto. LOUNT, J., held that if there was a mistake at all, it was a unilateral one, for which ordinarily there can be no reformation, and on that ground dismissed the action.

G. F. Shepley, K.C., for appellants.

A. B. Aylesworth, K.C., for defendants.

The judgment of the Court (OSLER, MACLENNAN, MOSS, JJ.A.) was delivered by

MACLENNAN, J.A., who, after setting out the facts, proceeded:—Without saying that in no case would the Court reform a conveyance which, by the mistake of one of the contracting parties only, was not made in conformity with an antecedent agreement in writing, I think it clear it ought not to do so in this case. Cases may be imagined in which the mistake by the one party was obvious to the other, and was deliberately taken advantage of by the latter. See Paget v. Marshall, 28 Ch. D. 255; May v. Platt, [1900] 1 Ch. 616, 622, 623. But this is not a case of that sort. It is, of course, competent to the parties to a written agreement for sale to carry it out with any variations and additions they think proper, and nothing is more common than to do so. In this case the plaintiffs' solicitor in his draft of the mortgage introduced several things into the mortgage which the agreement did not stipulate for . . . for the benefit and advantage of his clients, the plaintiffs. . . .

I think the defendant and his solicitors had a right to suppose that all these proposed additions to and changes in the terms of the contract, most of which were for the plaintiffs' benefit, were sanctioned by the plaintiffs. . . . If there was no more in the case than this, it would be quite impossible for plaintiffs to succeed.

But when it is remembered that the defendant had brought an action for specific performance, that the dispute was upon the form and substance of the deed and mortgage, and that the action was settled by the execution and delivery of the deeds as they now stand, I think it is simply out of the question, there being no fraud or unfair conduct or dealing on the part of the defendant, to maintain this action.

Appeal dismissed with costs.

OCTOBER 9TH, 1902.

C. A.

DOMINION RADIATOR CO v. BULL.

Bankruptcy and Insolvency — Assignment for Creditors — Sale of Estate by Assignee—Covenant of Purchaser to Pay Creditors—Enforcement—Privity—Trust.

Appeal by the defendant Hersee from the judgment of LOUNT, J., at the trial, in favour of plaintiffs in an action for the enforcement of the trusts of a certain deed and for payment of the balance of the full claim of the plaintiffs as creditors of the Hamilton Hardware Company. The facts are stated below.

The appeal was heard by OSLER, MACLENNAN, and MOSS, JJ.A.

G. Lynch-Staunton, K.C., and J. G. Farmer, Hamilton, for appellant.

D. E. Thomson, K.C., and D. Henderson, for plaintiffs.

MOSS, J.A.:—In the year 1899 the plaintiffs were creditors of the Hamilton Hardware Company, to the amount of $1,924.59, or thereabouts. In September of that year the company made an assignment under the Assignments and Preferences Act to the defendant Bull. Subsequently an effort was made by one A. E. Hersee, the president of the company, to effect a composition with the creditors, with the result that a deed of composition and discharge was prepared and executed by the great majority of the principal creditors, including the plaintiffs, whereby it was agreed that A. E. Hersee was to pay to each of the creditors a composition of 40 cents on the dollar of their respective claims, on or before the 1st October, 1899, in consideration of which the creditors

were to release and discharge the company from all claims and to authorize the defendant Bull to deliver and convey to A. E. Hersee all the assets and property of the company.

Following these provisions was a stipulation that the agreement should take effect and become operative only when executed by all the creditors, but not before. It never was executed by all the creditors, and so never became operative to bind the creditors to accept 40 cents on the dollar of their claims against the company.

On the 2nd October, 1899, another transaction took place between the defendant Bull and the defendant Hersee, the result of which was that the defendant Bull, with the assent of A. E. Hersee, executed an instrument whereby, after reciting the assignment by the company to Bull, the offer made by A. E. Hersee to the creditors of a composition of 40 cents in the dollar, and that the creditors had accepted the offer and that the defendant Hersee had agreed to take upon himself the payment of the said composition to the said creditors, the defendant Bull granted, assigned, and transferred all the estate and assets of the company to the defendant Hersee upon and for certain trusts and purposes set out in the instrument. These were expressed to be as follows, viz., that the defendant Hersee should pay the aforesaid composition of 40 cents in the dollar on the claims of such of the creditors as had agreed to accept the same, and pay in full or make such settlement as he might be able of the claims of such of the creditors as had not agreed to accept such composition, together with preference and privileged claims and the costs incurred by the parties in respect of the assignment by the company to Bull. Subject to these payments, the defendant Hersee was to hold the transferred estate and assets to and for his own sole and only use for ever. And the defendant Hersee covenanted with the defendant Bull to pay "such composition and claims and from time to time and at all times well and truly save and keep harmless and fully indemnify" the defendant Bull.

The defendant Hersee received the estate and assets from defendant Bull, and proceeded to pay the creditors. The plaintiffs refused to accept the 40 cents in the dollar tendered to them, alleging that before the execution of the instrument of the 2nd October, 1899, they had repudiated their acceptance of the offer of composition, and had notified the company of their withdrawal from the agreement. Subsequently they brought action against the company for the recovery of

their claim. This action was defended, and a sum equal to 40 cents in the dollar of the claim was paid into Court, the money, it is said, being supplied by the defendant Hersee. The trial resulted in the plaintiffs obtaining judgment for the full amount of their claim, and the sum paid into Court was ordered to be paid out on account of the judgment.

The plaintiffs then brought this action, asking for the enforcement of the trusts of the deed of the 2nd October, 1899, and payment of the balance of their full claim, alleging that under its provisions the defendant Hersee became liable to pay the plaintiffs' claim in full, and that it was the duty of the defendant Bull to enforce the trusts of the deed for their benefit, but that he had refused to do so, or to permit the plaintiffs to use his name for the purpose of enforcing the deed.

The defence set up want of privity and inability of the plaintiffs to maintain the action, and also that, assuming the right to maintain the action, the right to be asserted and the relief to be obtained are the same and no higher or greater than can be asserted or obtained by the defendant Bull, and that the latter's right to relief is limited to compelling the defendant Hersee to pay 40 cents on the dollar of the plaintiffs' claim, and that in any case the relief should be limited to an account of the value of the estate and assets received by the defendant Hersee, and that such value did not amount to 40 cents in the dollar of the claims against the company.

There was a reply to the defence, setting forth at length the reasons which the plaintiffs alleged justified them in withdrawing from the composition, alleging that before the execution of the instrument of the 2nd October the defendant Hersee had notice of the plaintiffs' withdrawal, and assigning other grounds against the validity of the defence.

At the trial the plaintiffs undertook to prove notice to the defendant Hersee of the plaintiffs' withdrawal from the composition, but, as it appears to me upon a careful perusal and consideration of the testimony, they failed to adduce any evidence upon which such notice ought to be fastened upon the defendant.

The onus was upon the plaintiffs to establish the fact of notice to the defendant Hersee, if, as they appeared to think, it was essential to their case. But every witness called or interrogated upon the point distinctly denied that the defendant Hersee had seen or read or been told of the plaintiffs'

letter of withdrawal or had any knowledge of the fact of withdrawal until after he had executed the instrument of the 2nd October, and had paid a considerable number of the creditors the amount of the composition provided for by his covenant. The only scintilla of evidence of notice or knowledge that could be argued for was in some answers to questions addressed to the defendant Hersee when he was under examination in the former action. But the questions and answers as read at the trial of this action, disconnected as they were from the preceding and succeeding questions and answers, seem vague and unsatisfactory in view of the direct testimony and of the probabilities of the case. It would be unsafe, in my opinion, to found a conclusion of fact on them. It was argued that the learned Judge had not given credence to the testimony of the witnesses on the question of notice. But, as said by Lord Justice James in Nobel's Explosives Co. v. Jones, 17 Ch. D. at p. 739, "really that is a fallacy which we had occasion to refer to more than once in this Court, that a man supposes that he proves the affirmative because the witness for the negative is not wholly to be believed. Of course that is not so. The affirmative must be proved, and to say that a witness for the negative is not wholly to be believed, or that some other witness might be there, is in no sense of the word to prove the affirmative."

So far as it affects this case, therefore, I think it ought to be taken that the fact of notice to the defendant Hersee of the plaintiffs' withdrawal from the deed of composition before he executed the instrument of the 2nd October, ought to be taken as not established.

The plaintiffs are not impeaching the transaction between the defendants Bull and Hersee. On the contrary, they have adopted it, and ask to have the trusts of the instrument of the 2nd October enforced for their benefit. Their right to maintain this action in their own names against the defendant Hersee must depend on the circumstance that the property and assets passed to the defendant Hersee impressed with a trust. Probably that is the only substantial distinction between this case and Henderson v. Killey, 18 S. C. R. 698, more fully reported in 11 Occ. N. 88. But the rights to be enforced are those which the defendant Bull could enforce, and no others, and, unless he call upon the defendant Hersee to pay the plaintiffs' claim in full, I do not perceive any ground upon which the plaintiffs can do so. In my judgment, the defendant Bull is not shewn to be entitled to that relief. It is plain upon the evidence, as I think, that the

defendants Bull and Hersee were dealing upon the footing of the plaintiffs being creditors who were willing to accept 40 cents in the dollar, and that when the instrument of the 2nd October was executed both were under the belief that, so far as the plaintiffs were concerned, the trust extended only to 40 cents in the dollar of their claim.

It was evidently not contemplated that the creditors who had intimated their acceptance of the composition, either by executing the deed or by letter to the defendant Bull, were to be paid in full by the defendant Hersee, in the event of their subsequently electing to treat their intimation as not binding, as they were at liberty to do provided the deed was not signed by all the creditors.

And the defendant Bull could not stretch the covenant or the trust so as to make them include more than 40 cents in the dollar of the claims of those whom he had represented as having agreed to accept that sum and treated as still willing to do so at the time when the instrument was executed. I do not think that, as regards any of claims which were so regarded by both parties, any Court would extend the trusts beyond the 40 cents in the dollar at the instance of the defendant Bull.

It follows that the plaintiffs are not entitled to the judgment which has been awarded them.

The appeal should be allowed and the action dismissed with costs.

OSLER, J.A., gave reasons in writing for the same conclusion.

MACLENNAN, J.A.:—The defendant Bull held the property of the debtors in trust for their creditors, including the plaintiffs, and he has sold the property to the defendant Hersee, the only consideration for the sale being the covenant sued upon. The plaintiffs having an undoubted right to the benefit of that covenant, and the defendant Bull having refused to enforce it, the right of plaintiffs to enforce it in their own name is as clear as anything can be.

The only question remaining is the construction and meaning of the covenant, and, to my mind, that admits of no doubt. The composition deed contained a proviso that it was only to become operative if assented to by all the creditors. Those who signed it first, therefore, signed it provisionally,

and, perhaps, could not withdraw until a reasonable time elapsed for the procurement of the signatures or the assent of the others, although that may not be so clear. However that may be, it never was assented to by all the creditors, and the assignee sold the property to the defendant Hersee, and as the consideration for the sale procured the covenant in question, which provides for the payment of both classes, both those who had accepted the composition and those who had not. It may be that plaintiffs could legally claim that they had not assented to the deed so as to be bound thereby, by reason of the condition referred to, and I incline to think they could, but it is proved, and is so found by the learned Judge, that before the sale they had notified the assignee that they repudiated it on the ground of misrepresentations whereby they had been induced to execute it, and that defendant Hersee was informed of that repudiation before he made his purchase. That being so, I think the plaintiffs are persons who had not accepted the composition within the meaning of the covenant, and whom Hersee covenanted with the assignee to pay in full in case no more favourable settlement could be made with them. . . . I think it is impossible, after the sale has been carried out and completed, to qualify the trust and the covenant by the recitals. I think the appeal ought to be dismissed.

Appeal allowed; MACLENNAN, J.A., dissenting.

MEREDITH, J. OCTOBER 10TH, 1902.

CHAMBERS.

RE BRANDON v. GALLOWAY.

Prohibition—Division Court — Amount Involved — Action for Tort— Costs.

Motion by defendant for prohibition to the 10th Division Court in the county of York, on the ground that the amount claimed and adjudged to plaintiff, $75, was beyond the Division Court jurisdiction, the action being one under the Workmen's Compensation Act to recover damages for injuries to plaintiff in defendant's factory by the alleged negligence of a fellow-servant.

John Greer, for defendant.

D. M. Defoe, for plaintiff.

MEREDITH, J.:—The plaintiff's claim in the Division Court was for damages for injuries sustained through the negligence of a fellow-servant of plaintiff, for which the defendant, the master, is said to be liable under the provisions of the Workmen's Compensation for Injuries Act. The claim was in respect of a wrong, and could not by any device be converted into one for breach of contract. The claim and judgment being beyond the jurisdiction of a Division Court, the defendant was entitled to prohibition. If the plaintiff sue and recover judgment upon his claim in a higher Court, he must then pay the costs of this motion or set them off against the judgment; otherwise no order as to such costs.