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COURT OF APPEAL.

FEBRUARY 1ST, 1912.

RE SISTERS OF THE CONGREGATION OF NOTRE DAME AND CITY OF OTTAWA.

Assessment and Taxes—Exemption—Building Used for Purposes of Seminary of Learning — Letting of Rooms in Building.

Case referred to a Judge of the Court of Appeal by the Lieutenant-Governor, by orders in council dated respectively the 27th September and the 21st November, 1911, pursuant to the provisions of sec. 77 of the Assessment Act, 4 Edw. VII. ch. 23.

The questions referred arose upon an appeal to the Judge of the County Court of the County of Carleton, by the Sisters of the Congregation of Nôtre Dame, from the decision of the Court of Revision of the City of Ottawa in respect to an assessment under the Assessment Act.

The facts were stated as follows:—

The Sisters of the Congregation of Nôtre Dame are the owners of a property on Gloucester street, in the city of Ottawa, used as a seminary of learning for educational purposes, known as "The Gloucester Street Convent." In 1909, the Sisters acquired an adjoining property, known as No. 50 Nepean street, on which is a building, formerly occupied as a dwelling-house. This building has been attached to the main convent premises by a covered passage-way. Two of the large rooms on the ground-floor have been made into one, which is used as the primary class-room of the Convent. Another large room in the third storey is used as the art studio of the Convent. Of the bed-rooms, five are occupied by Sisters of the Congregation, and nine are occupied by lady students of the Normal School at Ottawa, who take their meals in the main building of the Convent, and some

of whom take tuition in art, music, and French at the Convent. These lady students use the primary class-rooms for their general purposes after school-hours. The revenue derived from them is entirely devoted to the purposes of the seminary.

The following questions of law were submitted for the opinion of the Court of Appeal:—

1. Does the letting of rooms to persons other than students of a seminary of learning, in one of the buildings belonging to and used by that seminary for its ordinary purposes—the whole of the income so derived from the building being used for the purposes of the seminary—render the whole of the buildings and property of such seminary liable to taxation?

2. If question No. 1 is answered in the negative, does the letting of rooms to persons other than students of a seminary of learning, in one of the buildings belonging to and used by that seminary for its ordinary purposes—the whole of the income so derived from the building being used for the purposes of the seminary—render the whole of such building in which rooms are let liable to taxation?

3. If questions Nos. 1 and 2 are both answered in the negative, then according to what method should the building in which such rooms are let be taxed?

The case was referred by a Judge of the Court of Appeal to the full Court, and was heard by Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A.

E. Bayly, K.C., for the Attorney-General.

D. J. McDougal, for the Sisters of the Congregation of Nôtre Dame.

J. T. White, for the Corporation of the City of Ottawa.

Moss, C.J.O., said that the Court, having considered the case and the questions submitted, was of opinion that, upon the facts stated in the case, the questions should be answered as follows:—

1. The first question in the negative.

2. The second question in the affirmative.

3. Having regard to the foregoing answers, no answer to the third question is called for.

FEBRUARY 15TH, 1912.

*SIVEN v. TEMISKAMING MINING CO.

Master and Servant—Injury to Servant—Accident in Mine—Defective Condition of Works—"Pentice"—Proper Place for—Mining Act of Ontario, sec. 164, *Rules* 17, 31—*Negligence—Findings of Jury.*

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., 2 O.W.N. 1245, upon the findings of a jury, in favour of the plaintiff, for the recovery of $2,500 and costs, in an action for damages for personal injuries sustained while working in the defendants' mine.

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

H. E. Rose, K.C., and G. H. Sedgewick, for the defendants.

A. G. Slaght, for the plaintiff.

GARROW, J.A.:— . . . The plaintiff claimed to recover under the common law, the Mining Act, and the Workmen's Compensation for Injuries Act. . . .

The plaintiff was severely injured and disabled by a piece of rock falling down the shaft in which he was working, through no fault of his. This rock came through a man-hole situated above the mouth of the shaft, where men were engaged in what is called "stoping." The stope is an overhead excavation, which was being made in the roof of the 300-foot level, below which was the shaft or winze in which the plaintiff was working. There was, at the time, a trap-door or covering over the mouth of the shaft or winze in which the plaintiff was, but which unfortunately was open at the time of the accident. If it had been closed, the injury to the plaintiff would not have occurred. This trap-door could not be and was not intended to be kept closed all the time. It had to be opened from time to time to permit men to pass up and down with the drills which the plaintiff was using, and it was open at the time, so the plaintiff said, to let the drill bucket down.

Before proceeding with the stoping, Kelly, the workman in charge, sent his helper (Crabbe) to see that this trap-door was closed, and Crabbe called back that "everything was all right," upon which the stoping proceeded.

*To be reported in the Ontario Law Reports.

Kelly was examined as a witness, but Crabbe was not. It was Crabbe's duty, as Kelly said, not only to see that this trap-door was closed, but to remain near and see that it remained closed while the stoping operation was going on. That he did not do so is made evident by the undisputed fact that it was open—or the plaintiff would not have been injured in the manner in which, no one disputes, he was injured.

The learned Chief Justice left the case to the jury in a very full and careful charge, to which no substantial objection was taken, and the jury answered the questions submitted as follows:—

1. Were the plaintiff's injuries caused by the negligence of the defendants? A. Yes.

2. If so, what was their negligence? A. In not finding proper pentice over the man-hole into the stope.

3. Did the defendants fail to provide a suitable pentice for the protection of workmen in the shaft in which the plaintiff was injured (as required by sub-sec. 17 of sec. 164 of the Mining Act of Ontario)? A. Yes.

4. Did the defendants fail to comply with sub-sec. 31 of sec. 164, by examining the working shaft, level, and stope, in order to ascertain that they were in a safe and efficient working condition? A. We are of opinion that the shift boss or other officer going through the mine in the ordinary discharge of his duties does not fulfill the requirements of this sub-section. There has been no evidence produced to shew that systematic examination of the work was carried out.

5. Was the plaintiff guilty of negligence which caused the accident or which so contributed to it that but for his negligence the accident would not have happened? A. No.

6. If you answer "yes" to the last question, wherein did his negligence consist? (No answer.)

7. At what sum do you assess the damages, in case the plaintiff should be entitled to recover? A. $2,500.

It was conceded that the action could not be maintained under the Workmen's Compensation for Injuries Act, because it had not been commenced in time. . . .

In my opinion, the plaintiff established a good cause of action for a breach of Rule 17 of sec. 164 of the Mining Act, 8 Edw. VII. ch. 21, which provides that, "where a shaft is being sunk below levels in which work is going on, a suitable pentice shall be provided for the protection of the workmen in the shaft." The shaft . . . was being sunk below a level in which work was going on. The circumstances, therefore, called upon the defend-

ants to supply a "suitable pentice." The duty itself is too clearly expressed to admit of argument against.

The only real question is, therefore: Did the evidence shew that the duty had been reasonably performed? The jury, by their 3rd answer, find generally that it had not. This finding, however, the defendants contend, must be interpreted by the 2nd answer, and so interpreted means the placing of the pentice over the man-hole, which, they say, is an unreasonable and in fact impossible position in which to place it. I do not accede to either view, that is, that such an interpretation is compulsory, or that it would have been impossible so to place a pentice at the man-hole as to have prevented rock from falling into the shaft where the plaintiff was, although it may be conceded that to do so would, to some extent, have lessened the convenience of the man-hole, and would, of course, have involved the expenditure of money. The statutory duty, however, takes no account of inconvenience, or even expense, but is quite absolute in its terms. And the defendants themselves, in effect, so regarded it; for, while they contest the propriety, and even the possibility, of a pentice at the man-hole, they contend that the trap-door over the shaft was itself a pentice; and that, having supplied it, they have complied with the statute. That question was, upon the evidence and the charge, one which the jury was required to pass upon. The question itself (No. 3) was, as the learned Chief Justice told the jury, expressly based upon Rule 17. . . .

Our duty, as I understand it, is to sustain the judgment if there was reasonable evidence to support the findings and if the findings themselves are reasonably sufficient to determine the issues between the parties. . . . Having regard to the whole evidence, the charge, and the findings, I am quite unable to see any imperfection or inconsistency which requires our interference.

Nothing that I can see requires the 3rd answer to be confined as the defendants contend. On the contrary, it seems to cover, or at least to be sufficient to cover, other and wider ground than was intended by the second answer; and is, in my opinion, upon the evidence, the more complete and satisfactory answer of the two. The trap-door, if kept shut, would, as the learned Chief Justice seems to think, have been a "suitable pentice," within the language of the Act; but, when open, was no pentice at all. And for the failure to keep it shut, the defendants, and not the plaintiff, should suffer; the defence of common employment, it need scarcely be said, having no appli-

cation in the case of a breach of a statutory duty: see Groves v. Lord Wimborne, [1898] 2 Q.B. 402; Sault Ste. Marie Pulp and Paper Co. v. Myers, 33 S.C.R. 23.

This conclusion makes it unnecessary to consider the effect of the answer to the 4th question.

I would dismiss the appeal with costs.

MOSS, C.J.O., and MACLAREN, J.A., concurred.

MAGEE, J.A., also concurred, for reasons stated in writing.

MEREDITH, J.A., dissented, for reasons stated in writing. He was of opinion that the direct and immediate cause of the plaintiff's injury was the negligence of Crabbe in reporting to Kelly that the trap-door was closed, when in fact it was not; and that the appeal should be allowed and the action dismissed.

Appeal dismissed; MEREDITH, J.A., *dissenting.*

FEBRUARY 15TH, 1912.

*KLINE BROTHERS & CO. v. DOMINION FIRE INSURANCE CO.

Fire Insurance—Goods on Described Premises—Transfer to other Premises—Re-transfer to Original Premises—Assent to—Form of Assent—Want of Authority of Clerk of Former Agent—Ratification after Fire—Invalidity.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., 2 O.W.N. 917, dismissing the action.

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

L. G. McCarthy, K.C., and Frank McCarthy, for the plaintiffs.

H. Cassels, K.C., for the defendants.

MEREDITH, J.A.:—An insurance of goods in one building or locality is not an insurance of them in another building or locality; the removal of them from one place to another requires

*To be reported in the Ontario Law Reports.

that which is tantamount to a new contract in order to preserve the insurance: see Pearson v. Commercial Union Insurance Co., 1 App. Cas. 498.

The goods in question were moved from the place and building in which they were insured to another place and building, and were there destroyed by fire; and, therefore, the plaintiffs can recover in this action, upon the policy of insurance, only if they had procured, before the fire, that which was tantamount to insurance of the goods in the place and building where they were so destroyed.

They took steps with that object in view; but had not, in my opinion, accomplished it when the fire took place.

Their first step was, through their agents, an application to a copartnership firm in the city of New York, who had been the New York agents for the defendants, but had, some time before, ceased to be their agents, and were in difficulties which brought their business to a close soon after; the application was made in writing, upon a form called a "binder," which, upon its face, is singularly inappropriate, being in the form of an application for insurance, which, when accepted, becomes that which is in this Province always called an "interim receipt," constituting a binding contract of insurance subject to the conditions of the policy to be issued upon it. But no premium or consideration was given, nor any readjustment in any respect attempted, so that it is quite plain that all that ought to have been sought, and given, was the assent of the company to change of the locality of the goods insured; and the main difficulty I find in the plaintiffs' way to success in this action is, that that was not done; and the defendants cannot be bound, especially on the facts of this case, by intentions, or by what ought to have been done, not carried into effect.

The application was presented to a young man who was at the time in charge of that branch of the New York firm's business to which the application would, in the ordinary course of business, be made; but he was little experienced, and the business was . . . in a stage approaching collapse. Without inquiry, except to see that the application came from the office of a reputable insurance broker, and without consulting any one else in the office, he initialled the application, which the broker retained, and placed another—I suppose a duplicate—"on the file in the office" of his masters.

While the same policy was in force, another change of locality of the goods had taken place previously, and had been duly assented to by the defendants: the change in question was

a removal of the goods back to the place where they were when the insurance upon them was first effected. On this occasion the procedure adopted seems, from the evidence, to have been of a different character. According to the testimony of the broker, on the first occasion an indorsement of the policy giving consent to the change was drawn by him, signed by the company through their New York agent, and attached to the policy by him, and returned to the plaintiffs. . . . When consent to the second charge was sought, all concerned say—the brokers and the New York firm's clerk both say so very plainly—that the indorsement upon the policy could not be made by the New York firm; that, at that time at all events, it must be procured from the defendants, as it afterwards was, but not until after the loss.

Assuming, as I do, that, in the circumstances of this case, the plaintiffs might deal with the New York firm, as they did, as if still agents of the defendants, because no notice of their discharge had been given, I am yet unable to perceive how it can rightly be found that any consent of the defendants to change of locality had been obtained before the loss. Whatever the persons concerned intended to do or should have done, no such consent was actually given; all that was done was the presenting of the application in writing and the initialling of it and placing it upon the file . . . ; no indorsement was made; the character of the "binder" was, on its face, entirely different from that of the indorsement which had previously been obtained, and which would be the usual mode of evidencing consent to such a change; and no knowledge of the change came to the defendants until late in the month of March, more than three months after the "binder" transaction took place; and . . . the New York firm, having actually no sort of authority to act for the defendants at that time, ought not to be given any binding power, by reason of ostensible power, beyond that which they actually exercised, which is in writing, and which was exercised only through the ignorance of their clerk. . . .

I am quite unable to perceive how it can justly be said that, before the loss, the plaintiffs had obtained a binding consent of the defendants to the change of locality of the goods, the burden of proof of which is upon them; and, if that be so, they rightly failed in this action at the trial.

GARROW, J.A., gave reasons in writing for the same conclusion. He referred to Skillings v. Royal Insurance Co., 6 O.L.R. 401, 405; Walkerville Match Co. v. Scottish Union and National Insurance Co., ib. 674; Campbell v. National Insurance Co., 24

C.P. 133, 144; Scammell v. China Mutual Insurance Co., 164 Mass. 341; Thompson v. Adams, 23 Q.B.D. 361.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., also concurred.

Appeal dismissed with costs.

FEBRUARY 15TH, 1912.

BRITISH NORTH AMERICAN MINING CO. v. PIGEON RIVER LUMBER CO.

Company—Contract for Sale of Timber—Absence of Corporate Seal—Authority of Agent—Absence of Ratification—Right to Return of Timber Taken—Damages—Improvements and Moneys Expended—Set-off.

Appeal by the defendants (the lumber company and one Smith) from the judgment of SUTHERLAND, J., 2 O.W.N. 303.

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

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

L. G. McCarthy, K.C., and Frank McCarthy, for the plaintiffs.

GARROW, J.A.:—The plaintiffs are a mining company, incorporated by special Act in the year 1847, amended by 9 & 10 Edw. VII. ch. 69(D.), having their head-office at the city of Montreal, and owned a parcel of land, about ten square miles in extent, known as Prince location, in the district of Thunder Bay. Upon this land, the statement of claim alleges, the defendants had trespassed and cut therefrom a large quantity of pulp-wood amounting to about 2,500 cords, which they had removed from the land and caused to be floated in the Jarvis river, where it was when the action commenced; that the plaintiffs on the 16th June, 1910, demanded possession of and the return of such pulp-wood; and that the defendants deny the title of the plaintiffs thereto, and refuse to give up possession thereof or to return the same. And the plaintiffs claimed a declaration as to the title to such pulp-wood, an account, damages, a return of the pulp-wood, and an injunction. . . .

The defendants the Pigeon River Lumber Company pleaded that they purchased the pulp-wood from the defendant Smith, who had a title thereto under a contract in writing made with one Spittal, the authorised agent of the plaintiffs; that they found such contract registered in the registry office for the district of Thunder Bay on the plaintiffs' lands, and purchased the pulp-wood in good faith, and were innocent purchasers for value without notice; and other matters by way of defence which need not be set out.

The defence set up by the defendant Smith was of similar purport, in so far as the origin of his alleged title to the pulp-wood was concerned, which he derived through the contract in writing referred to by his co-defendants. He further pleaded that the plaintiffs were estopped by the conduct of their officers; claimed by way of set-off certain allowances for work done for the plaintiffs; alleged that, by the plaintiffs repudiating the action of their agent Spittal, this defendant had suffered loss, damage, and expense, in consequence of his failure to perform his contract with his co-defendants for the supply of pulp-wood. And, by way of counterclaim, he asked to recover from the plaintiffs $4,800 for moneys expended and improvements made upon the plaintiff's lands, and $2,000 for damages because of the interference with his right to cut wood on the plaintiffs' lands.

There were also subsequent pleadings, in which the defendants charge fraud if the plaintiffs repudiate or had not authorised Spittal to enter into the contract under which the defendants claimed. And the plaintiffs ask that the contract, which had been registered, should be set aside and declared null and void.

At the trial, although a considerable amount of extraneous matter was introduced, it was quite obvious, as Sutherland, J., more than once remarked during its progress, that there was really but one main question to be tried, namely, Spittal's authority. And, after hearing all the evidence, the learned Judge held that Spittal had no authority; that the plaintiffs were entitled to the pulp-wood, which had while the action was pending been sold, by consent, and the proceeds paid into Court; that the instrument executed by Spittal, which had been registered (but after and not before the defendants the Pigeon River Lumber Company purchased from the defendant Smith) was and should be declared to be null and void and set aside; that the defendants should be restrained from further trespassing; and, as to the counterclaim of the defendant Smith, that

the claim of the plaintiffs for trespass beyond the recovery of the pulp-wood and the claim of the defendant Smith should be set off the one against the other.

I agree with the conclusions of Sutherland, J. . . .

That the pulp-wood had been cut and removed by the defendant Smith from the plaintiffs' lands, no one disputed. The title of the defendants the Pigeon River Lumber Company, under the circumstances, wholly depended upon whether or not the defendant Smith had acquired a good title as against the plaintiff by the instrument called in the statement of defence a contract in writing, dated the 25th October, 1909. This instrument, when produced at the trial, turned out to be something more than a mere contract in writing, namely, a so-called indenture under seal. The parties to it are the plaintiffs, described as "the vendor," and Fred. J. Smith, lumberman, described as "the purchaser." And it professes, on the part of the plaintiffs, to agree to sell to the purchaser "all the spruce and balsam trees and timber now standing, growing, or being" on the whole of the plaintiffs' before-mentioned parcel of ten square miles, at the price of fifty cents per cord. The testatum clause is as follows:—

"In witness whereof the parties hereto have hereunto affixed their hands and seals the day and year first above written.

"The British North American Mining Co.
(seal)

"In the presence of A. H. Dowler. } "Per C. D. Spittal, Manager.

(seal)

"F. J. Smith." (seal)

The plaintiffs denied that this instrument, which was not under their corporate seal, was their deed or executed with their authority; the contrary of which the defendants attempted to prove by the production of the writing under which Spittal was appointed, which writing was as follows:—

"Montreal, August 11th, 1909.

"To Whom it May Concern:

"Mr. C. D. Spittal, whose signature subjoins, is authorised to mine and explore all the properties of the British North American Mining Company, namely, Prince Location, Spar Island, and Mink Island, etc., and to act for and take such action or actions as he may consider necessary in the interest of the company.

"The British North American Min. Co.,
"G. Durnford, Vice-Pres.
"Geo. Bonner, Sec."

"Chas. D. Spittal."

But to its sufficiency there is clearly more than one obvious objection.

The plaintiffs' Act of incorporation (clause 13) contains specific directions as to the mode in which the corporation may execute instruments under their corporate seal. Such directions require, in addition to the corporate seal, the signature of the president or of any two directors, and that the instrument should be countersigned by the secretary. But, quite apart from these statutory requirements, it is clear, upon general principles, that an agent appointed by parol cannot bind his principal by deed: see Berkeley v. Harding, 5 B. & C. 355: Powell v. London and Provincial Bank, [1893] 2 Ch. 555; Hebblewhite v. McMorine, 10 M. & W. 200.

In addition, and apart from any question of the mere form of the contract, the document by which Spittal was appointed, in my opinion, conferred no authority whatever upon him to enter into a transaction such as the one in question. He was appointed and employed to "mine and explore," and nothing else, so far as appears; and the general words in the latter part of the document are and should be limited by construction to the particular employment mentioned in the first part of it: see Harper v. Godsell, L.R. 5 Q.B. 422; Jacobs v. Morris, [1902] 1 Ch. 816. It is not easy to see how a person employed to mine and explore could, by reason only of that employment, justify selling any part of his employers' property—much less enter into a contract of the magnitude and importance of the one in question.

Efforts, which in my opinion quite failed, were also made by the evidence to extend and enlarge Spittal's authority beyond that contained in his written appointment. For this purpose, reliance was chiefly placed upon a letter said to have been written to Spittal by the plaintiff, saying, among other things, that "buying the machinery and selling the pulp-wood would be taken up when he (Spittal) went to Montreal." The plaintiffs by their witnesses say that no such letter was ever written. It was not produced at the trial nor very satisfactorily accounted for. But the letter itself, even accepting all that the evidence shews of its contents, was wholly insufficient to add to Spittal's previous written authority. Indeed, if anything, it goes to support the plaintiffs' contention that Spittal never had nor ever

was intended to have such authority, and was, if he was corresponding about it at all, which the plaintiffs deny, asking to be granted such authority.

Efforts, equally futile and without sound foundation, were also made to set up a case of estoppel by conduct, because one or more of the plaintiffs' directors are said to have become aware of the sale by Spittal to the defendant Smith; and particularly that Colonel Hamilton, a director, had, about the last of April or the first of May, 1910, been shewn what purported to be the agreement of sale, or a copy of it, in the hands of a solicitor at Fort William. Colonel Hamilton, however, lost no time on his return to Montreal in informing his fellow-directors of what he had seen, and the plaintiffs' solicitors were at once instructed to take the necessary steps to protect the plaintiffs' interests. Colonel Hamilton appears to have acted in the premises with a wise business discretion, in not at once making an outcry which might have had disastrous consequences to the plaintiffs' other and very much larger interests involved in the mining operations then proceeding, which were entirely in charge of Spittal. Colonel Hamilton, after all, was only one of several directors, and had no particular charge or management of the property, which on the occasion in question he was visiting chiefly by way of recreation, and not as a matter of business. Such a foundation is, under the circumstances, quite too slender upon which to build a case of estoppel; and, like all the other defences set up, must fail.

The plaintiffs were entitled to follow the pulp-wood itself, as by the pleadings they claimed to do, and Sutherland, J., accordingly, quite correctly, applied the principle laid down in this Court, affirmed in the Supreme Court, in the very similar case of Faulkner v. Greer, 16 O.L.R. 123; Greer v. Faulkner, 40 S.C.R. 399.

The appeal, in my opinion, wholly fails and should be dismissed with costs.

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

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., also concurred.

FEBRUARY 22ND, 1912.

*RE RISPIN.

Will—Construction—Trust for Benefit and Advancement of Legatee—Directions Given to Trustee as to Application—Sole Discretion of Trustee—Death of Beneficiary—Intestacy as to Undisposed of Residue—Next of Kin of Testator Entitled.

Appeal by the Canada Trust Company, executors of Luke Rispin, deceased, from the order of BOYD, C., 2 O.W.N. 1122, determining a question as to the construction of the will of Richard Rispin.

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

C. A. Moss, for the appellants.

F. P. Betts, K.C., for the executor of Richard Rispin.

W. R. Meredith, for the Official Guardian.

MOSS, C.J.O.:—The question submitted for solution in this appeal is, whether, upon the true construction of the 4th clause† of the will of the late Richard Rispin, the cash and securities therein designated were so disposed of as that, upon the testator's death, they became property of his son Luke Rispin to which his personal representatives are now entitled, or whether, as determined by the learned Chancellor, they are now subject to distribution among the next of kin of the testator as upon intestacy.

There is no direct gift to Luke Rispin of the property in question or any part of it. In terms it is given to the executor, in trust it is true, but not expressly to hold for Luke Rispin. If in the testamentary disposition in question a gift to Luke Rispin is to be found, it is only to be gathered from the whole

*To be reported in the Ontario Law Reports.

†4. After the payment of all my debts and funeral expenses I give the rest of my cash and securities in bank or in my possession in trust to my executor the Reverend Evans Davis, and I authorise and request him to pay the interest in whole or in part to my son Luke Rispin and the principal in whole or in part to my son Luke Rispin as in the judgment of my executor may be prudent with reference to the habits and conduct of my son my will and intention being that it shall be wholly in the discretion of my said executor to pay the interest and principal in such amounts and at such times as he may think right or to withhold payment altogether and I appoint the said Reverend Evans Davis to be executor of this my will.

clause. It contains words indicative, perhaps, of an idea in the mind of the testator that his son's position was to be as owner, with his right of complete enjoyment of it or its fruits controlled by the exercise of the prudent and discreet judgment of the executor, to be interposed if and when necessity required. The use by the testator of the expressions "pay" and "payment" contained in the authority and request to the trustee, which in their primary sense imply an antecedent obligation, instead of the word "give," which implies voluntary action, may be said to afford some indication of an intention that the property, though held by the trustee, was beneficially the property of the son. But, in view of all the other language, it is scarcely to be supposed that the testator was intending to use these words in their strictest sense, but simply as terms convenient to express the transfer of money. They are not the controlling words of the clause. Greater force is found in the injunction laid upon the trustee and the declaration of the testator's will and intention that it was to be wholly in the discretion of the trustee to pay or withhold payment altogether of principal or interest.

The property was thus left wholly subject to the trustee's action, and whether Luke Rispin got any or all of it depended wholly upon the trustee. It is plain that the testator was very desirous of withholding from his son any control over the property and any right to demand or receive it or any part of it from the trustee, except with his consent.

It was placed beyond the son's power to make any disposition of it which would take effect either during his lifetime or after his death. To have left it otherwise would have frustrated his main design by enabling it to be assigned or pledged and the proceeds improperly spent.

The matter being entirely within the power and discretion of the trustee as regards what Luke Rispin should receive, only that which he received up to the time of his death became his or belonged to him. The remainder, being undisposed of in the hands of the trustee, who, of course, lays no claim to it on his own behalf, is, therefore, subject to distribution as upon intestacy. There appears to be no question as to the date of the intestacy being as of the date of the testator's death.

There does not appear to be any good ground for further inquiry as to the oral directions said to have been given by the trustee to the manager of the loan company. The fact remains that the property never was received or placed in the control of Luke Rispin, but continued in the possession and subject to the actions of the trustee.

The appeal fails and must be dismissed; but, under the circumstances, the costs of all parties may be properly borne by the estate—the trustee's costs as usual.

GARROW, J.A., agreed, for reasons stated in writing, in which he referred to In re Stanger, 60 L.J.N.S. Ch. 326; Bain v. Mearns, 25 Gr. 450; Lassence v. Tierney, 1 Macn. & G. 551; In re Johnston, [1894] 3 Ch. 204; Eaton v. Watts, L.R. 4 Eq. 151; Martin v. Keighley, 2 Ves. 355; Knight v. Boughton, 11 Cl. & F. 513; Briggs v. Pensey, 3 Macn. & G. 546; In re Weeks Settlement, [1897] 1 Ch. 289.

MEREDITH and MAGEE, JJ.A., also gave written reasons for the same result.

MACLAREN, J.A., concurred.

Appeal dismissed.

FEBRUARY 22ND, 1912.

*WIGLE v. TOWNSHIP OF GOSFIELD SOUTH.

Municipal Corporations—Drainage—Jurisdiction of Drainage Referee—Action in High Court—Transfer to Referee—Case within Municipal Drainage Act—Cause of Complaint, when Arising—Limitation of Actions—Building of Bridge—Damage to Lands by Flooding—Quantum of Damages—Depreciation in Selling Value of Lands—Action Brought after Sale—Other Items of Damage—Reduction on Appeal.

Appeal by the defendants and cross-appeal by the plaintiff from the judgment of the Drainage Referee in favour of the plaintiff for the recovery of $5,000 in an action for damages for flooding the plaintiff's lands. The cross-appeal was for larger damages.

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

J. H. Rodd, for the defendants.

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

MOSS, C.J.O.:—This is really quite a simple case, and, as

*To be reported in the Ontario Law Reports.

viewed in the light of the evidence as developed before the Drainage Referee, might very well have been tried and disposed of at the non-jury sittings. But the parties appear to have formed and acted upon the view that it was a case proper to refer to the Drainage Referee, by whom it was fully tried; and this is an appeal by the defendants and cross-appeal by the plaintiff from his judgment.

An objection was taken, at this late stage of the case, to the authority or jurisdiction of the Referee to deal with the case under the order, because, it was said, the case did not fall within the provisions of the Municipal Drainage Act, for two reasons: one being that a question of drainage was not involved; the other being that the cause of complaint arose more than two years before the commencement of the action.

The damages in respect of which the plaintiff brought his action arose from flooding of his land—the earliest having occurred on the 30th December, 1907, and the others in the years 1908 and 1909. The action was commenced on the 28th December, 1909. The cause of the flooding was the erection by the defendants, in 1907, of a bridge across Cedar creek, which had the effect of narrowing its channel.

From the nature of the case it is apparent that the cause of complaint here is, not the building of the bridge, but the damage occasioned by the subsequent floods. In other words, the cause of action is the damage; and the plaintiff could not have instituted an action seeking damage until he had suffered some. Probably he could, while still owning the land, have applied for and obtained an injunction; but he did not seek this remedy; and his only claim is and must be for the damage fairly and reasonably attributable to the floodings which took place before he commenced this action. And the cause of complaint in respect of these damages did not arise until within two years before the issue of the writ: Whitehouse v. Fellowes, 10 C.B. N.S. 765. That being so, an answer to both grounds of objection to the Referee's authority is supplied by the amendment to the Municipal Drainage Act, 9 Edw. VII. ch. 78, sec. 2 (now sec. 99 of the Municipal Drainage Act, 10 Edw. VII. ch. 90), which empowers the Court or Judge to transfer an action, not only where it appears that the relief sought therein is properly the subject of proceedings under the Act, but where it appears that it may be more conveniently tried before and disposed of by the Referee. It never could have been intended that, because the reason given in the order of transferance afterwards turned out not to be the best reason, all that took place after the making of the order should be set aside and treated as nugatory.

Upon the evidence before him, the Referee concluded that there was an improper interference with the width of the channel of Cedar Creek, the result being that in times of freshet there was an interruption of the flow of the stream, which had the effect of flooding the plaintiff's lands. This finding is in accordance with the great preponderance of the testimony.

The question is thus reduced to one of the extent to which the plaintiff suffered damages for which he ought to be compensated in this action. Having parted with the land, he has now no right of action to restrain the continuance of the obstruction of the stream. Nor can he suffer damage by reason of any subsequent flooding.

One item of his claim is for depreciation in the selling value of the land by reason, as it is said, of the fear of future flooding and the prejudice against the continuance of such a state of affairs. The plaintiff did not, as he might have while still owner, take steps to prevent the possibility of such future damage. And, by reason of the absence of a by-law, the case is not one in which compensation is being awarded under the provisions of the Municipal Act as for lands injuriously affected by the work that has been done. In that case every claim for compensation would be settled once for all. Here the plaintiff is confined to such damages as properly and naturally result from each flooding; and alleged depreciation in the selling value is not comprised therein. This follows upon the principle that the damage, not the erection of the bridge, is the cause of action.

Lord Macnaghten's statement in West Leigh Colliery Co. v. Tunncliffe & Hampson, [1908] A.C. 27, at p. 29, made in a subsidence case, seems not to be distinguishable in principle from this case. After first expressing the opinion that the damage, not the withdrawal of support, was the cause of action, he said: "If this be so, it seems to follow that depreciation in the value of the surface-owner's property brought about by the apprehension of future damage gives no cause of action by itself." . . .

[Reference also to the remarks of the Lord Chancellor in the same case, p. 34; and to Rust v. Victoria Graving Dock Co., 36 Ch.D. 113.]

A contrary view would involve the possibility of a purchaser who acquired property at a reduced price afterwards recovering for the future apprehended damage from persons who had already been charged for it by an allowance against them for depreciation in selling value.

The sum of $2,000 allowed by the Referee under this head should be disallowed.

With regard to the other items of the claim, a number of which appear to be unsustainable and others to be exaggerated, there were some obvious mistakes and omissions in the summation of items. Allowing for these, and after examination of the particulars, and consideration of the evidence, it appears to me that a fair compensation to have allowed would have been the sum which my brother Garrow has named.

The result is, that the judgment should be varied by reducing the sum which the plaintiff is to recover from the defendants to $1,320; and the cross-appeal should be dismissed.

The plaintiff should pay the costs of the appeal and cross-appeal.

GARROW, J.A., agreed, for reasons stated in writing, that the $2,000 allowed by the Referee for depreciation in selling value could not stand. He referred to Darley Main Colliery Co. v. Mitchell, 11 App. Cas. 127; West Leigh Colliery Co. v. Tunncliffe & Hampson, [1908] A.C. 27; Arthur v. Grand Trunk R.W. Co., 22 A.R. 89; McGillivray v. Great Western R.W. Co., 25 U.C.R. 69. He also agreed as to the jurisdiction of the Referee, distinguishing McClure v. Township of Brooke, 5 A.R. 59. He also examined the other items of damage allowed by the Referee, and stated that they should be allowed at $1,320. He agreed also as to the costs.

MAGEE, J.A., gave reasons in writing for the same conclusions.

MACLAREN, J.A., concurred.

Appeal allowed; cross-appeal dismissed.

FEBRUARY 22ND, 1912.

IRISH v. SMITH.

Contract—Mining Venture—Payment for Statutory Work—Contribution—Mining Act of Ontario, sec. 81.

Appeal by the plaintiff from the order of a Divisional Court, 2 O.W.N. 1302.

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

E. S. Wigle, K.C., for the plaintiff.

A. B. Drake, for the defendant.

Garrow, J.A.:—Appeal by the plaintiff against the judgment of a Divisional Court reversing an order of the Mining Commissioner, whereby he directed the defendant to pay $612.36 within thirty days, or in default that his interest in the three unpatented mining claims in the Larder Lake Mining District in which the plaintiff and defendant were jointly interested should be forfeited. The order was made under sec. 81 of the Mining Act, 8 Edw. VII. ch. 21, which provides: "Where two or more persons are the holders of an unpatented mining claim, each of them shall contribute proportionately to his interest, or as they may otherwise agree between themselves, in the work required to be done thereon. In case of default by any holder, the Commissioner, upon the application of any other holder, and upon notice to and after hearing all persons interested, or such of them as appear, may make an order vesting the interest of the defaulter in the other co-owners upon such terms and conditions and in such proportions as he may deem just." "The work required to be done," of course, refers to the compulsory work necessary to enable the claim to be held: see sec. 78.

The learned Mining Commissioner found in favour of the claimant, but was reversed by the Divisional Court, Middleton, J., delivering the judgment of the Court. The matter had, in another form, but upon practically the same evidence and the same facts, been before the learned Judge upon the trial of the action brought by the claimant to set aside the transfer to the defendant, which was dismissed.

The questions involved are almost entirely questions of fact. I would have said, entirely so, but for the reference in the judgment of Middleton, J., to the "agreement," of which I may as well say what I have to pay, at once.

The section, primâ facie, imposes the liability equally upon the holders of the several interests in proportion to their shares. But they may by agreement vary such proportions, in which case the agreement, and not the proportion fixed by statute, would govern. The statutory obligation and the statutory lien, however, would, even in that case, remain. So that a default in performing the proper share, as varied and apportioned by the agreement, would have the same result in leading to a forfeiture as would a default where no agreement had been made.

But I see no evidence of any such agreement in this case. The only agreement spoken of was one which had for its object merely the mode of raising the money to be expended in doing the development work, and in no way altered or varied the proportion of such work which each co-owenr was by the statute compelled to do. The judgment of Middleton, J., however, does not, I think, depend to any extent upon his remarks respecting the agreement, but upon his conclusion upon the main question of fact—that is, whether the claimant had, with his own hands, or by the expenditure of his own money, done or had work done upon the claims in question in excess of his own proper statutory share. It was not asserted that the work had been personally done by the claimant. What he did assert was, that he had procured it to be done, and in so doing had expended his own money—an issue found against him by Middleton, J., who in his judgment in the Divisional Court says: "Neither owner has expended any money of his own, and both are accountable to subscribers for the money received."

This conclusion was based upon the evidence, which consisted chiefly of the testimony of the parties themselves, who are both described as unsatisfactory witnesses, an opinion of them which receives some confirmation in the judgment of the learned Commissioner, although he considered the "merits" to be with the claimant, and found in his favour. The only "merits" I can see in such a case is reasonable evidence of the facts which alone would create the special lien given by the statute. In the absence of such evidence, there can be no merits in the judicial sense, even with the aid of sec. 140, to which the learned Commissioner refers, which requires him to give his decision in matters coming before him "upon the real merits and substantial justice of the case."

Upon the whole, and for the reasons I have given, I agree with the conclusion of the Divisional Court and think the appeal should be dismissed with costs.

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

MACLAREN and MAGEE, JJ.A., also agreed.

MEREDITH, J.A. (dissenting):—I prefer the view of this case taken by the Mining Commissioner to that of the Divisional Court.

It is quite obvious that nothing agreed to between the parties to this action could absolve them from the performance of the

work in question, which sec. 78 of the Mining Act of Ontario imposes, if forfeiture of the mining claim, under sec. 84, is to be avoided. Then, under sec. 81, each of the parties was and is bound to contribute "proportionately to his interest, or as they may otherwise agree among themselves" in the performance of that work. Why, then, the interest of each being a moiety, should the respondent not contribute one-half?

It is said, because the parties, not having the means, agreed between themselves that the money required for such work should be obtained, if possible, from prospective shareholders in a company to be formed to take over this mining property. But I am unable to understand why that should relieve the respondent altogether; why it should permit him to play the part of a drone. His obligation may perhaps be met with money procured by him in that way and applied in doing the required work; but, short of that, I cannot perceive how he can rightly escape altogether the statute-imposed obligation to do his share.

There is nothing in the literal meaning of the words of sec. 81 which helps the respondent's contention that he is relieved altogether from the obligation to contribute; it provides that each shall contribute to the work proportionately to his interest, or as they may otherwise agree among themselves, that is, agree as to contribution, and there can be no contribution when one, or other, or each, is to contribute nothing; and the Commissioner's ruling is quite in accord with "the real merits and substantial justice of the case"—sec. 140—whilst that of the Divisional Court is not. The case is one plainly within sec. 81, and the onus of bringing himself within the exception, or alternative, contained in it, rests upon him—and, to say the least of it, that has not been done.

In short, I can find nothing in any agreement between the parties relieving the respondent from his duty to contribute his moiety, if required to do so by his co-holder of the unpatented mining claim; even if, in such a case as this, he could be altogether so relieved; and it is quite plain that there was no intention on the part of either party that he should be relieved of all obligation in that respect.

I would restore the order of the Commissioner, whose great experience in mining matters gives much weight to his rulings.

Appeal dismissed; MEREDITH, J.A., *dissenting.*

MOSS, C.J.O., IN CHAMBERS. FEBRUARY 19TH, 1912.

*RE STURMER AND TOWN OF BEAVERTON.

Appeal—Leave to Appeal to Court of Appeal from Order of Divisional Court—Costs Ordered to be Paid by Real Litigant —Practice—Amount in Controversy—Discretion.

Application on behalf of Alexander Hamilton for leave to appeal to the Court of Appeal from the order of a Divisional Court, ante 613, affirming the order of BOYD, C., 25 O.L.R. 190, ante 333.

F. Morison, for the applicant.
W. E. Raney, K.C., for the town corporation.

MOSS, C.J.O.:—The actual amount involved in the proposed appeal is $384, which is said to be the excess of the taxed costs of opposing the original application beyond $300 paid into Court as security.

The special grounds urged in support of a further appeal are, that, Hamilton not having been a party to the original proceedings, the Court had no jurisdiction to compel him to pay any of the costs incurred in the matter, and that neither by the practice as it existed before the Judicature Act nor by virtue of the power as to costs conferred by that Act have the Courts power or jurisdiction to make such an order, even admitting as it is admitted here that the proceedings were instigated by Hamilton and were prosecuted on his behalf and for his benefit.

These points were urged before and fully considered by the Courts below. It is not necessary to form or express an opinion at present as to the effect of any of the provisions of the Judicature Act and the Consolidated Rules in enlarging the powers and jurisdiction of the Court as regards directing payment of costs by persons not parties to the original proceeding, though it may well be that such is the case. The decision now sought to be appealed from does not appear to introduce a novel rule of practice—one hitherto unconsidered and now acted upon for the first time by the Courts. While apparent conflict between some of the early and the later decisions may be pointed at, it is plain that objections founded on technical reasons are no longer permitted to prevent the Court from dealing, so far as costs are concerned, with one who has so intervened as to make himself the substantial though not the ostensible party.

*To be reported in the Ontario Law Reports.

The decision in question here does not appear to carry the rule beyond what appears to be well established by decisions under somewhat similar circumstances.

No special reason appears for permitting the applicant to carry further a question of this kind, especially where the amount involved is so far under the statutory sum. It would not be proper to grant leave to appeal on the mere question whether the Court properly exercised its discretion in the circumstances of this case, even if that point appeared more doubtful than at present it seems to me to be.

The motion must be refused with costs.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. FEBRUARY 14TH, 1912.

*STAVERT v. CAMPBELL.

Appeal—Privy Council—Security for Costs of Appeal—Effect of—Stay of Execution—Judgment Appealed from Directing Payment of Money—Con. Rule 832(d)—Privy Council Appeals Act, 10 Edw. VII. ch. 24, sec. 4—"Rules to be Made."

Appeal by the defendant from the order of CLUTE, J., ante 591.

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

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

F. R. MacKelcan, for the plaintiff.

BOYD, C.:— . . . Mr. Justice Clute bases his judgment on the terms of Con. Rule 832, declaring that, in appeals to the Privy Council, execution shall not be stayed, if the judgment appealed from directs the payment of money, until security is given for such amount. If this Rule is in force, his judgment is right; otherwise, not so. It appears to me that this Rule is not in force, by virtue of the recent legislation; but to make this plain needs a good deal of intricate examination of what has been, and how it has been, superseded.

*To be reported in the Ontario Law Reports.

The development of the practice is to be regarded. In R.S.O. 1877 ch. 38, as to appeals to the Privy Council, it was prescribed by sec. 51 that, upon the perfecting of security for $2,000 in respect of costs and damages, the execution should be stayed. But the next section, 52, declared that the provisions of the 27th section of the Act as to appeals to the Court of Appeal was to apply to Privy Council appeals, whereby execution was not to be stayed when the judgment directed the payment of money till further security for that was given. On the revision ten years later, R.S.O. 1887 ch. 41, a separate Act embodied the legislation as to appeals to the Privy Council; and, by sec. 3, upon perfecting security to the extent of $2,000 execution was to be stayed. By sec. 4, the practice applicable to staying executions on appeals to the Court of Appeal shall apply to appeals to the Privy Council. To ascertain that practice, resort had to be made to the Rules passed by the Judges, of which No. 804 contained provision for special security in case of judgments directing the payment of money: McMaster v. Radford, 16 P.R. 20. The provisions of the statute as to appeals to the Court of Appeal were taken out of the statute and re-appear as Rules of Court: see Holmested and Langton's Judicature Act, ed. of 1890, p. 670 (see 51 Vict. ch. 2, sec. 4.)

So the provisions as to Privy Council appeals were referred to in the Rules of 1888, and it was provided that security should be for $2,000, and that any application to the Court of Appeal to stay proceedings shall be made in like manner and be upon the like terms as to security as is provided in like cases upon appeals to the Court of Appeal: Con. Rule 855. It is the union of these two Rules, which appear combined as the present Rule 832, which regulated the practice up to the 7th March, 1910. The last case on this point, which shews the then practice, is Sharpe v. White, 20 O.L.R. 575, which was argued in the Divisional Court on the 31st January, 1910.

The Rules of 1897 provide that in cases of appeal to the highest Court in Ontario security need not be given (apart from special application) for the amount directed to be paid by the judgment in order to secure a stay of execution: Rule 827; and Rule 832 varies that policy as to an appeal to the highest Court of the Empire.

That was the state of the law under R.S.O. 1897 ch. 48, secs. 2, 3, 4. Section 4 reads: "Subject to Rules to be made by the Judges under the Judicature Act, the practice applicable to staying execution upon appeal to the Court of Appeal in force prior to the 16th April, 1895, shall apply to an appeal to Her Majesty in Her Privy Council." (See 62 Vict. ch. 2, sec. 1.)

This was an expansion of what is found in R.S.O. 1887 ch. 41, sec. 4, which is quoted as its original.

A note as to chronology; R.S.O. 1897 ch. 48, referring to Rules to be made by the Judges, was prepared in draft soon after, if not before, the 13th April, 1897, the date of passing the Act 60 Vict. ch. 3, giving effect to the Revised Statutes of 1897, which were to be completed at an early date (see preamble). This body of Revised Statutes was, by proclamation, declared to come into effect on the 31st December, 1897 (see R.S.O. 1897, p. XXI.) The Rules referred to in sec. 4 of ch. 48 were made by the Judges under 58 Vict. ch. 13, sec. 42, and were approved and to go into effect on the 1st September 1897 (see Rule 1 and title-page of Con. Rules 1897), and were completed on the 23rd July, 1897 (see ib. p. X.)

Prior to the making of these Rules, the practice as to these appeals was under the Con. Rules of 1888, which were in force on the 16th April, 1895, but were superseded by the new body of Rules consolidated as of 1897. No such action as to the making of Rules has taken place under or in contemplation of the passing of the Act 10 Edw. VII. ch. 24.

As I have said, this statute of 1897 is repealed, and the section in force when this security was given, reads: "Subject to Rules to be made by the Judges of the Supreme Court, the practice applicable to staying executions upon appeals to the Court of Appeal shall apply to an appeal to His Majesty in His Privy Council." That is to say, by the express enactment now in force the practice applicable to staying executions in appeals to the Court of Appeal shall apply to appeals to the Privy Council—which is, that no security for the amount directed to be paid by the judgments is required—subject to Rules (i.e., of a contrary effect) to be made by the Judges. None such have been made: the Act contemplates and provides for future Rules "to be made," and one must find some declaration of practice in such Rules contrary to and equally explicit with the statutory declaration that execution shall be stayed when security for the $2,000 has been given. This is a new statute, which, in my opinion, cannot be varied in its meaning by omitting some of the words and reading "to be made" as if synonymous with "already made."

For this reason, I cannot agree with the order of my brother Clute, which should, I think, be set aside, with costs in any event to the defendants.

LATCHFORD, J., agreed in the result.

MIDDLETON, J., also agreed, for reasons stated in writing.

KELLY, J. FEBRUARY 15TH, 1912.

DEMPSTER v. RUSSELL.

Timber—Sale of Standing Timber—Contract—"Clearance of all Incumbrances, Timber Dues, and Crown Dues"—Time for Removal—Reasonable Time Allowed where no Provision Made—Failure of Purchasers to Cut and Remove—Absence of Interference by Vendor—Compliance with Crown Timber Regulations—Peaceable Possession—Breach of Contract—Damages.

Action for damages for breach of a contract.

A. G. Slaght, for the plaintiff.
M. F. Pumaville, for the defendants.

KELLY, J.:—The plaintiff, by agreement dated the 27th October, 1909, and the 6th November, 1909, bargained and sold to the defendants all the merchantable timber on the south half of lot 1 and on the south half of lot 2 in the 2nd concession of the township of Armstrong, in the district of Nipissing, except certain portions reserved by the agreement; the defendants to have two years to remove the timber; the plaintiff to give the defendants "a free clearance of all incumbrances, timber dues, and Crown dues," and also to give the defendants quiet and peaceable possession for the removal of the timber; the price to be paid being $1.50 per thousand feet log measure; measurement to be with what is known as Scribner's log rule; the payment to be made, $200 on the 1st February, 1910, and the balance of the price of the timber taken out in the season of 1909-1910, on the 1st April, 1910; "and the operations for the season of 1910 and 1911 on the terms and conditions as aforesaid, and all to be completed by the first day of April, 1911, when final settlement will be made as described in this agreement."

The agreement was drawn by the defendant R. S. Russell, and, before being signed, at the plaintiff's request there was added, immediately following the words above-quoted, the words "and to be all removed in the season of 1910, if possible, or through any unforeseen conditions."

The plaintiff's rights to the timber on the south half of lot 1 were acquired from one David Bass (the locatee of the property), under an agreement dated the 1st March, 1909, a term of which was, that Bass would clear the plaintiff "of all dues on

said timber." The plaintiff's rights to the timber on the south half of lot 2 were acquired from one Stafford (the locatee of that property), under an agreement dated the 15th September, 1908, a term of which was, that Stafford would give the plaintiff "a free clearance of all incumbrances such as timber dues and Crown dues;" this agreement also gave the plaintiff three years from its date to clear the timber from that lot. The agreement between Bass and the plaintiff did not fix any time within which the timber on the south half of lot 1 was to be removed.

Stafford transferred his rights in the property to one Neely, in 1909, and these rights were acquired by John Roulston in April, 1910: Roulston admitted at the trial that when he acquired these rights he had notice that the plaintiff had a contract for the timber.

The defendants let the contract to take off the timber to Bass and one Stephenson, who proceeded to cut and remove it.

On the 11th January, 1910, the plaintiff's solicitors wrote the defendants that the plaintiff prohibited them from drawing from his property any logs until they had been properly measured, and that the plaintiff wished an opportunity to be present when the measurement was being made. The letter also stated that the solicitors had written the defendants' two employees warning them not to remove any of the logs until they had been properly measured.

The plaintiff, however, asserts that the instructions he gave the solicitors were to ask to have the logs measured at the mill.

No reply was given to this letter, nor does it appear to have affected the defendants in their operations, for the defendants admit that, when Bass and Stephenson spoke to them of the solicitors' letter, the defendant R. S. Russell told them to go on with the work of taking off the timber. It is also admitted by the defendants that it was not until the summer of 1910 that they decided not to go on with the contract. The work was proceeded with, and during the winter of 1910 timber was removed, for which $459.32 was paid by the defendants to the plaintiff. Before settlement was made by the defendants with the plaintiff for this timber, the plaintiff procured, through Bass and Neely, the necessary "clearance" papers therefor, and delivered the same to the defendants. Some time afterwards, Bass and Roulston made some claim to be the owners of the timber on the lots in question. There appears to have been no foundation for such claim. It was also asserted by one or both of them, in the summer of 1910, that the time within which the plaintiff was entitled to remove the timber had elapsed. This

claim I find to be without foundation. The three years given for removal by the plaintiff's agreement for the purchase of the timber on the south half of lot 2 had not expired; and, though the agreement for the purchase by the plaintiff of the timber on the south half of lot 1 is silent as to the time within which it was to be removed, I find that, under all the circumstances, a reasonable time for such removal had not elapsed in August, 1910, when Bass claimed to be entitled to the timber. The fact that these claims were set up by Bass and Roulston was no justification for the defendants' refusal or neglect to perform their contract.

Before entering into the contract, the defendants had inspected the properties, and were aware of their condition, and of the improvements made thereon. They were also aware of the manner by which the plaintiff had acquired the timber, his agreements for the purchase thereof having been in the defendants' possesion at or prior to the time the defendant R. S. Russell drew the contract between the plaintiff and defendants, and these agreements were recited in that contract; and there is no evidence that, at the time in 1910 when Bass and Roulston stated that the timber was theirs, anything had happened giving them the right to it. So little, indeed, do the defendants appear to have been affected by these statements, that they did not even make inquiries to ascertain if they were true.

In the summer of 1910, some discussion took place between the defendant R. S. Russell and the plaintiff about the balance of the timber: the plaintiff says that Russell asked him to take it back; and, when he asked Russell to put this request in writing, he refused, but then said he would give the plaintiff to the beginning of September, 1910, to cut and sell the timber to "other parties."

Russell's evidence is, that he gave the plaintiff the privilege until the 1st September to sell the timber to other parties.

The plaintiff did not exercise this privilege, but on the 29th August, 1910, he wrote the defendants as follows:—

"Cobalt, Aug. 29/10.

"Russell & Sons, New Liskeard, Ont.

"Dear Sirs:—This is to notify you that I have not sold timber and that your contract still holds.

"I have obtained the best possible legal advice concerning possible interruptions of Bass and Roulston, and find that neither party has any right whatever to timber or to forbid you fulfilling your contract; consequently you must proceed

with work until stopped by force. Then I will clear the way for you. In case of any trouble with these parties notify me at once.

"J. D. Wilson "Robt. S. Dempster
"(Witness). "Cobalt, Ont."

The defendants made no reply to this letter, nor did they do anything afterwards towards carrying out their part of the contract.

In view of these facts and of the evidence of the defendant R. S. Russell that there was no interruption by the plaintiff of the defendants' operations, except the solicitors' letter of the 11th January, I find that there was no interference on the part of the plaintiff with the defendants or their men preventing them from performing their contract or entitling the defendants to cease operations, and that the plaintiff did not prevent the defendants from performing their contract.

The defendant R. S. Russell, at the trial, gave, as a reason for the defendants' failure or refusal to fulfill their contract, that he feared, if the plaintiff failed to secure "clearance" papers for the timber, he (the plaintiff) would be subject to payment of penalty dues.

With the knowledge which the defendants had at the time of entering into the contract, they must have been fully aware of the possibility of such dues becoming payable; and I can only assume that they relied on the plaintiff, under the terms of the contract, to protect them against such dues and the consequence of their becoming payable. Moreover, it must not be overlooked that, when the defendants asked for a "clearance" in respect of the timber cut in the winter of 1909-1910, the plaintiff obtained it promptly, and apparently without any objection or difficulty. From this it may readily be inferred that there was then no default in complying with the Crown Timber Regulations. Cockburn v. Muskoka Mill and Lumber Co., 13 O.R. 343, Langmaid v. Mickle, 16 O.R. 111, and McArthur Brothers Co. v. Deans, 21 O.R. 380, cited by counsel for the defendants, had reference to pine timber, and are not applicable to this case.

The plaintiff, therefore, did not refuse or fail to give the defendants the "clearance" of incumbrances, timber dues, and Crown dues, or to give peaceable possession such as he contracted to give.

It is clear, too, from the evidence, that the plaintiff did not waive his rights under the agreement; and there was no justification for the defendants' failure or refusal to perform their part of the contract.

Then as to the amount to which the plaintiff is entitled. The plaintiff, not being in default and not having waived the contract or treated it as otherwise than in force, was entitled to insist on its performance by the defendants. The defendants, however, allowed the time to run on without doing anything towards cutting and removing the timber, from the spring of 1910 until the time had expired for completion and settlement, and thus made it practically impossible for the plaintiff otherwise to get the benefit of the timber, as the time given him by his vendors for removal of it was nearing its expiration, if, indeed, in the case of one lot, it had not then expired.

The uncontradicted evidence is, that there remained on the properties from which the plaintiff sold the timber to the defendants merchantable timber contracted to be sold by the plaintiff to the defendants, to the amount of 881,200 feet. It was shewn that in the case of standing timber, such as is in question here, there is the possibility of there being some affected by rot or decay. Unfortunately, however, the evidence does not shew what percentage of the whole was likely to have been so affected. Making what I believe, under the circumstances, to be a reasonable allowance for such defects, I find the value of the timber agreed to be purchased and paid for by the defendants, and not so paid for, calculated at the rate of $1.50 per thousand feet, to be $1,270.

There will, therefore, be judgment for the plaintiff for $1,270 and interest from the 1st April, 1911, and costs. The claim made by the defendants is dismissed with costs.

DIVISIONAL COURT. FEBRUARY 16TH, 1912.

CONTRACTORS SUPPLY CO. v. HYDE.

Building Contract—Addition to Original Work—Tender and Acceptance—Supplemental Agreement—Terms of Original Contract Applicable by Implication—Extras—Architect's Certificate—Finality—Provision for Arbitration—Method of Invoking—Evidence—Manner of Taking by Referee—"Justly Due."

An appeal by the defendants Hyde & Powell, contractors, from the judgment of J. A. C. Cameron, an Official Referee, in a proceeding under the Mechanics' Lien Act, finding, as between the

appellants and the defendants the News Publishing Company, owners, that the appellants were bound by the certificates of the architect, and that if they had any claim for extras it must be determined by arbitration.

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

G. H. Kilmer, K.C., for the appellants.

M. H. Ludwig, K.C., for the defendants the News Publishing Company.

The judgment of the Court was delivered by MIDDLETON, J.:—By contract of the 20th August, 1910, Hyde & Powell agreed with the News Publishing Company to do the reinforced concrete and brickwork required in the erection of a certain building, for $8,587. This building was for a newspaper office and press rooms.

The plans do not shew a press pit; and on the 30th September, 1910, Hyde & Powell tendered for the construction of a press pit at the price of $1,100. This tender was accepted on the 6th October.

The contract of the 20th August is in a printed form in general use, and contains the usual provision by which the architect is given extensive powers, and his certificate is made final and a condition precedent to any action.

The tender of the 30th September contains no reference to this contract by which it can be said expressly to import its terms so as to make them govern the new work.

The Referee has treated the contract of August as governing the entire work. No reasons are given by him.

The contract provides: "Should the proprietor or their (sic) architects at any time during the progress of the said works require any alterations of or deviations from, additions to or omissions in, the said plans and specifications, they shall have the right and power to make such change or changes, and the same shall in no wise effect (sic) or make void the contract . . . and for additional work required in alterations the amount to be paid thereof (sic) shall be agreed upon before commencing additions," etc.

It is argued that the press pit either was an "addition" to the original work, or that the parties have chosen to treat it as an "addition," within the meaning of the contract—and, in that view, the tender and acceptance are to be regarded as a supplemental agreement by which the price was ascertained.

This view is fortified by the fact that the contract provides that the agreement for additional work shall "state also the extension of time (if any) which is to be granted by reason thereof." This tender says: "It is understood that we would start work at once, using a separate gang from the building gang, and our tender price included the shifting of our plant in order to allow this work to go on, and in this way making it possible to have the press erected without any delay on account of the building being a little behind time."

The conduct of the parties shews that this tender and acceptance were not regarded as constituting the whole bargain, because the work went on under the supervision of the architect, and his certificate was obtained.

Beyond this, I can see no reason why, in circumstances such as these, the same rule that has frequently been applied between landlord and tenant, when a new term is arranged for, should not be applied here. The common sense of the transaction would appear to be that, although there may have been a new contract, its terms must have been understood to be that, save as varied and expressly provided, all was to go on as under the old contract. See Phillips v. Miller, L.R. 10 C.P. 423; Doe dem. Mouck v. Geikie, 5 Q.B. 841.

I am aware of the reluctance the Court has, when asked to imply terms in a written contract; but, I think, the case falls within the rule laid down by Kay, L.J., in Hamlyn v. Wood, [1891] 2 Q.B. 494, and adopted by the Privy Council in Douglass v. Baynes, [1908] A.C. 482: "The Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it was entered into, such an inference that the parties must have intended the stipulation in question that the Court is driven to the conclusion that it must be implied."

The contract provides that any dispute as to extras or reductions, after the architect's certificate, shall be referred to arbitration. The Referee has determined that the claim of the contractors for extras must be determined by an arbitration under this clause; and, as no arbitrators have been appointed, has adjourned the hearing until arbitrators have been appointed and an award made.

This cannot be supported. A clause in an agreement providing for an arbitration cannot be invoked save in the manner provided in sec. 8 of the Arbitration Act (9 Edw. VII. ch. 35) by a motion to stay made after appearance and before defence and before taking any other step. This order was made

at the hearing, when the contractors were present and endeavouring to prove their claim.

The course adopted by the learned Referee of preventing the contractors from presenting their claim in their own way, and of himself calling the architect and allowing him to be examined by counsel for the owners, before the contractors had given any evidence in support of their claim, is most unusual and quite unwarranted.

An argument presented at the hearing should not be left unnoticed. It was suggested that the architect's certificate was final, unless varied by the arbitration contemplated by clause 6; and, therefore, that a reference back would not be of any real value to the appellants. A study of the contract has convinced me that this is not so.

The contract is very peculiar in its terms, and does not contain the usual provisions relating to the finality of the architect's findings as evidenced by his certificate; and it, perhaps, might create embarrassment to discuss the terms of the contract in detail at this stage. No certificate was here given until long after the litigation had been on foot; and, whatever the true meaning of the contract, in the circumstances of this case there is a right to recover what "is justly due" under the contract and for extras, without either a certificate or an arbitration. The amount "justly due" must be ascertained by the Referee upon the evidence when given.

The appeal should be allowed, and the matter should be referred back to the Referee to hear the evidence and to ascertain the sum due the contractors under the contract and for extras. The costs of the appeal should be in the cause; but the costs which are lost or occasioned by the refusal of the Referee to allow the contractors to prove their claim in the usual way should be paid by the owners in any event.

DIVISIONAL COURT. FEBRUARY 16TH, 1912.

*RE WEST NISSOURI CONTINUATION SCHOOL.

Schools—Continuation School in Township—Erection of Schoolhouse—Powers of Board—Powers of Township Council—Approval of Application for Funds—By-law—Right to Repeal—Issue of Debentures—Funds for Maintenance of School—Duty of Council to Levy—Continuation Schools Act, 9 Edw. VII. ch. 90—Mandamus—Demand and Refusal—Necessity for—Sufficiency.

*To be reported in the Ontario Law Reports.

Appeal by the Corporation of the Township of West Nissouri from the order of MIDDLETON, J., ante 478, granting an application by the Trustees of the West Nissouri Continuation School for a mandamus to compel the township council to raise (for the purchase of a site and the erection of a school-house) the sum of $7,000 and pay the same to the school treasurer, or to issue debentures for that amount under township by-law 208 and pay the proceeds to the treasurer; and also granting an application by the trustees for a mandamus to compel the council to pay $1,000 for maintenance of the school.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

Sir George C. Gibbons, K.C., and G. S. Gibbons, for the appellants.

T. G. Meredith, K.C., and W. R. Meredith, for the respondents.

RIDDELL, J. (after setting out the facts and referring to Re Henderson and Township of West Nissouri, 23 O.L.R. 21, 24 O.L.R. 517) :—As to the first appeal (that is, as to the $1,000 for maintenance), the formal order provides that the township corporation do forthwith pay to the treasurer of the school board the sum of $1,000, as required by the board, for maintenance of the school, in pursuance of 9 Edw. VII. chs. 90 and 91. I can see no ground for interfering with this disposition of the matter. The statute is plain—9 Edw. VII. ch. 91, sec. 37; the demand was official and sufficient; and, while the council may well have been justified in neglecting to comply with the demand until the last Court had given its decision, there was no excuse after this decision. There may, indeed, have been no official refusal, no specific refusal in words; but "it is not necessary that there should have been a refusal in so many words:" Littledale, J., in Regina v. Brecknock, etc., Canal Co., 3 A. & E. 217, at p. 223. . . .

[Reference, also, to Halsbury's Laws of England, vol. 10, p. 101, sec. 199; Rex v. Ford, 2 A. & E. 588; Rex v. Conservators of Thames, 8 A. & E. 904.]

I think it must be abundantly manifest, from all the circumstances, that the council "had distinctly determined not to do what is demanded." And, although the township corporation seem to have no money, there need be no difficulty in procuring enough for this purpose.

The appeal must be dismissed.

As to the other appeal, there are different considerations. Our law does not, like the law in some at least of the American States, make a distinction between duties of a private nature and those which affect the public at large. In the law of these States, while in the former class of cases a demand and refusal are a condition precedent to relief by mandamus, in the latter the law itself stands in lieu of the demand, and the omission to perform the required duty in place of a refusal: Short on Informations, p. 249; High on Extraordinary Remedies, pp. 17, 18. But in our law, where the extraordinary remedy by mandamus is sought, the applicant must be rectus in curiâ—he must have made a demand and received a refusal.

I do not think that there was any request by the school board shewn. Two individual members of the board did, indeed, demand, but not on behalf of the board; while McGiffin, the farmer who asked on the 29th November, 1911, does not adduce or pretend to any authority from the school board. It was the school board which was interested in the application; and I do not think the kind of demand made is sufficient. A formal demand would, in all probability, have been of no use; but in proceedings such as these the demand seems to be necessary.

While I agree that it was the duty of the council to provide the $7,000, I do not think mandamus lies. But, while the appeal should be allowed, the dismissal of the motion for mandamus will be without prejudice to another application after formal demand so as to avoid the very stringent rule laid down in Regina v. Bodmin, [1892] 2 Q.B. 21.

Counsel for the township said at the hearing that, if a proper demand were made, the township would accede to the demand—so that it may be that another application will be unnecessary.

As the appeal succeeds in part, I think there should be no costs of the appeal; but that in the proceedings below costs should follow the event in each case.

FALCONBRIDGE, C.J., concurred.

BRITTON, J., also agreed in the result. He pointed out that this case differed materially in its facts from the Medora School Section No. 4, reported 23 O.L.R. 523; and he adhered to the dissenting opinion expressed by him in that case as to the exercise of judicial discretion in granting a mandamus as between school and municipal corporations.

DIVISIONAL COURT. FEBRUARY 17TH, 1912.

*DOMINION FLOUR MILLS CO. v. MORRIS.

Trade-Mark—Unregistered Mark—"Gold Medal"—Infringement—Passing off Goods—Absence of Fraud or Deception—Undescriptive Words—Right to Use of Words as Mark.

An appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., dismissing the action, which was brought to restrain the defendants from selling flour with the mark or brand "Gold Medal," which the plaintiffs alleged was a mark in use by them for many years as applied to their flour and by which it was known.

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

W. S. McBrayne, for the plaintiffs.

G. Lynch-Staunton, K.C., and W. M. McClemont, for the defendants.

The judgment of the Court was delivered by BOYD, C.:—This is a case of alleged passing off goods by the sale of flour in bags impressed with a trade-mark (unregistered) which, it is said, is used by the defendants to the plaintiffs' detriment. The words used which are complained of are "Gold Medal;" and, as the mark is not registered, the onus is on the plaintiffs to shew that the defendants have been attempting to sell and have been selling the bags of flour they deal in as those made by the plaintiffs. The plaintiffs are millers and manufacture this brand of flour at Hamilton; the defendants are dealers in flour, wholesale and retail, and sell flour manufactured at Caledonia, in bags stamped with the same words as are found on the plaintiffs' bags, *i.e.*, "Gold Medal."

And next, the onus is on the plaintiffs to shew that the term "Gold Medal" has acquired, as used by the plaintiffs, a secondary meaning, denoting their flour only.

The words "Gold Medal" are ordinary words, capable of a well-understood meaning, and are applicable to articles which have gained a prize at some exhibition or competition. They are in no way descriptive of flour, nor could they properly be used as a trade-mark if they are misdescriptive and misleading, in this sense, that the flour of the plaintiffs never had the "Gold Medal" awarded to it.

*To be reported in the Ontario Law Reports.

But, apart from the aspect of the case, suppose a legitimate use of the words, it lies upon the plaintiffs to prove that these merely descriptive words (implying success at some exhibition) have acquired a technical and superinduced meaning distinct from the natural one and applicable only to this particular flour. That is the proposition to be established, and it must be so by convincing evidence. Whereas here it is in evidence that the words "Gold Medal" are applied to flour all over the country (although the only makers who have heretofore supplied Hamilton under that name appear to be the plaintiffs).

The reasons against allowing an exclusive expropriation (so to speak) of the words "Gold Medal" to a particular kind of flour are more cogent than in the case of simply descriptive words. . . .

[Reference to the remarks of Lord Shand, as to the latter class, in Cellular Clothing Co. v. Maxton & Murray, [1899] A.C. 326, at pp. 339, 340.

The origin of these words "Gold Medal" in reference to flour is not as clear as might be in the evidence, but the use did not originate with the plaintiffs or their predecessors. It came from the United States and spread since 1880 over many parts of Ontario. . . .

In brief, the words were used as a vague, euphemistic term, serviceable as a sort of catch-word with the public, but of no significance as meaning the flour made by the plaintiffs any more than that made all over the country (outside of Hamilton).

In passing off cases it is not essential that fraud should be proved in case it appears that there is an intention to sell one man's goods as and for another's. The language in Lee v. Haley (1869), L.R. 5 Ch. 155, cited by the Chief Justice, appears to be open to some modification in this respect (see judgment of Lord Westbury in Leather Cloth Co. v. American Leather Cloth Co. (1863), 4 DeG. J. & Sm. 137, affirmed in S.C. (1865), 11 H.L.C. 522). But it is a matter of almost controlling significance if there is an absence of direct evidence to shew that any one has been deceived. . . .

[Reference to remark of Lord Kyllachy, quoted by Lord Shand in Cellular Clothing Co. v. Maxton & Murray, [1899] A.C. at p. 341.]

In the case in hand there is no evidence that any one was deceived by the defendants' use of the words, nor that any confusion had arisen or was likely to arise by purchasers of flour. Barring the use of the words in common ("Gold Medal")

everything else in the defendants' advertisements and labels and bags appealing to the eye is clearly and distinctively different from those used by the plaintiffs. The defendants have made no attempt to deceive the public, or, if they have so attempted, no attempt has been made to shew it in evidence. The plaintiffs' trade may be affected by the defendants' business, but not more so than will arise from fair and ordinary competition.

The whole situation is cleared by what is said as to the source of the paper bags which held the flour. These have been prepared at the Lincoln Mills Paper Co.'s mills stamped with the brand "Gold Medal" as far back as 1885, before the plaintiffs' predecessors were in the field, and those bags were supplied indiscriminately throughout Ontario. . . .

This method of supply and obtaining paper and other bags stamped "Gold Medal" takes all the point out of the supposed attempt to interfere illicitly with the plaintiffs' trade. The plaintiffs' suit is a vain attempt to impose a tertiary meaning on "Gold Medal," importing the particular blend of the plaintiffs' flour sold at Hamilton, and so exclude all competitors selling mixed wheat flour from the benefits of Hamilton trade. It is impossible thus to insulate Hamilton by reason of a supposed local meaning attaching to the mark "Gold Medal," and thereby give the plaintiffs a monoply in that place.

The slender evidence to support this fabric is exposed by what is said by Lord Davey in a case already quoted from. For instance, a dealer in Hamilton says that before the defendants began to sell "Gold Medal," if he had been asked for that brand he would have sold the plaintiffs' flour. Naturally so, for the obvious reason that the plaintiffs' "Gold Medal" was then the only flour under that name sold in Hamilton. Of such kind of evidence Lord Davey said: "Unless the gentlemen who gave evidence of that kind know that there are other manufacturers making similar classes of goods, there is no subject of comparison:" [1899] A.C. p. 346.

As to the right to use "Gold Medal" by the plaintiffs, it is matter for serious consideration. If these words connote the same idea as "Prize Medal," and if there is no foundation in fact for their use, the cases of Batty v. Hill (1863), 1 H. & M. 264, 270, and Tallerman v. Dowsing Radiant Heat Co., [1900] 1 Ch. 1, 9, go far to shew that the plaintiffs would be outlawed for misrepresentation, but the matter may be left undisposed of on the present record. I have assumed everything in favour of the plaintiffs' title, going back to 1885.

The brief sum of the whole is, that the plaintiffs have signally failed to prove that the defendants have sought to palm off their flour as the flour of the plaintiffs; and the result is, that the judgment should be affirmed with costs.

Since delivering this judgment, I have found the point which was left undecided by us decided, as to "Gold Medal," in a New York case: Taylor v. Gillies (1874), 59 N.Y. 331.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 19TH, 1912.

GILROY v. CONN.

Attachment of Debts—Legacy—Share of Residuary Estate—Con. Rule 911*—Practice—Unascertained Amount.*

An appeal by the garnishees from an order of the Local Judge at Sarnia, dated the 5th December, 1911, by which, upon the return of a garnishee order nisi, he directed the garnishees to pay the judgment creditor "the debt due from them to the judgment debtor as soon as it becomes payable under and in pursuance of the last will and testament of Meredith Conn, deceased."

F. E. Hodgins, K.C., for the garnishees.
W. D. McPherson, K.C., for the judgment creditor.
No one appeared for the judgment debtor.

MIDDLETON, J.:—The alleged debt to the garnishees of the judgment debtor is his right, as one of the residuary legatees of the late Meredith Conn, to receive a share of the residue of the estate.

The estate is not yet wound up, and it is by no means certain that any sum will ever be payable to the judgment debtor. It is alleged that he was indebted to the deceased in a sum far exceeding the amount of any possible share in the residue. The judgment debtor admits this indebtedness; but the judgment creditor suggests that this admission is fraudulent and collusive and for the purpose of defeating his right, and that there was not in truth any indebtedness to the deceased.

It is not at all clear whether the Local Judge intended to pass upon this question. It may be that, by the order, he merely intended to direct the payment by the garnishees to the judg-

ment creditor of any balance which might ultimately be payable to the judgment debtor, as and when the same should be ascertained and become payable. But, however this may be, it is clear that the judgment creditor has entirely mistaken his remedy. Under the rule as it now stands—Con. Rule 911—the judgment creditor, by garnishee process, is enabled to reach "all debts owing or accruing" from the garnishee to his debtor.

The claim of a residuary legatee against the executors is not a debt—Deeks v. Strutt, 5 T.R. 690; Jones v. Tanner, 7 B. & C. 542—though, if the executor admits to the legatee that he holds any specific sum to the debtor's use, or, as it is sometimes put, "assents to the legacy," the legatee might recover upon the common *indebitatus* count at law: Topham v. Morecraft, 8 E. & B. 972.

Reliance was placed upon the case of McLean v. Bruce, 14 P.R. 190; but that case was decided under the Rules of 1888, where, under Rule 935, the attaching creditor could by this process make exigible, not only debts, but "all claims . . . arising out of trust or contract, where such claims and demands could be made available under equitable execution"—a provision long since omitted from the Rules.

The case of Hunsberry v. Kratz, 5 O.L.R. 635, relied upon by the garnishees, is in accordance with this view, although it turned upon the provision of the Division Courts Act relating to the attachment of debts.

It is also to be pointed out that under the practice there is no authority for a vague and undefined order such as made in this case. Before an order for payment can be made, the Court must find some definite sum either as presently due, when it is to be paid forthwith, or as a debt payable at a future date: Con. Rule 915 then authorises an order for payment when the sum so ascertained becomes payable.

The appeal must be allowed and the order vacated, with costs to be paid by the judgment creditor to the garnishees, both here and below, upon taxation.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 19TH, 1912.

REX v. MURRAY.

Criminal Law — Procedure — Foreign Commission — Criminal Code, secs. 716, 997—Nature of Evidence—Materiality—Terms.

Application by the Crown, under sec. 716 of the Criminal Code, for the issue of a commission to take evidence in Great Britain.

W. G. Thurston, K.C., for the Crown.
Grayson Smith, for the accused.

MIDDLETON, J.:—The accused is charged with an offence which is triable under Part XV. of the Criminal Code, relating to summary convictions. The issue of the commission is resisted upon the ground that, upon the material, the evidence to be given by the proposed witnesses is not sufficiently disclosed, nor is it made to appear that the evidence is sufficiently material, to warrant the granting of the commission. The case of Regina v. Verral, 16 P.R. 444, is relied upon in support of this objection.

The application, in that case, was under sec. 683 of the Code of 1892, corresponding with sec. 997 of the present Code. That section relates to the taking of evidence where the accused is charged with an indictable offence, and differs materially from the section under which the present application is made.

Under the section in question, a commission is to issue to take the evidence of any person who is "stated to be able to give material information." Under the section considered by Mr. Justice MacMahon in the Verral case, a commission is to issue "whenever it is made to appear . . . that any person who resides out of Canada is able to give material information."

I quite agree with Mr. Justice MacMahon that, where the statute requires that "it shall be made to appear," the discretion of the Judge is to be exercised upon evidence making it to appear to him that the witness is able to prove some fact which is material; but I think the rule is quite different when all that the statute requires is, that it shall be "stated" that the witness is able to give this material evidence.

Apart from this, I am satisfied that the witnesses in question are witnesses whom it is proper for the Crown to examine, and that from what is disclosed a case has been made out within sec. 997, had this application been made under that section.

I, therefore, make the order sought.

The statute does not warrant the imposition of any terms such as suggested by Mr. Smith.

BRITTON, J. FEBRUARY 19TH, 1912.

RE HAY.

Will—Construction—Legacy—Postponement of Time for Payment—Death of Legatee before Payment—Vested Legacy—Residuary Clause.

Motion by the Toronto General Trusts Corporation, executors of the will of George Hay the elder, deceased, for an order, under Con. Rule 938, determining a question arising upon the construction of his will.

W. Greene, for the applicants.

G. McLaurin, for the executors of the will of George Hay the younger.

J. F. Orde, K.C., for the children of George Hay the elder.

O. Ritchie, for the Official Guardian.

BRITTON, J.:—George Hay the elder made his will on the 7th July, 1906. Several codicils were subsequently made; and he died on the 25th April, 1910.

By the will, the widow is provided for, and she is not interested in the parts of the will now under consideration.

These parts are as follows:—

"I direct my trustee to set apart the sum of $35,000 and the investments representing the same, and pay and deliver the same, free from succession duty, to my son George Hay, whereof $5,000, part thereof, shall be paid to him within two years after my death, and the residue thereof, amounting to $30,000, within four years after my death, and in the meantime the net rents issues revenues and profits on the unpaid portion thereof shall be paid to him quarterly.

"And I further direct and declare that my trustee shall stand possessed of and interested in the whole residue of my estate and property and as soon as conveniently may be shall divide the same equally between and pay the respective shares to my sons and daughters and thereafter upon the death of my wife shall in

like manner divide the fund hereinbefore directed to be invested for her equally between and pay the respective shares to my sons and daughters. And in the case of the death of any one or more of my sons or daughters leaving a child or children him or her surviving, then the child, and if more than one, equally between them, shall take his or her respective parent's share, whether original or accrued. But if any of my sons or daughters shall die without leaving any child or children him or her surviving, then such share shall be divided equally between his or her surviving brothers and sisters, in equal shares."

Codicil No. 3, executed on the 19th April, 1910, contains the following: "I give devise and bequeath to my son George Hay a further legacy or additional sum of $6,000 for the purpose of furnishing him with means to purchase or acquire a home."

George Hay the younger died on the 26th November, 1911, having made his will on the 11th February, 1910.

The executors of George Hay the elder now apply for the construction of his will, so far as it relates to the legacy of $35,000 to George Hay the younger, and they submit the following questions:—

1. "Did the legacy or bequest of $35,000 to the late George Hay the younger vest in him and become his property in his lifetime and upon the death of his father, the late George Hay the elder?

2. "Or did the said legacy of $35,000, upon the death of the said George Hay the younger, lapse, and pass under the last clause of the will of the late George Hay the elder, disposing of the residue of his said estate as in his will set forth?" . . .

This case seems to come quite within the rule in Hanson v. Graham, 6 Ves. 239. That case decided that the word "when" in a will, alone and unqualified, is conditional, but it may be controlled by expressions and circumstances so as to postpone payment or possession only and not the vesting; as, where the interest on the legacy was directed to be laid out at the discretion of the executors for the benefit of the legatees, it vested immediately.

In the present case the word "when" is not used, but the words, after directing the trustee to set apart the sum of $35,000 and the investments representing the same, are, that the trustee shall "pay and deliver the same . . . $5,000, part thereof," *within* two years after the death of the testator, "and the residue thereof, amounting to $30,000, *within* four years after my death, and in the meantime the net rents issues revenues and profits on the unpaid portion thereof shall be paid to him quarterly." . . .

[Reference to In re Gosling, Gosling v. Elcock, [1903] 1 Ch. 448.]

The present is a stronger case. It is a specific sum over and above residue, and the payment is not restricted to the two and four years respectively, but payment may be made within the time mentioned.

[Reference to In re Jowlby, [1904] 2 Ch. 685; In re Couturier, Couturier v. Couturier, [1907] 1 Ch. 470; In re Eve, Belton v. Thompson (1905), 93 L.T.R. 235.]

That case (the last-cited) turned upon the construction put upon the will by the learned Judge (Kekewich), that there was no gift—only a direction to pay. There was no interest to pay, nothing to denote a gift, beyond the direction to pay a certain sum in case the brother should survive the testator by six years. The learned Judge, in referring to the cases cited—which included these now cited—stated that these cases did not assist much in the construction of this particular will. I agree in that.

This is not a mere direction to pay; but it is a gift accompanied by a direction; and the payment of the money is not dependent upon the expiration of four years after the death of George Hay the elder and before the death of George Hay the younger.

This conclusion must be reached whether the particular clauses in the will are alone considered, or whether the will, taken as a whole, is considered. The testator George Hay the elder intended to dispose of his whole estate.

I find no difficulty in the clause as to residue. The residue is divided into two parts: first, residue before death of wife; second, residue consisting of that the use of which his widow had during her widowhood.

The words "original or accrued" are not inconsistent with the interpretation that what went to the children could not in any case be part of the residue. The will is one carefully drawn; and the testator, adopting the words of the draftsman, which he fully understood, left no room for doubt as to his intention to make a gift to each of his children.

The words "set apart" and "pay over," in the paragraph where and as used, are equivalent to words creating a gift.

(1) The separation of the amount for the legatee George Hay the younger, (2) the payment of interest for the time the principal remained unpaid, (3) the way the testator dealt with residue, and (4) the additional or further gift of $6,000 to George Hay the younger, by codicil 3, dated the 19th April,

1910, are all in favour of vesting, and I have no doubt in deciding that the legacy of $35,000, upon the death of the late George Hay the elder, became the property of the late George Hay the younger, in his lifetime.

The legacy did not lapse, and so did not pass under the residuary clause of the will of the late George Hay the elder, or become part of his residuary estate.

Costs of all parties out of the estate, and of the executors as between solicitor and client.

DIVISIONAL COURT. FEBRUARY 20TH, 1912.

*HOOEY v. TRIPP.

Trespass—Division Line between two Halves of Irregularly Shaped Lot—Ascertainment—Deflected Line—Frontage—Areas—Value—Equality—Surveys Act.

An appeal by the defendant from the judgment of the Judge of the County Court of the County of Hastings in favour of the plaintiff, in an action for trespass to land, ordering the defendant to move the fence erected by her as the division line between the plaintiff's half lot and the defendant's half lot, and requiring the defendant to pay $25 damages and the costs of the action.

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

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

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

BOYD, C.:—The lot in question formed part of a triangular-shaped piece of land bounded on the south by the principal street of Trenton (Dundas, formerly Ferry street), by Division street, sloping west and north, and by a narrow and comparatively unimportant street, sloping east and north, and meeting Division street at the apex of the triangle. One row of lots faces south on Dundas street, a chain in width and about two chains deep, except two triangular lots at each end of this front row, and the lot in question, No. 8, which is not a parallelogram, but has a considerable slice taken off its north-east end by the

*To be reported in the Ontario Law Reports.

diagonal trend of Ridgway street. . . . Sheriff Proctor owned lot 8, and sold the west half of the lot to Tripp in 1909, and afterwards the east half to Hooey in 1911. The whole dispute is as to the right line of division between these two half lots.

Once there was a building facing on the street, but it has been burned down, and the whole lot is now vacant land.

The material words of description are "the west half of lot 8 on the north side of Dundas street (formerly Ferry)—reserving the right to build upon all the remaining part of the lot . . . according to Evans and Burtye's registered plan."

The other is described as the east half of lot 8 on the north side of Dundas street . . . according to the plan mentioned.

A fence was put up by Tripp about the centre of the whole lot, running parallel with the side line to the west between 7 and 8, which would give 462 feet of total area more to Tripp than to Hooey.

The County Court Judge has given effect to a line drawn by a surveyor for the plaintiff, running approximately north and south and parallel with the side line to the west of lot 8 and at right angles with Dundas street, which gives an equal area to each half lot, but on the front gives 56 links to the defendant and only 44 links to the plaintiff.

Both parties, I think, err in their claim; Tripp, because his line midway through the lot would not give equal superficial areas to each half; and the plaintiff's (approved by the Judge), while it gives an equal area to each, is not a fair line of division, because it deprives the defendant of some seven feet of the front on Dundas street, which is the important boundary line, by its denomination in the deed, its position, and its value for the practical use of the property as a whole.

There is no reason in law or in fact why, in a lot shaped like this, with a bias or diagonal line on one side, the line of division to separate it into half lots should be run parallel to the side line, which is straight: it may be run partly straight and partly to accommodate itself to the bias or diagonal line formed by the street at the north-east side of lot 8.

As far as the side lines of lot 8, beginning from Dundas street, are parallel, I would run the dividing line between the two half lots parallel thereto, and bisecting lot 8 so far in equal parts; and then, when this dividing line has reached the point opposite where the diagonal side of lot 8 lying to the east begins, I would deflect the line of division for the two half lots by a right line trending west from the centre of the lot to the north-

ern boundary so as to give an equal area of land in that part of the lot to each half owner. . . .

This secures an equal division, both as to area, as to the main and controlling frontage, and as to comparative advantages—matters which one can regard, on the principle approved in Skill v. Gloucester, 16 C.B.N.S. 81, that the Court may consider all material facts existing at the time of the transaction, so as better to appreciate what was being done. I think the equality which the two deeds contemplate is best preserved by giving, as far as possible, an equal division of the whole lot. That is to say, the width of the lot fronting on Dundas street is to be equally divided through the width of the whole lot, with the required result of giving each party an equal superficial area. The straight line parallel to both sides from the front on the south part of the lot, going about two thirds of the whole length of the lot, and the deflected line starting where the parallel line of division ends, and going north for the other third part of the lot to the north, which has the diagonal slice taken off to the east, will also effect this equal division. This method of partition, by the employment of a middle line of division for two-thirds with a partial deflection for the other one-third length, is justified by the considerations taken into account by the Judges of the Privy Council in Herrick v. Sixby, L.R. 1 P.C. 436, at p. 449.

The parcels to be ascertained are the east half and west half of lot 8, and these parcels must have an equal area; that is the prime requisite. Next is to be regarded equality in width in a lot situated as is this one. The equality contemplated by the deeds is best procured in giving equality in these regards to the whole lot as far as possible. By the method now given, about two-thirds of the lot (being the southerly part fronting on Dundas street) will be divided with equal area and equal width to each party, and the remaining one-third to the north is divided into equal areas, but of unequal width. Both equalities cannot be obtained; in the rear part, owing to the diagonal side of lot 8 and to the prime requirement as to equal areas; the other, as to equal width, must give way. Herrick v. Sixby, L.R. 1 P.C. 436, may be consulted as to the best way of grappling with difficulties caused by ambiguous boundaries of land.

The Ontario Surveys Act, R.S.O. 1897 ch. 181, does not apply to the manner of dividing a lot laid out on a private plan; and, if it did, it casts no light on the method of running a dividing line by which an aliquot part is to be ascertained.

Both parties claiming erroneously, I think this case should be without costs throughout, including the appeal to this Court.

LATCHFORD, J., agreed, for reasons stated in writing.

MIDDLETON, J., dissented, for reasons stated in writing.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 21ST, 1912.

CLARKSON v. McNAUGHT AND SHAW.
CLARKSON v. McNAUGHT AND McNAUGHT.
CLARKSON v. SHAW.
CLARKSON v. C. B. McNAUGHT.

Appeal—Leave to Appeal to Divisional Court from Order of Judge in Chambers—Summary Judgment—Agreement—Enforcement.

Application by the plaintiff for leave to appeal from the order of BRITTON, J., ante 670, dismissing an appeal from the order of the Master in Chambers, ante 638, refusing to grant summary judgment under Con. Rule 603.

F. R. MacKelcan, for the plaintiff.
F. Arnoldi, K.C., for the defendants.

MIDDLETON, J.:—I have very carefully considered this application. I do not think that leave to appeal should be granted. I base my judgment upon the fact that the matters involved are too important and too difficult to fall within the scope of the Rule in question.

It must be borne in mind, in dealing with applications under this Rule, that the right of appeal is very limited, and that these and similar considerations have led to the Rule being so restricted in its application as to render the summary procedure thereby provided available only where there is no real question either of law or fact between the parties.

It is sought to treat this application as one to enforce an undertaking given by counsel that judgment should be entered upon these notes if the plaintiff is found entitled to recover in the action of Stavert v. McMillan.

A very serious question is suggested by counsel for the defendants as to the effect of this undertaking, in view of the transactions which took place in July and August, 1911, long after its date. By the agreements then entered into, the title to the notes in question has become vested in Clarkson; but it is alleged that Clarkson has not succeeded to all the rights of Stavert, and that in truth he has no greater right than the Sovereign Bank itself, and that neither he nor the Sovereign Bank can enforce the notes in question. These questions are not only important, but difficult, and clearly are not such as ought to be dealt with upon a mere Chambers motion, but such as should be disposed of so as to permit the most ample consideration and to give the freest and most untrammelled right of appeal.

Apart from this, I do not think a motion to enforce such an undertaking could properly be made in Chambers, either before the Master or before the Judge. The undertaking may be enforced upon a summary application to the Court—Pirung v. Dawson, 9 O.L.R. 248—or may be enforced by action. In either case, the judgment will be free from the trammels placed by our Rules upon the right to appeal from Chambers orders.

In this case the parties will be well advised if the question of the validity and effect of the undertaking is raised by the pleadings, so that it can be dealt with at the trial; because it does not appear to be a matter that can be satisfactorily dealt with upon a summary application.

The motion will be refused; costs to the defendants in any event.

A cross-application for leave to appeal from the terms of the order of Mr. Justice Britton will also be refused; costs to the plaintiff in any event.

TEETZEL, J. FEBRUARY 21ST, 1912.

GALLAGHER v. ONTARIO SEWER PIPE CO.

Deed—Grant of "Sewer Pipe Clay"—Deposit on Land—Removal—Time—Depth of Deposit—Contemplation of Parties—Reformation of Deed—Agreement—Absence of Fraud and Unfair Dealing—Executed Contract—Subsequent Agreement for Exchange—Conflicting Evidence—Removal of Top Soil—Restoration—Future Rights.

Action for an injunction restraining the defendants from removing top soil from the plaintiff's land, or any clay other

than that referred to in a deed from the plaintiff to the defendants, for a mandatory order requiring the defendants to restore top soil removed, for damages, reformation of the deed, etc.

C. W. Bell, for the plaintiff.
J. A. MacIntosh, for the defendants.

TEETZEL, J.:—By deed, dated the 16th July, 1906, the plaintiff, in consideration of $2,277, granted to the defendants "all the sewer pipe clay" on the portion of his farm thereon particularly described, containing 7.59 acres, the defendants agreeing to remove "all the said clay to which they are entitled under these presents on or before the 1st day of April, 1913," and also "that they will leave the top soil on the said lands and as nearly level as practicable."

At the trial, I allowed the plaintiff to amend by setting up an alleged agreement between the parties, prior to the execution of the deed, to the effect that the defendants were only to remove the clay to an average depth of not more than three feet, and claiming a reformation of the deed to comply with such agreement, and damages for having, in violation thereof, removed a greater quantity of clay and other material.

I find upon the evidence that upon the negotiations for the clay it was contemplated by both the plaintiff and the representative of the defendants that, as the result of test pits dug upon the property and from the depth to which sewer pipe clay had been removed from adjacent properties, the quantity of sewer pipe clay upon the plaintiff's property was much less in depth than the defendants have actually removed from the plaintiff's land. I also find that the material which the defendants have removed at a greater depth than was originally contemplated is, in fact, sewer piper clay, although until 1910 the defendants had not been using that quality of material at their works, because it contained a small portion of gravel, and up to that date their machinery was not adapted for using clay with an admixture of gravel; but, having during that year installed machinery by which gravel could be ground, they proceeded to remove clay from the plaintiff's land, to a depth considerably greater than it was contemplated they would do when the bargain was made with the plaintiff, and which, notwithstanding the gravel, was profitably used as sewer pipe clay.

Beyond finding what both parties contemplated as above, I am unable to find that there was in fact any agreement arrived

at whereby the defendants were to be limited in the depth they should excavate on the plaintiff's land, so long as they removed sewer pipe clay only; so that the plaintiff entirely fails to establish the first requisite to support an application to rectify the deed. The mere circumstance that the plaintiff sold more than he thought he was selling, and the defendants got more than they expected, is not, in the absence of unfair dealing, sufficient to entitle the plaintiff to have his deed rectified. See Kerr on Fraud and Mistake, 4th ed., pp. 511-512; Okill v. Whittaker, 1 DeG. & Sm. 83; and Howkins v. Jackson, 2 Macn. & G. 372.

In this case fraud is not charged, nor can I find any satisfactory evidence of unfair dealing by the defendants.

Then again the consideration was paid, and the deed executed, and the defendants placed in possession, so that the peculiar doctrines of equity applicable to actions for specific performance are entirely beside the question.

I think that there is little doubt that, had the plaintiff known that the material he was selling as sewer pipe clay extended in fact to a greater depth than the bottom of the test holes, or that the defendants would be entitled to remove a greater depth of material than had been taken from adjacent properties, he would have demanded and been paid a greater price; but I am unable, in face of the unrestricted terms of his deed, to give him any relief against the defendants' claim to excavate to a greater depth than either party originally contemplated would be done.

The plaintiff also alleges an agreement in May, 1909, whereby, as he contends, in exchange for an additional strip of clay 10 feet wide, the defendants agreed to surrender to the plaintiff a certain portion of the land from which, under the deed, they were entitled to remove clay; and he alleges that the defendants have violated such agreement.

That there was a verbal agreement for exchange is admitted, but the quantity to be surrendered by the defendants is a matter of serious dispute, and the evidence as to it is most conflicting. I am not able to find that the portion claimed by the plaintiff was agreed to by the defendants; and, while it may have been more than that conceded by the defendants, I cannot say that in fact it was more. The very indefinite character of the defendants' letter of the 17th May, 1909, purporting to evidence the agreement, instead of clarifying the intention of the parties, makes it more difficult to accept in its entirety the oral evidence on either side as to what the true agreement was.

The plaintiff also charges that, in violation of the agreement contained in the deed, the defendants have removed from the

lands a large quantity of top soil. As to this part of the claim, while there was some evidence of improper dealing with top soil, the defendants may, before their rights under the deed expire (the 1st April, 1913), restore and replace the top soil in compliance with the deed. So that, while the action will be dismissed, the judgment will be without prejudice to any action the plaintiff may bring after the 1st April, 1913, for any breach of the agreement respecting top soil.

Under all the circumstances, I do not think it is a case for awarding costs to the defendants.

DIVISIONAL COURT. FEBRUARY 21ST, 1912.

*HOLMAN v. KNOX.

Landlord and Tenant—Tenant Taking down Wall of Building—Absence of Permission from Landlord—Breach of Covenant to Repair and Keep in Repair—Forfeiture—Landlord and Tenant Act, R.S.O. 1897 *ch.* 170, *sec.* 13—*Notice to Repair—Waiver—Receipt of Rent without Prejudice—Waste—Relief against Forfeiture—Right to "Build and Rebuild"—Restoration of Wall—Mandatory Order—Costs.*

Appeal by the defendants and cross-appeal by the plaintiffs from the judgment of SUTHERLAND, J., ante 151, in favour of the plaintiffs, the trustees under the will of The Honourable William McMaster, deceased, in two actions, the first being for an injunction restraining the defendants, the lessees from the plaintiffs of land on the north-west corner of Queen and Yonge streets, in the City of Toronto, from taking down the wall between the building on the land demised to them by the plaintiffs and a building adjoining it, upon land also demised to the defendants, and for damages; and the second action being to recover possession of the demised premises by reason of breaches of covenants in the lease, and for damages. The two actions were consolidated. The learned trial Judge found that the defendants had made openings in the wall without permission, and that their doing so was a breach of the covenant to repair and keep in repair contained in the lease; that the plaintiffs had not made out a case for forfeiture of the lease or recovery of possession,

*To be reported in the Ontario Law Reports.

not having given the notice required by R.S.O. 1897 ch. 170, sec. 13; and he gave judgment directing the defendants to restore the wall to its former condtiion and for the payment by them of $10 damages and the costs of the consolidated actions.

The appeal was heard by CLUTE, LATCHFORD, and MIDDLETON, JJ.

E. D. Armour, K.C., for the defendants.

W. N. Tilley and R. H. Parmenter, for the plaintiffs.

CLUTE, J. (after setting out the facts):—Mr. Armour's contention, as I understand it, is, that the notice given by the plaintiffs was obviously given under the covenant to repair according to notice; that that was a waiver of the forfeiture (if there was one) under the covenant to repair; and, therefore, the finding of no forfeiture was right; that the action cannot be maintained under the second covenant, because the notice required by sec. 13, sub-sec. 1, of the Landlord and Tenant Act has not been complied with; that the relief given cannot be granted under the findings as they stand or under the prayer for other relief, and an amendment was not asked and should not now be granted; that the relief granted was in effect specific performance, which could not be given; nor had the Court jurisdiction to grant a mandatory order in a case of this kind; and that what was done by the defendants was within the right of the tenant under the lease.

On the first point, the case chiefly relied upon was Doe v. Meux, 4 B. & C. 606. . . .

[Summary of Doe v. Meux; and reference to Doe v. Paine, 2 Camp. 520; Few v. Perkins, L.R. 2 Ex. 92; Fawcett on Landlord and Tenant, 3rd ed., pp. 500, 501, 502; Doe v. Lewis, 5 A. & E. 277; Rankin v. Brindley, 4 B. & Ald. 84; Cronin v. Rogers, 1 Cab. & El. 348; Coward v. Gregory, L.R. 2 C.P. 153; Penton v. Barnett, [1898] 1 Q.B. 276; Dendy v. Nicholl, 4 C.B.N.S. 376; Bevan v. Barnett, 13 Times L.R. 310; In re Serle, [1898] 1 Ch. 652; Roscoe N.P., 18th ed., p. 1034; Doe d. Baker v. Jones, 5 Ex. 498; Price v. Worwood, 4 H. & N. 512.]

In the present case, the covenant to repair, in its extended form, is, that the lessee will well and sufficiently repair, maintain, amend, and keep said premises in good and substantial repair when, where, and so often as need shall be, reasonable wear and tear and damage by fire, lighting, and tempest only excepted.

Having regard to the authorities above referred to and the wording of the covenant to repair, I am clearly of opinion that

here there is a continuing breach of the covenant to repair, and that the effect of the notice was not a complete waiver of that covenant, but only delayed the right of action until after the expiration of the notice to repair, when—the repairs not having been made—the right of action for possession immediately accrued.

I am also of opinion that the notice given was sufficient under sec. 13 of the Landlord and Tenant Act; and the mere fact that it did not claim a certain sum for damages would not, I think, make it bad. The defendants had all the information which the Act requires to be given except as to damages; and, as to that, I apprehend, the plaintiffs might waive their right; so that the plaintiff's right to bring this action was complete after the expiration of the notice. Having regard to the decision in Penton v. Barnett, supra, the right of action for possession was also complete after the expiration of three months from the giving of the notice under the covenant to repair according to notice; and no further notice claiming the forfeiture was required. The notice in form was not limited to either the statute or the covenant, and was, I think, sufficient under both.

Although there was thus, in my opinion, a forfeiture entitling the plaintiffs to possession, the Court should, nevertheless, accede to the prayer of the defendants, under sub-sec. 2 of sec. 13 of the Landlord and Tenant Act, and grant relief from the forfeiture.

I do not think effect can be given to the further contention of Mr. Armour that the removal of the wall was within the rights of the defendants under the lease. The wall was a part of the demise, and the lessees thereby have "the right and liberty to maintain, continue, use, build and rebuild such wall . . . subject to the lessees assuming the obligation, if any, existing on the part of the grantee under the said deed or the lessors to maintain or repair the said wall as appurtenant to the land hereby demised." So far from this clause having the effect contended for, it rather imposes upon the lessees and their assigns the duty to maintain and repair it. It creates an obligation to maintain it, instead of liberty to remove it.

I am further of opinion that the receipt of rent, without prejudice to the plaintiffs' rights, precludes the contention that the receipt of sums equivalent to the rent was a waiver of the plaintiffs' rights of forfeiture of the lease.

I think the terms imposed by the trial Judge, to restore the wall within three months, are reasonable and appropriate. The time may be extended for that period from the date of this

judgment; and, in default of restoration within the time limited, the plaintiffs should be entitled to recover possession of the premises.

Objection was taken to the sufficiency of the notice, which was signed by Mr. Thompson on behalf of the trustees. This objection is, I think, untenable. It was given by one trustee and adopted by all, and, it being sufficient under the statute, the objection fails.

Even should it be held that there was no forfeiture giving a right of re-entry, I am of opinion that the plaintiffs would be entitled to the relief given by the trial Judge: first, because waste had been committed of such a nature that, under the circumstances, a mandatory order to restore the wall would be the only sufficient and appropriate remedy: see the Encyc. of the Laws of England, vol. 14, p. 587; Fawcett's Landlord and Tenant, 3rd ed., pp. 348, 350; Woodfall's Landlord and Tenant, 18th ed., p. 695; Kerr on Injunctions, 4th ed., pp. 51(a), 431, 432; secondly, upon the ground that, a sufficient notice having been given to repair, and the repairs not having been made within the time limited by the notice, a right of action arose under that covenant, not only for forfeiture, but also, if forfeiture for any reason was not available to the plaintiffs, for other relief, and for which the appropriate remedy would be to restore the wall. See Fawcett on Landlord and Tenant, 3rd ed., pp. 367, 373, 375; . . . Gange v. Lockwood, 2 F. & F. 115; Doe dem. Vickery v. Jackson, 2 Stark. 293; . . Allport v. Securities Corporation, 64 L.J.N.S. Ch. 491; . . . Lane v. Newdigate, 10 Ves. 192; Rankin v. Huskisson, 4 Sim. 13; Morris v. Grant, 25 W.R. 55; Ryan v. Mutual Tontine Association, [1893] 1 Ch. 124.

As to the question of costs allowed below between solicitor and client, it was urged that the trial Judge had no jurisdiction to impose such costs; and Mr. Tilley was unable to cite any authority where they had been allowed in a case similar to the present. . . .

[Reference to Andrews v. Barnes, 39 Ch. D. 133; Jones v. Coxeter, 2 Atk. 400; Cockburn v. Edwards, 18 Ch. D. 449; Willmott v. Barber, [1881] W.N. 107; Morgan on Costs, 2nd ed., p. 5.]

In the present case, it is true that the plaintiffs are trustees, but the action is not brought in respect of the trust arising out of the will. The plaintiffs' claim is as landlords. I have been unable to find any case such as this where costs between solicitor and client have been given. It does not fall within the class of

cases where such costs have been allowed, nor do I think the rule should be extended.

With deference, I think the trial Judge was in error in finding that there was a waiver of the forfeiture to re-enter. The covenant to repair, which includes the keeping of the premises in repair, is a continuing covenant, and the effect of the notice to repair was not a waiver once for all of the general covenant, but an election that the plaintiffs would not take advantage of it during the currency of the notice to repair; and, after the expiration of that notice, the plaintiffs had the right to re-enter if the premises continued out of repair. The same may be said of the covenant to repair according to notice. Default in complying with the notice gave the right of re-entry after the expiration of the time limited by the notice. The notice was sufficient under sec. 13 of the Landlord and Tenant Act, giving all the information required; and no subsequent notice was, in my opinion, necessary.

The premises being admittedly out of repair, the right of re-entry was complete, and the plaintiffs are entitled to succeed upon their cross-appeal.

Relief may be granted, in accordance with the plaintiffs' prayer, under sub-sec. 2 of sec. 13; and the only appropriate relief, in my view, is the restoration of the wall within a reasonable time. Three months, I think, is a reasonable time, and that may be extended from the date of this judgment. Aside from the question of forfeiture, the taking down of the wall, under the circumstances, was, in my opinion, waste, the appropriate remedy for which was the restoration of the wall within the time limited by the trial Judge.

The costs below should be those allowed between party and party; the time for completing the repairs to be extended for three months from the date of this judgment. With this variation of the judgment below, the plaintiffs' appeal is allowed with costs and the defendants' appeal dismissed with costs.

MIDDLETON, J., agreed in the result, for reasons stated in writing. He referred to some of the cases cited by CLUTE, J., and also to the following: Doe dem. Dalton v. Jones, 4 B. & Ad. 126, 2 L.J.Q.B. 11; Holderness v. Lang, 11 O.R. 1; Platt on Covenants, p. 293; Rose v. Spicer, [1911] 1 K.B. 234.

LATCHFORD, J., concurred.

HEWITT ALLEN CO. v. ADAMS—MIDDLETON, J.—FEB. 17.

Interim Injunction—Claim to Hay—Remedy in Damages.]—Motion for an injunction to restrain the defendant until the trial from disposing of certain hay. The learned Judge said that the case appeared to him to be one in which damages were the appropriate remedy, and that there was no title in the plaintiffs to the specific hay. So that the parties might not be prejudiced, he did not now determine this, and enlarged the motion to the trial, which, as arranged and as now directed, was to take place at the Brockville sittings on the 12th March—and he made no order meanwhile. Grayson Smith, for the plaintiffs. W. E. Raney, K.C., for the defendant.

CRUCIBLE STEEL CO. v. FFOLKES—MASTER IN CHAMBERS—FEB. 21.

Judgment Debtor—Transferee—Transfer of Land in another Province—Con. Rule 903—*Examination.*]—The plaintiffs, as judgment creditors of the defendant, obtained an order under Con. Rule 903 for the examination of an alleged transferee from the defendant. On examination it appeared that the only transfer was of land in Manitoba. As to this the transferee declined to give any evidence, alleging that it is not "exigible under execution," within the meaning of the Rule. The plaintiffs moved to have him ordered to make full discovery. There was no contention that land in Manitoba is exigible under an execution issued in Ontario; nor was there any evidence that it is exigible in such a case under the laws of Manitoba. The Master said that, on this short ground, the motion failed and must be dismissed with costs, fixed at $20. See Canadian Mining and Investment Co. v. Wheeler, 3 O.L.R. 210. While Con. Rule 903 is, no doubt, to be construed so as to advance the remedy (see Gowans v. Barnett, 12 P.R. 330), yet this is only to be done so far as the fair meaning of the words will permit. To carry it to the length now suggested would be legislation, and not merely interpretation. Harcourt Ferguson, for the plaintiffs. J. H. Spence, for the alleged transferee.

GUEST v. LINDEN—MASTER IN CHAMBERS—FEB. 21.

Mechanics' Liens—Proceeding to Enforce Lien—Defendant not Appearing—Judgment of Official Referee—Motion to Set

aside—Jurisdiction of Master in Chambers—Con. Rules 42(17) (*d*), 778—*Jurisdiction of Referee.*]—In this proceeding under the Mechanics' Lien Act, a motion was made by the defendant to set aside a judgment given by an Official Referee on a trial before him, at which the defendant did not appear. It was objected that the Master had no jurisdiction to entertain the motion. Con. Rule 42 defines the powers of the Master in Chambers, and sub-clause (*d*) of clause 17 of that Rule excepts from his jurisdiction "staying proceedings after verdict, or on judgment after trial or hearing before a Judge." No mention is made of setting aside such a judgment, in any case, even by consent. The Master said that, if the defendant here had any remedy, it would seem to be under Con. Rule 778. The power given thereby could probably be exercised, in a proper case, by the Official Referee. See sec. 34 of the Act. Here the ground of attack was, that no written notice of trial was served, as required by the Act. It would be for the Referee to say whether notice was served, and, if not, what relief should be given to the defendant. Motion dismissed with costs, fixed at $10, to be added to the plaintiff's claim. T. Hislop, for the defendant. R. D. Moorhead, for the plaintiff.

CARRY v. TORONTO BELT LINE R.W. CO.—MASTER IN CHAMBERS —FEB. 21.

Discovery—Production of Documents—Action on Judgment and for Receiver—Inquiry as to Property of Judgment Debtors —Company—Production of Minute-books and Accounts.]—Motion by the plaintiff for a further and better affidavit on production from the defendants. The action was on a judgment against the defendants, recovered on the 9th June, 1893, for a sum which, with interest, amounted to nearly $5,000 at the issue of the writ in June, 1911. The plaintiff claimed: (1) the appointment of a receiver; (2) full discovery by the defendants of their real and personal property; (3) a sale of the railway and a reference to ascertain prior incumbrances; (4) a reference to ascertain value and amount of the property of the defendants exigible under the plaintiff's judgment. The defendants were incorporated by the Act 52 Vict. ch. 82 (O.) The affidavit already made by the secretary of the defendants produced only three documents: (1) agreement dated the 20th January, 1890, between the defendants and the Grand Trunk Railway Com-

pany; (2) agreement dated the 28th February, 1891, between the defendants and the Grand Trunk Railway Company; (3) mortgage deed of trust dated the 2nd April, 1890, between the defendants and two trustees. A copy of this last document was put in. It recited the agreement of the 20th January, 1890, and stated that it was as well a lease for forty years from the 1st July, 1891, to the Grand Trunk Railway Company, at a rent of $18,500, payable half-yearly, as an agreement with the Grand Trunk Railway Company to mortgage the property and franchise of the defendants to secure an issue of $650,000 first mortgage bonds, payable in forty years from date of issue, with interest at four per cent. half-yearly; and that, of these, $462,500 should be used by the defendants for the construction of the road (the interest on this at four per cent. being exactly $18,500). Reference to the Act of incorporation shewed that, by sec. 15, the above agreement had to be approved of at a special general meeting of the shareholders called for that purpose. The Master said that it seemed to follow from this that the defendants must produce their minute-books and all other material necessary to shew that the terms of the Act of incorporation in this respect were complied with. It was further contended by Mr. Gordon that the accounts of the defendants should also be open to his inspection. He supported this argument by the fact that the plaintiff asked, not only payment of his admitted judgment, but also the appointment of a receiver and discovery as to assets and liabilities, to enable the Court to see if it was a proper case for a receiver. He cited Bray on Discovery, pp. 571, 609, and cases cited; Yearly Practice (Red Book) 1912, vol. 1, p. 370. The Master said that the appointment of a receiver is a matter of discretion. Such a remedy is only granted on a proper case being made for the interference of the Court. On the principle that discovery extends to everything that may, not which must, assist the case of the applicant, it would seem that here the plaintiff is entitled to all such production and examination as will shew whether he has made out his case for the relief he asks, under any of the branches of the prayer for relief in the statement of claim. This is analogous to the examination of a judgment debtor, as pointed out in Bray, supra, pp. 570, 571, in the chapter intituled "Discovery in Aid of Execution." Order made for a better affidavit; costs to be in the cause, as the point was new so far as appeared. M. L. Gordon, for the plaintiff. Frank McCarthy, for the defendants.