The
Ontario Weekly Notes

VOL. VII. TORONTO, FEBRUARY 26, 1915. No. 25

APPELLATE DIVISION.

FEBRUARY 15TH, 1915.

LINKE v. CANADIAN ORDER OF FORESTERS.

Life Insurance—Proofs of Death of Insured—Waiver—Authority of Chief Officer of Society—Presumption of Death—Evidence—New Trial—Costs.

Appeal by the defendants from the judgment of BRITTON, J., ante 516.

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

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

E. P. Clement, K.C., for the plaintiff, respondent.

THE COURT were against the appellants on the defence that formal proofs of death were not furnished; holding that the defendants' Chief Ranger had authority to waive and had waived such proofs. Upon the question of the presumption of death, also raised by the appellants, the Court took the view that the evidence of witnesses who might have seen or heard of the insured more recently than those who were called, was obtainable, and that there should be a new trial; costs of the last trial and of the appeal to be costs in the cause unless the Judge at the new trial should otherwise order; the evidence already taken to be used at the new trial if the parties desire.

FEBRUARY 18TH, 1915.

*JOURNAL PRINTING CO. v. McVEITY.

Municipal Corporation—Right of Access of Public and Newspaper Representatives to Municipal Buildings and Offices —Right to Information for Purpose of Publication—Municipal Act, R.S.O. 1914 *ch.* 192, *secs.* 219, 237—*Right to Inspect Documents—Injunction.*

Appeal by the plaintiffs from the judgment of MIDDLETON, J., ante 633.

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

G. F. Henderson, K.C., and H. F. Parkinson, for the appellants.

A. J. Russell Snow, K.C., for the defendant, respondent.

THE COURT dismissed the appeal with costs.

FEBRUARY 19TH, 1915.

RE RUDDY AND TORONTO EASTERN R.W. CO.

Railway—Expropriation of Land — Compensation — Award— Value of Land Taken and Injurious Affection of Land not Taken—Appeal—Increase in Amount Awarded.

Appeal by Ernest L. Ruddy from an award of two of a board of three arbitrators, in an arbitration under the Dominion Railway Act, awarding him only $3,500 for lands expropriated by the railway company.

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

D. L. McCarthy, K.C., and T. L. Monahan, for the appellant.

McGregor Young, K.C., and J. A. McEvoy, for the railway company, the respondents.

The judgment of the Court was delivered by FALCONBRIDGE, C.J.K.B.:—I am clearly of the opinion that the two arbitrators

*To be reported in the Ontario Law Reports.

who join in the award appealed from have proceeded upon an entirely wrong principle in estimating the value of the appellant's property and the compensation to be awarded to him.

It is not a question of farm land to be valued at so much per acre as such. Nature had provided an ideal site for the particular purpose which the appellant had in view, and which he was carrying out with great judgment, viz., for a country residence of a man of means and good taste. It appears in evidence, and it is a self-evident proposition, that if it should become necessary or desirable for the appellant to sell the property, the existence of the railway, running where it does, would be a fatal objection in the mind of the only class to which he could reasonably look to find a purchaser.

I do not think that I can add anything to the extremely able presentation, both of the law and of facts, in the opinion of Mr. Holman, K.C. (the dissenting arbitrator). I entirely agree with it, and I also think that he has made a very moderate and reasonable estimate of the compensation.

The award should, therefore, be increased to the sum found by him, viz., $13,850, with costs of this appeal.

FEBRUARY 19TH, 1915.

*McMULLEN v. WETLAUFER.

Malicious Prosecution—Reasonable and Probable Cause—Advice of Counsel—Approval of Crown Attorney—Malice—Findings of Jury—Belief of Defendant in Guilt of Plaintiff at Time of Laying Information.

Appeal by the plaintiff from the judgment of MIDDLETON, J., 32 O.L.R. 178, ante 244.

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

H. H. Dewart, K.C., and R. T. Harding, for the appellant.

T. N. Phelan, for the defendant, the respondent.

RIDDELL, J.:— . . . Upon the hearing, counsel consented that we should ask the learned trial Judge for his finding in respect of the belief of the defendant at the time of laying the in-

*To be reported in the Ontario Law Reports.

formation, etc., and we have done so. Mr. Justice Middleton informs us that he considered that the defendant believed in the guilt of the plaintiff, but not on sufficient grounds.

In my view, we are not called upon to pass upon the question, "If the facts are placed fully and fairly before experienced counsel or even the County Crown Attorney and a prosecution is advised, does this constitute reasonable and probable cause?" As at present advised, I am not able to assent to an answer in the affirmative to that question, at least if the complainant does not himself believe in the guilt of the accused. The advice of counsel after disclosure of all facts is cogent evidence of the existence of reasonable and probable cause; but, if the complainant does not believe in the guilt of the accused, there is no reasonable and probable cause for him: Connors v. Reid (1911), 25 O.L.R. 44. This is implied by the terminology to be found everywhere in cases and text-books: that the prosecution must be bonâ fide. A prosecution must necessarily be malâ fide which is conducted by a prosecutor who does not believe in the truth of the charge he makes.

Here, however, the defendant believed that the plaintiff was guilty; and, if he had reasonable grounds for such belief, he is excused.

The facts are not very numerous or complicated. I propose to exclude everything but what bears on the present question. The defendant came into possession of certain letters. His solicitor recommended that the letters should be submitted to a well-known expert on handwriting for report as to whether they were the production of either of two women suspected. The report was in the negative, and the matter dropped. Afterwards, a subpœna, with admitted handwriting of the plaintiff, came to hand; and the expert was confident that the letters were written by the same hand. The plaintiff denied this on oath, and another expert was consulted, who agreed with the first. Thereupon the solicitor advised that the matter should be laid before the Crown Attorney. This was done. The first expert attended before Mr. Corley, and that very efficient Crown officer was convinced by the experts' reasoning that the handwritings were identical.

We are pressed with the statement of Lord Denman, C.J., in Clements v. Ohrly (1847), 2 C. & K. 686, at p. 689: "In my opinion, similarity of writing is not enough to constitute probable cause for charging a person with forgery without evidence of other circumstances, and parties cannot create probable cause by

referring to others, whether they be the most practised attorneys or the most experienced counsel.'' The defendant in that case had ''deposed that he believed that the direction in the corner of the bill was in the plaintiff's handwriting'' (p. 687); and, so far as appears, there was nothing else to connect the plaintiff in any way.

It is to be observed, first, that the Chief Justice was not laying down any opinion as to the law (proper). ''What is reasonable and probable cause in an action of malicious prosecution . . . is to be determined by the Judge. In what other sense it is properly called a question of law I am at a loss to understand:'' Lord Chelmsford in Lister v. Perryman (1870), L.R. 4 H.L. 521, at p. 535, ''The existence of 'reasonable and probable cause' is an inference of fact:'' Lord Westbury, in the same case, at p. 538. We are, therefore, not at all bound by Lord Denman's opinion.

Again it must be remembered that Lord Denman was one of the school of Judges who withstood the admission of evidence of this character. A very careful and comprehensive history of the course of decision will be found in Dr. Wigmore's exceedingly valuable work on Evidence, paras. 1991 sqq. . . .

[Reference to Doe dem. Mudd v. Suckermore (1836), 5 A. & E. 703, 749.]

Moreover, the learned Chief Justice speaks only of ''similarity of handwriting.'' . . .

If the meaning of the language used in Clements v. Ohrly be more than what I have indicated, and Lord Denman intended to lay down a rule of law, he should not be followed. We cannot abjure our common sense at the bidding of any person, however eminent and able, Judge or not, English or otherwise.

While more similarity of handwriting may in many cases be no reasonable cause, the opinion of experts that the handwritings are not merely similar but identical is or may be of very great value, and furnish most reasonable and probable cause. Just as mere similarity of feature, etc., may not be much or any evidence of identity, such a similarity as convinces a competent observer of the identity is most cogent. Many a man has been convicted, and rightly convicted, of forgery on just such evidence, and indeed on less evidence than is to be found in this case. Had the criminal jury found the plaintiff guilty of forgery, no appellate tribunal would have thought of setting aside the verdict.

It may not be amiss to add that more than one member of

this Court would, in the absence of the jury's verdict, have no hesitation in holding that the documents were by the same hand.

In that state of facts, how can it fairly be said that there were not reasonable and probable grounds for the honest belief of the defendant? With great respect, I think the learned trial Judge sets too high a standard for this defendant, and that it should be found that the belief of the defendant was upon reasonable and probable grounds.

I am not losing sight of the contention that the defendant should have made further inquiry. In Lister v. Perryman, L.R. 4 H.L. 521, there was a contention that further inquiry should have been made. No doubt in that case it was reasonable that further inquiry should have been made, but the "very sensible view" of Mr. Baron Bramwell was adopted, i.e., "it would have been a very reasonable thing . . . to do, but it does not therefore follow that it was not reasonable not to have done so" (p. 533).

It is very often taken for granted and oftener argued that when a certain course of conduct is admitted or proved to be reasonable, the opposite must be unreasonable. Of course that is not so; the real test is rather negative than positive; and, if one avoids all that to be reasonable a man should avoid, he cannot be charged with unreasonable conduct. . . .

Sufficient evidence to satisfy a reasonable man being available and at hand, there is, speaking generally, no need to make further inquiry. Of course, if there is a belief, or perhaps even suspicion, that inquiry will displace the evidence already found, it would or might be different. That would in itself go to bona fides. Nothing of the kind is to be found in the present case.

Here then, in my view, we have the four essentials in such a defence as laid down by Hawkins, J., in Hicks v. Faulkner (1882), 46 L.T.R. 127, at p. 129: (1) an honest belief in the guilt of the accused; (2) this belief being on reasonable conviction of the existence of the circumstances which led the accuser to that conclusion; (3) this belief based on reasonable grounds, i.e., such as would lead any fairly cautious man in the defendant's situation so to believe; and (4) the circumstances so believed and relied on such as amount to reasonable ground for belief in the guilt of the accused.

It must not be forgotten that it is not knowledge that is required, but belief. We know when we (1) believe (2) on reasonable grounds (3) what is in fact true. The third element is

or may be wanting, and yet the kind of belief required for this defence exist.

I think the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.K.B., concurred.

LATCHFORD and KELLY, JJ., agreed in the result.

Appeal dismissed with costs.

HIGH COURT DIVISION.

LENNOX, J. FEBRUARY 15TH, 1915.

HARRIS v. TOWNSEND.

Principal and Agent—Agent's Commissions on Sales of Company-shares—Evidence — Agreement — Percentage Rate—Commissions on Sales in Agent's Territory—Account—Reference.

Action for commissions on the sale of shares of the stock of a mining company, and for an account.

The action was tried without a jury at Barrie.

A. E. H. Creswicke, K.C., for the plaintiff.

M. K. Cowan, K.C., and J. T. Mulcahy, for the defendant.

LENNOX, J.:—. . . I accept the plaintiff's evidence in preference to the defendant's where they conflict.

The plaintiff is a mining prospector, and was living in Atherley, in the neighbourhood of the town of Orillia, where the defendant desired and expected to sell mining stock, in 1910. The defendant was deeply interested in the success of the Golden Rose mine; he was the president of the company controlling it, and held a great deal of the stock. The plaintiff, as a local authority upon mining questions and likely to have some weight with people of Orillia and its vicinity, was employed by the defendant from about the end of October, 1910, to report to possible purchasers of stock his opinion—founded upon actual investigation as an expert—of the condition and prospects of the Golden Rose mine, and to make or bring about sales of the defendant's stock.

This was not a dishonest scheme on the part of the defendant, or of either party in fact. As a preliminary, and to enable the plaintiff to speak from actual knowledge, the defendant took the plaintiff to the mine, and the plaintiff carefully inspected and reported his opinion to the plaintiff before any arrangement for sale of stock was come to. The report was favourable, and upon the return journey the plaintiff's agency was partly arranged for as above mentioned. It is not suggested that anything dishonest was contemplated, that any misrepresentations were made, or that any purchaser was disappointed. It is material to refer to this only in view of the conflict between the parties as to the scope and terms of the engagement. The agreement founding the plaintiff's rights is partly in writing, partly verbal, and in part to be implied from the manner in which the parties dealt with each other.

On the way out from the mine, after inspection, and after the plaintiff had verbally given his opinion, and indicated that he could honestly recommend it to purchasers, the defendant gave the plaintiff a memorandum in writing in these terms: "Oct. 28th, 1910. I hereby appoint R. A. Harris . . . agent to sell 4,000 shares of Golden Rose stock at par $1 per share, for which I agree to give him 1,000 shares of Golden Rose stock for his commission . . ." This was signed by the defendant.

The plaintiff swears that, almost immediately after delivery of this paper to him, and before any action had been taken, it was verbally agreed that he would have the exclusive right to sell stock in Orillia. The defendant denies this, asserts that the only agreement of any kind between them is contained in the writing, and pleads the Statute of Frauds. I find as a fact that the defendant agreed to this added term, and also that the agreement, at the instance of the defendant, was varied in many respects; and particularly the limitation upon the number of shares to be sold by the plaintiff and the price at which they were to be sold was removed. I find, too, that the plaintiff agreed that sales made within a limited specified period were to be without commission. The evidence that the plaintiff was to have an exclusive right of sale in Orillia is overwhelming, and as to all the superadded terms claimed or admitted by the plaintiff, the evidence is so clear and satisfactory that I would feel compelled to give effect to them upon the authority of Marsh v. Hunt (1884), 9 A.R. 595, if it were necessary to invoke the principle of that case; but I do not think it is. Neither do I see

that, in the circumstances of this case, any question arises under the Statute of Frauds.

The plaintiff is suing as upon an executed contract, and produces indisputable evidence of its terms. He claims commission (a) upon sales effected by himself and his agents; (b) upon sales in the town of Orillia in which the defendant intervened, which the plaintiff was entitled to have, and on which he would have earned commissions. I think he is entitled to recover under both these headings: Burchell v. Gowrie and Blockhouse Collieries Limited, [1910] A.C. 614, at p. 226. It was, I think, intimated by counsel that they might be able to adjust the account if I decided upon the basis of liability. If this cannot be done, there must be a reference to take the account.

But it is proper that I should deal specifically with the sale of 5,800 shares of stock to Allan Macpherson at 34½ cents per share. I think Macpherson lived in Orillia at the time of sale; and, if he did, the sale to him would be covered by what I have already said, whether it was directly effected by the plaintiff or not. He was evidently a resident of Orillia when examined de bene esse on the 10th May, 1913. But a great deal of evidence, pro and con, was directed to the question of whether this is to be treated as a sale by the plaintiff or not, and I propose to determine this question as a matter of fact. The sales, actual and contingent, to Macpherson, were completed by the defendant personally. It was the mere accident of ill health that prevented the plaintiff from being present upon that occasion. The defendant was at the plaintiff's house over night, and the two were to go together to Macpherson that morning. The plaintiff furnished the horse that conveyed the defendant. It is true that the defendant and Macpherson had accidentally met a long time before, and the defendant had spoken of the mine, but it was not followed up, and nothing came of it. The plaintiff was the means of bringing Macpherson and the defendant together as *purchaser and vendor;* he was the active negotiator, furnished the samples which in the end convinced Macpherson—and I find that it was the plaintiff's samples which were assayed—he was in every sense the efficient cause of the sale, and is entitled to a commission, whether Macpherson was or was not then living in Orillia: the Burchell case; McBrayne v. Imperial Loan Co. (1913), 28 O.L.R. 653; Stratton v. Vachon (1911), 44 S.C.R. 395; Como v. Herron (1913), 49 S.C.R. 1, at pp. 8, 9.

The writing defines the rate of compensation upon sales made at par, and, as it is not pretended that there was any variation

of the contract as to such sales, the plaintiff will be entitled in the taking of the accounts to a credit of one share for every four shares sold at their face value.

There was some evidence, however, but it was quite indefinite, to the effect that certain blocks of stock were sold upon a specific agreement that they were to be sold below par, and the plaintiff was to receive the proceeds—or its equivalent—above a certain rate—I think 75 cents a share was mentioned; but there is nothing to enable me to know to what particular transactions this arrangement applied. In dealing with these transactions, the Master will give the plaintiff credit for the excess, if any, only above the minimum rate. It was also admitted that for sales made during a limited period—some ten days—no commissions were to be paid. Any sales made under this arrangement will not be taken into account; but in his report the Master should specify what transactions he has eliminated in this way and the period covered. Subject to these exceptions, the written memorandum not only determines the rate of commission upon the sales at par, as I have said, but affords the best guide as to the rate of compensation which should be allowed upon sales below par. In the absence of evidence of a specific agreement, it is not to be inferred that the parties understood that upon the sale of a block of stock at say 75 per cent. of the par value, the agent would be paid the same aggregate commission as upon the sale of the same number of shares at par, nor is it, upon the other hand, to be inferred that he is to have a relatively lower commission upon sales made with the concurrence of his principal below par than at par. Both parties are presumed to have intended what is reasonable in the circumstances. Applying this: upon sales at par the plaintiff was getting a 25 per cent. commission—one-fourth of the defendant's receipts from sales—payable to the plaintiff in shares. The sale to Macpherson was of 5,800 shares for $2,000. The plaintiff is entitled, not to 1,450 shares, but to 25 per cent. on $2,000 payable in shares, that is, 500 shares; and, as I have all the evidence before me upon this branch of the case, I adjudge that 500 shares shall be credited to the plaintiff in reference to this transaction, upon taking the accounts. There was also a contingent sale of 10,000 shares to Macpherson. This was induced by the plaintiff, but cannot be dealt with until Macpherson exercises his option. The plaintiff's right to take proceedings for recovery of his commission upon this, if the sale is consummated, is reserved. The presumption as to the 500 shares transferred to the plaintiff to qualify

him to go upon the Board is, that they were given on account of commissions rather than as a gift, and the evidence is not sufficient to counteract this inference. They must be charged against the plaintiff on taking the account. There will be a reference to the Local Master at Barrie to take an account:—

(a) Of the number of shares of stock sold by the plaintiff or his agents for the defendant at par, and giving the plaintiff credit, as commissions, for one share for every four shares of stock so sold.

(b) The number of shares, if any, sold under a special agreement that the plaintiff was to sell at a minimum price, below par, and to be paid as commission the excess only above this minimum and the aggregate in money of this excess; and giving the plaintiff credit for one share for each dollar of this aggregate.

(c) The number of shares sold by the defendant and his agents, other than the plaintiff, in the town of Orillia, and the aggregate of these sales; and giving the plaintiff credit for one share for each dollar of this aggregate.

(d) The number of shares sold by the plaintiff and his agents below par other than those sold under special agreement ((c) above), the rate at which each block of such shares was sold, the aggregate in money for each block, and the aggregate in money for all sales of this class; and giving the plaintiff credit for each dollar of this last aggregate.

(e) Credit the plaintiff in account with 500 shares as commission upon the completed sale to Macpherson.

(f) Charge up against the plaintiff all shares already transferred to him and one share of stock for each dollar that he has retained or been paid on account of commissions; and ascertain and report the state of account between the plaintiff and defendant taken as hereinbefore directed.

Costs and further directions reserved until the Master shall have made his report; but, if counsel determine that a reference is unnecessary, they can submit the figures they agree upon, and, if they desire to do so, they may speak to the question of costs.

CITY OF TORONTO v. PILKINGTON BROTHERS LIMITED AND WEBER.

Highway—Encroachment of Building upon City Street—Failure to Prove Boundary of Street—Evidence—Plans and Surveys.

Action by the Corporation of the City of Toronto to evict the defendant from a strip of land said to form part of Simcoe street, occupied by buildings recently erected.

The action was tried without a jury at Toronto.

C. M. Colquhoun, for the plaintiffs.

George Kerr, for the defendants Pilkington Brothers Limited.

I. F. Hellmuth, K.C., for the defendant Weber.

MIDDLETON, J.:—The defendants Pilkington Brothers Limited were, at the time of the bringing of the action, the registered owners of certain lands lying east of Simcoe street, but they had conveyed the lands to the defendant Weber, and the buildings in question were erected by him, so that these defendants are in no way concerned in the matters in litigation. Upon the discovery of the unregistered deed, Weber was added as a party defendant.

Careful consideration since the trial has confirmed the view I then expressed that the plaintiffs fail, because they have not been able to prove the easterly boundary of Simcoe street, and therefore have failed to shew that the building in question encroaches upon the true street line.

Simcoe street is part of the lands lying west of the old town of York, and forming part of the tract lying between Yonge street and the Military Reserve, subdivided into town lots about the beginning of the last century. The original plans have not been put in, but copies of certain plans have been produced from the Crown Lands office. The instructions to the surveyors have not been found. The plans themselves bear no indications of the size or dimensions of the lots, and are in fact manifestly misleading, as, if any attempt is made to compare the width of the streets as laid down upon these plans with the size of the lots as they are laid out, it becomes at once apparent that no uniform scale has been used in the plotting of the plans. In truth, the plans are little more than sketches shewing the relative positions of the lots and streets.

It is also quite clear that, when the land came to be actually surveyed, the plan was not by any means adhered to. Speaking generally, the lands between Yonge and Simcoe streets south of Hospital street were laid out in acre lots; the tier of lots between Hospital street and Lot street were laid out apparently as approximately half-acre lots; yet, when the lands were laid out upon the ground, this tier of lots corresponded in size with the lots to the south; in fact, the frontage upon the streets running north and south somewhat exceeded the frontage on the streets east and west.

When the patent came to be issued of lot 11 north of Hospital street, it was described as having a frontage on Hospital street of 3 chains and 16 links and upon Graves street of 2 chains, 53 links; yet the actual survey shews that the lot was laid out as having 215 feet on Simcoe street and 210 feet on Queen street. The truth is that in the early days, when land was of nominal value only, surveys appear to have been made with great inexactitude.

Nowhere, upon the plan or elsewhere, is there any indication of what the width of Simcoe street was intended to be. It is quite probable that the "chain" width was the normal standard; but this has not been proved. This is of importance, because there is reasonably satisfactory evidence establishing the west line of Simcoe street. In a plan prepared by the late J. O. Browne, P.L.S., in 1864, the relation of the west side of Simcoe street to a dwelling-house on the north side of Richmond street is shewn, and this dwelling-house still exists. This plan also shews that that line conforms to a mark upon Queen street established by the late J. G. Howard, at one time the City Surveyor. The establishment of the west side of the street is, however, of no value in determining the east side, unless the width of the street is known.

In the absence of any satisfactory evidence shewing the existence or location of original monuments, resort is properly had to the boundaries established by old buildings and old fence lines; for it may reasonably be assumed that these buildings and fence lines were erected in accordance with what was known to be the true boundary at the time of their erection. Applying that class of evidence in this case, there is abundant evidence to shew that all along the eastern side of Simcoe street, between Queen and Richmond streets, there was no conformity to the line propounded by Mr. VanNostrand, 66 feet to the east of Mr. Howard's line established on the west side, but that there has

been for very many years a substantial conformity to the line of the present buildings.

Mr. John Ross Robertson was born in one of a pair of houses, still standing on the east side of Simcoe street between Queen and Richmond streets, and resided for many years in this house or in the other house of the same pair; and he has shewn that this building, probably erected as early as 1840, is still in the same condition as when originally constructed. The steps of this building reach to within 51 feet from the Howard line. There was, Mr. Robertson says, a fence along the street in line with these steps. North of that there was a fence enclosing the land south of the old frame store at the corner of Queen street. This fence and a shed erected at a later date on the same line enclosed the land now built upon. It shewed the width of Simcoe street to be 60 feet 5 inches. North of this again was the old frame store at the corner, still existing in a modified form. This shewed a street width of 64 feet, but there was to the west of the store a platform some 4 feet in width, extending the whole length of the store. This platform was used for placing straw and hay; the store from the earliest times being used as a flour and feed store.

The entry in the book kept by the late Mr. Unwin, when he was preparing to publish a plan of the City of Toronto, accords with this narrower width of the street. I do not infer from Mr. Unwin's entry that he was dealing with anything other than the de facto conditions found, but this is in accord with the other evidence.

The illustrations in Mr. Robertson's book, said by him to be taken from photographs, confirm his recollection as to the position of the building and fences.

The action is, therefore, dismissed with costs.

MIDDLETON, J. FEBRUARY 17TH, 1915.

MARSHALL v. DOMINION MANUFACTURERS LIMITED

Company—Title to Shares—Amalgamation — Contract — Novation—Failure of Consideration—Evidence.

The plaintiff in this action claimed, as against the individual defendants, to have his title declared to 2,424 shares of the stock of the defendant company standing in the name of the defend-

ant McConnell, 2,424 shares standing in the name of the defendant Patton, 500 shares standing in the name of the defendant Webster, 300 shares standing in the name of the Mount Royal Bond Company, and 2,610 shares standing in the joint names of the defendants McConnell and Patton, save in so far as any of these shares had been used to bonus a bond issue.

The action was tried without a jury at Toronto.

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

I. F. Hellmuth, K.C., for the defendants.

MIDDLETON, J.:—The plaintiff, prior to the making of certain agreements in March, 1913, had conceived the scheme of amalgamating the manufacturers of caskets and funeral supplies throughout the Dominion, and with that in view had entered into certain contracts with the leading casket manufacturers. Six of these agreements are of importance in connection with this litigation. A seventh agreement, with a Winnipeg company, is of no practical importance, except to explain certain matters arising in evidence, as this company was dropped from the amalgamation scheme. Four of the agreements contemplate the amalgamating companies receiving stock only, a certain proportion of common going with preferred, and these agreements occasion no particular difficulty.

The Semmens Company of Hamilton declined to go into the transaction except on a basis of actual cash sale. The price stipulated was $250,000—$10,000 down, the balance, $120,000 in 60 days, $120,000 in 120 days.

The Globe Casket Company stipulated for half cash, the price being $271,000, $10,000 down, $82,500 on the 1st April, $82,500 on the 1st June; the balance being taken in stock.

The amalgamated company was to have $3,000,000 of stock, of which $1,000,000 was to be preferred, $2,000,000 common.

When all the figures from the seven companies had been gathered in, it was found that the allotments of preferred stock would not exhaust the issue; and Mr. Marshall assumed that the result was, that the unissued stock became his personal property as the promotor of the scheme, instead of remaining in the treasury or unissued. Singularly, none of the negotiating parties other than Gerrard and Goldie, of Three Rivers, had made any stipulation as to Mr. Marshall's share in the venture. Gerrard and Goldie stipulated that not more than $50,000 of preferred stock should go to the promoters.

Mr. Marshall had no interest in any of the amalgamating companies; he had no money with which the undertaking could be carried out, and his sole remuneration would have to depend upon what would come to him as the result of the amalgamation. Naturally, the situation soon became acute, as he had not the wherewithal to make the initial cash payment necessary to the two companies. He sought the assistance of his co-defendants McConnell and Patton, men who had much experience in negotiating and financing undertakings of this type.

A series of agreements were entered into with a view of carrying the transaction into effect. The Dominion Manufacturers Limited was incorporated for the purpose of representing the ultimate merger; but for the purpose of providing for a profit to the promoters it was deemed necessary to have some intervening agent through whom the options or contracts could be transferred to it. The Mount Royal Bond Company was chosen for this purpose. It was really a nominal company, owned or controlled by McConnell. The scheme was worked out in this way. Marshall sold his contracts with the manufacturing companies to the Mount Royal Bond Company, which assumed his obligations. The Mount Royal Bond Company then sold its rights under these contracts to the Dominion Manufacturers Limited, in consideration of the transfer to it of all the capital stock of the Dominion Manufacturers Limited, save the necessary qualifying shares to maintain the corporation. The Mount Royal Bond Company then undertook to divide this stock, giving to each of the manufacturers his shares of the preference and common stock, reserving $90,000 for the Winnipeg company if it should come in, and allocating certain stock to the promoters and for promotion purposes, as will have to be more fully explained hereafter. The residue not so required was to be held for the purpose of sale, to provide working capital for the Dominion Manufacturers Limited. The cash necessary for the payment of the cash purchase-price was to be provided by the issue of debentures by the Dominion Manufacturers Limited, which were to be sold by McConnell and Patton at 90 cents on the dollar.

This issue of debentures was, of course, a matter that prejudiced the position of the companies receiving stock only; but that is not now material, as they appear to have consented to this depreciation of the value of the stock received by them. The main thing—to adopt the expression used by Mr. Marshall—was that this "manipulation" created the $50,000 of preferred stock which now forms a bone of contention; the original scheme of

promotion being that the promoters should receive common stock only, the preference stock going to the amalgamating concerns.

The bonds could not be sold, owing to the condition of the financial market, and perhaps for other reasons; but the transaction was carried out in such a way that the two manufacturers who had to be paid in cash accepted a portion of the debentures in lieu of cash. Other financial transactions took place between them and McConnell, by which they accepted part cash and partly other securities and McConnell's personal liability. In the result, the Dominion Manufacturers Limited has vested in it all the assets of the amalgamating companies, and it has issued precisely the stock which it was agreed it should issue, and precisely the debentures which it undertook to issue. (A change was made in the form of the debenture issue, with the assent of all parties, by which a large saving in interest was effected. It does not appear to me that this in any way affects the transaction.)

Marshall now takes the position that, because the transaction was not carried out precisely as originally contemplated, neither McConnell nor Patton is entitled to receive anything. There has been, he says, a complete failure of consideration. It is quite true that there was a variation of the contract. The manufacturers, as vendors, did not receive the money coming to them upon the very days stipulated; but they waived this and extended the time. In some cases the money stipulated for was not paid in cash; but the vendors agreed to accept in lieu of it other securities. It is true that Marshall may not have assented to all these details; but, when he assigned the contract, I think that his assent became unnecessary, and that he cannot complain because his assigns and the vendors carried out the contracts with these variations to which both assented. He was in no way prejudiced thereby.

But, quite apart from this, I think that, although Marshall may not have assented to each and all of the details, he was in truth an assenting party. He was only too anxious to have the transaction carried through, and too glad when McConnell was able to surmount the financial difficulties which confronted him, and to bring to completion the undertaking, which seemed to be on the verge of disaster.

The suggestion that there has been a total failure of consideration indicates an extraordinary misconception in the use of that much abused phrase. At a very early stage, McConnell put up $20,000 as the initial payment. He paid very large sums, running into hundreds of thousands of dollars, upon the other

payments. He hypothecated his own securities to very large amounts; he personally guaranteed securities that were handed over; he paid large sums by way of interest to secure the extension; and, where the cash has not been paid, the purchasers hold in hypothecation his property to twice the amount of the balance remaining due; and this novation, they fully recognise, has discharged Marshall from liability under his contract. Marshall's claim entirely fails.

One or two minor matters should be mentioned. The 500 shares of stock held by Webster was a specific block agreed to be issued to him, in consideration of his accepting the office of president of the company, for the purpose of lending it the prestige incident to his connection with it. Webster has acted as president, and is entitled to retain the shares given to him. The 300 shares given to the Mount Royal Bond Company were its remuneration for the part it played in the carrying out of the transaction. There is no reason why it should be deprived of its reward.

The action fails in every aspect, and must be dismissed with costs.

MIDDLETON, J. FEBRUARY 15TH, 1915.

McCONNELL v. MURPHY.

PATTON v. MURPHY.

Company—Title to Shares—Contract—Trust — Parol Evidence —Collateral Transaction—Costs.

Actions for declarations that certain shares in the Dominion Manufacturers Limited were held by the defendant Murphy in trust for the plaintiffs respectively.

The actions were tried together, without a jury, at Toronto.
R. McKay, K.C., for the plaintiffs.
George Bell, K.C., for the defendant Marshall.
C. H. Ivey, for the defendant company.
R. B. Henderson, for the defendant Murphy.

MIDDLETON, J.—These actions arise out of the transactions outlined in my judgment in Marshall v. Dominion Manufacturers Limited, ante, and the facts need not be here repeated.

Under the agreement with the Mount Royal Bond Company, one of the items of stock distributed was $50,000 preferred stock, which by the agreement was to be given to Marshall. The claim put forward in these actions by McConnell and Patton was that this $50,000 of stock was to be held by Marshall in trust, one-half for himself and for one Johnson, one-fourth for McConnell, and one-fourth for Patton. The stock was issued in the name of Murphy. Murphy, it is admitted, holds in trust only, and he is ready to deal with the stock as the Court may declare. The Dominion Manufacturers Limited is not concerned in the controversy. As said in the judgment in the other case, the original scheme involved the remuneration of the promoters by the issue to them of common stock only. As put by Marshall in this case, the securing of $50,000 of preferred stock for the promoters was the result of the manipulations of Mr. McConnell. This was sought because it was realised that the common stock would probably be of no value. What Mr. Marshall asks me to find is that two experienced financiers, such as McConnell and Patton, suggested and brought about this result for the sole benefit of Mr. Marshall, and to their own detriment.

The question is entirely one of fact, and I have no hesitation in finding that the plaintiffs have proved their case.

Mr. Bell argued that, because the stock was by the terms of the written agreement to be issued in the name of Marshall, parol evidence could not be received to shew that Marshall took in trust, or that there was an agreement for the sharing. This, I think, is quite fallacious. This is not any attempt to contradict in any way the terms of the written agreement. It is a subsidiary and collateral transaction, which can, as I understand the law, always be shewn.

Beyond this, the technical rule would have no application, because the agreement on which Mr. Bell relies as being the only document which may be looked at is not an agreement to which McConnell and Patton are parties. It is altogether res inter alios acta.

If I am correct in my finding of fact, and it was, as I think it was, clearly understood by Marshall that the stock was to be equally divided, then the law could not be so impotent as to permit Marshall, in fraud of this agreement, to retain all the stock himself.

The plaintiff's title in each case should be declared, and the defendant Marshall should be ordered to pay the costs of the plaintiff and of his co-defendants.

MIDDLETON, J. FEBRUARY 17TH, 1915.

RE WOOD VALLANCE & CO.

Partnership — Dispute — Provision in Partnership Articles for Reference to Arbitrator—Appointment by Judge of High Court—Persona Designata—Condition Precedent.

Motion by the surviving partner in a mercantile firm for the appointment of an arbitrator, in pursuance of a provision in the partnership articles.

The motion was heard on the 9th February as in the Weekly Court.

W. N. Tilley, for the applicant.

E. F. B. Johnston, K.C., for the executor of the deceased partner.

MIDDLETON, J.:—By the partnership agreement of the 31st January, 1910, it is provided that, should any dispute or difficulty arise between the partners, or between the surviving partner and the representative of a deceased partner, as to certain matters, such dispute shall be referred to an arbitrator mutually chosen, or, in the event of their failing to agree upon an arbitrator, then to such arbitrator as a Judge of the High Court shall upon notice appoint. Application is now made to me to appoint an arbitrator.

Some discussion took place as to the capacity in which I was called upon to act. I am satisfied that I can act only as *persona designata*, and that I should not enter upon any discussion of any of the questions arising between the parties, save that I should ascertain whether the condition precedent to the making of the appointment, namely, the existence of a dispute or difference with regard to any of the matters mentioned in the clause in question, has arisen.

There is room for much difficulty in construing the articles of partnership with regard to matters of great importance. Proceedings may be taken in the proper way before the Court to resolve these questions. I was asked to do nothing by way of appointment of an arbitrator until these questions had been determined.

I do not think that I should delay. It appears to me that so soon as there is a question between the parties with respect to

matters mentioned in the clause in question I should make the appointment. I am satisfied that it has been shewn that there is such a question.

The arbitrator whom I name will then be precisely in the same position as if named in the articles themselves, and upon his shoulders will be the responsibility of determining his course.

I have used the word "arbitrator" because it is used in the articles. I do not assume to determine whether the one appointed is in truth an arbitrator within the technical meaning of that term.

It was intimated that, if I thought it my duty to act, the parties could probably agree upon a person to be named. Unless I am notified within a week of the selection of a name agreeable to both parties, I shall, at the instance of either, make a selection of an arbitrator of my own nomination.

MIDDLETON, J., IN CHAMBERS FEBRUARY 18TH, 1915.

McCOWAN v. CITY OF TORONTO.

Summary Judgment — Mortgage Action — Facts and Circumstances Entitling Defendants to Defend—Marshalling of Assets—Judgment for Sale of Part of Mortgaged Land—Reservation of Right to Apply for Sale of Part Taken by Municipal Corporation for Street.

Appeal by the plaintiff from an order of the Master in Chambers dismissing a motion for summary judgment.

C. W. Plaxton, for the plaintiff.

B. W. Essery, for the defendants the Corporation of the City of Toronto.

The defendant Murch did not appear.

MIDDLETON, J.:—Lands were mortgaged by one Murch to McCowan to secure $2,000. Part of the lands were taken by the defendants the city corporation, and, after negotiation with Mr. Lobb, solicitor for Murch, the sum to be paid was fixed at $7,000, the building to be moved from the land taken to the remaining parcel. The $7,000 was paid to Lobb, who undertook to procure a deed from Murch and a discharge of the McCowan mortgage.

Lobb, it is said, has paid over only about half of this sum, and a real question remains to be determined as to where the loss must fall—Murch denying Lobb's right to draw the money.

To determine the question Murch has brought an action against the city corporation, and the same solicitors, acting for McCowan, bring this action.

The remaining land is admittedly worth much more than enough to satisfy McCowan's claim, and the bringing and prosecution of this action at this time means the incurring of much needless expense, to be ultimately borne by Murch or the city corporation.

In one sense, the city corporation have no defence; McCowan must in the end be paid; but the existence of a "defence" is not the only thing that entitles a defendant to defend an action. It is enough if facts and circumstances are shewn and are deemed sufficient to entitle the defendant to defend.

If Murch is bound by what was done in his name by Lobb, then the city corporation have the right, upon that principle of equity known as the marshalling of assets, to compel McCowan to resort first to that parcel not taken by the city corporation, and to resort only to the part paid for by the city corporation, and now forming part of a city street, when it is ascertained that the parcel retained by Murch is not adequate to satisfy his claim. McCowan must not be put in any peril as to his claim. Murch in this suit has made default in appearance, so judgment may now be pronounced against him.

If McCowan is ready to accept judgment directing a sale of the parcel vested in Murch and not covered by the civic expropriation, reserving his right to apply for sale of the parcel taken by the city corporation (if necessary), such a judgment may now be pronounced; but, if this is not satisfactory, then he must await trial in the ordinary way. In this case the actions should be consolidated.

If McCowan accepts this, he may add the costs of this appeal to his claim. If he refuses, then the appeal is dismissed, with costs to be paid by him to the defendants the city corporation in any event of the action.

LENNOX, J. FEBRUARY 18TH, 1915.

KNOWLTON v. UNION BANK OF CANADA.

Appeal—Forum—Reference to County Court Judge for Trial of Action—Judge Treating Reference as Made to him as Local Master—Appeal from Report—Jurisdiction of High Court Division—Mortgage—Ratification—Promissory Note — Estoppel—Report Varied in one Respect—Costs.

Appeal by the defendants from the report of a Local Master.

The appeal was heard in the Weekly Court at Toronto.

J. A. Hutcheson, K.C., for the defendants.

S. H. Bradford, K.C., for the plaintiff, raised a preliminary objection to the jurisdiction.

LENNOX, J.:—As a preliminary objection, counsel for the plaintiff contends that the application is by way of appeal from a judgment of a Judge of a County Court, and that I have no jurisdiction. If the statement of fact is right, the argument is unanswerable. It is shewn that, when the case came on for trial, the learned Judge presiding at the Brockville Assizes ordered "that this action be referred for trial to Edmund J. Reynolds, Esquire, Junior Judge of the County Court at Brockville." The Junior Judge referred to is also Local Master, and in the order quoted from is, incidentally, referred to as a Local Master. The difference in procedure is not very great, but it is evident that throughout the learned County Court Judge purported to act as a Local Master, and this seemingly with the concurrence of both parties. He made a report, and the report was filed, and notice given pursuant to the Rules governing references. The findings of the report are all in favour of the plaintiff, and it is from this report that the appeal is taken. This is what is before me. I have to deal with this as a fact. I have no power to go behind it—except to consider the evidence. I have no power to declare that the proceedings were illegal or irregular.

In addition to all this, the plaintiff has a report, or he has nothing.

I cannot say that I feel that the objection taken is not reasonably arguable, but I cannot quite see my way either to ignoring the fact that there is a report before me—in terms the findings

and report of a Local Master—and, as there is a remote possibility that my dealing with the conclusions of the Local Master upon the merits will result in terminating the litigation, and, on the other hand, will not prevent either party from going to the Court of Appeal, I shall determine the motion upon the merits as they appear to me.

It is argued by counsel for the defendants that the findings are based upon undisputed facts. They are not the less entitled to consideration for this cause. There are, I think, quite sufficient facts, not disputed by the defendants, to determine the issues. The controverted facts are, in my opinion, entirely irrelevant. Take the facts to be as contended for by the defence, and I see no ground for appeal except as to the $200 promissory note and its interest. The defendants had admittedly no right to debit the plaintiff with the first item in dispute, $511.86, at the time the entry was made; and, with the exception of the promissory note referred to, had no ultimate justification for insisting upon retaining any of the disputed debits in the books of the bank as moneys paid in liquidation of the plaintiff's bank account. The plaintiff owed no duty because he was under no legal obligation to protect the bank from loss through Lewis. The plaintiff, as regards the bank, was a mere volunteer. He acted in good faith, and was anxious to help the bank—or the bank manager. All that he said—push it as far as you can—was the expression of a hope, and contingent upon his getting a valid and effectual security from Lewis. He got nothing except a worthless scrap of paper. The principle of ratification is not pertinent. When he said he had got the mortgage he was misled—he made an innocent mistake. Both he and the bank manager understood that he had obtained a security which would entitle Lewis to $1,500 and enable the plaintiff to assist the bank without loss to himself. He ought not to be made the scapegoat for the blunder of bank officials—their disregard of head office instructions. This as to the amount in dispute except the $200. That is upon a different footing. The plaintiff was an endorser for this amount, upon a note of Lewis under discount and payable at the bank. He was liable for its payment and bound to pay it, upon due presentment, protest, and notice, if Lewis did not. His action prevented the protest. He is estopped as to this. It would be inequitable to allow him to repudiate it now. The report will be amended by reducing the amount allowed to the plaintiff for principal money from $1,500 to $1,300, the interest allowed from $290.98 to $252,18, and reducing the total allowed from $1,790.98 to a total of $1,552.18, as the amount

owing from the bank to the plaintiff on the 15th January, 1915; and the report thus amended is confirmed.

The appellants have slightly reduced the plaintiff's claim upon grounds not pressed, if mentioned, upon the argument. Upon the grounds distinctly taken in the notice of appeal, the defendants have not succeeded. In other respects, the motion will be dismissed with costs. Whether there is to be an appeal or not, it would appear to be convenient that judgment should be directed to be entered. I will do this if the parties desire it.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 19TH, 1915.

REX EX REL. YATES v. LAWRENCE.

Municipal Elections—Nomination Meeting—Hour for Holding —Violation of Statute—Municipal Act, secs. 63, 64 (4), 68 *—Avoidance of Election—Saving Effect of sec.* 150*—Evidence that Result Affected by Non-compliance with Statute.*

Appeal by the respondents, the councillors elect of the Town of Parry Sound for 1915, from an order of the District Court Judge of Parry Sound, voiding their election.

C. J. Holman, K.C., for the appellants.
E. F. B. Johnston, K.C., for the relator.

MIDDLETON, J.:—The Municipal Act, R.S.O. 1914 ch. 192, sec. 63, provides that the nomination of candidates for municipal office shall be held at 10 o'clock in the forenoon of the last Monday in December, unless the council of a town exercises the power conferred by sub-sec. 4 of sec. 64, of fixing the hour for nomination at 7.30 p.m.

Notwithstanding the clear provision limiting the hour to which a change may be made, the municipal council of this town by by-law directed that the nomination meeting should begin at 7 o'clock. The statute provides (sec. 68) that nominations may be made at any time within an hour from the time fixed. The returning officer, obeying the by-law, held the meeting for nominations from 7 p.m. to 8 p.m. There is some evidence, which, I think, cannot be disregarded, that this prevented nominations which would have been made had the meeting been held, in accordance with the statute, from 7.30 to 8.30.

It is argued that this is a matter falling within the curative provisions of sec. 150; and that, it not appearing that the mistake affected the result of the election, the Court ought not to interfere.

It is not easy to define matters that come within the scope of sec. 150, nor do I think that it would be wise to attempt to do so. It is, however, I think, right to determine that sec. 150 does not entitle the Court to disregard the violation of an express provision of the statute. Its scope is rather to avoid the defeat of the popular will resulting from stupidity or inadvertence in an honest endeavour to comply with the numerous details incident to the conduct of an election. I lay great emphasis upon the proviso that the power conferred by this section is only to be exercised when the Court is satisfied that "the election was conducted in accordance with the principles laid down in this Act." When the definite statutory hour for nomination is departed from, deliberately and intentionally, the election cannot be said to have been conducted in accordance with the principles of the Act. If the clerk inadvertently opened the meeting five minutes late, or if he prolonged it beyond the stipulated time, this might well be a matter covered by the curative provision.

For this reason, as well as from the fact that it has been made to appear that the non-compliance may well have affected the result, the appeal must be dismissed; and I can see no reason why costs should not follow the event.

MIDDLETON, J. FEBRUARY 19TH, 1915.

MACKENZIE v. CITY OF TORONTO.

Municipal Corporation — Regulation of Buildings—By-law — Permit for Building — Anticipated Use of Building in Breach of Police Commissioners' By-law—Nuisance—Risk of Owner—Action to Restrain Issue of Permit—Status of Plaintiff as Ratepayer and Adjoining Owner—Judgment—Reservation of Rights as to Future Proceedings.

Motion by the plaintiff, an adjoining owner and ratepayer, for an interim injunction restraining the defendant city corporation from granting a permit to the defendant the Masonic Temple Corporation for the erection of a building upon a street in the city of Toronto.

The motion was turned into a motion for judgment, and was heard by MIDDLETON, J., in the Weekly Court.

C. A. Masten, K.C., for the plaintiff.

C. M. Colquhoun, for the defendant city corporation.

G. F. Shepley, K.C., for the defendant the Masonic Temple Corporation.

MIDDLETON, J.:—The building is in conformity with the building by-law, and the only suggestion is that it may be used as a music hall or other place of amusement, contrary to a by-law passed by the Board of Police Commissioners under sec. 420 of the Municipal Act, or that it may be used in such a manner as to become a nuisance.

The building when erected may be used for many purposes clearly not within the by-law, and it is open to doubt whether the powers of the Police Commissioners cover any use to which the plaintiff suggests the buildings may be put.

The time for the consideration of these questions has not yet arrived. The sole question now to be determined is, whether a building permit should be issued.

When the plans and specifications of the proposed building conform to the building by-law, the duty of the civic official is to issue the permit. He is not in any way concerned with the question as to the enforcement of validity of the Commissioners' regulation, nor is it his duty to determine whether the regulation applies to this building or its contemplated user. The company proceeds entirely at its own risk, and must at its peril avoid committing any nuisance or the violation of any valid regulation applicable to its undertaking.

The plaintiff probably has no locus standi to maintain this action or any action to restrain breach of the Commissioners' by-law.

The case of Tompkins v. Brockville Rink Co. (1899), 31 O.R. 124, seems entirely applicable. There buildings were about to be erected in violation of the terms of a by-law passed under the fire limit section, prohibiting the erection of buildings of that type. It was held that an adjoining owner and ratepayer could not maintain an action to restrain the erection of the buildings.

This is in entire accord with the later decision of Mullis v. Hubbard, [1903] 2 Ch. 431, where it was held that a private person could not maintain an action to restrain the erection of a building which violated the provisions of the Public Health Act.

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

Mr. Masten asks that I should insert in the judgment some provision shewing that this judgment does not preclude the taking of any future proceedings if the building is found to constitute a nuisance, and that it should not interfere with any proceedings properly taken under the Police Commissioners' by-law, if it is applicable.

Manifestly this judgment can have no effect upon any such proceedings, but I do not think it proper to incumber the formal decree with any such provision.

MIDDLETON, J. FEBRUARY 19TH, 1915.

*TORONTO GENERAL TRUSTS CORPORATION v. GORDON MACKAY & CO. LIMITED.

Contract—Construction—Sale of Stock and Assets of Mercantile Company—Ascertainment of Amount Payable—Evidence—Acts and Conduct of Parties—New Agreement—Estoppel.

Action by the executors of Joseph Mickleborough, deceased, to recover the sum of $10,000, in the circumstances mentioned below.

The action was tried without a jury at Toronto.

C. J. Holman, K.C., and J. D. Bissett, for the plaintiffs.

I. F. Hellmuth, K.C., and J. H. Fraser, for the defendants.

MIDDLETON, J.:— . . . Joseph Mickleborough, in his lifetime of the city of St. Thomas, owned or controlled all the stock of a mercantile company called "J. Mickleborough Limited." This company had apparently carried on a successful business in that city, and negotiations took place looking to the sale of the entire undertaking to the defendant company, wholesale merchants carrying on business in Toronto. These negotiations eventuated in the agreement in question, which bears date the 16th February, 1912. It was prepared after much negotiation and after many drafts had been prepared and revised by the solicitors for the contracting parties.

Mr. Hellmuth tendered evidence of the negotiations antecedent to the making of this contract, to aid in its interpretation.

*To be reported in the Ontario Law Reports.

I refused to receive this evidence. Mr. Holman, while resisting any evidence of Mr. Hellmuth, strenuously sought to give in evidence not merely rejected drafts of agreements but conversations prior to the making of the bargain, with a view of shewing me the contract ultimately made. This I also rejected. I admitted evidence as to what was done under the contract, not merely to shew how the parties construed the bargain, but with the view of allowing it to be shewn that in effect a new contract had been made by which the transaction was completed upon a certain footing.

In the first place, it is, I think, my duty to ascertain from the document itself exactly what was contracted for between the parties, if this can be extracted from what appears within the four corners of the document itself.

Turning, then, to the document, it recites Mickleborough's control of the stock in the company, his desire to dispose of the company to the defendants, and that the defendants "are willing to purchase the said company on the basis of its having a paid-up capital of $50,000, and assets, after handing over the book-debts as mentioned in paragraph 8, and after making payments of $1,000 a month referred to in paragraph 5, of not less than the said amount of $50,000, as ascertained on the basis provided in paragraphs 2 and 3." It is then provided that the assets to be purchased, other than the shares, are to consist of the stock in trade and fixtures only, the fixtures to be valued at $5,000, the stock to be valued at 85 cents on the dollar, according to the stock sheets. By clause 4, Mickleborough is to pay all the liabilities down to the 1st March, and is to be entitled to all the book-debts of the company. There is a provision for the adjustment of insurance, telephone charges, etc., and for the granting of a lease by Mickleborough of the store premises, which he owned.

Apart from the recital which I have quoted, the difficulty is created by the provisions for payment. By clause 5 it is provided that the defendants "will pay the said Joseph Mickleborough for the said shares an amount equal to the value of the said goods, wares, merchandise, and fixtures, ascertained as herein provided, as follows: $20,000 by converting $200 of the said shares into first preference shares bearing a dividend . . . $20,000 in cash, and the balance in monthly sums of $1,000 each, with interest on the balances remaining unpaid at 6 per cent. per annum, payable half-yearly."

The stock was taken, the adjustments were made, and the

value of the goods and fixtures was ascertained to be $77,561.50. The question at issue is whether, as apparently contemplated by the recital, the purchaser is to have $50,000 left in the company to represent its capital after making the monthly payments, that is to say, whether all that is to be paid is $27,561.50, or whether the purchaser is to be entitled to receive in instalments the whole amount, less only the two sums of $40,000 paid in cash and by the transfer of stock, that is, a net sum of $37,561.50.

It seems to me to be idle to contend that there is not some measure at least of conflict between these two clauses. It is quite obvious that, if there was to be left $50,000 of net assets after all the thousand dollar payments had been made, as stated by the first clause, the latter clause ought to have provided not for payment of the entire balance but of the entire balance less $10,000.

The whole frame of the agreement is awkward: because no matter what might be the value of the goods and fixtures the same trouble is bound to arise. If the agreement means that for the $50,000 of stock $40,000 only was to be paid, it ought to have been possible to say so in simpler language. The agreement is one for which the parties are equally responsible; it is the joint handiwork of their respective solicitors.

Mr. Holman urges that I ought to reject the preamble and act solely upon the contractual clause. Mr. Hellmuth urges that what took place afterwards indicates that the parties adopted a certain construction, and that I ought to accept and act upon it. . . .

If as a matter of law I am entitled to look at what was done, I have no hesitation in finding that all that took place shews that it was never intended that any greater sum than $67,561.50 should be paid. Mr. Glenn (solicitor for Joseph Mickleborough) was a most careful and capable solicitor, and one who would appreciate to the full the position clearly taken by Mr. McMaster (solicitor for the defendants); and, if it had not been in accordance with the real intention of the parties, no one would have pointed it out more quickly and more clearly than he.

Chief Justice Tindal, perhaps more than any one else, relied upon action under a document as the best key to its interpretation. . . .

[Reference to Doe dem. Pearson v. Ries (1832), 8 Bing. 178, 181; Chapman v. Bluck (1838), 4 Bing. N.C. 187, at p. 193; 2 Inst. 181.]

Authority is not wanting to shew that the maxim contemporanea expositio est optima et fortissima in lege must not be unduly pressed, and it is clear that where the contract is devoid of all ambiguity its plain provisions must not be defeated merely because the parties have acted upon a mistaken interpretation of its provisions. The case cited by Mr. Holman, Lewis v. Nicholson (1852), 18 Q.B. 503, recognises the rule and this qualification. Campbell, C.J. (p. 510) says that the contract is free from ambiguity, and then, "That being so, I am clearly of opinion that we cannot look to subsequent letters to aid us in construing the contract." To quote this omitting the introductory words "That being so," is to miss the whole meaning of what was said.

See also North Eastern R.W. Co. v. Hastings, [1900] A.C. 260, where Lord Halsbury says (p. 263): "No amount of acting by the parties can alter or qualify words which are plain and unambiguous."

But I doubt whether contemporaneous exposition is the true principle here applicable. It seems to me rather that the law would empower the making of a new contract based upon the interpretation claimed. Assume an ambiguous document, while the contract is as yet executory: one party puts forward a certain interpretation, free from all ambiguity; the other may either contest the position taken or may elect to receive the benefit upon an acceptance of that construction. If he so elects, a new contract is in fact made.

Or it may be that the case should be regarded as an application of the doctrine of estoppel. When Mr. Glenn and his client permitted the transaction to be carried out on the basis of Mr. McMaster's letter, without a word of protest, it is not unfair to say that they are precluded from now setting up any other as being the true meaning of the agreement.

The attempt to offset what was done by Mr. McMaster and Mr. Glenn by an inference to be drawn from the computation of interest upon the larger claim, I think, entirely fails. It is not shewn that the defendants knew that the computation was made upon this basis. No doubt, they had the means of ascertaining if an accurate computation had been made by them; but the failure to compute or to notice the mode of computation does not amount to an acquiescence in it. It is more than offset by the balance-sheets, which are all based upon the smaller claim.

This relieves me from considering whether the rule which Mr. Holman invokes, that an unambiguous contract cannot be modi-

fied by a mere recital, applies to a document of this kind. All artificial rules are, I think, to be invoked only as a last resort. The rule invoked is much on a par with that which has defeated the intention of testators, that the last clause in a will has greater effect than an earlier clause, now commonly referred to as only "a rule of thumb."

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

DOEL v. KERR—MASTER IN CHAMBERS—FEB. 16.

Execution—Renewal—Ex parte Order—Judgment—Statute of Limitations.]—Motion by the defendants for leave to issue execution against the executrix of the plaintiff; and motion by the plaintiff to set aside an ex parte order made by the late Master in Chambers on the 17th November, 1908. Judgment was recovered in this action against the plaintiff in or about the month of January, 1884, for the sum of $333.12, and a writ of fieri facias against the goods and lands of the plaintiff was placed in the hands of the Sheriff of the County of York. The writ was renewed from time to time up to November, 1905. On the 17th November, 1905, the late Master in Chambers, on the application of the defendants, made an order that the defendants be at liberty to issue an alias writ of execution against the plaintiff, notwithstanding that six years had elapsed since the said judgment. The circumstances under which the order was issued were set out in the affidavit filed on behalf of the defendants, viz., that the writ of fieri facias was sent to Toronto to be renewed, but through inadvertence it was mixed with other papers, and went to St. Thomas, and was returned to Toronto too late for renewal. The original writ of execution had expired before the ex parte order allowing the issue of an alias writ of execution was made. The Master said that this order should not have been granted ex parte, referring to Joss v. Fairgrieve (1914), 32 O.L.R. 117; National Bank v. Cullen, [1894] 2 I.R. 683. When the defendants failed to renew their execution in 1905, the judgment became barred by the Statute of Limitations, and the ex parte order made by the late Master in Chambers could not operate to revive it. See Poucher v. Wilkins (1915), ante 670. The defendants' motion dismissed with costs. W. Lawr, for the defendants. C. C. Ross, for the plaintiff.

GILBERT v. REYNOLDS—LENNOX, J.—FEB. 18.

Mortgage—Reference for Sale—Advertising—Procedure in Master's Office.]—Motion by the defendants the Imperial Bank of Canada by way of appeal from the report of the Master in Ordinary or for a direction to the Master to advertise again in respect of the sale of the mortgaged lands in question. LENNOX, J., said that it was not shewn that the Master had erred. The motion was not really by way of appeal from his report. The ordinary procedure affords ample protection for all parties. It is not clear that the interests of all parties would be preserved if the application were acceded to. There was no reason to interfere. Motion dismissed with costs. H. E. McKittrick, for the applicants. J. R. O'Connor, for the plaintiff. E. R. Reynolds, one of the defendants, in person, and for the defendant Martha Reynolds.

CHALMERS v. CITY OF TORONTO—RIDDELL, J.—FEB. 18.

Pleading — Statement of Claim — Motion to Strike out — Further Consideration—Practice.]—An application by the defendants to strike out the statement of claim as disclosing no cause of action. The learned Judge said that the matters of law were such that he thought the case should not be disposed of without full argument, which was impracticable (owing to other engagements) at the time of the application. The defendants were at liberty: (1) to set the case down for the Toronto non-jury sittings forthwith; or (2) to bring the motion on de novo before the Judge of the week. If for any reason it should be desired that the learned Judge himself should dispose of the motion, he will make an appointment for a time suitable for all parties. Costs of this motion so far to be costs in the cause, unless otherwise ordered on the disposition of it. Irving S. Fairty, for the defendants. W. Proudfoot, K.C., for the plaintiff.

WINGROVE v. WINGROVE—MASTER IN CHAMBERS—FEB. 19.

Pleading—Reply—Statute of Frauds—Action for Possession of Land—Equitable Defence under Agreement for Purchase—Judicature Act, sec. 16—*Rule* 155.]—Motion by the defendant to strike out paragraph 3 of the reply. The action was brought

by the executors of Donald Wingrove to recover possession of a farm. The defendant pleaded an oral agreement between the testator and himself for the sale of the farm, and set up that he was legally in possession and that the agreement had been in part performed. The defendant did not counterclaim under the alleged agreement. The plaintiffs, in the paragraph of the reply attacked, set up the Statute of Frauds. The learned Master referred to Odgers on Pleading and Practice; sec. 16 of the Judicature Act, R.S.O. 1914 ch. 56; Rule 155; and Miles v. New Zealand Alford Estate Co. (1886), 32 Ch. D. 266, 279; and said that the plaintiffs had no right to set up the Statute of Frauds in reply. Order striking out paragraph 3, with costs to the defendant in the cause. W. Laidlaw, K.C., for the defendant. W. E. Buckingham, for the plaintiffs.

ASPINALL v. DIVER AND BREEN—LENNOX, J.—FEB. 19.

Fraudulent Conveyances—Action to Set aside—Evidence—Intent to Defraud.]—Action by an execution creditor of the defendant Breen to set aside as fraudulent certain conveyances of land made by that defendant to the defendant Diver about the time that the plaintiff's judgment was recovered. The learned Judge, in a written opinion of some length, reviews the evidence, and states his conclusion that there was no bona fide sale or purchase of any of the properties; that it was not intended actually to convey the properties from Breen to Diver; and that the conveyances were executed in pursuance of a scheme of the defendants to protect the properties from the creditors of the defendant Breen, and with the intent by both defendants of delaying, hindering, and defrauding the creditors of Breen—and particularly the plaintiff—in the recovery of their claims. Judgment declaring that the several conveyances are fraudulent and void as against the plaintiff and other creditors of Breen, in the usual terms, with costs. H. J. Martin, for the plaintiff. W. C. Hall, for the defendants.