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BOYD, C. NOVEMBER 7TH, 1912.

WILSON v. TAYLOR.

Mortgagor and Mortgagee—Power of Sale—Sale en Bloc where Parcelling Suggested as Better Method—Limits of Mortgagee's Responsibility—Test of "Prudent Man" Selling His Own Property—Omission of Lots from Description—Bona Fides.

Action for damages for sale of the plaintiff's property by the defendant, a mortgagee, under the power of sale in a mortgage.

J. E. Hutcheson, K.C., for the plaintiff.
J. L. Whiting, K.C., for the defendant.

BOYD, C.:—It has been said that in exercising the power of sale in a mortgage, the mortgagee is acting as a trustee, and in explanation of that relation it has been further said that he should act in the same way as a prudent man would act in the disposal of his own land. The highest Courts, however, have held that the mortgagee is not acting as a trustee, but only in pursuance of the powers conferred by the mortgage, and that he may first consult his own interest before that of the mortgagor, especially I would think in a case where the security, though adequate, may be difficult of realization. The effect of this state of the law is to displace the test of the prudent man dealing with his own property, in favour of a somewhat lesser degree of responsibility. The point is adverted to by Mr. Justice Duff in British Columbia Land & Investment Agency v. Ishitaka, 45 S.C.R., at p. 317, and has a bearing on the present case.

A valuable rule as to the obligations of the mortgagee is to be found in an appeal from Victoria to the Privy Council; viz., that

a mortgagee may be chargeable with the full value of the mortgaged property sold if from want of due care and diligence it has been sold at an undervalue, and the reference in such an event would be to charge the mortgagee with what, but for his wilful negligence and default, might have been received: National Bank of Australasia v. United Hand-in-Hand (1879), 4 App. Cas., at pp. 392, 411. In other words: the inquiry is, has the mortgagee been culpable to the extent of wilful default in exercising his power of sale?

My attention was called to the terms of the power of sale; in this case, the statutory form which was used in the mortgage of 20th November, 1908, made by the plaintiff to the defendant to secure $4,000, R.S.O. ch. 126, covenant 14, p. 1186. Power is given "to sell the lands or any part or parts thereof by public auction . . . as to him shall seem meet . . . and the mortgagee shall not be responsible for any loss which may arise by reason of any such . . . sale . . . unless the same shall happen by reason of his wilful default or neglect." The responsibility arising from the exercise of the power of sale is thus exactly defined in the terms used by the Privy Council and is to be measured by the usual tests applied in cases of wilful blame. In conveying the land to be held as security the mortgagor has given a large discretion to be bonâ fide exercised by the mortgagee. If default is made in payment and due notice given of the intention to sell by proper and adequate advertisements, the manner of selling whether en bloc or in parcels is left in the hands of the mortgagee. For a disadvantageous sale or for an inadequate price he is not responsible when he acts bonâ fide, unless the amount is so disproportionate to the value as to induce the conclusion that the property has been recklessly sacrificed. One is wise after the event, and after a sale one may be able to say that had the property been put up otherwise a better result would have been obtained. But in considering the method of advertising and the best way of putting up the property for sale it may be a matter of doubt as to what course is most advisable, for example, as to selling en bloc or in parcels. If in this dilemma the mortgagee prefers one way to the other he cannot be charged on the ground of wilful default. Acting according to the best light reasonably attainable he may err and yet be absolved from making good any loss to the mortgagor.

In the latest decision on the point in the Privy Council the language of Kay, J., in Warner v. Jacobs is approved, who says the power is given to enable the mortgagee the better to realize his mortgage debt. "If he exercises it bonâ fide for that pur-

pose without corruption or collusion with the purchaser the Court will not interfere even though the sale be very disadvantageous unless indeed the price is so low as in itself to be evidence of fraud:" Haddington Island Quarry Co. v. Huson, [1911] A.C. at p. 729. In Kennedy v. De Trafford, [1897] A.C. the law lords agree in holding that if a mortgagee takes pains to comply with the provisions of the power and acts in good faith his conduct as to the sale cannot be impeached.

At the close of the evidence I thought that the mortgagor had been damaged to the extent at least of $1,800 as an effect of the sale conducted as it was; the evidence as applied to the plan of the place indicated that the better way would have been to have sold in parcels and that four parcels could readily be adjusted (1) of the house and barn, (2) of the brickyard, and 7 acres of clay, (3) of three lots to the north of the house and (4) of the grazing land, about 13 acres, separated by a stream from the brickyard. There was evidence that the owner himself, to the knowledge of the mortgagee, had offered the place for public sale about a year before in parcels, and other evidence shewed that persons would have competed for the lots and the grazing land had they been put up in parcels. Some attempt was made to have the land parcelled out before the sale on behalf of the mortgagor, but nothing very definite as to the manner of subdivision was suggested.

I think, on the evidence, that the land should have been advertised in parcels and that a better attendance would have been the result at the place of auction.

On the other hand local conditions existed—that the property was a difficult one to dispose of in any way, and that in Gananoque, where it was situate, there was little or no market for land or for such a sized house as was on this land. The property was all in one place and fenced around, with some intermediate fencing, and though the mortgagee, from age and infirmity, was not able to give much assistance, he referred the applicants and the arrangement of the whole sale to a solicitor of long standing and experience resident in the place, who weighed the pros and cons of the situation. I might almost say that the mortgagee did not act as if he had been disposing of his own property, yet this would not be a decisive test in view of the latter authorities, for he employed a competent person who endeavoured to "take some pains" to carry out rightly the provisions of the mortgage both as to advertising and conducting the sale. The mortgagor had himself made use of all the various parts of the mortgaged property in connection with

the brickyard, and the solicitor thought that the best way to get the whole sold was to make no separation of the parts. The proposal to separate was not urged in any explicit or defined way: only a claim was expressed by the creditors that it should be sold in parcels, and what the mortgagor himself asked was that the brickyard might be sold separately and the rest to the best advantage.

The complaint in the pleadings is that the defendant sold the whole property en bloc; that he neglected to divide into separate parcels prior to the sale, though requested by the mortgagor, and that he omitted ten lots in the description given in the advertisement. No harm resulted from the omission of the numbers of these lots—it was a printer's error, and as the lots formed part of the brickyard, this enumeration was merely following the minutiæ of the description in the mortgage. No one clear method of division was suggested by the mortgagor or anybody else. When the mortgagor himself advertised for sale, he made three parcels: (1) the house and barn, (2) the brickyard, and (3) the grazing land, but his sale was abortive and none of the parcels were bid up to the reserved bid.

No doubt it was decided in Aldrich v. Canada Permanent Loan Co., 24 A.R. 193 (dissentiente Burton, J.A.), that the duty of the mortgagee was to sell in parcels and not en bloc. But that duty depends upon a variety of circumstances which do not here exist. In that case the mortgage covered a farm, and two shops in a village nearly three-quarters a mile away, and no justification for a joint sale existed. Whatever loss has resulted to the mortgagor from the sale of the property, conducted as it was, I do not think judgment should be given in his favour, having regard to the trend of judicial opinion.

I dismiss the action without costs.

BOYD, C. NOVEMBER 8TH, 1912.

TOWN OF WATERLOO v. CITY OF BERLIN.

Street Railway—Agreement between Municipalities—Division of Profits — Demand of Proper Account — Jurisdiction of Court—Powers of Railway and Municipal Board—6 Edw. VII. ch. 31, secs. 17, 51, 63, 64.

Action to enforce a proper accounting for profits under an agreement between the parties for the operation of a street railway.

A. B. McBride, for the plaintiffs.

A. Millar, K.C., for the defendants.

BOYD, C.:—Action by the town of Waterloo against the city of Berlin to enforce proper accounting under clause 20 of an agreement between these parties dated 18th January, 1910. The agreement, as a whole, makes provisions for the operation of the street railway between these municipalities; the railway itself being owned and operated by the defendants.

Clause 20 provides that Berlin shall pay to Waterloo one-quarter of the annual net profits earned by the railway on the 1st January of each year. The complaint is that Berlin has wrongly assumed to make deductions from the total profits "under the guise of taxes," and has so reduced the amount properly payable to the plaintiffs: and also with like effect the defendant has charged to maintenance account several sums which should have been properly charged to the capital account; and otherwise has failed fully to account for other profits. A general account is asked with special declarations of liability. The defendant pleads as a matter of law that the Court has no jurisdiction.

It was admitted that the agreement sued on was not of a voluntary character between the signatories, but was the outcome and the effective expression of terms and regulations imposed by the Ontario Board of Railway Commissioners by its order duly made on the application of Waterloo. The agreement itself was after execution submitted to and approved of by the same Board as appears by its order dated 2nd September, 1910. The objection having regard to these conditions is well taken. The policy of the legislature is that questions such as these between municipalities and street railways as to their operation and mutual relations, financial or otherwise, should be exclusively dealt with by the Railway Board specially constituted for that purpose. Once having laid hold of a matter within its jurisdiction, that Board is seized of it for all purposes of working out details of any directions given by the Board. It is for the Board to interpret and give effect to its own orders and to deal with differences arising out of these orders, and this the legislature intends for the very purpose of expeditious and appropriate adjustment without having recourse to the intervention of the Courts. Ample machinery is provided by the statute for dealing with the adjustment of the accounts and the ascertainment of the net profits on a right footing satisfactory to the Board—which gave the direction. Reference passim to the statute of 1906, 6 Edw. VII. ch. 31, will shew how

abundant are the powers and methods entrusted to the Board, for administrative and supervisory purposes. Thus sec. 16 gives power to the Board to dispose of any complaint that there has been a failure to do the thing called for by the agreement in question, viz., to pay a full and proper one-quarter of the net profits. And again more particularly as applicable to the present situation, the group of sections headed "Enforcement of Municipal Agreements," e.g., sec. 63. The Board has power to enforce municipal agreements such as this and the power to construe and determine the proper meaning of the clause in question (sec. 64). The Board may take such steps as are necessary to enforce payment of the one-quarter net profits and to solve the difficulties raised in the pleadings, sec. 63(2). The Board has full jurisdiction to hear and determine all matters of law or fact and have such powers in connection with the exercise of its jurisdiction as are possessed by the High Court, sec. 17(1): and having become properly seized of a case the Board has exclusive jurisdiction therein (sec. 17(3)).

Appellate jurisdiction is given to the Board in questions of amount, taxation and exemption therefrom (sec. 51), and these are also within the purview of its primary powers in a dispute such as the present. Of cases cited, Re Sandwich, 2 O.W.N. 93, where the question arose chiefly under a private agreement made between the litigants as to which it was said that the Board was not a Court and had no general power of adjudicating upon questions of construction in the abstract: a proposition not pertinent to the present agreement. On the other hand the large jurisdiction conferred by the Act of 1906 is commented on and recognized in Re Port Arthur, 18 O.L.R. 376, 382.

The objection is well taken and the action should stand dismissed with costs: this is, of course, without prejudice to any further application being made to the Railway Board.

RIDDELL, J. NOVEMBER 9TH, 1912.

RICKERT v. BRITTON.

Practice—Staying Proceedings—Unpaid Costs — Contempt — Vexatious Action—Plaintiff Acting Vexatiously—Mere Inability to Pay not Sufficient Ground.

Motion by the defendants for an order staying the action until the costs of two former actions have been paid by the plaintiffs.

C. G. Jarvis, for the defendants.
J. G. O'Donoghue, for the plaintiffs.

RIDDELL, J.:—Rickert, President of the United Garment Workers of America, Larger their Secretary, Waxmen their Treasurer, certain other persons their "Trustees," certain others members of their executive board, on behalf of themselves and all other members of the United Garment Workers of America, sued W. A. Britton & Co. of London, Ontario, for an injunction restraining them from using the plaintiffs' trade mark and for damages, etc.

The plaintiffs all resided outside Ontario; and the defendants took out a praecipe order for security for costs; the plaintiffs moved to discharge this order; on the return of the motion they were allowed to add as a plaintiff one Carroll an organizer of the society who lived in London, Ont., as do several of its members. It then being urged that Carroll had no property in Ontario, it was urged by the defendants that the order should stand. The Master in Chambers however set it aside: 3 O.W.N. 1008, April 11th, 1912.

The plaintiffs moving for an interim injunction examined one Burgess as a witness on the motion: he declined to answer certain questions and the plaintiffs moved for an order against him. This motion was dismissed by Mr. Justice Middleton with costs payable to the defendants and to Burgess forthwith after taxation: 3 O.W.N. 1272. These costs were taxed at $76.40. Execution was issued but the sheriff cannot find goods of Carroll, the rest of the plaintiffs are out of the country.

Thereupon the defendants moved substantially for an order for security for costs—the Master in Chambers refused "without prejudice to a substantive application to the Court as in Stewart v. Sullivan," 11 P.R. 529: see 3 O.W.N. 1512. This was June 22nd. June 26th the motion for an interim injunction came on before Kelly, J., and he dismissed it the next day with costs. These costs were taxed at $161.25. September 6th a formal demand was made on the solicitors for the plaintiffs for this sum accompanied by a copy of the taxing officer's certificate—The solicitors replied Sept. 10th: "We have received the taxing officer's certificate and regret to report that at the present moment, we haven't quite sufficient funds in hand to pay the amount mentioned in the same." This, counsel for the plaintiffs (one of the solicitors) admits, as indeed would be fairly clear without an admission, was sarcasm—they did not intend to pay the costs or any part of the same. The letter was, and was

intended to be a humorous way of saying "we do not intend to pay you; get the money if you can."

Thereupon registered letters were sent to the plaintiffs, or at least some of them, demanding payment of these costs but no answer has been received.

Carroll is clearly execution proof; it is not denied that the plaintiff organization is in receipt of large sums of money. Probably Carroll can't pay without the help of the organization —and the organization refuse to pay. I have no doubt that if Carroll desired the help of the organization he would get it without trouble.

A motion is now made for an order staying the action until these costs are paid.

In the case of In re Wickham (1887), 35 Ch.D. 272, it was pointed out that the mere non-payment of costs ordered placed a litigant in contempt—and there was jurisdiction in the Courts to stay all proceedings in the action until these costs were paid. It was said, however, that in the case of mere non-payment of costs an order would not or might not be made, but "where the party is acting vexatiously in withholding the costs of an interlocutory order" such an order would or might be made. There the costs which should have been paid were the costs of an application for a receiver—and I cannot find any circumstance of vexatious refusal, except the refusal itself.

A subsequent case of Graham v. Sutton, [1897] 2 Ch. 367, in the Court of Appeal, perhaps made the principle more clear. Lopes, L.J., puts it thus: p. 369 "If the application rested solely on the ground of non-payment of costs, or on non-payment coupled with an inability to pay, it could not succeed. . . . If the action is vexatious, or if the plaintiff in the course of it acts vexatiously towards the defendant, the Court has jurisdiction to stay proceedings till the costs which the plaintiff has been ordered to pay are paid. Whether the jurisdiction ought to be exercised depends on the circumstances of each case."

In our own Courts the Common Law rule seems to have been adopted, but the result is much the same as in England.

Stewart v. Sullivan (1886), 11 P.R. 529; Wright v. Wright (1887), 12 P.R. 42, may be looked at. What is decided is that "while non-payment of interlocutory costs was not a ground for staying proceedings, yet if it appeared equitable to stay proceedings until they are paid, the Court in the exercise of its inherent discretion might direct a stay:" headnote to Stewart v. Sullivan, *supra*.

I think that the test expressed by Lopes, L.J., is a fair one (while of course there may be other cases). Mere non-payment

is not enough even if accompanied by inability to pay—I should hesitate long before staying an action upon the ground of a plaintiff's impecuniosity. But if (1) the action is vexatious or (2) if the plaintiff in the course of it acts vexatiously towards the defendant, then an order may go, and in most, if not all cases should go.

I cannot here hold that the action in itself is vexatious but the other alternative remains to be considered. Did the plaintiffs in the course of the action act vexatiously toward the defendants? It is impossible to read the judgment of Mr. Justice Middleton as reported in 3 O.W.N., at p. 1273 without seeing that that learned Judge thought that the proceedings for an interim injunction were vexatious—"the Canadian Union have registered a label under the Statute, and this alone would indicate that there is such an issue to be tried as to render it unreasonable to suppose that any interim injunction will be granted. Besides this, a very serious legal question arises at the threshold of the plaintiffs' case."

The learned Judge goes on to point out other difficulties: "a novel and difficult legal question ought not to be dealt with upon a motion for an interim injunction," p. 1274.

I entirely concur with my learned brother in his views: and my brother Kelly, when all the material was before him, dismissed the motion for an interim receiver. I think the motion for an interim receiver from the beginning, and especially when persisted in after the views of Mr. Justice Middleton, was vexatious.

As regards the other costs, that is the costs of the motion to commit, the plaintiffs could not have supposed that the investigation they were desiring to make (as mentioned in 3 O.W.N. at p. 1273) would be permitted if objected to. The proceedings to commit the witness for contempt were also vexatious in my view.

The defendants in my opinion have brought themselves within the rule, even if we disregard the letter of the plaintiffs' solicitor.

The order will go as asked; costs to the defendants only in the cause.

RIDDELL, J., IN CHAMBERS. NOVEMBER 9TH, 1912.

RE LITTLE STURGEON RIVER SLIDES CO. AND MACKIE ESTATE.

Arbitration—Notice Appointing Arbitrator—Motion to Set Aside—Jurisdiction—9 Edw. VII. ch. 35, sec. 5—Timber Slides Act—Submission—Estoppel—Suggested Action.

Motion by the company for an order setting aside a notice served on them, on behalf of the Mackie Estate, of the appointment of an arbitrator.

G. F. Shepley, K.C., for the company.
R. McKay, K.C., for the estate of Thos. Mackie.

RIDDELL, J.:—In April, 1908, an agreement in writing was entered into, ostensibly between the Estate of Thos, Mackie and the Little Sturgeon River Slides Co. for the estate to do certain driving of timber over the works of the company; the company to pay for certain improvements to be made by the Estate "and in case of dispute the value thereof shall be settled by arbitration under the provisions of the Timber Slide Companies' Act." This agreement was signed by one H. T. Mackie purporting to act for the Mackie Estate, and "J. R. Booth per Wm. Anderson, for and on behalf of the Little Sturgeon Timber Slide Company Limited."

May 2nd, 1912, the Estate by their solicitor served notice of the appointment of V. as their arbitrator, calling upon the company to name another arbitrator.

The company repudiate the execution of the agreement, and say Anderson had no authority to sign it or to make any such agreement for the company. Booth denies all knowledge of it.

A motion is now made for an order setting aside and discharging the notice appointing an arbitrator upon the grounds (1) that there is no statutory or other authority for the serving of the notice: (2) that the alleged agreement was not made by the company, "or at all events the same is bona fide in dispute, and until the same has been admitted or duly established by process of law to be binding on the said company, the said notice and the proceedings contemplated by the said notice are premature and incompetent" (whatever that may mean): (3) that the company never went into possession.

I asked how I had any jurisdiction in the matter—and 9

Edw. VII. ch. 35, sec. 5 was referred to: "a submission unless a contrary intention is expressed . . . shall have the same effect as if it had been made an order of Court." But this applies to an actual submission, not to a document which may or may not be a submission. If upon the application of the company I were to act upon this section, the order would operate as an estoppel against their questioning the document as their submission. This the company do not want—and I accordingly do not act upon this section.

The Timber Slides Act R.S.O. 1897, ch. 194, secs. 24-35 does not advance matters.

A very simple and plain method was suggested on the argument—an action brought by the company to set aside the alleged submission and for a declaration that it is not a submission by the company, with an injunction against the Estate proceeding with the proposed arbitration, would answer all ends—an interim injunction would no doubt be granted.

If such an action be brought within 10 days, costs of this motion will be costs in that action to the Estate only; if not the costs will be paid to the estate forthwith after taxation.

RIDDELL, J. NOVEMBER 9TH, 1912.

RE MATON AND CLAVIR.

Vendor and Purchaser—10 Edw. VII. ch. 58—Building Erected on Land Encroaching 2¼ Inches in Rear—Estoppel—Possession—Innocent Purchaser—Registry Act.

Motion by the vendor for an order declaring that he can make a good title to the land in question.

A. MacGregor, for the vendor.
J. H. Cooke, for the purchaser.

RIDDELL, J.:—In this matter being an application under the Vendors and Purchasers Act (1910), 10 Edw. VII. ch. 58, one Membery owned a certain lot No. 88 on the north side of St. Clair Avenue. He made a contract with a firm of builders, Robinson & Burgess, to build a store on the eastern part of this lot. He told this firm to be very careful to keep within the eastern limit of the lot but that he was not particular about the west line as he owned the whole lot any way. The building was to be

25 feet wide. A mechanics' lien action was brought against him by the builders and this was settled, according to the official stenographer's note, as follows:—

This case is settled. Each party to pay their own costs. It is hereby agreed and this case is hereby settled on the above terms, each party to pay their own costs; plaintiff to take building off the defendant Membery's hands and pay the defendant $70 a foot for depth of 120 feet for the land for the 25 feet frontage, giving a deposit of cash within 30 days from date and permitting defendant Membery to occupy the premises until the 1st of August, 1912, at $40 a month rent; defendant Membery agreeing to vacate premises by 1st August, and all adjustments of taxes and rent to date from the date when the $70 per foot is paid; and all adjustments also to be made as of that date; defendant Membery to be free to take away the front platform and also sink in the front cellar when he moves.

"G. L. Crooks,"
Reporter.

The builders applying for a loan on the property, a survey was insisted upon and it turned out that the building occupied the easterly 25 ft. 0¾ inches of the lot. Membery would not convey till he was paid $10 more and his solicitor $5 for the conveyance: he then, May, 1912, conveyed "the easterly three quarters of an inch throughout from front to rear of the westerly twenty-five feet of lot number 88, etc., etc." It was not at that time noticed that while the building did project only ¾ of an inch on the west 25 ft. of the lot at the front, it ran further west at the rear.

The conveyances then to the applicants cover (1) the east 25 feet and (2) a strip of ¾of an inch to the west of this, in all the easterly 25 ft. 0¾ inches of the lot: and the building is known as No. 1224 Bloor West.

In October, 1912, the grantees made a contract with Clavir to sell him "the premises situate on the north side of St. Clair Avenue . . . known as street number 1224 Bloor West having a frontage of ("about" is scored out here) 25 feet . . ."

Clavir finds that the rear of the building projects 2¼ inches on the west 25 feet: his solicitor delivered requisitions on title which he does not consider fully and satisfactorily answered: and this application is made accordingly. [Reference to certain matters which are considered immaterial, or have been cleared up, and to the following requisition]:

6. "Grant of Membery of the easterly ¾ of an inch of the westerly 25 ft.: we will also require grant from him of the

easterly 2¼ inches of the said westerly 25 feet as the survey shews the rear of the building to be encroaching to that extent . . . . ''

The legal estate in this 2¼ inches, or so much of it as is not covered by the $10 deed from Membery, is still in Membery: it is sworn that his partner said that for $12.50 he could get the deed of this strip from Membery. But whether that is so or not, the vendors have not the title to it. It is argued that Membery would be estopped from setting up title to it—it may be so—I hope so—but that is not the great danger. A man who after agreeing to give up a building supposed to be 25 ft. frontage exacts $10 for ¾ of an inch extra which the building really measured: and then when it is found that the rear encroaches an inch or two more will not convey this trifling strip unless he is paid another sum of money, may reasonably be expected to take every advantage of his legal position. An ''innocent purchaser'' could no doubt be found to buy the westerly 24 ft. 0¼ inches of the lot: he could rely upon the Registry Act and might very well set up that the second deed of ¾ of an inch misled him, for ordinary prudence would have called for a perfectly correct deed at that time. When people get down to a deed for ¾ of an inch the strong presumption is that they are very accurate indeed. No doubt possession would be taken of the shop: but, as was long ago decided, possession is not in itself notice: Waters v. Shade (1851), 2 Gr. 457; Sherboneau v. Jeffs (1869), 15 Gr. 574: even if the second grantee knows it, in some instances at least: Roe v. Braden (1877), 24 Gr. 559.

At all events the ''innocent purchaser'' would take care not to know anything about the possession.

I do not think that the deeds are sufficient to convey all the land covered by the building, and that this requisition has not been answered.

While it is very seldom that litigation is advised by the Court, this seems to be a case for an action against Membery to carry out his agreement for settlement.

I have not omitted to notice that the contract calls for 25 ft. frontage only: both parties agree that it was the building No. 1224 Bloor West and the land it covers, which are the subject-matter of the contract.

The parties have agreed that there shall be no costs.

RIDDELL, J. NOVEMBER 11TH, 1912.

RE SEATON.

Will—Construction—"Real Estate at" No. 62—'At' and 'In' Distinguished—Adjoining Land Included—Presumption against Intestacy—Exception—Punctuation—Designation of Beneficiary—'Money Outstanding'—'Recipients of this Will.'

Motion by the executors of the estate of the late Herbert Alfred Seaton for an order construing his will, under Con. Rule 938.

J. H. Spence, for the executors.
W. N. Tilley, for Mrs. Hunt.
E. C. Cattanach, for several parties.
J. R. Cartwright, K.C., for the Attorney-General.

RIDDELL, J.:—The late Herbert Alfred Seaton left his last will and testament dated March 19th, 1912, which I am now asked to interpret. I had the original will sent for and find that it is written on a law-stationer's blank—all the blanks have not been filled up—and the following is how the document appears:—

"This is the last will and testament of me Herbert Alfred Seaton of the City of Toronto, 62 Muir Avenue, in the County of York, and Province of Ontario made this nineteenth day of March in the year of our Lord one thousand nine hundred and twelve.

I revoke all former wills or other testamentary dispositions by me at any time heretofore made, and declare this only to be and contain my last will and testament.

I direct all my just debts, funeral and testamentary expenses to be paid and satisfied by my executors hereinafter named as soon as conveniently may be after my decease. Peter Humphrey and John McIntosh each of the City of Toronto.

I give, devise and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say:—1. To Mrs. Hunt and her two sons my real estate at 62 Muir Ave., Toronto. 2. All the household furniture except the two parlors and the fast and loose fixtures of the store including show cases, refrigerators, etc., to be sold by auction and after all expenses being paid to be divided equally among five children of Mrs. James Hussy.

3. The sum of $2,000 insurance in the United Workmen as follows:—

(1) Five hundred dollars ($500) to Olivet Baptist Church through the trustees of Olivet Baptist Church, Toronto, (2) To Peter Humphrey $100, (3) To John McIntosh $50, (4) To Mrs. Hunt $100, (5) To William Hatch $50, (6) To Maggie Hatch $50, (7) Hatch, Jr., $50, (8) To Olivet Baptist Sunday School, Toronto, $100 for enlarging and building of Sunday School in connection with Olivet Baptist Church.

4. The sum of $1,000 of the Sons of England as follows:—I leave in the hands of the executors to carry out all payments of any money outstanding otherwise not specified in the estate and to divide the balance if any equally among the recipients of this will.

All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto

And I nominate and appoint

to be execut of this my last will and testament."

Then follow signature of the testator, a somewhat imperfect attestation clause, and the signature of two witnesses.

1. The first question is as to the "real estate at 62 Muir Ave., Toronto."

The facts are that Seaton for many years owned a lot at the corner of Muir and Sheridan Avenues with a frontage of some 46 ft. on Muir and a depth of 109 ft. 4 in. on Sheridan. At first he had a two-story brick building, a dwelling house at the N.W. corner of the two streets and known as 42 Muir Avenue, and he there resided—On the lot there was also a rough cast stable and the rest of the lot he used as a vegetable garden. In 1907 he made up his mind to open a store on Muir Avenue, having theretofore been carrying on a grocery business on Yonge St. He borrowed $2,000 on the whole lot and proceeded to build a one-story rough cast building adjoining his house which by that time had become 62 Muir Avenue: this he used as a store till the time of his death. The new building was erected close against his dwelling house, the only material dividing them being a sheeting of wood nailed against the outside wall of the dwelling. The dwelling he continued to occupy till his death. The store was built on part of his former vegetable garden, but the rest he continued to use as a vegetable garden till the time of his death. The store was at the date of the will and is now known as 64 Muir Avenue. The stable is in the rear of part of 62 and part of 64: it was used by him for stabling his horse, and if the two numbers were divided according to the dwelling wall between

house and store the stable would be cut in two. Photographs have been furnished me which shew that the two buildings are in fact very closely connected: although it cannot fairly be said that the buildings are one, the store would be in evil plight if the dwelling house were to be removed, not having any eastern wall of its own. I am satisfied that I must give effect to the words used by the testator (a) "my real estate" (b) "at." If it had been the intention to devise only the house, the word "house" would have been used—in clause 2 when he has to speak of the store he uses the word "store"—and I can see no reason for supposing that had he intended to devise the house as distinguished from the store he would not have used the word "house." Then if he had intended to devise only No. 62 there would have been no need to employ the word "at." The devise is not "my real estate 62 Muir Ave." but "my real estate at 62 Muir Ave."

It is contended that the word "at" in a will is synonymous with "in"—sometimes it is, but more often not. For example a devise of "all the estate . . . I have . . . in any lands . . . at Coscomb in the County of Gloucester" could not cover lands the manor of Farmcott but only lands in Coscomb: Doe v. Greening (1814), 3 M. & S. 171: so "lands situate at Dormstone" does not mean anything but lands situate within the parish and manor of Dormstone, per Fry, J., in Homer v. Homer (1878), 8 Ch.D. 758 at p. 764. "At or near" may mean "in or near:" Ottawa v. Canada Atlantic R.W. Co., 2 O.L.R. 336; 4 O.L.R. 56; 33 S.C.R. 376.

But it is common knowledge that "at" very frequently indeed is not synonymous with "in"—it is not precisely synonymous with "in" in the present instance, but even if the argument of the Deputy Attorney-General be adopted, it means "that is" or something of the sort. "At" means often "near" e.g. in Wood v. Stafford Springs, 74 Com. 437; Howard v. Fulton, 79 Tex. 231; Harris v. State, 72 Miss, 960; Annan v. Baker, 49 N.H. 161; O'Connor v. Nadel, 117 Ala. 595; Bartlett v. Jenkins, 22 N.H. 53; W.O. St. R. Co. v. Manning, 70 Ill. App. 239. And its original meaning is rather "near" than "in."

In any use of the word, colloquial or scientific, I think it broad enough to cover the "real estate," not only 62 Muir Avenue, but also that adjoining which is substantially one with 62 Muir Avenue. The ordinary presumption against intestacy helps in the same direction. I shall therefore declare that all the "real estate" in the block passes by this devise.

2. The second question is what is excepted from the sale directed in clause 2?

In the will it reads thus: (2) All the household furniture except the two parlors, and, the fast and loose fixtures of the store including show cases . . .'' a comma appearing after ''parlors'' and another after ''and.'' The punctuation rather assists the conclusion to which I had come without it, namely that all that is excepted is ''the two parlors.'' The regimen of ''except'' does not extend beyond ''the two parlors'' but is exhausted at the comma following these words—and the following noun ''fixtures'' is in the same construction as ''furniture.'' In other words the word ''except'' is not understood and is not to be supplied after the conjunction ''and.'' The presumption against intestacy may perhaps be considered to help in the same direction.

3. In clause 3 the sum of $2,000 insurance in the A.O.U.W. is spoken of but only $1,000, is disposed of. What of the balance?

As the sums are specifically mentioned which the beneficiaries are to receive I can find no reason for increasing them in any respect. There is consequently an intestacy as to $1,000.

4. ''Hatch Jr.'' is given $50.

Mr. John Hatch has only two sons, William Hatch who is admittedly the William Hatch or legatee of $50 in the same clause 3—and Nelson Hatch now about 18 years old and eight years younger than his brother. The testator was in the habit of referring to Nelson as ''young Mr. Hatch'' and ''Hatch Junior.'' There can be no doubt that Nelson Hatch is the beneficiary named: Lee v. Pain (1844), 1 Hare 201 at p. 251; Dowsel v. Sweet, Amb. 175 and note; Theobald, 4th ed., p. 221; Re Patrick Moran (1910), 17 O.W.R. 578; Re Catherine Gordon (1911), 20 O.W.R. 528.

5. What does clause 4 mean?

One cannot congratulate the draftsman, whoever he may have been, in making his meaning plain. The best I can do is to find that the $1,000 is to be applied in making all payments for and out of the estate which are not specified but which are necessary. Such payments are not specified as have no fund specifically provided for them—e.g. debts, funeral and testamentary expenses, costs of solicitors, etc., in administering the estate, executors' commission, etc., etc.

6. And who are the ''recipients of this will?''

Literally speaking, the only recipients of the will are those who receive the will itself, the officers of the Surrogate Court: but no doubt what is meant is ''beneficiaries under the will''—and that means all who receive any benefit under the will: 1. Mrs. Hunt; 2. and 3 Her two sons; 4 to 8 Mrs. Jas. Hussey's

five children; 9. Olivet Baptist Church; 10. Peter Humphrey; 11. John McIntosh; 12. William Hatch; 13. Maggie Hatch; 14. Nelson Hatch; 15. Olivet Baptist Sunday School.

7. There is an intestacy as to (a) the household furniture of the two parlors (b) $1,000 of the A.O.U.W. insurance (c) any property not specifically mentioned. It is not known that the deceased had any next of kin. An enquiry will be directed by the Master in Ordinary as to this.

Costs of all parties, those of executors between solicitor and client, out of the residue in the first instance, but in any event out of the estate.

RIDDELL, J., IN CHAMBERS. NOVEMBER 11TH, 1912.

RE GIBBONS v. CANNELL.

Prohibition — Division Court — Territorial Jurisdiction—10 Edw. VII. ch. 32, sec. 78—Notice Disputing Jurisdiction—Motion for Judgment—Defendant not Represented—Defective Affidavit—Objection Waived by Plaintiff's Counsel—Change in Wording of sec. 79—Effect of—Costs.

Motion by defendant for an order of prohibition to the 10th Division Court of the County of York.

E. G. Long, for the defendant.
J. F. Boland, for the plaintiff.

RIDDELL, J.:—A special summons issued out of the 10th Division Court of the County of York, on an advertising agreement whereby the defendant a hotel-keeper at Port Carling agreed on certain terms and conditions to pay the plaintiffs $50. The summons having been served September 21st, 1912, the defendant on September 26th filed a notice: "the defendant disputes the plaintiff's claim herein and also the jurisdiction of the within Court to try the same." I take this to be a "notice . . . that he disputes the jurisdiction of the Court" within the meaning of 10 Edw. VII. ch. 32, sec. 78.

The plaintiff served notice of motion for judgment under sec. 100 at the same time as the special summons, i.e., on the 21st September, 1912—and on the 27th September on the return of the notice of motion, judgment was directed to be entered for the plaintiff for the amount of the claim and costs. The de-

fendant was not represented at the motion: he swears that he instructed his solicitor to oppose the motion, furnishing him with an affidavit for that purpose, and that his solicitor, as he says, arranged with the plaintiff's solicitor for a hearing of the motion during the week beginning the 30th September. The defendant denies also on oath the execution of the document.

The defendant now applies for prohibition. Upon the argument it was pointed out that there was no affidavit specifically denying that the defendant resided or carried on business within the 10th Division Court Division, etc. (sec. 72): but the plaintiff's counsel most generously waived that objection, and I assume that the action was not properly triable in that Division under sec. 72, but that it should have been entered in another Division Court: sec. 79 (1).

The wording of sec. 79 (1) of the present act is not quite the same as that of the former acts: "79 (1) If it appears that an action should have been entered in another Court . . . it shall not fail for want of jurisdiction but etc., etc."—the former legislation was "shall not abate as for want of jurisdiction but etc., etc." Under the former legislation, it had been decided that the section in part quoted did not give the Court jurisdiction to try simply if no objection had been taken, or if taken either not tried or wrongly passed upon: Watson v. Woolverton, 22 O.R. 586 (*n*); Re Hill v. Hicks, 28 O.R. 390; Re Thompson v. Hay, 22 O.R. 583: 20 A.R. 379.

A tempting argument is based upon the change in the language of the enactment—thus—the act says that the "action . . . shall not fail for want of jurisdiction . . . ." This by implication gives the Court jurisdiction: and if the Court has jurisdiction, no mistake made by the Court is a ground for prohibition.

It may be at once admitted that if the Court had jurisdiction prohibition does not lie: Long Point Co. v. Anderson (1891), 18 A.R. 401; Ameliasburg v. Pitcher (1906), 13 O.L.R. 417; but I am unable to convince myself that the slight change in the language of the legislation has wrought such a great change in the law.

A provision that an action shall not abate as for want of jurisdiction seems to me to imply a grant of jurisdiction to the Court as a provision that the action shall not fail for want of prohibition. The Courts which have jurisdiction in a particular case are as well and clearly specified now by sec. 72 as formerly when Re Thompson v. Hay was decided. Had the Legislature intended that a Court other than those named in sec. 72 should have jurisdiction it would have been easy to say so.

I think I am bound by authority to hold that prohibition must go.

As to costs, the applicant would under ordinary circumstances have been entitled to his costs: but his material was defective, fatally defective, and it was only by reason of the generosity of his opponent that he was able to get on at all. Had the respondent's counsel insisted on his strict rights the motion would have had to be adjourned to enable him to complete his material; this enlargement would, of course, have been at his expense. This is saved him by the eminently reasonable and proper conduct of opposing counsel and I think the order must be without costs.

KELLY, J., IN CHAMBERS. NOVEMBER 12TH, 1912.

REX v. STEPHENSON.

Intoxicating Liquors—Conviction for Selling without License—Bottle Seized Bearing Label "Salvador"—Refusal to Admit Evidence—Request for Analysis—Estoppel—Fair Trial.

Motion to quash a conviction for selling liquor without a license.

G. W. Bruce, K.C., for the defendant.
H. S. White, for the magistrate.

KELLY, J.:—Defendant was convicted by the Police Magistrate for the Town of Collingwood of selling liquor without a license on July 12th, 1912, and a penalty was imposed of a fine of $250 and $22.15 costs, and on default three months in gaol at hard labour. The information was laid on July 15th and the hearing before the magistrate was begun on July 20th and evidence was then taken. Judgment was given on July 27th.

At the time of the occurrence in respect of which the charge was laid, the police officer seized (in defendant's premises) what he said was a bottle of beer, but which defendant swore was non-intoxicating beer, the same, he swore, as he was selling on that day in his premises. The bottle seized bore, at the time, a label "Salvador," the name of a beer which is said to be intoxicating. The officer who seized it swore he had "no other reason of thinking it was "Salvador" beer except from the label."

One of the grounds relied upon by defendant for quashing the conviction is that he was not given an opportunity of putting in evidence which he tendered and which the magistrate refused to consider.

On the motion an affidavit of the magistrate was filed wherein it is shewn that immediately after the service of the summons on July 15th, defendant's counsel applied to him (the magistrate) to have the beer which was seized sealed up, and he sealed it up in presence of the counsel; and further that when the case came on for hearing on July 20th, he was asked by the same counsel to send the beer for analysis, it being still in the possession of the police officer, and that he then told defendant's counsel that the case must go on on that day and afterwards the beer could be sent for analysis, and that he would in the meantime withhold judgment. The magistrate says further that after defendant had given his evidence on the 20th his counsel again requested that the beer seized be analysed, in reply to which the magistrate said he did not wish it analysed, but if defendant's counsel wished it, he (the magistrate) would direct the chief of police to send it to the Provincial Analyst; and that after the Court had adjourned he gave directions to that effect.

It is also set out in the affidavit of the magistrate that at the hearing, counsel for the prosecution having argued that defendant having admitted that the label on the bottle seized and the label on other bottles sold was "Salvador," and held out by him to his customers as intoxicating liquor, he was estopped from shewing that the bottles contained non-intoxicating beer; and that he (the magistrate) said he would convict at once if counsel for the prosecution could satisfy him by authority that defendant was estopped.

I am taking the magistrate's version of what took place, though the defendant's counsel puts the case even stronger. The magistrate, however, says, in his affidavit—not in the record of the conviction—that the question of analysis or the doctrine of estoppel had no bearing upon his judgment, as he made the conviction on other grounds.

The analysis was not produced afterwards, and on July 27th, without further reference to it, or further opportunity to defendant to complete that part of his defence, the conviction was made.

Under the circumstances the accused had not a fair trial. In a proceeding involving, as in this instance, a heavy fine and the liberty of the accused, he should have been afforded the fullest opportunity of putting forth his defence, and when he sought to have an analysis made of the liquor which was in possession of the police officers, and which on the prosecutor's own shewing was taken from defendant's premises as part of what was there being consumed at the time of the seizure, and defen-

dant contending that what was seized and what was being consumed on his premises was non-intoxicating beer, it cannot be said that he was afforded the opportunity of making a full defence, when the analysis was not proceeded with, especially as the magistrate himself admits that when on July 20th he was asked to have the analysis made, he said the case must go on on that day, that afterwards the beer could be sent for analysis and that he would in the meantime withhold judgment.

The conviction is, therefore, quashed, with costs, and there will be an order of protection to the magistrate.

I have not dealt with the other objection raised by defendant's counsel on the motion.

RIDDELL, J. NOVEMBER 12TH, 1912.

RE ROBERTSON AND TOWNSHIP OF COLBORNE.

Municipal Corporation—Telephone System—By-law and Resolution for Establishment of—Motion to Quash—Two Parallel Systems in Operation — Ontario Telephone Act — Petition Changed without Consent — Discretion of Council — Petitioners not Allowed to Withdraw—Violation of Alleged Understanding on which By-law Passed—Sealing of By-law—Schedule not Attached—Matters of Routine—Date of Debentures — Binding Lands in another Township — Alleged Partizan Action of Reeve and Councillor—Bona Fides—2 Geo. V. ch. 58 and Prior Statutes Considered.

Application to quash a by-law (No. 2 of 1912) passed by the respondent township on the 27th April, 1912, to raise $4,840 to pay for the cost of construction and installation of a telephone system known as "The Municipal Telephone System of the Township of Colborne"—also to quash a resolution passed on the same day that a by-law be passed providing for payment of law costs or other expenses in connection with said by-law No. 2.

Prior to the month of April, 1910, a joint stock company known as "The Goderich Rural Company," had procured from the said township a franchise to operate a telephone system in the township. In the month of April, 1910, it was understood that said company was not going to take advantage of said franchise and a number of the ratepayers, desirous of having a telephone system established, on May 10, 1910, presented a petition and agreement to the Township Council praying that a telephone

system should be established. On that date a resolution was passed that the petition presented be granted with the exception of clause 2. A by-law was thereupon introduced establishing the system and got a first and second reading. The final passing was put off until the next meeting. On the 26th of May the Council again met and passed the by-law. At this meeting a petition signed by applicant E. Maskell and others was presented to the Council, asking that their names should be removed from the petition. The Council passed a resolution that no action should be taken. The system thus created went on and built a system covering various concession lines in the township, and the township borrowed on two by-laws the sum of $3,800 and paid it over to the promoters of this system. The rural company also went ahead and built their lines. The township has thus two systems, which on various concession lines are both in operation.

The two systems are not in any way connected and the result is that neighbours cannot converse, and considerable ill feeling has been engendered. The individual applicants and several others who signed the petition to remove their names have not taken telephones from the municipal system. The by-law attacked embraces their land and it is claimed an attempt is thereby being made to compel them to pay for something they have not taken and will get no benefit from.

W. Proudfoot, K.C., for the applicants.
G. F. Shepley, K.C., for the Township.

RIDDELL, J. (after setting out the facts):—The statute to be considered is the Ontario Telephone Act which is 2 Geo. V. ch. 58, where necessary, with its forerunners 3 Edw. VII. ch. 19, sec. 331, 8 Edw. VII. ch. 49, 10 Edw. VII. ch. 84, 92; 1 Geo. V. ch. 55.

Taking up the objections in their order:—

1. That the township changed the petition without the consent or authority of the applicants by striking out paragraph 2 thereof; and thereupon passed by-law 15 of 1910, establishing a system.

The petition after reciting that it was desirable to construct a local telephone system in the township; and at the expense equally shared of the subscribers, paid for by debentures, etc., etc., went on to pray (1) the council to pass a by-law establishing such system under the Act of 1908, etc., (2) that the council should take proceedings to secure the right to extend the system beyond the boundaries of the township, or make such alternative arrangements as will secure the same, and (3) that the expense

shall be in equal shares borne by the members of the system, etc., etc.

The by-law No. 15 of 1910, did not contain any such provision as is contemplated in the 2nd paragraph of the petition.

I do not think this fatal, 8 Edw. VII. ch. 49, secs. 3, 4, 5, 6 and 9 (=2 Geo. V. ch. 58, secs. 9, 10, 11, 12, 13) give the statutory provisions. A petition is to be presented praying for the establishing of a system, which petition shall set forth such particulars as the council shall require "including a statement shewing the location of the proposed system and the manner in which it is proposed that it shall be constructed and maintained." This was done, and in addition the petition contained clause 2 asking the council to act under sec. 13 (now 9). The council thereupon did provide for the establishment, etc., under sec. 5 (now 11). The extension in sec. 5 (11) is not the extension in 9 (13): the former would be within the township; the latter without. I can see no necessity for the council doing everything at once; nor do I think a petition such as this must necessarily be given effect to in all its prayers at once or at all.

The second objection is thus stated:—

"2. Prior to the passing of said by-law No. 15, 1910, the respondent had granted to "The Goderich Rural Telephone System, Limited" a franchise to erect a telephone system in the said township, and it was on the understanding that the said company did not intend to use said franchise that the applicants (other than the said township) signed said petition. At the time said by-law was passed, it was known that the said company intended to proceed. With this knowledge the respondent should not have proceeded as it was not in the interests of either the applicants or the ratepayers to have two systems paralleling each other in said township."

But this is a matter for the discretion of the council—they had the power and, given good faith, the Court cannot interfere. The council is a legislative body with certain statutory powers: it is in no sense subordinate to the Courts and the *bonâ fide* exercise of statutory power should not be interfered with.

"3. The applicants and others (other than the township of Wawanosh) after the said petition had been presented and passed with the said change and with the knowledge that said company intended to proceed, desired to withdraw therefrom and for that purpose, before anything had been done thereunder or expense incurred, presented a request in writing to the respondent to permit them to withdraw therefrom, this the repondent improperly and illegally refused to assent to."

I do not find any provision for a petitioner striking his name from a petition—and in any case there were sufficient petitioners to answer the statute if the objectors' names were removed.

4. "Before passing the said by-law No. 15 of 1910, establishing the said system, it should have had a schedule or list of the petitioners annexed to and forming part of the said by-law and read and passed as part thereof. This was not done nor was the said list in any way attached to or made part of the said by-law."

The statute sec. 8, now sec. 14, provides for the cost of establishing and maintaining the system; and such being the case such an addition to the by-law is not only unnecessary but improper.

"5. The applicants would not have consented to the change made in the said petition and all steps, actions and proceedings thereafter taken by the respondent under the said petition were, so far as the applicants were concerned, illegal and void."

This has been already covered.

"6. The respondent's council, in passing the said by-law No. 2, of 1912, did not exercise their own will and judgment in doing so. Such by-law having been passed on the illegal resolution and understanding that if any expense was incurred by the township in upholding the same, it would be paid by the Municipal Telephone System, and without the said understanding a majority of the said council would have voted against the passing of the said by-law."

The by-law here spoken of is the by-law really attacked in the present motion. It is based upon by-law 15 of 1910; after reciting that by-law it goes on to provide for the issue of debentures, etc., etc.

A resolution was passed at the special meeting April 30th, 1912, in the following terms "that by-law No. 2, 1912, as read a third time be passed; and that a by-law be passed providing that the Municipal Telephone System of Colborne pay any law costs or other expenses that may be incurred on the township in connection with the passing of by-law No. 2." It is said that the council would not have passed the by-law without such an agreement of indemnity—probably that is so—and the Reeve thought the indemnity illegal though he did not tell the council so.

I do not see that this invalidates the by-law—whatever it was that induced the council to think it in the public interest that the by-law should carry, they did so; and that is enough. I cannot see that anything which is said in Begg v. Dunwich

(1910), 21 O.L.R. 94, or Re Angus v. Widdifield (1911), 24 O.L.R. 318, has any bearing adverse to this conclusion.

Nos. 7 and 8 are to be dealt with together.

7. "The respondent at the time the said by-law was passed, did not have attached thereto and forming part thereof the schedule shewing the list of names of persons whose property was thereby being bound, nor was the said list read, and although it purports to form part of the said by-law was not produced, nor read at the said meeting, and the respondent only in part, passed the said alleged by-law."

8. "The said by-law had not attached thereto at the meeting of the council when passed the seal of the said corporation attached, said by-law was taken away by the Reeve of the said township from the custody of the clerk where it properly belonged and remained in his possession without being sealed, and if sealed at all was sealed without authority on or about the time that a copy thereof was registered in the registry office for the county of Huron about which said time the said schedule of names was for the first time attached thereto."

These are, in my opinion, rather matters of routine, practice, than of substance—the schedule was lying on the table, everybody knew of it and its contents, the seal is kept at the clerk's office and not at the council chambers, and it was affixed at a convenient time after the meeting and before anything was done under the by-law.

It never has been held that the signing and (or) sealing of a by-law must be done at the council meeting: the instances in which this is done are probably rather the exception than the rule. Sec. 333 requires the signing to be done by the person presiding at the meeting but it does not require the signing to be done at the meeting and signature afterwards is quite sufficient: Brock v. Toronto and Nipissing R.W. Co., 17 Gr. 425, at p. 434, *per* Spragge, C.; McLellan v. Assiniboia, 5 Man. R. 127.

9. "The said by-law provides for the said debentures being issued as of the 21st of December, 1911, which is illegal and improper."

It is argued that the statute does not give any power to the council to issue the debentures as of the 21st December. I find nothing in the statute sec. 11 (1), now 17 (1), to prevent the council fixing any convenient date for the debentures—the statutory authority is given to issue debentures, however, and that is enough.

10. "The respondent in passing the said by-law assumed to bind lands in the township of West Wawanosh. No authority

was ever received by the respondent from the said township of Wawanosh to enter into or carry their lines into the said corporation, and the action of the respondents in doing so and in passing the said by-law, whereby an effort is being made to bind lands of ratepayers in the said township, is wholly illegal."

The applicants cannot complain of anything not affecting them—supposing the ratepayers of Wawanosh could.

11. "The resolution passed by the respondents on the 27th day of April, 1912, as hereinbefore fully set forth, was illegal. The respondents having no power or authority to either pass said resolution or to pass the by-law thereby provided for."

This has already been dealt with.

12. "The respondent without a vote of the ratepayers of the township of Colborne had no power or authority to pass the said by-law creating, as it does, a liability for which the credit of the whole township is pledged."

The statute sec. 11 (1) now 17 (1) gives the power and authority so to do.

13. "The Reeve and Councillor Halliday, both being subscribers to said Municipal Telephone System, acted in a partisan manner and had no right to vote on said by-law."

I think they acted in good faith, which is enough—but in any case three of the councillors were beyond suspicion and they acted in passing the by-law.

The attack fails on all grounds taken: and the motion must be dismissed with costs.

RIDDELL, J. NOVEMBER 13TH, 1912.

KELLY v. NEPIGON CONSTRUCTION CO.

Contract—Railway Construction—Written Agreement for Cutting and Delivering Ties—Reference to Master—Permits for Cutting—Parol Evidence of Surrounding Circumstances—Implied Variation as to Date of Delivery—Plaintiff Prevented from Fulfilling Contract—Damages—Method of Computing—Supplies Taken over—Conversion—Bailment—Costs.

Appeal by the defendants from the report of the Master at Port Arthur on a reference in an action for damages for breach of contract, etc.

The plaintiffs were a firm carrying on business in Port Arthur, the defendants were a company engaged in building part

of the National Transcontinental Railway. In or about November, 1909, the parties agreed for the plaintiffs to do some freighting, etc., for the defendants—and they did so. The action was in part for these services.

On February 9th, 1910, the parties entered into a written agreement for cutting and delivering ties, which with some other matters of minor importance, was considered in the action. At the trial, an order was made that all matters in question in the action should be referred for enquiry and report to the Local Master at Port Arthur, and all questions of costs and further directions were reserved. The Master made his report on August 24th, 1912, finding the defendants indebted to the plaintiffs in the sum of $12,815.08. The defendants appealed, and the plaintiffs moved for judgment on the report.

H. Cassels, K.C., for the defendants.
Glyn Osler, for the plaintiffs.

RIDDELL, J. (after setting out the facts):—As to the tie contract of February, 1910:—This contains a provision that the plaintiffs shall provide all labour, etc., necessary for the cutting and delivering of the ties required for the 75 miles of railway from a point 19⅛ miles west of the crossing of Mud river, eastward. They were to commence forthwith after the execution of the contract and cut and deliver before June 15th, 1910, 75,000 ties, and unless notified by the company to stop for a time, continue thereafter cutting and delivering ties until the full number should be delivered, and at such a rate as that the work of track laying should at no time be delayed, the company to be the sole judge of this. The ties cut along or near the right-of-way were to be delivered at points on the right-of-way, properly piled. The said piles were to be distributed so as to provide sufficient ties at each pile to carry the steel from that pile to the next, E. or W., so as to make it unnecessary to haul ties by teams. "Any of said ties which the company requires to be delivered at its No. 3 warehouse on Ombabika bay shall be placed in the water and towed to said warehouse and there placed in booms or piled on the shore."

The company were to furnish permits for the cutting of such ties and pay all dues; and the plaintiffs to conform to all the regulations of said permits.

The number of ties necessary is, as is admitted, 3,000 per mile or 225,000 for the 75 miles.

In fact only 3,600 ties were made up to June 15th, 1910,

instead of the 75,000 agreed upon—but there can be no complaint on this score, as the defendants requested that the plaintiffs should stop, and the plaintiffs willingly assented. It seems probable that the plaintiffs could have had the 75,000 ties cut had it been desired.

Much complaint is made by the appellants that the Master found as a fact that the 75,000 ties were to be made off the Ombabika limit, the contract being silent in that regard. No doubt it would not be proper to amend the written contract by introducing this term: McNeely v. McWilliams (1886), 13 A.R. 324; Betts v. Smith (1888), 15 O.R. 413, S.C. (1889), 16 A.R. 421, and similar cases well known. For example the plaintiffs would not be breaking their contract if they delivered these 75,000 ties from some other limit. Yet while the arrangement to cut on the Ombabika limit cannot be made a term of the contract, it is a circumstance to be taken into consideration in determining the amount of damages, etc., like any other circumstance surrounding the making of the contract, or contemporaneous with its performance in whole or in part—and it is in this view that the Master finds the fact, in which finding I agree.

The direction from the defendants to "go slow" was in March; the licenses expired on the 30th April and the Government had given notice that they would not be renewed; but on and after the 10th June, licenses could have been obtained without any trouble.

The defendants did not procure licenses. From the conduct of the defendants in staying the operations of the plaintiffs it would follow as a natural consequence that the term of the contract requiring delivery of 75,000 at a fixed date was impliedly varied, and a delivery at a reasonable time would be sufficient. And it being the duty of the defendants to supply the permits to cut, all time lost by the non-furnishing of the permits, the plaintiffs could not be held responsible for.

September 14th, 1910, the plaintiffs asked for permits in a letter to the defendants—they replied September 17th, 1910, saying that they had assigned their contract to O'Brien & Co.: September 26th, O'Brien & Co. wrote the plaintiffs saying "We will arrange to get permits for you between mileage 160 and 175 and 225 and 235 on either side of the railway": the plaintiffs replied, October 5th, that they held the defendants on the contract, and had not consented to any assignment, but "without prejudice to our claims against the Nipigon Company," if O'Brien & Co., would send the permits the plaintiffs would at once act on them. O'Brien & Co. answered, placing upon the

plaintiffs the responsibility of saying whether there were enough ties on the lands, O'Brien & Co. had preferred, and that if the plaintiffs said there were, O'Brien & Co. would get the permits. "But," they add, "surely you do not expect us to go into the woods and select your timber limits," "As stated before, we wish you would say if this territory is satisfactory to you, for we do not want to ask for permits in a territory where there is no tie timber."

The specific and definite contract of the defendants was to "furnish permits for the cutting of such ties," and I do not think they could cast upon the plaintiffs the duty of finding out where "such ties" could be obtained; but that they undertake that responsibility themselves.

The permits were not furnished, the plaintiffs did not perform their contract accordingly, but were prevented from doing so, and they are entitled to damages.

I cannot say that the Master is wrong in his estimate of damages properly attributable to this head. There are, however, two matters which require consideration.

First, the Master has made a mistake in his figures—he has made the remainder found by subtracting 75,000 from 225,000 to be 155,000 instead of 150,000. His figures must then be reduced by $150 (i.e., 5,000 ties at 3 cents = $150). Then he had allowed the plaintiffs $1,000 for "expenditure upon camp buildings, etc., which became useless by reason of the defendants' breach of . . . contract." What the Master says is this:—

"They (*i.e.*, the plaintiffs) had erected the necessary buildings from which to carry on operations and had cut roads as required. These buildings are valued by Mr. Bliss at $700, and the roads at $100 a mile, or for three miles which was the approximate length $300, making together $1,000. They had also bought and forwarded to their camp over $2,000 worth of supplies. Mr. Bliss says that Donnell the plaintiffs' foreman was a good competent man. It never could have been contemplated that the plaintiffs would spend $1,000 in preparation for making 3,600 ties and 800 logs also cut by them on that limit. The work on the roads could be taken away when the tie making was completed. Something might be saved from the buildings, but the loss on both would be spread over 75,000 ties and would be a mere trifle as compared with the loss if it is to be confined to 3,600 ties."

All this, I think, involves a fallacy—the plaintiffs would require to make all these expenditures to carry out their contract, and their reward would be the amount of their net profits,

not the net profits plus what they had spent in earning them. They cannot be in a better position than if their contract had not been broken. This $1,000 should be disallowed.

We now come to an item $1,734.24 "for supplies, etc., taken over by the defendants," but the property of the plaintiffs. What the Master says about this item is: "I think the defendants are liable to the plaintiffs for all the damages which the plaintiffs suffered from the refusal or neglect on the part of the defendants or their assignees to have that permit on Ombabika bay renewed and to permit the plaintiffs to carry out and complete their contract as originally agreed upon, and this includes the value of the supplies left at their camp at Ombabika bay, $1,734.24."

It will be seen that this involves the fallacy I have just been discussing. Counsel for the plaintiffs does not pretend to support it on any such ground but bases it as upon a conversion. We must, therefore, examine into the precise facts of the alleged conversion—and here the Master does not help us.

In the opening before the Master, counsel for the plaintiffs said: "When the defendants gave up work they had a good deal of material on hand on the ground . . . about $2,000 worth which we understand was taken over by the defendants' assignees O'Brien & Co."

The contracts between the defendants and O'Brien & Co. are two in number; an assignment of the plaintiffs' contract and an assignment of the contract to build the railway. Neither of these contains any assignment of the plaintiffs' goods—and consequently neither can be construed as a conversion. We must look at the facts as they occurred on the ground.

When the plaintiffs ceased work in the spring they left supplies of different kinds on the premises which they had occupied as a camp. The buildings there seem to have been rented. When O'Brien & Co. took over the defendants' contract, they wanted these supplies: Kelly went up and took an inventory of them and he and O'Brien dickered concerning the price, but apparently, could not—or at least they did not—agree. O'Brien took the supplies knowing them to be the plaintiffs', and being willing to pay the plaintiffs for them—not at all by reason of any authorization of the defendants. The plaintiffs must look to O'Brien & Co.; there was no conversion by the defendants.

Item 39 is also attacked. This was $516.55 for oats and hay alleged to have been supplied by the plaintiffs to the defendants. The Master says: "As to the item of accounting in dis-

pute I find that the defendants should pay for the hay and oats of which they were bailees, and which they turned over to O'Brien, McDougall & O'Gorman, and that the price should be what it cost plaintiffs to put these articles at Warehouse 1, if plaintiffs had not consented to accept the lower figure fixed by the defendants—$516.55."

[Discussion of the evidence, on which the learned Judge disallows this item, his conclusion being that there was no sale, and that on the Master's finding that the defendants were bailees, what has been said on the large item of $1,734.24 is applicable. The judgment proceeds:]

The Master has allowed to the plaintiffs also in an indirect way for other "goods supplied by the defendants to the plaintiffs for the purposes of and in connection with the said contract, which expenditure became wholly useless to the plaintiffs owing to the defendants' breach of contract. These amounts appear in items Nos. 100 to 131 inclusive . . . and instead of adding the amount to the damages assessed" he has "disallowed the items in question in dealing with the defendants' account." This is wrong for reasons I have already stated.

The amount of these, reducing No. 112 to $57 and deducting No. 116, $1,500, is $1,030.36.

The report should be amended by allowing to the plaintiffs the following sums in the first column and disallowing those in the second:—

		Allowed.	Disallowed.
(1)	Nos. 1 to 25	$9,411.60	
	34	11.25	
	35	19.26	
	40	208.40	
(2)	39		516.55
(3)		9,000.00	150.00
			1,000.00
			174.73
			1,734.24
Forward		18.650.51	3,575.52

	Allowed.	Disallowed.
Forward	18.650.51	3,575.52
		18,650.51
Total		$22,226.03

In the defendants' account there should be added the above amount of $1,030.36, being the real amount of items Nos. 100 to 131 inclusive, making the defendants' total:

Amount found by Master		$9,410.95
Add		$1,030.36
		10,441.31
Balance due to plaintiffs		8,209.20
		$18,650.51

The plaintiffs' balance in other words is reduced by the sum of $3,575.52 and $1,030.36 = $4,605.88. Deducting this from $12,815.08, as found by the report, we have $8,209.20.

It is possible that the amounts really due under items 100-131 of the defendants' account are not exactly right: either party may at their own peril take a reference back upon this point only. If that be done, I will reserve to myself the question of the costs of that reference, but so far as the success has been divided, I think the plaintiffs must have the costs of the action up to and including judgment, and no costs of reference, appeal, or motion for judgment to either party. If my figures are adopted the plaintiffs may have judgment for $8,209.20 with costs up to and including judgment at the trial only.

LENNOX, J.] [NOVEMBER 13TH, 1912.

LITTLE v. HYSLOP.

Administration—Action for Money Lent—Interest—Advancement—Evidence—Onus — Corroboration — R.S.O. ch. 73, sec. 10—Lien—Costs.

Action by the administrator of the estate of Esther Hyslop, deceased, to recover $700, alleged to have been lent by the deceased to the defendant, one of her sons, and interest thereon—claiming also a lien on the property purchased with the money.

J. H. Scott, K.C., for the plaintiff.
O. E. Klein, for the defendant.

LENNOX, J. (after setting out the facts):—The defendant admits that he borrowed $650 from his mother, but says he was not to pay interest, and that he re-paid, and over-paid, this money to the deceased.

The evidence shews that on the date in question there was $700 drawn from the deceased's bank account; and the defendant admits that he drew out this money. But the defendant says he gave his mother $50 out of that amount, or out of money he had on hand, the same evening. His wife gives some evidence upon this point, too; and although, as I shall mention later, I place no great reliance upon the evidence of the defendant or his wife, yet the plaintiff must establish the loan; and I cannot say that I am satisfied that it was for more than $650. The defendant is not at this point giving evidence of repayment—he and his wife are shewing that only $650 was borrowed.

After careful consideration of the circumstances and evidence, I have come to the conclusion that the defendant agreed to pay interest; and I allow interest at five per centum per annum. As between strangers a loan imports payment of interest, and, in view of the very limited means of the deceased, the doctrine of advancement could find no proper place.

The onus is, of course, on the defendant to prove repayment; and, being "an opposite or interested party" he is not then entitled to a finding in his favour "on his own evidence . . . unless such evidence is corroborated by some other material evidence:" R.S.O. ch. 73, sec. 10; Thompson v. Coulter (1903), 34 S.C.R. 261. And where the alleged payments are wholly unconnected—as they are here—corroboration of an item here and there is not corroboration of the whole account: Cook v. Grant (1882), 32 U.C.C.P. 511; Re Ross (1881), 29 Grant, 385.

The defendant called evidence which would amount to corroboration within the statute, if I could believe it. But, unfortunately for the defendant, I can place no confidence at all in the testimony of Hector McDonald; and defendant's own evidence and the evidence of his wife fell very, very far short of convincing me that they were telling the truth.

At this point, taking the testimony of these three witnesses alone, and carefully scrutinizing the various entries contained in defendant's book of account, the question of corroboration hardly arises as, even without reference to the statute, I would not be able to find in favour of the defendant as to the alleged payments.

But the evidence of Martha Wallace, as far as it goes, may, I think, be invoked to relieve the defendant. It is not corrobora-

tion—in fact, it is inconsistent with the defendant's evidence—but I am satisfied that the deceased did tell Mrs. Wallace that the defendant had paid her $100, and $30, and three or four sums of $10 each. This evidence was objected to; but it was clearly admissible even upon the narrow ground of being a statement against the interest of the deceased.

I will allow the defendants credit for the outside sum mentioned by Mrs. Wallace, $170. Upon the evidence it is difficult for me to determine when these sums were paid. If I credit the $170 as paid at the end of the third year I shall, I believe, be doing substantial justice between the parties.

The loan, with interest at five per cent. to the 5th April, 1910, will total $747.50. Deducting $170 from this, leaves a balance of $577.50.

There will be judgment for the plaintiff for $577.50, and interest thereon from the 5th April, 1910, with costs on the County Court scale; and the defendant will not be entitled to set-off costs.

The defendant has not asked for a stay of execution; and in view of this, I do not think that a declaration of lien is necessary.

The executor was justified in claiming the full $700 and interest. The action was, therefore, properly brought in the High Court, and he will be entitled to costs out of the estate, as between solicitor and client, upon the High Court scale.

DIVISIONAL COURT. NOVEMBER 13TH, 1912.

OLSON v. MACHIN.

Company—Wages of Employees—Action against Directors by Boarding House Keeper—7 Edw. VII. ch. 34, sec. 94—Note Given by Company for Indebtedness—Equitable Assignment.

Appeal by the plaintiff from the judgment of LATCHFORD, J., of June 24th, 1912, dismissing the action without costs.

The appeal was heard by RIDDELL, SUTHERLAND, and MIDDLETON, JJ.

H. A. Burbidge, for the plaintiff.

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

RIDDELL, J.:—This is an appeal from the judgment of Mr. Justice Latchford, and it was strongly urged that the learned trial Judge, had in effect refused to follow Lee v. Friedman, 20 O.L.R. 49. If this were so it is plain that the judgment could not stand.

I do not think the contention well founded—the learned Judge does not purport to disregard (as of course he could not disregard) the judgment of the Divisional Court in that case, but declines to extend that decision and to apply it to the facts of the present case.

The facts in Lee v. Friedman were different—there the employees of a company were customers of a store-keeper who declined to give them credit until they had got the consent of the company to pay to the store-keeper out of the wages coming to them at the end of the month the amount of their purchases from the store-keeper. The company agreed and the arrangement was carried out for some time, when the company made default. The store-keeper (in an action in which others were joined as plaintiffs in respect of other claims also for wages) sued for the amount owed to him and obtained judgment, claiming specifically as assignee of wages due to labourers, etc.

The Divisional Court held (1) that the arrangement was an equitable assignment of a certain part of the wages; (2) that an assignee of wages stands in the shoes of his assignor and is entitled to the benefit of the statute 7 Edw. VII. ch. 34, sec. 94. I think both conclusions were good law.

No difficulty arises from the assignment of part of a claim where the assignment is equitable and not under the statute: Smith v. Everett (1792), 4 Br. Ch. C. 64; Lett v. Morris (1831), 4 Sim. 607; Watson v. Duke of Wellington (1830), 1 R. & M. 602, where Sir John Leach, M.R., says at p. 605: "In order to constitute an equitable assignment, there must be an engagement to pay out of the particular fund." See also Marton v. Naylor (1841), 1 Hue, N.Y. 583 and cases cited. In Shaw v. Moss (1908), 25 Times L.R. 190, an assignment of 10% of salary and moneys to accrue due was supported as an equitable assignment.

I do not enter into the many curious and difficult questions arising out of the precise wording of the statute. The cases range from Brice v. Bannister (1878), 3 Q.B.D. 569 (C.A.) or before, to Foster v. Baker, [1910] 2 K.B. 636 (C.A.) or after.

In Lee v. Friedman it was indicated that the result would (or might) be different "under a slightly different state of

circumstances''—see 20 O.L.R. at p. 55. And in my view, the circumstances here are not slightly, but materially different.

Here the arrangement originated with the plaintiff and the company—the company gave him premises rent free and kept them insured, they gave him free electric light for 3 months and supplied him with wood for cooking purposes free, he agreeing to ''keep the fires going and the house heated without further charge to the company.'' It was agreed that he should ''charge the sum of 25 cents per meal served to employees,'' that he should ''have the money due him by the men collected through the mine office and before any man receives his time check from the mine manager,'' the plaintiff should ''notify in writing to the said manager the amount due by the man to the ''plaintiff'' and the company shall only be liable for the amount so written. Every man living in the boarding house shall live rent free, and he shall furnish his own blankets, towels and soap,'' while the company was to put up ice each year and allow the plaintiff the free use of the same.

When men were employed they had no option but to board at the house kept by the plaintiff—they were told that ''the board so much per day or week would be deducted from them.'' A pay roll was made out, the entry for each man containing his nominal wages—and a deduction was made from this amount for the amount of the claim of the boarding-house keeper.

I am unable to see how the amount so deducted ever was due to the employee at all. He knew from the beginning that a certain (or perhaps uncertain but if so, he could make it certain) amount would be due and payable, not to him, but to the boarding house keeper under an arrangement with which he had nothing to do and against which he was powerless to contend. It seems to me that out of the sum which represented the supposed value of the labour of the employee, and which would have been ''wages'' under other circumstances, a part never became due to the employee at all—It would, I think be an abuse of language to speak of the transaction as an equitable assignment: the relation of debtor and creditor subsisted from the beginning.

But even if this difficulty be got over another remains:

The total sum payable to the plaintiff was..	$2,396.55
there was also due for provisions.....	70.00
and for other goods.....	62.55
In all	$2,529.10

The parties get together, the amount is made up and settled as an account stated at $2,529.10—$500 is paid generally on

account, and a note for $2,029.10 given for the balance. By this transaction, as it seems to me, even if originally the amount due under the agreement had been "wages," the character was changed. If not, how much was now due for wages? Is the $500 a payment on account of wages? or partly so? How much is only in part?

At this stage if not earlier, all parties looked upon the amount due as one sum, not as composed of two sums differing in quality.

And the action was not, as in Lee v. Friedman, brought for wages at all, but upon a promissory note which had been given as part settlement of an account stated. This is made even the more manifest as Machin is sued as an endorser.

The Statute, 7 Edw. VII. ch. 34, sec. 94, is very plain that a director shall not be liable to an action for wages "unless the company has been sued therefor." I do not think it can fairly be said that the company has ever been sued for wages.

For these reasons I think the appeal fails and should be dismissed with costs.

SUTHERLAND, J., concurred in the judgment of RIDDELL, J.

MIDDLETON, J., gave reasons in writing, in which he concurred in dismissing the appeal.

DIVISIONAL COURT. NOVEMBER 14TH, 1912.

WILKINSON v. CANADIAN EXPRESS CO.

Contract—Express Company—Receipt—Conditions Limiting Liability—Plaintiff not within Special Contract—Common Carrier.

Appeal by the plaintiff from the judgment of WINCHESTER, Senior Judge of the County of York, in an action to recover $500 for the value of a magic lantern and slides alleged to have been lost by the defendants in transit, and for damages. At the trial judgment was awarded the plaintiff for $50 with costs up to payment into Court, and no set off allowed the defendants.

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

T. N. Phelan, for the plaintiff.
W. E. Foster, for the defendants.

RIDDELL, J.:—The plaintiff, a clergyman living in Aylmer, had a magic lantern outfit which had been carried on the G.T.R. to Stratford in a trunk as baggage. He left this in the baggage-room at Stratford: he went to Woodstock. From that city he wrote a letter to the "Canadian Express Company, Stratford," instructing the Company to ship it from Stratford to Galt. The letter is not produced: but there is produced a letter written immediately after as follows:

"Canadian Express Co. Woodstock, June 5/11.
Stratford.

I, in my haste dropped my previous letter in the office forgetting to enclose the cheque of my box. Find it enclosed with this.

Yours, etc.,
T. J. Wilkinson."

The agent at the depot at Stratford for the defendants received these letters in due course of mail: he took the check to the G.T.R. baggage-room, paid 55 cents for warehousing charges, gave up the check, received the trunk, made out the usual receipt and gave it to the baggage-man who probably threw it into the waste paper basket. The receipt read "Received of G.T.R. (herein called the shipper) 1 box said to contain not given valued at not given 100 dollars addressed Rev. Wilkinson, Galt, which the Canadian Express Company herein called the Company agrees to carry and deliver upon the terms and conditions on the back hereof to which the shipper agrees and as evidence of such agreement accepts this shipping receipt. . . .

For the Company,
A. Jones Agent."

On the back were printed certain conditions of which the following seem to be material: "2. This agreement shall extend to and be binding upon the shipper and all persons in privity with him claiming or asserting any right to the ownership . . . of the shipment. . . .

"3. The liability of the company upon any shipment is limited to the value declared by the shipper . . . If the shipper does not declare the value of the shipment, liability is limited to $50. . . ."

The trunk went astray and cannot be traced: the plaintiff sues for the value thereof, claiming $500: the defendants pay

$50 into Court and claim that they are not liable for more. The trial Judge, Winchester, Co.J., gave effect to this contention, the plaintiff now appeals.

Much argument was addressed to us to induce us to hold that the special contract did not apply in the present case and several cases were cited, amongst them: Lamont v. Canadian Transfer Co., 19 O.L.R. 291; Corby v. G.T.R. Co., 23 O.L.R. 318; James v. Railway, 6 Can. Rwy. Cas. 309; McMillan v. G.T.R., 12 O.R. 103; S.C. 15 A.R. 14; 16 S.C.R. 543.

I do not think it necessary to decide that point because, assuming that the contract does apply, it does not bind the plaintiff. The language is the language of the Express Company—they say in so many words that in that contract "shipper" means the G.T.R.—and the contract is in terms binding upon the shipper and his privies. The plaintiff, for the purposes of the special contract is neither the shipper—that is the G.T.R.—nor a person in privity with him: the plaintiff is not, therefore, within the special contract at all. What has happened is that the defendants on being requested to carry certain goods for the plaintiff take it upon themselves to purport to carry them on a special contract with some one else.

They are liable in my view for the full value.

We are told that the Railway Board have approved of this form as the only form to be used. This must of course, be read as meaning the only form of contract "impairing, restricting, or limiting the liability of" the company: R.S.C. ch. 37, sec. 353—it does not mean that the company may not carry on its common law rights so long as no attempt is made to impair, restrict or limit its liability—e.g., there is nothing to prevent the express company agreeing to pay twice the value of the goods carried, the order of the Railway Board notwithstanding, and in this case what they have done is to take the plaintiff's goods as a common carrier and lost them, without limiting their liability to him.

The evidence justifies a verdict for $280 and I think the plaintiff should have judgment for that sum with costs here and below.

FALCONBRIDGE, C.J.K.B., and LENNOX, J., agreed in the result.

SUTHERLAND, J. NOVEMBER 15TH, 1912.

RE STEWART ESTATE.

Will—Construction—Life Insurance Policies—Identification of —Variation — Altering Appointment—Ontario Insurance Act of 1912, *secs.* 247, 170, 171—*R.S.O. ch.* 203, *sec.* 160—*Vested Interest—Representation under Con. Rules* 939, 940.

Motion by the executors of John Marks Stewart's estate for an order construing his will under Con. Rule 938.

R. S. Cassels, K.C., for the executors
C. J. Holman, K.C., for the widow.
J. R. Meredith, for the infants.

SUTHERLAND, J.:—One John Marks Stewart was in his lifetime insured under certain policies of life insurance in 16 companies, aggregating a face value of $19,306.65. One of them for $1,000 was by its terms made payable to his mother, Agnes Stewart, and two others for $1,000 each to his estate. All the other policies were made payable to his wife, and in case she predeceased him, to his executors, administrators and assigns. He made a will dated 19th January, 1909, and died on the 25th May, 1912. Letters Probate issued to the executors named in the will on the 20th June, 1912. The testator left him surviving his widow and five sons and daughters, three of whom are infants.

The executors did not include in their inventory of the testator's estate any of the moneys secured by said policies, except the sum of $2,000, representing the amount of the two policies payable to the estate of the deceased; and, in an affidavit filed by one of them, he states that their reason for this was, chiefly, "that the will did not identify the policies," and he thought, "that the will did not make a valid re-appropriation."

The will contains the following clauses: "I give, devise and bequeath all my real and personal estate, including my life insurance policies, of which I may die possessed in the manner following, that is to say:—

"To my executors and trustees hereinafter named and appointed in trust to call in and convert the same into money, in trust to stand possessed of the fund thereby created for the following purposes and trusts, that is to say:—

"(1) To pay to my daughter Rena Stewart the sum of One

thousand Dollars which bequest is in addition to all other benefits which she is entitled to receive under this my will.

"(2) To pay to my mother Agnes Stewart the proceeds of my life insurance policy in the Independent Order of Foresters.

"(3) To invest the balance in first mortgages of real estate in the names of my trustees or in guaranteed investments of the Trusts and Guarantee Company, Limited, with power to vary such investments from time to time, with power to retain investments made by me in my lifetime as long as they shall think proper.

"(4) To pay to my wife Sarah Stewart the income arising from one-half of the said trust fund during the term of her natural life for her own personal use absolutely, which bequest I declare to be in lieu of all dower in my estate.

"(5) To pay the income arising from the remaining half of the said trust fund to my wife for the purpose of being expended by her in the education and maintenance of my infant children."

Two of the companies whose policies were payable to the widow, as already indicated, paid the amounts thereof to her. The other eleven companies, whose policies aggregate in value $13,288.17, required the executors of the estate to receive the insurance moneys under said policies and to discharge the companies from liability. The executors say that they considered these policies to be payable also to the widow, and it was not until the companies required them to receive the money and discharge the policies that they found themselves "compelled to intermeddle with the funds and become responsible for the administration of the same." The moneys payable under said eleven policies, with the exception of one, were paid to them before the 1st August, 1912, and the amount payable under it on the 6th August, 1912.

The executors are asking upon this application for the determination of the following questions:

"1. Do the following words used by the testator, "I give, devise and bequeath all my real and personal estate including my life insurance policies, of which I may die possessed," constitute a variation of the policies of insurance of the testator which, by the express terms of the policies, are made payable to Sarah E. Stewart, wife of the assured and now his widow, and in case she should predecease the assured, then to his estate, and are the words used a sufficient identification of same?"

"2. Has the testator by his will altered the apportionment of the insurance moneys secured by the various policies, or are

the moneys payable only as directed by the policies of insurance, and in accordance with the terms of the said policies, and the various indorsements thereon?

"3. Does the said general clause in the will of the testator, or any other clauses therein contained except paragraph 2, affect or control the disposition of the insurance moneys of the deceased?

"4. Can the executors pay to Mrs. Sarah E. Stewart the proceeds of policies mentioned in paragraph 9, (d) of the affidavit of Charles Julius Mickle filed on this motion, as having been paid to the executors of the estate and the widow, and amounting to $13,288.12?

It is admitted that if the law were still as it was before the passage of the Ontario Insurance Act (1912), 2 Geo. V. ch. 33, the widow would be entitled to receive the moneys: In re Cochrane, 16 O.L.R. 328. It is suggested on the authority of Re Dicks, 18 O.L.R. 657, that regard should be had to the law as it stood at the date of the will and not at the date of the death of the testator. Section 247 of said Act is as follows:

"247. Sections 162 and 201 of this Act shall come into force on the 1st day of August, 1912, and the remaining sections of this Act shall come into force forthwith."

Included, therefore, in the sections which did not come into force until the 1st August, 1912, is a new section numbered 170, which is as follows:

"170. Except in so far as the same are inconsistent with the provisions of this Act relating to contracts made or declared to be for the benefit of a preferred beneficiary or preferred beneficiaries, sections 171 to 182 shall apply to all contracts of insurance of the person and declarations whether made before or after the passing of this Act."

Subsections 3 and 5 of section 171 of said Act are as follows:

"(3) The assured may designate the beneficiary by the contract of insurance or by an instrument in writing attached to or endorsed on it, or by an instrument in writing, including a will, otherwise in any way identifying the contract, and may by the contract or any such instrument, and whether the insurance money has or has not been already appointed or apportioned, from time to time appoint or apportion the same, or alter or revoke the benefits, or add or substitute new beneficiaries, or divert the insurance money wholly or in part to himself or his estate, but not so as to alter or divert the benefit of any person who is a beneficiary for value, nor so as to alter or divert the benefit of a person who is of the class of preferred

beneficiaries to a person not of that class or to the assured himself, or to his estate.

"5. Where the declaration described the subject of it as the insurance, or the policy or policies of insurance, or the insurance fund of the assured, or uses language of like import in describing it, the declaration, although there exists a declaration in favour of a member or members of the preferred class of beneficiaries, shall operate upon such policy or policies to the extent to which the assured has the right to alter or revoke such last mentioned declaration."

It is contended on behalf of those interested in the estate other than the widow, that the Act of 1912 was in part passed in consequence of the decision in Re Cochrane, and the construction placed on section 160 of ch. 203 of R.S.O. 1897. Subsection 5 of said section 171, which is a new section, is referred to in this connection. It is argued that the Act is in this respect an enabling one and it should be given a liberal construction. See Maxwell on the Construction of Statutes, 4th ed., p. 360. If said subsection 5 applies, it would apparently make the declaration in the will effective to alter the previous declaration in the policies. It is also contended on behalf of those other than the widow, that though section 170 and 171 are sections referred to in section 247 as not coming into force until August 1st, 1912, nevertheless on that date they became operative and by virtue of section 171 are retroactively applicable to the declaration in the will made before the passing of the Act. On behalf of the widow it is, however, contended that on the death of the testator her interest became a vested one. The policies by their terms were payable on the death of the insured and to the widow. At that time the only existing declaration which was intended to, or could affect a change was the one in the will. It was, however, under the law as it then stood ineffective for that purpose. I think the contention on behalf of the widow is a sound one and that the Act of 1912 cannot be held to have any application to the policies in question, that the interest of the widow was a vested one and that she is entitled to the moneys in question. Reference to Craies' Statute Law, pp. 351, 352, 357, 367; "The Langdale," 23 Times L.R. 683; Smithies v. National Association of Operative Plasterers, [1909] 1 K.B. 310 at p. 319; Commercial Bank of Canada v. Harris, 26 U.C.R. 594.

The first three questions propounded in the notice of motion must, therefore, be answered in the negative and the fourth in the affirmative.

The two adult children of the testator, viz., Rena Stewart and James Downing Stewart, who were not represented on the motion, have the same interest in the estate as the infants who were represented. The executors on the motion asked that an order should be made appointing some one to represent them for the purpose of the motion. I do not think this is necessary. Under Rules 939 and 940 they are sufficiently represented by the counsel for the infants, whose interests are similar.

It is a proper case, I think in which to make costs of all parties payable out of the fund in question.

BLAISDELL v. RAYCROFT—RAYCROFT v. COOK—BOYD, C.—NOV. 7.

Will—Devise to Executors in Trust to Sell—Alleged Fictitious Sale at Undervalue—Attacking Parties, Joining in Conveyance—Undue Influence—Breach of Trust—Onus—Discharge of Mortgage.]—These actions were tried together, and arose out of a will, by which the testator gave all his estate, real and personal to the defendants in the first action, his widow Jane Raycroft and his daughter (by a former marriage) Florence Cook to sell and dispose of, and to apply the proceeds thus: To the wife $2,000, to the defendant Florence Cook $1,200, to the two plaintiffs (daughters) Hattie and Laura $100 each, and also legacies of $100 each to George, Minnie and Alfred (his children), making in all $3,700 of pecuniary legacies, and from and out of the residue a good comfortable house was to be purchased for the use of his wife during her life and after her death to become the property of Florence, at a cost not exceeding $1,800. Any estate left after the expenditure of the said $1,800 and after payment of debts and expenses was to be divided equally between his two daughters, the plaintiffs. The sale of the chattels realized no more than sufficient to pay debts, and the only other asset was the land in question (a farm) the value of which at the testator's death was no more than $4,800. The land was put up for auction at a reserved bid of $5,000 and the highest bidder offered no more than $4,800. After various efforts to sell, Mrs. Falinger, another daughter offered to buy at $4,800 and the transaction was carried out by a conveyance in which the two executors and the two residuary legatees joined. These legatees lived at Springfield, Massachusetts, and the deed was taken to them for execution by the co-executrix Mrs. Cook who told them no more money was coming from the estate and that

upon payment of their legacies out of the proceeds of sale nothing more would be coming to them. This transaction was attacked by the legatees on the ground that the sale was really to Mrs. Raycroft, who subsequently became the owner of the property, and that the putting forward of Mrs. Falinger was a mere subterfuge to disguise the real transaction. The learned Chancellor however found upon the evidence, as facts, that full value was obtained upon the sale of the land in question and that there was no scheme between the purchaser and the trustee for sale, whereby the latter should become the real owner, and that the beneficiary legatees who attack the transaction were parties to the conveyance to the purchaser, and on faith of their execution of that deed obtained the full amount of their specific legacies out of the proceeds. The view was expressed that if the plaintiffs had lodged their complaint soon after the transaction, the circumstances might have provoked some suspicion and have justified some method of investigation, but after a lapse of four years and after the sale of the property for $10,000 by Mrs. Raycroft, suspicion is transferred to the motives of this litigation, as being an attempt to secure some share of the windfall arising from this sudden rise in value, which has taken place owing to the land being required for railway purposes. [Reference to Re Postlethwaite, 59 L.T.N.S. 59 which was reversed in 60 L.T.N.S. 517 by the Lords Justices; and to Williams v. Scott, [1900] A.C. 499, the latter case being however distinguishable from this on the facts.] The action to be dismissed with costs with a declaration that the money realized from the late sale and now paid into Court is the property of the defendant Mrs. Raycroft.

RAYCROFT v. COOK was another contest between the co-executrices, which was ordered to be tried with Blaisdell v. Raycroft. The executrix Mrs. Cook joined hands with her sisters and sought to have the sale of the property treated as a nullity and to have the $10,000 which has been paid into Court as assets of the testator's estate. In that event $1,800 of it would be set apart for the purchase of a house in which she would have an estate in remainder after the widow's death, and the balance would be divisible between the two residuary legatees. In the Chancellor's opinion the same reasons which apply against relief being given to the sisters are equally and even more forcible as to the co-executrix, as she was fully informed of what the transaction was, and was satisfied, and indeed actively intervened to procure the signatures of the two sisters. After the land came into the hands of Mrs. Raycroft she dealt with her in the appli-

cation of the proceeds of sale, whereby it was ascertained after all the accounts of the estate were taken that a balance of $679 was pro tanto available towards the $1,800 to be provided for the purchase of a home for the widow. The widow having come into the possession of the farm it was arranged between the co-executors that as to this $679, the widow should have only a life estate with remainder to Mrs. Cook. To carry this out a mortgage for that sum was put upon the farm, which contained a provision for the cancelling of the security upon the deposit of a like sum of money in a bank at Prescott at any time the widow should desire. After the sale for $10,000 application was made to discharge the mortgage upon the deposit of a proper sum in the proper bank. This was refused by Mrs. Cook who then set up the larger contention which has failed. The learned Judge finds that the defendant was in the wrong: she should have relied upon the deposit in the bank as her security and have executed a discharge of the mortgage. The judgment of the Court is to this effect with costs to the plaintiff. If the parties cannot otherwise agree, the $679 may be paid into Court payable out according to the terms of the judgment. The counterclaim of Mrs. Cook is dismissed with costs, setting up as it does the contention of the residuary legatees which fails in all points. This judgment may be without prejudice to the passing of accounts of the estate before the Surrogate Judge and the raising of any contention there surcharging or falsifying accounts as between the executors, the costs of which he will dispose of. G. F. Shepley, K.C., for the plaintiffs in Blaisdell v. Raycroft. J. A. Hutcheson, K.C., for the defendant in that action, who was plaintiff in Raycroft v. Cook. T. D'A. McGee, for the defendant, Mrs. Cook.

ROGERS v. NATIONAL PORTLAND CEMENT CO.—RIDDELL, J., IN CHAMBERS—NOV. 9.

Discovery—Examination of Plaintiff—Default—Failure to Justify—Con. Rule 454—Order for Plaintiff to Attend at His Own Expense.]—Appeal by the plaintiff from the order of the Master in Chambers of Nov. 2, whereby he directed the plaintiff to attend for examination for discovery: ante 217. RIDDELL, J., dismissed the appeal with costs to the defendants in any event, stating that he entirely agreed with the Master in Chambers, and had nothing to add to what he had said. F. R. MacKelcan for the plaintiff. Grayson Smith, for the defendants.

MASON v. GOLDFIELDS—RIDDELL, J.—NOV. 9.

Company—Certificate—Mandamus.]—Motion by plaintiff for a mandamus to defendants to deliver certificates. Judgment that as the applicant has abandoned his right if any to costs, there will be no order as to costs, and the other objects of the motion having been achieved, there will be no order. G. A. Urquhart, for the plaintiff.

MACKAY v. MACKAY—FALCONBRIDGE, C.J.K.B.—NOV. 9.

Will—Action by Beneficiary—Taxes Accruing Prior to Testator's Death—Counterclaim.]—Action by a beneficiary under a will for a direction that he is entitled to a conveyance of lands devised to him, free and clear of taxes and other rates which had accrued prior to the death of the testator, on which point the learned Chief Justice found against the plaintiff. He also found against the plaintiff as to the chattel mortgage and the overdraft set up in the defendants' counterclaim, the general result being stated as follows: the plaintiff is declared to be entitled to have a conveyance of the lands devised to him by testator upon terms of paying to the executors the expenses which they have incurred in and about the sale of the lands, including the moneys actually paid to the treasurer, and their own expenses of attending upon the sale, and their solicitor and client's costs incurred in connection therewith: and also the items of the defendants' counterclaim, above referred to, viz. (a) Chattel mortgage for $315.71 and interest (b) amount of the overdraft $242.60, plus $16.50 interest to the first of November, 1911, and subsequent interest; (c) the costs of this action and counterclaim. J. H. Rodd, for the plaintiff. W. E. Gundy, and R. L. Brackin, for the defendants.

CAMPBELL v. VERRAL—GIBSON v. VERRALS—RIDDELL, J., IN CHAMBERS—NOV. 9.

Staying Proceedings—Prior Judgment against Incorporated Company without Assets—Res Judicata—Estoppel—Negligence.]—Motion by the defendant to stay these actions, which for the purposes of the motion may be treated as one, till a former judgment recovered against "Taxicab Verrals, Limited"

for the same cause of action is got rid of in some way. RIDDELL, J., said that he did not think the motion could succeed. "The cause of action against the incorporated company no doubt "transivit in rem judicatam:" but that is all. Any cause of action against Verral is still a "cause of action" only—it has not passed into a judgment. It was determined in the former action that the negligence of the chauffeur was the negligence of the company, and that judgment standing it operates as an estoppel as between the parties thereto (and their privies if any) but no further. The plaintiff could not as against the company say that the negligence was the negligence of Verral, but there is no reason why she should not as against Verral." Motion dismissed with costs to the plaintiff in any event. T. N. Phelan, for the defendant. John MacGregor, for the plaintiff.

NIEMINEN v. DOME MINES—MASTER IN CHAMBERS—NOV. 9.

Security for Costs—Extension of Time—Insufficient Affidavit —Con. Rules 1203, 518, 524, 312.]—Motion to extend the time for giving security for costs in an action for damages for death of plaintiff's son who was killed, as admitted, while working in defendants' mine a little over a year ago. The statement of defence was delivered on 12th September. It sets up the usual defences—and also a release given on payment of 1,000 marks in gold to the plaintiff and his wife who reside in Finland—as stated on the writ. The action was begun on 7th June—for some reason no order for security for costs was issued until 17th September, the day on which issue was joined. The order for security was duly served on 18th September but was never complied with. No steps were taken by the defendants to have the action dismissed under Con. Rule 1203—and on 2nd November, this motion was made to have the time for giving security extended for two months, stating that in support of the motion an affidavit would be read. It was not said that such affidavit had been filed and none was filed until the argument. It was argued by the defendants' counsel that as no affidavit had been filed before service of the motion as required by Con. Rule 524 none could afterwards be received, and also that as the affidavit was made on information and belief, without stating the grounds of facts which admittedly were not within the knowledge of the deponent, the affidavit was insufficient and could not be received under Con. Rule 518. The Master in Chambers said that the

necessity for a compliance with these rules had frequently been emphasised, referring to the headnote of the judgment in In re J. L. Young, [1900] 2 Ch. 753, which states that such an affidavit "is irregular, and therefore inadmissible as evidence whether on a interlocutory or a final application." He said, however, that following the principle of Con. Rule 312, he was unwilling to apply forthwith the rigour of the law. It seemed at least doubtful whether the plaintiff could really wish the action to proceed in view of the release above mentioned. If, however, a proper affidavit could be obtained from Mr. Findela, who is said in the affidavit filed to be "a Finnish interpreter in correspondence with the plaintiff with respect to giving security for costs," the motion might be renewed not later than 15th inst.; in default of which being done, the present motion would be dismissed with costs and the action itself dismissed with costs. Payment of costs of this motion forthwith to be a term of any enlargement of the time for giving security. H. L. O'Rourke, for the plaintiff. H. E. Rose, K.C., for the defendants.

MOORE v. THRASHER—MASTER IN CHAMBERS—NOV. 9.

Security for Costs—Prior Action between Same Parties—Property in Controversy, only Relied on—Suggested Consolidation.]—Motion by the plaintiff to set aside a præcipe order for security for costs issued under Con. Rule 1199, alleging that she has assets within this Province of a nature and amount to be ample security for the defendant's costs. The only property relied on by the plaintiff is an hotel in Amherstburgh, the ownership of which is in controversy in this action. It was the property of the mother of the plaintiff and her half-brother the defendant, who commenced an action on 29th January, 1912, alleging that their mother had made a will in his favour of this property as she had promised to do, for good consideration, that afterwards she went to reside with Mrs. Moore, who induced her to convey the hotel to her. A previous action for the same relief, namely, to have the deed to Mrs. Moore set aside and for discovery by her of the alleged will was begun by Thrasher on 14th March, 1910. This was not proceeded with as a settlement was being attempted, and the plaintiff allowed it to be dismissed for want of prosecution and at once began the pending action. This, too, was not pressed on, and statement of claim was only delivered on 26th October and statement of defence on 1st November.

Meantime, on 23rd September the action of Moore v. Thrasher was begun for possession and mesne profits or rent. This proceeded much more rapidly so that statement of claim was delivered on October 18th, and on 22nd October the usual order for security was taken out. The Master in Chambers, after stating the facts as above, said that it did not appear why there are two actions, nor why the defendant did not oblige the plaintiff to proceed in due course with the action of Thrasher v. Moore, and then herself counterclaim in that action for the relief now claimed in Moore v. Thrasher, which she could probably have done without giving security.—See Odgers on Pleading, 5th ed., p. 241. Even now it would seem in the interests of both parties to have the actions consolidated, or to have one stayed until the final disposition of the other, as the issue in both is one and the same. In any case this motion cannot prevail, as the only property put forward by the plaintiff is the subject of the litigation: Walters v. Duggan, 33 C.L.J. 362. He further said that it did not appear why the action of Moore v. Thrasher was necessary, and it seemed that the proper order to make now would be to let the action of Thrasher v. Moore go to trial at Sandwich on 2nd December, as the defendant can require to be done under the practice, and in the meantime let the other action be stayed, and let the costs abide the result of that action, the costs of the present motion being in the cause, as the delay of the plaintiff in Thrasher v. Moore was perhaps some excuse for the present action. Defendant should have leave to counterclaim now in Thrasher v. Moore, if necessary, to have the whole matter disposed of in that action formally. This can perhaps be done without her giving security. This, however, requires the consent of the parties. If this cannot be had then the present motion must be dismissed with costs to the defendant in the cause. F. Aylesworth, for the defendant. J. G. O'Donoghue, for the plaintiff.

DICKIE v. CHICHIGIAN—DIVISIONAL COURT—NOV. 11.

Trespass—Boundary Line—Evidence.]—Appeal by the plaintiff from the judgment of the County Judge of the County of Brant. The plaintiff alleged that on the 16th November, 1911, she built a fence on the boundary line between her land and the defendant's land, and on or about that date the defendant entered upon the plaintiff's land, broke down the fence and refused to put it up again. The plaintiff claims damages, an injunction and further relief. The defendant alleged that the fence was not on

the lands of the plaintiff, and that she had no right to erect a fence where she did. The County Judge found upon the evidence that the fence as erected by the plaintiff was not on her own property and dismissed the action with costs. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and CLUTE, JJ. The judgment of the Court was delivered by CLUTE, J., who said that upon a careful perusal of the evidence he found there was quite sufficient to support the finding of the learned trial Judge. This view was, he thought, supported by the evidence adduced by the plaintiff. There was not, however, sufficient evidence before the Court to enable it to define the boundary line between the properties, and this question is not affected by this judgment. The appeal should be dismissed, but under all the circumstances without costs. A. S. Baird, K.C., for the plaintiff. W. S. Brewster, K.C., for the defendant.

RE MCKAY, CAMERON v. MCKAY—KELLY, J.—NOV. 11.

Will—Construction—Amount of Bequest.]—Motion by the executors of the will of Angus McKay for an order construing his will under Con. Rule 938, in respect of what amount the testator intended by the second paragraph of his will should be paid "to the missions of the Free Presbyterian Church of Ashfield, in the county of Huron, concession fourteen (14), Lochalsh, Canada, in connection with the Free Church of Scotland." The learned Judge was of opinion that the testator intended that two hundred dollars should be paid at the end of the tenth year after his death and a further two hundred dollars at the end of the eleventh year after his death. W. Proudfoot, K.C., for the executors. E. C. Cattanach, for the infants.

RE LAWS—SUTHERLAND, J., IN CHAMBERS—NOV. 13.

Infant Joint Tenant—Application to Sell Property and Divide Proceeds—Prospective Rights of Infant—Suggested Payment into Court.]—Application on behalf of an infant, one of two joint tenants of real estate, "to sanction a sale thereof and the division of the proceeds between himself and his adult brother, the other joint tenant." SUTHERLAND, J., said that it seemed on the material a proper case for a sale of the property in the interest of both parties. If the adult joint tenant will

consent to all the purchase money being paid into Court and to remain there until the infant joint tenant shall come of age, and thereafter to be dealt with by agreement between them, or further order, the order may go sanctioning the sale, and in that case the costs of this motion will be payable out of the purchase money. If not, he was unable to see how he could properly compromise the possible prospective rights of the infant in the way sought, and the motion will be dismissed without costs. H. S. Lazier, for the adult brother. F. W. Harcourt, K.C., for the infant.

LAND OWNERS LIMITED v. BOLAND—SUTHERLAND, J., IN CHAMBERS—NOV. 13.

Account—Change of Solicitors—Notice of Discontinuance—New Plaintiff.]—Motion by the plaintiffs for an order for account. SUTHERLAND, J., said that the plaintiff company, since the launching of the motion, having obtained an order changing solicitors, and having through their new solicitors filed and served a notice of discontinuance, the action is at an end and the motion must be dismissed. The defendants will be entitled to their costs, under the circumstances, as against the plaintiffs. He did not think he could now, or should, if he had the power, in view of the facts so much in dispute, make an order as asked by Pickman on his consent filed, joining him as a plaintiff, or substituting him as such in this action as brought on his own behalf or on behalf of himself and all other shareholders of the plaintiff company. J. J. Gray, for the motion. Grayson Smith, for the company. J. H. Spence, for the defendants.

QUEBEC BANK v. FREELAND—MASTER IN CHAMBERS—NOV. 13.

Promissory Note—Motion for Speedy Judgment—Examination by Defendants of Plaintiff's Officer—Disclosure of Facts Entitling to Defend—Object of Con. Rule 603—*Costs.*]—Action on a promissory note in which a motion for speedy judgment was made under Rule 603. For the purpose of resisting the motion Mr. Strickland, a local manager of the plaintiffs, was examined at great length and it was practically conceded by counsel for the plaintiff that his examination disclosed such a state of facts as would entitle the defendants to have leave to defend. It was also admitted by counsel for both parties that the examination

was such as would probably in any case have been necessary for the defendants to make for the purpose of discovery. The costs of this examination constituted the principal part of the costs of the motion for judgment. Mr. HOLMESTED, sitting for the Master in Chambers, after stating the above facts, said: "The motion for judgment fails, and in disposing of the question of the costs I ought, I think, to arrive at a conclusion whether in the circumstances the motion was properly made. The object of Rule 603 is no doubt to furnish a summary remedy in simple cases, and to save thereby unnecessary costs; but a resort to that Rule ought not to be had, where it is known to the plaintiff that there is a bonâ fide dispute as to his right to recover. In this case a letter from the defendants' solicitors was read to me on the argument of the motion, of which, however, I do not find a copy among the papers, which very clearly intimated to the plaintiffs that the defendants disputed their right to recover on the note in question, and giving also, as I remember, an intimation of the grounds of defence. This defence I will not say is established, but is at all events shewn not to be without some appearance of substance, owing to the apparent discrepancy between the plaintiffs' books and the testimony of Mr. Strickland as to the time when the plaintiffs actually became the holders of the note in question. In these circumstances it does not appear to me that the plaintiffs were right in seeking to obtain judgment under Rule 603, and it would be wholly frustrating the object of that Rule to permit plaintiffs to litigate on a motion under that Rule a case which ought fairly and reasonably to be carried to trial in the usual way. I think, therefore, that the plaintiff should in any event pay to the defendants their costs of the motion, except the costs of the examination of Strickland, which are to be treated as costs of discovery." J. E. Jones, for the defendant Freeland. D. T. Symons, K.C., for the plaintiffs.

FULLER v. BONIS—MASTER IN CHAMBERS—NOV. 13.

Pleading—Statement of Claim—Particulars—Acts Antecedent to Writ—Inability to Give Further Particulars—Municipal By-law—Con. Rule 552.]—Action for an injunction to restrain the defendants from so working their quarry as to be a nuisance to the plaintiff. The defendant moved for better particulars of the various specific wrongful acts mentioned in the statement of claim, and to confine the particulars already delivered to acts occurring antecedently to the issue of the writ, and to strike out

paragraph 17, which alleges the provisions of a municipal by-law, and that part of 18 which claims that the defendants have acted in violation thereof. Judgment by Mr. HOLMESTED, sitting for the Master in Chambers: The plaintiff has delivered certain particulars prior to the motion, in answer to a demand of the defendants' solicitors; and the plaintiff has also been examined for discovery and questioned particularly as to the allegations concerning which further particulars are now sought and has, on oath, stated his inability to give them. It is not suggested that there is any other source than the plaintiff's own recollection from which more specific dates could be obtained, and I do not think on this application I should order him to do what he swears he is unable to do, at the penalty of striking out those allegations from the statement of claim. Neither do I think that the particulars of acts occurring since the issue of the writ, should be struck out, as they appear to constitute what is called in Rule 552 "a continuing cause of action," for which damages may be assessed in this action. With regard to the allegations as to the municipal by-law, I have come to the conclusion they ought not at this stage of the proceedings to be struck out. It is said that in determining whether the non-performance of a statutory duty which causes injury to an individual gives him a right of action depends on "the purview of the legislature in the particular statute and the language which they there employed:" Cowley v. Newmarket, [1892] 4 A.C. 352, and see Saunders v. Holborn Dis. Bd., [1895] 1 Q.B. 64, and Baron v. Portslade Dis. Cl., [1900] 2 Q.B. 588. The same considerations apply to by-laws which are made in pursuance of statutory powers. Whether this particular by-law gives the plaintiff a right of action I do not think can properly be determined by me on a motion of this kind. I do not think paragraph 17 is clearly irrelevant, on the contrary it appears to me to present a question proper for the decision of the Judge who may try the action. It may be remarked that the by-law does not appear to make something unlawful which before was lawful, but rather imposes a penalty for what was already an unlawful act. As plaintiff's counsel has pointed out, there is here no affidavit filed on the part of the defendants suggesting any difficulty in their pleading in the action for want of the particulars claimed, nor do I perceive any. The motion must, therefore, be refused with costs to the plaintiff in any event. E. C. Cattanach, for the defendant. S. S. Mills, for the plaintiff.

RE MONTGOMERY ESTATE—MIDDLETON, J.—NOV. 15.

Lunatic—Statutory Committee—Jurisdiction.]—Application for an order sanctioning a settlement between the Minister of Justice and the Inspector of Prisons and Public Charities acting as statutory committee of Frances A. Towner, now confined in a public asylum. Judgment: This unfortunate lady has not been declared a lunatic; and I am of opinion that the statute relating to lunatics—9 Edw. VII. ch. 37, does not give the Court any authority over lunatics or their estates unless and until an order has been made by the Court declaring insanity. By the statute relating to public lunatic asylums, R.S.O. 1897 ch. 317, sec. 53, the Inspector of Prisons and Public Charities is ex officio the committee of every lunatic who has no other committee; but I do not think that this brings him under the jurisdiction of the Court over the committees of lunatics conferred by 9 Edw. VII. The committee there referred to is not the statutory committee, but the committee appointed by the Court. The Court, therefore, has no jurisdiction in the premises; but I trust it may be found that the very wide powers conferred upon the statutory committee by the Revised Statutes may be found wide enough to authorise his approval of what appears to be a very reasonable arrangement. F. Aylesworth, for the Inspector of Prisons and Public Charities.