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HON. MR. JUSTICE LENNOX. FEBRUARY 23RD, 1914.

CAMPBELL v. IRWIN.

5 O. W. N. 957.

Arbitration and Award — Valuation of Buildings of Lessee at Termination of Lease — Distinction between Valuation and Arbitration—Conduct of Valuator—Bias—Disqualification—Interest —Valuation as Entire Building — Non-Concurrence of Three Valuators in Formalities of Award—Joint Action—Estoppel—Action to Enforce Award.

LENNOX, J., *held*, that where corruption, fraud, partiality or wrongdoing is charged against arbitrators it must be distinctly established, the presumption being in favour of the award.

Goodman v. *Sayers*, 2 J. & W. 249, referred to.

That an arbitrator is not disqualified by reason of being a mortgagee of property purchased by one of the parties.

Distinction between valuation and arbitration examined and authorities reviewed at length.

Action to recover $35,000, being the amount awarded by three arbitrators or valuators to be paid by the defendant (lessor) to the plaintiff (lessee) for the buildings erected by the lessee on the demised land upon termination of the leases by the lessor.

N. W. Rowell, K.C., and G. Kerr, for plaintiff.

W. N. Tilley and W. N. Ferguson, K.C., for defendant.

HON. MR. JUSTICE LENNOX:—Whether the proceeding under the leases was an arbitration or a valuation, and whether the valuators were bound to act judicially or not, the document sought to be enforced in this action, or the plaintiff's right to recover, is not in any way affected by anything done by Mr. Garland or the plaintiff in connection with North Toronto lots. Yet the suspicion engendered by Mr. Garland's endorsement of the plaintiff's promissory note (for the accommodation of Mr. Dinnick) has been a potent factor in this litigation, and but for this, I have no doubt

at all, Nicholas Garland would still be firmly entrenched in the confidence of the defendant's solicitor and agent, Mr. Charles Millar.

Suspicion of course is not enough. *Crossley* v. *Clay* (1848), 5 C. B. 581; and "Whenever the conduct of arbitrators is sought to be impeached the Court will look with a jealous and scrutinizing eye through the evidence advanced for the purpose." *Brown* v. *Brown*, 22 Eng. Rep. 384, Editorial foot note at p. 385. This domestic tribunal is the direct outcome of the specific terms of the defendant's own leases, and "we must not" says Chief Justice Cockburn, in *Re Hopper*, L. R. 2 Q. B. 367, "be over ready to set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something wrong or vicious in the proceedings."

For the present I am not distinguishing between an arbitration and a valuation although of course arbitrators are bound to observe rules and principles of judicial procedure never enacted or in fact looked for in the case of valuators.

Speaking then of arbitrators, corruption, fraud, partiality, or wrongdoing, if alleged, must be distinctly established. *Goodman* v. *Sayers*, 22 R. R. 12, 2 Jacob & Walker 249. And it must be shewn that the parties were actuated by corrupt motives, and that the arbitrator was influenced by what is complained of. *Mosley* v. *Simpson* (1873), L. R. 16 Eq. 226; *Re Hopper* (1867), 2 Q. B. 367; *Doberer* v. *Megaw* (1903), 34 S. C. R. 125. And the Court favours awards. *Morgan* v. *Mather* (1702), 2 Ves. Jr. 15.

The defendant says: "The arbitrator, Nicholas Garland, . . . was an interested person . . . and unknown to the defendant he was illegally biased for and interested in the plaintiff, whereby he was disqualified from acting in the capacity he filled."

The attempt was to shew that Garland was a mortgagee of land belonging to the British Land Company Limited, and that if the company sold some of their lots to the plaintiff they would be in a better position to meet their obligations to this valuator. Well this, if all true, goes no further than the alleged disqualification of the arbitrator in *Drew* v. *Drew & Leburn* (1855), 2 Macqueen 1. There the claim

that Mr. Leburn was interested in building up the fortunes of Mr. Drew, and so disqualified, does not appear to have been seriously entertained by the Lord Chancellor. At p. 7 his Lordship says: "Mr. Peter Drew has certain trust moneys in his hands, of which Mr. Leburn, the arbitrator, is one of the trustees, and Mr. Peter Drew, if this award goes against him, will be less solvent or more insolvent than if it goes in his favour. It it goes in his favour, it will be more likely that he will be able to pay Mr. Leburn, the arbitrator, his debt than if it goes against him. My Lords I do not hesitate to say, that this is a sort of interest, if you call it an interest, with which it is quite impossible for your Lordships to deal." As was said in *Halliday* v. *Hamilton Trustees,* 5 F. 800, Ct. of Sess., there is nothing in such a case to suggest that the arbitrator has not still "an open mind."

But if all that is suggested were true another difficulty confronts the defendant. The valuation and all questions referred to Mr. Garland and his associates, had been determined upon, the result had become known and the preparation and signing of the valuation paper had been arranged for before the land transaction was initiated or even spoken of. In *Re Underwood & Bedford & Cambridge Rw. Co.,* 11 C. B. N. S. 442, the arbitrator consulted with Underwood's solicitor as to the form of the award, and he was allowed to draw it up, but Chief Justice Erle, being satisfied that "the arbitrator had made up his mind as to the substances of the award," before he consulted the solicitor, refused to set it aside. In *Re Hopper* (*supra*), the distinction between the judicial and merely formal acts come up in two ways, namely, as to acceptance of hospitality before the award was executed, and the validity of the umpire's appointment. The first point turned, perhaps, chiefly upon the absence of evidence of a corrupt intention as already referred to, but the other distinctly involved the question I am now dealing with; and it was decided that the choice of an umpire having been made at a formal meeting of the two arbitrators, their judicial functions in this regard were then completed, and the endorsement of the appointment upon the submission and the signing of it was merely a formal record of their joint judicial act; and it was valid although each signed in the absence of the other. I can see no difference in principle between this and the signing

of a valuation previously determined upon and made known; and signed without variation.

In *Goodman* v. *Sayers*, above referred to, one of the arbitrators, Hobbs, was not present when the award was signed, or notified of the meeting. Sir Thomas Plummer, in delivering the judgment of the Court said "Here, however, all the evidence was heard, and all the substance of the business was settled in his presence; the rest, the signing of the award, was a mere form; this they thought they were at liberty to do by themselves; they did not however, act secretly but determined on the manner in which they had previously informed them that they should. Then should the Court set aside the award on account of the absence of one arbitrator? The cases have never gone that length."

But it is not true—as I find—that these parties were actuated by improper motives, or were acting in collusion or bad faith. The fact is that Nicholas Garland has no financial interest in the subdivision in question as mortgagee or otherwise, and it made no difference to him, nor to any member of his family, so far as I can see, whether the plaintiff did or did not purchase lots from the company. The mention of the lots at all was occasioned by a purely casual remark of the plaintiff, as he describes.

So far I have dealt with this action without reference to whether the plaintiff's rights are dependent upon an arbitration or valuation, but I am not at liberty to consider the question as an open one.

Upon an appeal from an order of Mr. Justice Middleton dismissing the defendant's motion to set aside the valuation or award now in question, the Court of Appeal declared that the leases set out in the statement of claim provide for "a valuation and not an arbitration." *Re Irwin & Campbell*, 24 O. W. R. 896; 25 O. W. R. 172.

It is not, and could not—in so many words—be contended that I am not bound by this judgment, and yet if I correctly apprehend Mr. Tilley's very able argument, many of his propositions are in direct conflict with the interpretation referred to. It is argued for the defendant that:—

1. The leases provide for an arbitration, though not for an arbitration within the provisions of the Arbitration Act.

I am at a loss to see how I can give effect to this contention, and to the judgment referred to; and counsel for the defendant has not pointed the way. The judgment of the Court is not that the leases do not provide for an arbitration under the statute, but that they provide "for a valuation and not for an arbitration" at all; and I am not only bound by this declaration, but, if I may say so, with the very greatest respect, it is the conclusion I would have reached in any case.

2. Even if a valuation was the proceeding provided for by the leases the proceedings taken were in fact arbitration proceedings, nevertheless; and of consequence, I presume, to be governed by the rules and principles of procedure in such cases.

I have not been directed to evidence supporting this proposition, and I have not found any. On the contrary, both Mr. Miller and Mr. Hunter repudiated the idea of an arbitration or the taking of evidence and insisted upon a valuation, and Mr. Miller specifically objected to evidence upon oath and directed the valuators to inspect the property and get information where and how they could. With this as to what actually occurred, and with the leases, the notices and the formal agreement, executed concurrently with the valuation itself all providing for a valuation—it is impossible to find that the proceedings were in fact arbitration proceedings, or that anybody connected with the matter had any idea that they were.

3. The leases provided for proceedings of a judicial character, or; the valuators, although valuators only, were bound to exercise their functions judicially. That "a valuation and not an arbitration" is provided for is a settled point. A starting point for this argument would be gained were it shewn that a valuation "of a judicial character" is distinguishable from an arbitration. I know of no case in which such a contention was established. In providing for a future valuation the parties to the contract can, of course, have guaranteed to them substantially all the formalities and safeguards of a trial in Court, but if they are relying upon quasi judicial proceedure they must say so, or clearly indicate it, in their contract.

No one will dispute that contracting parties may agree that questions which may arise in the future, including questions of value or compensation, will be investigated or

determined in any lawful way they see fit to provide for, and this in no way shifts the clearly defined boundary line between valuation and arbitration; but if they provide for all the incidents of an arbitration it becomes an arbitration. Nowhere perhaps is this distinction more pointedly expressed than by Chief Justice Cockburn in *Re Hopper*, at p. 372, where he says: "I am not disposed to quarrel with the cases of *Collins* v. *Collins* and *Bos* v. *Helsham*, looking at the facts upon which they were decided; but I think they must not be taken to comprehend every case of compensation or value; as where in ascertaining the value of property or amount of compensation to be paid, the matter assumes the character of a judicial enquiry, to be conducted upon the ordinary principles upon which judicial enquiries are conducted, by hearing the parties and the evidence of their witnesses. If it be the intention of the parties that their respective cases shall be heard, and a decision arrived at upon the evidence which they have adduced before the arbitration, it would be taking too narrow a view of the subject to say that, because the object to be arrived at was the ascertaining of the value of property, or the amount of compensation to be paid, the matter was not properly to be considered as one of arbitration." This statement is quoted with approval by Lord Coleridge in *Turner* v. *Goulden* (1873), L. R. 9 C. P. 57, at pp. 59, 60.

An arbitration is a judicial or quasi judicial proceeding, a trial out of Court, a substitute for the ordinary method of trial. In *Wadsworth* v. *Smith* (1871), 6 Q. B. 332, Cockburn, C.J., at p. 336, says: "I am of opinion that in sec. 17 (similar to sub-sec. (d) of sec. 2 of our Arbitration Act) but 'an agreement or submission to arbitration by consent' is meant an agreement by which it is intended by the parties that the matter shall be submitted to a judicial enquiry before a person chosen between them instead of being left to the ordinary proceedings of a Court of law, and not merely left to the uncontrolled and off hand decision of some architect or surveyor to be appointed by one of the parties only." In these trials by laymen judicial rules of procedure may be relaxed, but must not be ignored. There must be substantial compliance with the fundamental principles of investigation adopted by the Courts. Prominent among these are the rules governing the production of evidence. *Enoch & Zaretzky Bock & Co.*,

[1910] I K. B. 327 C. A.; *Walker* v. *Frobisher* (1801), 6 Ves. 70; *Re Brien* v. *Brien,* [1910] 2 Ir. R. 84 K. B. D.; *Plews* v. *Middleton,* 6 Q. B. 845; and *Dobson* v. *Groves* (1844), 6 Q. B. (A. & E. N. S.) 637; and this is exactly the kind of procedure demanded by the terms of the leases, says Mr. Tilley. Is not this simply another way of arguing back again that the appointees were to be arbitrators, and the proceeding an arbitration, the Court of Appeal to the contrary, notwithstanding?

On the other hand no such rule applies to provisions for valuation, in case a question of valuation or compensation should arise. I have examined all the cases and authorities referred to by counsel on both sides, and scores of others, and the cases all go to shew that it is invariably arbitration, on the one hand, with its judicial functions, or valuation in its primary ordinary meaning on the other —the arbitration for the most part, but not quite invariably, being based upon an actual dispute or difference existing at the time of the agreement or submission. *Laidlaw* v. *Campbellford & Lake Ontario Western Rw. Co.,* 5 O. W. N. 534; *Bottomley* v. *Ambler* (1878), 38 L. T. N. S. 545; *Re Hamond & Waterton* (1890), 62 L. T. 808; Hudson on Building Contracts, 3rd ed. p. 713; *Collins* v. *Collins* (1858), 26 Beav. 306; *Re Dawdy* (1885), 15 Q. B. D. 426; *Leeds* v. *Burrows,* 12 East 1; Fletcher on Arbitration, 3rd ed. p. 4; Slater on Arbitration and Awards, 5th ed., p. 4, and "Valuation" at p. 205; *Hickman* v. *Boberts,* [1913] A. C. 229; *Bristol* v. *Aird,* [1913] A. C. 241; *Chambers* v. *Goldthorpe,* [1901] 1 K. B. 264; and *Re Carus-Wilson & Greene* (1886), 18 Q. B. D. 7; and this last case contrary to a suggestion thrown out by Lord Esher in the *Dawdy Case,* and by Mr. Justice Brett in *Turner* v. *Goulden,* shews that the character of the proceeding is finally determined by the terms of submission, and a proceeding which opens as a valuation is not converted into an arbitration by the introduction or action of a third valuer or even an umpire.

But even if Mr. Tilley is right that there is an intermediate domestic tribunal "of a judicial character" somewhere in between an arbitration and a valuation, the defendant is not in a position to complain of what was done.

It was Mr. Hunter and Mr. Millar who prevented a quasi judicial enquiry and insisted upon a valuation merely,

and on just the character of investigation that obtained. "There is a good old fashioned rule" (says Bowen, L.J., in *Ex p. Pratt* (1884), L. R. 12 Q. B. D. 334, at p. 341), "that no one has a right to so conduct himself before a tribunal as if he accepted its jurisdiction and then afterwards, when he finds that it has decided against him, to turn round and say: 'You have no jurisdiction.'" And in *Drew* v. *Drew*, already cited, the Lord Chancellor, referring to the substitution of a "Solemn Declaration" for an oath, says: "We are told that that is not an uncommon way of taking evidence in Scotland; but at any rate the thing having been done in the party's own presence, to say that he shall object to it, after having allowed the proceedings to go on for months subsequently, no less than ten meetings having taken place, is perfectly preposterous, and out of all reason." To the same effect is the judgment of Mr. Justice Riddell in *Re Zuber & Hollinger* (1912), 25 O. L. R. 252.

4. The east and west end of the building on King street should have been valued separately.

I am disposed to think that the plaintiff had a right to insist upon a valuation as upon one entire building. An examination of the leases and the fact that it was put up without reference to lot divisions; and that it would not have been a rational act to build in any other way, and that if destroyed or injured it was to be resorted and maintained just as it was found at the time of valuation, satisfy me that as between the parties to this action there was no ground whatever for deducting for imaginary walls and stairways as is now contended for. But this is not material. The witnesses who testified upon this question are all men of unassailable integrity; men in whom I would place implicit credit. But unfortunately there is a clear conflict of testimony upon this one point, and I can only conclude that there is an unintentional mistake somewhere. There is a strong preponderance of testimony to the effect that it was distinctly understood and agreed by all parties that this building should be valued as one building "as a whole," as it is expressed. The defendant must abide by this. The authorities quoted as to estoppel apply here again.

5. The valuation is avoided by the valuators' interview with the plaintiff in the absence of the other parties? In the case of an arbitration I think this would be ground for setting aside or refusing to enforce the award. Cases above referred to and others go to shew this. In such a case the

arbitrator is not, in contemplation of the Courts, in any sense the representative of the person who appointed him. The agent? Such a thing could not be thought of. It is a domestic Court of Justice. In a valuation case it is different. Even then a triangular tribunal of judicial impartiality is a thing to be desired, but it is rarely desired by the parties. When Nicholas Garland was appointed it was expected of him that he would be earnest, vigilant and loyal in looking after the defendant's interest, and he was; a sensitive anxiety to protect the other side—unassailable judicial poise—was not expected, or desired. When Mr. Garland halted Campbell he was endeavouring to value the property down. Already Mr. Millar had sent Richard Smith to him, and he knew, what the other two valuators did not know, that Smith put the buildings at $40,000 and Armond at $42,000. He remembered that Campbell was somewhat disenchanted by the evidence in the O'Brien valuation. He knew that Mr. Millar had been most emphatic in insisting that it was the duty of the valuators to search for information everywhere—and there was no telling what these enquiries might elicit—and he knew that to call Smith or Armond would be but to corroborate the statements already in; and in this situation, as a keen, shrewd business man, he acted promptly and boldly and by doing so I have no doubt brought about a valuation some thousands lower than it otherwise would have been. I don't think any objection is open to the defendant upon this head. The defendant is not in a very good position to complain. The party complaining ought to be free from blame. Lord Eldon in *Featherstone* v. *Cook*, 9 Ves. 67. I am satisfied that it was quite clear to Mr. Millar that he could bring forward any evidence, estimates or opinions upon value he thought fit to use.

6. The valuation is avoided by including in it $300 for Judge Barron's costs.

I was surprised that this point was pressed. There is no ground for saying that this was done. I am quite satisfied that it was not done. The $300 had reference to the lavatory, as was stated in Court.

7. The valuation is not in the terms of the leases and is ineffectual for leaving undecided "the amount proper to be paid" for the buildings.

The award is clearly sufficient and I would not think it necessary to refer to this point were it not that in addition

to being pleaded it was strenuously argued as a defence. The valuation makes it quite clear that "the amount proper to be paid" is the sum of $35,300 and directs payment of this sum. This is not the only expression used in the leases. They are to "make a valuation" of the buildings and before entering on their duties they are to be "sworn to make a proper valuation."

8. This was not the joint act of the valuators? There is nothing to support this argument. The contrary is to be presumed from the document itself. It is manifestly not necessary that they should at the beginning be of one mind. Two of them were inclined to put the valuation higher, but finally came to look at it as Garland did. This is not a ground of objection. *Chichester* v. *McIntyre* (1830), 4 Blithe N. S. 78 has no application. McIntyre's arbitrator from first to last was of opinion that the rent should be £43, and he only signed the award because he was urged to do so by a person whom he had no right to consult.

I have considered the evidence as to the value of the buildings only in so far as it throws light upon the conduct of the valuators. *Morgan* v. *Mather* (1792), 2 Ves. Jr. 15; *Goodman* v. *Sayers* (1820), 2 Jacob & Walker 249.

There will be judgment for plaintiff against the defendant in the character in which she is sued for $35,300 with interest from the 1st of July, 1913, and costs of action. There will be a reference to adjust the rents, if parties cannot agree. Stay for thirty days.

HON. MR. JUSTICE BRITTON IN CHRS. FEB. 21ST, 1914.

TORONTO DEVELOPMENTS LTD. v. KENNEDY.

5 O. W. N. 922.

Pleading—Statement of Defence—Motion to Strike out Paragraphs as Embarrassing—Title to Land—Denial of Title of Registered Owner—Res Judicata—Importance of Matters Raised—Refusal to Determine on Interlocutory Motion.

BRITTON, J., refused to strike out certain paragraphs of a statement of defence, which raised matters which were not properly triable upon an interlocutory motion.

Judgment of Master-in-Chambers reversed.

Appeal by defendant from an order of the Master-in-Chambers made on the 28th January last, striking out paragraphs 2, 3, 4 and 5 of the statement of defence.

W. M. Douglas, K.C., for plaintiff.

W. N. Tilley, for defendant.

HON. MR. JUSTICE BRITTON:—The plaintiff company alleges that it is the registered owner of lots 15 and 16 in registered division "D." for Toronto, and this action is brought against the defendant for trespass and for an injunction.

The defendant in the first paragraph of the statement of defence denies all the allegations in the statement of claim.

The objectionable paragraphs in the statement of defence are as follows:—

"2. If the plaintiffs, as alleged (which this defendant does not admit, but denies), are the registered owners of parcels fifteen and sixteen in Register for section "D." in the office of Land Titles at Toronto, then this defendant says they wrongfully and improperly obtained such title from one James H. Kennedy, the executor of the will of the late David Kennedy, who had no right, authority or power to sell the lands in question in this action to the plaintiffs or to any other person, persons or corporation."

"3. The defendant pleads, and the fact is, that in a certain action in the High Court of Justice, wherein David Kennedy is plaintiff, and the said James H. Kennedy, this defendant, and others are defendants, the Judicial Committee of the Privy Council dismissed the appeal of the said James H. Kennedy from the judgment of the Court of

Appeal, which last-named Court declared that the clauses in the will of the said deceased David Kennedy, dealing with the residuary estate of the deceased, were void."

"4. Under the judgment of the Judicial Committee of the Privy Council aforesaid to which the defendant craves leave to refer more particularly at the trial, it has been finally determined that the said David Kennedy died intestate as to his residuary estate, of which residuary estate the lands claimed by the plaintiffs are a part, if the deed given by the deceased David Kennedy in his lifetime to this defendant of the lands in question herein is set aside."

"5. The defendant submits, therefore, that the plaintiffs have no title to the lands in question, and never did have, and consequently cannot maintain this action."

The defendant by this pleading seeks to get behind the registered ownership for reasons he gives in the pleading. Can he do this? I do not think that the Master-in-Chambers or a Judge on appeal from the Master-in-Chambers should be called upon to decide this question.

Then it is said that the defendant cannot any further litigate the question of ownership, registered or otherwise, because the matter is *res judicata* as between these parties. If that is established the defendant will not succeed, but again, it appears to me that the question of *res judicata* in this matter of protracted and complicated litigation ought not to be tried at this stage and merely upon objection to the pleadings. If I correctly understand plaintiff's contention, it is that upon proof of registered title it is entitled to succeed notwithstanding what is alleged by defendant. I am not able to agree with that proposition.

The plaintiff further contends that it now establishes by judgments and papers produced that the matter is *res judicata*. That may be so, but so important a question should not be decided in an interlocutory proceeding.

The pleading is not embarrassing. It is not an attempt improperly to retry a matter already tried. It is, as it appears to me, properly enough raised by way of defence to the plaintiff's action. The plaintiff objects to the substance of the defence sought to be raised by these paragraphs, not that they state evidence which it is proposed to adduce in support of these facts. In that respect the paragraphs are to a slight extent objectionable, but that is not the substantial part of this motion.

I think the appeal should be allowed and these paragraphs restored to the statement of defence.

Costs to be costs in the cause.

HON. MR. JUSTICE BRITTON. FEBRUARY 21ST, 1914.

SKEANS v. HAMPTON.

5 O. W. N. 919.

Contract—In Restraint of Trade—Limitation as to Time, Territory and Business — Reasonableness — Consideration—Granting of Employment—Breach by former Servant of Plaintiff—Injunction.

BRITTON, J., granted an injunction restraining defendant from engaging in the business of selling teas or coffees within the city of Toronto or within a radius of five miles adjacent thereto for three years from Dec. 27th, 1913, in breach of his contract in that behalf.

Mills v. *Durham*, [1891] 1 Ch. 576 and *Wicher* v. *Darling*, 9 O. R. 311, referred to.

Tried at Toronto, February, 16th, 1914, without a jury.

Action for an injunction to restrain the defendant from engaging in the business of selling teas or coffee within the city of Toronto, or within a radius of 5 miles adjacent thereto, for three years from the 27th December, 1913.

E. E. A. DuVernet, K.C., and J. C. McRuer, for plaintiff.

H. E. Irwin, K.C., for defendant.

HON. MR. JUSTICE BRITTON:—The plaintiff is a tea and coffee merchant, and his mode of doing business has been and is to establish certain routes on or over which plaintiff's agents canvass and take orders for and deliver tea and coffee.

Negotiations were entered upon for the employment by the plaintiff of the defendant to take charge of one or more of these routes, as the vendor of tea and coffee, at a salary of $10 a week.

The defendant understood that preliminary to entering upon his regular work he required to be instructed, and following and pursuant to negotiations he entered plaintiff's employ and served for some days. Before putting the defendant upon and in charge of a regular route, the plaintiff submitted a contract which he required the defendant to sign.

The defendant is not an illiterate man but quite the reverse, and if he did not read the contract, or understand it fully, it was his own fault. No compulsion was used, no threat, no concealment, no attempt to over-reach. The only words indicating haste were those that the plaintiff used when defendant was reading the contract, viz., "hurry up, the horse is waiting at the door." That was true, the defendant signed, and his signature was witnessed by one of the fellow workmen.

I must accept the recitals in this agreement as true, and known by the defendant to be so, and these recitals set out that practically what the defendant agreed to in the negotiations is what is evidenced by the writing.

I am of opinion that the giving defendant employment, the acceptance by defendant of employment, and his continuance therein, shew sufficient consideration for the contract.

The restraint for three years is not invalid, nor is the area, viz., within Toronto or in territory adjacent for five miles, unreasonable. The contract is not invalid by reason of the time or territorial restriction.

The contract, for the alleged breach of which this action is brought, is that the defendant will not engage in the business of selling teas or coffees in Toronto or within 5 miles for the period of 3 years from the termination of his employment as mentioned, either directly or indirectly.

The termination of defendant's employment with the plaintiff took place on the 27th December, 1913. There was no complaint of defendant's dismissal. He accepted it, and does not now complain. The defendant seems not to have considered himself bound. He announced his intention of leaving plaintiff's employ. He, as I think may be inferred, suggested that his brother-in-law should go into this tea and coffee business in Toronto, and the defendant told his brother-in-law where one of plaintiff's waggons could be purchased, and it was purchased. The defendant did solicit orders from some of plaintiff's customers. The plaintiff does not claim damages, but asks for continuance of injunction. The defendant, having broken his agreement, must be enjoined from further acts in breach of the agreement.

The judgment will be for the plaintiff for an order restraining the defendant from engaging in the business of selling teas or coffees in Toronto, or within a radius of 5 miles from said city, for the period of 3 years from 27th

December, 1913, as above mentioned, either directly or indirectly.

An interesting case in regard to unreasonable restraint of trade is the case of *Mills* v. *Durham,* [1891] 1 Ch. 576; *Wicher* v. *Darling,* 9 O. R. 311, is in point in plaintiff's favour.

I sympathize with the defendant in his being unable, with this injunction upon him, to find work for the support of his family, but the agreement, the contents of which defendant knew or ought to have known, must be obeyed.

The judgment will be with costs, if plaintiff exacts costs. The defendant's claim for damages will be dismissed.

Twenty days' stay.

HON. SIR G. FALCONBRIDGE, C.J.K.B. FEBRUARY 20TH, 1914.

THOMAS H. AND PATRICK LAVECK v. CAMPBELLFORD LAKE ONTARIO AND WESTERN Rw. CO.

5 O. W. N. 925.

Railway—Injury to Lands by Blasting — Trespass—Personal Loss and Inconvenience—Quantum—Agreement as to Damages—Admissions of Counsel—Tenant—Costs—County Court—No Set-off.

FALCONBRIDGE, C.J.K.B., awarded the plaintiffs $400 and $250 respectively in actions brought against a railway company for trespass and injury to lands and buildings by reason of blasting operations as well as personal loss and inconvenience suffered by reason of such blasting.

County Court costs—no set-off.

Trial at Napanee.

Action for damages for trespass caused by blasting operations.

E. Guss. Porter, K.C., and J. English, for plaintiff.

W. S. Herrington, K.C., for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—This is an action brought by the plaintiff, who is the owner of certain lands through which the defendants are constructing a line of railway. The plaintiff complains of trespass by the defendants and damage caused by their excavating rock on their right of way by blasting, whereby quantities of rock

have been thrown over upon a portion of the plaintiff's lands, causing damage to farm and buildings. I assess his damage as follows:—

Damage to buildings and contents thereof	$150 00
Damage for injury to lands, loss of crop, etc.	50 00
Damages for loss, inconvenience, fear and anxiety to plaintiff and his family in flying from his house to escape injury from blasts	200 00
	$400 00

This plaintiff had given the defendants an option to purchase the right of way at a certain price, "The said price to include compensation for all damage which may be sustained by reason of the exercise upon the said lands of the railway company's powers;" and it was contended by counsel for the defence that this disentitled the plaintiff to claim damages, or at any rate to claim damages in respect of the last item, which I have allowed as above.

I do not think that this contention is in consonance with his admission at the opening of the case, which the official stenographer has extended as follows:—

His Lordship: "May I ask what is the defence in this case?"

Mr. Herrington: "In respect to the blasting?"

His Lordship: "In respect of any trespasses he complains of."

Mr. Herrington: "The blasting, his damages are grossly excessive. Our contention is that it is a trifling amount, and the same way his whole claim is grossly exaggerated from start to finish."

His Lordship: "You admit some liability?"

Mr. Herrington: "Yes."

His Lordship: "It is a mere question of how much?"

Mr. Herrington: "Yes."

Mr. Porter: "Then I may as well go right at that then?"

His Lordship: "Yes."

I give this plaintiff County Court costs without any set-off by defendants.

Thirty days' stay.

PATRICK LAVECK v. CAMPBELLFORD, LAKE ONTARIO & WESTERN RW. CO.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—This case was tried at the same time as Thomas' case. Patrick is not the owner of his lot, but a tenant from one Mrs. Carroll, who gave an option to the defendant company in the same terms as the one set up above, but there is no option given by Patrick with reference to his own possession and tenancy. I assess his damages as follows:—

Damages to plaintiff in respect of crops and fences injured, loss of access to creek, and other items	$50 00
Damages for loss, etc., in flying from the house as in Thomas' case	200 00
	$250 00

In this case too, I give the plaintiff County Court costs without any set-off.

If I had come to the conclusion that the last item of damage in each case was not recoverable, I would not, of course, have certified to prevent a set-off of costs.

Thirty days 'stay.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 21ST, 1914.

RE PALMER.

5 O. W. N. 917.

Will—Construction—Gift of Property Bequeathed by Husband's Alleged Will—Husband Dying Intestate — Failure of Gift—Presumption against Intestacy Overborne.

MIDDLETON, J., *held*, that the following paragraph in a will—"My husband made his will. Its contents I know not. What he gives me and for my disposal I wish to give to the family of J.," did not pass property acquired from the estate of the husband of the testatrix on an intestacy.

Re Lenz & Bowstead, 19 O. W. R. 769, referred to.

Motion for the construction of will of the late Rhoda B. Palmer. Argued 19th February, 1914.

J. H. Fraser, for the executors.

A. M. Grier, K.C., for those opposed in interest.

A. C. McMaster, for the children of Josiah Packard.

HON. MR. JUSTICE MIDDLETON:—The question arises with reference to the provision made in the first clause of the will for the family of the testator's brother Josiah. It is admitted that this clause operates to give to them the life insurance, the silver, and the contents of the house, save the articles particularly bequeathed. The point in question is as to some $13,000 to which the testatrix became entitled upon the death of her husband, intestate. The clause is as follows: "This is my last will and testament. My husband made his will. Its contents I know not. What he gives me and for my disposal I wish to give to the family of my brother Josiah."

It is argued by Mr. Grier, I think correctly, that this clause cannot operate upon the property which the wife has taken upon her husband's intestacy. She thought that her husband had made a will. Under it she expected to take some benefit; what, she did not know. Whatever she took in this way from her husband she desired should go to the family of the brother, who, according to a later clause in the will, had shewn her greater kindness than she could ever repay.

I have little doubt that if the testatrix had supposed that her husband was going to die intestate she would have given to Josiah or his family all that would in that event have come to her from her husband's estate. But the difficulty is that I am not allowed to make a will for the testatrix, but merely to interpret the language which she used. In the construction of wills the Courts lean against intestacy; but where there is in fact an intestacy the law must take its course.

It is argued that the expression used here is capable of being so construed as to cover this property. I do not think that the language permits the construction suggested. When the testatrix used the expression, "what he gives me and for my disposal," it could only be fairly interpreted, having regard to the context, as relating to that which the husband by his will gives to the wife and for her disposal. It would be juggling with words to read it as suggested by Mr. McMaster—"what he gives me by his will or leaves by intestacy

for my disposal;" because it is quite plain that what the testatrix had in her mind was a will which she thought was in existence and which she expected would confer some property rights upon her. In *Re Lenz & Bowstead*, 19 O. W. R. 769, I discussed the principle which I think is here applicable, and I need not again refer to the cases.

One of the brothers has, I understand, conveyed his interest to the family of Josiah, thus recognising the real, as against the expressed, intention of his sister. Those entitled to the other third have not seen fit to adopt this course and they are entitled as upon an intestacy so far as this fund is concerned.

Costs of all parties to be paid out of the estate.

HON. SIR G. FALCONBRIDGE, C.J.K.B. FEBRUARY 21ST, 1914.

McNIVEN v. PIGOTT.

5 O. W. N. 921.

Vendor and Purchaser—Action to Rescind — Agreement—Entry by Purchaser—Acts of Waste—Certificate by Solicitor as to Good Title—Former Vendor and Purchaser Application — Order not Issued—New Facts—Dismissal of Action.

FALCONBRIDGE, C.J.K.B., *held*, that where purchasers of certain lands had entered immediately upon the execution of the purchase agreement, as agreed, and had committed acts of waste, and where their solicitors who also acted for the vendors had certified to a good title, they could not afterwards rescind the contract upon the ground that the title was defective.

Action by purchasers for rescission of an agreement for sale of lands in Hamilton.

W. S. MacBrayne, and W. M. Brandon, for plaintiffs.

E. D. Armour, K.C., and F. Morison, for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.: — Plaintiffs paid $7,000 on account of purchase money, went into possession and made alterations in the property, removed buildings, gates and fences and cut down, or at least cut branches off, trees.

It is true that the agreement provides that the purchasers (plaintiffs) should have possession at once, but in view of the fact that a firm of solicitors on 15th May, then acting for both parties, certified that defendant had a good title, subject only to a certain mortgage, and of the other surrounding circumstances, it seems to me that the pur-

chasers are not in a position to ask that the contract be rescinded.

These solicitors' certificate of title would appear to be, in view of my brother Middleton's judgment in *Pigott v. Bell*, 25 O. W. R. 265, quite correct.

But plaintiff retained other solicitors, and an objection to the title was argued before me. I thought the purchasers might be exposed to a "reasonable probability of litigation," and so the title was classed as doubtful. *Re Pigott & Kern*, 24 O. W. R. 863.

I am informed that no order was taken out on this judgment—and it is contended that it is competent for me now to hold, in view of subsequent events, that this objection is not a valid one. In *Re Consolidated Gold Dredging & Power Co.*, 25 O. W. R. 281, no order had been issued on a judgment of mine in Chambers, and it being represented to me that the facts had not been quite correctly placed before, the matter was re-opened and again argued, and I dismissed the original application.

Be that as it may, I am of the opinion that plaintiffs are not now in a position to maintain this action, and it must therefore be dismissed.

It is doubtful whether in any aspect of the case proper notices were given by plaintiffs to rescind or put an end to the contract.

It will be seen from the above narrative of events that the plaintiffs, who bought for speculative purposes, have had a pretty hard time, and I make no order as to costs.

Thirty days' stay.

HON. MR. JUSTICE MIDDLETON, IN CHRS. FEB. 21ST, 1914.

PECK v. LEMAIRE.

5 O. W. N. 926.

Judgment—Specially Indorsed Writ—Con. Rules 50, 56, 57—Defective Affidavit — Credits Claimed — Particulars not Given—Leave to Supplement Ignored—Appeal.

MIDDLETON, J., gave summary judgment for plaintiff upon a specially indorsed writ under Con. Rule 57 where defendant by his affidavit disputed the amount claimed and asserted credits due him but refused to give particulars of same.

Judgment of Master-in-Chambers affirmed.

Appeal from Master-in-Chambers granting summary judgment under Rule 57.

R. W. Hart, for defendant.

M. H. Ludwig, K.C., for plaintiff.

HON. MR. JUSTICE MIDDLETON: — The defendant entered appearance under Rule 50 disputing the amount of the plaintiff's claim, the writ being specially endorsed it was necessary for him to file the affidavit required by Rule 56. The affidavit filed was most unsatisfactory as it admitted the debt to some extent, but disputed the amount claimed, stating that money paid had not been credited. No amounts are stated or details given.

The plaintiff had then the option of proceeding to have an account taken under Rule 50 or moving for judgment under Rule 57. He chose the latter course. The Master gave judgment on this defective affidavit for the amount of the claim, rightly holding that the onus was on the defendant to state specifically the sums which he claimed to have paid, but which had not been credited. An opportunity was then given the defendant to supplement his material, but the defendant refused to give the information desired. On this appeal I have given the like opportunity, but no further affidavit is forthcoming.

The appeal is dismissed with costs.

HON. MR. JUSTICE BRITTON, IN CHRS. FEB. 21ST, 1914.

TORONTO DEVELOPMENTS, LTD. v. KENNEDY.

5 O. W. N. 927.

Action—Stay of, Pending Trial of Another—Insufficient Material—Dismissal of Motion.

BRITTON, J., refused an order to stay one action pending the trial of another, holding that the material filed was insufficient.

Motion by defendant to stay proceedings in this action until another action, in which same questions are involved, is determined.

W. N. Tilley, for defendant.

W. M. Douglas, K.C., for plaintiffs.

HON. MR. JUSTICE BRITTON:—This motion cannot prevail. No doubt if the trial in one is expedited, it will be in the interest of all parties to have an agreement by which

all the questions in dispute will be determined in the action first tried, but I cannot make the order asked, upon the material before me.

Motion dismissed. Costs in the cause—in this action.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. FEBRUARY 20TH, 1914.

HOLDEN v. RYAN.

5 O. W. N. 890.

Judgment—Contempt of Court — Motion to Commit—Building Restrictions—"One Building"—Amendment of Plans and Structure—"Front" of Building—Reference to Architect Appointed by Court—Undertaking to Obey his Report—Dismissal of Motion—Terms.

Motion to commit defendant for breach of the injunction herein granted by TEETZEL, J. (22 O. W. R. 767). Since that judgment defendant had altered her walls, and placed a permanent doorway in the vertical wall formerly dividing the building.

BRITTON, J. (23 O. W. R. 961) *held*, that the building was no longer two buildings, and that therefore the motion must be dismissed with costs.

Ilford Park Estates v. *Jacobs*, [1903] 2 Ch. 522, 526, referred to.

SUP. CT. ONT. (2nd App. Div.) ordered that if defendant would file an undertaking in one week to follow the plans of an architect to whom the matter had been referred by the Court and pay the costs of the motion and appeal, including the architect's fees, the motion should be dismissed, otherwise it was allowed with costs.

Appeal by the plaintiff from the order of HON. MR. JUSTICE BRITTON, 23 O. W. R. 961, dismissing a motion by the plaintiff to commit the defendant for contempt of Court for disobedience to a judgment.

The appeal was heard by HON. SIR WM. MULOCK, C.J. Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

A. C. McMaster, for the appellant.

J. R. Roaf, for respondent.

Upon the argument of the motion their Lordships were of opinion that the plaintiff was proceeding in disobedience of the injunction granted and referred the matter to Mr.

S. G. Curry, Esq., an architect, to report if and how the building could be completed to comply with the judgment of the Court.

HON. SIR WM. MULOCK, C.J.Ex.:—On defendants carrying out the amended plans as further amended by Mr. Curry, and in accordance with his report, and upon payment of the costs of this motion here and below, including Mr. Currie's fees to date, this motion is dismissed.

If the civic authorities require any changes from said plans and report, and both parties assent to such changes, they may be carried out, but if either party objects to any such changes, such objecting party may bring the question of such changes before this Court. The defendant within one week to file an undertaking to comply with above-mentioned terms; otherwise this motion is allowed with costs here and below.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 26TH, 1914.

ARMOUR v. TOWN OF OAKVILLE.

5 O. W. N. 980.

Contract—Construction of Sewer System in Municipality — Action for Bonus—Interpretation of Contract—Cost of Work—Extras—Finding of Engineer—Reference.

MIDDLETON, J., in an action by a contractor against a municipality for a bonus under a contract, which bonus depended upon the actual cost to the municipality of the work done, referred it to the Master to take an account of several items of such cost.

Action tried at Toronto non-jury sittings 23rd February, 1914.

Action for a bonus alleged to be due under a contract between plaintiff and defendant.

T. N. Phelan, for the plaintiff.

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

HON. MR. JUSTICE MIDDLETON:—The municipality, desiring to construct a system of sewers, entered into a contract with one Pietro Lorenzo, dated 15th April, 1912. This contract called for the construction of the drains and

disposal works for a total price of $81,418. The next highest tender was $103,000.

Lorenzo had scarcely started on the work when he failed, and abandoned the contract. A new contract was then entered into in July, 1912, with the plaintiff. Shortly the plaintiff undertook to do the work for the town at actual cost, plus a salary of $30 per week and plus a certain bonus if the cost was kept below a named figure. The work has now been completed; and the sole question in this action is the plaintiff's right with respect to the bonus. He alleges that the cost of the work has been kept within the stipulated price. This is denied by the town.

The dispute turns upon matters within a comparatively narrow compass, arising upon a construction of the contract. Under the original Lorenzo agreement, clause 12 of the printed schedule, it is provided "The corporation shall be at liberty to enlarge, modify or diminish any part of the work, and any such additions will be paid for and deductions made at the contractor's schedule prices, or at such other price as may be considered by the engineer just and equitable."

There is a schedule to the contract in which a specific price is affixed to all items going into the construction of the work.

In the contract with Armour, he undertakes to construct all the work described in the Lorenzo contract "in accordance with the plans, specifications and conditions embodied in and referred to in the said contract." This would no doubt carry into the contract the right of the municipality to diminish or extend the contemplated work, and this is recognised in the subsequent provisions of the Armour contract; but as the municipality had to pay for the work actually done, no express reference is made to this save in the clause relating to the adjustment of the accounts for the purpose of determining Armour's right to a bonus.

The bonus clause provides for payment to Armour of 20 per cent. of any sum by which the cost of construction of the sewers in less than $100,000; and it is then provided that for the purpose of computing the bonus the cost shall be deemed to include two certain sums, as to which there is now no dispute, of $11,374.74 and $2,826.18, and the value of the plant left by Lorenzo, which is not disputed as being $224. It is then provided that if the municipality "shall

enlarge or add to the work comprised and described in said plans and specifications, and if the aggregate cost of said enlargement and addition shall exceed the aggregate value of any portions of the work . . . which may be withdrawn from construction . . . the amount of such excess shall be . . . deducted from the total cost of the work."

The total cost of the work to the municipality, it is agreed, is $115,922.08. From this must be deducted the cost of the disposal works, $12,190.79, and also the cost of the laterals, which is placed by Armour at $10,629.70. These two sums being deducted would leave a balance of $93,101.59; to which must be added the three undisputed amounts above named, $11,374.74, $2,826.18 and $224. This would make a total of $107,526.51. A further deduction would then have to be made as representing the excess of the extended work over diminished work. This is placed by Armour at $17,220.36; leaving, according to his contention, the total cost for the purpose of ascertaining his right to a bonus, $90,306.15; so that he would be entitled to 20 per cent. on $9,693.85, the amount by which this falls short of $100,000. That sum is $1,938.77.

In making the computations necessary to bring about this result, Armour has assumed that the cost of the construction of the laterals is to be determined by applying to the construction of these lateral drains the schedule price found in the Lorenzo contract. The municipality on the other hand, contend that this price does not control, that the cost of the laterals must be found as a fact, and that from the actual cost of the entire work the amount to be deducted on this head is the actual cost of the lateral drains and not a sum arrived at according to some arbitrary schedule.

In the computation of the amounts to be deducted in respect of extra work, Armour has adopted substantially the same theory. He has applied to the extra work and the diminished work the figures found in the Lorenzo contract. This gives him as a result $15,334.13. Then he says Lorenzo's contract was for an inadequate price, and in as much as the whole work, according to the Lorenzo contract, would have cost more than Lorenzo's price, this sum must be increased *pro rata*; and applying the rule of three, upon this hypothesis, he increases the $15,334.13 to $17,220.36.

The municipality deals with this in the first place in precisely the same way as already indicated. It contends

that "cost" means actual cost. In the second place the municipality contends that Armour errs in including in his definition of "enlarged and additional work" matters which do not come properly under that head, but which are really amounts which would have constituted a claim for an extra allowance in respect of the original work. To illustrate; some of the original sewers were constructed through soft sand. Timber was inserted to support the sides of the excavation. Under the original contract the engineer had a right to direct that this timber should be left in the excavation. In that event the Lorenzo provided for payment for this timber at a certain named sum. Armour claims that the cost of this timber is an enlargement or addition to the work comprised in the contract. The municipality says no, this sewer was part of the original work and the timber is part of the cost of it; you do not substantiate your claim by merely stating that this allowance for timber might have been called an extra under the Lorenzo contract.

I agree with the contention of the municipality as to this. What Armour undertook was to construct the entire sewage system as shewn by the Lorenzo contract, upon terms which did not entitle him to a bonus unless the actual cost of these sewers, including all allowances for extras with respect to them, came to less than $100,000. This ruling would cover all claims in respect of the additional cost occasioned by the substitution of iron pipe for earthen pipes, and for concrete work where this was deemed necessary for the protection of the pipes.

Although these items are in my view excluded, they serve as an illustration of the real meaning of the respective contentions with regard to other branch.

The lumber left in the sewer cost a certain sum, far less, it is said, than the amount stipulated in the Lorenzo contract. Although this stipulated price would bind in the adjustment of accounts between Lorenzo and the town, it has, I think, no bearing upon the adjustment of accounts between Armour and the town.

It is said that the expression used in the contract, by which Armour undertook the construction of the work in accordance with the plans, specifications and conditions embodied in the Lorenzo contract, carries into his contract the Lorenzo schedule of prices. I cannot so read it. What this expression refers to is the terms of the Lorenzo contract relating to the work to be done and the mode of construc-

tion, etc., etc.; it has no reference to the price to be paid, which is separately dealt with in Armour's contract.

At the close of the argument I suggested that the parties should, if possible, agree upon the actual cost of the laterals and the actual cost for the extras. It seems that this is impossible. The matter will therefore have to be referred to the Master to take an account on the footing of the declaration above indicated, and the costs of the action and reference will be reserved; but for the purpose of affording some criterion hereafter, each party should name a sum which it is willing to give or receive.

I should, perhaps, have mentioned that the construction of this contract is aided when its provisions are contrasted with the clause I have quoted (No. 12) from the Lorenzo contract. There it is provided that the price of additions and deductions is to be in accordance with the contractor's schedule or such other price as the engineer may deem just and equitable. Here, deductions are to be made on the basis of such price as in the opinion of the engineer shall be just and equitable; additions are to be paid for on the basis of cost.

In arriving at the amount to be deducted, the amount allowed by the engineer as just and equitable in respect of diminutions, $6,796.23, is to be regarded as conclusively determined. That was the sum named by the engineer, and his adjustment has not been attacked. The two factors to be determined by the Master are the actual cost of laterals and the actual cost of the additional work given by the engineer on the basis of the Lorenzo contract at $10,629.70 and $22,130.22 respectively.

HON. MR. JUSTICE BRITTON. FEBRUARY 26TH, 1914.

LIMEREAUX v. VAUGHAN.

5 O. W. N. 978.

Trusts and Trustees—Lands Purchased by Mother—Deed taken in Daughter's Name—Improvidence—Absence of Independent Advice—Declaration of Trust.

BRITTON, J., gave judgment for the plaintiff in an action to have it declared that defendant was the trustee of certain lands for the plaintiff, holding that the plaintiff, a simple elderly woman, had been defrauded out of such lands.

Non-jury trial.

Action to have it declared that lots 13 and 14 on the north side of Alberta avenue is the city of Toronto, are the property of the plaintiff, and that the defendant is in respect of said lands a trustee for the plaintiff.

S. H. Bradford, K.C., for plaintiff.

J. C. McRuer, for defendant.

HON. MR. JUSTICE BRITTON:—The defendant sets up that she is the absolute owner of this land, and asks that she be so declared. The action has unpleasant features, as it is a case of mother against daughter, the mother being an aged woman, about 85 years of age. The plaintiff had agreed to purchase these lands from Mrs. DuVernet for $100, and had paid at least $35 on account of that purchase. She found it inconvenient, and perhaps impossible, to make the payments regularly upon her purchase. She and her daughter came together—whether at the instance of the defendant, who knew plaintiff's position, or at the instance of the plaintiff, who desired help—I cannot say, as the evidence is conflicting, but the result was that the defendant's husband provided $70, which Mrs. DuVernet accepted in full, and made the conveyance to the defendant.

The defendant says that she was willing to provide for her mother. No writing was given, no charge created on the land, nothing that plaintiff could shew or rely upon that she could have any interest in her property or any right to remain thereon.

The plaintiff is a simple-minded woman who for years has earned her money by nursing and by going out doing washing when she could get it to do, at $1 a day.

The defendant is a shrewd, forceful woman, and her husband is a business man.

The plaintiff did not understand the transaction which she entered into. It is clear that she supposed the advance of the money by the husband of the defendant was by way of gift, or loan, and that she was to be taken care of by the defendant and that she by her will, or in some way to take effect after her death, would give this property to her daughter.

I feel quite sure that neither the defendant nor her husband is satisfied that in procuring the conveyance to the defendant was a fair thing, and in order to give colour of right, to what was done, they aver the illegitimacy of the defendant, and as such could not inherit from the mother in case of the mother dying intestate. I cannot accept the story of the defendant or her husband, but on the contrary I do accept the evidence of the plaintiff, that the defendant was born in lawful wedlock. The consent by the plaintiff to the defendant getting the conveyance was an improvident thing on the plaintiff's part. She acted without advice. She was not a match in business matters for the defendant. Getting this conveyance was not all. Even as defendant understood the arrangement it has not been carried out by the defendant. No provision whatever has been made for the plaintiff's maintenance or her residence on the land. It would be most inequitable that the plaintiff should be at the mercy of her daughter or her husband.

Judgment will be for the plaintiff. There will be a declaration that the defendant holds the land in the statement of claim mentioned as trustee for the plaintiff. The land will be charged in favour of the defendant with the sum of $70 paid by her on the land, and with the amounts paid for taxes and insurance premiums, with interest upon each of these sums at 5 per cent. per annum from the date of payment by defendant to date of repayment by the plaintiff. Upon payment being made, the defendant will execute a conveyance to the plaintiff of the land in question free of all encumbrances, if any created by the defendant, or her assigns.

Judgment will be without costs.

Twenty days' stay.

HON. MR. JUSTICE MIDDLETON, IN CHRS. FEB. 9TH, 1914.

RE TUDHOPE MOTOR CO.

5 O. W. N. 865.

Company — Winding-up — Petition for under Dominion Winding-up Act, by Creditor Unwilling to Accept Compromise of Claim.

MIDDLETON, J., *held*, that a creditor cannot be compelled to accept the obligation of another company for his claim.
Order granted.

Motion by Parish & Bingham, creditors, for an order for the winding-up of the company, under the Dominion Winding-up Act.

J. A. Macintosh, for the petitioners.

M. B. Tudhope, for the company.

D. Inglis Grant, for creditors opposed to the motion.

HON. MR. JUSTICE MIDDLETON:—I am inclined to think that it may in the end turn out that the arrangement made and accepted by the majority of the creditors may be found to be from a business standpoint the best possible, but in my view this affords no answer to a winding-up application by a dissenting creditor. The creditor cannot in this way be compelled to accept the obligation of another company for his claim. He has the right to invoke the aid of the Winding-up Act and so to obtain what he can. It is not the case of a choice between a liquidation under the Dominion Act and a distribution of the debtor's estate under an assignment. There the Courts have found a discretion to exist, but this is an attempt to *coerce* an unwilling creditor by refusing to exercise the jurisdiction of the Court in his favour because of his unwillingness to accept a compromise which he deems unreasonable. No case can be found to justify this course. When the winding-up order is made the creditors may fiind that the arrangements made bind him, or that under the Act the majority may control his action, but this cannot be anticipated and he must be left to see how these matters work out.

The usual order must go. Costs of all parties out of the estate (if any).

HON. SIR. G. FALCONBRIDGE, C.J.K.B. FEB. 5TH, 1914.

RE GEORGIAN LAND AND BUILDING CO.

5 O. W. N. 859.

Vendor and Purchaser—Title to Land—Sale under Power in Mortgage—Evidence of Default — Short Forms of Mortgages Act, R. S. O. 1897 ch. 126, Schedule No. 14—Requisition on Title—Vendors and Purchasers Act.

Motion by the vendor under the Vendors and Purchasers Act, for an order declaring that an objection to the title of the vendor made by the purchaser, upon an agreement for the sale of land, viz., that a requisition made by the purchaser upon the vendor, to furnish evidence of default in payment of mortgage-moneys, a sale under the power in the mortgage-deed having been made, and the vendor deriving title thereunder, had been satisfactorily answered.

Glyn Osler, for vendor.

J. H. G. Wallace, for purchaser.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The evidence of default is the best now obtainable and is in my opinion sufficient.

But also, the extended form of the proviso R. S. O. ch. 126, p. 1186, sec. 14, contains the words "Of which default as also of the continuance, &c. . . the production of these presents shall be conclusive evidence."

The requisition has been satisfactorily answered.

No costs.

HON. SIR. G. FALCONBRIDGE, C.J.K.B. FEB. 7TH, 1914.

OWEN SOUND LUMBER CO. v. SEAMAN, KENT CO. LIMITED.

5 O. W. N. 861

Timber—Manufacture and Sale of Lumber — Refusal to Accept—Defects—Evidence — Time of Delivery — Damages—Resale of Lumber by Vendors—Mode of Selling—Reference.

Action for the price of lumber or for damages for breach of contract by refusal to accept the lumber.

W. H. Wright and J. C. McDonald, for plaintiff.

F. Smoke, K.C., and F. H. Kilbourn, for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The defendants endeavour to import into the contract a provision as to time, which cannot be done. The contract is of their own drawing.

The defects charged in manufacture, piling, etc., are not established by the weight of evidence. Plaintiffs' was a country mill and defendants had dealt with them before.

There will be judgment for plaintiffs for $1,862.96 and costs.

Defendants complained of the mode adopted by plaintiffs in selling the lumber, as not tending to get the best price. They did not satisfy me that a better result could have been produced by any other method of disposing of it. But defendants may have a reference as to damages at their own risk, and in that event further directions and subsequent costs will be reserved.

Thirty days' stay.