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HON. MR. JUSTICE KELLY. JUNE 27TH, 1912.

## BOLAND v. PHILP.

3 O. W. N. 1562.

*Vendor and Purchaser — Contract for Sale of Land — Absence of Authority from Owner—Contract with Husband—Correspondence—Establishment of Contract.*

KELLY, J., dismissed without costs action for specific performance of an alleged agreement to sell certain lands, holding that no authority had been given by defendants to their agents for the sale and that there was no sufficient note or memorandum in writing to satisfy the Statute of Frauds.

Plaintiff brought this action against William H Philip (or Philp) and Ida Emily Philip (or Philp), husband and wife, for specific performance of an alleged agreement for the sale of property on Murray street, in West Toronto, or in the alternative for damages for breach of the agreement.

Tried at Toronto without a jury on June 10th, 1912.

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

G. H. Gray, for the defendants.

HON. MR. JUSTICE KELLY:—Defendant Ida Emily Philp is the owner of the property; the evidence shews that any negotiations or dealings with plaintiff in respect of it were carried on not by her, but by others without any instructions or authority from her. She is not, therefore, liable.

As to defendant William H. Philp, he had had dealings with an agent, Bergland, in relation to other property, and mention was made between them of the property now in question, although it is not clear that any instructions were given to Bergland to sell it.

On 14th September, 1911, defendant W. H. Philp being then in Saskatoon, a telegram was sent to him by Bergland that he had an offer for the purchase of the property, the offer referred to being a verbal one by plaintiff, who made it to one Findlay, to whom he then paid $20 and from whom he took a receipt therefor, "as deposit on offer to purchase lots 36, 37, 38, 39 Murray street."

Findlay was not associated with Bergland, but having learned from plaintiff that he was desirous of investing in the purchase of real estate and knowing of the property in question, he negotiated to bring about a purchase thereof by plaintiff; and having communicated with Bergland the three of them went to examine the property or what they believed was this property. It was after this examination that plaintiff made the verbal offer and paid the $20.

Defendant W. H. Philp, on September 15th, replied by telegram to Bergland refusing the offer, but mentioning terms which he would be willing to accept.

Plaintiff, on or about 15th September, became aware, through searching the Registry Office, that defendant Ida Emily Philp, and not William H. Philp, was the owner of the property.

On September 20th this telegram was sent by Bergland to W. H. Philp, at Saskatoon: "Have another offer your two hundred feet Murray Street at seventeen fifty a foot. Three hundred cash. Two hundred and fifty every six months and entire balance in three years. Interest six per cent. Very responsible party who is financially good. Advise you to accept this offer. Answer immediately."

Both telegrams to Philp were written out by Findlay who signed Bergland's name thereto. Bergland denies that he was aware that the telegram of September 20th contained any reference to the responsibility and financial standing of the party making the offer, or that it advised the acceptance; but he admits that he approved of the other terms of the telegrams and of Findlay's signing his name thereto.

On September 21st, Philp replied to Bergland by the following telegram: "Accept offer. Property in wife's name. Back in two weeks." A formal contract was then prepared between plaintiff and Ida Emily Philp and was signed by plaintiff, but on its being presented to Mrs. Philp for her signature, she refused to sign it, and denied any right or authority in her husband or Bergland or any other person to offer the property for sale.

Plaintiff then fell back on the telegram and receipts as constituting an agreement for breach of which he claims he is entitled to damages as against defendant W. H. Philp.

After Bergland's receipt of the last recited telegram, Findlay communicated with plaintiff, who paid Findlay another $80 by cheque, payable to The Realty Exchange, the cheque not indicating in any way the purpose for which it was given. It was endorsed by "The Realty Exchange, W. H. Findlay;" Findlay received the proceeds thereof, which, at the time of the trial, was still in his possession.

I do not think plaintiff can succeed in his contention that Philp's telegram of September 21st, and the endorsement by Findlay of the $80 cheque (or indeed all the telegrams and receipts taken together), constitute a memorandum of an agreement sufficient to satisfy the Statute of Frauds. Philp's telegram of September 21st to Bergland was simply an instruction to accept the offer. Bergland did not act on it by giving any acceptance.. Whatever authority was given by Philp was to Bergland only, and even if Findlay took the $80 cheque and signed the endorsement thereof under instructions from Bergland, and even if that act could be held to constitute an acceptance by Findlay of plaintiff's offer, the plaintiff's case is not made out, for Bergland had no power to delegate the authority given to him.

On the whole evidence the plaintiff's action must be dismissed, but as the course pursued by W. H. Philp tended to mislead plaintiff into the belief that he was dealing with those who had a right to contract with him, and for other reasons appearing upon the evidence, the dismissal will be without costs.

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HON. MR. JUSTICE KELLY. JUNE 27TH, 1912.

## RE SOPER.

3 O. W. N. 1573.

*Husband and Wife—Dower—Forfeiture—Adultery—R. S. O. (1897) c. 164, s. 12.*

KELLY, J., *held*, that a wife who had deserted her husband and refused to return and had lived for a long period of time in adultery with another man had forfeited her right to dower.

*In re S.* 14 O. L. R. 536, referred to.

An application under sec. 12 of The Dower Act, R. S. O. (1897), ch. 164, to authorize the applicant to sell free from

the dower of his wife certain lands described in the affidavits filed, and to declare that the wife has forfeited her right to dower.

W. J. McLarty, for the applicant.

Hon. Mr. Justice Kelly:—The facts as shewn by the affidavits filed by the applicant are that the applicant married his wife in 1856, that they lived together as husband and wife until 1871, there being then four children of the marriage; that in 1871, the wife left home with one R., taking with her the four children; and she continued to live with R. as his wife from that time; that she and the four children adopted the name of R.; that two children, at least, were born to her while living with R.; that soon after she left her husband he followed her to Montreal for the purpose of having her return, but she evaded him, and thereafter lived with R., at first in the province of Quebec, then in Toronto, and later in British Columbia.

In 1907 she called on the applicant and requested him to sign a writing declaring that he had not been properly married to her, the object being to establish that her son by said R. was a legitimate son of R. and herself, so that he might inherit certain property of R., who was then dead.

The applicant in his affidavit states that she at that time admitted to him that she had lived with R. as his wife down to the time of his death, and that she had a number of children by R.

With the exception of this occasion, and perhaps at one other time prior thereto the applicant has not since 1871 seen his wife, and he does not now know whether she is living or dead.

On the facts as submitted, and for the reasons given in *Re S.* , 14 O. L. R. 536, and the cases therein considered, it is quite clear that the wife of the applicant is not entitled to dower. The applicant is entitled to an order dispensing with the concurrence of the wife for the purpose of barring her dower.

COURT OF APPEAL.

JUNE 28TH, 1912.

## TOWNSHIP OF ORFORD v. TOWNSHIP OF ALDBOROUGH.

3 O. W. N. 1517, O. L. R. .

*Drains—Outlet Liability—Municipal By-law—Jurisdiction of Township Council—Municipal Drainage Act, s. 3, s-s. 3, 4, s. 77.*

COURT OF APPEAL *held*, (*per* GARROW, J.A.), that s. 77 of the Municipal Drainage Act as to "repairing upon report" covers the repair and improvement of an existing drainage system with an insufficient outlet and that such work can be initiated by report without petition.

Effect of 6 Edw. VII. c. 37, s. 9, upon the decisions of *Sutherland Innes* v. *Romney*, 30 S. C. R. 495; *Orford* v. *Howard*, 27 A. R. 223 and *Rochester* v. *Mersea*, 2 O. L. R. 435, discussed.

That where an unimportant natural watercourse becomes incorporated in an artificial drainage system, it loses its identity and adjoining lands lose their immunity from liability for up-keep.

*Re Elma* v. *Wallace*, 2 O. W. R. 198, and *McGillivray* v. *Lochiel*, 8 O. L. R. 446, distinguished.

Appeal from judgment and report of Drainage Referee dismissed with costs.

An appeal by the township of Orford from a judgment of the Drainage Referee, dismissing with costs an application to set aside a by-law passed under the provisions of The Municipal Drainage Act, and based upon the report of G. A. McCribbon, O.L.S., assessing and charging the sum of $3,225, against the lands and roads in the township of Orford in respect of a proposed drainage work in a natural creek or watercourse, known as Kintyre creek, in the township of Aldborough.

The appeal to the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW. HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

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

C. St. Clair Leitch, for the respondent.

HON. MR. JUSTICE GARROW:—The facts are very fully set out in the judgment of the learned Referee, in the course of which he said:—

"Dealing with the question of whether or not the old outlet of the Pool drain is sufficient, I am satisfied as the

findings I have already made indicate that it is not and never had been a proper outlet for the waters which are conducted to it. It may be that the assessment as to waters tributary to the Kintyre creek in Orford would be more properly outlet assessment, but in view of the fact that there is no practical difference in this case in the result between the assessment for outlet liability and assessment for injuring liability, I have not thought it fit to suggest any alteration in the report. Had there been any practical difference so as to necessitate a re-adjustment of the assessment, I might possibly have thought fit to suggest that. But however one regards it, the result is the same. There are waters brought to the old outlet, and which flow beyond it, causing damage to lands below. These waters occasion injury, and the engineer is justified in relieving them and in assessing the lands which cause the injury accordingly," which seems to tersely epitomize the case with which we are called upon to deal.

Counsel for the appellant addressed us very fully and very ably upon certain objections, all of which are in their nature objections going to the jurisdiction of the council. These briefly stated are: (1) The proceedings should have been initiated by petition, and not by report without petition; (2) The work proposed is useless to Orford lands, which already have a sufficient discharge by the works already constructed, and for the construction of which the land owners in Orford have paid their share; (3) The Orford lands discharge into natural watercourses with defined banks, and are for that reason not liable for the proposed work; (4) The proposed work does not improve the present outlet, or furnish a sufficient outlet.

There were also objections as to the details of the assessment and upon the merits generally, all of which were very fully dealt with by the learned Referee with a knowledge and experience in such matters to which I cannot pretend, and I therefore, content myself with a general agreement with his conclusions as to them.

Dealing now with the objections to the jurisdiction before mentioned and taking them in their order, I am quite unable to follow the learned counsel in his contention that a petition was necessary. The contention necessarily implies that if there had been a petition the objection would fail. I could more easily understand an argument that even upon petition the circumstances are such that the relief could not

lawfully be granted and that, that being so, there could be no relief, either upon petition or report—in view of the fact which we have here of an intervening watercourse. Such an argument would have had some shew of virtue, and even of authority (see *Rochester* v. *Mersea,* 2 O. L. R. 435), under the old and narrower construction of sub-sec. 3 of sec. 3 of the Municipal Drainage Act by reason of the absence from it of the words "either directly or through the medium of any other drainage work or of a swale ravine or creek or watercourse," which are in sub-sec. 4. The "any means," in sub-sec. 3 did not, so it was held, include a "swale ravine, creek, or watercourse," always, it seems to me an excessively narrow construction. But if it be granted as it apparently is that the relief required could be obtained on petition the objection seems to utterly vanish. What is proposed is not the construction of a new drainage work, but merely the repair and improvement of an established system, which experience has proved is defective in that lands and roads along its course are being flooded from year to year by the overflow of waters for which that system provides no adequate or sufficient escape. Such a case seems to me to very clearly fall within the express provisions of sec. 77 of "The Municipal Drainage Act," as to "repairing upon report."

In considering such cases as *Sutherland Innes* v. *Romney,* 30 S. C. R. 495, and *Orford* v. *Howard,* 27 A. R. 223, both of which were much discussed before us, it should be remembered that this section, which is old sec. 75, was very materially amended after both these decisions, by 6 Edw. VII., ch. 37, sec. 9, so as to be made expressly to apply to the case of the better maintenance of a natural stream, creek or watercourse, which had been artificially improved by local assessment or otherwise in the same manner and to the same extent and by the same proceedings as are applicable to the better maintenance of a work wholly artificial. The effect of this amendment is very wide. It destroys at one blow the value of much that was said in *Sutherland Innes* v. *Romney,* never, in some respects an entirely satisfactory decision: see per Armour, C.J., in *Rochester* v. *Mersea* before cited at p. 436; it restores the authority of *Orford* v. *Howard* as an exposition of sub-sec. 3 and 4, which had been shaken by the *Sutherland Innes Case,* and quite apart from these, and from all the other cases decided before the amendment, it apparently gives a new and substantive right, directly applicable to the facts and circumstances which here appear.

It would, perhaps, have been better if the Legislature had expressly made the words which I have quoted from sub-sec. 4 applicable also to the previous sub-sec. To have done so would at least have saved some rather hair-splitting arguments upon the subject to which the Courts have had from time to time to listen. There is upon the face of things no good reason why injuring liability should stand upon one foundation, and outlet liability upon another and a different one. It must surely often happen that certain sections or lots in a drainage scheme are liable for both. In *Orford* v. *Howard*, Lister, J., apparently with the concurrence of the other members of the Court, held that the amendment of sub-sec. 4, by the introduction of these words had had the effect of also enlarging the meaning of sub-sec. 3, a conclusion fortified and put beyond question by the subsequent amendment, which while not primarily directed to sec. 3, is directed to another and a minor phase of the same subject-matter.

The second and third objections which are somewhat related, may perhaps be conveniently considered together.

It is not, in my opinion, necessary in this case to discuss the general question of the riparian right of drainage into natural watercourses for the purposes of agriculture. The facts in the cases of *In re Elma & Wallace*, 20 W. R. 198, and *McGillivray* v. *Lochiel*, 8 O. L. R. 446, to which counsel referred, and upon which he relied, were very different. Fleming creek and Kintyre creek, both, although small, entitled in strictness to be called watercourses, long ago lost their natural condition, and became part of an artificial drainage system created under the drainage laws of the province. The law permits that to be done. And when it is done the part of the system which was once a natural watercourse is entitled to no particular immunity under the law over the other parts which are purely artificial. The whole must operate so as to discharge the waters which it gathers at a proper and sufficient outlet. The law at least aims at affording complete relief from the common enemy, and not merely a nominal or paper relief, or the relief of one section of the locality at the expense of another. And until this main object is secured I see nothing in the Act pointing to the finality upon which so much of the argument was based. Section 77 provides that "Whenever for the better maintenance of any drainage work constructed under the provisions of this Act or any Act respecting drainage by

local assessment or to prevent drainage to any lands or roads it is deemed expedient to change the course of such drainage work or make a new outlet for the whole or any part of the work or otherwise improve, extend, or alter the work," the council . . . may undertake the work.

These words are very large, but not too large for the accomplishment of the very desirable purpose aimed at by the Legislature, and they should not in my opinion be narrowed by the construction for which the appellant contends.

The remaining objection, of the insufficiency of the proposed outlet, is a question of fact depending upon the evidence, and was determined against the appellant by the learned Referee. The learned Referee in the course of his judgment points out the importance in this case of a personal inspection which he had made. Whether or not his conclusion upon this objection was affected by the inspection does not, I think, appear, but however that may be, while the finding is not in some respects entirely satisfactory, I am not convinced that it is erroneous. And I reach this conclusion with the less regret because the objection does not appear in the written notice of objections served by the appellant which contains some 13 other objections. It it had, it is quite possible that further and more satisfactory explanations would have been forthcoming.

Upon the whole, the appeal in my opinion fails, and should be dismissed with costs.

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HON. MR. JUSTICE BRITTON. JUNE 28TH, 1912.

## MOSIER v. RIGNEY.

3 O. W. N. 1564.

*Will—Testamentary Capacity—Absence of Undue Influence—Proof of Will in Solemn Form in Surrogate Court—Action in High Court.*

BRITTON, J., dismissed action without costs to set aside a will made by testator a few hours before his death on ground of want of testamentary capacity.

An action to set aside the will of the late John Bowman, tried at Kingston without a jury.

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

J. L. Whiting, K.C., for the defendants.

HON. MR. JUSTICE BRITTON:—John Bowman made his will on the 24th December, 1910, and on the same day died in L'Hotel Dieu hospital at the city of Kingston. On the 13th day of January, 1911, the plaintiff, Mary Mosier, who is a first cousin of the deceased, caused a caveat to be filed in the Surrogate Court of the county of Frontenac. J. McDonald Mowat was the plaintiff's solicitor in the matter. The grounds stated, on which the caveat was lodged, were that at the time when the paper writing alleged to be the last will of Bowman, purported to be executed, the said deceased was not in possession of his faculties—was not of a disposing mind, and was brought to sign the paper by undue and improper influence.

Baillie, one of the named executors, renounced probate. Rigney, the other named executor, filed in the Surrogate Court a statement of claim and asked for probate.

On the 7th May the plaintiff, by her solicitor, filed her statement, alleging want of testamentary capacity, undue and improper influence, and that the paper writing did not express the will of the testator. Upon motion made pursuant to leave of the Surrogate Judge, the matter came on for hearing. Evidence was taken—affidavit evidence and *viva voce*—and on the 14th day of March, 1911, that Court made an order that the paper then and now in question was the will of John Bowman and that the same should be admitted to probate, as "proved in solemn form of law."

On the 16th day of March, 1911, letters of probate issued. This action was commenced by plaintiff—by Mr. Mowat his solicitor on the 30th day of January, 1911, and pending proceedings in Surrogate Court nothing further was done after appearance until the 13th September, 1911, when the statement of claim was filed. In it, the fact is stated that letters of probate were granted to the defendant-executor, after proof in solemn form. The grounds of attack upon the will are precisely the same as taken in the Surrogate Court. Each defendant put in a statement of defence. No defendant asked to have proceedings in this action stayed on the ground, or pleaded as a defence, that by the order of and the grant of probate by the Surrogate Court the mental capacity of the testator to make a will, was *res judicata*. Under these circumstances I dealt with the case as if before me in the first instance. The deceased was taken ill three or four days before the day of his death. Dr. Kilborn was called in. Upon the doctor's order, the deceased was taken

at once to the L'Hotel Dieu hospital—and there, the doctor —who was acquainted with deceased paid close attention to him during his short illness. The doctor visited deceased on the 23rd December, and says that the deceased was on that day mentally all right. He saw deceased again on the following day, after 9.30 a.m. and before 11.30 a.m. The deceased at that interview knew the doctor—spoke, said he was better, but immediately his mind began to wander. The doctor is of opinion that the deceased was not at time of last interview, capable of making a valid disposition of his property. Death occurred shortly after 11.30 on the 24th December, 1911. The doctor stated, that, in his opinion the deceased may have been competent at 7 a.m. on the day of his death. The circumstances attending the making of the will are—that when the sickness of the testator seemed likely, and very soon, to terminate fatally, one of the sisters in charge, telephoned to the defendant Rigney. Mr. Rigney cannot be said to have been the general solicitor of the corporation L'Hotel Dieu, nor did it appear that Mr. Rigney was asked for, or that any lawyer was asked for by deceased. Rigney went at once. He did not know the relatives of deceased—or the names of his friends—or the value of his estate.

Rigney's testimony was clear that the deceased intelligently gave instructions for the will—these instructions were taken down in writing by Rigney—before he drew the will itself—then the will was drawn. The will was carefully read over to deceased who seemed to fully understand it. The deceased named his sister-in-law and gave reasons for leaving her only interest on money to be invested. Deceased named "Frank Blake," and at first named a smaller amount in giving instructions but changed it to the sum of $500. So far as appears, nothing was said by deceased as to value of estate or of what it consisted. It was in fact a large estate for a man of the mode of life and habits of deceased. The deceased was not interested in charitable work, and beyond a small donation on at least one occasion it was not shewn that he had given money to charities. None of the relations of deceased could reasonably expect gifts by will or otherwise from him. The comparatively large wealth of deceased was simply the result of accumulations held to by deceased until obliged by death to let go,—and when about to give it up, there was apparently some indifference as to who should get, or who should manage his estate.

The evidence of Rigney was fully corroborated by the affidavits of the subscribing witnesses to the will, and also by the oral testimony of witnesses in the Surrogate Court, and before me except in the evidence of Jas. T. Delaney.

This witness says his statement in the Surrogate Court was not a true statement, and could I accept his evidence as true, I would be obliged to decide against the will—considering Delaney's demeanour in the box—having regard to the affidavit he made, the evidence he gave before the Surrogate Judge, his contradiction by himself and by the other witnesses I cannot accept as true what Delaney said before me.

Upon the whole case, the attack upon the will fails. It was a proper case for a caveat—and to ask that the will be proved in solemn form of law. When that was done the plaintiff desiring to go farther could not expect to do so and have her costs borne by the estate should she fail. I do not impute to the plaintiff any understanding with the witness Delaney by reason of which Delaney has given a false statement as I think he has. Not knowing what to do in the face of the changed attitude of Delaney she went on with her action, and had Delaney in Court. She has failed and the most that under the authorities can be done, is to relieve her from paying defendants' costs. This I will do, and the action will be dismissed without costs.

Twenty days' stay.

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DIVISIONAL COURT.

JUNE 28TH, 1912.

## VAN HORN v. VERRALL.

3 O. W. N. 1567.

*Damages — Personal Injuries — Negligence — Elements of Damage —Pecuniary Loss — Pain and Suffering — Increase on Appeal of Damages Awarded by Trial Judge.*

Action for damages for injuries sustained by alleged negligence of defendant's servant in operating an automobile.

BRITTON, J., awarded plaintiff $300 damages and costs.

DIVISIONAL COURT on appeal by plaintiff held that the damages awarded would only compensate for actual pecuniary loss and that plaintiff was entitled in addition to damages for the pain and suffering incurred.

*Rowley* v. *London & North-Western Rw. Co.*, L. R. 8 Ex. 221, and *Phillips* v. *South-Western Rw. Co.*, 4 Q. B. D. 406, and 5 Q. B. D. 78, referred to.

Judgment below varied by increasing damages from $300 to $700. Costs of trial and appeal to plaintiff.

An appeal by the plaintiff from a judgment of HON. MR. JUSTICE BRITTON awarding plaintiff $300 damages resulting from injuries caused by the negligence of defendant's servant in operating an automobile.

The appeal was for a new trial or to vary the judgment by increasing the damages.

The defendant did not appeal against the finding of negligence so that the sole question for consideration was one of damages.

See 20 O. W. R. 545, 773; 3 O. W. N. 337, 439.

The appeal to Divisional Court was heard by HON. SIR WM. MEREDITH, C.J.C.P., HON. MR. JUSTICE TEETZEL and HON. MR. JUSTICE KELLY.

J. W. McCullough, for the plaintiff, appellant.

W. G. Thurston, K.C., for the defendant, respondent.

HON. MR. JUSTICE TEETZEL:—The collision in which the plaintiff was injured occurred on May 24th, 1911; the plaintiff was thrown or pulled from his rig and sustained several minor bruises and suffered considerable pain and distress in his chest and sides, but did not consult his physician until May 31st. On that date the physician says: "he was in quite a nervous condition. . . . In the examining I found that his nervous system seemed to be under a bit of shock, and it seemed to disarrange his system sufficient to require some little help." The pain and distress continued to increase, and on the 10th June acute pneumonia, accompanied with pleurisy, developed. The learned Judge accepting the evidence of two experts found that this condition resulted from the injuries caused by the negligence found against the defendant.

The plaintiff was confined to his bed between three and four weeks, and was for a long time afterwards very weak and unable to do any heavy work. His physician examined him on September 12th, and says at that time: "his heart was displaced to the right about an inch from this pleural effusion in the pleural sac. It was very irregular and very rapid, and his nervous condition was very bad: he was extremely nervous."

On the 14th November his physician again examined him and found him very much improved, but says: "he had not regained his usual vigour; he was still weak."

The plaintiff is sixty-two years old, and before the casualty had been an unusually strong, healthy man. The learned Judge finds that at the trial he appeared to be as well as ever, although the plaintiff himself claimed that he had not regained his normal strength.

The plaintiff's actual expenditures directly attributable to the casualty would be about $100. He was unable to work or devote himself to the superintendence of work on his farm at a time of year when both such work and supervision were greatly needed for the profitable operation of his farm; and while the consequent actual loss is difficult to determine, I am satisfied, after a careful perusal and consideration of the evidence, that $200 would not be an excessive sum at which to fix that loss.

For several weeks after the accident the plaintiff admittedly suffered much pain and even after he was able to be about he must have suffered much physical discomfort from his nervous condition and the displacement of his heart, as described by the physician. For this pain and discomfort he is clearly entitled to compensation, and in my opinion the amount should not be less than $400.

The plaintiff was guilty of no wrong, but suffered a wrong at the hands of the defendant, and he is not only entitled to be fairly compensated for his pecuniary loss but he is also entitled to a reasonable allowance for the months of pain, inconvenience and loss of enjoyment sustained by him.

With great deference to the learned trial Judge, I am driven to the conclusion that he did not give due effect to the undisputed evidence as to plaintiff's physical injuries and suffering. As the sum awarded will not more than compensate plaintiff for his pecuniary losses, I think it unreasonably inadequate and that in accordance with the principles laid down in *Rowley* v. *London & North-Western Rw. Co.* (1873), L. R. 8 Ex. 221, and *Phillips* v. *South-Western Rw. Co.* (1879), 4 Q. B. D. 406, and 5 Q. B. D. 78, the judgment should be varied by fixing the damages at $700, with costs including the costs of the appeal to be paid by the defendant.

HON. SIR WM. MEREDITH, C.J.C.P., and HON. MR. JUSTICE KELLY agreed.

COURT OF APPEAL.

JUNE 28TH, 1912.

## SMITH v. EXCELSIOR LIFE ASSCE. CO.

3 O. W. N. 1521.

*Life Insurance — Policy — Condition — Breach — Assured Taking Employment on Railway without Permit — Knowledge of Agent of Insurance Company — Acceptance of Premiums by Company —Authority of Agent — Absence of Notice to or Knowledge of Company.*

Action by beneficiary under a policy of insurance issued by defendants upon the life of one C. F. Smith dated May 16th, 1898, for the amount of the policy $1,000. The policy provided that, if within two years of its date the insured then a farmer should be employed on a railway without a permit from defendants the policy should become void and all premiums paid thereunder should be forfeited. Within two years from the date of the policy deceased was employed on a railway and continued in such employment until his death in a railroad accident on July 20th, 1911. The company had no knowledge of a change of occupation, but some time after the two-year period their local agent at Sarnia who had sent in the application heard of it but did not notify the company. By the terms of the policy the local agent was not allowed to alter or modify any terms of the policy or grant any permits.

BRITTON, J., *held*, (20 O. W. R. 449; 3 O. W. N. 261), that defendants had waived the condition and gave judgment for plaintiff with costs.

COURT OF APPEAL *held*, that defendants having no notice or knowledge of the facts could not be deemed to have waived the condition nor could they be estopped from setting it up.

*Western Assurance Co.* v. *Doull*, 12 S. C. R. 446, and other cases referred to as to authority of local agent.

Appeal allowed and action dismissed both with costs.

An appeal by the defendant from a judgment of HON. MR. JUSTICE BRITTON at the trial in favour of the plaintiff, 20 O. W. R. 449; 3 O. W. N. 261.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

H. E. Rose, K.C., for the defendants, appellants.

John R. Logan, for the plaintiffs, respondents.

HON. MR. JUSTICE GARROW:—The action was brought upon an insurance policy issued by the defendant for one thousand dollars upon the life of Charles F. Smith payable to his mother the plaintiff Zillah Smith. The policy is

dated the 16th day of May, 1898. At that time Charles F. Smith was a farmer. The policy contained a condition that if within two years from the date of the contract, the insured should, without a permit, engage in employment on a railway the policy should be void and all payments made thereon should be forfeited to the company. The assured did within the period of two years engage in employment on a railway by becoming a fireman upon a locomotive engine, in which employment he continued, and in which he finally lost his life in an accident on July 20th, 1911. There was no evidence that a permit had ever been given, or even asked for to enable the assured to become a railway employee. But the premiums having been paid after the change until the death it was contended by the plaintiff that under the circumstances the defendants should be held to have waived the condition. To this contention Britton, J., acceded and gave judgment for the full amount. I am with deference unable to agree with that conclusion.

The terms of the contract are very clear, and easily understood. What the defendant stipulated for was not merely notice of a change of employment but that for such change a permit should be required. The condition is a perfectly reasonable one. The premium for the one risk naturally differed from that of the other. It is even doubtful on the evidence if at the time the risk was undertaken or the employment changed a locomotive fireman would have been able to obtain from the defendant a policy on any terms.

The change of employment having admittedly taken place without a permit, in breach of the condition, the onus was clearly upon the plaintiff to establish by satisfactory evidence a case against the company of either waiver or estoppel. And the very first step towards making out such a case would necessarily be proof of notice to or knowledge by the company, for without such notice or knowledge there could be neither the one nor the other.

There was no such proof nor indeed any serious attempt made to prove notice to or knowledge by the company as a company. And the negative of any such notice or knowledge at any time prior to the death of the assured was clearly established by the uncontradicted testimony of the general manager Mr. Marshall. What was proved and all that was proved by the plaintiff was that Mr. Telfer, the defendants' local agent at Sarnia, who obtained the risk in

the first instance and who continued to forward the premiums until the death of the assured, had become aware of the change of employment. Exactly when he acquired this knowledge is not clear, but it is clear that it was long after the expiry of the two years within which the condition was operative.

Mr. Telfer's appointment as agent was in writing which was produced at the trial. He was not a general agent, but agent only for the town of Sarnia and vicinity, and such other territory as might be from time to time agreed upon. By the terms of the contract he had no power to make, alter or discharge any contract given on behalf of the company, or to waive any forfeiture or grant any permit or to collect any premiums except those for which policies or official receipts had been sent to him for collection.

In the body of the policy it is stated that none of the terms of the policy could be modified nor any forfeiture waived except by agreement in writing signed by the president, or vice-president, or the managing director whose authority for such purpose it was therein declared could not be delegated.

In the month of August, 1899, or before the expiry of the two-year period, Mr. Telfer retired from the agency, although he continued to forward premiums upon this and some other policies which had been received by him while agent. He, however, never notified the defendant of what he had heard concerning the change of employment, which he apparently did not regard as a matter of any moment, as of course it would not have been if it had occurred as he probably assumed, after the two years had expired. Notice to any agent in the position of Mr. Telfer even if his employment had continued would not be notice to the company. That seems to be settled by authority binding upon this Court. See *Western Assce. Co.* v. *Doull*, 12 S. C. R. 446; *Torropp* v. *Imperial Fire Ins. Co.*, 26 S. C. R. 585. See also *Imperial Bank of Canada* v. *Royal Ins. Co.*, 12 O. L. R. 519, where many cases including *Wing* v. *Harvey* upon which the learned trial Judge relied are cited; and *Wells* v. *Sup. Court Forresters*, 17 O. R. 317. The result might be otherwise if there were any circumstances from which it could be reasonably inferred that the knowledge acquired by the local agent had been in any way communicated to the head office. There are, however here, no such circumstances, while the uncon-

tradicted evidence of Mr. Marshall makes it beyond question that in fact the company never actually had until the death any notice or knowledge whatever of the change.

The appeal must therefore, in my opinion, be allowed, and the action dismissed. And under the circumstances the usual consequences as to costs must follow. It is a great pity that the very reasonable offer made by the defendant at the trial to pay such an amount as the premiums would have paid for in the new and more hazardous employment was not accepted. I have, of course, no power to impose such a term, but I may at least express the hope that notwithstanding the result of the litigation the defendant will again renew the offer, and that the plaintiff will accept it.

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COURT OF APPEAL.

JUNE 28TH, 1912.

## THOMPSON v. PLAYFAIR.

3 O. W. N. 1539, O. L. R. .

*Timber—Crown License to Remove—Contract for Sale of Timber—Authority of Agent to Contract for Principal—Ratification by Acquiescence—Statute of Frauds—Part Performance.*

An action for specific performance by defendants of an agreement for the sale by plaintiff to defendants, Playfair and White, of certain timber, on Yeo Island, Manitoulin district, and for payment of the balance due plaintiff, or in the alternative for damages against defendant Byers, alleged to have been sustained through untrue representations made by him.

RIDDELL, J., *held*, 20 O. W. R. 867; 3 O. W. N. 506; 2 D. L. R. 37; 25 O. L. R. 365, that the alleged agents had no authority either to buy the timber or to sign the contract for the purchase, but the defendants Playfair and White adopted the contract and sent their agent upon the island, which amounted to taking possession of the land and constituted a part performance sufficient to take the case out of the operation of the Statute of Frauds. Judgment for plaintiff against Playfair and White for $5,000, with interest thereon from June 22nd, 1911, and full costs of suit. Action against Byers dismissed without costs.

COURT OF APPEAL *held*, that there was a sufficient memorandum in writing to satisfy the Statute of Frauds, and that there had been ratification by defendants of their agent's acts but no sufficient part performance had been proven.

Appeal from judgment of Riddell, J., dismissed with costs.

An appeal by the defendants, from a judgment of HON. MR. JUSTICE RIDDELL, 20 O. W. R. 867; 25 O. L. R. 365; 2 D. L. R. 37; 3 O. W. N. 506.

The appeal to the Court of Appeal was heard by Hon. Mr. Justice Garrow, Hon. Mr. Justice McLaren, Hon. Mr. Justice Meredith, Hon. Mr. Justice Magee, and Hon. Mr. Justice Lennox.

R. McKay, K.C., and F. W. Grant, for the defendants, appellants.

G. H. Gilmour, K.C., and D. Robertson, K.C., for the plaintiff, respondent.

Their Lordships' judgment was delivered by

Hon. Mr. Justice Meredith:—There are just two substantial questions involved in this appeal, (1) is there a sufficient memorandum in writing to satisfy the requirements of the Statute of Frauds, and if so; (2) are the defendants bound by it?

The receipt given for the payment of one hundred dollars is quite sufficient to bind those who gave it, but obviously it could not bind the defendants who did not; the plaintiff must rely on other writing for that purpose, which she does; at the time when their receipt was given, a copy of it was made, headed with the words "copy of receipt," Byers acting as if their agent in this transaction signed it; and this writing was given to the plaintff's agent; the other being retained by Byers and afterwards sent by him to his masters, the defendants.

If the word approved, or correct or something of that character, had been added to either writing and had been thereunder signed by the defendants I can have no doubt that the writing would be a memorandum of the sale sufficient to satisfy the requirement of the enactment; and I can find no good reason against attributing to the copy of the receipt the same meaning as if such a word had been inserted above the signature. The copy of the receipt was made, signed and given as binding evidence of the transaction; it was a certificate in the defendants' names of that which was set out in the receipt. Then reading the two writings together, as, of course, one may, there is in my opinion a sufficient memorandum signed by the parties to be charged as well as by the other parties.

On the other point, I am unable to differ from the trial Judge in his finding that the transaction was ratified by the defendants, and so is binding upon them whether or not Byers or Thompson—who also was an agent of the defend-

ants and took part with Byers in making the agreement—had authority to make it.

An order was given by Byers on the defendants to pay the $100 "on account of the purchase of Yeo Island," and it was paid; the transaction was so entered in the books of the defendants; for a long time before the transaction the defendants had an eye to the purchase of this property; and investigation to some extent had been made for that purpose. On the 23rd May the defendants wrote to Byers, "Trust you will find a lot of timber on Yeo Island;" on the following day Byers wrote to him, "We closed for the island, at least we have bound the bargain;" and on the same day they wrote to him "I am pleased that you have secured Yeo Island and trust it will turn out a good one for cedar."

These things are not conclusive, but, with others, support the finding, by the trial Judge, of ratification; and in addition to that seems to me sufficient evidence of an antecedent authority.

I cannot, however, find anything in the evidence which would support this transaction on the ground of part performance.

Although not altogether on the same grounds, I would affirm the judgment directed to be entered by the trial Judge.

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COURT OF APPEAL.

JUNE 28TH, 1912.

## MORGAN v. JOHNSON.

3 O. W. N. 1526.

*Vendor and Purchaser—Contract for Sale of Lands—Specific Performance—Action for—Alternative for Damages for Breach of Contract—Agency—Order for Specific Performance Granted—Order for Possession Against Person who Took Possession and Performed Certain Work on Lands when Action was Commenced —Costs to Plaintiff.*

MULOCK, C.J.EX.D., 20 O. W. R. 509; 3 O. W. N. 297, gave judgment for plaintiff for specific performance of an agreement to sell certain lands entered into by an agent of defendant, but with ample authority to sell.

COURT OF APPEAL dismissed appeal therefrom with costs.

An appeal by the defendants Charles Galvin Johnson and William A. Johnson from a judgment of HON. SIR WM. MULOCK, C.J.Ex.D., 20 O. W. R. 509; 3 O. W. N. 297, for the plaintiff at the trial, without a jury.

The appeal to the Court of Appeal was heard by Hon. Sir Charles Moss, C.J.O., Hon. Mr. Justice Garrow, Hon. Mr. Justice Maclaren, Hon. Mr. Justice Meredith, and Hon. Mr. Justice Magee.

E. F. B. Johnston, K.C., and D. Inglis Grant, for the defendants, appellants.

A. H. F. Lefroy, K. C., for the plaintiff, respondent.

Hon. Mr. Justice Garrow:—The action was brought to enforce the specific performance of an agreement for the sale of a parcel of land in the city of Toronto by the defendant Charles Galvin Johnson through his agent and co-defendant to the plaintiff. The agreement is in writing, but is executed in the name of the defendant William A. Johnson the agent, only. And the only question on this appeal is as to the sufficiency of such execution to bind the defendant, Charles Galvin Johnson.

The facts are fully set out in the judgment of the learned Chief Justice, who has very fully and carefully set out his reasons both upon the law and the facts for his conclusions. I entirely agree both with the reasoning and the conclusion of the learned Chief Justice, who has dealt with the matter so fully, that but little more can usefully be said.

There was a contract in writing sufficient under the Statute of Frauds to bind the defendant William A. Johnson. If he had been the owner, judgment against him would have been as of course, for he has no defence. But he was not the owner, but the agent, and the plaintiff's contention is that he was entitled to prove the agency and so hold the principal on whose behalf the contract was made. That such proof may be given is, as the learned Chief Justice points out, well established, and cannot be, and is not, disputed. Then the power of attorney when produced, shews that it is amply sufficient to authorize the agent to sell. That also is not disputed. The contention, therefore, is narrowed to this, that because the power, in the usual form, says that the sale is to be "for me and in my name," a sale by the agent in his own name is invalid. That contention is one for which I can find no authority, and certainly none which would support it was cited to us by the learned counsel for the defendants. It looks to me very like a somewhat desperate attempt by sacrificing the spirit to the letter to construct a defence where there is none, an attempt which now-a-days usually and deservedly fails.

I would dismiss the appeal with costs.

HON. MR. JUSTICE GARROW. JUNE 28TH, 1912.

## LECKIE v. MARSHALL.

3 O. W. N. 1527.

*Contract—Rescission of Sale of Mining Properties—Non-payment of Instalments—Reference—Order for Further Payments of Arrears of Instalments.*

Application by plaintiffs for an order granting leave to rescind a certain agreement in the pleadings mentioned dated May 6th, 1908, for the sale of certain mining properties on the ground of non-payment of instalments of purchase-money thereunder or for such other order as to the Court might seem meet. The action was by the vendors for a declaration that the defendants were no longer entitled to any benefits under the agreement and had been appealed to the Privy Council which gave judgment on May 25th, 1911, in favour of defendants. Pending the litigation several instalments of purchase-money had accrued due from defendants, who were in possession of the properties covered by the agreement.

SUTHERLAND, J., ordered, 19 O. W. R. 803; 2 O. W. N. 1441, that defendants pay into Court on or before August 6th, 1911, the instalments of purchase-money accrued due to the credit of the action.

DIVISIONAL COURT, 20 O. W. R. 117; 3 O. W. N. 86, varied order of Sutherland, J., by permitting defendants to pay the overdue instalments of purchase-money into Court instead of ordering them to do so. In default of payment, relief to be given to parties according to terms of contract. Time for payment extended ten days for first instalment and thirty days for each succeeding instalment.

COURT OF APPEAL dismissed defendants' appeal from judgment of Divisional Court with costs.

*Per* GARROW, J.A., " When a litigant either as plaintiff or as in this case, a defendant by counterclaim, resisting the plaintiff's claim sets up an agreement to sell or purchase land and asks the Court to order specific performance, he necessarily submits to, on his part, perform it, and the judgment which he afterwards succeeds in obtaining is as binding on him as it is on his opponent."

An appeal by the defendant from a judgment of Divisional Court, 20 O. W. R. 117; 3 O. W. N. 86, varying an order by HON. MR. JUSTICE SUTHERLAND, 19 O. W. R. 803; 2 O. W. N. 1441, for payment into Court, and from a judgment on further directions of HON. MR. JUSTICE RIDDELL, and a cross-appeal by the plaintiffs from so much of the latter as reserved further directions.

The appeal to the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

G. Bell, K.C., for the appellants.

Jas. Bicknell, K.C., for the plaintiffs, respondents.

Hon. Mr. Justice Garrow:—The case in one form and another has been before us more than once, and with the facts we are very familiar.

Dealing first with the cross-appeal, chiefly a question of practice, I am unable to see the necessity for the further reservation. The motion was itself a motion on further directions, and ought to have I think made further provisions for disposing of the remaining questions. I would, therefore, allow the cross-appeal, and direct such further amendments, if any, to the order on further directions as may be necessary, with liberty to either party to apply in Chambers in case any subsequent direction becomes necessary; which amendments may, if the parties desire, be defined on settling the minutes of the judgment of this Court.

I am entirely against the defendants' appeal, which it seems to me is based upon unsubstantial, I have almost said fanciful, grounds.

Three points were mainly relied on—first, that the specific performance awarded by the judgment left it optional with the defendant at whose instance it was ordered, to recede from the bargain; second, that owing to the delay caused by the litigation, the property has so much decreased in value that it is now inequitable to compel the defendants to accept, and third, that in any event the Master's report on the title is conditional, and should not be acted upon.

These, and possibly other objections which I have not noted, were all presented and elaborated before us with great ability by the learned counsel for the defendants, but I am quite unable to see any force in any of them. When a litigant either as plaintiff or as in this case, a defendant, by counterclaim, resisting the plaintiff's claim, sets up an agreement to sell or to purchase land, and asks the Court to order specific performance, he necessarily submits to, on his part, perform it, and the judgment which he afterwards succeeds in obtaining is as binding upon him as it is upon his opponent.

As to the second point, the delay of which the defendants complain was wholly caused by their own demand, in opposition to the plaintiff's claim, to have specific performance. That being so, how could they now be heard to complain? If after long delay and changed circumstances a plaintiff comes into Court asking the Court to enforce specific performance, the Court might consider it inequitable to so

order, and leave the parties to their other rights under the contract. But that is not at all this case.

As to the third point—the report of the Master finds that a good title can be made upon certain things in the nature of mere conveyancing being done.

That is not, in my opinion, a conditional finding, or a finding against the title, but a mere finding as to the necessary conveyancing to perfect the good title shewn to be in the plaintiffs.

The appeal should be dismissed with costs, and the cross-appeal allowed, but without costs.

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COURT OF APPEAL.

JUNE 28TH, 1912.

## SMITH v. HAMILTON BRIDGE CO.

3 O. W. N. 1524.

*Negligence—Servant Disfigured and Disabled for Life—Action for Damages—Using Smaller Hooks for Larger Ones—Evidence that Caused Accident.*

An action by plaintiff, formerly an employee of defendants, to recover $2,000 damages for injuries sustained while in defendants' employment, whereby plaintiff alleged he had been disfigured and disabled for life, and that such accident was caused by defendants' negligence in using a lighter pair of hooks instead of the regular ones for transporting an iron beam, causing said beam to fall on plaintiff and break his leg. At the trial the action was dismissed, but assessed plaintiff's damages at $1,500 in event of plaintiff being able to recover.

DIVISIONAL COURT, 20 O. W. R. 227; 3 O. W. N. 177, allowed the appeal and entered judgment for plaintiff for $1,500 and costs, holding that the evidence pointed to the use of the small hooks as the only cause of the accident and that the exchange of the larger hooks for the smaller was negligence.

COURT OF APPEAL dismissed appeal from above judgment with costs.

An appeal by the defendant from a judgment of Divisional Court, 20 O. W. R. 227; 3 O. W. N. 177, reversing a judgment at the trial without a jury before HIS HONOUR JUDGE SNIDER, sitting for a Judge of the High Court, who dismissed the action.

The appeal to the Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

Hon. Wallace Nesbitt, K.C., for the defendants, appellants.

J. G. Farmer, K C., and M. Malone, for the plaintiff, respondent.

Hon. Mr. Justice Garrow:—The action was brought to recover damages caused to the plaintiff by an injury which he received on January 13th, 1911, while in the employment of the defendant in its factory at the city of Hamilton.

On that day the plaintiff, with other workmen, was engaged in moving an iron beam weighing between 2 and 3 tons, when the hooks by which the beam was suspended slipped and the beam fell on him and inflicted severe injuries for which the Divisional Court has awarded him the sum of $1,500.

The negligence alleged was the slipping of the hook, which it is said was an improper hook of insufficient grasp to use for the purpose, and that a larger hook, which was also in use in the factory, should have been used.

The learned trial Judge was of the opinion that the hooks used were proper hooks, that they were made of proper material, and were in good order; and that in strength, shape, and grasp, they were sufficient for the work. And his impression as to the cause of the accident, although not stated as his conclusion, was that the hooks had slipped, not from any defect in them, but because they had not been properly attached to the beam.

The Divisional Court was of the opinion that the hooks were insufficient in grasp, that the larger hooks should have been used, and that the insufficiency of the hooks and not the mode of attaching them was the cause of the beam falling.

The beam had been removed part of the way by means of the large hooks. When the pile of material on the floor over which the beam had to be lifted was reached the foreman directed the men to use the smaller hooks, because the larger hooks from their length would not lift it over the pile, and the change was accordingly made. The plaintiff had been employed in the factory for nearly five years, and was familiar with the work, and also with the appliances. He says the small hooks did not have a good grip, and the beam was too heavy for them. Although he had been engaged in hundreds of similar operations he had never seen the small hooks used before for so heavy a beam. The large ones were always used, and no accident had ever occurred.

Evidence contradicting the plaintiff as to the use of the small hooks on similar work was given on behalf of the defendant, but to my mind it is not very convincing. It does not for one thing quite take away the effect of the practically undisputed circumstance that the large hook was considered the proper thing to use until the pile on the floor was reached, when it was found it would be necessary to change to the smaller one in order to surmount it. And at least one of the witnesses called for the defendant (Mr. Louth), says that in his opinion the larger hook was the better one to use, because, as seems reasonable, it would take a better grip, and was, therefore, the safer of the two to have used on the occasion in question.

The point is, of course, a somewhat narrow one depending upon the evidence, which has to be read with some care to make the necessary discriminations between what is fact, and what is merely excuse or justification after the event. In doing so we are not hampered by any question of credibility, for all the witnesses examined were given credit for candour and impartiality by the learned trial Judge; and after giving my best consideration, I am of the opinion that the Divisional Court arrived at the proper conclusion.

I would dismiss the appeal with costs.

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DIVISIONAL COURT.

JULY 29TH, 1912.

## QUEBEC BANK v. CRAIG.

3 O. W. N. 1635.

*Banks and Banking — Advances by Bank on Security of Raw Material — Bank Act, secs. 74, 88, 89 — Substitution of Goods —Promissory Notes—Payment—Receipt of Proceeds of Manufactured Goods when Sold—Estoppel.*

Action upon two certain promissory notes given by defendant to secure certain advances made by plaintiffs to the Imperial Paper Mills of Canada, Limited, of which he had been manager. The company was in financial straits when the advances were made and required money to purchase sulphite in order that they might turn a large quantity of pulp which they had on hand into paper. Plaintiffs agreed to make the necessary advances for the purchase of sulphite direct to defendant, receiving from him the promissory notes sued on, a lien on the sulphite purchased and an undertaking to keep up the stock of sulphite from time to time. This latter was not done and the sulphite made into paper and sold, the proceeds being turned over to plaintiffs, on account of other advances made. Defendant contended that he should be credited with the value of the sulphite in the paper so sold of which plaintiffs received the proceeds, which amount would extinguish his liability on his promissory notes.

RIDDELL, J., gave judgment at the trial for full amount of plaintiffs' claim with costs.

DIVISIONAL COURT dismissed appeal from above judgment with costs.

An appeal by the defendant from a judgment of HON. MR. JUSTICE RIDDELL, directing judgment for the plaintiffs for the amount sued for and interest and costs.

The action was brought upon two promissory notes dated 23rd December, 1904, and the 31st January, 1905, for $4,500 and $5,000 each, upon which has been paid on account of principal $3,000 and interest to the 15th November, 1906, secured under the Bank Act, sec. 74, now sec. 88, by 312 tons of sulphite pulp.

The appeal to Divisional Court was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LENNOX.

Jas. Bicknell, K.C., and H. W. Mickle, for the defendant, appellant.

F. E. Hodgins, K.C., for the plaintiffs, respondents.

HON. MR. JUSTICE CLUTE:—The defendant was at the time of the advances the manager of the Imperial Paper Mills of Canada Limited, who were largely indebted to the plaintiffs for advances to the company for which the bank held security on pulp wood of the company. The company was in straitened circumstances. Owing to the action of the bondholders who were pressing for payment the bank refused to make further advances to the company for the purchase of sulphite which was necessary to enable the company to continue the manufacture of paper of a certain kind of which sulphite formed an ingredient, it is said, of 18 to 50 per cent. of the value of the product.

The company required sulphite to enable them to work up the wood on hand into pulp and paper. The bank was interested in having the wood upon which they held their lien turned into paper for sale. It was arranged that advances should be made direct to Craig, who should purchase sulphite and give security to the bank upon the sulphite so purchased for the advances so made. It was under these circumstances that the advances were made on the notes sued on. The money was directly used for the purchase of sulphite. Craig, as manager of the company and as owner of the sulphite, allowed the same to be used in the manufacture of paper upon the understanding that the amount so used should be replaced from time to time by the company. This was done. Paper was manufactured and sold and the sulphite replaced down to May, 1906. The company

continued to use the sulphite without replacing it and by July it had all been used up. The defendant contends that it went into paper which was sold and of which the plaintiffs got the benefit; in short, that they were paid in full for the advances made upon the notes by receiving the whole of the proceeds of the paper when manufactured and sold, and that the bank was bound to account to the defendant to the extent of the value of the sulphite on a sale of the paper and which, he contends, realised sufficient to pay the notes in full.

It is, I think, rather a question of fact than of law.

It is clear that the bank did not lose their security for the advances made to defendant by the substitution of other sulphite in place of that first given in pledge, as this was the intention of all parties under the arrangement.

Sub-section 2 of sec. 88 expressly provides that the bank may allow the goods covered by such security to be removed and other goods of substantially the same character and value substituted therefor and such substituted goods shall be covered by the security as if originally covered thereby. Under sec. 89 it is provided that the bank may continue to hold security during the process and after completion of its manufacture with the same right and title as it held the original goods. Sub-section 2 gives the bank priority even over an unpaid vendor unless the vendor also has a lien known to the bank.

That the purchase by Craig of the sulphite was made to facilitate the business of the company is evidenced by a declaration to that effect in an agreement made between Craig and the company in July, 1904.

In dealing with questions of fact the trial Judge states that he had no reason to doubt the veracity of any of the witnesses, but that the recollection of other witnesses was to be preferred to that of the defendant Craig in matters in which they disagreed. After a careful perusal of the evidence I have formed the same opinion.

The case turns largely upon what took place in carrying on the business between the 1st of May and the end of June or the first of July when the crash came. Watson was assistant-treasurer acting under the direction of the defendant. He did the financing and full credit is given to his evidence by my brother Riddell. If the facts are as he states, and I see no reason to doubt them, they are conclusive in my opinion against the defendant's contention.

It appears from his evidence that the sulphite purchased by advances given upon the notes was used up within a month or two thereafter and was replaced by purchases from time to time; that by the direction of the defendant about the beginning of May, 1906, the sulphite on hand began to be depleted by not being replaced as it was used. The bank was not aware of this until sometime towards the end of June when the local manager ascertained that it was all used up.

The company required advances from time to time for the running of the mill. These were obtained by selling the paper and assigning the accounts. The bank, however, did not collect these accounts. They were collected by the company and immediately they were collected the accounts so assigned to the bank were redeemed by the company. Assuming that the value of the sulphite went into this paper sold and that the bank had the right to follow it and hold the proceeds of the paper as security for the original advance upon the notes and the defendant had the correlative right of insisting that the proceeds on the sale of the paper should be so paid, the question remains, and it seems to me the only question, as to what in fact took place upon the sale of the paper and whether the action of the company, with the knowledge and sanction by the defendant, precludes the defendant now from claiming such right.

Watson says that when the advances were being obtained the sulphite hypothecations never came into discussion. He says that in May he pointed out to the defendant that they were using up the sulphite; that as the paper was manufactured and shipped out they would hypothecate the accounts to the bank and draw the money from it and then repay them as the cheques came in from the different parties; that the bank thus advanced about $28,000 in June, the bank advancing from 90 to 94 per cent. of the face value; that this question of advances was discussed constantly with the plaintiff, and they were doing the best they could to try and keep the thing afloat pending some arrangements to be made in the old country.

"Q. Did the bank know that the amount which ought to be kept there to keep their securities safe was diverted so as to go into this paper? Did the bank know that you were depleting their lot? A. No, I do not think they knew of that until the time of the trouble in July." This is confirmed by the evidence of Kirby, the bank manager.

"Q. Up to February you had been keeping it replaced? A. Yes, up to May. It was only up to May. It was only when the supply was to come from their own mill that we let it drop back, and Mr. Craig understood this because it was his own suggestion, we took it; and instead of paying out money we were going to use the sulphite which we were making ourselves."

The whole evidence so far as it affects the line of defence set up by the defendants, may be reduced to this. It is true the bank held the security on certain sulphite purchased by the defendant as collateral to the notes; that it was the intention of all parties that this sulphite should be used and it was used in the manufacture of paper; it was also understood that it should be replaced by other sulphite bought by the company. This was done down to May, 1906, when all the sulphite on hand was used up. The paper manufactured and of which this sulphite formed a part was sold. Indirectly the bank received the proceeds of it, but before they received such proceeds the paper had been sold by the company and the accounts assigned to the bank and advances made thereon to the extent of from 90 to 94 per cent., and all this was done by the sanction of the defendant. The evidence further shews that over and above the advances so made, there was no surplus after deducting the value of the wood owned by the company and pledged to the bank.

In my opinion, the defendant having authorised the assignment of the accounts arising from the proceeds of the paper manufactured from the sulphite forming the security for the notes and having received the advances thereon to their full value over and above the value of the wood and having made no claim at the time that the proceeds should in part be applied upon the notes, cannot be heard now to charge the bank with the loss of the sulphite or with its proceeds. He himself authorised the arrangement by which the company obtained the advances to the full extent of its value.

After the bank had ascertained that their security was gone they pressed the plaintiff for payment and it was under such pressure that the $3,000 and interest was paid. Mr. Kirby swears that so far from the plaintiff repudiating what was done or claiming that the notes had been paid, he repeatedly promised to pay them.

On the 17th of September, 1906, an agreement was made subject to the approval of the bondholders by which the

business of the company could be carried on and a committee was named representing the various interests for that purpose. The 17th clause of that agreement is as follows: "The parties to the present agreement hereby expressly recognise and admit any special lien or privilege that the party of the third part (the bank) may have under section 74 of the Bank Act on the whole product of the mill which may be on hand on the 17th day of September instant and which was manufactured previous to September 1st, 1906, and consent that the party of the third part shall take the whole of such product towards the payment of its debt for wood furnished by it to the mill prior to that date and which may still be unpaid for." The defendant signed that agreement as managing director of the company, he being no party to the agreement except as representing the company. He then made no claim to any part of the proceeds of the paper on hand, and it seems probable that he did not do so because he had intimate knowledge that his interest in the sulphite as security was already gone owing to advances made by the bank.

It was urged upon the argument that Mr. Jones, who subsequently became the local manager of the bank at Sturgeon Falls, by his affidavit on the 14th February, 1907, in another action made claim to this sulphite on the part of the bank. The clause referred to is as follows: "4. That at the date of the said agreement (that is the agreement last referred to) there was in the said mill and in and about the premises a large stock of paper, ground wood and sulphite, the product of wood upon which the above-named Quebec Bank held securities under sec. 74 of the Bank Act." This is the new evidence sought to be given on the argument. The Court having intimated that Mr. Jones might be further examined as to this so as to make it evidence and that the defence should have the opportunity of cross-examining, Mr. Hodgins stated that rather than delay the case he would consent to the affidavit being read. I do not think, however, that this statement by Mr. Jones affects the plaintiff's position.

Having regard to the facts of the case as now known I think the fair reading of the clause is that the paper which was made up of ground wood and sulphite was the product of wood upon which the bank held securities under sec. 74 of the Bank Act. That was perfectly true, but it was made long after the plaintiff, in the view I take of the case, had

lost any right to claim the proceeds of such paper by authorising the assignment of the accounts to obtain advances.

There is a further view arising out of the facts of the case that also in my opinion precludes the defendant's recovery. The bank in fact did not sell the paper or receive the money on such sale. The various transactions were carried through by the company. Payments were made to the company and then the amount of the accounts which had been assigned by the company to the bank was paid out of the money so received. In other words, the bank has never received any part of the proceeds of the paper on account of or by means of the warehouse receipts.

In my opinion the defendant is estopped from making claim now to the proceeds of the sulphite which he himself directed in another channel and by which it was lost to the bank.

I agree in the conclusion arrived at by the trial Judge, and think the appeal should be dismissed with costs.

HON. MR. JUSTICE SUTHERLAND:—I agree.

HON. MR. JUSTICE LENNOX:—The defendant appeals from the decision of HON. MR. JUSTICE RIDDELL, directing judgment for the plaintiffs for the full amount claimed and costs.

When the defendant made the notes sued on in this action, it was agreed, and was understood by all the parties interested, that as the sulphite obtained by the money advanced was put into the manufacture of paper, other sulphite would be purchased and put in stock; and in this way the bank's security, and incidentally the security of the defendant, would be maintained. This was done for a time, but not after the beginning of May, and the whole stock of sulphite was gone by the end of June, 1906. When the paper into which this sulphite was put was sold, the plaintiffs received the proceeds and applied it upon the indebtedness of the company, this is, the Imperial Paper Mills Company, Limited.

The defendant contends that a sum equal to the value of the sulphite which went into this paper should be credited upon the notes sued on and that this would be sufficient to pay the notes in full.

Special rights are secured to the plaintiffs by the bank Act but I am of opinion that, aside from any of these pro-

visions, the plaintiffs are entitled to apply, and retain, the moneys in question, just as they did apply them as the proceeds of sales were from time to time handed over to them. If, subsequently to the making of these promissory notes, the defendant were a stranger to the dealings between the plaintiffs and the company, there might be very strong reason to support the defendant's claim. But the very reverse is the fact. Everything was done through the defendant. He was the manager of the company and he it was who, ignoring the agreement, depleted the stock of sulphite without having other sulphite put in its place. He was a surety, but could he complain of his own act?

Then, as to the subsequent advances by the bank, the sales, the assignments of the accounts, the collections and the payment over to the plaintiffs, the defendant was the actor or director at every point, and this without a suggestion of individual rights. Can he stand by and have the plaintiffs alter their position and later set up inconsistent rights to the prejudice of the plaintiffs? I don't think the Court should help him to do this. He did more than stand by—he was the chief actor. It is argued that the defendant, by virtue of his position, was virtually compelled to sign the agreement of the 17th of September, 1906, an agreement in terms wholly inconsistent with his present contention. I am not impressed with this argument. If the defendant had not intended to subordinate any possible individual rights he had to the interests of the company if he had not intended to waive and abandon every possible personal interest nothing was simpler than to say, "saving or without prejudice to the personal rights of the said John Craig," etc. But such a thing was not even mentioned. The subsequent payment of $3,000, on account and the promise to pay the balance is a circumstance to be noted, but the plaintiffs' rights are clear without this.

I agree too with the learned trial Judge in his finding that the moneys in question were not received by the plaintiffs on the authority or by the force and effect of the warehouse receipts. The defendant determined that they should not be received in that way.

The appeal should be dismissed with costs.

HON. MR. JUSTICE KELLY. JULY 29TH, 1912.

## MAPLE CITY OIL & GAS CO. v. CHARLTON & RIDGETOWN FUEL SUPPLY CO.

3 O. W. N. 1629.

*Husband and Wife—"Oil Lease" of Wife's Lands Made by Husband — Confirmation by Wife — Alteration of Lease — Payments Received by Husband for Wife—Estoppel.*

Action for a declaration that a certain "oil and gas lease" of the lands of defendant Agnes Charlton assigned to plaintiffs was in force and for an injunction restraining defendant company from drilling on said lands. The lease in question was made in October, 1905, with defendant John Charlton, although defendant Agnes Charlton his wife owned the lands covered thereby. The latter was fully conversant with and approved of the transaction and some two years later signed a copy of the lease at the request of plaintiff's predecessor in title in which her name was inserted in place of her husband. In January, 1911, defendants the Charltons made another oil and gas lease" to another person, seeking to repudiate that given to plaintiff on ground that defendant Agnes Charlton was not a party thereto and that the payments thereunder had been made to her husband and not to her. In pursuance of the alleged lease last referred to defendant company had entered upon the lands in question and expended considerable money, with knowledge, however, of plaintiff's lease which was registered.

KELLY, J., *held*, defendant Agnes Charlton estopped from denying the validity of the lease to plaintiffs and gave judgment for plaintiffs with costs. If plaintiffs take benefit of work done by defendant company they are to pay for same, and a reference is directed if necessary.

Action by the assignees of an oil lease for possession of the lands leased and for an injunction restraining the defendants from entering upon or prospecting for oil or gas thereon during the currency of the lease, tried without a jury, at Chatham, on the 28th and 29th May, 1912.

W. N. Tilley, for the plaintiffs.

O. L. Lewis, K.C., and W. G. Richards, for the defendant Co.

R. L. Gosnell, for the other defendants.

HON. MR. JUSTICE KELLY:—Defendant Agnes Charlton, wife of her co-defendant, John Charlton, is the owner of part of lot 177 on the north side of Talbot road (on the town line), in the township of Tilbury, containing 90 acres more or less.

On the 12th October, 1905, W. E. Keve, accompanied by George A. Jackson, a farmer residing in the township of Romney, went to the residence of the defendants, the Charl-

tons, and negotiated with the defendant, John Charlton, for what is known as an "oil lease," of the property. The negotiations were carried on in the presence of the defendant Agnes Charlton, and resulted in a lease being made by John Charlton to Keve of all the oil and gas in and under the premises, with the exclusive right to enter thereon for the purpose of drilling and operating for oil, gas, or water . . . . for the term of ten years, "and as much longer as oil or gas are produced therefrom," etc.

The lease was made on certain conditions, one of which was that if operations for drilling a well for oil or gas were not commenced within 4 months from the date of the lease, and in case a well were not so commenced the lease should become null and void unless the lessee should pay to the lessor 25 cents per acre annually thereafter until a well should be commenced, and that such payments might be made "in hand by cheque or post office order mailed to the first party's (lessor's) credit in the Bank of Commerce of Blenheim, Ontario." Jackson, who completed the drawing of the lease, says he assumed John Charlton was the owner of the property.

On the 20th July, 1906, Keve assigned this lease to H. E. Graham, and both the lease and the assignment were registered in the registry office on the 9th August, 1906.

Drilling for oil or gas did not commence within the four months, and on February 6th, 1907, $22.50 (being 25 cents per acre for the 90 acres), was paid to John Charlton, who gave to the New York and Western Consolidated Oil Company (a company apparently owned by Graham, or with which he was associated), a written receipt therefor, which was expressed to be "in full for one year's rent from February 12th, 1906, to February 12th, 1907, on lease made by me to W. E. Keve, of Lima, Ohio, on the 12th day of October, 1905, for oil and gas purposes on my land known as situated in lot west ½ 177 town line Tilbury township, Kent county, Ontario, being west ½ lot 177 town line, containing in all ninety acres more or less, and this payment is received by me in full satisfaction of all present claim or claims due me on said lease, which is hereby confirmed."

It having come to the knowledge of Graham that these lands stood in the name of the defendant, Agnes Charlton, and not in that of John Charlton, early in September, 1907, Graham and A. D. Chaplin, who was the secretary-treasurer of the plaintiff company, went to Charlton's house with the

evident intention of having Mrs. Charlton confirm the lease made by her husband, or of having her sign a new lease to take the place of the former one. There was then produced to her what purported to be a copy of the original lease signed by her husband and Keve, and after the names "John Charlton" and "W. E. Keve," had been struck out and the names "Agnes Charlton" and "H. C. Graham" substituted therefor, the document was signed and sealed by Agnes Charlton and by Graham.

Later on, the lease was assigned by Graham to A. D. Chaplin, who in turn assigned it to the plaintiff company.

The lessee or those who subsequently became entitled to the benefit of the document, not having commenced to drill, they continued to make the annual payments of $22.50, and subsequent to the above-mentioned payments, for which the defendant, John Charlton, gave his receipt, the following payments were made: Cheque of Graham to the order of The Canadian Bank of Commerce at Blenheim, dated February 7th, 1908, for $22.50. The only evidence of the date on which this was paid to the bank, is from a statement of the bank, produced since the trial, shewing its receipt on February 15th, 1908.

Prior to February 12th in each of the years, 1909, 1910, and 1911, there was paid into the same bank by plaintiffs by cheques, payable to the order of John Charlton, the sum of $22.50, each cheque on its face indicating that it was rent for the property in question.

All of these sums were by the bank placed to the credit of John Charlton.

It appears, too, from the bank's statement that a further sum was paid in to the bank for the credit of John Charlton on January 6th, 1912.

On April 11th, 1908, John Charlton by cheque signed by him drew from the bank the $22.50 paid in the previous February.

On January 6th, 1911, defendants Agnes Charlton and John Charlton made an "oil lease" of these same premises to John W. Smith, who on January 9th of that same year, assigned it to the defendants the Ridgetown Fuel Supply Company, Limited.

Prior to the making of the latter lease and subsequent to the making of the document under which plaintiffs claim, another lease was made by the Charltons, or one of them, to other parties, but it was afterwards abandoned.

The defendant company proceeded to drill a well on the premises, and have incurred considerable expense thereby.

Jasperson & McKay, the contractors who did the work of drilling the well, were made parties defendants, but before the trial the action was discontinued against them.

In answer to the plaintiffs' claim to be entitled under the documents to Keve and Graham, the defendants have set up that the plaintiffs are not, under these documents, entitled to the property or the use thereof or to the gas or oil which may be taken therefrom, on the ground that John Charlton had not the right to make the lease, that the document signed by Agnes Charlton was not a confirmation of the lease, and if the latter document should be taken to be a lease from her to Graham, that the lessees have forfeited their rights by reason of payment of the 25 cents per acre annually having been made to John Charlton and not to her. They also contend that there have been such material alterations in the documents as render them inoperative. The further defence is put forward that the lands are not described with such accuracy as to satisfy the Statute of Frauds. Defendants, however, are not entitled to succeed on this last ground; in my opinion the documents sufficiently describe the property.

As to any alterations made, they were immaterial and not such as to affect the validity of the documents or as to vary their legal effect; they merely expressed more fully the intention of the parties already apparent on the face of the documents, and do not prejudice any of the parties thereunder. Norton on Deeds (2nd ed.), p. 39.

Moreover, the evidence of Chaplin is that no alterations or additions were made to the document signed by Mrs. Charlton, after she had signed it, except this addition at the end, "22nd October, 1907;" but there is no evidence to shew by whom this addition was made.

Defendants laid stress upon two letters from Graham to Mrs. Charlton, in December, 1907, in which she was told that the plaintiffs would not drill on the property until they had got a lease properly signed. This was not in repudiation of what had been already signed, but it shews a desire on lessees' part to have a more formal document from the owner before they commenced to drill.

A ground of defence urged in the argument was as to the manner of making the annual payments of $22.50, and the consequence of their having been made to the credit of

John Charlton, instead of to Agnes Charlton. On this ground I think they must fail.

From the depositions of the Charltons, on their examination for discovery, it is quite apparent that both fully understand the nature, objects and meaning of the original lease and the document later on signed by Agnes Charlton; that the husband had been in the habit of conducting business for his wife; that she, when the original document was drawn, knew of its contents, read it over and expressed her approval of it; and that when she signed the document in September, 1907, she intended it to be a confirmation of the lease signed by her husband on October 12th, 1905.

I cannot treat the dealings of the husband and wife in this transaction as separate; and taking into consideration all the circumstances, I think it would be most unfair and inequitable to allow them to evade the consequences of what may be taken to have been their joint act, and thus relieve them from the obligation to carry out the bargain which they made with the plaintiffs' predecessors in title. The propriety of this conclusion is to be seen from their evidence.

Mrs. Charlton, in her examination for discovery, says:—

"Q. And you were there on that day? (referring to the making of the lease of 12th October, 1905). A. Yes.

Q. After that Mr. Chaplin and Mr. Graham came out to see you? A. Yes.

Q. And they told you that they had discovered somehow that Mr. Charlton was not the owner of the lot and that you were? A. Yes.

Q. And they had a lease, a copy of the lease that he had signed there, signed by Keve and Chaplin? A. Yes."

* * * * * *

"Q. Now what you thought you were doing was that you were confirming your husband's action in leasing this property; you were correcting what was an irregularity, as far as you knew? A. Yes.

Q. And that was your intention? A. Yes.

Q. I suppose it is the same in your family as others, the husband does the business and the wife lets him? A. Yes, generally.

Q. And you were approving of what he had done? A. I guess I must have been or I would not have signed that paper."

* * * * * *

And referring to her husband signing the lease to Keve, she says:—

"Q. You were quite willing he should do what he was doing, and considered that whatever he was doing he was doing for you, as usual? A. Yes.

The evidence of John Charlton shews that the lease was recognized as existing and in force, when in April, 1908, he drew from the bank the $22.50 paid in by the lessees; this money was not returned to the plaintiffs or their predecessors in title.

On the argument the question was not raised as to the effect of the payment for the year ending February 12th, 1908, being made after that date. There is some doubt about the date the bank received it. But assuming that it was made after the end of that year, I think the Charltons waived any forfeiture that might have resulted from failure to make payment within the proper time when the husband drew that payment from the bank in April, 1908.

The acceptance of this payment and what took place in November or December, 1909, when John Charlton spoke to the plaintiffs' secretary about giving up the lease, and to which I refer later on, is evidence that the Charltons treated the lease as being in effect at that time.

John Charlton admits, too, that he had notice from the bank in each year, except the present year, that the annual payment had been paid into the bank.

Neither of the Charltons did anything to repudiate the lease, until about November or December, 1909, when an opportunity presented itself of leasing the property on terms more favourable to them than those contained in the document, under which plaintiffs claim, and, desiring to be freed from their dealings with the plaintiffs and their predecessors, the defendant, John Charlton, approached the secretary of the plaintiff company and asked, as the secretary says, for a surrender of the lease held by the plaintiffs. John Charlton himself admits that he did go to the secretary, "to see what he was going to do about the lease—whether he was going to go on and drill, or give it up," and he admits he told the secretary he was going to lease it to other parties; in reply to which the secretary said that if he did so he would get into trouble. On his return home, he told his wife of this interview.

In the face of this warning, the Charltons did lease to Smith; and the more favourable terms they were able to

make with him may have helped to induce them to disregard whatever obligations they may have been under towards the plaintiffs.

In answer to an objection by the defendants, it is contended on behalf of the plaintiffs, that Agnes Charlton is estopped from denying the rights of her husband to bind her to the transaction of the 12th October, 1905.

Jackson, who completed the drawing of the lease, and whose evidence was given with frankness and apparent honesty, shews the interest she took in the negotiations when, as he says, she read over the lease of October 12th, 1905, before it was signed and expressed her approval of it. It is true that the husband in his examination for discovery denies that his wife read this document. I prefer, however, to accept Jackson's testimony on that point. She knew or should have known that the title was in her, and I cannot see how she can escape from being held to be estopped, especially when it is so clearly shewn that she and her husband were acting together.

In *Cairncross* v. *Lorimer* (1860), 3 Macqueen, 827, it is stated that "the doctrine will apply which is to be found, I believe, in the laws of all civilized nations, that if a man either by words or by conduct has intimated that he consents to an act which has been done and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct." And again, "I am of opinion that generally speaking, if a party having an interest to prevent an act being done, has full notice of its having been done and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license."

Counsel for the Charltons contended that the registered deed to Agnes Charlton was notice to plaintiffs of her title, and should be presumed against them, and therefore her "standing by," had not the effect of estopping her or giving the plaintiffs any right by estoppel.

It must not be overlooked that there was more than a mere "standing by" on her part, when she read over and expressly approved of the making of the original document. In *Gregg* v. *Wells*, 10 A. & E. 90, it is laid down that "a party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

As to the defendant company, they cannot claim to have been ignorant of the true condition of affairs. The original lease to Keve and the assignment thereof by Keve to Graham had both been registered before they negotiated with the Charltons. Charlton swears that Smith was told of the existence of the lease claimed by the plaintiffs and of the documents under which they claimed, and, as he puts it, "I told him all about it."

The evidence of Agnes Charlton on the same point is as follows:—

"26. Q. After that Macdonald comes along for Smith? A. Yes.

27. Q. And you gave him a lease? A. Yes.

28. Q. Now when you gave Macdonald a lease for Smith, you told all about these leases? A. Yes.

29. Q. You had signed and your husband had signed? A. Yes.

30. Q. That you had received money. Who from? A. The company. They knew all that, they knew everything.

31. Q. And they knew also, Mrs. Charlton, that your husband and Chaplin had some words about it, and that the Maple City Oil Company were claiming that the leases were good, and they were going to enforce them. You told them all that? A. They knew all that—yes."

The defendant company, though put upon inquiry, both by the registered documents and by the knowledge which they obtained from the Charltons, took no steps to clear off the title or to put themselves in a position where they could safely deal with or obtain a lease of the property; they took the risk of entering upon the property and expending a very considerable sum of money in drilling operations.

On the whole evidence, and without expressly referring to many objections taken by counsel for defendants in their lengthy and able arguments, I cannot do otherwise than hold

that the effect of the lease of 12th October, 1905, and of the document subsequently signed by Agnes Charlton to Graham, taken together, as I think they should be, is to constitute a lease by the husband and wife. It is beyond doubt that both intended that the lease should be given, and they thought they were making such a lease; they acted upon it to the extent of accepting payment of the first year's rental as well as the rent for the year ending February 12th, 1908, which was drawn from the bank by John Charlton (for I must hold that the receipt of these moneys by the husband was for the wife), and they had notice that the other payments were being made from time to time to the bank as rental for the subsequent years.

If any part of the evidence adduced by plaintiffs was capable of being contradicted or explained by defendants, they did not avail themselves of the opportunity of doing so, as they refrained from going into the witness box at the trial.

I declare, therefore, that the document of 12th October, 1905, taken with that signed by Agnes Charlton in December, 1907, constitutes a lease for the purpose therein set forth of the part of lot 177 on the Talbot road, township of Tilbury East, owned by Agnes Charlton, and that the plaintiffs are entitled to possession for the purposes set forth in these documents.

The defendant company is restrained from entering upon or prospecting for oil or gas on these lands during the time that plaintiffs are so entitled.

Following what was directed by his Lordship the Chancellor in *McIntosh* v. *Leckie,* 13 O. L. R. 54, a case in many respects not unlike the present one—if plaintiffs take the benefit of the work done and improvements made by the defendant company on the lands, it must be on terms of compensating that company therefor; and there will be a reference to the Master at Chatham to ascertain the amount of such compensation, if the parties fail to agree.

Plaintiffs are entitled to their costs of the action.

DIVISIONAL COURT.

JULY 31ST, 1912.

## McNAIR v. COLLINS.

3 O. W. N. 1639.

*Animal—Dog. Killed when Trespassing—Justification—Apprehended Danger to Sheep—R. S. O. 1897 c. 271—Municipal By-law—Municipal Act, 1903, s. (1), (2)—Findings of Trial Judge—Appeal—Damages.*

Action for damages for the killing of plaintiff's dog, a well-trained half-bred collie, by defendants. The dog was killed on defendant's premises, unaccompanied by its owner, but the evidence conflicted as to whether it was killed before or after sundown or whether it was "found" a half-mile from the premises of its owner. Defendants relied on Statute R. S. O. 1897, c. 271, s. 9 (c), permitting the killing of any dog found "straying between sunrise and sundown on any farm whereon any sheep and lambs are kept," and on a by-law of the township permitting the killing of any dog "found running at large at a greater distance than one-half mile from the premises of its owner unaccompanied by such owner or a resident ratepayer," as defences to the action. This latter by-law was passed under the provisions of the Municipal Act 1903, 3 Edw. VII. c. 19, s. 540, permitting municipalities to pass by-laws restraining and regulating the running at large of dogs and for killing dogs running at large contrary to such by-laws.

MORRISON, Co.C.J., gave judgment for plaintiff for $125 damages and costs.

DIVISIONAL COURT dismissed appeal therefrom with costs, Riddell, J., dissenting.

Statute 3 Edw. VII. c. 19, s. 540, s-s. 2 (a), providing that "a dog shall be deemed to be running at large when found in a street or other public place and not under the control of any person," does not furnish an exhaustive definition of "running at large," but only one of the conditions under which a dog may be so considered.

An appeal by the defendants from a judgment of the County Court of Prince Edward county, in favour of the plaintiff in an action for damages for the loss of a dog killed by the defendants.

An action for damages for wilfully and unlawfully killing plaintiff's dog. There was no dispute about ownership, and the dog was wilfully killed by the younger defendant, and his father, the other defendant, frankly admitted liability, if any, for the act of his son.

The learned County Judge who tried the action without a jury found for plaintiff, and assessed damages at $125.

The appeal was not only upon the question of liability, but also for a new trial, or reduction of damages.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL.

J. H. Moss, K.C., for the defendants, appellants.

McGregor Young, K.C., for the plaintiff, respondent.

HON. MR. JUSTICE BRITTON:—The dog was a valuable one, even if not thoroughbred. He was well trained to herd and attend to cattle, was a kind and affectionate animal, a good watch dog to which plaintiff and his wife were much attached. A good deal of evidence was given as to the value of the dog, or the value of such a dog, and as a result it is quite clear that if there is liability the damages cannot be considered excessive. In his reasons for judgment the trial Judge states: "The defendants' counsel explicitly conceded at the trial, that upon the evidence given thereat no justification had been established under the statute, etc. . . . and further, the only question then is whether the killing of the dog was justified under sec. 2 of the by-law."

My brother Riddell in his reasons which I have had the pleasure of perusing, thinks there was justification under the statute for the killing, as it took place after sunset on 1st July, on the farm where sheep were kept. With great respect, I am not able to agree. The evidence seems to me quite clear that the dog was shot before sunset. After the position taken by defendants' counsel at the trial when and where the evidence was in the mind of Judge and witnesses, I do not think it open to defendants to fall back upon R. S. O. (1897), ch. 271. All that is open to defendants is the defence, if any under the by-law mentioned. The municipal council of the township of Hillier had power under the Consolidated Municipal Act, 1903, sec. 540, sub-sec. 1 and 2, to pass this by-law, which may be considered as a by-law restraining and regulating the running at large of dogs, and for killing dogs running at large contrary to the by-law. The defendants must justify, by strict proof, the act of killing. I do not agree with the proposition laid down by the learned trial Judge that a by-law passed under the authority of the Municipal Act can only justify the killing of dogs found running at large in a street or other public place. When a dog is found in a street or other public place and not accompanied by the owner or some member of the owner's family at a greater distance than half a mile from the premises of the owner, the dog shall be deemed to be running at large, and the onus of proof to the contrary is put upon the owner of the dog, but when not in a street or public place, etc., etc., the onus of proof to justify, is entirely upon the person killing. The defendants, to succeed, must prove that the plaintiff's dog, was found unaccompanied, etc., etc., on the defendants' premises at a greater distance than half

a mile from the premises of the plaintiff, and that the defendant killing the dog was a resident ratepayer of the municipality. The questions are questions of fact, and the trial Judge has not found in defendants' favour upon all of these questions, and in my opinion this Court ought not to interfere with the findings of fact. Then as a matter of law it seems to me an entire misapplication of the by-law, by it, to justify the killing of plaintiff's dog under the circumstances given in the evidence. The dog was not at first found on defendants' premises. He was seen upon the road, apparently having taken to the road from his master's home, although the defendants did know that the farm was occupied. The dog was walking from the west toward the east, quietly on the road—he stopped once and turned back, perhaps as suggested, because he heard the opening or closing of a door. He then turned east, for the younger defendant saw him go upon defendants' premises and continue easterly along the east and west fence, not acting like a stray dog, not "giving tongue," apparently perfectly harmless—and when turning to the south, but continuing easterly he was wantonly shot. The dog was apparently sent from home to meet his master. A strict application of the by-law would permit the shooting, by a resident ratepayer, of a dog, having followed his master for a distance of one half a mile, was left outside the door upon a neighbour's premises. That was not the intention of the law, and if a strict application of the words of the by-law is insisted upon by defendants, then there should be a strict application as to where the dog was "found." He was found in the sense of being seen walking or running on the highway as he was on defendants' premises, and when on the highway he was within the distance of half a mile from his master's home.

In my opinion the appeal should be dismissed with costs.

Hon. Sir Glenholme Falconbridge, C.J.K.B.:—I agree in dismissing the appeal with costs.

Hon. Mr. Justice Riddell (*dissenting*):—The plaintiff a farmer in Prince Edward county, owned a half bred collie (the stenographer thinks it was a coolie, but that is not material). The dog was of more than ordinary intelligence, very much of a house dog, a good watch dog and useful about the farm. Both the plaintiff and his wife estimate his value at least $300, and in that estimate they are backed up by at least one neighbour, while another thinks

he was worth $250. It is true that other neighbours consider that $25 or $30 would be more like the proper figure, pups it is said being worth about $10 a dozen, and it not being a matter of much difficulty to raise and educate such animals. It is not without precedent that a man thinks his neighbour's dog nothing but a cur anyway and more of a nuisance to everybody than a benefit to anyone. However that may be, the evidence was amply sufficient to justify the finding of the Court below, that the dog was worth $125, and we would in no case interfere with the judgment in that respect.

In the afternoon of July 1st, 1911, the plaintiff was away from home, his wife took the dog with her and went toward her mother's; turning back, she allowed the dog to go on along the road to meet his master.

He made his way along the road for a piece and then went "snooping along the fence," of the defendant Hamilton. Collins saw him so snooping, "as a tramp dog would do." ("Snooping," I may say, is defined by the defendant as "crouching along in a sneaking way"): If he had gone on he would have got among the defendants' sheep, and the defendant was suspicious of the dog, as he had lost sheep by dogs and had had several bitten and wounded some time before. When the dog saw or heard the defendant he started to go back. The younger defendant, the son of Hamilton Collins, recognized him as a dog he had seen 8 or 10 days before terrifying the sheep—he would not say "chasing the sheep," because with admirable accuracy he says: "I can't tell you what was in the dog's head," but "running through the field terrifying the sheep." The young man got his gun and shot the dog dead in his tracks, because as he says: "I was afraid he would do harm to our sheep."

The place at which the dog was shot and where he fell was on Collins' farm—the defendants dug a hole close to where the dog lay, and "dog rolled over in the hole." It was argued for the plaintiff that the grave was some distance away from where the dog was shot, but this is not justified by the evidence—farmers do not as a rule go farther than is necessary to get rid of a carcase—and the words are not "rolled over and over," as they would be if the contention of the plaintiff's counsel were correct.

The plaintiff' brought his action in the County Court of the county of Prince Edward, and after trial before the Judge without a jury, characterized perhaps with more than the usual amount of acerbity, he directed judgment to be entered for the plaintiff for $125 and costs.

The defendants now appeal both as to quantum and otherwise.

So far as the quantum is concerned, leaving aside all sentimental damages (and that these are great is shewn amongst other things by the fact that the dog's dead body was dug up by his master and buried near him own home), there is, as I have said, ample evidence to justify the estimate of the learned County Court Judge, even if the animal were a mongrel as contended by the defendants.

Whether the plaintiff is entitled to damages at all depends upon the law which was canvassed before us with great care, skill and erudition.

At common law it is correctly said: "To kill . . . another man's dog without legal justification is an actionable wrong . . . It is no legal justification that the dog was trespassing. In order legally to justify such an act, it must be proved that it was done under necessity for the purpose of protecting the person or saving property in peril at the moment of the act." Halsbury's Laws of England 595, sec. 857. No doubt in the present case the dog was trespassing—why does not appear unless, indeed he was in search of a *lectus genialis* as suggested by the learned County Court Judge. But there was no present or any danger to person; and before the fatal shot all danger—even all apparent danger—to the sheep was over for the time being; the dog had turned back and was no longer on his way toward the sheep.

The defendants rely upon the statute and a by-law of the township.

The statute R. S. O. 1897, ch. 271, sec. 9 (c) provides: "Any person may kill . . . any dog which any person finds straying between sunset and sunrise on any farm whereon any sheep or lambs are kept." The learned Judge does not deal with this statute; but I think it affords a perfect defence to the action. Notwithstanding the evidence of Hamilton Collins, I think it fairly established by other evidence that it was after sunset that the dog was killed—the dog was found straying, and it was on a farm whereon sheep were kept.

But in any case, the by-law in my view is sufficient to protect the defendants.

By-law No. 14 reads, sec. 2: "It shall not be lawful for any dog to run at large unaccompanied by its owner or by some member of such owner's family; and any dog except

hounds, found so running at large at a greater distance than one-half mile from the premises of its owner, and unaccompanied therewith may be killed by any resident ratepayer of this municipality."

This by-law was passed March 22nd, 1911, under the provisions of the Municipal Act of 1903, 3 Edw. VII., ch. 19, sec. 540. "By-laws may be passed by the councils of municipalities . . . for the purposes . . .

1. For restraining and regulating the running at large of dogs; and for seizing and impounding dogs running at large contrary to the by-laws; and for selling the dogs so impounded . . .

2. For killing dogs running at large contrary to the by-laws.

(a) For the purposes of the two next preceding paragraphs a dog shall be deemed to be running at large when found in a street or other public place and not under the control of any person . . ."

The Act 1 Geo. V., ch. 57, sec. 8 (2), referred to as amending this section, was not in force at the time of the passing of the by-law, as it came into force two days thereafter, i.e., March 24th, 1911—and in any event it is not material in the present case.

In the note in Biggar's Municipal Manual to this sec. 540, it is said: "The validity of laws providing for the forfeiture or destruction of property without compensation to the owners has been doubted." I know of nothing justifying such a statement or such a doubt if expressed—but, however that may be, there cannot now be any doubt whatever as to the power of the Legislature: *Florence, etc.* v. *Cobalt, etc.* (1908), 18 O. L. R. 275, at p. 279: "If it be that the plaintiffs acquired any rights . . . the Legislature had the power to take them away . . . And there would be no necessity for compensation to be given. We have no such restriction upon the power of the Legislature as is found in some States."

The chief objection to the by-law, that to which effect was given in the Court below, is based upon the sub-sec. or clause (a). This was introduced for the first time by (1903), 3 Edw. VII., ch. 18, sec. 107. It is contended that it was intended to contain and does contain an exhaustive definition of "running-at-large"—and that within the meaning of the section a dog cannot be "running at large" unless it is "found in a street or highway."

The result of such an interpretation would be alarming. A dog would not be at large and might roam with impunity miles away from his master's home and his master, traverse hill and dale, meadow and orchard—he might run free through the forest pursuing at will squirrel and groundhog, not see or be seen by his master or any other person for months—and still so long as he kept off street and public place he would not be "running at large." Being pursued on the road he would, if he were a wise dog, dodge through the fence upon a farm and forthwith cease to be running at large. One does not like to contemplate the tragedy of such an animal, trusting to the accuracy of a survey and sitting in fancied security a foot or two beyond the apparent line of the street, and then shot with impunity because an accurate survey shewed the true line ran a few inches beyond him. A dog traversing the country would alternately be and not be running at large as he crossed the road or got through the fences.

The Legislature no doubt had the power to effect such an absurd result; but before an interpretation resulting in such an absurdity be adopted we should be sure that this is their meaning. The absurdity amounts to a repugnance in my view and on every canon of construction the proposed interpretation should be rejected if at all possible. In the *Duke of Buccleuch* (1889), 15 P. D. 86, Lindley, L.J., says: "You are not so to construe the Act of Parliament as to reduce it to rank absurdity." See also *Simms* v. *Registrar Probates* (1900), A. C. 323, at p. 335, per Lord Hobhouse; *R.* v. *Tunbridge Overseers* (1884), 13 Q. B. D. 342, per Brett, L.J.; *Christopherson* v. *Lotinga* (1864), 33 L. J. C. P., per Willes, J.; *Nuth* v. *Tampher* (1881), 8 Q. B. D. 247, at p. 253, per Jessel, M.R.; *Miller* v. *Salmons* (1852), 7 Ex. 475, per Parke, B., at p. 553, and such cases.

The expression "running at large," is well known; it has been applied to horses and cattle, e.g., R. S. C. 1906, ch. 57, sec. 294, 294 (3). The cases on this section and its predecessors are collected in *Sexton* v. *G. T. R.* (1909), 18 O. L. R. 202. And many other cases on similar statutes will be found cited in "Words and Phrases, etc.," vol. 1, pp. 604-607. No abstract rule could be laid down applicable to every case as to the nature, character, and extent of the absence of restraint within reasonable limits; it was a question of fact in each case. In my opinion the Legislature by the amendment of 1903 simply intended to remove from the realm of controversy the question whether a dog was running

at large in the one case; and to lay down as a matter of law that when a dog was "found in a street or other public place . . . not under the control of any person," he was running at large; and it must be so held: *Rogers* v. *McFarland* (1909), 19 O. L. R. 622, 14 O. W. R. 943. But no other case is provided for and in any other case the question of running at large *aut non* remains a question of fact. Clause (a) is not like a mathematical definition, convertible—there is no provision that no others shall be considered running at large than those in the street, etc., and I cannot think that the Legislature intended to limit the power previously given to the municipalities by introducing this clause.

It was argued that where the dog was killed was not half a mile from the premises of his owner—but the distance was measured, and it was found that even as the crow flies, the distance from the nearest point of the plaintiff's field to the place where the dog was when shot was 11½ feet over half a mile.

The learned County Court Judge seems to be rather of the opinion that as the dog was seen running for some distance before he was shot, he was "found" when he was first seen, and consequently he was "found" less than half a mile from his owner's premises, and so could not have been found where and when he was shot. This, with much respect, is quite too subtle. I may find a man in my house though I saw him go in, a dog in my garden though I saw him jump the fence—and one arrested on the street for being there found drunk and disorderly, would hardly be acquitted because the policeman saw him coming down his own walk from his house drunk and howling. Although I do not think authority is necessary for the construction, I refer to a few.

In *R.* v. *Lopez* and *R.* v. *Salter,* 7 Cox C. C. 431, it was held that a person is "found" wherever he is actually present: and in *Jowett* v. *Spencer,* 1 Ex. 647, a mineral is "found" where "it is ascertained to be and be." See also such cases as *Simmons* v. *Mulligan,* 2 C. B. 524; *Griffiths* v. *Taylor,* 2 C. P. D. 194.

The by-law itself may be subject of criticism—it is not quite what a careful draftsman would make it—it would seem to require the premises of the owner to accompany the dog—but the "therewith" must, I think, in view of the earlier provisions in the section be interpreted as meaning "by its owner or some member of such owner's family." With this interpretation the by-law is well enough.

I think the appeal must be allowed; and in view of the perfectly reasonable suspicions of the defendants as to the dog, and the absence of any improper conduct on their part, either before or after the beginning of the action, I think they should have their costs both in this Court and in the Court below.

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HON. MR. JUSTICE BRITTON. AUGUST 7TH, 1912.

## TORONTO v. WILLIAMS.

3 O. W. N.

*Municipal Corporations—By-laws—Building Restrictions—Permit Issued for Apartment House—Motion to Restrain Erection of Building.*

Motion to continue injunction restraining defendant from locating or proceeding with the location of an apartment house in a residential district in contravention of a civic by-law passed on May 13th, 1912, under the authority of 2 Geo. V. ch. 40, sec. 10, permitting certain municipalities "to prohibit, regulate and control on certain streets to be named in the by-law of apartment houses" . . . Prior to the passage of the by-law in question defendant had purchased the lot, prepared plans and specifications for an apartment house, applied for and obtained a permit for the erection of the same from the City Architect's department, and obtained and paid for a water service from plaintiffs. Plaintiffs sought to distinguish this case from *Toronto* v. *Wheeler*, 22 O. W. R. 326; 3 O. W. N. 1424, on the ground that no work had actually been done on the lot looking to the erection of an apartment house prior to the passage of the by-law.

BRITTON, J., *held* that the granting of a building permit in itself constituted a "location" within the meaning of the statute.

Action dismissed with costs.

(Case is being appealed.—Ed.)

Motion in Single Court by the city of Toronto to continue an injunction restraining the defendant from erecting an apartment house upon her lot on Brunswick avenue. By consent of counsel the motion was turned into a motion for judgment.

I. S. Fairty, for the plaintiffs.

Mr. Campbell, for the defendant.

HON. MR. JUSTICE BRITTON:—The defendant purchased the land upon Brunswick avenue in May, 1911.

In the affidavit of the father of defendant it is stated, and I have no doubt of the truth of the statement, that this lot was purchased by the defendant for the purpose of erecting an apartment house thereon.

Shortly after the purchase proceedings were taken for expropriating part of that lot having in view the straightening of Brunswick avenue, and enlarging Kendall square. The defendant naturally halted as to their going on with the contemplated building. Subsequently the project or proposal

as to Brunswick avenue was not gone on with, and the defendant then proposed to proceed with her apartment house. In the latter part of 1911 the defendant applied to the City Architect and Superintendent of Building for permission to build and submitted plans and specifications. The City Architect and Superintendent of Building knew that these plans and specifications were those of an apartment house—and on the 31st January, 1912, permission was granted to the defendant, in terms, "to erect a two-storey brick apartment, near Wells street, on Brunswick avenue, in Limit B., in accordance with plans and specifications approved by this department."

Water service was applied for—and granted by plaintiffs and paid for by defendant.

The work has not been rapidly proceeded with, but some work has been done—and there is not before me anything to indicate bad faith on the part of the defendant.

On the 16th day of April, 1912, an amendment of the Municipal Act was made (2 Geo. V. ch. 40, sec. 10) by which the following section was added as sub-sec. (c) to the sec. 19 of the Municipal Amendment Act of 1904:

"(c) In the case of cities having a population of not less than 100,000 to prohibit, regulate, and control the location on certain streets to be named in the by-law, of apartment or tenement houses or garages to be used for hire or gain."

The plaintiffs contend that there has been no location of this contemplated apartment house—and so it can, under the recent amendment, be prohibited.

I am of opinion that what was done amounts to a "locating" of the house, and a consent by the plaintiffs to its location. The plaintiffs have assumed to revoke the permission given and they say power is given to do so by sec. 6 of the city's building by-law No. 4861. The alleged attempt at revocation was not for any of the causes mentioned in sec. 6.

The case as presented to me seems quite like Toronto v. Wheeler, 22 O. W. R. 326. I agree with the decision and reasons for decision given by Mr. Justice Middleton. It would be manifestly unfair to the defendant—it would be rank injustice to her after granting the permit which in my opinion amounts to location within the meaning of the statute—to now step in and stop the work—leaving upon her hands the lot she bought, the plans and estimates prepared, and the work much or little already done—of no value to her other than for the house she desires to erect.

The action will be dismissed with costs.