The
Ontario Weekly Notes

Vol. IV. TORONTO, MAY 23, 1913. No. 36

APPELLATE DIVISION.

MAY 13TH, 1913.

*RE ROYSTON PARK SUBDIVISION AND TOWN OF STEELTON.

Plan—Subdivision of Lands in Town—Approval of Town Council Refused—Application to District Court Judge for Approval—Jurisdiction—Registry Act, 10 *Edw. VII. ch.* 60, *sec.* 80—*Construction—Prohibition.*

Appeal by certain land-owners in the town of Steelton from an order of FALCONBRIDGE, C.J.K.B., in Chambers, made upon an application of the town corporation, prohibiting the Judge of the District Court of the District of Algoma from proceeding with the issue of an order pronounced by him, approving of a plan submitted by the appellants of a subdivision of their lands, under the provisions of the Registry Act, 10 Edw. VII. ch. 60, sec. 80.

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

A. R. Clute, for the appellants.

H. S. White, for the town corporation.

The judgment of the Court was delivered by RIDDELL, J.:—The decision must depend upon the meaning to be attached to 10 Edw. VII. ch. 60, sec. 80 (18): "The registrar shall not register any plan upon which any street, road or lane is laid out unless there is registered therewith the approval of the

*To be reported in the Ontario Law Reports.

proper municipal council or the order of the Judge of the County or District Court . . . approving of such plan made upon notice to such council."

It is not contended by the town that the word "or" has not its ordinary alternative meaning: Elliott v. Turner, 2 C.B. 446; Co. Litt. 732. It is not suggested that it should, as not infrequently happens, be read "and," or that it is interpretative or expository. The argument is, that there are two courses prescribed by the statute, either of which may be adopted by the owners; but, having chosen one of these, they are precluded from resorting to the other.

The cases cited do not support this contention. . . .

[Reference to Birely v. Toronto Hamilton and Buffalo R.W. Co. (1898), 25 A.R. 88; Town of Aurora v. Village of Markham (1902), 32 S.C.R. 457.]

If the District Court Judge has jurisdiction, it is no ground for prohibition that he may go wrong. No misinterpretation, actual or apprehended, of a statute, is of the slightest relevancy in determining the question of prohibition, unless such misinterpretation itself gives jurisdiction. It has been laid down in such cases as In re Long Point Co. v. Anderson (1891), 18 A.R. 401, Re Township of Ameliasburg v. Pitcher (1906), 13 O.L.R. 417, and reaffirmed by this Court in Park v. Fletcher (2nd May, 1913), that it is only a misinterpretation (of a statute, etc.), which misinterpretation gives jurisdiction to an inferior Court, which can be made a ground for prohibition. . . .

The council, no doubt, is considered to represent the municipality. When an owner of land desires to register a plan laying out his land as a subdivision, the council should see that the roads, streets, etc., agree with the town's policy as regards roads, etc.—if so, of course the council would approve. But the council does this, not as a Court determining the rights of two contesting parties, but as representing one of two parties interested—namely, the public. The other party interested, that is, the owner, must look out for himself. If the council refuses, whether for proper or improper reasons, the refusal is not a judicial determination of the rights of the parties, but the assertion by its agents and representatives of what the one party desires or claims—a refusal by one party interested to allow the other to use his property as he desires. It was to enable an owner to have a judicial decision that the Legislature, on limiting, in 1908 (8 Edw. VII. ch. 33, sec. 37), the right of an owner

to register a plan of subdivision, enabled him to go to the County or District Court Judge. That the council is considered by the Legislature as representing one of two interested parties, is shewn by the provision that notice of the application is to be given to the council. The position, then, is rather analogous to the case of an appeal to the Court of Appeal from a Judge in Court "by consent or by leave of the Court of Appeal" in certain cases: 4 Edw. VII. ch. 11, sec. 2. When a party desired to appeal direct to the Court of Appeal, he might apply to the opposite party for a consent, and, if that consent was refused, it never was thought that he was concluded by the refusal, and an application could not be made to the Court. There was, indeed, no necessity to ask the other side for a consent; but, not infrequently, the application was made to the Court of Appeal in the first instance. The case we are considering is quite analogous. If the other party interested consents, the plan can be registered—but, if not, an order must be made by the Court. That may follow a refusal by the council, or be without an application to the council at all, but the order will not be made without notice to the council. In the one case, a party may appeal direct if (a) the other party consents or (b) the Court so decides—in the other case, the party may register his plan if (a) the other party consents or (b) the Court so decides.

I am not forgetful of the maxim "Nothing is more dangerous than analogy." The same result follows from a consideration of the object of the statute. This is so obvious that I do not further pursue the inquiry.

This conclusion is not at all opposed to what is said in Re Stinson and College of Physicians and Surgeons of Ontario, ante 627. . . .

Appeal allowed with costs in this Court and below.

MAY 13TH, 1913.

*O'NEIL v. HARPER.

Highway — User — Dedication — Evidence — Statute Labour— Municipal By-laws—Action for Declaration of Existence of Highway — Obstruction — Injunction—Peculiar Damage to Plaintiff—Right of Action.

Appeal by the plaintiff from the judgment of BRITTON, J., ante 841, dismissing the action without costs.

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

J. S. Fraser, K.C., for the plaintiff.

M. Wilson, K.C., for the defendant.

CLUTE, J.:—. . . The trial Judge found that there was a public highway by dedication, as claimed by the plaintiff, but that he had not suffered peculiar damage, and dismissed the plaintiff's action, but without costs.

After a careful perusal of the evidence, I do not think there is much doubt as to the main facts. . . .

[Statement of the facts.]

The evidence clearly establishes, and indeed it does not seem to be disputed, that from the earliest settlements in the vicinity, prior to 1850, and probably even before 1845, the road in question formed part of the only and regular thoroughfares from Wallaceburg west to the St. Clair river. . . .

The trial Judge's finding is well supported by the evidence. It would appear that the defendant's buildings have encroached upon a part of the travelled portion of the old road, and his fence has enclosed a further portion, and persons requiring to use the road passed to the south of the fence and buildings. . . .

Land dedicated to the public for the purpose of passage becomes a highway when accepted for such purposes by the public: Regina v. Petrie (1885), 4 E. & B. 737; but whether, in any particular case, there has been a dedication and acceptance, is a question of fact and not of law.

[Reference to Turner v. Walsh (1881), 6 App. Cas. 642; Halsbury's Laws of England, vol. 16, secs. 33, 43, 47; Barraclough v. Johnston, 8 A. & E. 103; Simpson v. Attorney-General, [1904]

*To be reported in the Ontario Law Reports.

A.C. 493; Regina v. Wright, 3 B. & Ad. 681; Regina v. Leake, 5 B. & Ad. 469; Roberts v. Hunt, 15 Q.B. 17; Regina v. Inhabitants of East Mark (1848), 11 Q.B. 877, 882; Rae v. Trim, 27 Gr. 374; Baxter v. Taylor (1832), 4 B. & Ad. 72; Rex v. Barr (1814), 4 Camp. 16; Rugby Charity Trustees v. Merryweather (1790), 11 East 375 (n.)]

Applying the principles laid down in these cases to the present case, I am of opinion that there was evidence upon which a jury might and ought to find, as the trial Judge did find, a dedication of the road in question. This view is strengthened by the fact that the Municipalities of the Townships of Chatham and Wallaceburg considered it necessary to take proceedings to close portions of this road by by-laws. These were public acts, and shew how the question was regarded by the public, acting through their official representatives.

That this would be admissible as evidence of reputation would appear from the Barraclough case, supra, where it was held that action taken at a public meeting was evidence of reputation, upon an issue as to whether or not certain land was a common highway. The fact that the mail was carried over this road for many years is also cogent evidence.

What also weighs with me in the disposition of this case is the nature of the land through which the road passed. The question should be considered as it existed down to the time when action was taken to drain the lands. The policy of the Legislature was first evidenced by the Drainage Act; and dedication, if it took place at all, was long prior thereto. The case differs, I think, from that of a partially settled country, where roads are used across private property until the authorised public roads are opened; for, in that case, even long user does not always raise a presumption of intention to dedicate on the part of the owner of the lots. Every one knows that, as soon as the roads on the side-lines and between the concessions are opened, the ways of convenience across the lots may be abandoned.

But here, from the condition of the lands, the case is different. The presumption is, I think, the other way. It can scarcely be supposed that the owners of the lots had in mind a possible future policy of the Legislature, and only intended to permit the road being used for a temporary purpose.

Upon the facts of this case, I agree with the trial Judge that the road in question became a public highway by dedication.

This being so, the subsequent opening of the concessions and side-lines, and the gradual diversion of the traffic to these better roads, did not, in my opinion, have the effect of destroying the

character of the road in question. The common law rule applies, "once a highway, always a highway," until by legal means its character is destroyed, although the long-continued existence of an obstruction may tend to shew that there never was a highway: see Halsbury's Laws of England, vol. 16, sec. 103.

The question remains, did the plaintiff suffer such damage peculiar to himself as entitles him to bring this action?

In the view of the trial Judge, he did not. He points out that the evidence was almost wholly directed to the question of highway or no highway, and the plaintiff "omitted to prove, if he could prove, either the particular damage to himself by the defendant's obstruction, or to prove an assault," so as to bring the case within Drake v. Sault Ste. Marie Pulp and Paper Co., 25 A.R. 256, and Fritz v. Hobson, 14 Ch. D. 542. One of the instances of acts which may be found to be nuisances at common law is that of erecting a fence or building across, or so as to encroach upon, the highway: Halsbury's Laws of England, vol. 16, sec. 266, and cases cited in note (n). The remedy is by indictment or an action at the suit of the Attorney-General for an injunction to restrain the commission of the nuisance or for a mandatory injunction directing its abatement, and in such action no actual injury need be proved; "but a member of the public can only maintain an action for damages or an injunction in respect of such nuisance, if he has sustained therefrom some substantial injury beyond that suffered by the rest of the public, such injury being direct and not merely consequential:" ib., sec. 269; and in such cases the Attorney-General is not a necessary party: Wallasey Local Board v. Gracey (1887), 36 Ch. D. 593; Tottenham Urban District Council v. Williamson, [1896] 2 Q.B. 353 (C.A.). . . .

[Reference to Cook v. Mayor of Bath, L.R. 6 Eq. 177; Spencer v. London and Birmingham R.W. Co., 8 Sim. 193.]

It is important to consider the peculiar circumstances of this case in deciding the question whether or not the plaintiff sustained a substantial injury beyond that suffered by the rest of the public. . . .

The defendant by his pleadings denies that the road in question was a highway. The evidence shews that the defendant maintained a fence across it, and prevented the plaintiff from passing along the highway by such obstruction, and by his refusal to permit him to go through. He says: "I stopped him going through with a buggy;" and that the threshing machine had gone through prior thereto from time to time.

It would appear that until the occasion referred to, the plain-

tiff and others passed through, usually closing the gate. From the evidence, I think it established that the plaintiff was prevented by the defendant from passing along the road across lot 7 by the fence forming an obstruction between lots 7 and 8. . .

[Reference to Fritz v. Hobson, 14 Ch. D. 542; Halsbury's Laws of England, vol. 16, secs. 269 and 270, and cases cited; Spencer v. London and Birmingham R.W. Co., 8 Sim. 193; Cook v. Bath Corporation, L.R. 6 Eq. 177; Baker v. Moore (1697), cited in Iveson v. Moore (1699), 1 Ld. Raym. 486, 491; Rickett v. Metropolitan R.W. Co., 5 B. & S. 156, 2 H.L.C. 175, 188; Beckett v. Midland R.W. Co., L.R. 3 C.P. 82; Halsbury's Laws of England, vol. 16, sec. 270; Rex v. Dewsnap (1812), 16 East 194; Rose v. Miles (1815), 4 M. & S. 100; Boyd v. Great Northern R.W. Co., [1895] 2 I.R. 555; Re Taylor and Village of Belle River, 1 O.W.N. 609; Metropolitan Board of Works v. McCarthy, L.R. 7 H.L. 243.]

With great deference to the trial Judge, and notwithstanding that the plaintiff's evidence was chiefly directed to the question of dedication, and not to the peculiar loss suffered by him, yet, owing to the peculiar location of this lot and of the buildings thereon, and the drainage canal and the railway crossing it, and the fact that the evidence on both sides, in the main, agrees that the road could not have been opened without the lands first being drained, I think it fairly clear, from the evidence, that the plaintiff did suffer that peculiar and special damage which entitled him to bring this action.

I would allow the appeal, set aside the judgment for the defendant, and direct judgment to be entered for the plaintiff, and grant an injunction restraining the defendant from continuing any obstruction to the highway across lot 7.

The plaintiff is entitled to costs here and below.

MULOCK, C.J., SUTHERLAND and LEITCH, JJ., concurred.

RIDDELL, J., with some hesitation, also concurred.

Appeal allowed.

MAY 14TH, 1913.

STUART v. BANK OF MONTREAL.

Trusts and Trustees—Interest in Lands Conveyed by Son to Father—Absolute Conveyance—Action to Cut down to Mortgage—Subsequent Transfer by Father to Trustees for Bank in Settlement of Indebtedness—Valuable Consideration—Purchasers for Value without Notice.

Appeal by the plaintiff from the judgment of LATCHFORD, J., ante 846, dismissing the action with costs.

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

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

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

THE COURT dismissed the appeal with costs.

MAY 14TH, 1913.

HAYES & LAILEY v. ROBINSON.

Summary Judgment—Con. Rule 608—Application of—Special Circumstances—Claim on Overdue Promissory Notes.

Appeal by the defendant from a summary judgment granted by LATCHFORD, J., on the 8th May, 1913, upon an application in the Weekly Court at Toronto, under Con. Rule 608.

The action was brought by wholesale merchants against a retail merchant upon nine promissory notes.

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

R. G. Smythe, for the defendant.

A. T. Davidson, for the plaintiffs.

The following authorities were referred to: Kinloch v. Morton, 9 P.R. 38; Francis v. Francis, 9 P.R. 209; Greene v. Wright, 12 P.R. 426; Leslie v. Poulton, 15 P.R. 332; Molsons Bank v. Cooper, 16 P.R. 195; Lake of the Woods Milling Co. v. Apps, 17 P.R. 496.

At the conclusion of the argument, the judgment of the Court was delivered by MULOCK, C.J.:—The affidavits shew that the notes made by the defendant are overdue and unpaid; that many demands for payment have been made, but none complied with. The defendant has been selling goods without replacing them or accounting for the proceeds. Nor has the defendant insured the goods or paid his rent or taxes. Admittedly he has no defence to this action, and he is insolvent.

We think the case comes within the authorities under Con. Rule 608 shewing that injury and injustice would result to the plaintiffs unless they are granted immediate relief. There are special circumstances entitling the plaintiffs to the application of the Rule; and we think the appeal should be dismissed with costs.

MAY 14TH, 1913.

FARAH v. CAPITAL MANUFACTURING CO.

Fraud and Misrepresentation—Sale of Shares—Agreement—Lease—Rescission—Return of Moneys Paid.

Appeal by the defendants from the judgment of KELLY, J., ante 680.

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

J. T. White, for the defendants.

W. L. Scott, for the plaintiffs.

THE COURT dismissed the appeal with costs.

MAY 15TH, 1913.

CLEVELAND v. GRAND TRUNK R.W. CO.

Contract—Servant of Railway Company—Promise of Foreman to Add Crop of Hay to Wages—Authority of Foreman—Breach—Evidence—Nonsuit—Interest in Land.

Appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Hastings, withdrawing the case from the jury and dismissing the action, which was brought

to recover damages for breach of a contract alleged by the plaintiff.

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

E. G. Porter, K.C., for the plaintiff.

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

MULOCK, C.J.:—The evidence shews that the plaintiff was, on the 3rd October, 1911, employed as section-man on the defendant company's railway, by their foreman William Murphy; and shortly thereafter was appointed by Murphy as lamplighter for the company at Belleville, at the wage of $1.50 per day, the maximum rate paid by the company to lamplighters; and Murphy had no authority to exceed that rate.

After working for a week or two as lamplighter, the plaintiff, according to his evidence, told Murphy: "I will keep this job steady if you will give me the hay that grows there at the east end of the yard. Mr. Murphy said: 'If you keep this job steady, the hay is yours; until such time as that hay is fit to cut, the hay is yours.' . . . I said, 'All right, sir, I will.'"

The plaintiff continued as such lamplighter until some of the hay was ready to cut; and, upon going to cut it, he found a portion of it already cut, and removed, by a man named Palmateer, apparently with the consent of the company; and the action is for damages caused by the breach of the alleged contract to give the hay to the plaintiff.

The plaintiff, during his period of service as lamplighter, was paid in money at the rate of $1.50 per day.

Murphy, who was called by the plaintiff, testified that he had authority to hire the plaintiff as a lamplighter at a rate not exceeding $1.50 per day, and that it was part of his (Murphy's) duty each year to see that the hay in question was cut and removed; and that, in order to effect such purpose, he was authorised to give it away to any one, in consideration of such removal; and he swore that the giving of the hay by him to the plaintiff was a pure gift for the purpose of securing its removal, and not by way of an addition to the plaintiff's wages.

The plaintiff's contention, in substance, is, that he was to receive an addition to his rate of wages, not in money, but in kind, viz., in hay; but there was no evidence to submit to a jury of any authority in Murphy to bind the company to a contract for an increase of wages—such increase to be paid to

the plaintiff, not in money but in kind, viz., by giving him any property (for example, hay) of the defendant company in behalf of such service.

I, therefore, think that the learned trial Judge was right in withdrawing the case from the jury and dismissing the plaintiff's action; and this appeal should be dismissed, and with costs, if the defendants require them.

CLUTE, and LEITCH, JJ., concurred.

SUTHERLAND, J., dissented. After setting out the facts and quoting portions of the testimony given at the trial, he said:—

I think that there was evidence of a contract set up and testified to by the plaintiff that should have been submitted to the jury. The question of the agency of Murphy and its scope were also matters which, upon the evidence, the plaintiff was entitled to have go to the jury.

The plaintiff, on his motion by way of appeal, asks for a new trial, and I think this should be granted. The defendants on the appeal contended that the hay, under the circumstances, was an interest in land; and, as there was no contract in writing, as required by the statute, the plaintiff could not succeed. The contract set up by the plaintiff, however, was, that, if he continued to work at his employment until the hay was ready to cut, it would thereupon become his, provided he cut and cleared clean.

I do not think that, under these circumstances, the hay could be considered an interest in land.

I would allow a new trial, with costs of the appeal to the plaintiff.

Appeal dismissed; SUTHERLAND, J., *dissenting.*

MAY 16TH, 1913.

WARREN GZOWSKI & CO. v. FORST & CO.

Broker—Shares—Pledge—Contract—Breach—Tender of Shares—Time.

Appeal by the defendants from the judgment of MIDDLETON, J., ante 77.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, and LEITCH, JJ.

I. F. Hellmuth, K.C., and A. McLean Macdonell, K.C., for the defendants.

F. Arnoldi, K.C., and D. D. Grierson, for the defendants.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

BOYD, C. MAY 12TH, 1913.

*CARR v. TOWN OF NORTH BAY.

Municipal Corporations—Local Option By-law—Voting on—Vote Taken on Day of Polling for Municipal Elections, 1913—Use of Voters' Lists for 1911—Action to have Voting Declared of no Effect—Knowledge of Plaintiff of Voters' List to be Used—Failure to Object—Municipal Act, 1903, sec. 148—"Last List of Voters Certified by the Judge"—Town not Properly Subdivided for Polling—Notice to Electors of Situation of Polling Places—Indication of Area of Subdivisions—Municipal Act, 1903, sec. 536—Failure to Shew that Voters Misled—Substantial Compliance with Statute.

Action by an elector, on behalf of himself and other electors, for a declaration that the proposed local option by-law of the Town of North Bay voted on in January, 1913, was not legally submitted to the electors or voted upon in the manner provided by the Liquor License Act and the Municipal Act, and that the

*To be reported in the Ontario Law Reports.

alleged vote did not operate to prevent the electors from petitioning for the submission of a similar by-law or the council from submitting one at any time.

H. E. Irwin, K.C., for the plaintiff.
James Haverson, K.C., for the defendant Mulligan.

BOYD, C.:—The power to pass by-laws respecting the establishment of local option in a municipality is given by R.S.O. 1897 ch. 245, sec. 141 (1), with this proviso, that the by-law, before its final passing, "has been duly approved by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act."

By subsequent legislation, 6 Edw. VII. ch. 47, sec. 24 (3), a preliminary step was the presentation, i.e., by filing with the clerk of the council (7 Edw. VII. ch. 46, sec. 11), of a petition praying for the submission of such by-law to the electorate, signed by twenty-five per cent. of the electors. This being done, it became the duty of the council to submit the by-law, so petitioned for, to the municipal vote. If the by-law so submitted does not receive the approval of three-fifths of "the electors voting thereon," the council shall not pass the same, and no further by-law for the same purpose shall be brought again before the electors for three years: 6 Edw. VII. ch. 47, sec. 24 (5).

The petition is to be filed with the clerk on or before the 1st November next preceding the day of the poll: ib., subsec. 3.

The petition presented in this case, on the last day of October, was satisfactory to, and accepted by the council as a compliance with the statute. Thereupon the peculiar statutory effect of the petition was, that it operated as a command to the council, whose ordinary discretion in dealing with petitions was suspended: per Anglin, J., in Re Williams and Town of Brampton, 17 O.L.R. at p. 408. In effect, the petitioners possess the initiating power to which the subsequent action of the council of the municipality becomes responsive. In this case the council did respond by taking the usual steps to publish the by-law (proposed), appoint the polling places, and present the question for the opinion and vote of the electors. The result was adverse to the by-law by a vote of 586 for and 552 against; the total poll being one of the largest in the municipal experience of North Bay. . . .

The fairness of the election was questioned under many

heads in the pleadings; but the allegations were not substantiated by the evidence. This was frankly admitted at the close of the plaintiff's case; and the questions remaining to be considered are upon the effect of various provisions in the statutes, which are none too clear. . . .

The vote taken was on the 6th January, 1913, the day fixed for the general municipal election, and on that day the Mayor and members of the council and the school trustees were elected, who now hold office, and whose due election has not been called into question. It is sought to except the vote on this by-law from the general result, on the ground that the voters' list used was for the year 1911, and that no list had been made up according to the possible electorate of 1912. The suggestion is, that the population had changed and increased since the list of 1911, and that there might have been a larger number of voters, or other voters, eligible to vote than were so eligible under the lists used. That may be or may not be; for it was not proved. The question is, was the vote invalid because the list of 1911 was used? . . .

The delay in this case arose apparently (as was conceded) by reason of the assessor; and, when the petition for this by-law was lodged with the council on the 31st October, it was known to the plaintiff, who is assistant secretary of the local option committee, that the assessment rolls for 1912 had not been returned; he knew that no voters' list for 1912 had been compiled; and it was known and talked about that the old list would have to be used in the municipal election. Knowing this, he took no steps to withdraw the petition or to stay the action of the council in proceeding with the publication of the by-law and the submission of the question to the voters. Can the plaintiff, in these circumstances, ask the Court to nullify what he and his associates invited the council to do? No authority was cited; and, though I have a decided opinion, it is not necessary to rest the decision on a negative answer to that query.

The election is to be conducted "in the manner provided by the sections in that behalf of the Municipal Act." What are these provisions? . . .

[Reference to secs. 148 and 351 of the Municipal Act, 3 Edw. VII. ch. 19.]

The last list certified by the Judge was that of 1911, and there was, therefore, punctual compliance with the terms of the Liquor License Act as to the manner of voting and the persons eligible to vote. The question need not, in my opinion, be

carried further into the Voters' Lists Act and the Assessment Act, which were cited, as that would only lead to needless confusion. The test as to what electors formed a proper constituency is limited by the language of the statute to what is found in the four corners of the Municipal Act. The vote was good enough for the general municipal election, and, therefore, good enough for this by-law. The first and main objection, for this reason, fails.

The next objection on the record is, that the corporation defendant failed to provide a sufficient number of polling subdivisions, as required by sec. 536 of the Municipal Act, and that about half the area of the town had not been included or erected into one or more polling subdivisions, as so required. And a further objection in the same line is, that only five polling subdivisions had been constituted at the date of polling, and that for the purposes of the election the town did by by-law 347 name and constitute eleven polling places without in any way, "by by-law or otherwise," making known the territory or area for which each of said polling places was constituted.

The reference in the pleadings to "half the area of the town" refers to an accession of two pieces of adjoining land consisting of 1,214 acres and 92 acres, which, by public proclamation of the 23rd April, 1910, were annexed by the Government to the municipality of North Bay. Before that time, the town had been divided by by-law of the 5th February, 1905, into five polling subdivisions, embracing the whole of the existing area.

When the addition of territory came in 1910, no action was taken formally by the council to constitute another subdivision of this new area. But the matter was solved practically in this way. The publication of the places of voting, eleven in number, made known to the electors where to cast their votes, and these places were allocated by the reference to the then well-known existing polling subdivisions (five in number) thus: polling subdivision I. had polling places 1 and 2; polling subdivision II. had numbers 3 and 4; polling subdivision III. had numbers 5 and 6; polling subdivision IV. had number 7; polling subdivision V. had numbers 8 and 9. That is, up to this point, nine polling places had been provided for the area as it existed before the new parts were added. The by-law provides for the new part by the two last places, numbers 10 and 11. The voters' list for the year 1911, which was published to the voters, as required by statute, specifies the area of each of the five duly constituted subdivisions, and then . . . deals with the new part thus: "Polling subdivision number VI.

comprising that portion of the township of Widdifield recently annexed to the town of North Bay.'' Putting all this information together, it cannot be doubted that the electors were well advised of where they could vote—the particular locality was designated, so that no mistakes are or were proved. There is no evidence that any voter was misled or in ignorance of where he could vote; and the counter-evidence is, that an unusually large vote was polled—relatively as many in the new area as in the older portions of the town. And the town clerk swears that he considers the voting accommodation quite sufficient for the whole place, including both parts of the annex. The new subdivision was not, it is true, defined by by-law; but, when the voters' list for 1911 was prepared by the clerk, including this new area as subdivision VI. (whatever his authority was), it was acted on by all concerned or interested—Judge, officials, and voters, without objection. The main object of all the sections is to provide sufficient and well-defined accommodation for all voters, and that has been accomplished in this election, so that no possible better result could have been obtained though all the directions of the statute had been complied with au pied de la lettre. Much absence of form may be forgiven when the essentials are right.

Some other objections were urged ore tenus, but they are not noticed in the pleadings, and they do not seem to me to be of such importance or value as to justify an amendment of the record, when there is failure on all the numerous grounds specifically set forth.

The action should be dismissed with costs as to the defendant added by special order, B. N. Mulligan.

After writing this opinion, I find that the main point has been, in substance, determined by a case not cited, a decision of Mr. Justice Anglin in Rex ex rel. Black v. Campbell, 18 O.L.R. 269. See also Re Ryan and Town of Alliston, 21 O.L.R. 582, affirmed 22 O.L.R. 202.

LENNOX, J. MAY 13TH, 1913.

LARCHER v. TOWN OF SUDBURY.

Highway—Establishment of—Dedication—Acceptance — Municipal Action—Subsequent Registration of Plan not Shewing Highway—Approval of Council—Estoppel—Surrender or Closing of Street—Land Titles Act, R.S.O. 1897 *ch.* 138, *secs.* 26, 109, 110—*Municipal Act,* 1903, *secs.* 29, 630, 632—*Costs.*

Action for trespass to land claimed by the plaintiff as his, but asserted by the defendants to be part of a highway.

A. Lemieux, K.C., for the plaintiff.
G. E. Buchanan, for the defendants.

LENNOX, J.:—The land in dispute in this action is part of the west half of lot 4 in the 4th concession of the township of McKim, in the district of Nipissing. This half lot, 160 acres, was patented to Samuel Robillard on the 19th May, 1893, and is now within the limits of the town of Sudbury. Robillard was in rightful possession as locatee from 1887 or 1888, and made his final payment to the Crown on the 15th April, 1893. . . . Before the patent, Robillard determined to subdivide; and, in selling to Edward Dubreuel and Edward Dubreuel junior, he agreed to open a public road, where the road in dispute is now, connecting what is now Murray street with the portion of the said half lot lying north and east of the Junction creek. Thereupon the Dubreuels entered into possession of their respective parcels, the road was opened, a bridge built by Robillard and Edward Dubreuel the younger; and the elder Dubreuel, as owner of the land now owned by the plaintiff, defined the limit of the roadway and of his own land, as the same is now contended for by the defendants, by erecting a brush fence between his property and the roadway as it was then recognised by all parties interested, from near the south-easterly corner of the bridge, curving south-westerly until it intersected the easterly boundary of Murray street as it now is. It has been satisfactorily established that this brush fence was replaced by a better one, and this again by a post and wire fence; all built by Dubreuel the elder. These posts are there yet, and they marked an undisputed easterly boundary of the defendants' alleged highway until the plaintiff attempted to extend his boundary westward by building a fence along the eastern

side of Murray street and cutting off access to the road and bridge in question. This road and the road beyond the bridge were laid out and formed, and a connecting bridge built, just where the present bridge stands, fully a quarter of a century ago.

The plot of land owned by Dubreuel the elder became the property of Mr. J. H. Clary. He subdivided and filed a plan. That portion of it affecting the issues in this action are lots 6, 8, 7, and 9, now owned by the plaintiff. This plan shewed no road except Murray street touching upon or crossing these lots. It bears this certificate: "Sudbury, July 20th, 1906. The Council of the Town of Sudbury, three-quarters of the members thereof being present, hereby resolve that we hereby approve of this plan." This bears the corporate seal and is signed by the Mayor and clerk. Murray street, the only street shewn, is less than 66 feet wide. Upon this endorsement the plaintiff practically rests his case; and the effect of it has to be determined in this action. Before dealing with this point, however, it will be necessary . . . to consider and determine whether or not, prior to the endorsement of this certificate, the roadway in question had become "a common and public highway."

I have come to the conclusion, upon the evidence, that both Robillard and his grantee clearly intended to dedicate the road in question as a public highway, and recognised and treated it as a highway, by doing statute labour upon it and otherwise, for a number of years. It is true that the bridge and the first fence may have been built before the patent issued, as in Beveridge v. Creelman, 42 U.C.R. 29, and Rae v. Trim, 27 Gr. 374; but here there was a continuous offer until it was accepted and acted upon by the Township of McKim, as I shall shew. Although not a complete dedication at the time, perhaps, the owner was bound by his acts, both before and after the issue of the patent, as held in the two cases above quoted. As a matter of fact, however, neither the patentee nor the adjoining owner did anything at any time except in recognition and furtherance of the dedication. . . .

Distinguishing between the road and the bridge, Robillard says that the township took over the road definitely in 1891; and the minutes of council bear this out. On the 6th May, 1891, they appointed a special committee to report as to rebuilding the road near the bridge. There was a special meeting for consideration of the report on the 13th May, and it was then resolved to do the work by "statute labour tax," and that it be done "under the supervision of Robillard as pathmaster

for that section where the road is used." The minutes of the 27th August, 1891, contain a resolution to call for tenders for a bridge—said to be another bridge upon the road in question. The minutes of the 8th October, 1891, record the appointment of Xavier Pilton to oversee the expenditure of the poll-tax of the township where he resides, and give acknowledgments, etc.

The Town of Sudbury succeeded to the rights and obligations of the township when this territory became a part of the town. When that happened has not been shewn—but it was evidently before the 6th August, 1896. From that date, the town records shew occasional expenditures on road and bridge, amounting to about $380. . . .

I am clearly of opinion, then, that on the 20th July, 1906, when the certificate approving of plan M. 59 was endorsed, the disputed land—the road in question—had become and was a common and public highway of and within the town of Sudbury.

I dealt with the question of gates at the trial. The only reliable evidence was as to gates north of the bridge, and so north of the land in question. If the evidence was pointed to the question of dedication, it fails, as the evidence of intent and dedication is clear, and it is not suggested that Robillard or his grantees maintained or sanctioned a gate, and Robillard's evidence is clearly the other way. There never was any interruption of user, and time does not run and obstructions do not count as against the Crown.

Now as to the question of the effect of the alleged approval by the council. Does this act effect a conveyance or surrender of the highway or estop the municipality? Clearly not. As to estoppel, I am . . . of the opinion . . . that there may be cases in which this doctrine will grip and hold an individual clothed with absolute power, and yet not bind a municipal corporation to the act or neglect of its statutory agent. In the latter, the question "What were the powers conferred upon the council?" must be met. But, aside from this, there are no equities in support of it. The evidence shews that the council if it was the act of the council, simply blundered. It is shewn too that Mr. Clary, for whom the plan was made and filed, never intended that it should touch or interfere with the highway, and did not know in fact that the subdivision embraced land covered by the highway. These are not, perhaps, determining points in themselves. But they are secondary considerations when inquiring as to the vital points connected with a plaintiff invoking estoppel.

The action is without merits. The roadway was an open,

travelled, and conspicuous highway—visible to everybody. The plaintiff knew of it, saw it, inquired about it, and knew that the defendants claimed it, before he bought. He saw the boundary-fence, and must be taken to have known that what he bought outside that line of posts was not land, but a lawsuit with its precarious results. I cannot give judgment for the plaintiff upon the ground of estoppel. It was not shewn that the plaintiff as a matter of fact knew about this plan at all; but, as it is filed, he has perhaps a right to say that he had legal notice of it. Take it in this way, and what had he the right to conclude? That the street, not being shewn upon the plan, was surrendered or closed? I don't think so. Sudbury registrations are under the Land Titles Act. Under sec. 26 of the Act in force at the filing of this plan, R.S.O. 1897 ch. 138, and under sec. 24 of the present Act, all registered lands, without any notice thereof upon the registry, are to be taken to be subject to "any public highway, any right of way, watercourse, and right of water and other easements," subsisting in reference thereto. And in 1906, under R.S.O. 1897 ch. 138, sec. 109, it was not necessary, as it is now under the Land Titles Act of 1911, sec. 105, that the plan should shew "all roads, streets . . . or other marked topographical features within the limits of the land so subdivided." In fact, as a matter of law, at that time and under that Act, subject to one exception only, the land-owner, without consulting the council, could file any plan he liked. The exception is to be found in sec. 110 of R.S.O. 1897 ch. 138, and sec. 630 of the Municipal Act, which prevent the establishment of a street or highway of less than 66 feet in width without the consent of the council "by a three-fourths vote of the members thereof." The council, therefore, only spoke as to the width of Murray street, and consented to its being only 50 feet. They had jurisdiction to sign for that purpose, and only for that purpose; and that is what they did approve of in fact, as shewn by the reference to "three-fourths" of the members in the certificate itself. Anything beyond this would be ultra vires. The result is obvious. The plaintiff had a right to infer the council's approval of the narrow street; and, buying upon the faith of this, he has the right to rely upon this road as a highway and outlet. Estoppel should aid him to this extent, and no further.

Is there any other way of putting it for the plaintiff? I think not, but there is a stronger way of putting it for the defendants, and this because there are statutory methods provided by which alone highways can cease to be highways. This

highway remains the property of the town until closed or disposed of under the provisions of the Municipal Act. The rights of persons interested to be heard and the requirements as to notice by posters and publication in a newspaper and provision for a substituted road and compensation, in some cases, must all be accorded and strictly complied with before a highway can be legally stopped up, altered, diverted, sold, or disposed of by the municipal council: Consolidated Municipal Act, 3 Edw. VII. ch. 19, secs. 629, 632; cases collected in Biggar's Municipal Manual, pp. 352.3. The counsel could not, therefore, by the casual and equivocal act referred to, deprive the corporation and the public of this valuable and necessary highway for the benefit of a man buying with his eyes open. The council, however, have not been blameless, and the defendants are, therefore, not entitled to costs.

There will be judgment dismissing the action without costs.

KELLY, J. MAY 14TH, 1913.

BOARD OF GOVERNORS OF KING'S COLLEGE WINDSOR v. POOLE.

Evidence—Action to Recover Amount of Lost Promissory Note Payable at Decease of Maker—Letters Acknowledging Existence of Note—Provisions of Will and Codicil of Maker—Recovery against Executors on Note—Satisfaction of Legacy—Indemnity—Costs.

Action against the executors of the will of the Reverend Jacob Jehosophat Salter Mountain, deceased, to recover $5,000, and interest from the date of his death, the 1st May, 1910, as a debt due, or, in the alternative, for payment of that sum as a legacy, with interest from the 10th May, 1911.

The Alumni of King's College Windsor, a corporate body, were added as defendants at the trial.

J. G. Harkness, for the plaintiffs and added defendants.

R. C. Smith, K.C., for the original defendants, the executors.

KELLY, J.:—By paragraph 19 of his will, dated the 25th June, 1902, the testator made the following declaration: "It is my desire further that as soon as the obligations on my personal and real estate have been discharged, including the payment of

$5,000 (five thousand dollars) to the University at Windsor, N.S., for which I gave 'my note of hand,' then all my real estate in Cornwall, Ont., in the Isle of Wight . . . shall be" disposed of as the testator then directed. In a codicil dated the 6th April, 1903, he directed that "the $5,000 (five thousand dollars) referred to in my last will and testament as set apart for the benefit of the University at Windsor, Nova Scotia, be paid by my executors to the Alumni Association of King's College, to be held by them in trust for said University, on condition of its remaining as heretofore in the town of Windsor, Nova Scotia, and its being conducted according to the intention of its original founders, as it now is:" and he further directed that the interest only on the sum was to be handed over from time to time to the treasurer of the Board of Governors of the University.

The "note of hand" referred to has not been produced, though it is clear, from evidence to which I shall presently refer, that the testator delivered it to the plaintiffs or their representative prior to the making of the will.

In December, 1912, after the pleadings herein had been closed, there were discovered in the basement of the Church of England Institute in Halifax, letters written by the deceased to the Bishop of Nova Scotia (Dr. Courtney), in some of which reference was made to this $5,000. In one, dated the 27th November, 1897, where the testator speaks of the necessity of making a new will owing to his marriage, he says: "Nevertheless, I don't think that my bequest to my dear old Alma Mater would otherwise have been vitiated by my subsequent marriage, because of the formal note of hand by which, at your suggestion, I further obliged myself in the same behalf, and then enclosed it to the secretary of the Alumni. Still it is just as well to make assurance doubly sure, lest possibly the question might be raised and cause trouble. As it now is, this claim would count among my debts, and be the first on my property, even before my funeral expenses."

In another, dated the 6th January, 1903, he says: "I also take the liberty of asking you to send me a copy of the 'note of hand' I sent you some years ago for $5,000 (five thousand dollars) payable after my death to the University of King's College, Windsor, Nova Scotia. I have not been able to find the copy I must have of it somewhere."

The statements made both in the will itself and in these letters indicate that a note for $5,000 was made by the testator, payable at his death. There is also the evidence, in his own written acknowledgments, that the note was delivered over

From this I find a clear intention to make the payees creditors of his estate.

It is evident that he adopted this course deliberately, so as to place the holders of the note in the position of creditor rather than of legatee. That being so, the attempt by the codicil to put a condition on the manner and terms of payment could not have any effect as against what I find to be a debt of the testator then existing. While we have the clear evidence of the making and delivery over of the note, there is no evidence that it, or the obligation it represented, was satisfied by payment or otherwise in the lifetime of the deceased; and I think that the estate should now pay to the plaintiffs the $5,000 and interest thereon from the 1st May, 1910, the date of the testator's death, such payment to be in full satisfaction of the note and obligation of the testator and of the $5,000 mentioned in the will and codicil.

The note having been lost, or in any event not being forthcoming, the executors will, at the time of payment, be entitled to a bond of indemnity against it from the plaintiffs.

It is not the fault of the executors that the note has not been produced; and until after the close of the pleadings they had no knowledge of the existence of the letters which are a material part of the evidence. This is not, therefore, a case where costs should be awarded. The executors will, however, be entitled to be paid their costs, as between solicitor and client, out of the estate.

HODGINS, J.A. MAY 14TH, 1913.

CARDWELL v. BRECKENRIDGE.

Water and Watercourses—Mill-dam—Injury to Lands by Flooding—Prescription—Evidence—Plan—Surveys — Witness — 1 Geo. V. ch. 41, secs. 3, 25—Raising and Tightening of Dam — Actual User — Freshets — Temporary Holding of Water for Use of Mill in Summer—Constant and Systematic User—Damages—Injunction—Costs.

Action by four plaintiffs for damages for the flooding of their lands and for an injunction.

The complaint of the plaintiffs was that the defendant's dam, built across the river Ouse, in the township of Asphodel, had been raised twenty-one and a half inches since 1885, and had been tightened, resulting in a great increase in the water backed upon their lands, with consequent damage, in later years.

The defendant denied the raising and tightening of the dam, and claimed the right to flood the plaintiffs' lands whenever the natural flow of the Ouse required him to do so in operating his mill.

G. H. Watson, K.C., and L. M. Hayes, K.C., for the plaintiffs.
I. F. Hellmuth, K.C., and F. D. Kerr, for the defendant.

HODGINS, J.A.:—. . . The defendant purchased the mill and appurtenant lands in 1885; and in his conveyance from George Read there are included "the mills, dam, and machinery now therein" and a right to enter into and upon an embankment on the west side of the Ouse for the purpose of repairing, amending, and rebuilding the same. . . .

This mill was a going concern when purchased by the defendant; and his predecessor in title, John Powell, had for many years maintained the dam in question with a seven-foot head. . . . The embankment mentioned in the defendant's deed was then in place, and has been maintained ever since.

In 1886, 1900, 1901, and 1908, some repairs and improvements were made to the dam.

In 1886, the two inside sections of the dam and the timber slide were taken down and repaired. In 1900 and the winter of 1901, steam was put in, the posts replaced in the timber slide, and the old saw-mill on the west was taken down, as well as its flume; and the dam was repaired. In 1903, shafting was put across below the dam, a chopper put in, and steam was used to saw and grind chop. In 1908, the old grist-mill flume was made into a sluiceway, and a new concrete flume put in to the east. . .

The chief disputes were: (1) was the dam raised? (2) was it tightened? (3) had the defendant acquired the right by prescription to collect and retain whatever amount of water the dam, if it remained unaltered, could contain at any time? (4) the question of damages and injunction. . . .

In discussing the question of the exact height of the present dam and the height of the dam at the time spoken of by one Lobb, in 1902 or 1903, and also the height of the embankment and of the water at several dates, a number of plans and elevations were put in. There are four plans which give elevations; exhibits 13, 14, and 28 being confined to the dam, the former taking in the embankment on the west or left side of the mill-pond; exhibit 30 dealing with portions of the lands involved.

Mr. Watson, for the plaintiffs, objected to the later plan, on the ground that it professed to give surveys, and that Mr. Wright, its draftsman, was not an Ontario land surveyor. Mr. Watson

referred to 1 Geo. V. ch. 41, sec. 25. I overruled the objection; but Mr. Watson relied on it, and in consequence did not cross-examine at length.

I think that Wright was a competent witness; and the only restraint that I can find in the statute is in sec. 3, which does not in any way affect his right to give evidence. The weight to be attached to it might be measured in some degree by sec. 25. . . .

Having regard to the detailed evidence of the repairs that were done, how they were carried out and why, and particularly to the dates and the present height, as well as the user sworn to, I have come to the conclusion that the dam was not raised during these repairs; but that confusion has been caused regarding the effect of the work of repair and by the lapse of time, and that what has been spoken of as additional timber is in reality timber used to replace, at the same height, that already in use or worn out. . . .

I am, therefore, unable to find that the dam was in fact raised by the defendant.

As to the tightening of the dam, the evidence varies. The method of putting in sawdust, etc., originally used, has been followed by the defendant, and was in use as late as December, 1912, when Wright took his measurement. It might have been done oftener of late years, and there is some evidence of this.

Counsel for the defendant, upon the assumption that the dam has remained at the same height—which I have found to be correct—argued at the trial that he had the right to hold all the water that in its natural course came down the Ouse, for so long and during such periods, long or short, as the supply enabled him so to do. In other words, this means that the capacity of the dam and the supply of water were the only limitations on his right to dam the flow of the stream.

I think the right of the defendant must be qualified in some way, and that at least it must be shewn that the user, while not absolutely continuous de die in diem, must at all events be so constant that a consistent course of action and use must exist, even though periods elapse without the user being actively asserted. I have, therefore, to determine what the actual user has been, as defining the scope of the defendant's rights.

In the view I take, it is unnecessary to follow out the devolution of title. The property conveyed was a mill property, with an existing dam; and whatever rights the defendant has acquired depends upon prescription, and not upon the conveyances subsequent to his deed from Read, in none of which is there any express recognition of his rights, and, therefore, no express servi-

tude. But I cannot see that the plaintiffs, because they bought from Read, are debarred from claiming that the defendant has exceeded his rights. . . .

There is, to my mind, until after 1908, a great preponderance in favour of the view that the water was used regularly during the spring freshets up to a seven-foot head, and not after that, and again in the late fall and winter. . . .

In 1900, the defendant put in steam; and, between that time and 1908, David Breckenridge says, they did not use so much "continuous" water power. They abandoned steam in the saw-mill and went back to water power for both in 1908. From that time on the trouble dates.

It may be that the defendant did not use more water power, but, having abandoned steam—which his son David said he only used when there was not enough water—i.e., in the summer time—the use of the water was made more continuous, and included the summer months. The history of the years after 1908 shews that something had changed. . . .

It is . . . a question whether the temporary holding of the water for use of the mill in the summer, when there were occasional heavy rains, justifies or is a use similar to the holding of the water during the summer, when these rains occurred at a time enabling the defendant practically to continue the high water of the spring freshets, either by better management or by a tighter dam, in such a way as to overflow the lands of the plaintiffs. If so, the defendant can practically, during the summer, or at all events for a longer time than formerly, flood the plaintiffs' lands.

It may be said that, apart from the question of tightening, the systematic holding up of every increase of water during a dry season, and making use of every rainfall, while a much less lengthy process than during a wet season, is in its legal effect the same. That is, it is a user of the water so far as user can be had, having regard to the season. If so, can the fact that the rains occur immediately after the spring freshets cease, deprive the defendant of the right to use the rain water which happens opportunely to lengthen the spring user, if he has the right to use it if and when it occurs, after an interval? . . .

[Reference to Innes's Law of Easements, 7th ed., p. 57; Goddard, 7th ed., pp. 269, 346; Hall v. Swift, 4 Bing. N.C. 381; Angell on Watercourses; Hall v. Lund (1863), 1 H. & C. at p. 685; Gale on Easements, 8th ed., p. 139; Bechtel v. Street (1860), 20 U.C.R. 15.]

I see no reason . . . to quarrel with the statement of counsel for the defendant that a prescriptive right might be acquired

to hold as long as he could all the water that comes down in its natural course for such period or periods as the water lasts. But it equally follows from the cases that there must be a constant and systematic user to support that claim, and the user is the test of the prescriptive right. . . .

[Reference to Attorney-General v. Great Northern R.W. Co., [1909] 1 Ch. at p. 779; Crossley v. Lightowler, L.R. 2 Ch. at p. 481; Beaty v. Shaw (1805), 8 East 208; Calcraft v. Thompson (1867), 15 W.R. 387; McNab v. Adamson (1849), 6 U.C.R. 100; Cain v. Pearce, 1 O.W.N. 1133, 2 O.W.N. 446, 896, 1496, 3 O.W.N. 1321.]

From the above authorities I conclude that, even granting that the use of summer water, when it came down, is proved, the prescriptive right to use it is limited by the actual user (neither more nor less), and that to use it in prolongation of the spring freshets is a different and more oppressive use, considering the season of the year and the right of the plaintiffs to cultivate their land. In Hall v. Swift (ante), the right had been established by a long course of enjoyment, and the cesser during the dry season was only urged as an interruption destroying the right. It must be borne in mind that one of the elements of a prescriptive right is, that the servient tenement shall be burdened with some right openly and continuously exercised, and that it cannot be gradually and insensibly increased: Goddard on Easements, 6th ed., pp. 398, 399. The exact point is, in my judgment, a narrow one, and the dividing line hard to draw.

But I think that the real answer in this particular case is, that the sort of user practised during the summers prior to and after 1886, and down to 1908, was merely to use such head as there ordinarily was—say five and a half feet—and to cease working when that gave out, except after a heavy rain; and not, as has been done since, so to manage and conserve the water that a full seven-foot head could be maintained much longer into the summer than formerly.

I think the fair result of the evidence is, that the full use of the mill privilege prior to 1908 was confined to the time during the spring freshets, and that after they subsided the mill was worked with a lower head, and was suffered to be idle from time to time rather than injure the lands above it. . .

The time of the spring freshets has been variously stated. . . . I think that the 15th May is a reasonable time to fix as that on which the spring freshets are over.

Upon the question of damages, I am not impressed with the idea that the plaintiffs have suffered to the extent indicated by

their particulars or as deposed to before me. I have not been convinced that the trees have been injured. If they have been, their commercial value is trifling; and it was left for counsel to suggest that they had in these cases some other value to the plaintiffs or that the serious consequences argued for will necessarily follow.

I think, also, that the plaintiff Thomas Cardwell is, to some extent, the author of his own damage; and that, while he has suffered, the defendant has not been shewn to be the source of all of it.

I do not set out in this judgment a detailed examination of the dispute over the effect of the making or closing of the cuts in and north of the embankment, or of the old ditch and its continuation into Mrs. McMullen's property. I have, however, gone over it with care, and my judgment is against the plaintiff Thomas Cardwell and in favour of the defendant upon what was done and its effect.

The plaintiffs are entitled to some damages. It is hard to say just how much of the damage has been caused by the defendant's action and how much would have naturally flowed from the wetness of the seasons.

Having regard to the circumstances in each case, the weather records, the time specified during which it is said damage occurred, including any detriment to the trees—and the want of any exact date of the real damage—I fix the damages of Thomas Cardwell at $100, of Benjamin Cardwell at $50, of Fitzpatrick at $75, and of Garvey at $75.

In addition to damages, the plaintiffs are entitled to an injunction to restrain the defendant, after the cessation of the spring freshets or after the 15th May, whichever shall be the latest, and until the autumn freshets begin or until the 1st November, whichever shall be the latest, from maintaining the water by his dam so as to overflow the embankment mentioned in his deed; except that in the case of the plaintiff T. Cardwell the injunction shall not extend so as to protect him from flooding occasioned by any cuts or openings beyond the north end of the embankment mentioned in the evidence.

The defendant had the right to stop the old ditch where it entered his land, and is entitled, under his conveyance from Read, to enter on and repair the embankment, and may, if he desires it, have it so declared, especially with reference to the cut or opening known on plan exhibit 12 as "B."

As to the costs. While the plaintiffs succeed in their claim for an injunction and damages, they fail upon a most important part

of their claim, namely, the assertion that the dam had been raised; and they have not proved their damages as set out before the trial. While, therefore, they are entitled to the general costs of the action other than those relating to the taking of Lobb's evidence and the application therefor, I think that there must be deducted from these costs one-half of the counsel fees taxed against the defendants for the trial.

MIDDLETON, J. MAY 15TH, 1913.

FIELD v. RICHARDS.

Trespass—Cutting Timber—Damages—Injunction—Costs.

Action for an injunction and damages in respect of trespass and cutting timber on the plaintiff's lands.

The action was tried before MIDDLETON, J., without a jury, at Bracebridge, on the 8th May, 1913.

R. C. Levesconte, for the plaintiff.

J. E. Jones, for the defendant.

MIDDLETON, J.:—The plaintiff owns lot 15 in the 12th concession of the township of McLean, intersected by a bay of Lake Menominee (often called Rat Lake). The lands are wooded, and were purchased for use as a summer residence. The patent reserves "an allowance of one chain in perpendicular width for a road on the shore." Warne, the patentee, purchased the timber on the road allowance from the Townships of McLean and Ridout; but, when he sold the land, he did not sell the timber on the road allowance. On the 12th July, 1909, Warne, for $25, sold to Richards the timber on this allowance, with the proviso that all timber not removed by the 19th April, 1911, should revert to him. Richards also acquired title to the adjoining lands.

In the winter of 1909-1910, Richards and his co-defendant Zimmerman, acting for him, cut timber and trespassed on the plaintiff's lands. It is admitted that 21 trees were cut on the portion of the lot north of the bay, and it is shewn that 23 trees were cut on the lands south of the lake.

A discharged employee of one of the defendants gave an exaggerated account of the trespass, and a motion for an injunction was the result. The plaintiff was also ignorant of the

rights of the defendant Richards upon the road allowance, and much incensed at the destruction of the trees along the shore. On the return of this motion, the defendants were, by order, allowed to remove the timber cut, subject to the plaintiff's right to damages. The timber then cut was the plaintiff's, and the defendants must answer for its then value—not as standing timber, but as it then was in the log. Faulkner v. Greer, 16 O.L.R. 123, and Greer v. Faulkner, 40 S.C.R. 399, are conclusive upon this question.

The 44 trees would cut on the average 3 logs each; and, allowing 18 logs to the M., would give about 7,000 feet—probably an under-estimate, as some of the trees were very large. This at $6.50 per thousand would make $45. To this must be added two cords of tan bark, $10; and, I think, an allowance should be made for the trespass and injury to the lands; this I fix at $50; making a total of $105.

Then as to costs. In Cooper v. Whittingham, 15 Ch.D. 501, Sir George Jessel says: "When a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion and cannot take away the plaintiff's right to costs . . . The rule is plain and well settled. It is, for instance, no answer, when a plaintiff asserts a legal right, for a defendant to assert his ignorance of such right, and to say, 'If I had known of your right, I would not have infringed it.' There is an idea prevalent that a defendant can escape paying costs by saying, 'I never intended to do wrong.' That is no answer; for, as I have often said, some one must pay the costs, and I do not see who else but the defendants who do wrong are to pay them."

Here the defendants did not admit the wrong and submit to an injunction, as they well might have at an early stage, and so have avoided the prosecution of the action beyond the injunction motion.

Something is said, in a memorandum handed in by Mr. Jones, as to the defendant Zimmerman being a contractor, and so being alone liable. This is based on an answer made to a question asked late in the trial, and upon which there was no cross-examination. The defence admits the responsibility of both defendants for the cutting, and no such issue was suggested at the hearing.

Judgment will be for the plaintiff for the injunction sought and $105 damages and the costs of the suit on the High Court scale, including the costs of the injunction motion.

MIDDLETON, J. MAY 15TH, 1913.

SHANTZ v. CLARKSON.

Assignments and Preferences — Assignment by Company for Benefit of Creditors—Inspector of Insolvent Estate—Interest in Purchase of Assets—Action to Set aside Sale—Locus Standi of Plaintiff—Acquisition of Share of Company's Stock after Winding-up Order—Shareholder not Representing Company—Inspector Abstaining from Action in Regard to Assets—Formal Concurrence in Conveyance of Assets—Absence of Knowledge by Assignee of Interest of Inspector—Sale Beneficial for Creditors—Insolvent Plaintiff—Inspector not Occupying Fiduciary Position.

Action by Dilman B. Shantz, on behalf of himself and other creditors and shareholders of Jacob Y. Shantz & Son Company Limited, to set aside a sale of the assets of the company by the defendant Clarkson, the assignee of the company for the benefit of creditors, to the defendant Gross; upon the ground that one Jacob B. Shantz, an inspector of the estate, was interested in the purchase.

The action was tried before MIDDLETON, J., without a jury, at Berlin, on the 13th May, 1913.

M. A. Secord, K.C., for the plaintiff.

W. N. Tilley and R. H. Parmenter, for the defendant Clarkson.

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

MIDDLETON, J.:—On the 28th February, 1912, the company made an assignment to the defendant Clarkson of all its assets, upon trust to sell and convert the same into money, and to apply the proceeds in payment of the debts, and to pay the balance, if any, to the company. . . .

[The learned Judge then referred to a proceeding for the winding-up of the company and the making of a winding-up order, which did not become effective.]

On the 19th March, a meeting of the creditors was held. Mr. Jacob Shantz, Mr. Butler, and Mr. Whitehouse were appointed inspectors. The inspectors met immediately after the shareholders' meeting, and instructed the assignee to draw up an advertisement for the sale of the business as a going concern.

An advertisement was accordingly published, but the sale was not proceeded with pursuant to it, as the plaintiff desired a postponement, hoping that he would be able to make financial arrangements which would enable him to purchase the property, and organise a new company in such a way that the creditors

would receive payment in full, and that he and other members of the old company, who had become personally responsible to creditors, would in this way be relieved from liability.

The sale was accordingly adjourned until the 2nd May. In the meantime, and before the date first fixed for the sale, an arrangement had been entered into between the plaintiff and his brother, the inspector, Jacob Shantz, by which Jacob was to assist in the purchase and to take stock in the proposed new company.

Upon this coming to the knowledge of the assignee, he informed Jacob that he ought at once to resign, as it would be improper for him to be interested in the purchase while still inspector. Mr. Shantz did not formally retire, but accepted the view of the assignee, and withdrew from the meeting of inspectors; and thereafter, save as to the formal execution of the conveyance, took no part as inspector. He did not learn anything, in his capacity as inspector, not otherwise fully known to him; and he took absolutely no part in the subsequent sale.

Quite unknown to the assignee, Jacob Shantz had been negotiating with the defendant Gross. Gross was interested in the company, and was contemplating purchasing if D. B. Shantz (the plaintiff) did not himself purchase: so as to protect the creditors and to minimise his own loss as a creditor and as surety. Jacob Shantz, in all that he did, acted with perfect openness and propriety. His position was known both to the plaintiff and to Gross. If his brother could purchase, as he expresses it, he "was with him;" if his brother failed to purchase, then he "was with Gross" to aid him.

When the property was offered for sale, a reserved bid of $75,000 had been fixed by the assignee and the other two inspectors. The best bid was made by Gross, who offered $70,000. The $75,000 was a sum estimated as being required to pay the creditors in full.

The offer made by Gross was rejected, and the negotiations were continued; the plaintiff hoping for and seeking delay, believing that he might yet be able to obtain financial assistance; but it was plain to all concerned that this hope would never be realised. Finally—after notice to the plaintiff—the assignee and the inspectors other than Shantz agreed to accept $70,000 from Gross; Gross assuming all liabilities incurred by the assignee after the date of the assignment, so that the $70,000 should be available for the creditors. It now appears that this sum will be sufficient to pay the creditors in full, or almost in full.

The sale was a good sale, and, in the interest of all concerned,

it should not be interfered with unless there is no other alternative.

The plaintiff, prior to the liquidation of the company, had held some 459 shares of the capital stock; but before that date he had, with the assent of the company, transferred this stock.

On the same day that the company assigned—the 28th February, 1912—Shantz himself executed an assignment for the benefit of his creditors.

In these two ways he had at this time divested himself of all title as stock-holder. He is not shewn to be a creditor of the company.

Apparently for the purpose of giving trouble, the plaintiff obtained an assignment from his wife of one share of stock, which she held. This assignment is put in at the trial, and bears date the 2nd April, 1912. I have suspicion as to that being the actual date of the assignment. This assignment is not shewn to have been in any way approved; and, being made more than a month after the date of the winding-up order, is inoperative as a transfer of stock; but it may operate as an assignment of any dividend which might be payable to the shareholders as the result of the liquidation.

It is by virtue of the supposed ownership of this share that the plaintiff claims a locus standi to maintain this action. He issued his writ on the 18th May, 1912, after the contract with Gross, but before a conveyance had been made in pursuance of that contract—the conveyance being dated the 20th May, and registered on the 27th May, after the registration of the lis pendens in this action. In the meantime a new company had been incorporated; and Gross, on the 21st May, conveyed to it. This company has been in possession and operating the plant for the year during which this action has been pending; and the $70,000 paid by Gross has been held by the assignee.

I think the plaintiff fails, for various reasons.

First, he has not been shewn to be either a creditor or shareholder. On the evidence, there is no suggestion that he was a creditor; and I think the transfer to him of the one share of stock after the date of the winding-up order did not make him a shareholder.

Secondly, I do not think that the right of action, if any, is vested in the shareholder. Under the trust deed, the creditors are first to be paid, and the money is then to be held for the company. Even if a shareholder or creditor, the plaintiff does not represent the company. The rights of the company are vested in the liquidator.

In the next place, although Jacob Shantz had not formally

resigned his position as inspector, he was given to understand that he could not take any part in the deliberations of the inspectors, by reason of his contemplated interest in the plaintiff's proposed purchase; and from that time on he took no part whatever in the negotiations leading up to the sale. It cannot be said that he in any way abused a fiduciary relationship.

It is true that Jacob Shantz signed a memorandum in the margin of the conveyance to Gross. This, it was said, was done at the request of the purchaser, who deemed it essential to perfect the conveyance. But his act in joining in the conveyance was purely formal.

The case is entirely different from any of the cases cited, because there was no knowledge on the part of Clarkson that Shantz had any interest in the purchase made by Gross. There was no collusion in any sense of that term. Clarkson, voicing the views of the creditors, desires to affirm the sale. In no other way can these creditors expect to receive payment in full of their claims. They have no interest in setting aside the transaction.

If the sale was at an undervalue—which is not alleged—the creditors are not concerned; the company alone is interested. Gross was not disqualified from being the purchaser. It was open to him to bid. If Shantz, the inspector, by reason of his sub-contract, is disqualified from keeping for himself any profits he may make out of the transaction, that is a matter that cannot now be dealt with; for the company, who alone could claim it, and Shantz, who alone could be liable, are not before the Court.

I would be the first to deprecate any attempt to narrow the beneficial equitable doctrine which precludes a person occupying a fiduciary position from himself purchasing without the concurrence of all concerned; but this case illustrates what has often been pointed out, that equitable doctrines must not be pushed to such an extent as to produce a palpable absurdity. When it is realised that in this case an insolvent man, who has assigned for the benefit of his creditors, takes a transfer of one share in a company in liquidation and seeks to set aside a sale of property made by the assignee of the company, which has secured to the creditors payment in full—a result which the plaintiff hoped for, but proved unable to bring about—and that this action is brought just at the critical moment of the closing of the transaction, and has resulted in withholding $70,000 from the body of creditors for a year, and when it is not suggested that any other shareholder of the company has any sympathy with the contention put forward by the plaintiff, it is seen how utterly devoid of any semblance of equity this action is.

The action is dismissed with costs.

KREHM v. BASTEDO—MASTER IN CHAMBERS—MAY 12.

Discovery—Examination of Person as Assignor of Chose in Action Sued for—Con. Rule 441—*Refusal to Testify—Remedy —Attachment for Contempt of Court—Con. Rule* 454—*Jurisdiction of Master in Chambers—Con. Rule* 42(1).]—Motion by the defendants for an order dismissing the action with costs, or requiring the attendance for examination for discovery of David Krehm, a former partner of the plaintiff. The action was brought, admittedly, in respect of a transaction between the defendants and the then firm of Krehm Bros., at a time when David Krehm was a member of the firm. He had since retired, and all his interest in the assets of the partnership was, before action, transferred to his brother Nathan, the plaintiff, by whom the business was being carried on under the old name. It was argued that this arrangement was in effect an assignment by David Krehm of the chose in action now in question to his brother, the plaintiff. Acting on this view, the defendants took out an application for the examination of David for discovery, under Con. Rule 441. He attended before the examiner, but refused to be sworn, on the advice of his counsel. The question chiefly discussed on the motion was, whether David was an assignor in respect of the claim made in the present action. The Master said that it did not seem necessary to deal with this point at present, because, granting for the sake of argument that David Krehm was an assignor, within the meaning of the Rule, there was no authority for penalising the plaintiff for the default of his former partner. It would seem that the remedy for any contumacy on the part of any one properly examinable under Con. Rule 441 (and perhaps also under Con. Rule 440) is that provided by Con. Rule 454. In such cases proceedings must be taken by attachment as for a contempt of Court by the person sought to be examined, but refusing to submit to its process. But such a motion is excepted from the jurisdiction of the Master in Chambers by Con. Rule 42(1). Following his decision in McWilliams v. Dickson Co. of Peterborough, 10 O.L.R. 639, the Master dismissed the motion, with costs to the plaintiff in any event. Gideon Grant, for the defendants. A. J. Russell Snow, K.C., for the plaintiff.

BUTLER v. BUTLER—MIDDLETON, J.—MAY 12.

Promissory Note—Action on—Defence—Agreement to Renew—Money Paid for Defendant—Action for—Payment into Court—Costs.]—Action to recover $436.56 and interest, being moneys paid by the plaintiff for the defendant to a bank upon a guaranty. Another action was brought upon a promissory note. The learned Judge said that temper seemed to have prevailed over wisdom. In the action on the note the whole issue was as to an alleged agreement to renew the note; and he did not think that this agreement was proved; and, if proved, he did not think it would constitute a defence in law. In the action for the amount paid the bank, the defendant admitted the debt, and had paid the amount of it into Court; so the only question was one of costs. The learned Judge could see no reason why the defendant should not pay the costs. As the plaintiff might have contented himself with one suit, no costs should be allowed up to the appearance, but costs subsequent thereto should be allowed, as they were occasioned by the defendant's improper attitude. J. G. Wallace, K.C., for the plaintiff. W. R. Smyth, K.C., for the defendant.

RE DAVIS AND KORN—MASTER IN CHAMBERS—MAY 13.

Attachment of Debts—Cheque Drawn by Third Person on Garnishee Bank in Favour of Judgment Debtor and in Possession of Judgment Creditors—Solicitors.]—Application by Davis and Mehr, solicitors, who were judgment creditors of Theresa Korn, by virtue of an order for payment of their costs by her, in a summary proceeding for taxation and payment, to make absolute an order attaching moneys alleged to be due to Theresa Korn by the Metropolitan Bank, garnishees. The attaching order was granted on the 29th April. There was no dispute as to the facts. The applicants were the solicitors of the judgment debtor, who was the plaintiff in an action which was settled. One of the terms of the settlement was an immediate payment to the plaintiff of $200; each party was to pay his or her own costs. Theresa Korn refused to pay her solicitors' costs. They thereupon had their bill taxed, and it was certified at about $160. They received from the defendant in the action a marked cheque on the Metropolitan Bank in favour of Theresa Korn, for $200, which remained in their possession. They now asked for an order that the bank, on presentation of

the cheque, deposit it to the credit of the drawer, and pay to the applicants the amount of their judgment with costs. The Master said that he did not see how any such order could be made. No authority was cited for it. The cheque was drawn by a person who was not a party to this proceeding. If it was to be redeposited to his account, he should give the necessary direction or endorsement. Even if the drawer had been the garnishee, an order absolute could not have been made as against him. The dfficulty had arisen from the solicitors being in possession of the cheque. Their wisest course would have been to return the cheque with a notice to the drawer, or his solicitors that their costs had not been paid, and that they looked to the proceeds of the action for payment. See De Santis v. Canadian Pacific R.W. Co., 14 O.L.R. 108, and cases cited. This might yet be done, and might probably result in satisfaction of the claim of the applicants. If not, an attaching order might issue in respect of the money then in the possession of the defendant. As the matter stood, the present attaching order must be discharged, with costs to the bank, fixed at $5. The debtor was not entitled to any costs, as it was her refusal to pay her solicitors that had caused the present proceedings. And, so far as appeared, there was no justification for that refusal. Lionel Davis, for the judgment creditors. W. J. McLarty, for the judgment debtor. N. B. Wormwith, for the garnishees.

ANTISEPTIC BEDDING CO. v. GUROFSKY—MASTER IN CHAMBERS—MAY 13.

Evidence—Foreign Commission—Application by Defendant—Delay of Trial—Reasonable Facilities for Making out Defence.]—After the disposition of the previous motion in this case, ante 1221, the plaintiffs amended by setting up the identity of the defendant with the Insurance Brokerage Company, and alleging that the premiums were never paid to the insuring companies and never reached their hands, though the defendant assured the plaintiffs otherwise. The defendant has rejoined that the reply does not disclose any right in the plaintiffs to recover, even if the facts as to the identity of the Insurance Brokerage Company and the defendant are true. He further alleges that he obtained insurance for the plaintiffs as he had agreed to do, and is not responsible for the pretended cancellation by the insurance companies who issued the policies. The defendant now moved for a commission to Liverpool, England,

to Winnipeg, and to two places in the United States, to take evidence of the proper officers of the companies who issued the policies in question, on the question of payment. The Master said that there was no doubt that, if the order should be granted, there could not be any trial of the action until after vacation. But this was not, of itself, any reason for a refusal, as there had not been any delay on the part of the defendant in the conduct of the case. The issue raised by the plaintiffs was a very serious one for the defendant, involving his honesty and veracity. It was essential for his future business career that he should clear himself in the matter, and he was entitled to all reasonable facilities for so doing. See Ferguson v. Millican, 11 O.L.R. 35, which gave effect to the principle that defendants are to be allowed all "reasonable facilities for making out their defence." An order should, therefore, be granted, and the costs thereof and of the commissions reserved to be disposed of by the Taxing Officer, if not disposed of at the trial. The date of the return of the commissions should not be later than the 1st August—unless otherwise agreed by the parties. C. A. Moss, for the defendant. F. Arnoldi, K.C., for the plaintiffs.

DAVISON v. THOMPSON—KELLY, J.—MAY 15.

Promissory Notes—Action on—Defence—Notes Given without Consideration and for Accommodation of Plaintiff—Conflicting Testimony—Finding of Fact—Amendment of Defence—Refusal.]—Action on two promissory notes, one for $500, the other for $600, made by the defendant, payable to the plaintiff, in renewal of three notes for the same aggregate amount. The defendant did not dispute the making of the notes sued on or of the original notes; his defence was, that they were given without consideration and for the accommodation of the plaintiff. At the trial, the defendant moved for leave to amend the statement of defence; the motion was refused. The learned Judge, weighing the conflicting testimony in the light of the circumstances shewn, found that the plaintiff was entitled to succeed. Judgment for the plaintiff for the amount claimed, with costs. J. T. White, for the plaintiff. W. M. Hall, for the defendant.