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CARTWRIGHT, MASTER. FEBRUARY 3RD, 1905.

CHAMBERS.

BOWERMAN v. HALL.

Pleading—Statement of Claim—Motion to Strike out Part—Execution against Interest in Land—Judgment—Remedy by Summary Application.

Motion by defendant for particulars of 4th paragraph of statement of claim, and to strike out paragraph 7 as embarrassing.

Grayson Smith, for defendant.

G. W. Holmes, for plaintiff.

THE MASTER:—Defendant agreed to buy certain real estate. He was to assume a first mortgage, make a certain down payment, and give a second mortgage for the balance of the purchase money.

He made the down payment, but did not execute the mortgage. A deed was made out to his nominee but not delivered.

Defendant made certain payments on account, and in May last plaintiff obtained an assignment of the above agreement from defendant's vendor. In November he commenced the present action, asking either specific performance or sale, etc.

The 7th paragraph of the statement of claim alleges recovery of a judgment in June last in the County Court of York by plaintiff against defendant; that execution has been returned nulla bona; and that defendant appears to have no property except his interest in lands described in the above

mentioned agreement, and now vested in plaintiff, subject thereto.

The prayer for relief asks: (2) that an account may be taken of what is due on this judgment; (3) that defendant's interest in the lands in question be declared to be subject to a lien for such amount; and (4) may be sold and the proceeds applied to pay such sum, as well as the arrears due under the agreement.

It was argued that plaintiff's remedy (if any) was under Rule 1018, and that he could not proceed by action.

Having regard to the last clause of sec. 57 (12) of the Judicature Act, and the judgment of the Court of Appeal in McGowan v. Middleton, 11 Q. B. D. 471, on similar words in the English Act, I think paragraph 7 should be allowed to stand, leaving defendant to raise the point again by way of demurrer in his statement of defence, if so advised.

Johnson v. Bennett, 9 P. R. 337, where Proudfoot, V.-C., followed his previous decision in Kerr v. Styles, 26 Gr. 304, and cases there cited, seem to shew that plaintiff is pursuing his proper remedy to have satisfaction of the County Court judgment.

Defendant also asked for particulars. It was conceded at the argument that these must be given.

The costs of the motion may, therefore, be in the cause, as success has been divided.

CARTWRIGHT, MASTER. FEBRUARY 6TH, 1905.

CHAMBERS.

BELL v. MORRISON.

Particulars—Order for Delivery before Trial—Evidence to be Limited to Particulars — Non-delivery of Particulars — Motion to Strike out Defence.

On 10th October an order was made in the form approved of in Noxon Brothers Manufacturing Co. v. Patterson and Brother Co., 16 P. R. 40, requiring defendant "within three weeks before the trial of the action to furnish full particulars" of the various allegations in the statement of defence.

The order further provided that "the defendant at the trial of this action be limited in his evidence to the particulars which shall have been delivered and filed under this order, unless otherwise ordered by the trial Judge."

No particulars having been delivered, plaintiffs moved for a further order requiring particulars on or before 9th February, and that in default the statement of defence be struck out.

R. L. Fraser, for plaintiffs.

W. N. Ferguson, for defendant.

THE MASTER.—Plaintiffs are executors, and defendant is one of the next of kin of deceased. This action is to establish a will, in solemn form. Defendant may have no more than suspicion to go on. He may be intending to rely on what he can do to break down plaintiffs' case on cross-examination of the attesting witnesses and by using what is brought to light through the usual methods of discovery.

He may possibly succeed in this, or he may satisfy the trial Judge that costs should be given to all parties out of the estate, or at least that costs should not be given against defendant. He may now be satisfied to take his chances of getting some one or other of these decisions at the trial.

I am not aware of any precedent for such an order as plaintiffs are asking for; and the judgment of the Chancellor in the case above referred to is opposed to it. It would seem that defendant is being sufficiently restricted by the order of 10th October. If his conduct appears culpable, it can be better dealt with by the trial Judge.

At present I think that no further order can be made, and that the motion should be dismissed with costs to defendant in any event.

I have assumed that "the three weeks before the trial," limited in the order of 10th October, have already begun. But the exact effect of this term, in a case to be heard at the Toronto non-jury sittings, is doubtful, and the point is not to be considered as being in any way decided on this motion. It will be well in any future case to use precise and definite language.

TEETZEL, J. FEBRUARY 6TH, 1905.

TRIAL.

HENNING v. TORONTO R. W. Co.

Contract—Advertising Privileges—Renewal—Uncertainty—Invalidity—Construction of Contract.

Action by an advertising firm against the Toronto Railway Company and the Canadian Street Car Advertising Com-

pany for a declaration that plaintiffs were entitled to a renewal of the exclusive privilege of placing advertisements in certain spaces in the cars of defendant railway company, and that their rights were prior to those of defendant advertising company, and for specific performance of an agreement for renewal, or for damages.

By the agreement defendant railway company leased the privilege to plaintiffs for 3 years from 1st September, 1901, at an annual rental of $5,000—"this agreement to be renewable at the end of 3 years, at a price to be agreed upon, but not less than $5,000 per annum."

E. E. A. DuVernet, for plaintiffs.

J. Bicknell, K.C., and J. W. Bain, for defendant railway company.

S. B. Woods, for defendant advertising company.

TEETZEL, J.— . . . In my opinion the language used in this agreement is too vague and indefinite to create any responsibility either for specific performance or damages.

Plaintiffs' right to renewal depends upon the parties coming to an agreement as to the price. No machinery is provided for fixing the price, in the event of the parties failing to agree. Nothing binds either party to accept the minimum of $5,000 in the event of a failure to agree upon any higher price. . . .

As I view the provision, it is no more than an engagement of honour, under which both parties promise a renewal if they can agree upon the price, and under which neither party has any remedy in law against the other for not agreeing or for failing to make a bona fide effort to agree.

Viewing the engagement as merely honorary, it follows that there is no force in plaintiffs' argument that in any event the railway company could not, during the currency of plaintiffs' lease, put it beyond their (the railway company's) power to grant plaintiffs a renewal at the end of the 3 years. . . .

[Manchester Ship Canal Co. v. Manchester Race Course Co., [1900] 2 Ch. 252, [1901] 2 Ch. 37, distinguished.]

The following cases may be referred to for agreements held void for uncertainty: Montreal Gas Co. v. Vasey, [1900] A. C. 595; In re Vince, [1892] 2 Q. B. 478; Fogg v. Price, 145 Mass. 513; Price v. Assheton, 1 Y. & C. Ex. 441; also cases cited by Mr. C. B. Labatt, "Law of Options," 36 C. L. J. 564.

Action dismissed as against both defendants with costs.

FEBRUARY 26TH, 1905.

DIVISIONAL COURT.

DOLAN v. BAKER.

Timber—Sale—Contract—Time for Removing not Specified—Attempt to Remove after Ten Years—Construction of Contract—Reasonable Time—Injunction.

Appeal by defendants from judgment of MACMAHON, J., 3 O. W. R. 833, in favour of plaintiff in an action for trespass to land.

The appeal was heard by BOYD, C., ANGLIN, J., MAGEE, J.

C. E. Hewson, K.C., for defendants.

F. E. Hodgins, K.C., and T. E. Godson, Bracebridge, for plaintiff.

BOYD, C.—The sealed instrument is expressed in the form of a grant in fee simple, but it is not intended to create a perpetuity in the thing granted—it contains inherent limitations. The subject dealt with—"timber" to be cut—savours of the realty, and for that reason the contract requires to be manifested in writing so as to satisfy the Statute of Frauds. The grant or sale is not of *all* the trees, but of so much timber as the purchaser, his heirs, &c., may see fit to remove. It is further limited to "all the first class sound merchantable saw logs and firewood timber *now* upon" the lots described.

There is further given the right of entry "at all times" until the said timber shall have been removed.

There is a special provision in these words, "the vendors before cutting or clearing hemlock on said lands shall give the purchaser written notice in each year of such intended cutting—to be given in each year and to apply only to the then ensuing season's cutting or clearing; and will not fall bark trees in bad places to the injury of the purchasers removing the same."

The price was to be 50 cents a thousand b. m., except hemlock, which was to be 25 cents, and for No. 1 firewood 10 cents a cord.

This deed was made on 13th December, 1889, and was registered 24th March, 1898. This action was begun in 1904—the date of the issue of the writ is not given as it should be on the record—to restrain the cutting and removal of the timber by defendant, who is assignee of the first purchaser.

In 1890 the plaintiff gave notice of cutting and peeling hemlock, and a second notice of further cutting and peeling in second year after the contract, but no action was taken by defendant to remove and pay for the trunks, and they are lying decaying on the land.

In 1900, nothing having been done in the way of entering and cutting trees by defendant, plaintiff made sale of the timber to one Middlebrough, and then received a letter from defendant Baker forbidding the sale.

On 6th December, 1900, Baker sold and conveyed to his co-defendants all the timber covered by his deed of 1889, and in 1903 men went on to cut and remove all the timber under defendants' orders, and in consequence this action was brought.

Defendant Baker was not on the place after he bought the timber, and no entry was made on the premises for over 10 years. The question is as to lots 24 in the 13th and 24 in the 14th concessions of Medora. Plaintiff lived on lot 24 in 13th, and has cleared over 20 acres thereon from year to year since 1889; the lots adjoin, with bush on each lot, and the bush part is not enclosed; but it has been constantly used by plaintiff for pasturing his cattle on and cutting down such small wood or trees as he wanted. There is sufficient evidence of his being, not only in legal, but in actual, possession of the whole.

These seem to be all the material facts as to the surroundings of the case.

According to the common law of England "timber" was strictly applicable only to three kinds of trees, oak, ash, and elm, because of their being fit and commonly employed for building purposes; but by custom other trees, such as birch and beech, were also considered timber because serviceable and used for the same purpose. We have the same varieties of trees in this country and others, which when of proper size are used for construction, and are treated as timber. In England as a rule nothing is considered to be timber unless of twenty years' growth; though in some places they judge by the size of the trees, and those that have reached the dimensions of two feet in girth or six inches in diameter are classed as timber: Whitty v. Dillon, 2 F. & F. 68; Dunn v. Bryan, Ir. R. 7 Eq. 143; Honeywood v. Honeywood, L. R. 18 Eq. 306.

As defined by Robinson, C.J., in Miller v. Clark, 10 U. C. R. 10, "timber means the trunk of the tree or any part of it while it exists in the solid state;" tops and limbs would be thus excluded. In the present contract, the evidence shews

what was meant to be included in the term "timber." On the land were standing and growing varieties of trees such as pine, hemlock, oak, elm, ash, beech, birch, basswood, maple. The pine was not bought, as defendant admits; the hemlock was to be cut and peeled for tan bark by plaintiff, and the wood or trunk was to be purchased by Baker at a price fixed. It was understood apparently that the parts of trees cut and suitable for firewood were to be paid for also at so much a cord. It is not important now to consider whether all the hardwood was sold or only certain varieties; but everything not to be regarded as timber at the date of the contract was excluded; the words of description being "all the first class sound merchantable saw logs and fire wood timber *now* upon" the two lots in question. The growth of timber then existing was being dealt with, not a later growth.

Though the instrument gives a right to so much of the soil and for so long as is sufficient to sustain and nourish the trees sold till they are actually cut down, yet the substantial purport of the whole transaction is the sale of a merchantable commodity; the standing trees are to be turned into saw logs and timber; the conveyance severed them in law from the freehold; and the question now is whether the actual severance in fact should not have been within a reasonable time or within the period fixed by the Statute of Limitations for exercising a right of entry on lands. A right of choice is given to the purchaser—all trees are not sold, but such as he may see fit to remove—should not this right of selection be exercised within reasonable limits of time? The parties had in contemplation a speedy removal, though no time is expressed in the writing. Both speak of the purchaser's intention to enter upon the cutting the next year and the bringing up of a floating mill to the lake near the place for the purpose of cutting up the trees, and getting the firewood necessary for the mill from this place. Plaintiff's wife says that five years was spoken of as the limit, but the husband says that this was not mentioned, but that five years would have sufficed to get all off.

No cases can be expected in England on such a question as to timber; but they are not uncommon in the United States, where, as with us, timber is one of the chief products of parts of the country.

It appears to me that a very reasonable doctrine is laid down in a late case from the pine State in which the law is fully discussed, viz., McRae v. Stillwell, 111 Ga. 65 (1900). An instrument in the form of a deed conveyed to the grantees at a price per acre "all the pine timber suitable for saw mill purposes" on lots described, with right of entry, &c., and no

limit as to time. It was held incumbent on the grantees or their assignees to cut and remove such timber within a reasonable time from the sale, and that on failure to do so their interest ceased and determined; and further, that what would be a reasonable time for so doing was a question of fact to be passed upon and decided in the light of all the facts and circumstances surrounding the transaction. This decision was affirmed in a later case in the same volume of Goethe v. Lane, at p. 400. The same statement of law was made in Pennsylvania in a case decided in 1899, Patterson v. Graham, 164 Pa. St. 235, where the Court said: "Undoubtedly in a contract for the sale of timber where the parties intend a severance, and no time is fixed within which it is to be removed, the law implies that the grantee will remove it within a reasonable time, and what is a reasonable time is to be determined by all the circumstances:" p. 241. In that case the delay of eleven years was held unreasonable. And again in Tennessee in 1902 was decided Carron v. Three States Co., wherein the holding was that a sale of standing timber without stipulation as to time of removal gives only a reasonable and not an unlimited time: 29 S. W. R. 320. I think that the germ of what is now under consideration may be found in the words of Parke, B., in Hewitt v. Johns, 7 Exch. 79 (1857), in which he says: "Wherever trees are excepted from a demise, there is by implication a right in the landlord to enter the land and cut the trees at all reasonable times. If indeed, he leaves them on the land for an unreasonable time he does more than the law authorizes him to do."

More than a reasonable time elapsed in this case before anything was done by the purchaser. There was a conditional grant of so much suitable timber for saw logs as the purchaser might see fit to cut—it was contemplated that there should be the selection and cutting and removal of substantially the same growth of timber as was then on the land, and not trees subsequently maturing as timber—not, it may be, an immediate severance, but one not unreasonably remote; operations on both sides were contemplated forthwith, and the inaction of the purchaser is cogent evidence of his abandonment of the right to enter and cut.

I do not consider the case having regard to the application of the Statute of Limitations; on the other ground of unexplained and unreasonable delay, I think the judgment should be affirmed with costs.

ANGLIN and MAGEE, JJ., severally gave reasons in writing for the same conclusion.

FEBRUARY 6TH, 1905.

DIVISIONAL COURT.

MENDELS v. GIBSON.

Mortgage—Action on Covenant for Payment—Attempted Exercise of Power of Sale—Agreement for Sale on Credit, not Carried Out—Removal of Building from Land—Inability to Reconvey Poperty in Original Condition—Liability of Mortgagee to Account for Price, though not Paid—Possession—Rents and Profits.

Appeal by plaintiff from judgment of ANGLIN, J., 4 O. W. R. 336.

G. H. Watson, K.C., for plaintiff.

T. D. Delamere, K.C., for defendant.

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

MEREDITH, C.J.—The action is brought on a covenant by defendant for the payment of $700 and interest, contained in a chattel mortgage from him to plaintiff, bearing date 20th April, 1899.

Defendant sets up in answer to plaintiff's claim that the chattel mortgage was given as collateral security to a mortgage on a cheese factory and the land on which it stood, which he had given to plaintiff, and on which there remained due the $700 secured by the chattel mortgage; that plaintiff took possession of the property covered by both mortgages and sold it on 7th August, 1902, under the power of sale which the mortgages contained, to Alvin W. Mitchell, for $750; that Mitchell subsequently sold the property for $1,000; that the machinery contained in the factory was immediately removed by Mitchell or his grantee; that the factory was dismantled by Mitchell, and "removed piecemeal several miles from the original location;" and that plaintiff, by these dealings with the mortgaged property, "is estopped from proceeding with an action on the covenant."

According to the evidence given at the trial, defendant left Ontario and went to the North-West Territories immediately after the chattel mortgage was given, without making any provision for payment of the mortgage money or for the care of the property, which was left vacant, and he has remained in the North-West Territories ever since. Plaintiff in the following year took proceedings under his powers of sale, and after advertisement of the intended sale put up

the property at auction on 21st May, 1900, when the highest bid was $150, and the property was withdrawn. On 7th August, 1902, plaintiff sold the property by private sale to Mitchell for $750. On the same day an instrument in writing containing the terms of the agreement for sale was executed by both parties. According to its terms, the purchase money was to be paid as follows: $100 on 1st May, 1903; $250 on 1st November, 1903; and the remaining $400 on 1st November, 1904—all with interest from the date of the agreement. The agreement provides for the conveyance of the property upon payment of the purchase money and interest, and that plaintiff will suffer the purchaser, his heirs and assigns, to occupy and enjoy the property until default.

. . . .

Plaintiff did not himself occupy or use the property; the key of the factory was, however, under his control, and the purchaser, about 1st March, 1903, obtained it from the custodian of it, by plaintiff's direction. Mitchell never used or occupied the factory, but shortly after his purchase sold the property to Slavin and Magann, who proceeded at once to take the factory down, and removed most of the materials of which it was composed to another site several miles distant, where they remained at the time of the trial. The boiler and engine were not removed, but the other property comprised in the chattel mortgage appears to have been taken away.

Plaintiff was not a party or privy to what was done by Slavin and Magann, and did not become aware of it until after the removal had taken place, and nothing appears in the evidence to warrant the conclusion that he afterwards acquiesced in what had been done. The most that can be said is, that he took no steps to compel the restoration of the property or to require the wrongdoer to answer in damages or otherwise for having removed it.

Mitchell never completed his purchase or paid anything on account of either purchase money or interest, and the factory remained closed and unused until it was taken down.

The trial Judge came to the conclusion that the contract for sale to Mitchell and the giving to him of possession did not amount to an exercise of his power of sale by plaintiff sufficient to extinguish defendant's equity of redemption, and that defendant was not entitled to credit for the purchase money on the footing of a completed sale to Mitchell, and defendant being therefore entitled to redeem, and plaintiff, not being in a position to reconvey the security as it was when he took possession or when he gave possession to Mitchell, was not entitled to enforce the covenant sued on, and,

following Re Thuresson, 3 O. L. R. 271, 1 O. W. R. 4, he made the following direction for the entry of judgment: . . .

[The action was to be dismissed unless plaintiff satisfied the Master, upon a reference, that he was in a position to reconvey the mortgaged property substantially as it was when he took possession.]

I am unable to agree with the conclusion of the trial Judge.

The principle upon which Re Thuresson was decided is not, in my opinion, applicable to such a case as this. . . .

[Reference to Walker v. Jones, L. R. 1 P. C. 50; Lockhart v. Hardy, 9 Beav. 349, 357; Perry v. Barker, 8 Ves. 527, 13 Ves. 799; Gowland v. Garbutt, 13 Gr. 578; Schoole v. Sall, 1 Sch. & Lef. 176; Stokoe v. Robson, 3 V. & B. 51, 19 Ves. 385; Shelmardine v. Harrol, 6 Madd. 39; Kinnaird v. Trollope, 39 Ch. D. 636; Dyson v. Morris, 1 Hare 427; Palmer v. Hendrie, 27 Beav. 349, 28 Beav. 341.]

I have found no case in which the principle has been applied where the mortgagee is in a position to restore the whole of the mortgaged estate, but not in the condition in which it was when he took possession, even although the altered condition is due to his own act or the acts of those for whose dealings with the estate he is answerable to the mortgagor.

To give such a wide application to the principle would make it impossible for a mortgagee who had entered into possession of mortgaged property worth not more, it might be, than one-tenth of his debt, to sue upon the covenant, if he had either by acts or omissions caused or suffered the condition of the property to be altered, be it by pulling down a building or the improper cutting down of a tree, or the like, though the result had been to depreciate the value of the property but to a trifling extent.

In my opinion the principle does not extend to a mere alteration of the character or condition of the mortgaged estate, where the mortgagee is in a position to reconvey the whole of the land itself. I use this expression as meaning the land apart from that which is affixed to it, either by the operation of nature or the hand of man, such as a tree or a building; there is, as I view it, no good reason why he should not be entitled to recover the mortgage money after deducting from it what may be sufficient to compensate the mortgagor for the injury done to the mortgaged property by the wrongful act or default. . . .

[Reference to Munsen v. Hauss, 22 Gr. 279.]

I am unable to see any sound reason for preventing the mortgagee from suing where the impaired condition of the mortgaged estate is due to his own acts, and allowing him to sue when that condition is due not to his acts but to his neglect to perform the duties which rested upon him as a mortgagee in possession . . .

It is unnecessary to consider whether a case may not arise in which, though the act of the mortgagee has been only the unlawful destruction of a building on the mortgaged land, he may nevertheless be precluded from suing on the covenant. It may be that where the building is of such a character that compensation in money would not be an adequate indemnity to the mortgagor for the injury done by its destruction, the principle of the cases to which I have referred may be applicable. I express no opinion on the point, for it is sufficient to say that, for such an injury as was done to the mortgaged premises in this case, beyond question full compensation may be given by charging the mortgagee with the loss occasioned thereby to the mortgagor.

Nor is it necessary, in the view I take, to consider whether, on the facts of this case, had no sale under the power taken place, plaintiff would have been answerable for the wrongful act of Slavin and Magann in pulling down the factory building and removing from the land the materials of which it was composed, though my present impression is that plaintiff is not answerable for those acts, and is answerable, if at all, for the consequences of them only to the extent of any loss which may have been sustained by the mortgagor owing to plaintiff not having taken steps to recover damages for the wrongful acts of Slavin and Magann, or to compel them to restore the factory to its former condition.

I am of opinion, however, that plaintiff is bound to account for the whole of the purchase price which was to have been paid by Mitchell. Plaintiff was not entitled, according to the terms of the powers, to sell on credit, but a sale made by a mortgagee on credit, if a real sale, is, according to the decided cases, a valid exercise of the power, if the mortgagee stands ready to account to the mortgagor for the price as so much money received by him in cash: Thurlow v. Mackeson, L. R. 4 Q. B. 97, and cases there cited; see also Kennedy v. De Trafford, [1896] 1 Ch. 262, [1897] A. C. 180; Beatty v. O'Connor, 5 O. R. 731.

It is not, I think, open to plaintiff to contend that the sale was an invalid one, and it having been made for a price less in amount than was owing upon his mortgage, he must be taken to have received the whole of the agreed purchase

money, or at least to have taken upon himself the risk of the failure of the purchaser to pay. . . .

[Bank of Upper Canada v. Wallace, 16 Gr. 280, and Willes v. Levett, 1 De G. & S. 392, distinguished.]

Plaintiff is not, I think, chargeable with rents and profits for the period which elapsed after defendant left the Province to the time of sale, or for any part of that period.

He did not, as I have said, occupy the premises, and is, therefore, not chargeable with any occupation rent; he received no rents and profits, and is not, in my opinion, chargeable for rents and profits which he might have received but for his wilful neglect or default. He was not bound to take possession, and did not, I think, do so, at all events until he made the agreement with Mitchell. The key of the premises was in the possession of one Lane, with whom it had been left by defendant, and all that plaintiff did was to send the auctioneer to the factory when the sale was about to take place, to make an inventory of the chattels which were in it. The fact that Lane, by the direction of plaintiff, gave the auctioneer the key to enable him to enter the factory for that purpose, or the fact that Lane was asked by plaintiff to look after the property for him, or both of these facts combined, did not constitute a taking possession by plaintiff so as to charge him with liability for the rents and profits which he might have received from the property, if indeed he could have rented it, which is upon the evidence quite problematical.

Upon the whole, I am of opinion that the judgment appealed from should be reversed, and in lieu of it judgment should be entered for plaintiff for the mortgage money and interest (including the costs of exercising the power of sale, which may be taxed if defendant so desires), less the amount of Mitchell's purchase money ($750), treating it as a sum received on 7th August, 1902.

FEBRUARY 6TH, 1905.

DIVISIONAL COURT.

SCOTT v. SPRAGUE'S MERCANTILE AGENCY OF ONTARIO, LIMITED.

Fraud and Misrepresentation — Action for Damages for Fraudulent Representations Inducing Contract—Failure to Prove Actual Fraud.

Appeal by plaintiff from judgment of TEETZEL, J., 4 O. W. R. 454, dismissing action.

J. H. Rodd, Windsor, for plaintiff.

J. A. MacIntosh, for defendants.

THE COURT (MEREDITH, C.J., ANGLIN, J., MAGEE, J.), dismissed the appeal with costs.

CARTWRIGHT, MASTER. FEBRUARY 7TH, 1905.

CHAMBERS.

DOULL v. DOELLE.

Attachment of Debts — Judgment against Married Woman, Payable out of Separate Estate—Proceeds of Insurance on Life of Husband.

Motion by plaintiffs to make absolute a garnishing summons.

F. J. Roche, for plaintiffs.

W. E. Middleton, for defendant.

THE MASTER.—The money attached is in the hands of the Commercial Travellers' Association of Canada. It is the proceeds of a policy on the life of defendant's husband, the policy being payable to her.

Judgment was signed against defendant on 11th April, 1899, on certain promissory notes given by her during coverture, all of them made subsequent to 60 Vict. ch. 22 (O.)

By that judgment plaintiffs were declared to be entitled to recover $1,310.51 from defendant "payable out of her separate estate."

In Softlaw v. Welch, [1899] 2 Q. B. at p. 427, Vaughan Williams, L.J., said: "The Scott v. Morley form is the right form of judgment whenever the action is brought on a contract made by a married woman during coverture." And A. L. Smith, L.J., said: "The fact of a married woman becoming discovert does not, apart from the provisions of the Act of 1893 (from which the Ontario Act of 1897 is copied), extend her liability upon contracts made by her during coverture."

It was contended for defendant that the judgment must be followed strictly, and could not be held to bind after-acquired property.

It seems, however, to follow from what was said in Softlaw v. Welch (supra) that this argument cannot be sustained.

The judgment as entered was the only possible judgment. But, in the subsequent events which have happened, the words of the statute apply, so that the judgment is "now enforceable by process of law against (this as well as) all

property which she may thereafter while discovert possess or be entitled to."

It is just as if the sheriff, under an execution in the words of this judgment, had seized a quantity of valuable jewelry recently left by will to defendant.

Could defendant prevent this being done?

The motion should therefore be granted with costs—those of garnishees to be paid by plaintiffs, and added to their claim against defendant.

IDINGTON, J. FEBRUARY 7TH, 1905.

CHAMBERS.

SLEMIN v. TORONTO POLICE BENEFIT FUND.

Pleading—Statement of Claim—Motion to Strike out Portions—Allegations of Material Facts.

Appeal by defendants the Toronto Police Commissioners from order of Master in Chambers, ante 178, so far as it refused to strike out paragraphs 18, 20, and 25 of the statement of claim.

J. S. Fullerton, K. C., for appellants.

R. C. Clute, K.C., for plaintiff.

IDINGTON, J., affirmed the Master's order except as to paragraph 5, which he ordered to be amended. Costs of appeal to be costs in the cause.

FALCONBRIDGE, C.J. FEBRUARY 7TH, 1905.

WEEKLY COURT.

RE CORBIT.

Will—Construction—Devise—Incomplete Form—Sufficiency—Substituted Devise over—Restraint on Alienation—Void Condition—Annuity in Perpetuity—Vagueness—Charge on Land—Sale Subject to.

Motion by the Toronto General Trusts Corporation, the administrators de bonis non, with the will annexed, of the estate of Martin Corbit, who died on 20th January, 1861, for an order declaring the true construction of his will and determining certain questions as to the distribution of his estate.

The will was dated 20th January, 1861, and was as follows:

"First that my wife Mary Corbit shall have all the right title and privilege of renting for her own use and support during her lifetime all the houses on this lot on letter O lot No. 17 South Dalhousie with all furniture goods and chattels whatsoever. This premises is never to be sold. Mrs. Corbit shall have it as long as she lives. After her death I will it to Steven Corbit or the oldest son of Michael Corbit and that the same shall be bound to pay the sum of ten pounds per year to Bridget Ryan eldest daughter of Bill Ryan Montreal during her lifetime and after her death to the next kin. Lott No. 21 South Patrick street to John Corbit. Ashburnham Hill property to John Franklin after the first of May, 1861. The fifty pounds which will be paid to Mr. Lees on the first of May next is to be laid out as directed in head stone and other necessary expenses under the direction of William Kennedy and William Garrett. I leave six pounds to Steven Garrett son of William Garrett. After Mrs. Corbit's death all the funds is to be given to Fany Franklin. If there is not sufficient sum of money to pay all the debts, John Corbit shall for his share pay any deficiency out of the lot on St. Patrick street. . . ."

The questions raised by the motion were as follows:—

(1) Whether the testator died intestate as to lot 12 on the east side of Dalhousie street, letter O, Ottawa.

(2) Whether the testator intended, by the words he used in his will, "Lot on letter O lot No. 17 South Dalhousie," to devise lot 12 to his widow for life, and after her death to Stephen Corbit or to the eldest son of Michael Corbit; and whether the will in fact sufficiently expressed, by the words of such devise, such intention so as to pass and devise lot 12 to his wife for life, and after her death to Stephen Corbit, or the eldest son of Michael Corbit.

(3) And in case the Court decrees that the answer to question 1 is "no," and to question 2, "yes," to whom does lot 12 devolve, and to whom should the administrators convey the same?

(4) In case the Court decrees that the eldest son of Michael Corbit, that is to say, James Corbit, or that the descendants of Stephen Corbit, or either of them, is or are entitled to lot 12, after the death of the testator's widow, what is the estate to which James Corbit, or to which the descendants of Stephen Corbit, is or are entitled, and what

valid condition or conditions attaches or attach thereto or limit it?

(5) Whether the condition that the lands and premises are "never to be sold" is void, or not.

(6) To whom, after the death of Bridget Ryan (now Mrs. Bridget O'Keefe), is to be given the ten pounds each year, (*a*) to the next of kin of Bridget Ryan, or (*b*) to the next of kin of the deceased testator; and what is the legal effect of this condition; and is not this whole gift itself void, as offending against the rule against perpetuities, or as too vague to mean anything?

(7) Whether the payment of £10 each year to Bridget Ryan, or to the next of kin, is a lien or charge upon lot 12.

(8) In case the payment of £10 each year cannot be made out of the yearly revenue or income from lot 12, how is the deficiency thereof to be made up, and upon whom is the loss to fall?

(9) Whether the administrators can and should sell and convey lot 12, pursuant to the powers in them vested, for the purpose of paying the costs and disbursements of the administrators and of the administration, and free from the claims of Bridget Ryan and of the next of kin of either Bridget Ryan or of the testator, so as to give to a purchaser thereof a good title in fee simple.

A. E. Lussier, Ottawa, for the Toronto General Trusts Corporation, administrators de bonis non with will annexed.

C. J. R. Bethune, for the official guardian representing the unascertained next of kin of Bridget Ryan (O'Keefe).

FALCONBRIDGE, C.J.—The will which has to be considered was not only not drawn by a lawyer, but was drawn by some illiterate person.

In answer to questions 1 and 2: the testator did not die intestate as to lot 12 on the east side of Dalhousie street, but by the words he used he intended to devise said lot 12 as therein set forth.

In answer to questions 3 and 4, I am of opinion that Stephen Corbit having died before the widow, who was the life tenant, there is a substitutional gift to the eldest son of Michael Corbit, who is therefore the person entitled, subject to the charge hereinafter mentioned: Underhill & Strahan, p. 224.

5. The condition that "the premises is never to be sold" is void, being an absolute and unqualified restraint on alienation: Re Watson, 14 O. R. 48; Blackburn v. McCallum, 33 S. C. R. 65.

6. The legacy of £10 a year after the death of Bridget Ryan to "the next kin" is void as offending against the rule of perpetuities, and as being too vague to mean anything. It might be "the next kin" of the testator or "the next kin" of Bridget Ryan, or of Bridget's father.

7. The payment of £10 each year to Bridget Ryan, now O'Keefe, is a lien or charge upon lot 12.

8. This question is not, strictly, a question for the Court. Any one taking the land must take it with the burden.

Question 9 is in the same position. I take it the land must be sold subject to the charge.

The circumstances of this case are very exceptional, and it is ordered that in any event the costs of the official guardian be paid by the administrators de bonis non.

MEREDITH, C.J. FEBRUARY 7TH, 1905.

WEEKLY COURT.

RE BUNYAN AND CANADIAN PACIFIC R. W. CO.

Contract — Assignment — Payment for Work Done — Estimates—"Moneys Due"—Moneys Retained as Guarantee —Moneys Payable to Contractor—Claims of Lien-holders, Assignees, and Creditors—Priorities—Marshalling.

Appeal by the Bank of Ottawa from a report of a local Master upon a reference to ascertain the respective rights of the claimants to a fund, and to settle their priority and adjust their claims with respect thereto. The fund consisted of a sum of money owing by the railway company to Michael G. Bunyan for work done on the railway under a contract. The fund was claimed by mechanics' lien holders, persons claiming under assignments of the whole fund or part of it, and Division Court garnishing creditors.

On 27th May, 1904, the Master reported that the whole fund available for distribution was $5,513.24; that $1,756.90 should be distributed among lien-holders; $1,381.75 among certain assignees; $100 paid to a garnishing creditor; and $1,824.77 to the Bank of Ottawa.

From this report there was an appeal, upon which, inter alia, a reference back was directed for the purpose of ascertaining whether the assignment under which the Bank of Ottawa claimed was limited to the September and October estimates.

Upon the reference back the Master found that the assignment was so limited, and he reduced the amount from $1,824.77 to $505.52 by deducting from $1,986.77, which he found to be the amount of the September and October estimates, $1,481.25, the aggregate amount of the claims of the assignees, which, according to the Master's finding, were entitled to priority over the bank's claim.

The appeal was from this report.

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

W. E. Middleton and H. L. Dunn, for the respondents.

MEREDITH, C.J.—The first ground taken by the appellants is, that the Master should not have found that the October estimates amounted to $1,986.77, as he did find, but to that sum with the percentages retained by the railway company added.

The assignment to the appellants was made by Bunyan, dated 11th November, 1903, in these words: "I hereby assign to the Bank of Ottawa all moneys due to me under my contracts for the year 1903 with the Canadian Pacific Railway Company as shewn by the estimates hereto annexed."

Bunyan's contract with the railway company is dated 3rd June, 1903, and is for the doing of work at scheduled prices on different sections of their line.

Paragraph 18 of the contract is as follows: "Approximate estimates of the work done under this contract are to be made at the end of each calendar month by the engineer, and payments thereon shall be made by the railway company to the contractor on or about the 20th day of the next ensuing month, less all previous payments and less 10 per cent. of the amount of each and every such monthly estimate, which last mentioned percentage may be retained by the railway company as an additional security for the performance of this contract by the contractor until the same has been completely performed."

And paragraph 19 provides as follows: "When, in the opinion of the chief engineer of the railway company, this agreement has been completely performed within the time herein provided, subject to the foregoing provision as to extension, he shall certify the same in writing under his hand,

with a final estimate of the work done by the contractor and a statement of the amount due and unpaid, and the railway company shall, within 60 days after such completion, pay to the contractor the full amount which shall be so found due, including the percentage retained on former estimates as aforesaid, except as in this agreement is otherwise provided, upon delivery by the contractor to the company, if required, of a good and valid release and discharge of and from any and all claims and demands," etc.

Monthly estimates were from time to time made by the railway company in accordance with the terms of the contract.

The estimate is a certificate from the division engineer of the railway company, setting forth in detail the work done during the month, the amounts included in the previous estimate, the "total" work done, the rates at which the work was to be paid for, and the amounts earned. From the aggregate of the amounts earned is deducted "percentage retained 10 per cent.," and from the balance is then deducted "amount previously retained," stating the month for which the return was made, and the ultimate balance is stated to be "amount for the month of"—the month for which the estimate was made. . . . .

The Master in taking the accounts has proceeded upon the assumption that the appellants acquired by their assignment the right to receive only the $1,300.28 and $1,083.84 shewn by the October estimates as the amounts for that month, subject in both cases to prior claims, and this is objected to by the appellants, who contend that the assignment passed to them not only these sums but the percentages which were retained as shewn by the estimates, and which Bunyan was entitled to have paid to him upon the final completion of his contract.

The appellants' contention in this respect is, I think, well founded. The assignment to them is not simply of the October estimates, but of "all moneys due under my contract . . . as shewn by the estimates hereto annexed."

The words "moneys due" are not, I think, used in the sense of presently payable, but extend to money owing though not presently payable. Such an interpretation of the language the parties have used accords with what must have been, I think, their intention, for, upon the other construction, owing to the prior assignments which had been made by Bunyan, the fund assigned would not have been such a security as he had agreed to give for the advance of $2,000 which was made to him by the appellants on the faith of it.

The October estimates . . . shew, in my opinion, when read in the light of clauses 18 and 19 of the contract, that the railway company owed to Bunyan the two sums of $1,300.28 and $1,083.84, which were presently payable, and the two sums of $980.15 and $1,128.11, which were not presently payable, because they were retained by the railway company as security for the performance of the contract, and were to be paid to the contractor only when he had completed it on his part.

The Master has not thought that the two sums of $1,300.28 and $1,083.84 were any the less money due on the contract because the calculations upon which their ascertainment was based were subject to revision when the final estimate should come to be made, and in this he was, in my opinion, right. . . .

I do not understand why the appellants were by the order treated as being assignees of the September estimates. There is no pretence that these were assigned to them. This is, however, unimportant. . . .

If I had been of a different opinion as to the effect of the assignment, the report must, nevertheless, I think, have been varied, for the appellants are entitled to invoke the doctrine of marshalling, and indeed, as between them and the lienholders, the Master has applied it.

The creditors having garnishee orders, except Downing, have as against the appellants no higher rates than Bunyan himself had, and therefore as to them the fund is to be marshalled so that any of the claimants whose assignments have been given priority to the appellants, who are entitled to be paid not out of some particular estimate, but out of what at any time might be or become due to the contractor, must first resort to that part of the fund which is not appropriated to the payment of the appellants' claim. . .

The right of all the assignees who were given priority to the appellants to be paid out of the fund is not open to be questioned upon this appeal, and therefore, if the doctrine of marshalling is to be applied, it will be by subrogating the appellants to the rights of the prior assignees in as far as they were entitled to have the estimates subsequent to the October ones applied in satisfaction of their claims.

The appeal must, therefore, be allowed, and for the finding of the Master there must be substituted a judgment declaring that the appellants are entitled to rank on and be paid out of the fund as found by the first report. This is, of course, subject to any change or modification which may

be necessary to be made consequent on the final disposition of the claim of Simpson & Rowland.

There will be no costs of the appeal, unless on further directions the Court sees fit to direct them to be paid out of the fund. Such a disposition of them, in my opinion, would not be an unfair one.

ANGLIN, J. FEBRUARY 7TH, 1905.

TRIAL.

HOPKINS v. BURCHARD.

Master and Servant—Injury to Servant—Death—Negligence—Defect in Ways—Contributory Negligence—Course of Employment—Sunday Work—Jury—Nonsuit.

Action to recover damages for death of plaintiff's husband, an engineer employed by defendants, who was killed on Sunday 17th July, 1904, while engaged, as plaintiff alleged, in repairing a steam pipe which ran along a wall above defendants' boiler room. The space above the boiler room had formerly been used as a drying kiln, but after a fire which occurred some months before the date of the accident, its use had been discontinued, and the flooring removed, only a few boards being left, which were partly charred through, and were afterwards whitewashed over. The deceased had been for 12 years in defendants' employment, and must have known these facts. Nobody saw the accident happen. The deceased was found lying on the floor of the boiler room, his position and surroundings making it apparent that he had fallen owing to one of the boards mentioned having given way under his weight. Plaintiff claimed to recover both at common law and under the Workmen's Compensation Act.

At the close of plaintiff's case, defendants moved for a nonsuit, and renewed the motion after all the evidence was in. Judgment was reserved upon the motion, and questions submitted to the jury, who failed to agree upon any finding except that there was no proof of negligence which should be attributed to defendants as personal negligence, contra-distinguished from evidence of an employee.

J. M. Godfrey and A. McNab, for plaintiff.

E. E. A. DuVernet, for defendants.

ANGLIN, J. . . . I am of opinion that there was no evidence to go to the jury of negligence either of defendants or of their employees. The situation of the defective board,

the breaking of which caused the accident to deceased, was such that no reasonably careful man in his position would have used it, as he must have used it on the Sunday in question. It was obviously not intended for such use. Moreover, upon the evidence adduced on behalf of plaintiff, I do not think the jury could properly have found that deceased, when injured, was engaged in the course of his employment by defendants, which, in ordinary circumstances, extended from Monday morning to Saturday at noon in each week: Holmes v. Mackay, [1899] 2 Q. B. 319. This excludes the application of the statute. The only finding made by the jury negatives the existence of any right of action at common law.

Action dismissed with costs.

FEBRUARY 7TH, 1905.

DIVISIONAL COURT.

IMPERIAL BANK OF CANADA v. HINNEGAN.

Bills of Exchange—Action on—Defence of Payment—Bills Accepted for Goods Sold—Destruction of Goods by Fire—Application of Insurance Moneys—Interest of Vendees—Insurable Interest—Trust—Notice—Indemnity.

Appeal by plaintiffs from judgment of MEREDITH, J., in so far as in favour of defendants in an action on bills of exchange.

J. Bicknell, K.C., for plaintiffs.

J. S. Fraser, Wallaceburg, for defendants.

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

MEREDITH, C.J.—The action is brought against defendants as acceptors of two bills of exchange, each for $525, dated 12th October, 1903, drawn by A. H. Raymond on and accepted by them, and payable 5 months after date; and the defence is that the bills were given in payment of the price of 700 bushels of flax seed sold by Raymond to defendants; that it was one of the terms of the sale of it that Raymond should keep the flax seed, while it remained in his possession pending delivery to defendants, insured against fire for the benefit of defendants; that plaintiffs had notice of all this when they became holders of the bills; that at the time of their purchase of the flax seed it was, with the rest of the contents of a warehouse belonging to Raymond, in which the

flax seed was stored, insured against loss by fire for $6,000; that Raymond kept the insurance on foot, increasing it on 24th November, 1903, to $8,000, until and at the time when, on 22nd February, 1904, the warehouse and its contents, including the 700 bushels of flax seed, were totally consumed by fire; that plaintiffs, to whom "the loss was payable" under the insurance contracts, received $6,250, which was accepted in full satisfaction of the claim of Raymond on the then existing contract of insurance for the loss on the contents of the warehouse; and that defendants were entitled to have the insurance money applied pro tanto in payment of the bills, and that so applying it the bills were paid.

It appears from the evidence adduced at the trial that the flax seed sold to defendants, with other flax seed belonging to Raymond, was covered by assignments issued by him to plaintiffs under sec. 74 of the Bank Act, and held by them as security for his indebtedness to them; that Raymond made the sale of the 700 bushels sold to defendants with the assent, if not by the direction, of plaintiffs, for the purpose of reducing his overdraft with them, and that he was authorized by plaintiffs to sell the flax seed free from their claim under their security agreements.

It appears also that there was no separation of the 700 bushels from the bulk of the flax seed in the warehouse, but the proper conclusion upon the evidence is, I think, that what was sold by Raymond and purchased by defendants was 700 bushels to be taken from the quantity of flax seed in the warehouse at the time of the sale to defendants; the agreement of Raymond to insure for the benefit of defendants was also, I think, proved; that is to say, his agreement was in effect that the existing insurance which he held on the contents of his warehouse should be held for the benefit of defendants to the extent of the 700 bushels, and that he would keep up the insurance until delivery of the flax seed to defendants had been made. It also appears clearly that plaintiffs always recognized the right of defendants, if they had been so minded, to have, out of the quantity of flax seed in Raymond's warehouse, the 700 bushels which they had bought. It was not, however, shewn that plaintiffs had notice of Raymond's agreement to insure. The contract of insurance existing when defendants' purchase was made, by its express terms covered flax seed in bins and bags, being Raymond's own or held on trust or on commission or sold but not delivered, contained in his storehouse in the town of Essex (i.e., the warehouse in which the flax seed bought by defendants was stored), and that in force when the fire occurred covered flax seed in bins and bags, dressed flax and hemp fibre in

bales and tow in bales, being Raymond's own or held on trust or on commission or sold but not delivered.

The trial Judge gave judgment directing a reference to ascertain whether any, and if so how much, of the insurance money was referable to the flax seed purchased by defendants, reserving further directions and all questions of costs until after the report upon the reference had been made; and from that judgment the present appeal is brought.

Upon the facts, as I have stated them, it is not open to question that, although the property in the 700 bushels may not have passed to defendants, they had nevertheless an insurable interest in them: Box v. Provincial Ins. Co., 18 Gr. 280.

Nor is it, I think, open to question that, as between defendants and Raymond, the insurance contracts and any moneys which Raymond should become entitled to receive under them were in his hands bound by a trust in favour of defendants to the extent of their interest in the subject matter of the insurance.

Putting their case on the highest ground possible, and assuming that, not having had notice of Raymond's agreement as to the insurance, they are not affected by it, I can see no reason why, if, after taking out of the insurance moneys received by them sufficient to indemnify them for what was destroyed by fire, excluding the 700 bushels of flax seed which defendants were entitled to have, a balance remains, defendants are not entitled to be paid that balance to the extent of the value of their 700 bushels at the time of the fire.

It may be that plaintiffs are not entitled to put their case on as high ground as this, and that Raymond having insured, not only the flax seed which he owned, but that which he held on trust and that which he had sold but not delivered, the insurance, as far as it was applicable to defendants' 700 bushels, is a security held by plaintiffs to the benefit of which defendants, on payment of the bills, are entitled, notwithstanding that plaintiffs may not have had notice of Raymond's agreement to insure.

The 700 bushels purchased by defendants come, as it appears to me, clearly within the description either of flax seed held by Raymond on trust or flax seed sold but not delivered, and it is difficult to see how, having an insurance contract assigned to them which on its face covers flax seed held on trust by the insured or sold by him and not delivered, and having, as they clearly had, notice of the agreement which

Raymond had made with defendants, except the term of it as to his insuring the flax seed for the benefit of defendants, it is possible for plaintiffs to deny the right of defendants to receive so much of the insurance money as was referable to defendants' 700 bushels.

As I understand the judgment which has been directed to be entered, nothing is concluded as to the rights of defendants in respect of the insurance money, not even that in any view or to any extent they are entitled to the benefit of it, though I gather from what was said by counsel for plaintiffs at the trial that it was conceded that if, after taking out of the insurance moneys received by plaintiffs what was sufficient to indemnify them for the loss by fire on the contents of the warehouse, excluding the 700 bushels of flax seed bought by defendants, a balance remained, defendants are entitled to it.

In my view, if the trial Judge erred at all it was in pronouncing a judgment which is too favourable to plaintiffs, and that this appeal entirely fails and should be dismissed with costs.

FEBRUARY 7TH, 1905.

DIVISIONAL COURT.

RE BAINSVILLE SCHOOL SECTION.

Public Schools—Formation of New School Section—Award—Statutory Requirements—Area of Section—Number of Children of School Age—Determination of Arbitrators—Jurisdiction—Power of Court to Review.

Appeal by the corporation of the township of Lancaster from order of ANGLIN, J., 4 O. W. R. 455, dismissing appellants' motion to set aside an award.

D. B. Maclennan, K.C., for appellants.

C. A. Masten and J. A. Chisholm, Cornwall, for respondents.

THE COURT (FALCONBRIDGE, C.J., BRITTON, J., IDINGTON, J.), dismissed the appeal with costs, agreeing with the opinion of ANGLIN, J.

BRITTON and IDINGTON, JJ., expressed their views in writing.

IDINGTON, J. FEBRUARY 8TH, 1905.

TRIAL.

BRENNAN v. FINLEY.

Limitation of Actions—Real Property Limitation Act—Tenant Paying no Rent—Payment of Taxes—Insufficiency to Prevent Statute Running — Mortgage—Costs—Counterclaim—Right of Way.

Action by mortgagee for foreclosure. The mortgage was made in 1897 by defendant Finley, who did not defend. Defendant Joyce was made a party because in possession of a part of the mortgaged land, as to which he defended, and claimed title thereto and to a right of way appurtenant thereto by virtue of the Real Property Limitation Act. He also counterclaimed for a declaration that the mortgage was not binding upon him and was not a charge upon his part of the land, and that the mortgage was subject to the right of way, and for a mandamus directing plaintiff to discharge the mortgage so far as it purported to be a charge on the part of the land which was thus claimed.

G. F. Henderson, Ottawa, and A. W. Greene, Ottawa, for plaintiff.

Glyn Osler, Ottawa, and F. M. Burbidge, Ottawa, for defendant Joyce.

IDINGTON, J. . . . The patent from the Crown granting the lands to defendant Finley issued on 5th August, 1870. Thereafter Finley built on the lands a row of 4 houses, one of which, that now in question, defendant Joyce entered into possession of about 1st November, 1875, as tenant of Finley, at a rental of $150 a year. . . . Joyce had been tenant of Finley in another house for some years. . . . He had fallen much in arrear for the rent. . . . These arrears he seems to have been paying up for some years after his removal, but he never, unless by way of paying the taxes and water rates, which are collected as taxes in Ottawa, where the land is, paid any rent for the new house.

The possession of Joyce continued from the time of his first entry until the trial of this action. He has thus clearly acquired by length of possession, under the Real Property Limitation Act, the land in question, unless the statute has been prevented from running by reason of the payment of rent in the way that is made to appear in the following evidence by defendant Finley:— . . .

[The learned Judge then set forth the evidence, the effect of which was: that Joyce was to pay the taxes and water rates, and the amount was to be deducted from the rent; no definite time was mentioned; Joyce was to pay $150 a year rent; there was no writing; Joyce paid no rent; when witness told Joyce to go and pay the taxes he said nothing, but went and paid them.]

Assuming for argument's sake that this established the right of Finley to apply the payments of taxes on account of rent, and that in his own mind, though his book does not shew it, he looked upon these payments as so applied, but failed to communicate that to Joyce, does it entitle plaintiff to succeed?

I think not. In one view the tenancy may be taken as a tenancy at will, and in another as a tenancy from year to year, but in either view the case falls within sub-sec. 5 of sec. 5 of the Real Property Limitation Act, and the statute began to run, on the facts presented here, on or about 1st November, 1876, unless any rent since "payable in respect of such tenancy was received" by the landlord.

Can the tax collector or the city treasurer who got any such taxes be held to have been the agent of the landlord? . . .

It would be competent, perhaps, for landlord and tenant so to agree that taxes so paid might be held to have been rent received. This evidence, however, falls far short of many conceivable cases of that kind, wherein the statute might be prevented from running.

The term for which this payment of taxes was to have been so applied is quite indefinite. What was said may have been, and I think probably was, spoken of the then current year's taxes. . . .

[Finch v. Gilray, 26 A. R. 493, distinguished. Darby & Bosanquet, 2nd ed., p. 383, and Attorney-General v. Stephens, 6 DeG. M. & G. 111, 136, referred to.]

The quality of admission of right required to fulfil the conditions of the statute, thus expressed, is what is wanting in the tenant's acts here, and in plaintiff's case.

The payment of taxes being compulsory, it is impossible to attribute their payment over so many years to a casual conversation or temporary arrangement. I have not overlooked the fact that the landlord took care to keep an eye on the tenant to see that he did pay them. He is, when pressed, unable

to go further and shew that the tenant had in paying been mindful of it as a duty that he owed to his landlord. I am unable to infer anything beneficial for plaintiff's case from the assessment of Joyce as tenant and Finley as owner, which continued all the time: see McCowan v. Armstrong, 3 O. L. R. at p. 107, 1 O. W. R. 28.

I must dismiss the action as against Joyce in respect of the land set out in his statement of defence, but, in the circumstances, without costs.

Plaintiff will be entitled to add to the mortgage debt his costs of suit, including those incurred by reason of this contestation with defendant Joyce, as incurred in the reasonable effort to protect the title supposed to have been conveyed to him: Fisher on Mortgages, 4th ed., p. 922 et seq.

The counterclaim must be allowed so far as to declare that the mortgage in question is not a charge upon the lands occupied by defendant Joyce . . . and that, so far as that defendant is entitled to a right of way, plaintiff, as mortgagee by virtue of the mortgage to him, is not entitled to interfere with the exercise of such right. . . . I do not feel at liberty to direct a mandamus, and there will be no costs of counterclaim.

FEBRUARY 8TH, 1905.

DIVISIONAL COURT.

DOULL v. DOELLE.

Arrest—Setting aside Order for—Powers of Judge—Judgment against Married Woman—Proprietary Liability—Form of Order—Intent to Quit Ontario—Bail Bond—Restoration—Appeal.

Appeal by plaintiffs from order of MACMAHON, J., 4 O. W. R. 525, setting aside his own order for the arrest of defendant, who was a married woman when judgment was recovered against her by plaintiffs in 1899, but was a widow at the time of the arrest.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., IDINGTON, J.

F. J. Roche, for plaintiffs.

W. E. Middleton, for defendant.

BRITTON, J.— . . . No objection was taken by plaintiffs in the argument before the learned Judge to his want of jurisdiction to set aside his own order for arrest, and that

objection is not stated in plaintiff's notice of motion on the present appeal, but the objection was urged by counsel on argument before us.

I am of opinion that this matter must be dealt with rather upon the facts appearing in this altogether exceptional case than upon the law as to the learned Judge's right to set aside his own order for arrest, or upon the larger question of the exemption of defendant from arrest, the judgment herein having been recovered against her as a married woman, payable out of her separate estate.

It now appears upon the material before us on the argument that defendant has actually "quitted Ontario," absconded as plaintiffs say, and that the money which plaintiffs seek to make available for payment of their judgment has been sent by defendant to her brother in Pontiac, Michigan.

The learned Judge who made the order for arrest is of opinion, and so states in his reasons for judgment, that the order should not have been made.

If this appeal should succeed, the bail bond given by defendant to the sheriff, now vacated, could not be restored so as to make the sureties liable to plaintiffs for this debt in case of non-production of defendant.

Then Rule 1047 permits the Court or a Judge, subject to appeal, to make such order for the discharge out of custody as may seem just.

In the view I take of it, upon the whole case, the proper disposition of it will be to dismiss the appeal without costs, and without prejudice to any new action or proceeding that plaintiffs may think proper to take upon the judgment or against defendant, in any circumstances which may hereafter arise.

FALCONBRIDGE, C.J., concurred.

IDINGTON, J., gave reasons in writing for the same conclusion.

IDINGTON, J. FEBRUARY 8TH, 1905.

CHAMBERS.

TASKER v. SMITH.

Partition—Aplication for Summary Order—Question of Title —Direction as to Action.

Application by plaintiff for a summary order for partition or sale of land in the circumstances set forth in the judgment below.

A. W. Ballantyne, for plaintiff, referred to Russell on Awards, 8th ed., p. 201, and Stroud v. Sun Oil Co., 7 O. L. R. 704, 3 O. W. R. 806, 4 O. W. R. 212.

W. D. Gwynne, for defendant, referred to MacDonald v. McGillis, 8 P. R. 339; Hopkins v. Hopkins, 9 P. R. 71; Smith v. Smith, 1 O. L. R. 404.

IDINGTON, J.—Plaintiff, by notice pursuant to Rule 956, moves . . . for partition or sale of certain lands . . . She alleges that she is entitled to an undivided one-fourth interest in said lands, and that defendant is entitled to three-fourths undivided interest. Plaintiff and defendant are sisters.

A considerable estate, consisting of lands and mortgages, was vested in certain trustees of the will of the late Emily E. Taylor, for the benefit of the parties hereto and three others. It was agreed by those so interested that all of the lands or . . . so held in trust (save certain specified exceptions) should be partitioned and divided between the parties by arbitrators named in the submission.

These arbitrators made their award.

By this award they allotted to defendant, amongst other parcels of land, a three-fourths undivided share in . . . the lot in question here, and they allotted to plaintiff, in addition to other parcels of lands, a one-fourth undivided share in the same lot.

By a clause of the award the arbitrators direct as follows: "We do further award and adjudge that if the said Annie Smith desire, within six months from the date hereof, to purchase the interest in lot lettered D. awarded hereunder to Louisa J. Tasker, she shall be entitled to do so for the sum of $375, and on payment of the said sum the said Louisa J. Tasker shall execute a proper conveyance of her interest in said lot D. to said Annie Smith."

Within the time limited defendant alleges that she tendered $375 to plaintiff, and requested the conveyance provided for by the award, but this was refused. Plaintiff now contends that the clause I have just quoted was beyond the powers of the arbitrators.

Many interesting and difficult questions are suggested by this contention. They are of such a nature as to render it improper to make a disposition of them upon this motion. For the purposes of these partition motions the title must be clear, and where that is not so, the matter must be adjudicated upon in some other proceeding.

I think, therefore, that this motion should stand over till plaintiff may have had the opportunity of ascertaining her rights by a suit for partition, or declaration of her rights and partition. I think the costs of the motion should abide the result. I have formed an impression in regard to the contentions set up by plaintiff that I do not think I should, in view of the result, give expression to at present.

CARTWRIGHT, MASTER. FEBRUARY 9TH, 1905.

CHAMBERS.

RANDALL v. BERLIN SHIRT AND COLLAR CO.

Appeal from Master's Report—Extending Time for—Special Circumstances—Terms.

Motion by the liquidator of the A. O. Boehmer Co. to extend the time for appealing from the report in a mortgage action, in which he proved a claim for more than $14,400 as a subsequent incumbrancer. Plaintiffs' claim was proved at about the same amount. The report was filed on 2nd December, 1904, and notice of filing was served on 6th December, 1904, so that 20th December was the last day for giving notice of appeal.

A. C. McMaster, for applicant.

W. Davidson, for plaintiffs.

THE MASTER.—The motion is based on the statements of the original mortgagee, Margaret Boehmer. After the report had become absolute, she was asked, on her examination in the winding-up of the Boehmer Co., how the $10,000 (the mortgage money) was paid. Her statements were not very definite, and the liquidator now wishes to have an opportunity of investigating this question further before the Master. He thinks, and no doubt rightly, that it is his duty to have this made clear, and to have it shewn that the whole consideration was really advanced. . . .

[Reference to Re Gabourie, 12 P. R. 252; Ross v. Robertson, 7 O. L. R. 464, 3 O. W. R. 513.]

In the present case it does not seem that any injury will result to plaintiffs from granting the motion. I cannot say that the "appeal is apparently groundless or frivolous." And as to the merits it would not be proper to consider them at present any further.

The time for redemption is fixed by the report for 2nd June, 1905, and this time should not be extended now. To this the applicant is willing to accede.

An order will, therefore, issue extending the time for giving notice of appeal (or taking such other proceeding as the applicant may be advised) until 16th February instant.

The costs of this motion will be to plaintiffs in any event, and be added to their claim. Time for redemption not to be extended beyond 2nd June.

MACLAREN, J.A. FEBRUARY 9TH, 1905.

C.A.—CHAMBERS.

O'LEARY v. PERKINS.

Appeal—Court of Appeal—Leave to Appeal from Order in Weekly Court—Grounds.

Motion by defendants for leave to appeal directly to the Court of Appeal from an order of TEETZEL, J., (7th December, 1904), in the Weekly Court, upon appeal from a Master's report.

W. J. Hanna, Sarnia, for defendants.

J. S. Fraser, Wallaceburg, for plaintiffs.

MACLAREN, J.A.— . . . By his report the Master found $6,970.47 to be due to plaintiffs. On appeal Teetzel, J., reduced this amount to $5,528.23. Defendants gave notice of appeal to this Court, and prepared an appeal book, as if the order appealed from had been prior to 1st September, 1904. On discovering their error they now ask leave to appeal directly to this Court without going to a Divisional Court.

Plaintiffs oppose the motion, first, on the ground that the amount in controversy in this appeal is less than $1,000. They allege that the amount of reductions asked for in the appeal from the Master's report was not $1,000 above the $1,442.24 allowed by Teetzel, J. I do not find, however, that this clearly appears from the material before me, and I do not wish to base my judgment on this ground.

The next point to be considered is whether, assuming that an appeal would lie to the Supreme Court of Canada, I should, notwithstanding plaintiffs' objection, grant leave to defendants to appeal to this Court instead of to a Divisional Court.

As stated by the Chief Justice of this Court in Canada Carriage Co. v. Lea, 5 O. W. R. 86, "the applicants must

shew some reasonable ground for depriving the respondents of the right which the statute has given them of requiring the applicants to first carry their case to a Divisional Court."

I do not find in this case any such sufficient grounds. The issues appear to be mere questions of fact, and they are to be determined by an appreciation of the admissions and evidence, which are within a very narrow compass. I do not think I should assume that a Divisional Court will not be able to render such a judgment as ought not to satisfy both parties.

There are here no circumstances that are not to be found in every case over $1,000, except the part preparation of the appeal book, and I do not think this alone is a sufficient ground for granting the application. Even if the case is one that might be appealed to the Supreme Court, there is no suggestion that it is likely to be taken there, and no questions apparently involved that might not be reasonably expected to be settled without its being taken so far.

Application dismissed with costs.

CARTWRIGHT, MASTER. FEBRUARY 10TH, 1905.

CHAMBERS.

DUNLOP v. DUNLOP.

Evidence—Examination of Witness on Pending Motion—Ex Parte Motion—Substituted Service of Process—Status of Witness to Move to Set aside Appointment and Subpoena.

Motion by a person, not a party to the suit, who was served by plaintiff with a subpœna and appointment for examination as a witness upon a pending motion, to set aside the subpœna and appointment.

W. E. Middleton, for applicant.

W. J. Elliott, for plaintiff.

THE MASTER.—Plaintiff obtained an ex parte order for substituted service of the writ of summons on defendant by serving the person now sought to be examined. The papers served were returned by applicant's solicitors, who wrote that witness "cannot and will not communicate the fact of service to the defendant." . . . Plaintiff filed an affidavit stating the abortive result of the first order, and that the witness "is in communication with the defendant and knows of his whereabouts and address." On being served with subpœna and appointment, the witness applies to have

them set aside as being an abuse of the process of the Court.

Several grounds were taken in the notice of motion. Those mainly relied on were: (1) that there is no motion pending before the Court, and so Rule 491 does not apply; (2) that an order for substituted service has already been made and acted on, and the witness, on whom service was made, has disclaimed any knowledge of defendant's residence; and (3) that the Rules do not provide for or permit the examination of witnesses upon an ex parte motion.

It was argued that the witness has no status to move yet. This point was met by Steele v. Savory, 8 Times L. R. 94, which seems to overrule the objection.

The substantial question is whether an ex parte motion is a "motion before the Court" within the meaning of Rule 491.

The notes to this Rule in Holmested & Langton's Jud. Act, p. 673, and the cases cited, seem to shew that an ex parte motion is a motion in support of which evidence can be obtained.

In the present case plaintiff is right in trying to obtain such information as will enable such an order to be made as will prima facie bind defendant on the question of service. When an order has been made, as here, which is plainly abortive, it does not seem reasonable to hold, in the absence of authority, that plaintiff's whole remedy is exhausted. . . .

In my opinion, the motion should be dismissed. . . . I do not think it is a case for costs.

MEREDITH, C.J. FEBRUARY 10TH, 1905.

TRIAL.

MOFFATT v. LEONARD.

Patent for Invention — Infringement — Substance of Invention—Anticipation—Injunction—Damages.

Action for infringements of two patents obtained by plaintiff dated 12th October, 1894, one for improvements in feed water purifiers, and the other for improvements in oil extractors for exhaust steam, and for an injunction to restrain defendants from further infringements.

G. H. Kilmer and J. G. Wallace, Woodstock, for plaintiff.

G. C. Gibbons, K.C., for defendants.

MEREDITH, C.J.—As to the alleged infringement of the second of these patents, I am of opinion that plaintiff's case

fails, for no infringement was, I think, proved, and indeed plaintiff's counsel did not press very strongly this branch of his claim.

As to the alleged infringement of the other patent, the case of plaintiff was rested on the second claim, which is as follows: "2. In a feed water heater and purifier the combination with the upper filterers and central pipe arranged as specified of a slanting deflecting plate surrounding the pipe and having a straight edge designed to direct the water to the one side and to the bottom of the bottom filterer, the top of the side of the filterer beneath the edge of the plate extended upwardly in proximity to the deflecting plate so as to leave an opening beneath the plate as and for the purpose specified."

What is claimed by plaintiff is that by the arrangement of the several parts of the purifier according to the description contained in the specification in his patent he has provided against the blowing off of the top or cover of the filtering chamber owing to the unequal pressure of the steam within it, which because the chamber was a closed one was not permitted to escape, and his method of remedying this defect was by so constructing the chamber that one of its sides did not extend up to the top of cover, but to a point a short distance below it, thus leaving a space through which the steam generated in the chamber was permitted to escape and pass upwards through the purifier.

The second claim is, I think, adequate to cover this mode of construction, which, it was shewn, effected a substantial improvement in the purifier by remedying the defect in those previously in use, to which I have referred.

Defendants have, I think, in this particular infringed plaintiff's patent. Their filtering chamber is not a closed one, but has substantially the same means provided for the escape of the steam as that described in plaintiff's specification.

In doing this they have availed themselves of what was described by Lord Cairns as the "pith and marrow" of this part of plaintiff's invention; that they have not adopted exactly the same form as that used by plaintiff is immaterial, if they have, as I think they have, taken substantially the substance and pith of his invention: Dudgeon v. Thomson, 3 App. Cas. 34, at p. 39; Hocking v. Hocking, 4 R. P. C. 434, at pp. 442-443, approved by Lord Watson, S. C., 6 R. P. C. 69, at p. 78; Consolidated Car Heating Co. v. Came, [1903] A. C. 509.

It was contended that plaintiff's invention was shewn to have been anticipated, but I find that that was not shewn, for in none of the patents put in evidence was the defect which plaintiff sought by his mode of construction to remedy attempted to be met.

Plaintiff is therefore entitled to judgment for damages, which I assess at $50, and to an injunction restraining defendants from further infringement, the injunction being strictly confined to the one particular in which I have found that there has been an infringement, and as to all the other claims and alleged causes of action, the action must be dismissed.

There will be no costs to either party.

FEBRUARY 10TH, 1905.

DIVISIONAL COURT.

HATELY v. ELLIOTT.

Contract—Illegality—"Unduly" Lessening Competition—Trade Association—Criminal Code, sec. 520 (d)—Cheque—Conditional Payment.

Appeal by defendant from order of Judge of County Court of Brant refusing a new trial in an action tried in the 1st Division Court in that county, in which judgment had been recovered by plaintiff for $200 and costs in an action upon a cheque.

W. S. Brewster, K.C., for defendant.

E. Sweet, Brantford, for plaintiff.

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

MACMAHON, J.—Defendant was a member of "The Brantford Coal Importers Association," formed in July, 1899, of which plaintiff, who is not a member, was appointed secretary-treasurer. The association was not incorporated, but there was a constitution framed and rules passed by which the members were bound.

The constitution, art. I., provides that the association shall be composed of such dealers as are importers of coal, who shall have been elected and signed the constitution and by-laws.

Article VI. provides for holding meetings of the association at which all matters affecting the trade may be voted upon, and the decision of the majority is to be binding on the whole.

By art. VIII. provision is made for investigating any charge of violation of the rules, &c., by a member of the association, and if "the charge be sustained, the association shall take such steps as may be considered necessary to carry out the purpose for which the association is formed."

By sec. 2 of the by-laws, "Prices of coal as fixed by the association can, under no circumstances, be deviated from or altered, except by authority of a subsequent meeting."

3. Any member of the association who shall sell coal at less than the prices fixed, or in violation of the rules and regulations made by the association for the sale of coal, shall appear before the association, and an investigation held in accordance with art. VIII. of the constitution. . . .

6. Municipal and government contracts for coal may be tendered for at special rates, but only on such conditions as may be agreed upon at a meeting of the association. . .

20. Any member of this association who . . . may sell coal at a price less than that fixed by this association shall pay to this association the sum of $1 for each and every ton of coal so sold. The decision of the secretary, after investigation, to be final.

In the judgment of the County Court Judge he summarizes the evidence as to the methods of the association thus: "The association at its meetings fixed the minimum price of coal among its members for the city, and of selling contracts for the supply of coal to public institutions by auction amongst its members. In the latter case they first fixed the minimum price at which a tender could be put in, and the contract was then put up among the members at auction and sold to the highest bidder, the unsuccessful bidders being permitted to tender for the contract, but not at so low a figure as the purchaser. The proceeds of the sale of the contract were then placed in the hands of a third party, the plaintiff, to be distributed among the members of the association in equal shares. Among other contracts thus put up at auction among the members of the association, was one for the public schools of the city, and defendant was declared the purchaser thereof at $212, and on 19th June, 1901, he forwarded his cheque to plaintiff for that amount, it being marked "cheque conditional deposit," the condition being referred to in the letter accompanying the cheque as

follows: "That the contract for the city schools is to be awarded to me and the same commenced and binding, tenders being received on the 20th day of the current month."

Defendant was awarded the contract by the school board, and was paid the contract price as fixed by the association. . . .

Defendant wrote again to plaintiff on 29th July, 1901, stating that, although the tenders for coal required by the school board were received on 20th May, the contract was not awarded until June, and in the meantime coal had gone up 10 cents a ton, and that he thought he was entitled to an allowance of 10 cents a ton on 200 tons. The association having declined to make the allowance, defendant notified the bank . . . not to pay the cheque.

Plaintiff then sued on the cheque, abandoning the excess over $200.

The principal grounds of defence relied upon were:—

1. That the cheque was given conditionally.

2. That the Brantford Coal Importers' Association was an organization coming within sec. 520 of the Criminal Code, and that the transactions out of which the alleged cause of action arose were illegal, and plaintiff could not recover. . . .

[Upon the first point, the learned Judge referred to the Bills of Exchange Act, secs. 3, 72; Jury v. Barker, E. B. & E. 459; Kirkwood v. Carroll, [1903] 1 K. B. 531; Taylor v. Currie, 109 Mass. 36.]

The instrument in question here had "cheque conditional" written on its face, and no bank would pay on presentation with these qualifying words written on it. A document which in other respects is a cheque, but which directs payment of a sum of money "conditionally" cannot be transferred into an unconditional order to pay at the will of the drawee. . . .

[The learned Judge then took up the second point, and referred to the evidence and sec. 520 (d) of the Criminal Code.]

Upon the question whether the 8 or 10 persons and firms who composed the association (defendant being one), and became bound by the constitution and by-laws, had conspired to "unduly prevent or lessen competition" in the price of coal, evidence was necessary in order to shew that competition in the sale of the article had been "unduly" prevented. . . . It appears that all of the importers of coal in Brantford were members of the association, and all

became bound not to sell below the prices fixed by the association, and any member selling at less than the fixed price became liable to the association in the sum of $1 for every ton of coal so sold. That without more is sufficient to shew that the combination was of a character which must "unduly" prevent competition in the sale of coal. And, in addition to what appears in the by-laws, there was evidence as to the method adopted of dealing with tenders for supplies of coal to municipal bodies, by fixing the minimum price and putting up the contracts for sale by auction amongst the members, the unsuccessful bidders not being permitted to tender at so low a figure as the purchaser—a striking illustration of the manner in which the association absolutely prevented competition in selling coal to municipal bodies.

The finding of the County Court Judge should, therefore, be reversed, and the finding should be that there was an agreement by the members of the association to "unduly lessen competition in the sale of coal."

Plaintiff was serving as the agent of the partners forming the association, and, as the evidence given by him at the trial shewed that the association was an illegal one, within sec. 520 of the Criminal Code, he cannot recover. . . .

[Reference to Rex v. Elliott, ante 163.]

Appeal allowed and action dismissed. No costs.

FEBRUARY 11TH, 1905.

DIVISIONAL COURT.

DAVIDSON v. WATERLOO MUTUAL FIRE INS. CO.

Fire Insurance—Oral Application—Authority of Agents—Ownership of Goods Insured — Insurable Interest — Lessees—Notice to Agents—Policy Differing from Application—Statutory Condition 10 — Estoppel — Statutory Condition 2—Reformation of Policy.

Appeal by defendants from judgment of TEETZEL, J., in favour of plaintiffs in action to recover $2,500, the amount of loss which plaintiffs sustained by the destruction by fire of certain machinery which was on their premises at the time when the fire occurred, and against the loss by fire of which, as plaintiffs alleged, defendants had contracted to indemnify them to the extent of $2,500.

The appeal was heard by MEREDITH, C.J., IDINGTON, J., MAGEE, J.

R. McKay, for defendants.

J. Lorn McDougall, Ottawa, for plaintiffs.

MEREDITH, C.J.—Since the argument further documentary evidence has been put in, by leave, in support of plaintiffs' case.

The machinery consisted of 3 box-making machines . . . with their attachments. . . .

Plaintiffs, though not the owners of the . . . machines, were lessees, and had an insurable interest in them to the full extent—$2,500.

The state of the title, the name of the owners, and the nature of plaintiffs' interest in the machines, were communicated to the agents of defendants to whom the application for the insurance was made. The agents were also at the same time informed that the owners of the machines had asked plaintiffs for an insurance of $2,000 on the machines, and that plaintiffs had an interest in them, and wanted $500 more put on to make the insurance $2,500. . . .

The machines themselves were worth probably from $2,500 to $3,000.

The application for the insurance was made on 3rd February, 1903, and was for an insurance for one year; it was oral; one of the application forms of defendants was partly filled up by the agents and signed in the name of plaintiffs, per G. S., which are the initials of a member of the firm of R. Stewart & Son, the agents. This was done without the knowledge, consent, or authority of plaintiffs.

Nothing is said in the form thus filled up as to the ownership of the property.

The agents had authority to accept the risk, receive the premium, and issue an interim receipt on behalf of defendants, and all this they did. The interim receipt bears date 3rd February, 1903.

The form purporting to be the application of plaintiffs for the insurance was forwarded by the agents to the head office of defendants, and a policy of insurance was issued by them and sent to plaintiffs, but no notice was given to them that the policy in any way differed from the contract which they had proposed in the oral application which they had made to defendants' agents.

In the policy the property insured is stated to be "more particularly described in the application for this insurance made by the assured, and being represented in said application as otherwise not insured," and the policy contains the further statement, following the words I have quoted, "and the said property aforesaid as being held by assured as owners."

The latter statement does not appear in the application form. . . .

The description of the property which the application form contained was as follows: "On 3 box-making machines . . . with attachments thereto, including . . . in a three-story brick, felt and gravel roofed, building, while occupied only for the manufacture of wooden boxes by the assured."

All the property was destroyed by fire during the currency of the policy, and this action is brought to recover $2,500, the amount insured.

Plaintiffs had, as I have said, an insurable interest in the property at the time of the fire to the extent of at least $2,500.

The only defence made is, that plaintiffs are not, by reason of the 10th statutory condition, entitled to recover for the loss in respect of the 3 machines, because, as it is pleaded, they were owned by a person other than plaintiffs, and the interest of plaintiffs in them was not stated in or upon the policy.

My brother Teetzel, having found the facts substantially as I have stated them, directed judgment to be entered for plaintiffs against defendants for $2,500, with interest and costs. . . .

I agree that the proper conclusion upon the evidence is, that the insurance which plaintiffs proposed to defendants' agents was one upon their insurable interest in the property, which was, as they informed the agents, as to the machines not a full ownership, and the nature of which was truthfully stated to the agents; that that proposal was accepted by the agents, who were thereupon paid the premium for the insurance for one year, $140; that the agents thereupon issued to plaintiffs an interim receipt intending to insure them against loss in the sum of $2,500 on their interest in the property as it had been described to them.

The interim receipt is for an insurance for 12 months from 3rd February, 1903, and is expressed to be subject to

the approval of the head office and the conditions of the company's policy; and the following statement appears at the foot of it: "Unless previously cancelled, this receipt binds the company for 30 days from the date hereof and no longer, after which time the risk shall be considered to be cancelled and of no effect. If the insurance be declined, the amount received will be refunded, less the premium for the time insured; if confirmed, a policy will be issued in due course."

Assuming that the agents had no authority to bind defendants to an insurance for 12 months, and that all they were authorized to do was to receive the application and to grant an interim receipt in the form in which that issued to plaintiffs was drawn, and that plaintiffs must rely upon the acceptance by defendants of the contract which plaintiffs had proposed to them through their agents, and the policy issued upon their application and sent to them—are plaintiffs precluded by the provisions of condition 10 from recovering for their loss?

It is to be noticed that there is nothing in the application form or in the interim receipt to indicate that defendants will not or do not undertake to insure against loss any one who is not the owner of the property insured, and nothing to indicate that, in order that the insurance applied for shall operate, if the insured is not the owner of the property, he must state what is his interest in it.

It is apparent that the appellants did not deem it important that they should know what the interest of plaintiffs in the property really was. The application form contains no less than 40 questions, and not one of them is pointed, directly at all events, to ascertaining what the interest of the applicant in the property to be insured is. . . . The only question which is, even remotely, directed to such an inquiry, is the 30th, which seems to have been applicable to an insurance on buildings rather than to one upon personal property, and even that question is unanswered.

The provision of condition 10 is not that if the nature of the insured's interest is not disclosed in the application the policy is to be void, or that the policy is not to cover any insurable interest of the insured unless he is the owner of the property insured, but that the company are not liable for loss of property owned by any other than the assured, unless the interest of the assured is stated in or upon the policy.

The policy on its face contains a covenant on the part of defendants to make good to the assured all such loss or damage by fire, not exceeding the amount insured on the property, as should occur during the continuance of the policy;

and, except in as far as, if at all, this covenant is qualified by the 10th condition, defendants would be liable to make good the loss to the extent of the insurable interest of plaintiffs in the property, whatever the nature of that interest might happen to be.

Defendants had notice through their agents of the real interest of plaintiffs in the property insured; and it was, I think, therefore, their duty to have indorsed on the policy the necessary statement as to it, or at all events they are estopped from setting up the 10th condition to defeat plaintiffs' claim.

There is nothing to shew that the agents had not the necessary authority to make the indorsement on the policy required by the 10th condition; they were the general agents at Ottawa of defendants, and their authority, as described by one of them, was wide enough, as it appears to me, to cover the doing of such an act, on behalf of their principals.

If I am right in this view, I am unable to see why defendants should be permitted to avail themselves of the failure of their agents to do this, and thereby make the policy a real security to plaintiffs, instead of being, if the contention of defendants is well founded, a worthless piece of paper —and, indeed, worse than that, something to lead plaintiffs to believe that they had the security against loss by fire which they had applied for and for which they had paid their money, when in truth they had not.

There is another ground also upon which, in my opinion, plaintiffs were entitled to succeed.

Their application was, as has already been said, an oral one, and, if the policy gives them a contract different from that for which they applied, as it does if defendants' contention is well founded, I do not see why plaintiffs may not invoke the provisions of the 2nd statutory condition to prevent defendants from setting up the provisions of the 10th condition. . . .

The 2nd statutory condition is as follows: "After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company point out in writing the particulars wherein the policy differs from the application."

I see no reason for confining the operation of this condition to a written application, and there is no injustice done to the insurer, if he chooses not to require the application to be made in writing, and to trust to its being correctly enunciated by his agent, in holding him bound by the application that has in fact been made to his agent. He has the

remedy in his own hands; he may refuse to accept the risk at all unless the application is put in writing and signed by the applicant; and, if he chooses not to do this, and he is misled and suffers loss, why should that loss not fall rather upon him than upon the insured? It may well be that the draftsman of the condition in framing it had in view just such a case as this, but, however that may be, the condition is, I think, applicable to an oral application.

Then what is the effect of the condition? Its purpose is manifestly, I think, to secure to the applicant the very contract for which he has applied, unless the insurer informs him in writing that the policy sent to him is a different one, and points out the particulars in which it differs from his application. Whether the condition requires the policy to be read just as it would have been drawn had it been written in accordance with the terms of the application, or affords a ground for the rectification of the policy so as to make it agree with the application, or precludes the insurer from setting up any term of the policy as issued which is inconsistent with the terms of such a policy as would have been issued had it been written in accordance with the terms of the application, is, I think, unnecessary to consider, because, in my opinion, in one or other of these ways plaintiffs are entitled to rely on the condition to meet the defence which defendants have set up, and, even if the condition affords only ground for the rectification of the policy, plaintiffs are entitled to recover without what Patterson, J.A., in Billington v. Provincial Ins. Co., 2 A. R. at p. 185, called the useless form of having the policy actually reformed.

In Fowler v. Scottish Equitable Ins. Co., 28 L. J. Ch. 225, the difficulty in the way of the plaintiff obtaining a reformation of the policy was, that there was no consensus ad idem; he had intended to effect the insurance only on the terms that were proposed to the agent, but the head office, from which the policy issued, intended to enter into the contract only on the terms of the policy as issued.

Condition 2, as I read it, gets rid of such a difficulty . . . and its effect is, I think, to secure to the applicant for insurance the very contract for which he has applied, though the policy sent to him is a different one, unless the notice for which it provides is given by the insurer. This is no more, in such a case as this, than imputing to the insurer the knowledge which his agent has, and I can see no injustice in doing that. . . .

Appeal dismissed with costs.

IDINGTON, J., gave reasons in writing for the same conclusion. He referred to McLeod v. Citizens Ins. Co., 3 R. & G. (Nova Scotia) 156; Atlantic Ins. Co. v. Wright, 22 Ill. 474; Germania Ins. Co. v. Hoick, 125 Ill. 361; Van Schoick v. Niagara Fire Ins. Co., 68 N. Y. 434.

FEBRUARY 11TH, 1905.

DIVISIONAL COURT.

BOUCHER v. CAPITAL BREWING CO.

Liquor License Act—Sale of Intoxicating Liquors to Person not Entitled to Sell—Recovery of Moneys Paid—Person Carrying on Business on Licensed Premises—License in Name of Another—Failure to Establish Agency—License Held in Trust for Occupant—Exception in Statute as to Honest Belief that Person Licensed to Sell—Application to Civil Action—Absence of Reason for Belief—Licensed Brewers Selling by Wholesale—Relief from Liability as Penalty—Purchase of Goodwill and Renting of Premises—Illegal Scheme.

Appeal by plaintiff from judgment of TEETZEL, J., dismissing the action with costs and referring the counterclaim for trial to the local Master at Ottawa.

Action to recover from defendants a large sum of money paid to them by plaintiff between 12th October, 1901, and 2nd February, 1904, for intoxicating liquors which he had bought from them, and which, as he alleged, had been furnished in contravention of the Liquor License Act, R. S. O. 1897 ch. 245, or otherwise in violation of law, within the meaning of sec. 126 of that Act.

Defendants counterclaimed for $2,226.88 in respect of 7 promissory notes made by plaintiff, of which they were the holders; for $624.30 for rent of the premises in which plaintiff carried on business; for two sums of $34 and $42 alleged to have been paid by them for plaintiff; and for $142.35 for interest on all these sums.

In his defence to the counterclaim plaintiff set up that the whole of this indebtedness was incurred in furtherance of an illegal arrangement between him and defendants, which was entered into for the express purpose, object, and intention of enabling plaintiff to take and have possession of the premises in which he afterwards carried on business, and to

"dispose of therein and thereon for his own use and benefit by retail divers intoxicating liquors to be drunk and consumed in and upon the said premises, without his having been licensed so to do, in violation of the law, and to evade the provisions enacted for the protection of public morals and safety;" and plaintiff alleged that on account of this defendants were not entitled to recover upon their counterclaim.

The appeal was heard by MEREDITH, C.J., IDINGTON, J., MAGEE, J.

W. E. Middleton, for plaintiff.

J. Lorn McDougall, Ottawa, for defendants.

MEREDITH, C.J.—At the time the sale of the liquor in question took place, plaintiff was carrying on the business of a tavern-keeper in Ottawa, and defendants were brewers carrying on business at the same place.

The liquor was bought by plaintiff for the purpose of reselling it, and some, if not all, of it was re-sold by him in the course of his business.

Plaintiff had no license to sell liquor, and unless he was entitled to sell liquor under the license to which I shall afterwards refer, he was "a person not entitled to sell liquor," within the meaning of sec. 64 (1) of the Liquor License Act.

A liquor license for the premises in which plaintiff carried on business was issued in each of the years in which the transactions in question occurred, to Henry Kuntz, the manager of defendants' business.

Kuntz was not the proprietor of the business which plaintiff carried on, and the license was obtained by him in the following circumstances. A former proprietor of the business (Webb) had failed, and defendants were creditors of his; plaintiff was desirous of acquiring the business, but had not the means to pay for it; defendants in some way, not explained in the evidence, became possessed of the chattel property which was on the premises and the goodwill of the business, and these they sold to plaintiff for $1,200, and it was agreed that the license should be taken out in the name of Kuntz in order that it might be held and controlled by him for the purpose of securing defendants for the purchase money, which was also secured by a mortgage on the chattel property upon the premises.

Defendants obtained a lease of the premises on 21st October, 1901. The term of the lease was 2 years and 7 months, to be computed from 1st October, 1901, and the

rent $50 a month, the first payment of which was to be made on the 1st of the following November.

Plaintiff was from time to time debited in his account with defendants with this monthly rent, and it would appear that he was treated as a sub-tenant of defendants, holding on the same terms and conditions as those on which they held, or it may be that defendants were to hold the lease for the benefit of plaintiff, but keeping it in their own name as security for the payment of the $1,200.

Kuntz was not, as I have said, and it was not intended that he should be, the proprietor of the business, and plaintiff was not the manager or agent of Kuntz or of defendants for carrying on the business for them or either of them, but was the proprietor of the business; and the sales of the liquor were, as I have said, made by defendants to him.

The fees for the license were paid by plaintiff, or, if paid by defendants, were debited to his account with them, and Kuntz was, no doubt, as far as could be, if at all, a trustee of the license for plaintiff, subject to his (Kuntz's) right to deal with it for the benefit of defendants in accordance with the agreement which had been entered into.

My brother Teetzel was of opinion that, inasmuch as Kuntz held the license as trustee, agent, or representative of plaintiff, and plaintiff was selling liquor with the consent and authority of Kuntz, and was himself interested in the license as cestui que trust, the liquor sold by defendants to plaintiff had not been furnished in contravention of the provisions of the Liquor License Act, within the meaning of sec. 126, and he therefore held that the action and the defence to the counterclaim failed.

I agree with my brother Teetzel that there was no intention on the part of defendants or Kuntz, in what was done or agreed to be done, to evade the provisions of the Liquor License Act, and that all the parties to the transaction honestly believed that what was being done was lawful to be done under the authority of the license which had been granted to Kuntz, and I therefore regret that I am unable to see my way to reach the conclusion to which my learned brother came as to the proper disposition to be made of the action.

The right of plaintiff to recover depends on the answer which is to be given to the question, was the liquor for which plaintiff had paid defendants furnished in contravention of the Liquor License Act, or otherwise in violation of law

within the meaning of sec. 126? For, if it was, it is no matter how unmeritorious the claim may be, as the section declares that the payment or consideration "shall be held to have been received without any consideration and against justice and good conscience, and the amount or value thereof may be recovered from the receiver by the party who made the same."

Was then the liquor sold by defendants to plaintiff and delivered to him between 12th October, 1901, and 2nd February, 1904, furnished in contravention of the Liquor License Act or otherwise in violation of law? . . .

Section 49 (1) of the Act—"No person shall sell by wholesale or retail any spirituous, fermented, or other manufactured liquors without first having obtained a license under this Act. . . ."

This sub-section is subject to certain exceptions in favour of brewers, distillers, and other manufacturers of liquors, to which I shall afterwards refer, and to an exception in favour of chemists and druggists, which for the purpose of the present inquiry it is unnecessary to consider.

64. (1).—"No person shall . . . sell or deliver intoxicating liquors of any kind to any person not entitled to sell liquor, and who sells such liquor, or who buys for the purpose of re-selling, and any violation of the foregoing provision shall be an offence under this Act.

"(2) But no person shall be convicted under this section who establishes . . . that he had reason to believe and did believe that the person to whom the liquor was sold or delivered was duly licensed to sell such liquor, or did not sell liquor unlawfully, or did not buy to re-sell.

"(3) This section shall apply only to a sale or delivery of liquor in any city, town, or village by a person residing or carrying on business therein to a person who sells liquor unlawfully in the same city, town, or village."

The argument for plaintiff is that the liquor supplied by defendants to plaintiff was sold and delivered in contravention of this section, because, as it is contended, plaintiff was a "person not entitled to sell liquor," within the meaning of the section.

If it be conceded that plaintiff was a "person not entitled to sell liquor," this argument is unanswerable. . . .

Unless he had first obtained a license under the Act authorizing him to do so, he was not only not entitled to

sell liquor. but was expressly prohibited from so doing: sec. 49 (1).

But it was argued for defendants that, in the circumstances of this case, plaintiff should be held to be a person who had obtained and possessed a license under the Act authorizing him to sell spirituous, fermented, and other manufactured liquors within the meaning of sec. 49 (1).

I am unable to agree with this argument.

Section 16 provides that, subject to the provisions of the Act as to removals and transfers of licenses (which have no bearing on the question under consideration), "every license for the sale of liquor shall be held to be a license only to the person therein named and for the premises therein described, and shall be valid only so long as such person continues to be the occupant of the said premises, and the true owner of the business there carried on."

It may be that, inasmuch as Kuntz was not the occupant of the premises described in the license issued to him, or the true owner of the business there carried on, the license was never of any validity; but, however that may be, it is clear, I think, that the license conferred no right upon plaintiff to sell liquor in the course of his own business and on his own account; the license was a personal one to Kuntz, and for a business to be carried on by him in the premises described in the license, of which, in order that the license should be effectual, he must have been and have continued to be the occupant . . . Plaintiff was not, even in form, either the agent or servant of Kuntz.

The provisions of sec. 16 render it impossible, I think, to hold—assuming plaintiff's position to have been that of a cestui que trust and Kuntz to have been a trustee for him—that the license conferred upon plaintiff, as cestui que trust, any right to sell liquor of his own and for his own benefit on the premises described in the license.

The language of the section is plain, and the provisions as to obtaining a license emphasize the declaration contained in it. . . .

"A license shall not be granted until the inspector has reported in writing to the license commissioners that the applicant is a fit and proper person to have a license, and that he is known to the inspector to be of good character and reputation:" sec. 11 (1).

The inspector "shall not report in favour of any applicant other than the true owner of the business of the tavern or shop proposed to be licensed:" sec. 11 (2).

Sub-section 8 of sec. 11, which deals with the grounds of objection which may be taken to the granting, and sec. 47 as to constantly and conspicuously exposing the license.

These provisions make it very clear, I think, that the granting of a license to one who has no interest in the business, and is not an occupant of the premises in which it is carried on, in trust for another, who is the true owner of the business and the occupant of the premises, is not a thing permissible under the Act, for, if it were, all the elaborate safeguards which the legislature has provided against the granting of a license to an unfit or improper person might be rendered unavailing, because it would be open for an undesirable person wishing to carry on the business of a tavern-keeper, who could not himself obtain a license, to procure the license to be granted to some unobjectionable person who would be a trustee for him, and to carry on his own business under the license so obtained.

I come, therefore, to the clear conclusion that the license granted to Kuntz conferred no authority on plaintiff to sell liquor on his own account, and in the course of a business of which he alone was the true owner and in which Kuntz had no interest whatever.

It was argued, however, that, assuming that to be the case, the proviso contained in sub-sec. 2 of sec. 64 was applicable as well to a civil proceeding under sec. 126 as to the offence which sec. 64 creates; in other words, that it is not a furnishing of liquor in contravention of the provisions of the Act, within the meaning of sec. 126, if the person furnishing it has reason to believe and does believe that the person to whom it is furnished is duly licensed to sell the liquor or does not sell liquor unlawfully or does not buy to re-sell, although the contrary is the fact.

This contention is not, I think, well founded.

The proviso contained in sub-sec. 2 of sec. 64 is, I think, plainly confined to a proceeding for the recovery of the penalty for the offence created by the section; it is not, in form or in substance, a qualification of the prohibitory words of sub-sec. 1. That protection is unqualified—"no person shall"—and sub-sec. 2, as I read it, qualifies only the latter words of sub-sec. 1, "and any violation of the foregoing provision shall be an offence under this Act."

But, if the argument of defendants were well founded, on the facts of this case they must fail in bringing themselves within the proviso, because, although they may have honestly

believed, as I think they did, that plaintiff was duly licensed to sell the liquor which they furnished to him, they had not, in my opinion, reason to so believe.

Defendants contended, lastly, that, being, as they were, brewers duly licensed by the government of Canada for the manufacture of liquor, and having, as they had, a brewer's provincial license, they had the right to sell liquor to others than licensees in wholesale quantities, and therefore to sell to plaintiff, even though he were not a person licensed to sell; and for this contention sec. 51 of the Liquor License Act and sec. 4 of 62 Vict. (2) ch. 31 (O.) were relied on.

I am unable to agree with this contention, for, in my opinion, the authority conferred by the sections relied on does not override the provisions of sec. 64.

There is no good reason why a brewer any more than any one else entitled to sell liquor by wholesale should be exempt from the prohibition against selling or delivering to a person not entitled to sell liquor who sells the liquor he buys or who buys for the purpose of re-selling it.

I should be of the same opinion even if 62 Vict. (2) ch. 31 did not, as it does, provide (sec. 30) that it shall be read with and as part of the Liquor License Act.

I at one time thought that it might be possible to exercise the powers conferred by R. S. O. 1897 ch. 108, and to relieve defendants from the liability . . . but I am unable on consideration to see my way to that conclusion; the liability is not, I think, a pecuniary penalty imposed upon defendants, within the meaning of ch. 108.

As I understand it, all that is effected by sec. 126 is to remove the impediment which at common law stood in the way of a person seeking to get back what he had given as the consideration on his part of an illegal contract where the illegal purpose has been carried out.

The result is that, in my opinion, plaintiff was entitled to recover the amount which he had paid to defendants for liquor furnished to him by them between the dates mentioned in the statement of claim, and that as to this branch of the case the appeal should be allowed and judgment entered for plaintiff.

The counterclaim, so far as it is for the price of liquor furnished to plaintiff, fails and should be dismissed, but I see no reason why defendants may not recover the remainder of their claim, or so much of it as they may be in a position to establish in the Master's office.

Plaintiff has entirely failed to shew that either the purchase of the goodwill and the personal property or the renting of the premises was part of a scheme devised for the purpose of enabling him to sell liquor in contravention of the law, or to enable defendants to furnish him with liquor which he was to sell illegally. The whole of this part of the transaction was carried out without any violation of the law taking place; there was no obligation upon plaintiff to procure the liquor required for his business from defendants or on them to supply it; he was free to procure it wherever he could.

The case comes within the principle of Waugh v. Morris, L. R. 8 Q. B. 202, cited in Pollock on Contracts, 7th ed., p. 378.

It was, as I have said, no part of the contract between the parties that liquor should be sold by defendants to plaintiff for the purpose of his re-selling it in violation of the law, and, even if that had been their intention in entering into the contract, it is necessary, to defeat defendants' right to recover, to shew that there was a wicked intention to break the law; there having been no such wicked intention, but an honest belief that what was intended to be done was lawful, the defence to the counterclaim based upon the alleged illegality of the transaction failed.

I would, therefore, vary the judgment on the counterclaim by declaring that defendants are not entitled to recover for the price of any liquor furnished by them to plaintiff between 12th October, 1901, and 2nd February, 1904, and making the reference to the local Master at Ottawa to take an account of what is due and owing by plaintiff to defendants in respect of the other claims put forward by them in their counterclaim, and directing that judgment be entered for them against plaintiff for what shall be found due, with costs subsequent to the trial.

In taking the accounts the Master will, of course, disallow so much, if any, of the claim of defendants in respect of the liquor as is included in the promissory notes held by them.

Proceedings on the judgment in favour of plaintiff will be stayed until after the report is made, and what is found due to defendants will be set off against it.

There will be no costs of the action or counterclaim up to and including the trial, or of the appeal to either party, but defendants should have their costs of the reference.

IDINGTON, J., gave reasons in writing for the same conclusion, referring to Huffman v. Walterhouse, 19 O. R. 186, 191; McRae v. Brown, 5 U. C. L. J. 91; Flannigan v. McMahon, 7 U. C. L. J. 155; Crozier v. Taylor, 6 U. C. L. J. 60; Walsh v. Walper, 3 O. L. R. 58; In re Blumenthal, 125 Pa. St. 412; Conn v. Bugan, 9 Dana 310; R. v. Jones, 59 J. P. 87; Pearson v. Broadbent, 36 J. P. 485; Vine v. Leeds, L. R. 10 Q. B. 195; Ritchie v. Smith, 6 C. B. 462; Cowles v. Gale, L. R. 7 Ch. 12; Tadcaster v. Wilson, [1897] 1 Ch. 705; Thompson v. Harvey, 4 H. & N. 254; Mayhew v. Suttle, 4 E. & B. 347; 1 Sm. L. C. 385; Thwaites v. Coulthwaite, [1896] 1 Ch. 496.

MAGEE, J., concurred.

ANGLIN, J. JANUARY 13TH, 1905.

TRIAL.

VAN CLEAF v. HAMILTON STREET R. W. CO.

Way—Non-repair—Injury to Person — Portion of Roadway Occupied by Street Railway Tracks—Liability of Railway Company—By-law of Municipality Imposing Duty on Company—Construction.

Action by the father and mother of Thomas C. Van Cleaf, under the Fatal Injuries Act, for damages for the death of the latter by alleged negligence of defendants.

The deceased, a teamster, on 5th July, 1904, was driving a team of horses with a waggon westerly along the north side of Barton street, in the city of Hamilton, and when near the east side of Sandford avenue, on turning to the left to pass vehicles in front, the front left wheel of the waggon came in contact with the southerly rail of the northerly track of defendants' rails on Barton street, causing the waggon to "slew" and throwing the deceased out on his head, inflicting injuries from which he died a few days afterwards. Plaintiffs alleged that the "slewing" was caused by defendants' track being out of repair by reason of the rails not being flush with the street, and not being from 3 to 5 inches above the level of the street inside the tracks, such inequality having existed for a long time prior to the accident.

A. M. Lewis, Hamilton, for plaintiffs.

E. E. A. DuVernet and W. W. Osborne, Hamilton, for defendants.

ANGLIN, J.—I find it will not be necessary in this case for me to further reserve judgment. I have had an opportunity of carefully considering by-law 624 of the city of Hamilton, and, in my opinion, the proper construction of that by-law is such that it is conclusive against the claim of plaintiffs. Before, however, disposing of the case upon that ground, I think it proper to make findings of fact upon the evidence, and contingently to assess the damages, in order that plaintiffs, if advised to prosecute this matter further, may have the benefit of this trial, to which they are entitled.

I find in the first place that the road on Barton street where the accident happened was in a bad state of repair and in a highly dangerous condition. I find that the depression between the tracks and immediately against the rail which caused the accident, was from 3 to 3½ inches in depth, and that this depression existing there causing this accident constituted a danger of a serious character, and such, owing to its duration and to the notice which the parties responsible for it must have had, of its condition, as to constitute negligence for which the proper parties would certainly be responsible in an action for damages. I find there was no sufficient proof of contributory negligence on the part of the deceased which would disentitle plaintiffs to recover if otherwise entitled. The damages which plaintiffs sustained I would assess at $600, if giving judgment in their favour, basing this upon a reasonable expectation of continued receipt by the parents for a period of four years after the death of the son of the same proportion of his wages which the evidence shews they had received for some time before his decease. The plaintiffs would be entitled to judgment for this amount jointly, if they should so elect, or if they should prefer to have the damages apportioned I would apportion them $450 to the mother and $150 to the father.

Upon the legal question involved, however, as already intimated, I think plaintiffs must fail. They have seen fit to bring their action, not against the municipal corporation, upon whom the primary liability to maintain the roadway in a suitable condition rests, but against the railway company. The railway company, unless the duty which primarily rests upon the city is imposed upon them by legislation, owe no duty to plaintiffs. The fact that there is anything in the nature of an agreement between the railway company and the city, by which the company assume the responsibility of maintaining any portion of the highway, is something of which plaintiffs may not take advantage—is something upon which plaintiffs might not succeed. But, even assuming that

the liability resting upon the railway company is to be regarded as statutory so far as imposed by the by-law No. 624, which might be regarded as incorporated in the statute of 29th March, 1873, under which the Hamilton Street Railway Co. constructed their lines, and in that light regarding the provisions of by-law 624 as conditions upon which the Legislature authorized the construction of these lines, and as therefore imposing upon the Hamilton Street Railway Company the duties which the by-law calls upon them to perform, I would read this by-law as not imposing any duty to construct or repair the highway or the portion of the highway which was placed in their hands for construction and repair by the by-law, except upon the requirement of the board of works in and for the city, as stated in sec. 5 of the by-law.

Section 5 reads: "The space between the rails to be allowed for the railway upon any paved or macadamized street and for two feet outside of such rails shall be, by the said company, and under the direction of and as required by the board of works in and for the said city, constructed and kept in repair with such suitable material as the said board of works may from time to time direct, the materials therefor to be supplied by or at the expense of the said city corporation."

I cannot read this provision of the by-law as requiring the company to either construct or repair without a demand or request from the board of works. In that view of the matter, there is an entire absence of evidence that there was ever any such requirement or request. It is in evidence that the roadway was originally properly constructed; it is in evidence that the rails are laid flush as nearly as practicable with the surface of the street; the evidence satisfied me that the depression which caused this accident was the result of wear upon the portion of the highway between the tracks. If the board of works of the city had required the company to repair this, and requested them to do it, and the company had neglected such duty, it might be that in the view suggested, regarding this by-law as in effect a statutory condition imposing a statutory duty upon defendants, plaintiffs would have some remedy, but, as I construe the by-law, the only duty which it imposes upon the railway company arises after and upon request of the city made through the board of works. In the absence of such request, I cannot find that there was any such duty upon that ground. Therefore, the action fails, and must be dismissed with costs.