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HON. MR. JUSTICE LENNOX. JUNE 9TH, 1913.

DAHL v. ST. PIERRE.

4 O. W. N. 1413.

Vendor and Purchaser—Specific Performance—Attempt to Rescind —Time of Essence—Waiver—Account—Reference.

LENNOX, J., *held*, that where time is made the essence of the contract, this provision is waived by recognition of the contract by the party entitled to insist on such provision after the expiry of the time provided for by such contract and thereafter in order to cancel the same reasonable notice must be given of a time within which the contract must be completed.

Webb v. *Hughes*, L. R. 10 Eq. 281, referred to.

Action for specific performance of contract to sell to plaintiff parts of lots 7 and 8 in the Lake Shore Range lots, township of Rochester, county of Essex, for $3,500.

M. K. Cowan, K.C., for plaintiff.

F. D. Davis, for defendant.

HON. MR. JUSTICE LENNOX:—The plaintiff is entitled to specific performance of the agreement sued on. Time is in terms made of the essence of the contract, but this is not open to the defendant as a defence. After the default now complained of the defendant continued to negotiate with the plaintiff and recognised the continued existence and validity of the contract. Having once done this he cannot afterwards hold the plaintiff to the original stipulation as to time. *Webb* v. *Hughes*, L. R. 10 Eq. 281. Once the time is allowed to pass the rights of the parties are governed by the general principles of the Court. *Upperton* v. *Nicholson*, L. R. 6 Ch. App. 436. And the defendant could not in these circumstances terminate the contract abruptly as he attempted to do by the letters of 20th and 27th of January,

1913, he must give a notice fixing a date within which the contract is to be completed, and that date must afford the other party a reasonable time. Malins, V.C., in *Webb* v. *Hughes*, at pp. 286, 287; *McMurray* v. *Spicer* (1868), L. R. 5 Eq. 527. There are other reasons. A person who is himself in default cannot avail himself of this stipulation as against the other party. *Foster* v. *Anderson*, 15 O. L. R. 362, 16 O. L. R. 565. I am quite satisfied that it was understood that the plaintiff's share of the rent was to be applied upon the October payment and that this and the state of the mortgage account against the property was the cause of the delay. On the other hand the moving cause of the defendant's sudden energy was the same as that which caused the dog to grab at the shadow in the stream, the desire to grasp what was not his—the increased value of the property subsequent to the sale. The result is a loss in both instances. The total contract price is $3,500. The plaintiff is entitled to be credited as payments on the contract with the following sums namely:—

Share of tomatoes	$ 90 00
Share of corn	13 50
Share of potatoes	2 25
Pasture 10 acres @ $4 an acre	40 00
27 loads of sand @ 75 cents	20 25
Cash payments	775 00
Total	$941 00

Leaving a balance of consideration exclusive of interest amounting to $2,559.00.

It was contemplated that the plaintiff would make payments by the 15th of October, 1912, amounting to $1,075. After giving the credits above he has fallen short of this by the sum of $134, the balance of the $3,500, namely $2,425, was to be paid when the defendant cleared the property of the mortgage to the Huron & Erie Loan & Savings Co.

But the amount required to release the land covered by agreement on the 1st of May, 1912, was $3,177.67, and had increased by the 15th of October, so that at the time of the alleged default counting only the cash payments of $775 the plaintiff has paid more than he was safe in paying, and more than he could be reasonably called upon to pay until

the mortgage was reduced. The plaintiff must pay this $134 shortage with interest upon it from the 15th of October, 1912, as soon as the defendant reduces the mortgage charge upon the land to the sum of $2,425, and he should not be called upon to pay it until this is done. Of the items of credit above allowed two require explanation. The defendant agreed to crop the whole of the land. If he had done this the plaintiff's share of the crop would probably have netted him $100 or more, judging by the returns from the portion cropped. Instead, I have allowed the value of the land as pasture only. I judged by plaintiff's counsel that he was satisfied with this. The defendant as a trespasser carried away 27 loads of sand from the land sold to the plaintiff and sold it for $1.25 a load. As a trespasser he might well be charged with the total received. I have not done this. If it is suggested that this cannot be treated as a payment I say in answer that it can well be deducted as a shortage in land from the consideration money, but as a matter of convenient adjustment of accounts it can also be justified.

There will be the usual judgment for specific performance with the costs of the action to the plaintiff and a reference to the Master at Sandwich to adjust the account and interest and settle the conveyance in case the parties cannot agree—a stay for thirty days.

MASTER-IN-CHAMBERS. JUNE 9TH, 1913.

ST. CLAIR v. STAIR.

4 O. W. N. 1437.

Discovery—Affidavit on Production—Claim of Privilege—Dates and Authors of Documents for which Privilege Claimed to be Disclosed.

MASTER-IN-CHAMBERS *held*, that where privilege was claimed in an affidavit on production for certain reports, the date and author of such reports should in each case be given even though in so doing the names of witnesses are disclosed.

Marriott v. *Chamberlain*, 17 Q. B. D. 154, followed.

Motion by the plaintiff for a better affidavit on production from the defendant the Jack Canuck Co.

For the facts of this case see 23 O. W. R. 740.

W. E. Raney, K.C., for plaintiff's motion.

A. R. Hassard, for defendant, contra.

CARTWRIGHT, K.C., MASTER:—The affidavit attacked claims privilege for "A quantity of reports fastened together numbered 1 to 77 inclusive initialled by this defendant." These are claimed to be privileged as "being reports and communications obtained for the information of solicitors and counsel and for the purpose of obtaining advice thereon with a view to litigation between the plaintiff and the said defendants."

It was objected (1) that the dates of these reports and the names of the authors should be given, and (2) that the claim of privilege was defective because it did not state that these reports were obtained solely for the purposes of the pending action.

The cases relied on in support of the motion were *Swaisland* v. *Grand Trunk Rw. Co.*, 3 O. W. N. 960, on both branches and *Jones* v. *Great Central Rw. Co.*, [1910] A. C. 4, on the second.

In cases such as *Collins* v. *London Gen. Omnibus Co.* (1893), 68 L. T. R. 831, no doubt the word "solely" is necessary in view of the previous judgment in the similar case of *Cook* v. *North Metropolitan*, 6 T. L. R. 22. But this qualification is not of universal application though it might be as well to use it in every case as a matter of precaution and for greater security.

As at present advised it does not seem necessary to express any opinion on this point, because the motion seems entitled to prevail on the first ground. The documents in question should comply with what was said in the *Swaisland Case* (*ubi supra*), at p. 962, "Moreover it is essential that the documents should be so clearly identified that if it turns out that the affidavit on production is untrue there will be no difficulty in securing a conviction for perjury."

It would seem necessary, therefore, to give the date of each report and the name of the person making it for "where the name is a material fact it must be disclosed and it is no answer that in giving the information the party may disclose the names of his witnesses."

Bray's Digest of Discovery (1904), p. 39 citing *Marriott* v. *Chamberlain*, 17 Q. B. D. 154.

So too Odgers on Pleading, 5th ed. 179, citing in addition (with other cases) *Milbank* v. *Milbank*, [1900] 1 Ch. 376.

A further and better affidavit must therefore be made within a week as above directed. In this the claim of privilege can also be amended by adding "solely" if the deponent thinks it wise to do so and can so declare in view of what may appear when the reports are dated. I make this remark because the affidavit on production of the Holland Detective Bureau, made a defendant herein, mentions "Reports made at various times between November 20th, to December 27th, 1912, by the bureau to James R. Rogers." These are probably the reports mentioned in Mr. Rogers' affidavit.

The writ in this action was issued only on 27th December, 1912, though the libel action was begun earlier. The plaintiff is entitled to the costs of this motion in any event.

HON. MR. JUSTICE LENNOX. JUNE 7TH, 1913.

RE ETHEL GLADYS PHILLIPS, AN INFANT.

4 O. W. N. 1408.

Parent and Child — Right of Father to Custody of Daughter—Alleged Moral Irregularities—Discretion of Court.

LENNOX, J., refused to grant a father the custody of his infant daughter then in the custody of the Children's Aid Society, until he had satisfied the Court that he was living a moral life and could make a proper home for her.

Motion by father for custody of his infant child now in custody of Children's Aid Society.

C. Elliott, for the father.

W. B. Raymond, for the Children's Aid Society.

HON. MR. JUSTICE LENNOX:—I find it very difficult to decide what should be done in this matter. The right of a parent to the custody and care of his child should not be interfered with except for weighty reasons satisfactorily shewn. There are a lot of statements in the affidavits and papers filed on behalf of the Children's Aid Society that cannot be regarded as evidence, and I am not able to accept the sworn statement of William H. Lee; none of it is very convincing, and the Christmas story, as shewn by the

police records, is clearly untrue. Whether Phillips did all he could for his wife or not is perhaps only a collateral question, but the true character of the wife is a very important question in deciding this issue. In this connection then I would expect that if the wife while living in the Stanford boarding gave way to the use of intoxicating liquor in the way described, some police officer or neighbour, or some one in or out of that house other than Phillips and Mrs. Stanford, could have been found to depose to it. To determine this question rightly is important in determining how much weight should be attached to the wife's death-bed accusations and wishes. The affidavits in support of the father's claim make it pretty clear to me that in a general way, in his outside life, he is a well-behaved man, but they afford no actual evidence as to the relations between Phillips and Mrs. Stanford, whether or not there is anything in the circumstance that while these two deponents both swear that Phillips did not occupy the rear room, yet neither of them state what room he did occupy, I do not know but it becomes significant in view of the evidence of the deceased wife in the Police Court on the 30th of November, 1911. That evidence was of a specific and most damaging character and the husband Phillips did not then bring Mrs. Stanford or go into the witness box himself to deny it. Under these circumstances, for so long as the father continues to make his home where it now is, I cannot say that the father is a fit and proper person to have the care, custody, education or control of his daughter Ethel Gladys Phillips. The application will, therefore, stand adjourned until Friday, the 20th of June instant, to be renewed in my Chambers at 10 o'clock. If it then appears to my satisfaction that the applicant has permanently abandoned his present residence and established a respectable and suitable home for himself and his daughter and enters into an undertaking to faithfully carry out the new arrangement the order asked for will be made, otherwise the application will then be dismissed with costs.

HON. MR. JUSTICE LENNOX. JUNE 9TH, 1913.

KELLY v. McKENZIE.

4 O. W. N. 1412.

Trial—Jury Notice—Equitable Relief Only Sought—Notice Struck out—Con. Rule 1322.

LENNOX, J., struck out a jury notice in an action where the only relief sought was equitable.
Bissett v. *Knights of the Maccabees*, 22 O. W. R. 89, approved.

Motion by plaintiff for order striking out jury notice filed by defendant.

Wm. Proudfoot, K.C., for plaintiff.

H. S. White, for defendant.

HON. MR. JUSTICE LENNOX:—This is an action in which the remedy sought by the plaintiff could only be obtained in a Court of Chancery prior to the Judicature Act. The defence in effect is simply a denial of the plaintiff's right to any part, or at all events, the whole of the relief claimed. The defendant claims to have the issues tried by a jury, and the plaintiff moves to have the jury notice struck out. The propriety of leaving the determination of this question for the trial Judge in an action of a common law character, has been declared on many occasions, and the cases are collected and reviewed by the Chancellor in *Stavert* v. *McNaught* (1909), 18 O. L. R. 370. In *Montgomery* v. *Ryan*, 13 O. L. R. 297, the Chief Justice of the Common Pleas based his judgment striking out the jury, upon the double ground that it was "plainly a case which would be tried without a jury—one of investigation of accounts," and a case to be tried in Toronto where non-jury sittings are practically continuous throughout the year; and delivering the judgment of the Divisional Court in *Bryans* v. *Moffatt* (1907), 15 O. L. R. 220 at p. 223, said: "Speaking for myself, I think the rule of practice laid down in *Ryan* v. *Montgomery*, 13 O. L. R. 297, might well be extended to any case, whether in town or country, where the case is one that, in the opinion of the Judge before whom the motion to strike out the jury notice comes, should be tried without a jury. It was held that the Chancellor exercised a proper discretion in striking out the jury notice. On the issues the case is not distinguishable

from this action. I think then, that the order should go. This is not a common law action like *Stavert* v. *McNaught* (*supra*), but is clearly governed by *Bryans* v. *Moffatt* (*supra*), being a case which, in my opinion, ought to be tried without a jury. I don't know that it can be said with absolute certainty that "no Judge would try the issues with a jury," but the judgment in *Clisdell* v. *Lovell* 15 O. L. R. 379, was pronounced before the promulgation of rule 1322. I concur in the meaning and effect of this rule adopted by Mr. Justice Riddell in *Bissett* v. *Knights of the Maccabees*, 22 O. W. R. 89. This rule, whilst it enlarges the powers of a Judge in Chambers, prevents embarrassment by vesting the ultimate decision in the trial Judge. I direct that the action be tried without a jury.

Costs will be costs in the cause.

HON. MR. JUSTICE LENNOX. JUNE 5TH, 1913.

BEAHAN v. NEVIN.

4 O. W. N. 1399.

Negligence—Fatal Injuries Act—Death of Boy Struck by Motor-Cycle—Quantum—Reasonable Pecuniary Expectation.

LENNOX, J., gave judgment for $530 in an action brought for damages for the death of plaintiff's son, a boy of eleven years, killed by being struck by defendant's motor cycle through his alleged negligence.

Action by father for damages for the death of his son, a boy aged eleven years, by reason of his having been struck by a motor cycle ridden by defendant, Gordon Nevin, through the alleged negligence of the latter.

F. D. Davis, for plaintiff.

T. G. McHugh, for defendant, Frederick Nevin.

E. S. Wigle, for defendant, Gordon Nevin.

HON. MR. JUSTICE LENNOX:—On the 29th of October, 1912, the defendant, Gordon Nevin, was riding a motor bicycle in the city of Windsor, and ran over and knocked down William Beahan, a son of the plaintiff. The boy was so seriously injured that he died within a few hours. The plaintiff is a labourer and brings this action on behalf of him-

self and his wife, Ollie Beahan. William was a little over eleven years old at the time of the casualty. He was a good boy, attended school, ran errands—was executing an errand at the time—and was strong, healthy and clever.

Both parents swear that they expected him to be of assistance to them, and in their position in life it is not unreasonable to expect that before long he would be earning money and contributing to the upkeep of the family. There are seven other children. The oldest is 23 and is still living at home, and as I understand, the parents are gainers by this.

The casualty was caused by the negligence and want of care of the defendant, Gordon Nevin, in riding the cycle. It was a dark night—he was running without a light, and in passing a vehicle he was running, as he says, 12 to 15 miles an hour. He was almost able to stop as it was, and if he had slowed down in passing to the seven miles an hour limited by the statute, he would have been able to stop in time to avoid collision.

The measure, as well as the basis of damages, has been very much discussed in our own Courts. It is said here that the funeral expenses amounted to $200. I am not at liberty to take this into account.

Based upon a reasonable expectation of pecuniary benefit, I think a fair assessment of damages will be $530, and there will be judgment against the defendant, Gordon Nevin, for this amount, with the costs of the action—$230 of this will belong to the mother Ollie Beahan. The action will be dismissed as against the defendant, Fredrick Nevin, without costs. Reference may be made to *Thompson* v. *Trenton*, 11 O. W. R. 1009; *McKeown* v. *Toronto Rw. Co.*, 19 O. L. R. 361; *Ricketts* v. *Markdale*, 31 O. R. 180, 610, and Lord Campbell's Act, 46 Canada Law Journal.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. MAY 14TH, 1913,

STUART v. BANK OF MONTREAL.

4 O. W. N. 1280.

Deed—Absolute in Form—Alleged to have been by way of Security only—Evidence.

LATCHFORD, J., 24 O. W. R. 118; 4 O W. N. 846, dismissed plaintiff's action to have it declared that a certain deed from his father to his grandfather, of certain lands in Hamilton, was, in reality, a mortgage, being by way of security for certain advances, and that the defendants, subsequent purchasers, had notice and knowledge of that fact, finding against both of plaintiff's contentions as above.

SUP. CT. ONT. (2nd App. Div.) affirmed above judgment.

An appeal by the plaintiff from a judgment of Hon. Mr. Justice Latchford, 24 O. W. R. 118; 4 O. W. N. 846, dismissing the action with costs.

The appeal to the Supreme Court of Ontario (2nd Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

W. M. Douglas, K.C., and W. J. Elliott, for the plaintiff.

Hon. Wallace Nesbitt, K.C., and H. A. Burbidge for the defendants.

THEIR LORDSHIPS (v.v.) dismissed the appeal with costs.

HON. MR. JUSTICE LENNOX. JUNE 5TH, 1913.

MALOT v. MALOT.

4 O. W. N. 1405.

Statute—Validity of Marriage — 1 Geo. V. c. 32—Constitutionality of.

LENNOX, J., refused to declare a marriage null and void until the question of the constitutionality of 1 Geo. V. c. 32 had been argued before him.

Action to have a certain marriage declared null and void under the provisions of 1 Geo. V. ch. 32.

F. A. Hough for plaintiff.

HON. MR. JUSTICE LENNOX:—On the 11th day of September, 1911, Reverend S. James Allin, then of Windsor, pronounced the defendant and plaintiff man and wife. The plaintiff, Minnie Malot, swears that there were no witnesses present. The names "Fernie Allin" and "V. May Allin" appear as witnesses on the marriage certificate, but the whole of the writing upon the certificate is manifestly in the same hand. At the time of the marriage, or alleged marriage, the plaintiff was only a little over 13 years of age, and the defendant, it is said, was less than nineteen. They were married upon a license, and if the Attorney-General's department should inquire into how the license was obtained and punish somebody, it might check the commission of perjury in the future. This is a very disgraceful case, and it would have given me pleasure to learn from Mr. Allin how he was so woefully deceived as to the ages of these children and about the witnesses, but when I spoke of getting him to Court by 'phone, I learn that he has been removed to another sphere of usefulness.

The action is brought to have the marriage declared null and void, and for this the authority of 1 George V., ch. 32, is relied upon. The evidence of the plaintiff to prove that the marriage was not consummated and her manner of giving evidence were both unsatisfactory; the story she tells is a difficult one to believe, and yet may be that as it is the only evidence I ought to accept it. I have not yet finally made up my mind as to this. There is no reason why the defendant should not be subpoenaed and examined.

But in any case my jurisdiction to give judgment depends upon the constitutionality of the Act referred to and this question after a good deal of consideration I do not as yet feel prepared to determine affirmatively. If counsel for the plaintiff will communicate with the Attorney-General's department I will appoint a day for argument.

HON. MR. JUSTICE MIDDLETON. JUNE 5TH, 1913.

RE JOSEPH SHEARD.

4 O. W. N. 1395.

Will—Construction—Gift of All Benefits—Absolute Interest.

MIDDLETON, J., *held*, that a direction by a testator that $4,000 be invested in the names of executors for the benefit of his son, Frederick, that the income be paid to the latter and that if he shall take unto himself a wife then the money was to be invested in real estate "so that my said son shall have a home for his absolute use and benefit" without gift over, conferred an absolute interest upon the son.

Rishton v. *Cobb*, 9 Sim. 615, followed.

Petition to determine questions arising in the administration of the estate of the late Joseph Sheard.

W. D. McPherson, K.C., for petitioners.

N. W. Rowell, K.C., for Elizabeth Sheard.

HON. MR. JUSTICE MIDDLETON:—The affidavits filed make it clear that the wife, notwithstanding the suggestions contained in the will, is of perfect mental capacity, and *sui juris*.

The testator directs that $4,000 shall be invested in the names of his executors, for the benefit of his son Frederick, and that the income shall be paid to him, and if Frederick "shall take unto himself a wife" then the money shall be invested in real estate "so that my said son shall have a home for his absolute use and benefit." There is no gift over.

It is clear upon the authorities that this confers an absolute estate in Frederick. *Rishton* v. *Cobb*, 9 Simons 615, holds that the estate would be absolute even if the gift of income terminated upon marriage. This decision has the approval of Farwell, J., in *Re Howard*, [1901] 1 Ch. 412. Upon the whole subject see *Re Hamilton*, 27 O. L. R. 445; 23 O. W. R. 549, and in appeal 4 O. W. N. 1170.

Declared accordingly. Costs out of the estate.

SUPREME COURT OF ONTARIO.

1st APPELLATE DIVISION. JUNE 7TH, 1913.

TORONTO v. FORD.

4 O. W. N. 1386.

Municipal Corporations—Apartment Houses—By-law to Restrain Location of—2 Geo. V. c. 40, s. 10—Meaning of "Location"—Effect of Building Permit—Terms—Costs.

MEREDITH, C.J.C.P., *held* (24 O. W. R. 351), that "location" with reference to an apartment house meant more than the choosing of the site and covered the erection of the structure.

Toronto v. *Williams*, 27 O. L. R. 186, followed.

That the issuance of a building permit to defendant under another by-law did not affect the right of the plaintiff to restrain the defendant from infringing the by-law in question.

SUP. CT. ONT. (1st App. Div.) dismissed appeal with costs.

(See *Toronto* v. *Garfunkel*, 23 O. W. R. 374.—Ed.)

Appeal by the defendant from the judgment of the Chief Justice of the Common Pleas (24 O. W. R. 351), dated the 27th March, 1913, after the trial before him sitting without a jury at Toronto on that day.

The appeal to the Supreme Court of Ontario (1st Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

W. C. Chisholm, K.C., for appellant.

Irving S. Fairty, for respondent.

HON. SIR WM. MEREDITH, C.J.O.:—The appellant is not entitled to succeed if *Toronto* v. *Williams* (1912), 27 O. L. R. 186, was well decided, and we are asked to overrule it.

In our opinion the Court in that case came to the right conclusion and we agree with it as well as with the reasoning on which it is based and with the reasoning of the learned trial Judge, to which we cannot usefully add anything.

The appeal is dismissed with costs.

HON. MR. JUSTICE BRITTON. JUNE 11TH, 1913.

ARNPRIOR v. THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

4 O. W. N. 1426

Bonds—Fidelity Bond—Tax Collector of Municipality—Embezzlement by—Statement by Mayor to Defendants—Answers to Questions Submitted — "Renewal or Continuation" of Bond — Materiality of Alleged Misstatements—Facts as to.

BRITTON, J., gave judgment for $5,000 for plaintiffs, a municipal corporation, in an action upon a "fidelity" bond given to secure plaintiffs against the default of a tax collector who embezzled upwards of $11,200 of the moneys of plaintiffs, holding that the written answers made by the mayor of plaintiffs to questions put to him by defendants at the time of the entering upon of the bond were correct, having regard to the interpretation put upon such answers by both parties at the time they were made.

Action brought to recover $5,000 upon a fidelity bond made by defendant company, dated 30th May, 1905, by which defendants agreed, subject to certain conditions and stipulations in said bond, to make good and reimburse to the plaintiffs' municipality all and any pecuniary loss sustained by plaintiffs of money, securities, or other personal property in the possession of one John Mattson, Chief of Police and tax collector of plainiffs, by any act of fraud or dishonesty on his part in the discharge of his duties as Chief of Police or tax collector.

The bond contained a great many conditions, and the breach of these was put forward by defendants in their statement of defence as relieving them from any liability under their bond.

W. M. Douglas, K.C., and J. E. Thompson, for plaintiffs.

G. H. Watson, K.C., and R. J. Slattery, for defendants.

HON. MR. JUSTICE BRITTON:—On or about the 19th day of May, 1904, Mattson made an application in writing to the defendants for a bond as an officer of the plaintiff corporation. The then Mayor of Arnprior, at the request of defendants, sent to them a statement dated the 10th day of June, 1904, agreeing to be bound by the statements and answers to questions therein, and agreed that the answers to the questions submitted in that statement were to be taken as conditions precedent and as the basis of the bond applied for

or any renewal or continuation thereof, or any other bond substituted in place thereof.

A bond was issued by the defendants in favour of the plaintiffs dated 16th June, 1904, for $5,000.

On the 30th May, 1905, a new bond for the same amount was made by the defendants in favour of plaintiffs; and defendants contend that all the statements which were the foundation of the first bond continued as the foundation and basis of the bond last mentioned. There was no application in writing by either Mattson or the plaintiffs for the new bond; no representation of any kind by them. If any were made by Mattson they were made without the knowledge and consent of the plaintiffs. No continuation notice was sent by defendants to plaintiffs at or about the time of expiry of the first bond.

The liability on the last bond—the one sued upon—was from 10th June, 1905, to 10th June, 1906, subject to continuance or renewal. It was continued by certificate on 28th May, 1906, to 10th June, 1907, and by certificate 11th July, 1907 to 1st June, 1908 (this was a mere clerical error, stating 1st instead of 10th). It was further continued on 10th June, 1908, to 10th June, 1909, and by certificate 4th June, 1909 to 10th June, 1910, and by certificate 14th June, 1910 to 10th June, 1911.

During the currency of the bond and between June 10th, 1910, and June 10th, 1911, suspicion was directed towards Mattson that he was not acting honestly as collector. A special audit was ordered, and investigation followed, with the result that Mattson was found to have fraudulently appropriated to his own use money of the plaintiffs. He embezzled:

In 1908	$ 3,941 12
In 1909	7,521 61
	$11,462 73
Upon the rolls of 1907 he had overpaid the treasurer	216 18
	$11,246 55

leaving $11,246.55 as the amount of the total deficit. The defendants deny liability by reason of certain statements in the writing of 10th June, 1904, and upon many other grounds.

There is no doubt about Mattson's embezzlement. He pleaded guilty on a trial for larceny and was sentenced to twelve months in jail. He was called by the defendants at the trial of this case and gave evidence establishing his theft of the money.

The plaintiffs deny the right of the defendants to set up as any defence in this action the written statement mentioned. It was made for the purpose of getting a bond in 1904. It served its purpose. The bond was issued. There was liability under it for a year. At the end of the year liability was not continued, but was terminated by defendants.

On the 30th May, 1905, the defendants upon being paid the premium for another year, executed and issued the new bond above mentioned. This bond by continuation certificates was kept in force until 10th June, 1911.

In each year after 1905, except one, the defendants made enquiry of the plaintiffs and received a satisfactory report of Mattson's conduct.

With a good deal of hesitation I come to the conclusion that the written statement of the 10th June, 1904, upon which the bond of 16th June, 1904, was issued, can be invoked as part of the contract represented by the bond of 30th May, 1905. The statement is the only one in writing from the plaintiffs held by the defendants. The recital that the plaintiffs had delivered a statement in writing, &c., was true, and the defendants state that they made this statement a part of the bond. I must assume that the statement of the Mayor at the time it was made was authorized by the plaintiffs, and that the plaintiffs by accepting the bond—with that recital as stated—and with the condition in the body of the bond that "if the employer's written statement hereinbefore referred to shall be found in any respect to be untrue this bond shall be void"—must be bound by the statement.

The statement itself contains the following:

"It is agreed that the above answers are to be taken as conditions precedent and as the basis of the above bond applied for, or any renewal or continuation of the same that may be issued by the United States Fidelity and Guaranty Co. to the undersigned upon the person above named."

My conclusion is that the present bond is a renewal of the original insurance. There is much to be said against that

view. The bond itself in express terms makes the new bond a new contract. It states, beginning at line 100:

"The company upon the execution of this bond shall not thereafter be responsible to the employer under any bond previously issued to the employer on behalf of the said employee, and upon the insurance of any bond subsequent hereto upon said employee in favor of said employer, all responsibility hereunder shall cease and determine, it being mutually understood that it is the intention of this provision that but one (the last) bond shall be in force at one time unless otherwise stipulated between the employer and the company."

The former bond could have been continued, as the last one was. The company has a form of continuation or renewal certificate. It was argued that the statement was only part and parcel of the contract which expired in one year and which was not renewed within the meaning of the contract; as to which renewal or continuation has a definite meaning; but it expired; and as to the new bond the company did not ask for a new statement or report of any kind.

It is somewhat anomalous that the company can allow the bond to expire, and keep a statement on foot as the basis of a new bond. I come to the conclusion that the defendants can do this, only because of the want of care on plaintiffs' part in not making enquiry as to the written statement mentioned in the bond.

The plaintiffs are not bound by any alleged warranty of the truth of the statement. The plaintiffs did not execute the bond; the employee did.

Such a statement as defendants invoke might be true when made, and untrue at the expiration of the first year, so that a new statement in the same words could not be given. The defendants are getting the benefit of the falsity of a statement, if it was false, made in 1904, by making that statement do the double duty of being the foundation of a bond in that year and of another one in substitution in 1905, without the plaintiffs asking for such substituted bond.

In the case of *Youlden* v. *London Guarantee & Accident Company*, 4 O. W. N. 782, it was held that a renewal receipt, even after the lapse of a policy, was not a new unconditional insurance but that it carried on the old contract in its entirety. That differs from the present case in this respect;

the old bond was not carried on, the new bond alone is recognized both by plaintiffs and defendants.

In *Liverpool London & Globe Ins. Co.* v. *Agricultural Savings & Loan Co.*, 32 O. R. 369, it was held that a renewal was not a new contract of insurance. That is the converse of the present case.

I am of opinion that the old statements for the former bond can be read into the new contract and as the foundation of the bond sued upon.

Counsel for the plaintiff submitted that under ch. 203, sec. 144, sub-sec. 2 (R. S. O. 1897) the defendants could not rely upon the falsity of any statement in the writing mentioned; as the bond did not, in providing for the voiding of it, limit the untrue statements to those that are material to the risk.

In so far as defendants rely upon any mis-statement in the application, that objection is supported by *Village of London West* v. *London Guarantee & Accident Co.* (1895), 26 O. L. R. 520, but the main reliance of the defendants is upon the mis-statements in the writing itself, not the application. This is set out in the body of the bond. Having regard to *Jordan* v. *Provincial Provident Institution* (1898), 28 S. C. R. 554, and to *Venner* v. *Sun Life* (1889), 17 S. C. R. 394, I do not decide nor do I give effect to the plaintiffs' contention in this action upon that point.

In the case of *McDonald* v. *London Guarantee & Accident Ins. Co.* (1911), 19 O. W. R. 807, the recited statement in writing delivered by the employer expressly stipulated that the statements therein were to be limited to such statements as were material.

The case of *Hay* v. *Employers Liability Assce. Corp.* (1905), 6 O. W. R. 459, decides upon the authority of *Venner* v. *Sun Life*, 17 S. C. R. 394, *and Jordan* v. *Provincial Provident Institution*, 28 S. C. R. 554, that as the question of materiality in the answers to the statement in writing, is for the Judge or jury, it is unnecessary to set out in the policy in full the mis-statements relied upon or to allege their materiality. I am bound by this.

Also see *Elgin Loan & Savings Co.* v. *London Guarantee & Accident Co.* (1906), 11 O. L. R. 330.

The defendants apparently rely most strongly upon the statement of the Mayor in the writing referred to, as it

appears in the answers to questions 11 and 12 on that paper.

These are:

11 Q. To whom and how frequently will he account for the handling of funds and securities? A. He accounts to Treasurer daily, or when he has collected funds.

The answer was merely a statement of the collector's duty. That was true until the collector failed to do his duty, and appropriated money he ought to have paid to the treasurer. It was to prevent loss in case the collector failed to do his duty that the guaranty bond was secured.

Question—What means will you use to (a) ascertain whether his accounts are correct? (b)—How frequently will they be examined? Answer (a)—Auditors examine rolls and his vouchers from treasurer yearly. (b)—Yearly.

I am of opinion that these answers do not mean more, and that they were not intended to mean more, than that the Municipal Act requires a yearly audit, and that there would be such an audit; the Act would be complied with.

Section 295 of the Consolidated Municipal Act, 1903, provides for the appointment of a collector or collectors; and sub-section 3 of that section provides that the Council may prescribe regulations for governing them in the performances of their duty. There is no regulation governing them prescribed by statute, and the matter is left to the fair and reasonable discretion of the Council.

The plaintiffs' Council, on the 4th October 1893, passed a by-law requiring all municipal taxes to be paid on or before the 14th day of December in each year. This by-law was amended in a manner not material in this action, by a by-law dated October 6th, 1899.

Under the by-law of 1893, five per cent. had to be added to these unpaid taxes. To have that done, and to enable the Treasurer to make the return required of him, the collector was obliged to make a return to the Treasurer of all persons who had paid taxes on or before the 14th day of December, and at the same time he was required to pay to the Treasurer the amount of taxes so paid.

Section 292 provides that the Treasurer shall after the 14th December and on or before the 20th December prepare, and transmit to the Clerk of the municipality, a list of all persons who have not paid their taxes on or before the 14th day of December. This necessitates the examination of the

collector's roll for each year, down to the 14th December; and apparently no statutory duty is put upon the Treasurer to examine the collector's rolls other than to that date.

Section 299 provides for the appointment of two auditors by the Council of each municipality.

Section 304 defines the duties of these auditors. They shall examine and report upon all accounts affecting the corporation or relating to any matter under its control or within its jurisdiction for the year ending 31st December preceding their appointment.

The Treasurer of the village of Arnprior was a salaried officer, who also gave security to the plaintiffs by a bond of these defendants for the due performance of the duties of his office.

Section 290 prescribes the duties of the Treasurer, and section 291 states what books the treasurer is to keep. He must keep a cash book and journal; and in entering receipts of money in cash book it would seem to be sufficient to enter amount of money received from collector, without stating the persons from whom the collector received it, or on account of the taxes of any person. He should enter the date of payment of any tax money to him by the collector.

After the roll gets back t the collector, with the percentage added for collection, there is no statutory provision for any inspection of it.

Mattson saw his opportunity, and began to appropriate the money received by him from taxes unpaid on the 15th December, 1908, and unpaid on the roll on December 15th, 1909.

In interpreting the answer of the Mayor it should be remembered that the plaintiffs are a municipal corporation. Their work is done as prescribed by statute, and as to which the defendants know as much as the plaintiffs. They are presumed to know the law. The answers were given in perfect good faith.

I am able to find upon the evidence that there was no fraud or concealment of any kind, nor was there any wilful mis-statement on the part of the Mayor, Treasurer, or Clerk, or any officer of the plaintiff corporation, in obtaining the bond in question. I am of opinion that the answers of the Mayor—the statements in writing—are true in the way the Mayor understood the questions and in the way he wished

the defendants to understand them, and in the way the defendants did understand them.

It is alleged by the defendants that Mattson was in debt to the plaintiffs in June, 1904, and that the plaintiffs were aware of it or should have been aware of it, and that Mattson was in debt to the plaintiff corporation every year during the continuation of the bond and that the plaintiff corporation had knowledge of that condition of affairs.

There is no proof of any such indebtedness for the year 1907, or any year prior to that; and the plaintiff corporation had no knowledge of any such indebtedness, if any existed, in or prior to the year 1907.

I find against the defendants upon the eleventh, twelfth, and thirteenth paragraphs of the statement of defence. These have reference to the notice by the plaintiffs to the defendants of Mattson's default; and to the want of compliance by the plaintiffs with the conditions as to proof of loss. These conditions were reasonably complied with.

The defendants say that in the statement made in the application by Mattson for the issue of the bond, and the answers to the questions of the defendants by the plaintiffs therein, and the statements by the plaintiffs to the defendants mentioned before, were all untrue. I am of opinion that many of the statements were immaterial and that all of them were substantially true.

Going back to the statement of 10th June, there are seventeen questions, exclusive of some sub-divisions. In what I have said, I have dealt with questions 11 and 12. No argument can successfully be made in favour of the defendants upon the answers to 1, 2, 3, 4, 5, 8, 9, 10; and 17. This leaves 6, 7, 13, 14, 15, and 16 to be considered. Question 6 (a)—What will be the title of applicant's position? (b)—Explain fully his duties in connection therewith. Answer (a)—Chief of Police and collector of taxes. (b) To collect all taxes.

The answers are perfectly true; but the defendants say that additional duties placed upon the collector voids the bond. The alleged additional duties were the collection of license fees and water rates and fines and acting as sanitary inspector.

There is no evidence of his collection of any fine or license fees nor of his being authorized by the plaintiffs to

make such collections. If he did, he acted without authority from the plaintiffs, at the instance of the person liable.

"Sanitary Inspector" is not a district office. It was something fairly within the duty of Mattson as Chief of Police, to look after on his rounds.

There is no evidence that he acted as collector of water rates and if he did so act, there was no shortage in his water account. Although Mattson was called, he said nothing about making up shortage, if any, on water rates by payment out of tax money.

Question 7—(a) If the duties embrace the custody of cash, state largest amount likely to be in his custody at any one time? (b) And the average amount of daily handlings.

Answer—(a) $2,000. (b) $100 to $500.

It was stated by Mattson that on occasions when the heaviest taxes were paid, and paid by cheque, there was as much at one time as $8,000, including cheques, in his hands. Even if Mattson did have $8,000 in cash and cheques in his possession at one time, it was an exceptional thing—a thing not in the ordinary course likely to occur. The Mayor was only speaking of what was likely. Mattson stated in his signed application of the 19th May, 1904—which defendants put in as evidence—that the total amount handled by him during the year would be $18,000 or $19,000, and the largest amount apt to be under his control at any one time would be $1,000. Taking the largest amount for the whole year at $19,000, and allowing say a hundred days for collection, the average would be only $190 a day; much less than the maximum amount mentioned in the statement of the Mayor.

I find that the answers to question 7 are substantially true.

It was not shewn that the answers to questions 13, 14, 15 and 16 were not true. The onus was upon the defendants to shew the falsity if the answers were false.

No evidence was given to shew that there was any default or indebtedness prior to that of 1909.

I find that the defendants were duly notified in writing of Mattson's default, and that the defendants were furnished with proofs of their loss.

I further find that defendants requested that Mattson be prosecuted for theft or embezzlement, and that, as stated before, he was prosecuted and found guilty.

There will be judgment for the plaintiffs for five thousand dollars, with interest thereon from the 20th day of June, 1911, at five per cent. per annum; with costs.

Twenty days' stay.

HON. MR. JUSTICE BRITTON. JUNE 10TH, 1913.

FINLAYSON v. O'BRIEN.

4 O. W. N. 1440.

Contract—Proof of—Evidence—Signature of One Partner—Partnership Bound—Final Ajustment not Made—Action Premature.

BRITTON, J., *held*, in an action by sub-contractors for a balance due upon a contract for railway construction that the evidence established that the contract had provided that the settlement of balances was to await the settlement made by the contractors with the Commissioners building the railway and this not being made the action was premature and should be dismissed without costs.

Action for money alleged to be due from the defendants upon a contract between plaintiff and defendants for work on the construction of the National Transcontinental Railway. Tried at Ottawa without a jury, on April 25th, 1913.

J. A. Ritchie, K.C., for plaintiffs.

J. H. Moss, K.C. and J. Lorne McDougall, for defendants.

HON. MR. JUSTICE BRITTON:—In the year 1908, the defendants had a contract with the Transcontinental Railway Commission for the construction of a large section of the Transcontinental Railway east of Superior Junction. The plaintiff being a contractor entered into a sub-contract with the defendants, first for the construction of ten miles, a part of defendants' work. Afterwards the plaintiff and one J. R. Barry entered into partnership and contracted with the defendants, for the construction of an additional five miles, making fifteen miles in all, which the plaintiff and Barry were to build. They did the work and were paid for it, up to ninety per cent. of their claim. This action is for the remaining ten per cent. The amount has been arrived at, save and except, as defendants contend, the plaintiff and Barry are obliged to submit to any reduction that may result from a re-valuation of the work by the Chief Engineer for the Transcontinental Railway Commission. A settlement

has been made between plaintiff and Barry to the effect that of the amount claimed the plaintiff (Finlayson) will get $10,000 and two-thirds of the balance, and Barry will get one-third of such balance. This settlement was made between plaintiff and Barry, with the knowledge and consent of defendants. The plaintiff alleges that the defendants agreed to pay the amount on the first August, 1911. This the defendants deny.

The amount sued for is $18,216.44 with interest from 1st day of August, 1911.

There was no contract in writing between the defendants and the plaintiff. The written contract signed by Barry, I will speak about later. The negotiations were as follows: The plaintiff saw the defendant Alexander McDougall in September, 1908, and had with him a general conversation about the work, its location, prices, &c. McDougall invited the plaintiff to go out and look the matter over. The plaintiff went, and upon a view of the location at first concluded not to have anything to do with it and wired McDougall to that effect.

Plaintiff returned to Ottawa. Negotiations were renewed. The principal difficulty was that plaintiff was unwilling to take the contract at the prices offered, and McDougall was not willing to pay more. Finally some concession was made and it was supposed by both parties that a satisfactory agreement had been arrived at. This was to be reduced to writing, but the plaintiff never signed any writing, nor was he personally asked to do so.

Some time after a written contract was submitted by defendants to Barry, and he, as a partner of plaintiff, signed it.

This contract is upon its face dated 1st October, 1908, and purports to be between defendants "as employers" of the one part, and "Finlayson & Barry" as contractors, of the other part. Defendants say that this contract is in its terms, the contract as verbally made by plaintiff and McDougall, and further that even if not in every respect the same as the verbal agreement, it is the one finally accepted by the plaintiff; and even if not accepted by the plaintiff it is binding upon him, having been signed by his partner, Barry.

I have to decide upon conflicting evidence. It is common ground that whatever was agreed upon, was to be reduced to writing. The defendants had in their possession the printed forms of contract which were used by them in all cases, so

far as appears, with their contractors for portions of the work. The plaintiff was an experienced man, familiar with the form and substance of similar contracts for the kind of work he was to do.

A contract in regard to other work, similar to the one signed by Barry, was signed by the plaintiff. That was a contract between plaintiff and McDougall & O'Brien, dated 4th June, 1906.

It is in evidence that the plaintiff said he would be satisfied with the contract if the same as that with O'Brien, as that was a fine contract. Upon the evidence I must conclude that the real contract between these parties was, except as to prices and some minor matters not in dispute, the same as the contract between the defendants and the Transcontinental Railway Company, so far as the latter contract can apply to subcontractors. Coming to that conclusion, I think the contract signed by Barry is binding upon the plaintiff. Apart from the question of acquiescence that contract is binding as it is practically and in all respects material in this action the same as the verbal contract entered into.

There are, no doubt, small differences. These were mentioned as having been assented to by defendants, not as concessions upon matters in dispute, but as according to the contract contended for by the plaintiff.

The real contract was substantially what is set out in the writing signed by Barry.

As to acquiescence, the plaintiff was angry and used strong words when he first learned that Barry had signed; but instead of insisting that Barry should repudiate it, he advised the contrary. He took the position that the contract signed only by Barry and signed in Barry's individual name and not for the firm, was not binding upon him.

In the view I take of the case it is not necessary that I should decide, or discuss, that point further. The defendants relied upon what Mr. McDougall stated to be the contract, and that in any event Barry could and had bound the firm, and so took no further steps to attempt to get the contract signed by plaintiff.

If that is the contract between the plaintiff and defendants then the plaintiff is bound by the terms in the contract between defendants and the Transcontinental Railway Company.

This action is for the last ten per cent. of amount to be paid to the plaintiff and Barry.

Payments are to be made "in the following manner: Within five days from the time the employers shall receive any payment from the commissioners in respect of the said works covered by this agreement, they shall pay to the contractor ninety per cent. of the value of the work, in respect of which the payment is made, based on the annexed schedule of prices, less moneys paid or assumed on account of contractor as above provided," "and less any moneys due by the contractor or assumed by the employer, the remaining ten per cent. is to be paid forthwith after the employer shall have been paid in full by the commissioner." In computing the amount of work done under this agreement, the quantities in respect of which the commissioner shall have paid the employers shall be the quantities to be paid for by the employers to the contractors."

The matter of final settlement between defendants and the Transcontinental Railway Commission is in some way held up. This is hard upon the defendants, but more so upon the plaintiff. I cannot say that there is any blame to be attached to the defendants. It did not appear what, if anything, has been done by the defendants to attempt to hasten a settlement. The plaintiff is powerless, and, according to the evidence, a large amount of money is held from him.

The Commission claims the right to make a re-valuation, and to make reductions, if found necessary as the result of revaluation.

If it was the intention of the Commission to do this, why has it not been done before now? It is singular that in reference to a part of their great work, completed in 1910, the contractors should be until now without a settlement and with no immediate prospect of a settlement being made.

The action must be dismissed as premature, but without prejudice to any future action, if necessary, upon the defendants being paid or settled with by the Commission or upon new or other facts and circumstances.

The dismissal of the action will be without costs. Thirty days' stay.

HON. MR. JUSTICE MIDDLETON. JUNE 10TH, 1913.

KNIBB v. McCONVEY.

4 O. W. N. 1417.

Vendor and Purchaser — Specific Performance—Vendor to Prepare Deed—Default as to—Tender of Deed from Registered Owner — Attempted Rescission by Vendor — Specific Performance Decreed.

MIDDLETON, J., *held*, that where a vendor under an agreement of sale is given the deed at his own expense it is his duty to prepare the same and tender a draft thereof and a tender of a deed from the registered owner, not himself, is not a tender in accordance with the contract.

Foster v. *Anderson*, 15 O. L. R. 362, followed.

Action by purchaser for specific performance, tried at Toronto on June 4th, 1913.

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

J. M. Ferguson, for defendant.

HON. MR. JUSTICE MIDDLETON: — By agreement dated 25th February, 1913, the defendant agreed to sell the lands in question to the plaintiff. At this time the title was vested in the Title & Trust Company; the defendant having a contract with them under which he was entitled to call for a conveyance upon payment of his purchase money.

By the agreement the price, $6,300, was to be paid, $200 on the execution of the agreement and the balance on the completion of the sale, which was to be on the 10th of March, 1913.

Time is said to be of the essence of the agreement, but there is no forfeiture clause. The agreement provides that the deed is to be given at the expense of the vendor.

The $200 was paid; the title was searched and found satisfactory; and the purchaser had every intention of completing his contract. On Saturday, March 8th, no draft deed having yet been prepared or submitted by the vendor, the vendor wrote a letter to the purchaser's solicitors, which reached them on the morning of March 10th. After referring to the contract and to the provision that time was of its essence, he proceeds:

"I therefore give you notice that on the 10th day of March, 1913, I will tender the executed deeds for this parcel of land at your offices in the Canada Life Building, King

Street, Toronto. Therefore, if this sale is not closed on the 10th day of March, 1913, I will cancel this sale."

The purchaser's solicitors communicated with their clients and with the vendor, and an appointment was made for 2.30 p.m. to close the matter. Neither the vendor nor the purchaser kept this appointment. The solicitor had not been placed in funds. At 3.30, or a little later, the vendor went to the office, dramatically produced deeds from the Trust Co. to the purchaser, and demanded the money and an undertaking from the solicitors that the purchaser would execute the conveyance. The purchaser not being there, the solicitors stated that they would try to reach him by telephone, and asked the vendor to call later. The endeavours of the solicitors to find the purchaser were unsuccessful. At 4.30 the vendor returned, again he produced the deeds, and, the money not being forthcoming, said that he called the transaction off.

On each occasion the purchaser was accompanied by a clerk from the Title & Trust Co., whose instructions did not permit him to part with the conveyances unless the money was paid and the deed signed by the purchaser, or an undertaking received from the solicitor that it would be so signed. The vendor had given his own cheque to the Title & Trust Co., but it was worthless until the purchase price was deposited to meet it. The next day the balance of the purchase money was tendered and refused. This action followed on the 13th of March.

Foster v. *Anderson,* 15 O. L. R. 362, shews that where the deed is to be given at the expense of the vendor it is the duty of the vendor to prepare the deed. In this case the vendor not having submitted a draft deed, and not having complied with the request made to him in the letter of March 10th, to hand the deed to the purchaser's solicitors for execution by the purchaser, "this being necessary because of certain covenants in the nature of building restrictions," was himself in default. Apart from this, the deed tendered was not in compliance with the contract. It would no doubt operate as a good conveyance; but the purchaser was entitled to have the vendor's own covenants, and was only bound to covenant with the vendor and not with the Title & Trust Co. The difference between the deed tendered and the deed to which the purchaser was entitled may or may not be material; but before the purchaser can be regarded as in

default the vendor must be himself blameless with respect to matters concerning which the onus is upon him.

In *Boyd* v. *Richards* I have discussed the effect of the recent decision in *Kilmer* v. *British Columbia Orchard Lands*, [1913] A. C. 319, and need not here repeat what is there said. If necessary, I would, in this case, relieve from forfeiture.

I should mention the fact that copies of two letters were produced and marked, upon the assumption that they would be proved to have been sent. No such proof was given; and I think that these letters, if sent, did not relate to this transaction, but to a transaction in respect of lands on Rutland avenue.

Judgment will, therefore, go for specific performance. The costs should be deducted from the purchase money.

MASTER-IN-CHAMBERS. JUNE 10TH, 1913.

RUNDLE v. TRUSTS & GUARANTEE CO.

4 O. W. N. 1438.

Discovery—Further and Better Affidavit on Production—Action to Re-open Accounts—Privilege — Necessity for—Prima Facie Case—Rule as to Discovery Generally—Costs.

MASTER-IN-CHAMBERS, in an action to set aside a release and for a re-opening of certain estate accounts, ordered that production should be made of the estate papers even though plaintiff had not established a *prima facie* right to the relief sought.

Motion by plaintiff for a further and better affidavit on production by an officer of defendant company.

W. E. Raney, K.C., for plaintiff.

Casey Wood, for defendant.

CARTWRIGHT, K.C., MASTER:—This action is to set aside a release by the plaintiff, C. A. Rundle, to the defendants, as administrators of his mother's estate, and to reopen the accounts which, on 22nd December, 1909, were passed in the Surrogate Court in his absence on the strength of a letter which he was induced to sign after it had been prepared by the defendants. In this he was made to say that he had carefully examined the accounts and was

quite satisfied with them and did not desire the company to produce vouchers on the audit.

The grounds of objection to the affidavit are two. In the first place it is said the mention of the documents in the second part of the first schedule is too vague and indefinite and in no way complies with the principle affirmed in *Swaisland* v. *G. T. R.*, 3 O. W. N. 960, at p. 962.

In the affidavit these documents are said to be: "Statements, estate vouchers, receipts for pass books, cheques, submitted to C. A. Rundle through the Waterbury National Bank when release executed by him; letters, vouchers, books, documents referring to and connected with the administration of the estate of Lily Rundle." This is clearly insufficient, as it does not identify them in any way.

As set out in paragraph 5 of the affidavit in question, the refusal to produce these documents is based on the fact that they all relate to the administration of the estate of plaintiff's mother and of his own, and that the defendant company has passed its accounts before the Surrogate Court and secured its discharge as such and has duly accounted to plaintiff for the balance found to be in the hands of the company by the orders of the Surrogate Court, and has received from him the full release set out in the pleadings. This is substantially an assertion that these documents are not relevant to the issue to be tried, and that these documents are only to be produced after the plaintiff has established his right, and to have the release set aside and to be allowed to attack the orders of the Surrogate Court, assuming that he can do so in this action.

In cases such as *Adams* v. *Fisher*, 3 M. & C. 526, where plaintiff has to establish his right to an account, only what is relevant to that issue will be ordered to be produced. See, too, *Sheppard Pub. Co.* v. *Harkins*, 8 O. L. R. 632. But where the existence of a fiduciary relationship is admitted, and, "where it does not clearly appear that the documents mentioned are immaterial to the question to be decided at the trial, production would be ordered." See Bray on Discovery, 32. So far as appears in the present case, no examination of the accounts has been made by the *cestui que trust* or any one on his behalf. And there are two reasons given in favour of full discovery at once by Bray, p. 28, which might be found applicable to the present action. The 7th paragraph of the statement of claim alleges negligence by the defendants in respect of the personal belongings and

household goods of the deceased. As to this issue production would certainly be relevant as well as to the negligence and improvidence in management of the estate alleged in paragraphs 10 and 12 especially.

A further affidavit should be filed in accordance with the above. The costs of the motion will be costs to plaintiff in the cause.

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HON. MR. JUSTICE LENNOX. JUNE 5TH, 1913.

EMMONS v. DYMOND COLONIAL CO. LIMITED.

4 O. W. N. 1405.

County Courts—Removal of Action to Supreme Court of Ontario—10 Edw. VII. c. 30, s. 22, s.-ss. 3, 5, 6, 23 and 29—"Fit to be Tried in the High Court"—Meaning of.

BRITTON, J. (24 O. W. R. 657) dismissed an application to transfer an action from the County Court of Middlesex to the Supreme Court of Ontario, upon the ground that no sufficient reason therefor had been shewn.

Re Aaron Erb No. 2, 16 O. L. R. 597; *Hill* v. *Telford*, 12 O. W. R. 1056, referred to.

LENNOX, J., refused leave to appeal from above judgment.

Application for leave to appeal from judgment of HON. MR. JUSTICE BRITTON (24 O. W. R. 657.)

E. C. Cattanach, for the defendant.

R. U. McPherson, for the plaintiff.

HON. MR. JUSTICE LENNOX.—I cannot say that there is "good reason to doubt the correctness of the judgment" of His Lordship Mr. Justice Britton pronounced herein on the 27th day of May, 1913, and it would be necessary for me to entertain this opinion as well as that important matters are involved before I could make an order under Rule 1278. The application for leave to appeal is refused. Costs to be costs in the cause.

HON. MR. JUSTICE LATCHFORD. JUNE 11TH, 1913.

SIMONS v. MULHALL.

4 O. W. N. 1424.

Landlord and Tenant—Damages for Overholding—Counterclaim—Conversion of Tenant's Fixtures—Degree of Annexation—Bar Cabinet—Costs.

LATCHFORD, J., gave the owner of certain hotel premises $260 damages against defendant for overholding the same and defendant $300 damages upon a counterclaim for conversion of certain tenant's fixtures such as a bar cabinet and beer pump, converted by plaintiff to his own use.

Action by the owner of certain hotel premises against a tenant for wrongfully overholding the same, and counterclaim for certain alleged fixtures converted by plaintiff to his own use.

E. G. Porter, K.C., and A. A. McDonald, for plaintiff.

F. M. Field, K.C., for defendant.

HON. MR. JUSTICE LATCHFORD:—As I intimated upon the argument, the notice which the defendant gave after the expiration of his term, was not effective to renew the lease. Accordingly the plaintiff, as purchaser of the reversion, and as assignee from the lessor of the lease made by the defendant, became entitled at the end of the term to possession of the leased premises and to the benefit of all covenants made by the lessee, including a right to the transfer of the hotel license "without any expense or charge, upon demand."

Mulhall appears to have acted in good faith though erroneously, in thinking himself entitled to the additional term of two years. By his refusal to give up possession until removed on the 9th July, under an order made pursuant to the Overholding Tenants Act, he caused substantial damage to the plaintiff. The profits which the plaintiff thus lost are, I think, greatly exaggerated in his evidence. He places the net earnings of the dining-room and bed-rooms at $10 a day. The bar receipts averaged about $40 daily, from the 30th July to the 14th August, and on this, 50 per cent. is sworn to be profit. The stables brought in $1 additional. The defendant says the receipts from the dining-room, bedrooms and stables were about $4 a day, and that the bar produced an average of $30. I am disposed to discount not

a little the estimate of the plaintiff as to the net earnings of the hotel at the time of the contest for possession. It is exceedingly difficult upon the evidence to say with any degree of accuracy, what profit the plaintiff lost between the 24th June and the 9th July, but, from the best consideration I have been able to give to the point, I estimate his loss at $10 a day. This loss continued after he obtained possession, owing to the refusal of the defendant to sign a transfer of the liquor license or permit. The transfer was, however, signed on the 25th July. For any subsequent delay I do not regard the defendant answerable, nor do I think he should be held liable for the expense the plaintiff was at in interviewing the License Commissioners, employing counsel, or enlisting the services of persons assumed to have influence with the Commissioners and others. Between June 24th and July 25th, there were twenty-six days on which the bar—from which the profits were, I think, wholly derived—might have been open, had the defendant conformed to his covenants. The plaintiff's loss at the rate stated is $260; and for this he is to have judgment with costs on the County Court scale.

The counterclaim of the defendant is for the conversion by the plaintiff of certain fixtures. At the trial this claim became restricted to the following articles which the plaintiff claimed as part of the freehold, and refused to deliver to the defendant; one large mirror, a beer cabinet, a beer and a porter pump, and a bar cabinet.

Quite clearly the defendant is entitled to damages for the conversion of the mirror, which rests upon a mantel and is suspended from the wall by a wire, and may be removed as readily as a picture hung in the same way.

When the defendant leased the premises from Golding, the plaintiff's predecessor in title, the bar fixtures mentioned were sold to him with the furniture and other movables, for $3,500. The lease contained a provision that Mulhall might remove fixtures. As between Mulhall and Golding, the cabinets and pumps were in fact as well as in the common intention of the landlord and the tenants, trade fixtures which the tenants had the right to remove at the end of the term or within a reasonable time afterwards—if such removal could be effected without material damage to the freehold. Whether the articles in question are affixed by screws and bolts, as the

defendant contends, or in the case of the bar cabinet, by nails, as asserted by the plaintiff—though he is not supported in this by his expert witness—they cannot in circumstances establishing beyond question that they were intended by lessor and lessee to continue chattels be regarded as part of the freehold—at least as between tenant and landlord. The defendant has amply satisfied the onus which the law casts upon him.

The plaintiff is not, in my opinion, in any higher position than that which Golding would occupy had he not sold the hotel. Simons purchased the property subject to the lease, and with knowledge of the right possessed by the defendant to remove the fixtures which he had bought from Golding. He wrongfully withheld these chattels when they were claimed from him by the defendant. The mirror I find worth $10; the bar cabinet $250; the beer cabinet and pumps $40. There are some other articles of trifling value in question which were not demanded. These, I understand, the plaintiff is willing to deliver to defendant. There will be judgment upon the counterclaim for $300 and costs.

Reference to *Argles* v. *McMath* (1895), 26 O. R. 224; *Slack* v. *Eaton* (1902), 4 O. L. R. 335, and *Re Chesterfields Estates*, [1911] 1 Ch. 237.

HON. MR. JUSTICE MIDDLETON. JUNE 11TH, 1913.

KLING v. LYNG.

4 O. W. N. 1422.

Vendor and Purchaser—Reformation of Agreement for Sale—Evidence—Terms.

MIDDLETON, J., gave judgment for the reformation of an agreement to sell certain lands and for specific performance thereof, but as the mistake was the fault of plaintiff upon terms that he pay the costs of the action.

Action for reformation of an agreement to sell certain lands and for specific performance. Tried at Toronto on the 2nd and 5th of June, 1913.

Wm. Proudfoot, K.C., for plaintiff.

R. R. Waddell, for defendant.

HON. MR. JUSTICE MIDDLETON:—Mary Lyng was the owner of lot 27 on Mansfield avenue, Toronto, subject to a certain mortgage for $750, erroneously assumed at the time

of the sale to be for $700. Her husband made an agreement in his own name with Gustav Kling and his brother for the sale of the house for $2,675. This agreement was in writing, but is not produced; and it was prepared by a young lady then living with the Lyngs, who is not called as a witness by either party.

Kling, realising that the agreement with the husband was not satisfactory, asked Mrs. Lyng to execute a formal contract, and took her to his solicitor, Mr. Melville Grant, for the purpose of having this drawn. Mr. Grant prepared the document produced, dated 12th March, 1912, by which Mrs. Lyng agreed to sell this property for $2,675, payable $100 as a deposit, $700 by the assumption of the first mortgage, $1,000 by a second mortgage, the balance in cash on the closing.

Mr. Kling and his solicitor, Mr. Grant, now both depose that this was not the bargain, but that the true bargain was that the second mortgage should be subject not to the $700 mortgage existing against the property but to a mortgage for $1,500 which Kling was to place upon the property in substitution for the $700 mortgage, which would fall due in a comparatively short time. Mr. Grant says that he knew and understood this, but did not put it in the written document because he was acting for both parties and he intended to provide for this in the conveyancing. A more unsatisfactory statement it would be hard to conceive.

The transaction was in due course carried out, and Mrs. Lyng received her mortgage, which contained a clause at the end: "the mortgagor to have the privilege of raising a first mortgage for any amount up to $1,500 in priority to this mortgage, said mortgagee will consent thereto and execute any necessary documents to permit of such priority and will consent to renewal or replacement of said such mortgage whenever necessary at the cost, however, of the said mortgagors."

This mortgage was executed by the mortgagor only, and Mrs. Lyng was not asked to sign it. The evidence that she knew of the insertion of any such clause is most unsatisfactory. It is said to have been read to the mortgagor, and it is said that she was present and could have heard if she had tried. No explanation was given to her at the time the transaction was closed; it being assumed that she knew.

Mrs. Lyng states that she left the transaction entirely in the hands of her husband. He is now dead. She has no

recollection of the details of the transaction, and probably never understood it at all, but merely signed at the request of her husband documents which he may or may not have understood.

Kling placed a first mortgage upon the property, and then brought this action to have the agreement reformed and for specific performance. He has since sold the property, so that the transaction cannot be rescinded.

There being no contradiction of the solicitor's statement, there is nothing to lead me to believe that he is not stating the facts, and I do not see how I can disregard his evidence. Accepting it, I think the contract must be reformed; although in adopting this course I fear that I may be doing the defendant injustice. Had the husband been alive and had he contradicted the plaintiff and his solicitor, I would not have given effect to the latter evidence; and it may be a serious misfortune to the defendant that her husband, manifestly a most material witness on her behalf, is not now here to give his evidence. Yet, weighing this, and realising that the husband was alive when the defence for the action was undertaken, I cannot bring myself to disregard the evidence given.

The mistake in the preparation of the agreement is the fault of the plaintiff and his solicitor, and I think I am warranted under the cases in giving relief only upon the term that as a condition precedent the plaintiff pay not only the costs of the action, but all the instalments of principal and interest which have fallen due under the mortgage.

HON. MR. JUSTICE BRITTON. JUNE 12TH, 1913.

SMYTH v. McLELLAN ET AL.

4 O. W. N. 1442.

Conversion—Wrongful Seizure of Saw-mill—Damages—Quantum of.

BRITTON, J., gave judgment for plaintiffs for $1,400 damages for the wrongful seizure of a saw-mill and appurtenances by defendants, prospective purchasers thereof.

Action for the recovery of a saw-mill and machinery and appurtenances, which the plaintiff owned and of which the defendants took possession and converted to their own use. Tried at Toronto without a jury.

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

G. F. Mahon, for defendant.

HON. MR. JUSTICE BRITTON:—The plaintiff was anxious to sell the property and Geo. Ross, a solicitor of Cobalt, was acting for the plaintiff—in attempting to find a purchaser. The defendants appeared willing to buy for the sum of $1,400, and the terms of payment were satisfactory, but the defendant, without waiting for a bill of sale to be prepared and signed by the plaintiff, without paying any money, or giving any notes or security for payment of the mill and machinery, took possession of it and now retains possession against the will of the plaintiff. The defendants say that Geo. Ross, the solicitor of the plaintiff, gave them permission to take possession. This is denied by Ross, and it is also denied both by Ross and the plaintiff, that Ross had any authority to close the sale or give possession. I accept the testimony of Ross, that the defendants were not given possession of the mill or machinery or any part of it, and that the taking possession by the defendants was wrongful. The defendants knew that the plaintiff was the owner, and that if any sale was to be completed it must be by the plaintiff. The defendants knew that the payment had to be made to plaintiff—and security arranged with him. During the earlier part of the negotiation I think the defendants acted with perfect good faith, but finding Mr. Ross not as attentive as he should have been, the defendants wrongfully, as I find, took the matter in their own hands, and took and retained the property.

There will be judgment for the plaintiff; no doubt the cost and original value of the property was considerably more than $1,400—probably as much as $3,900—but, considering it as second hand, and where the property was situate, and that the plaintiff was willing to sell for $1,400, I think the damages should be $1,400 and interest from 18th December, 1911.

The plaintiff is entitled to a declaration that the existing lien upon the property is valid until payment in full, and that the plaintiffs are entitled to the property until this judgment is fully satisfied. The plaintiff is entitled to the money paid into Court to be applied by them in part payment of the judgment herein. The defendants must pay costs—and on the High Court scale.

Thirty days' stay.

HON. MR. JUSTICE MIDDLETON. JUNE 11TH, 1913.

WIDELL CO. & JOHNSON v. FOLEY BROS.

4 O. W. N. 1419.

Action—Authority to Bring—Repudiation by Member of Alleged Partnership — Foreign Corporation — Stay of Proceedings—Terms—Costs.

MASTER-IN-CHAMBERS (24 O. W. R. 636) stayed an action brought by an alleged partnership, where one of the alleged partners, a foreign corporation, disclaimed all responsibility for the action and claimed that the partnership had terminated, without prejudice to the remaining partner's rights to proceed with the action in another form.

Barrie Public School Board v. *Barrie*, 19 P. R. 33, referred to.

MIDDLETON, J., *held*, that the proper order to make under the circumstances was that the dissenting partner should be eliminated as a plaintiff and made a defendant and leave given to serve it out of the jurisdiction and make all appropriate amendments.

Re Matthews, Oates v. *Mooney*, [1905] 2 Ch. 460, followed.

Appeal by the plaintiff from the order of the Master-in-Chambers, 24 O. W. R. 636, dated 23rd May, staying the action.

G. S. Hodgson, for plaintiffs.

R. McKay, K.C., for defendants.

HON. MR. JUSTICE MIDDLETON:—It is conceded that Widell Co. and Johnson carried on business together in partnership, so far at least as the transaction in question is concerned, under the above-mentioned firm name.

It is clear law that a partner may sue in the name of his firm, but if his co-partners object he may be ordered to give the objecting co-partner security against the costs of the action. See Halsbury 22 p. 41; also *Seal* v. *Kingston* (1908), 2 K. B. 579.

Widell & Co., the objecting co-partners in this case, are out of the jurisdiction, and have notified the defendants that they are not party to this litigation; and, fearing to attorn in any way to this jurisdiction, they decline to make the motion necessary for protection.

The true solution of the situation is that indicated in *Re Matthews, Oates* v. *Mooney*, [1905], 2 Ch. 460. The name of the Widell Co. should be eliminated from the style of cause, and it should be added as a party defendant. Leave should now be given to serve it out of the jurisdiction and to make all appropriate amendments.

The term imposed in *Re Matthews*, that security should be given for the costs of the defendant, cannot properly be imposed here. The foundation for it in that case was the fact that the dissenting plaintiff had become liable for costs by assenting to be a plaintiff in the first instance.

The costs before the Master and of this appeal should be to the defendant in the cause.

HON. MR. JUSTICE MIDDLETON. JUNE 11TH, 1913.

PHILLIPS v. MONTEITH.

4 O. W. N. 1420.

Vendor and Purchaser—Claim of Municipality as to Arrears of Taxes —Dispute as to—Right of Purchaser to make Deduction.

MIDDLETON, J., *held*, that where a municipality claimed taxes to be in arrear upon certain lands, and the owner relied in answer to their claim upon a certificate furnished him that there were no arrears of taxes, that a purchaser was justified in deducting from the purchase price sufficient to meet the alleged claim of the municipality.

Motion for judgment on affidavits in an action upon a cheque for $3,900, the parties consenting that their substantive rights and the question of costs should thus be dealt with.

F. Aylesworth, for plaintiff.

T. H. Peine, for defendant.

HON. MR. JUSTICE MIDDLETON:—Monteith Bros., the defendants, purchased certain lands from the plaintiff for $4,000. A declaration was made by the plaintiff at the time of the closing of the transaction, that there were no taxes or incumbrances upon the land. Upon the strength of this a cheque was given for the full balance of the purchase price.

The defendants stopped payment of the cheque, because they learned, as they say, that $47 arrears of taxes existed against the property. The bank was, however, authorised to pay the cheque if the $47 to meet these taxes was retained. Phillips refused to assent to this, claiming that he had searched in the Sheriff's office and ascertained that there were no arrears of taxes against the land.

It appears that a son of Phillips had been in possession of the lands and was primarily liable for the payment of these taxes. When the roll was placed in the collector's hands, the collector threatened to distrain. Young Phillips then persuaded the collector to make a false return shewing that the taxes had been paid; young Phillips promising to ultimately pay the amount to the collector. This payment has never been made; and the township now claim that the false return made by the collector, certifying to a payment which has never in fact been made, does not operate to discharge the land. Phillips, senior, claims that his land is exonerated and that the township must look to the collector and his sureties, or to the son.

This action is now brought upon the cheque for $3,900. Monteith Bros. are ready to carry out the sale and pay the whole price if they are allowed either to deduct the amount in question or if they receive security.

I do not think that Phillips can call upon them to accept the risk of the township being sustained in its contentions. It may be that the certificate which has been issued will serve to protect Phillips from any claim; but this is his concern, and he is quite wrong in seeking to shift to the purchaser the onus of resisting the township.

The proper solution of the matter is to allow the whole price to be paid to Phillips upon his giving to Monteith Bros. an indemnity; or a sufficient sum to adequately protect them should be deducted from the purchase money and be retained in Court pending the final adjustment of the dispute.

As in my view Phillips has been wrong throughout, the defendants should be allowed to deduct their costs from the purchase price.

I do not understand that there is any question of interest upon the purchase money. If there is, I may be spoken to with reference to it.

MASTER-IN-CHAMBERS. JUNE 11TH, 1913.

BERLIN LION BREWERY v. LAWLESS.

4 O. W. N. 1441.

Judgment—Summary Judgment—Con. Rule 603—Action on Promissory Notes—Prima Facie Defence Shewn—Failure of Motion.

MASTER-IN-CHAMBERS refused to give summary judgment upon two promissory notes where defendants swore that they were given for accommodation only.

Smyth v. *Bandel*, 23 O. W. R. 649, 798, followed.

Motion for summary judgment under Con. Rule 603 in respect of two promissory notes for $3,000 each.

W. H. Gregory, for motion.

H. J. Macdonald, contra.

CARTWRIGHT, K.C., MASTER:—On 15th November, 1912, defendants gave the plaintiff company a mortgage on lands in the city of Ottawa for $6,000 payable 2 years after date. At the same time they gave 2 notes of $3,000 each, payable 3 months after date. The real indebtedness had not at that time been ascertained. These notes have admittedly not been paid. The plaintiff now moves for judgment on them for an alleged balance of not quite $5,000.

The defendant, J. A. Lawless, makes an affidavit that when he and his wife, the co-defendant, gave the mortgage and notes it was agreed that the notes were given at plaintiff's request, so that they could be used with the bank; but that they were only for plaintiff's accommodation and were to be renewed during the currency of the mortgage. It does not appear whether these notes were given at or after the execution of the mortgage.

The defendant has not been cross-examined; the president of the plaintiff company was cross-examined. He will not admit the defendant's contention that the mortgage was the real security. He says, however, (Q. 114 *et seq*) that he went to Ottawa where the defendants were apparently residing at the time, and threatened action. He went to Ottawa specially for the purpose of getting "the matter straightened out." When the defendant suggested a mortgage, the president said "quite satisfactory," and at Q. 117, "we took the notes and made use of them."

In view of these admissions and the defendant's affidavit, the motion cannot succeed. It may be that the doctrine of merger will apply, as the defendants are joint mortgagors and the notes apparently are several only. The case may be ruled by *Wegg Prosser* v. *Evans* [1895], 1 Q. B. 108. See Odgers' Brooms C. L. 669, and cases there cited.

However this may be decided, it seems clear that this is not a case for summary judgment, and the motion is dismissed with costs in the cause. See *Smyth* v. *Bandel*, 23 O. W. R. 649, 798. The second decision was affirmed on appeal on 20th December, 1912, by Middleton, J.

YORK COUNTY COURT.

JUNE 14TH, 1913.

WATERS v. TORONTO.

Malicious Prosecution—Municipal Corporation—Liability for Acts of Mayor and Board of Control—Arrest of Employe of Power Company—Charge of Disorderly Conduct—Costs.

DENTON, Co.C.J., *held*, that neither the mayor nor the Board of Control of a city have any authority to bind the city by their acts in procuring an illegal arrest, and the city is, therefore, not liable to the person so arrested in damages therefor.
Kelly v. *Barton*, 26 A. R. 608.

Action for malicious prosecution and false arrest, arising out of the arrest of plaintiff on October 30th, 1912, by certain police officers while engaged in erecting poles at the corner of Davenport road and Bathurst street, Toronto, for the Toronto and Niagara Power Company, for whom he was employed and his subsequent prosecution upon a charge of disorderly conduct. The jury found a verdict for plaintiff for $75, but judgment was reserved upon defendant's motion for a non-suit.

H. H. Dewart, K.C., and N. S. Macdonnell, for plaintiff.

Irving S. Fairty, for defendants.

HIS HONOUR JUDGE DENTON:—At the close of the plaintiff's case defendants moved for a non-suit on the ground amongst others that assuming the plaintiff's arrest and prosecution to have been at the request of the then

mayor of the city is not liable for such act of the mayor. With a view if possible to avoiding the necessity for a new trial in case a non-suit should be improperly granted judgment was reserved on the motion until after the verdict was taken. The motion must now be disposed of.

The question whether an act done by an agent or employee or officer is done within the usual scope of the agency or employment or duties is usually one for the jury. Bevan 3rd ed., vol. 1, p. 583. *Whatman* v. *Pearson*, L. R. 3 C. P. 422; *Bernstein* v. *Lynch*, 4 O. W. N. 1005, at p. 1007, but the question whether there is any evidence upon which the jury could reasonably find that what was done was done within the scope of the employment or agency or duties is, manifestly, for the Judge.

There was evidence in this case proper to be submitted to a jury, that the arrest of the plaintiff was made under the authority, and as a result, of the mayor's letter to the chief constable of October 2nd, 1912, and the jury might infer from the resolution of the Board of Control of October 8th, 1912, that the method adopted by the mayor to prevent the erection of poles and towers met with the approval of that board.

The highest ground upon which the plaintiff can put his case is that the arrest was made at the instance or request of the mayor and that what the mayor did was sanctioned by the Board of Control. The matter was never brought to the attention of, nor was it dealt with in any way, by the city council.

In *Kelly* v. *Barton*, 26 A. R. p. 608, the facts proved in evidence were that the mayor called a meeting of the executive committee of the city council, that he then stated to the committee that he had as mayor given instructions to stop all busses on the following Sunday, and that on these instructions the plaintiff was arrested, and that he wanted the committee to protect the police by employing a lawyer to defend the action brought against them. The committee did as the mayor requested. It was sought to make the city liable in that case on the ground that the mayor had authorised the arrest and on the further ground that the city had ratified what had been done by undertaking to defend the constables. The Chancellor held, in a judgment which was upheld in the Court of Appeal (22 A. R. 522), that there could be no liability on the part of the city in such a case. If we substitute poles and towers for motor

busses and board of control for executive committee I can see no real difference between *Kelly* v. *Barton* and the present case. It was argued in that case as in this that the duties and power of the mayor as defined by sec. 279 of the Municipal Act are wide enough to include the act of the mayor in authorising an arrest for a breach of a municipal by-law. But this argument did not prevail. Little help can be derived from the general law of principal and an agent or master and servant. The powers and duties of the mayor are defined by statute. The things he may lawfully do for the city without the sanction of the council are very limited, and certainly the causing or authorising an illegal arrest is not among them. The matters in respect of which the board of control may bind the city without the sanction of the city council are few and well defined, and ratifying the act of its mayor in causing an illegal arrest is not among them.

The result is that while the jury has found as a fact that what the mayor did was within his duties as mayor, it is my duty to rule as a matter of law that there was no evidence proper to be submitted to the jury, upon which they could so find.

While there must be a non-suit, it will be without costs and for this reason: The action of the mayor in making use of the city police to prevent the plaintiff as an employee of the power company from doing that which, under the decision of the Judicial Committee of the Privy Council rendered in the previous July in the North Toronto case he had a perfect right to do and which to the knowledge of the mayor he could not be restrained from doing by due process of law, and his action in causing the arrest of the plaintiff for the alleged offence of being disorderly under a city by-law when in truth the plaintiff was only doing his lawful duty, is too plain to require comment. *Res ipsa loquitur.*

HON. MR. JUSTICE LENNOX. JUNE 5TH, 1913.

TOURBIN v. AGER.

4 O. W. N. 1405.

Injunction—Interim Order—Affidavits—Service.

LENNOX, J., continued for one week an interim injunction order where the affidavits had not been served as ordered.

Motion by plaintiff to continue an interim injunction.

HON. MR. JUSTICE LENNOX:—The affidavit of plaintiff upon which the interim injunction was granted is not among the papers.

The injunction order gave leave to file additional affidavits, but only upon condition of serving copies. Copies are not shewn to have been served of O'Brien or Delbrick affidavits. The case was not set down upon the list. Under these circumstances I will continue the injunction for a week and the plaintiff can take such measures in the meantime as he may be advised.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. JUNE 16TH, 1913.

DICARLLO v. McLEAN.

4 O. W. N.

Negligence — Workmen's Compensation for Injuries Act s. 3 s.-s. 5—Steam Shovel on Temporary Track—"Locomotive Engine or Machine or Train upon a Railway"—Meaning of—Findings of Jury.

SUP. CT. ONT. (2nd App. Div.) *held*, that a steam shovel moving from place to place upon a temporary track was a "locomotive engine or machine or train upon a railway" within the meaning of s. 3 s.-s. 5 of the Workmen's Compensation for Injuries Act.

McLaughlin v. *Ontario Iron & Steel Co.*, 20 O. L. R. 335, referred to.

Judgment of MIDDLETON, J., at trial affirmed.

Appeal by defendant from judgment of MIDDLETON, J., awarding plaintiff $1,500 upon the findings of a jury in an action for personal injuries caused by reason of defendant's alleged negligence.

The appeal to the Supreme Court of Ontario (2nd Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

J. M. Ferguson, for defendant, appellant.

B. H. Ardagh, for plaintiff, respondent.

HON. MR. JUSTICE CLUTE:—The defendant is a sub-contractor for the Canadian Pacific Railway. The plaintiff was in the defendant's employ and, at the time of the accident, was operating the jack which supported a steam shovel when hoisting the load. The steam shovel rested on wheels on a side track and changed its position from time to time on the rails, in order to carry on its work of excavation in connection with the railway.

It became necessary, when operating, to give support by means of the jack, in order to meet the counter-balance the extra weight thus imposed upon one side of the steam shovel.

For this purpose it was the plaintiff's duty to operate the jack, and while in the act of so doing, it is claimed that the engineer, in charge of the engine operating the shovel, started the machinery and steam shovel without giving warning to the plaintiff, whereby a part of the hoist swung round and knocked the plaintiff on the jack and threw him against the cogs of the steam shovel, which caught his coat and drew his left arm therein, injuring and crushing the same and rendering it necessary to have his left arm amputated. The following are the questions submitted to the jury, with their answers:

"Q. 1. Did the accident to the plaintiff happen by reason of any defects in the works, ways and plant of the defendant? A. Yes.

Q. If so, what? A. By not having the cogs sufficiently guarded.

Q. 2. Did the accident happen by reason of any negligence on the part of the defendant? A. Yes

Q. If so, what? A. Owing to the negligence of the engineer in not giving sufficient warning.

Q. 3. Was the accident occasioned or contributed to by any negligence on the part of the plaintiff; if so, what? A. No. Damages $1,500."

Upon these findings judgment was entered for the plaintiff for $1,500, and costs, against which the defendant appeals.

Upon the argument the plaintiff's counsel conceded that there was no evidence to support the finding in respect of the cogs not being sufficiently guarded, but submitted that the plaintiff was entitled to retain the judgment upon the other findings.

There is sufficient evidence to support the findings as to the negligence of the engineer in not giving sufficient warn-

ing. The only question that remains is as to whether or not the case falls within sec. 3, sub-sec. 5, of the Workmen's Compensation for Injuries Act, the argument being that the engineer was not a person who had charge or control of a locomotive engine or machine or train upon a railway.

In *Murphy* v. *Wilson* (1883), 52 L. J. Q. B. 524, it was held that "a steam crane fixed on a trolley and propelled by steam along a set of rails when it is desired to move it, is not a "locomotive engine" within the Employers' Liability Act (1880), sec. 1, sub-sec. 5."

Sub-section 5 varies from the corresponding section in the English Act, as the word "machine" is not found in the English Act, and in the latter Act there is no comma between the words "locomotive" and "engine" as in the Ontario Act. As to the effect of the punctuation, see *Barrow* v. *Wadkin*, 24 Beven, 327. The question of punctuation may not be material here owing to the introduction of the word "machine" in the Ontario Act.

As pointed out in *McLaughlin* v. *Ontario Iron & Steel Co.*, 20 O. L. R. 335, the introduction of the word "machine" has very much widened the scope of the Act, and quite distinguishes *Murphy* v. *Wilson* from the present case. See, also, *Dunlop* v. *Canada Foundry Co.*, 4 O. W. N. 791, at p. 796, where is was held that a hoist was a machine or engine, and the rails upon which it ran, a tramway, within the meaning of the Act.

Sub-section 5 applies to a temporary railway laid down by a contractor for the purposes of construction work, *Doughty* v. *Firbank*, 10 Q. B. D. 358, and applies to railways operated under the Railways Act of the Dominion: *Canada Southern Railway Co.* v. *Jackson*, 17 S. C. R. 316.

I am of opinion that the plaintiff is entitled to retain his judgment upon the findings of the jury, and that this appeal should be dismissed with costs.

HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH, agreed.

HON. MR. JUSTICE LENNOX. JUNE 14TH, 1913.

RE PATERSON.

4 O. W. N. 1435.

Will—Construction—Partnership Assets—Direction to Value Same and to Permit of Use by Partnership—Appreciation in Value—Right of Beneficiaries to Receive.

LENNOX, J., *held*, that where a testator directed his executors to value his interest in certain partnership assets and to permit such sum to remain in the partnership for five years, this did not preclude the beneficiaries of his estate from claiming all appreciation in the value of such assets during such five years

Motion for construction of a will.

A. C. Heighington, for applicants.

A. F. Lobb, for executors, and for Robert Paterson individually.

F. W. Harcourt, K.C., for infant.

HON. MR. JUSTICE LENNOX:—Mr. Lobb, in appearing for Robert Paterson, states that matters subsequently arising may affect the ultimate division of the property so far at all events as the widow is concerned, and he waives no rights, lying outside of the question of the proper construction of the will, as to this client.

The following clauses occur in the will in question: I give, devise and bequeath to my said executors and trustees, all my property, upon trust: (1) To pay my just debts; (2) To determine the value of my interest in the business carried on at the corner of Danforth and Dawes road, Toronto, by Paterson Brothers, and allow the amount to remain in said business for five years, interest to be paid thereon at per cent. per annum, half yearly; (3) To divide all my property in equal shares between my wife Bertha Davidson Paterson and my said daughter Jessie P. Davidson.

The surviving partner, the said Robert Paterson, is one of the executors and trustees, and a testamentary guardian of the infant beneficiary. It is not contended as I understand it, that anything has taken place since the death of the testator to affect the rights of the infant. Certain real estate which belonged to the partnership has appreciated in value since the valuation was made, at the death of the testator.

I am asked whether the widow and daughter, the legatees and devisees, are entitled to share in this rise in value. Subject to anything the widow, a person *sui juris*, may have done to debar herself, they certainly are. The testator did not mean by clause two that his trustees were to sell out to the surviving partner when they determined the value, and there was no obligation on the surviving partner to accept the valuation, or carry on the business, or pay interest. The testator merely meant that the surviving partner should have the right, if he desired it, to have the use of the testator's share of the assets for five years, at a rental, and this rental was to be measured by interest upon a valuation to be made. Practically speaking, there is no reason that this valuation should not be treated as final so far as the stock in trade, and, perhaps, the other chattel property, is concerned. As to the real estate, the infant daughter is clearly entitled to one-fourth share of what it is worth or what it can be sold for now—(at the end of the five years), and subject to any contract or estoppel which Robert Paterson may be allowed to set up against his *cestin que trust*, the widow is entitled to an equal share.

Costs of all parties out of the estate.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. JUNE 14TH, 1913.

SHEARDON v. GOOD.

4 O. W. N.

Judgment—Motion to Vary—Refusal of Motion.

SUP. CT. ONT. (2nd App. Div.) refused to vary judgment herein. 24 O. W. R. 658.

Motion to vary judgment of Supreme Court of Ontario (2nd Appellate Division), pronounced herein, 24 O. W. R. 658.

C. W. Plaxton, for plaintiff.

L. V. McBrady, K.C., for defendant.

HON. MR. JUSTICE SUTHERLAND:—After a careful consideration of the matter, I am unable to see that the judgment should contain any direction to the effect that the $100 paid to the real estate agent, by the vendor, should be repaid by the defendant to the plaintiff. I have spoken to the other members of the Court, who agree also in this disposition of the matter, and of the costs as already made.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. JUNE 16TH, 1913.

COLEMAN v. ROBERT McCALLUM AND THE CORPORATION OF THE CITY OF TORONTO.

4 O. W. N.

Municipal Corporations—Apartment House By-law—Definition Contained in Earlier By-law—Definition in Statute—2 Geo. V. c. 40, s. 10—"Private Temperance Hotel"—Mandamus—Terms—Appeal—Allowance of.

LENNOX, J. (24 O. W. R. 470) granted a mandamus compelling the city architect of defendant corporation to issue a building permit for the erection of a structure at the corner of Sherbourne and Rachael Streets, Toronto, holding that by-law 6061 of defendants passed by virtue of statute 2 Geo. V. c. 40 s. 10 prohibiting the erection of apartment houses upon certain streets must be taken to have adopted the definition of "apartment house" set out in an earlier by-law of the defendant corporation as to buildings and not that of the statute under which it was passed and that therefore the proposed structure was not a contravention of the by-law.

SUP. CT. ONT. (2nd App. Div.) *held*, that the definition of apartment house in the statute was the definition governing the by-law and that therefore no mandamus should be granted.

Appeal allowed with costs.

Appeal by defendants from judgment of LENNOX, J., 24 O. W. R. 470, granting plaintiff a mandatory order compelling defendants to stamp and approve of certain plans filed upon certain terms.

The appeal to the Supreme Court of Ontario (2nd Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, and HON. MR. JUSTICE SUTHERLAND.

Irving S. Fairty, for defendants, appellants.

J. T. White, for plaintiff, respondent.

HON. MR. JUSTICE SUTHERLAND:—The applicant is the owner of land situated at the corner of Sherbourne and Rachael streets in the city of Toronto, and desires to erect a building thereon. He had plans and specifications prepared by an architect, originally for an apartment house, and applied to the respondents for a permit to erect it.

The respondent, McCallum, is the City Architect and Superintendent of Buildings, for the respondent corporation. The application was refused. Alterations were made in the plans and further applications made and refused. Thereupon a motion was launched on the 20th March, 1913, "for an order of peremptory mandamus, directing the respondents to forthwith approve and stamp the plans and specifications submitted by the applicant," &c., "and to issue a permit for the erection thereof."

The motion was heard before LENNOX, J., and on the 19th April, 1913, he made an order to the following effect, that "The applicant for himself and his heirs and representatives in estate now undertaking to amend the plans on file in the City Architect's Department of the City of Toronto, so as to provide that each bedroom in the apartment house which he proposes to build on the south-west corner of Sherbourne and Rachael streets, in the city of Toronto, shall have a clear floor area of one hundred square feet at least, and the plaintiff, by his counsel, now undertaking that the said building shall not at any time, without the consent of the defendants or of this Court, be diverted from the uses and purposes or occupied or used in a manner inconsistent with the uses and purposes now declared by the plaintiff, due notice of this undertaking and of this order shall be given to the purchaser, and he will, in and by the conveyance, bind the purchaser, his heirs and assigns, to observe and abide by the conditions hereinbefore set out, and such order as a Court of competent jurisdiction may make. It is peremptorily ordered that the defendants do forthwith approve of and stamp the plans and specifications submitted by the applicant for the erection of a building at the south-west corner of Sherbourne and Rachael streets in the city of Toronto, and do forthwith issue a permit for the erection thereof."

From this order the respondents now appeal. The learned Judge, who heard the motion, says, in his judgment. "After a very great deal of hesitation, I have come to the conclusion that perhaps the proposed building may be legitimately described as a temperance hotel. Hotels, of course, are not pro-

hibited. I prefer, however, not to rest my decision wholly or mainly upon this view of the question."

He also holds that the building proposed to be erected in conformity with the amended plans and specifications, is a lodging house, within the meaning of the definition of that term contained in By-law No. 4861 of the defendant corporation, which he states to have been in force at the time the notice of motion was served.

The appellant is relying upon an amendment to the Municipal Act, contained in 2 Geo. V. ch. 40, sec. 10, and a by-law passed in pursuance thereof. Said section 10 is as follows:

"Section 541a of The Consolidated Municipal Act, 1903, as enacted by sec. 19 of The Municipal Amendment Act, 1904, is amended by adding after clause (b) the following clauses:

(c) In the case of cities having a population of not less than 100,000, to prohibit, regulate and control the location on certain streets to be named in the by-law of apartment or tenement houses and of garages to be used for hire or gain.

(d) For the purposes of this section an apartment or tenement house shall mean a building proposed to be erected or altered for the purpose of providing three or more separate suites or sets of rooms for separate occupation by one or more persons."

The said Act came in force on the 16th April, 1912, and on the 13th May of the same year, the defendant corporation passed its By-law No. 6061, "to prohibit the erection of apartment or tenement houses or garages to be used for hire or gain on certain streets." The first recital in said by-law shews the intention thereof to be to pass a by-law under the express authority of said amending Act.

A second recital is as follows: "And whereas it is expedient that the location of apartment and tenement houses, and of garages to be used for hire or gain, should be prohibited on the streets hereinafter named."

Clause 1 of the by-law is: "No apartment or tenement house, and no garage to be used for hire or gain, shall be located upon the property fronting or abutting upon any of the following streets," viz.; and included in the list of streets are Rachael street and Sherbourne street.

The judgment of Lennox, J., is reported in 4 O. W. N., at 1127, and the facts are fully set out therein. With respect, I am unable to agree with him. The moment a by-law was passed by the Municipal Corporation under the authority of

said sec. 10 of the Act of 1912, I think that upon the streets named therein the Municipality has the right to prohibit, regulate and control the location of apartment or tenement houses which answered to the description contained in sub-sec. (d) of sec. 10 of said amending Act.

It is plain, in my opinion, from an examination of the plans as altered, that the building proposed to be erected thereunder is an apartment or tenement house providing three or more sets of rooms for separate occupation by one or more persons.

I am of opinion that this by-law, No. 6061, was in force at the time the application was made by the plaintiff to the defendants for their approval of the plans and specifications now in question, and for a permit for the erection of the building, the refusal of which by the defendants led to motion.

I think the defendants were within their rights thereunder in refusing. This is quite apart from any objection to the form of the order or other matters urged in support of the appeal which I do not, in the circumstances, think it necessary to deal with.

I would allow the appeal with costs.

HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, and HON. MR. JUSTICE RIDDELL, agreed.

HON. MR. JUSTICE MIDDLETON. JUNE 18TH, 1913.

SALTER v. EVERSON.

4 O. W. N.

Way—Right of Way—Title by Prescription—Evidence as to—Chain of Title—Interim Injunction—Damages.

MIDDLETON, J., in an action brought claiming a right of way over defendant's lands by prescription *held*, that the evidence did not establish the right plaintiff was claiming.

Action tried at Toronto Non-Jury Sittings, in which the plaintiff claims a right of way over defendant's lands by prescription.

H. H. Dewart, K.C., and D. D. Grierson, for plaintiff.

A. R. Clute, for defendant.

HON. MR. JUSTICE MIDDLETON:—Malachi Quigley who died on 24th August, 1890, in his lifetime owned the whole block, and by his will devised to his son Samuel Quigley, 30 feet of land on Bond street, marked on the plan Ex. 1 as "A," and to Michael Quigley, the parcel marked as "B. & C." on Simcoe street, and also gave parcels D. and E. to other children.

The testator also devised the central part of the block or yard and a lane running to Bond street to his four children as tenants in common, "subject to the mutual rights of user of the same in common, hereinbefore mentioned." This refers to the fact that the gift of each parcel was followed by a further devise of a right to use the lane and yard "in common with the owners and occupants from time to time of all and every other portion of the said lot which adjoin the said lane and yard or either of them, together with a right of way over the said lane."

During the life of the testator he had built stores and cottages round this central yard and used the parcel marked "C" as a means of access to it. That portion of the "lane" east of parcel "A," was enclosed by fences and had never been used as a means of access to the yard.

The testator contemplated, by his will, a change in the mode of user the "lane" being opened to Bond street and the parcel "C" being included in the land given to Michael absolutely would then cease to be used as a way.

After the testator's death matters were allowed to remain as they were for some years but, finally, the lane was opened to Bond street, and since then it has been, and still is, used as a means of access to the yard.

Michael did not close the entrance from Simcoe street, and it was freely used as a mode of access to the rear of stores which he owned upon parcel "B" and on parcel "D," to which he had acquired title.

The defendants having acquired title from Michael Quigley, contemplated erecting a block of buildings on Simcoe street covering *inter alia* parcel "C" and so closing it as a means of access to the yard. The plaintiff claiming title under Samuel Quigley now brings this action for an injunction, claiming to have acquired a title by prescription to a right of way from the lane and yard across the strip of land in question.

Samuel Quigley, on 11th April, 1901, conveyed the 30-foot parcel (lot A), to one Hincks "together with the rights of way and user in the will of Malachi Quigley . . . described and thereby devised to the party of the first part and his assigns."

This conveyance does not grant to Hincks Quigley's title to the yard and lane as tenant in common—but only his right as owner of one of the dominant tenements to the easements appurtenant to the 30-foot parcel as defined by the will.

The right of way now claimed by the plaintiff is not appurtenant to the parcel of which he is the owner, *i.e.*, the 30-foot lot. Quigley may have been enjoying the use of the land in question as a means of access to the yard, and it may be that the title he was acquiring under the statute would have passed to his grantee of the yard, but he is still owner, as one of several tenants in common of the yard and lane—subject to the various rights and easements created by the will.

Further, the right, if any, which Quigley was acquiring, was a right of way to and from the yard and lane—and of which he was a tenant in common, and not a right of access to the 30-foot parcel. The way is in no sense appurtenant to it.

The evidence as to user is most unsatisfactory. No doubt a great deal of traffic went over this land—most, if not all, being to the rear of the stores—occasionally teams and passengers may have gone to the rear of the cottages on the 30 feet. No one was called to shew any such user during the last few years who had any real knowledge of the facts. The occupants of the cottages were not called—those who used the way were not called—and Allen, a most estimable man who seemed to devote much time to watching the traffic, on cross-examination had to admit that all he knew was that teams drove into the yard and that he had no knowledge whether this was on the business of the plaintiff's tenants or on the business of any of the other tenants whose premises backed on this common yard.

On the evidence I cannot find that the alleged easement "has been . . . enjoyed by any person claiming right thereto without interruption for the full period of twenty years," next before this action—as I must find before I can declare that there is an easement by prescription.

The easement claimed is by no means essential to the beneficial enjoyment of the plaintiff's premises. The lane

to Bond street affords an easy access to the yard at the rear of his houses.

For these several reasons the action fails and must be dismissed with costs.

I am asked to assess damages under the undertaking on the injunction motion. Why any interim injunction was sought I cannot understand. There was no real inconvenience in using the Bond street lane pending the trial, and no object in preventing the erection of the buildings. The defendant would have gone on pending the action at his own risk.

The delay has made the erection of the buildings more expensive and has resulted in loss of rent. While anxious not to award too much, I cannot see how to cut the amount claimed down to less than $300.