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COURT OF APPEAL.

JUNE 28TH, 1912.

*TOWNSHIP OF ORFORD v. TOWNSHIP OF ALDBOROUGH.

Municipal Corporations—Drainage—Outlet Liability — Injuring Liability—By-law — Jurisdiction of Township Council —Initiation of Proceedings—Report—Necessity for Petition—Benefit of Work to Adjoining Township—Municipal Drainage Act, sec. 3, sub-secs. 3, 4; sec. 77—Natural Watercourses—Riparian Right of Drainage into—Insufficiency of Outlet.

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

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

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

C. St. Clair Leitch, for the respondents.

*To be reported in the Ontario Law Reports.

The judgment of the Court was delivered by GARROW, J.A.:—The facts are very fully set out in the judgment of the learned Referee, in the course of which he says:—

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

This seems to epitomise tersely the case with which we are called upon to deal.

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

There were also objections as to the details of the assessment and upon the merits generally, all of which were very fully dealt with by the learned Referee . . . and I . . . content myself with a general agreement with his conclusions as to them.

Dealing now with the objections to the jurisdiction beforementioned, and taking them in their order: I am quite unable to follow the learned counsel in his contention that a petition was necessary. The contention necessarily implies that, if there had been a petition, the objection would fail. I could more easily understand an argument that, even upon petition, the

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

In considering such cases as Sutherland-Innes Co. v. Township of Romney, 30 S.C.R. 495, and Township of Orford v. Township of Howard, 27 A.R. 223 . . . it should be remembered that this section, which is old sec. 75, was very materially amended after both these decisions, by 6 Edw. VII. ch. 37, sec. 9, so as to be made expressly to apply to the case of the better maintenance of a natural stream, creek, or watercourse, which had been artificially improved by local assessment or otherwise in the same manner and to the same extent and by the same proceedings as are applicable to the better maintenance of a work wholly artificial. The effect of this amendment is very wide. It destroys at one blow the value of much that was said in Sutherland-Innes Co. v. Township of Romney—never in some respects an entirely satisfactory decision: see per Armour, C.J.O., in In re Township of Rochester and Township of Mersea, 2 O.L.R., at p. 436; it restores the authority of Township of Orford v. Township of Howard as an exposition of sub-secs. 3 and 4, which had been shaken by the Sutherland-Innes case; and, quite apart from these, and from all the other cases decided before the amendment, it apparently gives a new and

substantive right, directly applicable to the facts and circumstances which here appear.

It would, perhaps, have been better if the Legislature had expressly made the words which I have quoted from sub-sec. 4 applicable also to the previous sub-section. To have done so would at least have saved some rather hair-splitting arguments upon the subject to which the Courts have had from time to time to listen. There is, upon the face of things, no good reason why injuring liability should stand upon one foundation and outlet liability upon another and a different one. It must surely often happen that certain sections or lots in a drainage scheme are liable for both. . . .

[Reference to the judgment of Lister, J.A., in Township of Orford v. Township of Howard.]

It is not, in my opinion, necessary in this case to discuss the general question of the riparian right of drainage into natural watercourses for the purposes of agriculture. The facts in the cases of Re Township of Elma and Township of Wallace, 2 O.W.R. 198, and McGillivray v. Township of Lochiel, 8 O.L.R. 446, . . . were very different.

Fleming creek and Kintyre creek, both, although small, entitled in strictness to be called watercourses, long ago lost their natural condition and became part of an artificial drainage system created under the drainage laws of the Province. The law permits that to be done. And, when it is done, the part of the system which was once a natural watercourse is entitled to no particular immunity, under the law, over the other parts which are purely artificial. The whole must operate so as to discharge the waters which it gathers at a proper and sufficient outlet. The law, at least, aims at affording complete relief from the common enemy, and not merely a nominal or paper relief, or the relief of one section of the locality at the expense of another. And, until this main object is secured, I see nothing in the Act pointing to the finality upon which so much of the argument was based. . . .

[Reference to sec. 77 of the Act.]

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

The remaining objection, of the insufficiency of the proposed outlet, is a question of fact, depending upon the evidence, and was determined against the appellants by the learned Referee. The learned Referee, in the course of his judgment,

points out the importance in this case of a personal inspection, which he had made. Whether or not his conclusion upon this objection was affected by the inspection, does not, I think, appear; but, however that may be, while the finding is not in some respects entirely satisfactory, I am not convinced that it is erroneous. And I reach this conclusion with the less regret because the objection does not appear in the written notice of objections served by the appellants, which contains some 13 other objections. If it had, it is quite possible that further and more satisfactory explanations would have been forthcoming.

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

JUNE 28TH, 1912.

SMITH v. EXCELSIOR LIFE INSURANCE CO.

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

Appeal by the defendants from the judgment of BRITTON, J., ante 261.

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

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

John R. Logan, for the plaintiffs.

The judgment of the Court was delivered by GARROW, J.A.:—The action was brought upon an insurance policy issued by the defendants for $1,000 upon the life of Charles F. Smith, payable to his mother, the plaintiff Zillah Smith. The policy is dated the 16th May, 1898. At that time, Charles F. Smith was a farmer. The policy contained a condition that, if, within two years from the date of the contract, the insured should, without a permit, engage in employment on a railway, the policy should be void and all payments made thereon should be forfeited to the company. The assured did, within the period of two years, engage in employment on a railway, by becoming a

fireman upon a locomotive engine, in which employment he continued, and in which he finally lost his life in an accident on the 20th July, 1911. There was no evidence that a permit had ever been given, or even asked for, to enable the assured to become a railway employee. But, the premiums having been paid after the change until the death, it was contended by the plaintiffs that, under the circumstances, the defendants should be held to have waived the condition. To this contention Britton, J., acceded, and gave judgment for the full amount. I am, with deference, unable to agree with that conclusion.

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

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

There was no such proof, nor indeed any serious attempt made to prove notice to or knowledge by the company as a company. And the negative of any such notice or knowledge, at any time prior to the death of the assured, was clearly established by the uncontradicted testimony of the general manager, Mr. Marshall. What was proved and all that was proved by the plaintiffs was, that Mr. Telfer, the defendants' local agent at Sarnia, who obtained the risk in the first instance, and who continued to forward the premiums until the death of the assured, had become aware of the change of employment. Exactly when he acquired this knowledge is not clear; but it is clear that it was long after the expiry of the two years within which the condition was operative.

Mr. Telfer's appointment as agent was in writing, which was produced at the trial. He was not a general agent, but agent only for the town of Sarnia and vicinity and such other territory as might be from time to time agreed upon. By the

terms of the contract, he had no power to make, alter, or discharge any contract given on behalf of the company, or to waive any forfeiture or grant any permit or to collect any premiums except those for which policies or official receipts had been sent to him for collection.

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

In the month of August, 1899, or before the expiry of the two-year period, Mr. Telfer retired from the agency, although he continued to forward premiums upon this and some other policies which had been received by him while agent. He, however, never notified the defendants of what he had heard concerning the change of employment, which he apparently did not regard as a matter of any moment, as of course it would not have been if it had occurred, as he probably assumed, after the two years had expired.

Notice to any agent in the position of Mr. Telfer, even if his employment had continued, would not be notice to the company. That seems to be settled by authority binding upon this Court. See Western Assurance Co. v. Doull, 12 S.C.R. 446; Torrop v. Imperial Fire Insurance Co., 26 S.C.R. 585. See also Imperial Bank of Canada v. Royal Insurance Co., 12 O.L.R. 519, where many cases, including Wing v. Harvey, 5 DeG. M. & G. 265, upon which the learned trial Judge relied, are cited; and Wells v. Supreme Court of the Independent Order of Foresters, 17 O.R. 317. The result might be otherwise if there were any circumstances from which it could be reasonably inferred that the knowledge acquired by the local agent had been in any way communicated to the head office. There are, however, here no such circumstances, while the uncontradicted evidence of Mr. Marshall makes it beyond question that in fact the company never actually had, until the death, any notice or knowledge whatever of the change.

The appeal must, therefore, in my opinion, be allowed, and the action dismissed. And, under the circumstances, the usual consequences as to costs must follow. It is a great pity that the very reasonable offer made by the defendants at the trial, to pay such an amount as the premiums would have paid for in the new and more hazardous employment, was not accepted. I have, of course, no power to impose such a term; but I may at least ex-

press the hope that, notwithstanding the result of the litigation, the defendants will again renew the offer, and that the plaintiffs will accept it.

JUNE 28TH, 1912.

SMITH v. HAMILTON BRIDGE WORKS CO.

Master and Servant—Injury to Servant—Negligence—Order of Foreman of Works—Use of Implements Insufficient for Purpose of Dangerous Work—Cause of Injury—Workmen's Compensation for Injuries Act—Appeal—Reversal of Judgment on Facts—Further Appeal.

Appeal by the defendants from the judgment of a Divisional Court, ante 177, reversing the judgment of the trial Judge, upon the facts, and directing judgment to be entered for the plaintiff for $1,500 with costs.

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

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

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

The judgment of the Court was delivered by GARROW, J.A.:—The action was brought to recover damages caused to the plaintiff by an injury which he received on the 13th January, 1911, while in the employment of the defendants in their factory at the city of Hamilton.

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

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

The learned trial Judge was of the opinion that the hooks used were proper hooks; that they were made of proper material and were in good order; and that in strength, shape, and grasp

they were sufficient for the work. And his impression as to the cause of the accident, although not stated as his conclusion, was, that the hooks had slipped, not from any defect in them, but because they had not been properly attached to the beam.

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

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

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

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

I would dismiss the appeal with costs.

JUNE 28TH, 1912.

MORGAN v. JOHNSON.

Vendor and Purchaser—Contract for Sale of Land—Authority of Agent of Vendor—Power of Attorney—Limitation of Authority by Verbal Instructions not Communicated to Purchaser—Purchaser Acting in Good Faith—Principal Bound though not Named in Contract—Specific Performance.

Appeal by the defendants from the judgment of MULOCK, C.J.Ex.D., ante 297.

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

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

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

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

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

There was a contract in writing sufficient under the Statute of Frauds to bind the defendant William A. Johnson. If he had been the owner, judgment against him would have been as of course, for he has no defence. He was not the owner, but the agent; and the plaintiff's contention is, that he was entitled to prove the agency and so hold the principal on whose behalf the contract was made. That such proof may be given is, as the learned Chief Justice points out, well-established and cannot be and is not disputed. Then the power of attorney, when produced, shews that it is amply sufficient to authorise the agent to sell. That also is not disputed. The contention, therefore,

is narrowed to this, that, because the power, in the usual form, says that the sale is to be "for me and in my name," a sale by the agent in his own name is invalid. That contention is one for which I can find no authority; and certainly none which would support it was cited to us by the learned counsel for the defendants. It looks to me very like a somewhat desperate attempt, by sacrificing the spirit to the letter, to construct a defence where there is none—an attempt which now-a-days usually and deservedly fails.

I would dismiss the appeal with costs.

JUNE 28TH, 1912.

LECKIE v. MARSHALL.

Contract—Sale of Mining Properties—Purchase-price Payable by Instalments—Judgment—Payment into Court—Specific Performance — Delay — Report on Title—Judgment on Further Directions—Reservation—Practice.

Appeal by the defendants William Marshall and Gray's Siding Development Limited from the order of a Divisional Court, ante 86, affirming with some variations the order of SUTHERLAND, J., 2 O.W.N. 1441, directing payment into Court; and from the judgment of Riddell, J., on further directions. Cross-appeal by the plaintiffs from so much of the judgment of RIDDELL, J., as reserved further directions.

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

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

J. Bicknell, K.C., for the plaintiffs.

The judgment of the Court was delivered by GARROW, J.A.:—The case, in one form and another, has been before us more than once, and with the facts we are very familiar.

Dealing first with the cross-appeal, chiefly a question of practice, I am unable to see the necessity for the further reservation. The motion was itself a motion on further directions, and ought to have, I think, made further provisions for disposing of the remaining questions. I would, therefore, allow the cross-appeal, and direct such further amendments, if any, to

the order on further directions as may be necessary, with liberty to either party to apply in Chambers in case any subsequent direction becomes necessary; which amendments may, if the parties desire, be defined on settling the minutes of the judgment in this Court.

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

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

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

As to the second point, the delay of which the defendants complain was wholly caused by their own demand, in opposition to the plaintiffs' claim, to have specific performance. That being so, how could they now be heard to complain? If, after long delay and changed circumstances, a plaintiff comes into Court asking the Court to enforce specific performance, the Court might consider it inequitable so to order, and leave the parties to their other rights under the contract. But that is not at all this case.

As to the third point, the report of the Master finds that a good title can be made, upon certain things in the nature of mere conveyancing being done. That is not, in my opinion, a conditional finding, or a finding against the title, but a mere finding as to the necessary conveyancing to perfect the good title shewn to be in the plaintiffs.

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

JUNE 28TH, 1912.

MANN v. FITZGERALD.

Crown Grant—Patents for Land—Construction—Broken Front Lots—Peninsula Physically Connected with one Lot but Lying in Front of Adjoining Lot—Unpatented Land—Title —Possession—Acts of Ownership—Plan — Survey.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., ante 488.

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

E. D. Armour, K.C., and A. D. Armour, for the plaintiffs.

R. J. McLaughlin, K.C., for the defendant.

The judgment of the Court was delivered by MAGEE, J.A.:— The land in question is the outer end of a peninsula projecting from the front of broken lot No. 26 in the 10th concession of Fenelon township, south-westerly into Cameron lake. The peninsula is separated from the mainland by a bay running up north-easterly about 10 chains into the southerly side of that lot, the total length of the bay and peninsula being over 40 chains, and the peninsula itself projects as far south as the middle of lot 25, which is south of lot 26, and separated from it only by a side road allowance. The question is, whether the south boundary of lot 26 on the mainland should be extended across the bay and peninsula. The plaintiffs contend that it should not be so extended, but that the whole peninsula is part of lot 26, and was included in the Crown grant of that lot under which they deduce title. The defendant contends that the line should be so extended, and that all south of it belongs to him as owner of lot 25.

The township was surveyed in 1824 by James Kirkpatrick, under written instructions from the Surveyor-General. Those instructions directed that the township should be laid out into concessions, 66 chains and 67 links wide, and each concession into lots 30 chains wide, thus containing 200 acres each. No latitude was given the surveyor as to including in any lot any parcels beyond such boundaries which might more conveniently be occupied with it. Actually, he was only to survey and mark the centre lines of the roads between the concessions and mark the side lines of each lot and side road; and, should the waters

of any lake come within the survey, they were to be accurately traversed, the contents of each broken lot were to be calculated and stated on each, and a plan of the survey was to be made out and sent to the Surveyor-General's Department with the field-notes.

Under these instructions, the only way of ascertaining the length of these two lots would be from the traverse of the lake shore. If that is in existence, it is not produced, and the field-notes, being only of the work on the concession road allowances, do not aid. There is some evidence that this peninsula extends so far west that the west part of it would be in the 9th concession, and that the concession road would run north and south across it. But, according to the field-notes of that concession road, the lake extended across it from lot 23 to lot 31. The plan sent in by the surveyor shews no peninsula or bay, but shews the lake shore of lot 26 as being wholly east of the centre line of the 10th concession, and the lot is marked as containing only 78 acres.

In the absence of any record of the traverse of the lake, it is impossible even to guess whether it was the peninsula or the bay which the surveyor failed to see. He shews the northern boundary of lot 26 much shorter than the southern boundary, and in that respect his contour of the shore, wrong as it is, would roughly correspond with the actual lake frontage of the lot down to the disputed parcel. His line of shore trending to the east as it went north across lot 26 he may have got by inaccurate sighting from some point to the north or west where the bay would not be seen, and thus he would be led into drawing the plan wrongly, as he did.

It it were in truth the bay which was omitted, and he intended the line of shore upon his plan to represent the outer or western side of the peninsula, then the line between the lots should be carried to that side. No work on the ground along the side road or side lines was required to be done by the surveyor; there is nothing but the plan to indicate the division line between these two lots; and, according to it, the line extends till there is nothing beyond it but the main body of the lake. It seems to me as reasonable to suppose that he omitted the bay as that he omitted the peninsula; and, if he did, then this land would belong to the defendant. No argument can be drawn against that supposition from the fact that the length of the side road on the plan approximates the actual length measured to the bay, and is much short of the length to the peninsula, for it is evident that the lengths were mere guess-work, and

there is in fact greater discrepancy at the northern boundary than at the southern.

But, assuming that it was the peninsula which the surveyor failed to see or to survey or to note on his plan, I agree with the learned trial Judge that it cannot be said that this land was granted by the Crown as part of lot 26. Neither according to the surveyor's instructions nor to any actual work by him on the ground, nor according to his plan or field-notes, nor according to the description by metes and bounds in the letters patent, did it form any part of that lot. The Crown never knew of any land called lot 26 extending beyond the northerly and southerly width of 30 chains and the easterly and westerly length of 66 chains and 67 links. In giving instructions for running the lines in that way, it reserved to itself the discretion as to joining in a grant parcels which could more conveniently be held or worked together. No discretion was given to the surveyor, and there is nothing to shew that he attempted to exercise any such discretion or so depart from his instructions. No land outside the prescribed dimensions is anywhere shewn as constituting part of this lot, and the absence of any marks of division on the peninsula is accounted for by the fact that no division anywhere along the line was called for or made, except at its eastern end.

The description in the letters patent does not strengthen the case for the plaintiff. It runs westerly along the northern boundary to Cameron lake, and "then southerly, westerly, and southerly to the southern limit of said broken lot number 26 in said 10th concession, otherwise to the allowance for road between broken lots Nos. 26 and 25," and then easterly. This southerly, westerly, and southerly course does not even affect to follow the lake shore; and more nearly agrees with the defendant's contention than with the plaintiffs', in fact, as the plaintiffs would have to interpolate also an easterly and a northerly course. The reference to the side road accords with either contention; and the distances from the township line given for the northerly and southerly courses, though far astray, correspond relatively rather with the line claimed by the defendant. So far as the letters patent are concerned, we are, therefore, left to the meaning to be attributed to "broken lot No. 26;" and the Crown, having never consented to name any land as lot No. 26, which would cover the land in dispute, cannot, I think, be held to have granted it; and the judgment of the learned trial Judge should be sustained.

The evidence shews that ever since 1868 the land in dispute

has been recognised by the resident owners of each lot as belonging to lot 25. The owners of lot 25 have sold timber upon it, and trespasses upon it have been reported to them by the neighbouring owner of lot 26. The line of side road across the peninsula was surveyed and marked by a surveyor at the instance of the owner of lot 26 in 1868, and was afterwards pointed out between successive owners of lot 26 as their boundary, and the land in question has been known as Diehl's Point, called after Peter Diehl, who owned lot 25 from 1833 to 1853. Continuously since 1882, excepting a few years, the owner of lot 25 has been receiving rentals from lumber firms for the right of "snubbing" timber along the shore. In every way, so far as acts of ownership of land of such character and so situate could be expected, have the owners of lot 25 been acting as owners. Until these plaintiffs in 1909 obtained, by discreet wording, a conveyance from J. J. Eades, who did not pretend to own the land, and did not think he was conveying it, it was never questioned between the owners of the two lots that it formed part of lot 25. Although there is no fence between the two lots at the peninsula, there is low, swampy ground, and it is not shewn that even cattle from lot 26 crossed more than a very few times. There has been no attempt at shewing any act of ownership by the proprietors of lot 26, and there was, in fact, I think, upon the evidence, clearly a discontinuance of possession by them for more than 40 years, if any possession by any of them could be said to have been had.

The appeal should be dismissed with costs.

JUNE 28TH, 1912.

MUNN v. VIGEON.

Contract—Sale of Timber Limits and Assets of Company—Offer or Option—Construction of Document—"Not Completed"—Reformation—Sum of Money Paid by Purchaser—Right of Vendor to Forfeit—Costs.

Appeal by the defendants the Ontario Lumber Company from the judgment of BRITTON, J., ante 811.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

J. Bicknell, K.C., for the appellants.

Leighton McCarthy, K.C., for the plaintiff.

The judgment of the Court was delivered by MEREDITH, J.A.:—The appellants have failed to convince me that this appeal should be allowed.

The writing in question was an "offer to purchase," and the acceptance in writing at the foot of it is of "the above offer;" the most material term of the offer is, that the cash payment of $5,000, to be made when the agreement was effected, was "to be returned without interest if contract not completed."

Ordinarily these words should not give an absolute right on the purchaser's part to rescind: if that right had been intended to be reserved, there would have been no difficulty in finding words well fitted to give expression to it. On the other hand, the whole of the testimony shews that this term was inserted at the purchaser's instance and for his benefit; and it is hard to see how it would be beneficial to the purchaser except in the way of a right to rescind.

The words are ambiguous; the case is not one in which to give the relief sought would be to disregard words of but one meaning; and, putting one's self as nearly as one can in the position of the parties at the time of the making of the agreement, I am not prepared to say that the interpretation of the words in question by the learned trial Judge is wrong.

It is not an uncommon thing for a vendor to provide that he may in certain events—but not at will—rescind on returning the deposit of purchase-money; but it is at least quite unusual for a purchaser to provide for rescission at his will. If it be held that a right to rescind vested in the vendor alone, and at will, it would be unusual, and rather hard upon the purchaser; whilst, if it give each such a right, it would be substantially no agreement. It may, of course, be that the parties were really never at one: and in that case the result would be the same.

If the case were one of words of unquestionable meaning, I cannot think that a case for reformation would have been made at the trial.

Under the circumstances, the action might very well have been dismissed without costs; the lack of any sort of reasonable care in signing the very doubtful "offer to purchase" has really brought about this litigation. As the plaintiff was given his costs at the trial, I would make no order as to costs here.

JUNE 28TH, 1912.

STRONG v. CROWN FIRE INSURANCE CO.

(AND THREE OTHER ACTIONS.)

Fire Insurance—Actions on Policies—Premature Actions—New Actions Brought—Orders Consolidating with Original Actions—Opportunity not Given to Plead and Adduce New Evidence after Consolidation—Ontario Insurance Act, 1912, *sec.* 158—*Appeal—New Trial.*

Appeal by the defendants from the judgment of SUTHERLAND, J., ante 481.

See also note of a motion before SUTHERLAND, J., ante 1377.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

F. E. Hodgins, K.C., and A. H. F. Lefroy, K.C., for the defendants.

N. W. Rowell, K.C., and G. Kerr, for the plaintiffs.

The judgment of the Court was delivered by GARROW, J.A.:—The actions were brought upon insurance policies against loss by fire upon the property of the firm of Wright & Hughes, at the town of Dresden. There were several defences set up in the statements of defence—the one which involved the most evidence and the greatest difficulty being as to the value of the stock-in-trade which was destroyed, upon which a large number of witnesses were examined. It appears that, while the actions were pending, the plaintiffs in two of the actions, in anticipation of an objection that their actions had been prematurely brought, caused other actions upon the same causes of action to be commenced, which actions had apparently not proceeded the length of pleadings when the judgment now in appeal was delivered. In that judgment, Sutherland, J., ordered the consolidation of these new actions with the older ones, and found in favour of the plaintiffs in all the actions. Objection is now taken to the consolidation—among other reasons, because, by the course adopted, the defendants were prevented from pleading and setting up defences to the new actions, and giving further evidence in support of such defences.

On the other hand, it is alleged that the defendants were given the opportunity to do what they now say they were pre-

vented from doing, and that they waived the right to do so and cannot now complain.

It is not easy to determine exactly what occurred. What seems clear is, that there is not upon the record, where it should be, any proper evidence of such waiver. The effect of what occurred is plainly to put the defendants at a disadvantage, from which in some way they are entitled to be relieved. And the reasonable and fair way, in my opinion, is, without expressing any opinion upon the merits, which I think would be premature, to vacate the present judgment, including the consolidation, permit the parties to plead and to offer such further evidence in the new actions as they may be advised, and to direct the cases to be reheard or tried before Sutherland, J., upon the evidence already given and such further evidence, if any. This to be, of course, without prejudice to any order which the learned Judge may make as to consolidation, under sec. 158 of the Ontario Insurance Act, 1912, upon the completion of the pleadings in the new actions.

The costs of this appeal and of the former trial, and of the further proceedings before Sutherland, J., may all, I think, not unfairly, be made costs in the cause, and, as such, subject to the order of the trial Judge. The misunderstanding is one for which no one is particularly to blame, although it is rather apparent that, if Mr. Rose, acting for the defendants, had attended, as he at first intended to do, the meeting for the settlement of the minutes of the judgment, of which he was duly notified, the situation which I have been dealing with would probably not have been created. I do not say this to blame him at all; for his diversion from his original intention, while unfortunate in the result, is, I think, sufficiently accounted for.

The appeal will, therefore, to the extent I have indicated, be allowed, and the cases remitted for further trial before Sutherland, J.

JUNE 28TH, 1912.

LEFEBVRE v. TRETHEWEY SILVER COBALT MINE LIMITED.

Master and Servant—Injury to and Death of Servant—Negligence—Evidence—Findings of Jury.

Appeal by the defendants from the order of a Divisional Court of the 30th November, 1911, dismissing the defendants' appeal from the judgment of FALCONBRIDGE, C.J.K.B., at the

trial, upon the findings of a jury, in favour of the plaintiffs, the widow and children of Albert Lefebvre, a painter, in an action, under the Fatal Accidents Act, to recover damages for his death by contact with a live wire, while working for the defendants, by reason, as alleged, of their negligence.

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

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

McGregor Young, K.C., for the plaintiffs.

The judgment of the Court was delivered by GARROW, J.A.:—The deceased was engaged upon a scaffold in painting a building owned by the defendants, in the immediate vicinity of certain wires carrying a high voltage of electricity, with which he came in contact and was killed. No one actually saw the accident. When first seen immediately afterwards, the deceased was lying upon the wire, apparently lifeless. He had evidently commenced work, and had painted so far upon one side that it was necessary for him to descend by the ladder by means of which the scaffold was reached, and remove the ladder in order to pass to the other side. He had apparently just accomplished this and got again upon the scaffold when he met with the accident.

The scaffold was about 20 inches wide, and consisted of two loose planks. The board which was to be painted was immediately over the wires.

The deceased had been warned by the master carpenter, Henderson, about the danger of going near the electric wires. "Don't go within two feet of them," Mr. Henderson says, he told him. The warning certainly seems sufficiently definite and emphatic. And that the deceased understood seems probable, for he replied; "That is all right; I understand; I painted all the O'Brien wires or fixtures."

Then on the morning of the accident, the 24th August, 1910, it is clear that something occurred between Lefebvre and McNaughton, the defendants' manager. McNaughton says that Lefebvre met him near the building, and, "pointing up to the fascia board, said, 'Will I paint that?' and I said, 'No.' He says 'No?' I said 'No—you keep on to the machine shop where you were painting;' and that was all that passed." They were seen talking, apparently about the board, by two other witnesses, Stocker and Dempster, but they could not hear what was said. The evidence, however, leaves no room for doubt that, within

half an hour from the time when Lefebvre had been thus warned by McNaughton not to paint, he had brought his paint pot and brush and had painted part of the board, and been killed by the wires.

The very fair, clear, and careful charge of the learned Chief Justice left nothing to be desired in that direction; and no objection to it was taken by counsel for the defendants.

The jury answered the questions submitted as follows: the death of Lefebvre was caused by the negligence of the defendants; such negligence consisted—"if any instructions were given by McNaughton, same were not properly given so as to be understood by Lefebvre;" scaffolding was such as to render the position of Lefebvre while at work over dangerous high voltage wires unsafe; no notices warning the public or workmen of the danger were posted up; wires were not properly protected or insulated for a sufficient distance from the building; no contributory negligence; Lefebvre was not directed by McNaughton on the morning of the accident not to work at the transformer, but to keep on at the machine shop; Henderson had probably previously warned Lefebvre in a general way, but the warning would be overridden by subsequent instructions given by McNaughton. And they assessed the damages at $4,000, the apportionment to be made by the Court.

Counsel for the defendants now contends, as he contended at the trial, that there was no evidence proper for the jury; that the deceased was acting contrary to orders and in spite of express warnings; and that, in any event, there is no reasonable evidence as to how the contact with the wires occurred.

I am, however, unable to accede to these contentions or any of them. There was, it seems to me, evidence of negligence on the part of the defendants causing the death, which could not have been withheld from the jury. It is not necessary to prove to a demonstration how a death by actionable negligence occurred. See Evans v. Astley, [1911] A.C. 674, at p. 678. There must, of course, be something more than mere conjecture; in other words, some reasonable evidence from which the necessary inference may be drawn. And such evidence is found, it seems to me, in the conditions under which the deceased was here required to work. Suicide is not suggested. The deceased is said to have been both a careful and an experienced man. Intentional contact is, therefore, quite out of the question; and there remains only the probability of accidental contact arising from the cramped and insecure position upon the scaffold in which he required to be to do the work.

This, of course, assumes that he was properly there at the time. And it appears to me that the jury have dealt fairly and intelligently with that, as well as with the other questions. They evidently did not believe McNaughton, which they were quite at liberty not to do, and, indeed, at which I am not much astonished, for his story seems highly improbable, in the light of what occurred immediately afterwards. What seems much more probable is, that he pointed out the board to Lefebvre that morning and told him to paint it while the scaffold was there, which the unfortunate man at once proceeded to do, and in doing so met his death.

I would dismiss the appeal with costs.

JUNE 28TH, 1912.

*KING v. NORTHERN NAVIGATION CO.

Negligence—Death of Person Falling into Hold of Vessel—Open and Unprotected Hatch—Cause of Death—Absence of Direct Proof—Inference—Findings of Jury—Duty of Owner of Vessel—Trespasser—Licensee.

Appeal by the plaintiff from the judgment of a Divisional Court, 24 O.L.R. 643, ante 172.

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

A. Weir, for the plaintiff.

R. J. Towers, for the defendants.

The judgment of the Court was delivered by GARROW, J.A. (after setting out the facts at length) :—The law, both at common law and under the statute, has wisely surrounded the servant with certain safeguards for his safety and protection. He may, for instance, claim a safe place to work in, safe tools, materials, and appliances with which to carry on his master's operations, care in the selection of competent overseers and foremen, etc.; but all these only when and so far as may be necessary for his protection while actually working. It is for the master to say when he shall work. And, if the master provides no work, but continues to pay, the servant cannot complain. All he need do is to be ready and willing when called on. When

*To be reported in the Ontario Law Reports.

the servant is not engaged in work for the master, he has no more right to complain of the defective conditions of his master's premises than has any other stranger.

It is clear, therefore, upon the admitted facts, that, in so far as the action is based upon the relation of master and servant, it utterly fails.

The Divisional Court was apparently of the opinion that the deceased was, under the circumstances, in the position of a trespasser. I do not, with deference, consider it necessary to go quite so far. My inclination, rather, is to regard the unfortunate man, upon the evidence, as in the position of a bare licensee, although the result, so far as the action is concerned, would not, I think, in law be different. His past and future employment on the boat, the key which he carried, and all the other circumstances might not unreasonably lead him at least to think that he was at liberty to go upon the boat upon the occasion in question without the special leave of the owners. This, however, would not place him in the position of an invitee, or indeed in any higher position than the one which I have indicated. And the only duty which an owner of premises owes to such a person is not to deceive him by means of a trap, or to be guilty of any act of active negligence, of which on the occasion in question there is no reasonable evidence. See Perdue v. C.P.R., 1 O.W.N. 665. The licensee must otherwise take the premises as he finds them.

The plaintiff's action, therefore, seems to me, upon the undisputed facts, wholly to fail.

I would, for these reasons, dismiss the appeal with costs.

JUNE 28TH, 1912.

*THOMSON v. PLAYFAIR.

Contract—Sale of Timber—Interest in Land—Statute of Frauds—Document Signed by Servant of Purchasers—Absence of Authority as Agent—Knowledge of Principal—Adoption of Contract—Insufficiency of Memorandum to Satisfy Statute—Part Performance.

Appeal by the defendants from the judgment of RIDDELL, J., 25 O.L.R. 365, ante 506.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

*To be reported in the Ontario Law Reports.

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

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

The judgment of the Court was delivered by MEREDITH, J.A.:—There are just two substantial questions involved in this appeal: (1) is there a sufficient memorandum in writing to satisfy the requirements of the Statute of Frauds; and, if so, (2) are the defendants bound by it?

The receipt given for the payment of $100 is quite sufficient to bind those who gave it, but obviously it could not bind the defendants, who did not: the plaintiff must rely on other writing for that purpose, which she does: at the time when this receipt was given, a copy of it was made, headed with the words "copy of receipt;" Byers, acting as if their agent in this transaction, signed it: and this writing was given to the plaintiff's agent; the other being retained by Byers and afterwards sent by him to his masters, the defendants.

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

On the other point, I am unable to differ from the trial Judge in his finding that the transaction was ratified by the defendants, and so is binding upon them, whether or not Byers, or Thompson—who also was an agent of the defendants and took part with Byers in making the agreement—had authority to make it.

An order was given by Byers on the defendants to pay the $100 "on account of the purchase of Yeo Island," and it was paid; the transaction was so entered in the books of the defendants; for a long time before the transaction, the defendants had an eye to the purchase of this property; and investigation to some extent had been made for that purpose. On the 23rd May, the defendants wrote to Byers, "Trust you will find

a lot of timber on Yeo Island;" on the following day Byers wrote to him, "We closed for the Island, at least we have bound the bargain;" and on the same day they wrote to him, "I am pleased that you have secured Yeo Island, and trust it will turn out a good one for cedar."

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

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

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

JUNE 28TH, 1912.

*BATEMAN v. COUNTY OF MIDDLESEX.

Damages—Personal Injuries—Assessment of Damages by Trial Judge—Appeal—Further Appeal—Reduction of Damages.

Appeal by the defendants from the order of a Divisional Court, 25 O.L.R. 137, ante 307, dismissing an appeal (upon the question of the quantum of damages) from the judgment of RIDDELL, J., 24 O.L.R. 84, 2 O.W.N. 1238, awarding the plaintiff $2,500 damages in an action for personal injuries caused by the negligence of the defendants.*

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

Sir George C. Gibbons, K.C., and J. C. Elliott, for the defendants.

T. G. Meredith, K.C., and J. M. McEvoy, for the plaintiff.

The judgment of the Court was delivered by GARROW, J.A.:—In the reasons for appeal it is said, apparently without contradiction from the other side, that some members of the Divisional Court expressed the opinion that, although the damages were much larger than they would have given, they would not interfere because the verdict is not so perverse and unreasonable that, if it had been tried by a jury, twelve intelligent men might not have arrived at the same conclusion.† . . . All,

*To be reported in the Ontario Law Reports.

†See the brief report of the judgment of the Divisional Court, 25 O.L.R. 137.

therefore, that I can say upon the subject is, that, if such a statement was made and was the foundation for the judgment, it does not express my view of what the law is upon the subject, because it apparently fails to discriminate between a trial by a Judge alone and a trial by a Judge with a jury.

The distinction is very clearly expressed by Bramwell, L.J., in Jones v. Hough, 5 Ex. D. 115, 122. . . . His language has been quoted more than once with approval in Canadian Courts: see North British and Mercantile Insurance Co. v. Tourville, 25 S.C.R. 177, at p. 193; Prentice v. Consolidated Bank, 13 A.R. 69, at p. 74; see also the remarks of James, L.J., in Bigsley v. Dickinson, 4 Ch.D. 24, at p. 29.

And a finding as to damages can stand upon no other footing than any other finding made by a Judge trying the case without a jury.

What is a reasonable sum is always to me a difficult question, from answering which I would gladly escape, if consistent with my duty. The principles deducible from the cases of authority upon the measure of damages do not, in my experience, go very far in helping one, except along general lines. The real difficulty is, that, within these lines, there is almost always so much reason for honest difference of opinion.

The question of the proper measure of damages in such cases as this was much discussed in the well-known case of Phillips v. London and South Western R.W. Co., 4 Q.B.D. 406, affirmed in 5 Q.B.D. 78. . . . And see also Church v. City of Ottawa, 25 O.R. 298, affirmed in this Court in 22 A.R. 348, which was also the case of an injury to a physician.

That the present plaintiff sustained a severe injury, from the effects of which it is improbable, at his time of life, that he will ever fully recover, is beyond question. But that he will so far recover as to be able to resume the practice of his profession, in a somewhat modified form perhaps, within a comparatively short period, is, I think, the fair result of the evidence. The three items of injury which bulk the largest are thus summed up and commented upon by Riddell, J.: "The difficulty at the liver could probably be overcome by a surgical operation of a comparatively simple character; the neurasthenia may be expected to be fairly well overcome in about a year longer; but the prolapsed kidney is another story"—the learned Judge evidently regarding the latter as the most serious of them all.

Prolapsed or movable kidney is, it appears from the evidence of the medical experts, a by no means uncommon condition, not always, nor I would infer, usually or necessarily, a very disab-

ling defect, since patients may be so affected for very long periods, and even for life, without ever becoming aware of it. In the plaintiff's case it was not discovered until some six weeks after the accident—after he had gone to the baths at Mount Clements, although before that he had been examined more than once by local physicians, and was himself one of long experience. Dr. Primrose, in his statement, says that the prolapsed condition may or may not have been caused by the accident. And I am not able to find in the evidence of the other medical witnesses any more positive evidence or evidence which displaces this statement. And, if the matter rests as put by Dr. Primrose, as, in my opinion, it does, the fact is not established; for, of course, the burden of proof is upon the plaintiff, who must incline the balance in his direction, not by a mere scintilla, but by a reasonable amount of legal evidence. In this connection —that is, the condition of the plaintiff's kidneys before the accident—the evidence of Mr. Robertson, a wholly disinterested witness, also is of some importance; he said that several months before the accident the plaintiff told him that he was being troubled by his kidneys, and that his hard work and hard driving were using him up. The plaintiff denies this, and says that there was never even a conversation, and that he was never troubled with his kidneys; but, as between the two, there is no reason why the usual rule as to crediting the disinterested witness should not be allowed. But while, for these reasons, I incline to think that the evidence as it stands does not warrant the conclusion that it is established that the prolapsed condition of the kidney was caused by the accident, I think it highly probable that, as the blow which the plaintiff received was in its vicinity, the kidney was injured to some extent in the accident, since there is evidence of blood and pus in the urine, which could not otherwise be reasonably accounted for.

The plaintiff was not able to point to any decided diminution in income as the result of the accident, although it would be natural to expect a falling off to some extent. And it is quite probable that, although the plaintiff will resume practice, he may have to decline the more arduous work to which he has been accustomed—elements which, of course, very properly enter into a consideration of the amount of damages, and which I have, I hope, duly considered.

Upon the whole, after, in the language of Field, J. (in Phillips v. London and South Western R.W. Co., supra), applying to the circumstances such reasonable common sense as I possess, I have, with deference, come to the conclusion that the

amount awarded at the trial is substantially too large, and should be reduced. And the amount I would consider fair and just, under all the circumstances, would be $10,000, which, if it errs at all, as it probably may seem to do, to the minds of the next appellate tribunal, errs, I think, as I believe we all do, on the side of being generous to the plaintiff.

The plaintiff should have the costs up to and inclusive of the trial; and there should be no costs to either party of the motion in the Divisional Court or of this appeal.

JUNE 28TH, 1912.

*IMPERIAL PAPER MILLS OF CANADA LIMITED v. QUEBEC BANK.

Banks and Banking—Advances by Bank to Milling Company—Pledge of Timber—Antecedent Written Promise to Give Security—Validity—Bank Act, sec. 90—Winding-up of Company—Receiver Representing Bondholders—Claim to Timber—Description—"Logs on the Way to the Mill"—Lien.

Appeal by the plaintiffs from the judgment of BRITTON, J., 2 O.W.N. 1500.

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

A. W. Anglin, K.C., and J. H. Moss, K.C., for the plaintiffs.

F. E. Hodgins, K.C., and D T. Symons, K.C., for the defendants.

MEREDITH, J.A.:—The real question in this action is, which of the parties is entitled to the proceeds of the logs in question?

Originally they were the property of the paper company, being cut by them under a lease from the Province.

The defendants claim title under certain charges made upon the property by the company in their favour.

The reply is, that the charges are invalid in law; and that, if not, they are subsequent to charges in favour of the bondholders, who are represented in this action by their receiver, the plaintiff Clarkson.

*To be reported in the Ontario Law Reports.

The first question for consideration is, therefore, whether the charges in favour of the defendants, the bank, are invalid because not made in accordance with the provisions of the Bank Act, sec. 90. But, in all things substantial, they seem to me to have been so made. They were made under and in accordance with the antecedent agreements, in writing, to give such security—one of them expressly so. The contention that the precise amount of the debt to be secured must be stated in the antecedent promise in writing is not well founded: the enactment does not require it, nor does the case of Toronto Cream and Butter Co. v. Crown Bank, 16 O.L.R. 400, 419, give reasonable encouragement to the contention. In that case the security was not shewn to have been given upon a previous promise to give it. The promise in this case was of security for the amounts to be advanced to enable the company to get out a quantity of pulpwood logs estimated at 15,000 cords in the first transaction, and in like manner as to the other transactions—a promise which, in my opinion, comes within the provisions of sec. 90. Nor are the securities invalid for want of compliance with the provisions of the Act in regard to the description of the goods. I see no reason why a certain number or quantity of pulp-wood logs out of a greater quantity may not be so charged without severance, just as, I think, would be the case in regard to wheat and other things in which all parts are alike, and so greater certainty is not required for any purpose so far as any one affected, or who might be affected, is substantially concerned. No creditor, or subsequent transferee of the property, would be a whit better off if each particular log had been ear-marked.

Then are the logs in question excepted from the general security given in favour of bondholders? The exception as expressed in the first mortgage is in these words, "logs on the way to the mill," the mortgage being a "floating security," covering everything presently owned, as well as to be acquired, by the mortgagors. It is said that the exception does not apply to the future, that it must be confined to logs then on the way to the mill; but I am quite unable to agree in that contention; indeed, it seems to me to be quite plain that such was not the intention of the parties; and that neither strict grammatical construction, nor ordinary understanding, of such words, favours it. The business was to be carried on; that is, fully provided for in the mortgages; it could not be carried on without pulpwood; pulpwood could not be obtained without payment of transportation charges, charges which are in the case of common carriers a lien upon the goods carried; pulpwood would be

needed in future years quite as much as at the time when the mortgages were given. I cannot think that among business-men any one would have thought of raising such a contention.

There was power, therefore, to charge logs on the way to the mill; but the further contention is made that the logs in question were not on their way to the mill when charged; but again I am quite unable to see anything in the point. From the time the logs were cut in the forest until they reached the mill, they were on their way to the mill; the purpose of cutting them was that they should go to the mill and there be converted into paper-pulp. Every step taken towards that destination was a step on the way to the mill, whenever taken; it was part of the necessary transportation.

It was suggested that the later mortgage might be wider in its scope than the earlier; but the contrary is so; there is in it the words "excepting logs on the way to the mill," and, in addition, the plainest liberty to mortgage or charge for the purpose of carrying on the business; the subsequent covenant, not to mortgage or charge without the consent of the bondholders, does not affect the preceding exception or liberty; it comprises mortgages and charges for other purposes.

Needless technical obstruction ought not to be put in the way of honest mercantile transactions such as those here in question. Such enactments as that in question are best interpreted when given the meaning which business-men generally would attach to them.

MACLAREN, J.A., agreed in the result, for reasons stated in writing.

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

Appeal dismissed with costs.

JUNE 28TH, 1912.

*MAYBURY v. O'BRIEN.

Vendor and Purchaser—Contract for Sale of Land—Absence of Authority of Agent of Vendor to Make—Receipt Signed by Agent in his own Name—Memorandum in Writing to Satisfy Statute of Frauds.

Appeal by the defendant from the judgment of CLUTE, J., 25 O.L.R. 229, ante 393.

*To be reported in the Ontario Law Reports.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

W. M. Douglas, K.C., for the defendant.

A. W. Anglin, K.C., for the plaintiff.

GARROW, J.A. (after setting out the facts):—The learned trial Judge was of opinion: (1) that the defendant had appointed Mr. Pardee his agent, and had authorised him to make the agreement in question; and (2) that the agreement referred to and set out in the statement of claim was sufficient to satisfy the Statute of Frauds.

My difficulty is to accept the first proposition, which, with deference, I think was not proved. This proposition seems to divide itself into two questions: (1) was Mr. Pardee an agent for the defendant for any purpose; and (2), if he was, was he or his firm authorised to make the particular agreement sued on? And I think both should be answered in the negative. They are both, of course, questions of fact; and, in dealing with them, I am bound to regard the learned trial Judge's statement that he prefers the evidence of Mr. Pardee to that of the defendant when they differ.

The onus was upon the plaintiff to prove, by reasonable evidence, an agency in fact. There were and are no circumstances in the case to justify a finding that the alleged agency was an agency, in law, or, in other words, arose by estoppel; and, indeed, no such contention is advanced.

Now, what is the evidence? And I will take Mr. Pardee's own statement for it. He says he had frequently acted for the plaintiff in buying lands. He acted for him in making a resale of the same lands to Mr. Plummer at an advanced price. At the opening of the negotiations in question, he went to the defendant on behalf of the plaintiff. No claim is made that at or prior to that time he was acting or had any authority to act, either personally or for his firm, for the defendant. He did not inform the defendant for whom he was acting, but the conversation implied that he was acting for a principal—"I mentioned that my purchaser would like to have an answer at once. Q. He never said anything to you about $200, did he?" A. No, I do not think he did. Q. And he never said anything to you about signing any receipt, did he? A. No. . . . Q. You were dealing as one man would with another in a business transaction? A. Exactly. Q. There was no association between you? A. No. Q. There was no common interest? A. No. Q. You were trying to get the best terms you could for your client? A. Yes. Q.

And he was trying to get the best terms he could for himself? A. Yes. Q. You for Maybury, he for O'Brien? A. Exactly. Q. He told you he would not sell, unless he had a third cash? A. Exactly. Q. Which was what you understood? A. Yes. Q. And you finally came down to the terms one-third cash? A. Exactly. Q. What did you understand by that? A. A third of the total payment. Q. Cash down on the signing of the agreement? A. I presume so, yes. Q. And, so far as you are concerned, is that all that you had to do with it? A. That is all. Q. Then you signed the receipt, exhibit 3, as you thought, in pursuance of some authority given you by Mr. O'Brien? A. No, I signed it as we do generally; we take a deposit when we sell property. Q. So that that was quite apart from any actual authority given you? A. Yes, I cannot recall any actual amount named as a deposit by Mr. O'Brien. Q. Nothing was said about a deposit, was there? A. Well, it went without saying, if we sold the property we would take a deposit. Q. That is your usual practice? A. Yes. Q. And there was no other mention of any terms or conditions in connection with the agreement than those which you have indicated? A. Exactly."

Then, after the personal interview, what took place was entirely over the telephone:—"Q. You got as far as stating that Mr. O'Brien rose from his desk, and you took that as an intimation that the interview was over, and you left? A. I did. Q. And you stated that, immediately before that, you stated to Mr. O'Brien that the purchaser would consent to the increase in the cash payment? A. No, I did not. Q. What was said? A. Mr. O'Brien said to me, after rising from his desk, that he would call me up in the evening and let me know the best terms he would sell on—the best cash payment. . . . Q. Mr. O'Brien did not call you up? A. Mr. O'Brien did not call me up that evening. On the following morning I called Mr. O'Brien up at his hotel. I was informed that he was not in. I left word for him to call me up when he did come in. He did so, I should say in the neighbourhood of ten or fifteen minutes afterwards. He stated to me that he would sell on the proposed terms of a third down, the balance of his equity, about $1,000, in December, 1911, and June, 1912, at 7 per cent. interest, and the purchaser assume Mr. Keenan's payments under Mr. Keenan's agreement. I informed Mr. O'Brien over the telephone that, if I could sell on those terms, I would do so without consulting him further. He said that was satisfactory. Mr. Maybury came into the office a few minutes afterwards, and I told him I was able to sell Mr. O'Brien's property at the price of $225 a foot, under the terms as he stated to me. Mr. May-

bury stated to me that he would take the property. I then called up Mr. O'Brien, got him on the 'phone in Mr. Maybury's presence, and told him that I had sold the property. Mr. O'Brien answered, 'All right.' I asked him who was looking after his interests in the matter, and he informed me that Boyce & Hayward—Q. What next? A. Mr. Maybury then gave me $200—a cheque for $200—to bind the bargain, and I gave him a receipt for it."

I am wholly unable, even without the defendant's denial, to see in this evidence, which is the whole story upon that branch of the case, any reasonable evidence that the defendant appointed or agreed to appoint Mr. Pardee or his firm his agents. A man is not to have an agent thrust upon him in that way. The appointment necessarily results from a contract, in which there must appear in some shape an offer upon the one hand and an acceptance upon the other, out of which there grow the mutual rights and responsibilities of the relation. Down to the conversation over the telephone there is not the very slightest room even to pretend that either party contemplated the alleged agency. Mr. Pardee was there, in the defendant's office, as the representative of the plaintiff, and of him alone. He was the "purchaser" who wanted an immediate answer, and it was in his interests, and not the defendant's, that Mr. Pardee haggled with the defendant over the down-payment, which he wished to have reduced. The defendant's impression of what occurred is set out in the memorandum in his note-book, ... put in by the plaintiff, which he says he read over to Mr. Pardee, who does not, so far as I see, deny the statement, in which the defendant states that the sale was to Mr. Pardee himself. This memorandum, fairly read, is utterly inconsistent with an agency such as that alleged, or of any other kind.

Then, in the conversation by telephone, the expressions "I informed Mr. O'Brien that, if I could sell on these terms, I would do so," and "I told him I had sold the property," and the defendant's reply, "all right," are to be read in conjunction with the earlier course of the negotiations, and are, I think, perfectly consistent with Mr. Pardee still being, in the defendant's opinion, the agent only of the purchaser, and are wholly insufficient, in the light of all the evidence, to create, in such an obscure and indirect manner, the important relation now claimed for them of also making him the agent of the vendor.

Then, upon the second question, as to the alleged authority to make the particular agreement which was made, the instruc-

tion, on Mr. Pardee's own shewing, was to make an agreement upon the term (among others) of one-third cash on signing the agreement, and he made no such agreement. What he did make was an agreement stipulating for $200 down, and the balance of the one-third cash payment when the title and documents were accepted. I cannot, with deference, agree that these mean the same thing. It is, however, not exactly that, but whether an explicit instruction has been followed. It is, in other words, a question of power and authority, pure and simple; and, in my opinion, there was no power or authority to substitute for one-third cash, on signing the agreement, the term of $200 down and the balance when the title and documents were accepted. The latter, doubtless, had, in Mr. Pardee's eyes, the merit of giving him so much of the defendant's money in hand, in case there should subsequently be a dispute about his agency for the defendant, and its resulting commission, which if he did not claim, he would be a very unusual agent.

Upon the whole, and without entering upon some of the other matters discussed before us, which, in my opinion, become unimportant in the view which I take of the facts, I think, for the reasons I have given, that the appeal should be allowed and the action dismissed with costs.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

MACLAREN and MAGEE, JJ.A., and LENNOX, J., also concurred.

Appeal allowed.

JUNE 28TH, 1912.

*MERRITT v. CITY OF TORONTO.

Water and Watercourses—Marsh Lands—Passage over Adjacent Lands—Access to Deep Water—Proprietary Rights—Riparian Rights—Ashbridge's Bay.

Appeal by the plaintiff from the order of a Divisional Court, 23 O.L.R. 365, 2 O.W.N. 817.

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

H. M. Mowat, K.C., for the plaintiff.

H. L. Drayton, K.C., and G. A. Urquhart, for the defendants.

*To be reported in the Ontario Law Reports.

Moss, C.J.O.:— . . . The plaintiff rests and can only rest his case against the defendants upon such rights as he has under the grant to him of what is designated the lot covered with water extending south to the property granted to the defendants by the two several patents in the case. And it was incumbent upon him to shew, not only that the waters of Ashbridge's Bay were navigable in the sense in which that quality is to be found in order to confer riparian rights of the kind claimed, but also that his property did in fact border upon the waters. If that which intervenes between his dry land fronting on Eastern avenue and the north limit of the defendants' property has always been marshy, boggy land, and the defendants' property for some distance south of the north limit has always been of the same nature, there is nothing in the respective grants and conveyances to turn them into water lots.

Upon the best consideration I have been able to give to the testimony, and without the aid of what is recorded in the publications referred to by Middleton, J. (in the Divisional Court), I come to the same conclusion as the Chancellor, viz., that the plaintiff's property, comprised within the conveyances and grants under which he claims, is now and always has been marsh, and nothing but marsh; and that, between it and the artificial channel through which he seeks access as riparian owner, there is land of a like character.

Present appearances, after so much has been done by means of dredging and channelling to create a condition of open water, afford no index to the condition in early days of the waters of the Ashbridge's Bay marsh and of the lands bordering upon them. But, whatever the conditions may have been at the easterly part, the testimony makes it plain that there always was bog and marsh to the west in front of the property now claimed by the plaintiff, and that its character has undergone but slight change, though liable of course to some changes in appearance and wetness according as the year or season was a wet or dry one.

Upon the whole, I am unable to say that the conclusion of the Divisional Court is erroneous, and I would, therefore, dismiss the appeal.

SUTHERLAND, J., agreed with MOSS, C.J.O.

MEREDITH, J.A., agreed that the appeal should be dismissed, for reasons stated in writing. He referred to Niles v. Cedar Point Club, 175 N.J. 300, and Ross v. Village of Portsmouth, 17 C.P. 195.

MACLAREN, J.A., and CLUTE, J., dissented, for reasons stated by CLUTE, J., in writing.

Appeal dismissed.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. JUNE 25TH, 1912.

*RE HUTCHINSON.

Infant—Custody—Rights of Father against Maternal Grandparents—Welfare of Child—Agreement under Seal—Adoption—1 Geo. V. ch. 35, sec. 3—Application upon Habeas Corpus—Affidavits—Opinion Evidence—Costs.

APPEAL by W. H. Hutchinson, the father of Adah May Hutchinson, a child of two years, from the order of BOYD, C., ante 933, 26 O.L.R. 113, upon the return of a habeas corpus, refusing to order the child to be delivered to the appellant, by the child's maternal grandparents, the respondents.

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

W. N. Tilley, for the appellant.

V. A. Sinclair, for the respondents.

RIDDELL, J. (after setting out the facts) :—In Fidelity Trust Co. v. Buchner, ante 1208, I had occasion, in deciding as to adoption, to consider the effect of 1 Geo. V. ch. 35, sec. 3; and I refer to that case for most of the authorities which led me to the view that the statute has no application to such a case as the present. I add Halsbury's Laws of England, vol. 17, p. 123, sec. 287; . . . Lord Westmeath's Case (1819), Jacob 251, note (*c*); . . . Macpherson on Infants, p. 83; . . . Schouler on Domestic Relations, sec. 287.

Holding then, as I do, that the statute does not apply to the present case, it is necessary to consider whether, outside the statute, this document† has any validity to bind the father. . . .

[Reference to Roberts v. Hall, 1 O.R. 388, 404, 406; Regina v. Smith, 17 Jur. 24, 22 L.J.N.S. Q.B. 117, 16 Eng. L. & Eq. 221.]

*To be reported in the Ontario Law Reports.

†An instrument in writing, referred to in the Chancellor's judgment, by which the appellant purported to give the custody, care, and control of the child to the respondents.

I adhere to the decision in Re Davis, 18 O.L.R. 384: "Parents cannot enter into an agreement legally binding to deprive themselves of the custody and control of their children; and, if they elect to do so, can at any moment resume their control over them."

Humphrys v. Polak, [1901] 2 K.B. 385, 390, is also in point. . . . See also Lord St. John v. Lady St. John, 11 Ves. 531; Hope v. Hope, 8 DeG. M. & G. 731; In re O'Hara, [1900] 2 I.R. 232, 241: "English law does not recognise the power of binding by abdicating either parental right or parental duty:" per Fitzgibbon, L.J.

Roberts v. Hall, supra, has been cited as against this doctrine; but all that that case actually decides is, that, even though one party to a contract could not be compelled to carry out his part, if he does in fact carry out his part, the other party is bound to carry out his. We need not consider whether this would be held to be law, since the case in the Supreme Court of Chisholm v. Chisholm, 40 S.C.R. 115. That case seems to me to be against the respondents. . . .

The document not being a bar, there is no need to have it set aside. It is not, perhaps, wholly without significance that there is no provision in it that the grandchild shall be the "heir" of her grandparents.

The document, although it is not a bar to these proceedings, is not wholly to be disregarded in the consideration of the second branch of the case.

Upon an application to the Court for the custody of a child, it is not altogether, or even primarily, the parental rights of the father which the Court, acting for the King as parens patriæ, takes into consideration, but the advantage—I use the larger word—of the child. The law gives the custody and control of his children to the father, not for his gratification, but on account of his duties. . . .

A long acquiescence in another having the custody and control of the child may indicate disregard of parental duty—and, what is equally important, may permit a child to become accustomed to an environment from which he should not be torn. Nothing of the kind appears here. Even assuming that the father wholly understood the document when he signed it, there was a prompt repudiation—and there was no becoming habituated to a novel situation subsequent to and authorised by the agreement.

In my opinion, then, the agreement is of small significance, if any.

There is no doubt as to the law. It is not as at the common law, where "the parent had, as against other persons generally, an absolute right to the custody of the child, unless he or she had forfeited it by certain acts of misconduct" (per Lord Esher, M.R., in Regina v. Gyngall, [1893] 2 Q.B. 232, 239); but as in equity, where "the Court is placed in a position, by reason of the prerogative of the Crown, to act as supreme parent of children, and must exercise that jurisdiction in a manner in which a wise, affectionate, and careful parent would act for the welfare of the child. . . ."

[Reference to In re Fynn, 2 De.G. & S. 457; In re O'Hara, [1900] 2 I.R. 232; Re Faulds, 12 O.L.R. 245.]

There is and can be no pretence that the appellant is other than of good character. . . . Nothing which . . . could be called misconduct is even alleged.

The facts, or alleged facts, adduced to shew unmindfulness of parental duty, are almost absurdly petty. . . . There is nothing which shews that the father is unmindful of his parental duties.

Then is there any inability to provide for the welfare of the child? I do not see any. The father is healthy—the attempt to shew, or at least to suggest, that he is tuberculous . . . wholly fails . . . He is respectable, of good habits, industrious, and trustworthy. . . . He intends to take up house, and have his sister keep house for him; she is about thirty years of age, and was trained in housework by her mother. . . . She has at different times acted as nurse and taken special care of children. She swears that she is fond of children, and has been in contact with them a great deal. . . . She is . . . quite able and fit to look after her brother and his child.

It is rather suggested than said that the expectations of the child will be diminished by placing her in the hands of her father. This, I decline to believe. . . . But, if it be so, "pecuniary benefit is often a very secondary consideration"—and more so in this new land than in the older countries. . . .

I think the appeal should be allowed without costs here or below; the order not to issue until the father files an affidavit shewing that he has procured a suitable house or rooms for himself and child.

A mass of affidavits has been filed, containing much irrelevant material. The climax of absurdity in that regard is reached by the filing of a petition signed by a number of neighbours giving their opinions as to the proper custody of the child. This will be taken off the files. The Court does not decide cases ac-

cording to the wishes or views of neighbours, however respectable; and the solicitor should have known better than to offer such a document. . . .

FALCONBRIDGE, C.J., agreed in allowing the appeal, without costs here or below.

BRITTON, J., also agreed in the result, for reasons stated in writing.

Appeal allowed.

MIDDLETON, J. JUNE 26TH, 1912.

RE McKAY.

Will—Construction — Annuity — "Residue" — "Remainder" —Maintenance of Infant Children—Powers of Trustees under Will—Payments for Medical Attendance and Education—"If they Deem Proper"—Right of Married Daughter —Resort to Particular Funds—Gift of Income of Fund to Children during Life—Gift of Principal to Grandchildren —Distribution per Stirpes or per Capita—Postponement of Payment of Shares beyond Majority—Invalidity—Period of Distribution—Orders of Court for Increased Allowances for Maintenance—Effect of—Costs.

Motion by the executors and trustees under the will of Hugh McKay, deceased, upon an originating notice, for an order determining certain questions arising upon the construction of the will.

The motion was heard at the London Weekly Court on the 22nd June, 1912.

J. B. McKillop, K.C., for the London and Western Trust Company, executors.

F. P. Betts, K.C., for the widow, Ellen McKay.

T. G. Meredith, K.C., for James R. McKay, and other adult children of the testator.

J. M. McEvoy, for Ethel M. Parker, a married daughter.

P. H. Bartlett, for Mary McKay and F. C. McKay, infant children.

W. R. Meredith, for grandchildren and unborn issue of children.

MIDDLETON, J.:—The late Hugh McKay died on the 3rd July, 1897, leaving an estate of upwards of $60,000, personalty. He left him surviving his widow and eight children, all the children being at that time infants. Since his death two of the children—Gordon Alexander McKay and Nellie Irene McKay —have died, while yet infants and unmarried.

By his will, dated in September, 1896, the testator bequeathed all his property to his executors upon trust to get the same in and to invest and hold it upon the trusts set forth.

The various trusts mentioned are so ill-defined, confused, and contradictory, that it is impossible with any certainty to grasp what was in the mind of the testator.

He first directs that, from the moneys realised, $35,000 be set apart, and thereout and out of its accumulations there be paid to the wife for five years an annuity of $1,500, for the next five years an annuity of $1,200, and during the rest of her life an annuity of $1,000. Upon her death or remarriage, this fund "is to become part of and to form the residue of my estate." The annuity is to be used by the wife in the maintenance of herself and such of the children as shall elect to reside with her; and upon her death "the above sums" are to be paid to the guardian named, for the maintenance of any infant children until they attain age.

By the next clause of the will, the fifth, the "remainder" of his estate is to be divided into as many parts as he shall have children living at the time of his decease; and these shares are to be invested, the interest arising to be paid to each daughter when she attains the age of 21, and to the son when he shall attain 27. But, in case of the sickness of any of the children, the trustees are to have power, if they deem proper, to pay for the medical and other attendance; the amount so paid to be deducted "from the residue of my estate, and in the event of any child electing to enter a profession or to attend a university the trustees may provide from the residue of my estate and charge to the interest of such child sufficient money for the aforesaid purpose." Each daughter is also to have $400, and each son $500 when married, "such sums to be deducted from the residue of the estate."

By the sixth clause, the principal sum invested for each son and daughter is given "to their issue, if any;" but, in the event of any son or daughter dying without issue, the amount of the portion that would be his if he had lived is to become part of the principal and to be equally divided among the other children, share and share alike, and "to be governed by para-

graph No. 5;" the widow of any son to have a third interest paid to her during widowhood. By the same clause, the "residue of my estate is to be divided among my surviving grandchildren, and the interest accruing thereon to be paid to my children, each to share and share alike."

Two theories are put forward as to the construction of the will.

It is argued by Mr. T. G. Meredith and those in the same interest that the testator has contemplated two distinct funds: the first consisting of the $35,000 to be held for the widow, which he designates "the residue of my estate;" the other, which he designates "the remainder of my estate," is everything beyond this $35,000. This "remainder" is to be divided into eight portions, one to be held for each child; and it is contended that the primary idea with reference to this fund is, that it is to remain intact for the children. The $35,000, erroneously called the "residue," is to be resorted to in the first place for the payment of the widow's annuity. The annuity would not exhaust the income derived from the fund. Upon this fund there was also to be cast the special payments for the maintenance of the family. The medical expenses and expenses of a kindred type are, by clause 5, directed to be borne by "the residue." Moneys spent for educational purposes, while to be first paid from this residue, are to be ultimately charged "to the interest of" the child. The allowance upon marriage is also directed to be paid from the residue, but there is no provision in this case that it should be charged against the child's interest.

It is then argued that the testator has attempted, with reference to what he calls "the remainder," to create an estate tail in his personal estate. The income is to be invested until each daughter attains the age of 21, when she is to receive the income of her share, including accumulations. The income on the share of the son is to be invested until the son attains the age of 27, when he is to receive the income, including accumulations. The principal invested is to go to the issue of the son or daughter who dies, and in the event of a son or daughter dying without issue, then the shares of the other children are to be augmented, subject to the dower provision made for the widow of a deceased son. When the residuary estate, so-called—that is, the $35,000—is free from its primary burden of providing an income for the maintenance of the wife and family at home, or the minor children in the case of her death, then this residue is to be divided among the testator's surviving grandchildren.

The opposing theory, advocated by Mr. W. R. Meredith, in the interests of the grandchildren, is, that the $35,000 is set aside for a temporary purpose merely. Upon the death of the widow it is to form part of the residue, and there is but one residual fund to be dealt with. Upon the death of the children, this residual fund is to be divided, share and share alike, among the then surviving grandchildren; the children having in the meantime shared in the income derived. . . .

I am inclined to accept the first theory, with some modifications. It appears to me that the period for which the residue is to be held under clause 4 is the death or marriage of the wife and the attaining of age of the youngest surviving child, whichever is latest. Up to that time this fund is to be resorted to for the purpose of maintaining the family; and in the meantime, I think, the trustees had the right to resort to it also for the purpose of medical and kindred expenses and for the payment of the marriage portions of both sons and daughters; and I would fix this as the period of survivorship, when the division amongst the grandchildren is to take place. Until then, any interest arising from this $35,000, not used in the payment of the widow's annuity or the substituted annuity for the maintenance of minor children, should be divided among the children equally.

This gives meaning to both branches of the seemingly self-contradictory clause at the end of paragraph 6.

What then is the position with reference to the share of the children in the so-called remainder—the sums that were directed to be divided and allocated to them respectively after the $35,000 had been set apart?

Mr. T. G. Meredith contends that there is an absolute gift to the children, because this is an unsuccessful attempt to create an estate tail in personalty. I do not agree with this. It appears to me that it is a gift of each share to the executors to hold in trust for the child during life, and upon the death of the child the principal of each share is given to the issue, if any, of the child absolutely, and, in the event of the death of the child without issue, then the shares fall into the fund of the surviving children and are to be governed by paragraph 5; which I understand to mean, to be held upon the trust indicated, the income to be given to the other children for life. It is not a gift to the child "and his issue," which I agree would be absolute.

The result of this is, that the shares of the children in everything over the $35,000 will ultimately be distributed among the grandchildren *per stirpes,* while the grandchildren will

share in the $35,000, when it comes to be divided, *per capita.* The children are given nothing but the interest; the interest on the shares being theirs absolutely; and the attempt to postpone payment in the case of sons to the age of 27 being nugatory, on well-understood principles. The right of the children to receive interest on the $35,000 will terminate on the arrival of the period of distribution.

Several orders have been made by the Court dealing with this estate, and increasing the allowances for maintenance. . . .

I am not called upon to consider the validity of these orders or their propriety. Effect must be given to them according to their terms. The increased allowances must be charged as they direct, against the shares, in which, in my view, the children had only a life interest. The annual payments authorised by the testator must be charged to the $35,000 fund.

The accounts should be made up and taken upon that basis.

On this application, the married daughter Ethel M. Parker asks for a direction that the executors should pay to her a sum to recoup her for medical and kindred expenses. I do not think that I can make any such order. She is married, and, *primâ facie,* her husband ought to bear any such expenses. But, apart from that, the payments for medical and kindred expenses are payments which the executors "deem proper." The executors in this case expressly state that they do not deem the payment now sought to be proper. They are the final authority.

Save as expressly directed by the orders of the Court, my view is, that the payments for medical expenses must be borne by the $35,000; advances for educational purposes must be borne by the shares of each child; and that the orders of the Court dealing with specific sums must be given effect to in accordance with their terms.

Where no specific direction has been given with reference to the costs of different applications, costs should be charged in the same way as the sums dealt with by the order. . . .

Costs of all parties of this application should be allowed out of the $35,000 fund.

DIVISIONAL COURT. JUNE 26TH, 1912.

*RE SANDERSON AND SAVILLE.

Mines and Minerals—Prospecting and Discovery by Miner on Crown Lands after Expiry of License—Renewal after Discovery and Staking—"Special Renewal License"—Effect of —Mining Act of Ontario, secs. 22 (1), 84, 85 (1) (*a*), 176 (1), 181 (1)—*Offence Punishable as Crime—Taking Advantage of Wrong—Mining Commissioner—Finding of Fact—Credibility of Witness—Appeal.*

Appeal by Sanderson from a judgment of the Mining Commissioner reversing the decision of a Mining Recorder and declaring that Eliza Saville was entitled to be recorded as the holder of two mining claims in the Sudbury mining division.

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

J. W. Bain, K.C., and M. L. Gordon, for the appellant.

G. F. Shepley, K.C., and H. S. White, for the respondent.

RIDDELL, J.:— . . . Sanderson, who was the holder of a mining license, being at a distance from the Recorder's office, failed to have his license renewed before the 1st April, 1911; but he went on, and on the 21st April made a discovery and staked two claims. . . . On the 24th April, he had his license renewed under sec. 85 (1) (*a*) of the Mining Act of Ontario, 1908. The Mining Commissioner holds that Sanderson can acquire no rights by such a discovery and staking.

The Act provides, sec. 22 (1), that "no person . . . not the holder of a miner's license shall prospect for minerals upon Crown lands . . . or stake out, record or acquire any unpatented mining claim . . . or acquire any right or interest therein." Section 176 (1) provides: "Every person who (*a*) prospects . . . any Crown lands . . . for minerals otherwise than in accordance with the provisions of this Act, or 6 Edw. VII. ch. 11, sec. 103 . . . shall be guilty of an offence against this Act and shall incur a penalty not exceeding $20 for every day . . . and upon conviction thereof shall be liable to imprisonment for a period not exceeding three months unless the penalty and costs are sooner paid." Section 181 (1) directs the prosecution before a Police Magistrate or a Justice of the Peace, or before the Commissioner or a Recorder.

*To be reported in the Ontario Law Reports.

This express provision excludes the application of sec. 164 of the Criminal Code: but the offence is none the less a crime. If, for any reason, sec. 164 of the Code does apply, then the Act was a crime, quite beyond question. "*Nullus commodum capere potest de injuriâ suâ propriâ.* . . . "No system of jurisprudence can with reason include amongst the rights which it enforces, rights directly resulting to the person asserting them from the crime of that person."

[Reference to Cleaver v. Mutual Reserve Fund Life Association, [1892] 1 Q.B. 147, 156; McKinnon v. Lundy, 24 O.R. 132, 21 A.R. 560; Lundy v. Lundy, 24 S.C.R. 650.]

The principle must, of course, be subject to two qualifications. The rights in question must be property rights. . . . So, too, while rights cannot be acquired by a wrongdoer from his wrong, the rule only applies to the extent of undoing the advantage gained, where that can be done, and not to the extent of taking away a right previously possessed. . . . See also, Ackford v. Preston, 6 H. & N. 464.

In the present case, the discoverer had no rights in the land and claim, previously possessed; and he founds his claim upon acts done by him as a trespasser, a wrongdoer, one liable to conviction for a crime. It is clear that no such claim can be allowed by any Court, nor can it be allowed to be set up against the right or claim of any other—unless, indeed, the provisions of sec. 85 (1) (*a*) of the Act save the appellant.

Section 85 (1) (*a*) does not purport to be in any way in modification of secs. 22, 23, 27. . . . Section 85 (1) (*a*) provides for . . . what is called a "special renewal license," both in the section itself and in the tariff, item No. 23. . . . It is not provided that it shall come into effect retroactively. It is only issued "to save forfeiture" (tariff, item No. 23)—a forfeiture under sec. 84. This, as will be seen, is forfeiture of "all the interest of the holder of a mining claim before the patent thereof has issued." The "special renewal license" is not operative to make that rightful which was wrongful, that innocent which was a crime, but only to save from forfeiture the interest already rightfully and lawfully acquired of "the holder of a mining claim."

This part of the Commissioner's judgment is undoubtedly right, and the appeal in that regard should be dismissed.

The other branch of the case is on a simple question of fact. . . . . After a careful examination of all the evidence, I am not able to say that the conclusions of the learned Commissioner are not wholly justified by the evidence. Much depends

upon the credibility of Saville, who gave testimony before the Commissioner in conflict with what he had previously said before the Recorder. The explanation given is not wholly satisfactory, but the Commissioner saw the witness and he chose to give credit to the testimony before himself. We cannot . . . interfere.

In a matter of the credit to be given to witnesses, the Master (or Commissioner) is the final judge . . . "according to the well-established practice in Ontario:" Booth v. Ratté, 21 S.C.R. 637, 643; Hall v. Berry, 10 O.W.R. 954; Bishop v. Bishop, ib. 177.

The appeal should be dismissed on all grounds taken, and with costs.

FALCONBRIDGE, C.J., and BRITTON, J., agreed that the appeal should be dismissed with costs.

KELLY, J. JUNE 27TH, 1912.

BOLAND v. PHILP.

Vendor and Purchaser—Contract for Sale of Land—Absence of Authority from Owner—Contract with Husband—Correspondence — Establishment of Contract—Statute of Frauds —Specific Performance — Costs.

Action against William H. Philp and Ida Emily Philp, husband and wife, for specific performance of an alleged agreement for the sale of property on Murray street, in West Toronto, or, in the alternative, for damages for breach of the agreement.

A. C. Macdonell, K.C., for the plaintiff.
G. H. Gray, for the defendants.

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

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

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

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

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

The plaintiff, on or about the 15th September, became aware, through searching the registry office, that the defendant Ida Emily Philp, and not William H. Philp, was the owner of the property.

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

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

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

The plaintiff then fell back on the telegram and receipts as constituting an agreement, for breach of which he claims damages as against the defendant W. H. Philp.

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

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

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

BRITTON, J. JUNE 28TH, 1912.

MOSIER v. RIGNEY.

Will—Testamentary Capacity—Absence of Undue Influence—Proof of Will in Solemn Form in Surrogate Court—Action in High Court to Set aside Will—Failure to Impeach—Costs.

Action to set aside the will of John Bowman; tried at Kingston, without a jury.

J. A. Hutcheson, K.C., for the plaintiff.
J. L. Whiting, K.C., for the defendants.

BRITTON, J.:—John Bowman made his will on the 24th December, 1910, and on the same day died in L'Hotel Dieu Hospital at the city of Kingston.

On the 13th January, 1911, the plaintiff, Mary Mosier, who is a first cousin of the deceased, caused a caveat to be filed in the Surrogate Court of the County of Frontenac. J. McDonald Mowat was the plaintiff's solicitor in the matter. The grounds stated, on which the caveat was lodged, were, that, at the time when the paper writing alleged to be the last will of Bowman purported to be executed, the deceased was not in possession of his faculties, was not of a disposing mind, and was brought to sign the paper by undue and improper influence.

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

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

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

The deceased was taken ill three or four days before the day of his death. Dr. Kilborn was called in. Upon the doctor's order, the deceased was taken at once to L'Hotel Dieu Hospital; and there the doctor—who was acquainted with the de-

ceased—paid close attention to him during his short illness. The doctor visited the deceased on the 23rd December, and says that the deceased was on that day mentally all right. He saw the deceased again on the following day, after 9.30 a.m. and before 11.30 a.m. The deceased at that interview knew the doctor, spoke, said he was better, but immediately his mind began to wander. The doctor is of opinion that the deceased was not, at the time of the last interview, capable of making a valid disposition of his property. Death occurred shortly after 11.30 on the 24th December, 1911. The doctor stated that, in his opinion, the deceased may have been competent at 7 a.m. on the day of his death.

The circumstances attending the making of the will are, that, when the sickness of the testator seemed likely, and very soon, to terminate fatally, one of the Sisters in charge telephoned to the defendant Rigney. Mr. Rigney cannot be said to have been the general solicitor of the Corporation L'Hotel Dieu, nor did it appear that Mr. Rigney was asked for, or that any lawyer was asked for by the deceased. Rigney went at once. He did not know the relatives of the deceased, or the names of his friends, or the value of his estate.

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

The evidence of Rigney was fully corroborated by the affidavits of the subscribing witnesses to the will, and also by the

oral testimony of witnesses in the Surrogate Court, and before me, except in the evidence of James T. Delaney. This witness says that his statement in the Surrogate Court was not a true statement; and, could I accept his evidence as true, I should be obliged to decide against the will. Considering Delaney's demeanour in the box, having regard to the affidavit he made, the evidence he gave before the Surrogate Judge, his contradiction by himself and by the other witnesses, I cannot accept as true what Delaney said before me.

Upon the whole case, the attack upon the will fails.

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

DIVISIONAL COURT. JUNE 28TH, 1912.

VANHORN v. VERRAL.

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

Motion by the plaintiff by way of appeal from the judgment of BRITTON, J., at the trial without a jury of an action for damages for personal injuries sustained by the plaintiff, owing to the negligence of the defendant, as alleged, and for a new trial or an increase of the damages. The learned Judge warded the plaintiff $300, which, the plaintiff asserted, was insufficient.

The motion was heard by MEREDITH, C.J.C.P., TEETZEL and KELLY, JJ.

J. W. McCullough, for the plaintiff.

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

The judgment of the Court was delivered by TEETZEL, J.:—Appeal by the plaintiff from the judgment of Mr.

Justice Britton awarding the plaintiff $300 damages for injuries caused by the negligence of the defendant's servant in operating an automobile. The appeal is for a new trial or to vary the judgment by increasing the damages. The defendant does not appeal against the finding of negligence; so that the sole question for consideration is one of damages.

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

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

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

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

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

For several weeks after the accident, the plaintiff admittedly

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

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

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

BRITTON, J. JULY 2ND, 1912.

RE SNETSINGER.

Will—Construction—Devise of "Real Estate"—Land Subject to Contract of Sale not Included.

Motion by Allan M. Snetsinger, upon an originating notice under Con. Rule 938, for an order determining a question arising in the administration of the estate of John Goodall Snetsinger, deceased, as to the construction of a clause in his will dealing with real estate in the township of Cornwall which belonged to the testator.

The motion was heard at Cornwall.

G. A. Stiles, for the applicant.

C. H. Cline, for the executors.

BRITTON, J.:—The testator made his will on the 19th November, 1906. On that day he owned several farms in the town-

ship of Cornwall. On the 15th March, 1899, the testator entered into an agreement with one W. H. Conliff for the sale to Conliff of part of the east half of lot 22 in the 4th concession, 5th range, of the township of Cornwall, for the price or sum of $2,500, payable in yearly payments—the first of $50 and the second to the fourteenth inclusive of $100 each, and the balance at the expiration of the fifteenth year. The time for payment in full will not expire until the 15th March, 1914. The purchaser went into possession, was at the time of making the will, at the time of the death of the testator, and is now, in possession. The executors recognise the agreement with Conliff as in force; and, although there has been default in paying as much on account of principal as the agreement calls for, and although the agreement permits the vendor (in case of default) to resell, there has been no re-entry or attempt to sell by either the testator or the executors. The principal money of the purchase-price has been reduced. The vendee could, during the testator's life, according to the terms of the agreement, have made his payments on principal up to $1,000, and could have demanded and got a conveyance to him—giving to the testator a mortgage for the balance. The testator died on the 9th December, 1909. The vendee has his right to retain the land, and get a conveyance from the executors.

The clauses of the will requiring consideration are:—

(1) "I give devise and bequeath to my son Allan M. Snetsinger my entire stock of goods in my store at Moulinette aforesaid, my carriages, harness, farm implements of all kinds, horses, and all kinds of live stock, and generally the contents of the stables, carriage houses, and outbuildings at my residence and upon my farms in the township of Cornwall, and one half of my household furniture and household effects and furnishings of all kinds, including plate, glass ware, pictures, books, and the entire contents of my dwelling, and all my real estate in the township of Cornwall . . . ."

The testator had farms—real estate—in the township of Cornwall not in any way connected with the farm under agreement with Conliff. No part of the chattel property bequeathed to Allan was upon the Conliff farm. Nothing in the will refers directly to the Conliff farm.

The devise of all the rest and residue of the testator's property is upon trust "(1) forthwith to convey, assure, assign, and set over to my son Allan M. Snetsinger the real and personal estate hereinbefore devised and bequeathed to him." This clause does not in any way enlarge the devise or assist Allan in his claim to the Conliff farm.

The sole question is, do the words, "my real estate in the township of Cornwall," include the real estate sold to Conliff? I am of opinion that they do not. This farm was not, at the time of making the will, or at the time of the testator's death, his real estate, within the meaning of these words. The words "real estate" do not, as a general thing, include leasehold—nor do they include the beneficial interest which a mortgagee has. In this case the testator had his interest limited to the unpaid purchase-money—what the testator intended to indicate as the real estate he devised to his son is shewn by mentioning the chattels upon the farms, and mentioning by description one parcel. The distinction between purchase-money for land and the land itself is clearly maintained in all cases of ademption. See In re Clowes, [1893] 1 Ch. 214; Re Dods, 1 O.L.R. 7; Ross v. Ross, 20 Gr. 203.

It was held in Leach v. Jay, 6 Ch.D. 496, that the words "real estate of which I may die seized" did not pass lands which, at the time of the testator's death, were in the wrongful possession of a stranger. The fair inference from the reasoning in that case is, that the words "real estate" would not pass lands which, at the time of the testator's death, were in the rightful possession of a purchaser, even if all the purchase-money was not paid.

The order will go construing the will of the said John Goodall Snetsinger in this way, that the clause devising all the real estate of the deceased in the township of Cornwall did not pass that portion of the east half of lot number 22 in the 4th concession, 5th range, of the township of Cornwall, in the county of Stormont, lying north of the Ottawa and New York Railway, crossing said east half of said lot.

Costs of all parties out of the estate—costs of executors between solicitor and client.

BRITTON, J. JULY 2ND, 1912.

RE JOHNSON.

Will—Construction—"Survivor"—Period of Ascertainment—Death of Testator.

Motion by Eliza Blackwood, executrix of the will of Margaret J. Johnson, deceased, the mother of John Roger Johnson, deceased, and one of the devisees named in his will, upon an originating notice under Con. Rule 938, for an order determining a question as to the construction of his will.

The motion was heard at Cornwall.

G. A. Stiles, for the applicant.

R. A. Pringle, K.C., for Catharine Lillian Warner (formerly Froom.)

BRITTON, J.:—John Roger Johnson made his will on the 1st September, 1904, in the words following:—

(1) "I will and direct my executrices hereinafter named to pay my just debts and funeral and testamentary expenses out of my personal estate.

(2) "I will and devise all of my real and personal estate to my mother Margaret J. Johnson and to my sister Catharine Lillian Froom or the survivor of them.

(3) "I hereby appoint my mother Margaret J. Johnson and my sister Catharine Lillian Froom executrices of this my will and I hereby revoke all other wills by me heretofore made."

The testator died on the 9th May, 1905. Both his mother, Margaret, and his sister Catharine survived the testator; but the mother, Margaret, died on the 22nd November, 1911.

The contest here is between the sisters, Eliza Blackwood and Catharine Lillian Warner (formerly Catharine Lillian Froom) as to the true meaning of the second clause of the will. It is contended on behalf of the applicant Eliza Blackwood that the survivorship mentioned has reference to the testator; and, as both the mother and sister survived the testator, they took as tenants in common.

The rule as laid down in Theobald on Wills, 4th ed., p. 554, seems correct as deducible from the authorities: "Survivorship is to be referred to the period of division. If there is no previous interest given in the legacy, then the period of division is the death of the testator—and the survivors at his death will take the whole legacy. But, if a previous life estate is given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole legacy. The same rule applies to realty as to personalty." See cases cited by Theobald.

Here no life estate was given. It was a direct gift to the two—the mother and sister or the survivor. They both survived the testator—they both took it all, as tenants in common.

Some of the cases cited on the argument and relied upon for Mrs. Warner are outside of this rule. In Peebles v. Kyle, 4 Gr. 334, there was a devise to the wife of the testator for life, with remainder to A. B., and C., or survivors or survivor of them. Survivorship there meant survivors at the death of the tenant for life—and not of the testator. In Smith v. Coleman, 22 Gr. 506, there was a devise to the wife for life.

There will be a declaration that the survivorship mentioned in the will of John Roger Johnson was referable to the death of the testator; and, upon the testator's death, Margaret J. Johnson and Catharine Lillian Froom took as tenants in common.

There will be no order as to costs.

RE S.—KELLY, J.—JUNE 27.

Husband and Wife—Dower—Forfeiture—Adultery—R.S.O. 1897 ch. 164, sec. 12.]—Application under sec. 12 of the Dower Act, R.S.O. 1897 ch. 164, to authorise the applicant to sell, free from the dower of his wife, certain lands described in the affidavits filed, and to declare that the wife had forfeited her right to dower. The facts, as shewn by the affidavits filed by the applicant, were that the applicant married his wife in 1856; that they lived together as husband and wife until 1871, there being then four children of the marriage; that in 1871 the wife left home with one R., taking with her the four children; and she continued to live with R. as his wife from that time; that she and the four children adopted the name of R.; that two children at least were born to her while living with R.; that, soon after she left her husband, he followed her to Montreal for the purpose of having her return, but she evaded him, and thereafter lived with R., at first in the Province of Quebec, then in Toronto, and later in British Columbia. In 1907 she called on the applicant and requested him to sign a writing declaring that he had not been properly married to her, the object being to establish that her son by R. was a legitimate son of R. and herself, so that he might inherit certain property of R., who was then dead. The applicant in his affidavit stated that she at that time admitted to him that she lived with R. as his wife down to the time of his death, and that she had a number of children by R. With the exception of this occasion, and perhaps at one other time prior thereto, the applicant had not since 1871 seen his wife, and he did not know whether she was living or dead. KELLY, J., said that on the facts as submitted, and for the reasons given in Re S., 14 O.L.R. 536, and the cases therein considered, it was quite clear that the wife of the applicant was not entitled to dower. The applicant was entitled to an order dispensing with the concurrence of the wife for the purpose of barring her dower. W. J. McLarty, for the applicant.