The
# Ontario Weekly Notes

Vol. III. TORONTO, DECEMBER 6, 1911. No. 12.

## COURT OF APPEAL.

NOVEMBER 30TH, 1911.

### STAVERT v. McMILLAN.

*Practice—Court of Appeal—Five Actions Tried together—Appeals Consolidated and Heard as One—Separate Certificates of Judgment—Con. Rules* 635 (2), 818—*Third Party—"Party Affected by the Appeal"—Con. Rules* 799 (2), 811 *—Costs—Transmission of Interest between Hearing of Appeal and Judgment thereon—Date of Judgment.*

Motion by the respondents, the defendants, or some of them, to vary the certificates of the judgment of the Court in the above and four other actions, as settled by the Registrar. See ante 6.

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

F. Arnoldi, K.C., and F. McCarthy, for the defendants.

W. J. Boland, for the third party.

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

The judgment of the Court was delivered by MOSS, C.J.O.:— The first contention is, that only one certificate should have been drawn up in the five actions, instead of a separate certificate in each. It is said that the appeals were consolidated and ordered to proceed as one appeal. An order so expressed was made on the 18th June, 1910. At that time there were separate judgments in each of the five actions, entered in the Central Office of the High Court, dismissing the actions. There were appeals entered against each of these judgments. But, inasmuch as substantially they had all been tried together, and the evidence was all taken in the one proceeding, and it was expedient,

in order to save expense in printing five cases, to have but one printed case and one argument, the appeals were ordered to proceed as one appeal.

The manifest intent and meaning of the order is, that the appeals are to be heard together upon one case to be printed and used for the purposes of the argument of the appeals. In this way they were to be proceeded with as one appeal. But there is no consolidation of the actions or any proceeding whereby they were to be thereafter continued otherwise than as separate actions. Judgment in each case having been entered under Con. Rule 635 (2), the judgment of this Court is to be certified by the Registrar and entered in the proper judgment book, as Con. Rule 818 directs. The case is then no longer in the Court of Appeal, and all subsequent proceedings are to be taken in the High Court: Hargrave v. Royal Templars, 2 O.L.R. 126.

There being at present of record in the High Court a judgment in each of the five cases, which has been reversed by this Court, the directions contained in Rule 818 are best given effect to by the issue of a certificate of the judgment of this Court in each case, thus leaving each record as it would have been if the judgment at the trial had been what it now is. This is what would have been done if there had been five cases not argued together; and what was done in these cases did not make them any the less separate actions as regards all subsequent proceedings.

The second objection is, that the respondents are directed to pay the Sovereign Bank's costs of the appeal. The bank was brought in at the instance of the other respondents, as a third party who was liable to indemnify them against the plaintiff's claim. At the trial the plaintiff's claim against the other respondents having been dismissed, the claim against the third party was also dismissed without costs.

The plaintiff, upon appealing to this Court, made the third party a respondent, and he appears to have treated it as occupying that position throughout, but he did not and could not ask any relief against it. Nor did the other respondents take any steps to notify the third party of intention to ask for any relief against it upon the hearing of the appeal.

A third party against whom relief is asked by the defendants up to and inclusive of the trial is "a party affected by the appeal," within the meaning of Con. Rules 799 (2) and 811; and the plaintiff properly served the third party with the notices provided for by these Rules. But there his duty ended; and it was for the other respondents to take any further steps towards

keeping the third party before the Court for the purposes of the appeal, if they so desired: Eckensweiller v. Coyle, 18 P.R. 423. They did not do so, and the third party was apparently kept before the Court by the action of the plaintiff. He, and not the other respondents, should, therefore, bear whatever costs may be properly taxable to the third party other than those properly incurred by reason of the service of the notices under Con. Rules 799(2) and 811. Probably the best disposition of this question is to direct that there be no costs to or against the third party.

The third objection is, that there has been a transmission of interest by the plaintiff to some other person, and that the actions have abated or become defective. This is not established in evidence; but it is said on behalf of the applicants here that it occurred while the appeals were standing for judgment.

The proper practice in such a case is pointed out in the recent case of Young v. Town of Gravenhurst, 3 O.W.N. 10.

The certificate should be varied as to the third parties' costs as indicated. And there should be no costs of this application.

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NOVEMBER 30TH, 1911.

## *JONES v. TORONTO AND YORK RADIAL R.W. CO.

*Street Railways—Injury to Person Crossing Track—Negligence—Contributory Negligence—Ultimate Negligence—Findings of Jury.*

Appeal by the defendants from the order of a Divisional Court, 23 O.L.R. 331, 2 O.W.N. 979, reversing the judgment of RIDDELL, J., at the trial, 23 O.L.R. 331, 2 O.W.N. 684, and directing judgment to be entered for the plaintiff upon the findings of a jury.

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

C. A. Moss, for the defendants.

J. MacGregor, for the plaintiff.

GARROW, J.A.:—The case is in this Court for the second time. When here last, the occasion was an appeal from the order

*To be reported in the Ontario Law Reports.

of a Divisional Court directing a new trial, which order this Court affirmed: see 21 O.L.R. 421. The case has since been tried a second time. . . .

[The learned Judge then set out the findings of the jury at the second trial, and referred to the reasons for the judgments of RIDDELL, J., and of the Divisional Court, now in appeal.]

The real difficulty in the case is, in my opinion, due not to any doubt about the law, which is fairly well settled as to both classes of negligence, but about the facts.

The plaintiff, by his pleadings, alleged two and only two acts of negligence, namely, excessive speed and failure to warn, both of which were negatived by the findings of the jury, and quite properly so, on the evidence.

There was no specific allegation of any act of negligence occurring after the plaintiff had shewn that he intended to cross the track; but the learned trial Judge, without objection, submitted that question also to the jury, in these words: "Was there anything which the railway could have done, notwithstanding the carelessness on the part of the plaintiff, if he was careless, to have prevented the accident?" Having previously pointed out that it was the duty of the motorman to keep a look-out, in these words: "It is the duty of the motorman to keep a look-out, a reasonable look-out . . . A motorman seeing a person approaching a track has a right to believe that the man will use ordinary prudence, and if there is nothing to indicate that the man is going to cross the track in the face of his car, then you will ask yourselves whether the motorman is called upon, in the exercise of reasonable care, to suppose that that man is going to be fool enough to walk in front of his car. And is there any evidence here that this motorman ought to have seen that this man was going to walk in front of his car?" And it is evidently to this phase of the case—in other words, to the secondary rather than to the primary negligence, which they negatived—that the jury intended their second and sixth answers to apply. I, therefore, agree with the view of the learned Chancellor in the Divisional Court, that, if the plaintiff is entitled to recover at all, it can only be in respect of negligent acts occurring after the plaintiff's own negligence became apparent.

These answers (2nd and 6th) contain three elements: (1) the motorman should have seen the plaintiff sooner; (2) he should have stopped the car sooner; and (3) he should have rung the gong continuously.

The question of the gong may be at once dismissed. The evidence is overwhelmingly against the idea that any amount of ringing would have prevented the accident; and, if it would not have done that, its omission cannot be said to have in any way caused or contributed to the accident. The unfortunate plaintiff is shewn to be very deaf. There is no dispute about the fact that the gong was rung and rung violently immediately before he stepped on the track, and when he was only a few feet distant, and that he did not hear it. Nor did he hear the shouts of warning addressed to him at about the same time —circumstances which clearly shew the inconclusiveness, and I had almost said the absurdity, of this particular finding.

The real point in the case arises, in my opinion, wholly upon the other two, which, notwithstanding their lack of definiteness, I assume to be sufficiently in the plaintiff's favour to support the judgment which he now has. And the question to be determined is, was there reasonable evidence proper for the jury to justify such findings?

The burden of proof was, of course, upon the plaintiff. He was bound to incline the balance in his favour by something more than a mere scintilla of evidence. There must be reasonable evidence; such evidence as would justify reasonable men in coming to the conclusion that it was within the power of the motorman, after he saw, or should have seen, that the plaintiff probably intended to cross the track in front of the car, to have stayed his advance and thus prevented the accident. And such evidence, after a careful and indeed anxious consideration of the evidence, I am quite unable to find.

About the plaintiff's own negligence there can, under the circumstances, be no doubt whatever, notwithstanding the exceedingly mild yet sufficient terms in which it is expressed in the 4th answer. He was so deaf that he could not trust his ears for defence; and he seems, upon the evidence, to have utterly failed to use his eyes, but kept them, as the witnesses say, turned upon the ground, or, as he says, looking only in the wrong direction, namely, toward the south, when he should have kept a look-out both ways. From where he commenced to cross the street to the track is said to be about 40 to 45 feet on the oblique course which he took. He was going, I will assume, at his usual pace, which may be put at three miles an hour, although one of the witnesses, John Cudmore, says he was apparently running. And at that pace he would traverse the 45 feet in about ten seconds. The motorman says he saw him for the first time when from 4 to 8 feet from the track. It is not suggested that he did not at once do what he could to stop the car then. He at once sounded

the gong violently, shouted to the plaintiff, and applied the reverse. The car was equipped only with hand-brakes and not with air, but no point is made apparently of faulty equipment. What is said is, that the motorman should have seen him sooner, but the point at which he should have seen him is not determined, as it was in the somewhat similar case which came to this Court and afterwards went to the Supreme Court, of O'Leary v. Ottawa Electric R.W. Co., partly reported in 2 O.W.R. 469. How much sooner in the plaintiff's progress toward the track should the motorman have seen him? Clearly only at the point at which it became reasonably apparent that the plaintiff intended to proceed in his course across the track. It was broad daylight. The plaintiff, to outward seeming, was a sober, capable man, in possession of his senses. The car was easily within his line of vision; and, if he had had ordinary hearing, he could have heard as well as seen it. It is no unusual thing, as every one knows, for one desiring to cross, to approach quite near the track and there await the passing of a car. What was there to shew that the plaintiff intended to pursue a different course, under such obvious circumstances? Nothing, apparently, except the circumstance that in advancing he was apparently not looking towards the car but towards the ground, or the west, or the south, as different witnesses say. But it did not follow that he had not looked earlier and was quite aware of the approaching car; indeed, his failure to look north when near the track pointed quite as much to that as to anything else. So that it is exceedingly difficult to see how the motorman can be blamed in proceeding as he did until he actually saw the plaintiff a few feet away, and still advancing, when he gave an alarm by gong and voice which would have stayed any one but one so deaf as the plaintiff was, and otherwise did all he could to prevent the collision.

The fact is, that the evidence puts the plaintiff very much in the position of the man referred to by Lord Cairns in Dublin Wicklow and Wexford R.W. Co. v. Slattery, 3 App. Cas. 1155, at p. 1166, as one who should fairly be regarded as the sole author of his unfortunate injury, by running into the car rather than having it run into him.

I would allow the appeal and dismiss the action, both with costs.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

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

## HIGH COURT OF JUSTICE.

RIDDELL, J. NOVEMBER 24TH, 1911.

### *RE RALLY.

*Will—Construction—Legacy of Specific Sum of Money in Hands of Third Person—Debt Owing to Testatrix—Payment of Debt before Death of Testatrix—Lapse of Legacy—Petition for Advice of Court—R.S.O.* 1897 *ch.* 129, *sec.* 39(1)*—Scope of —Petition Changed into Motion under Con. Rule* 938(*a*)*— Practice.*

Petition by the executor of the will of Isabella Rally, deceased, for the advice of the Court as to whether a certain legacy given by the will had lapsed.

D. L. McCarthy, K.C., for the executor and next of kin.
Shirley Denison, K.C., for Charles Rally, the legatee.

RIDDELL, J.:—The late Isabella Rally, about the 1st September, 1899, made a will, giving to each of three nieces named "an equal share of all my ready money securities for money and household furniture." Thereafter, and about the 18th June, 1900, she made another will, containing the following: "I give and bequeath to Charles Rally the son of my step-son William A. Rally . . . the sum of five hundred dollars being the amount of money now in the hands of the said William A. Rally belonging to me and not secured by mortgage it being my intention to devise that specific money to be paid by the said William A. Rally to the said Charles Rally."

At the time this will was made, William A. Rally owed Isabella Rally the sum of $500 for money advanced by her to him, and this was not secured by mortgage. Afterwards she demanded payment of all the money William A. Rally owed her, and the same was repaid her, so that at the time of her death William A. Rally owed her nothing.

Before the repayment of these sums, she had to her credit in the bank $240.37; these sums, being also deposited, raised the deposit to $1,442.12. She then invested from this money $800 upon a mortgage, which was outstanding at the time of her death. Her bank account was kept up, and at no time shewed a credit of less than $600, and at the time of her death it stood at $1.097.83.

She died on the 15th February, 1911.

Charles Rally demands the payment to him of the sum of $500; and the executor files his petition and requests "to be advised if, in the opinion of this Court, the said legacy has lapsed

*To be reported in the Ontario Law Reports.

or whether the same is still payable to the said Charles Rally'' —counsel certifying that the case ''is a proper one for the advice of a Judge of the High Court of Justice under the Trustee Act.''

The Act referred to is, no doubt, R.S.O. 1897 ch. 129; and the application is made under sec. 29(1) . . . originally passed in 1865 as 29 Vict. ch. 28, sec. 31(C.). . . . Very early it was decided that this statute was not intended to give the Court power, nor did it give the Court power, to determine the rights of parties or any party under the will—it was only ''the opinion, advice, or direction of a Judge . . . on any question respecting the management or administration of the . . . property'' that could be obtained. . . .

[Reference to Re Hooper, 29 Beav. 656; In re Williams, 1 Ch. Ch. R. 372.]

It was necessary to file a bill in such circumstances as exist in this case; but the Judicature Act . . . has provided a cheap and speedy method, without the issue of a writ—by originating notice. Con. Rule 938(*a*) is the Rule to apply—and that provides for notice of motion.

I, with the consent of all parties, as all parties were represented before me, turned the petition for advice into a notice of motion under Con. Rule 938(*a*), and I have heard the parties. .

I am of opinion that the legacy has lapsed.

The testatrix intended to bequeath and did bequeath the chose in action, intended to give Charles Rally the right to receive a sum of $500 from William A. Rally, for there is no pretence that a certain sum of money in coin or otherwise was set apart and was held in custody and possession by William A. Rally as bailee for her. What she means by ''specific money'' is not a ''specific'' heap of coins, but the sum of $500 which she had already specified as not being secured by mortgage.

Then she herself changed the chose in action into a chose in possession, thereby destroying the chose in action. She had ''intended the thing itself to pass unconditionally, and in *statu quo*, to the legatee:'' per Lord Selborne, C., in Robertson v. Broadbent, 8 App. Cas. 812, at p. 815; and she destroyed that ''thing.'' And it does not help that the ''thing'' is changed into something else—that ''something else'' will not pass. . . .

[Reference to Frewen v. Frewen, L.R. 10 Ch. 610.]

I cannot see that the destruction of the right to receive money, by receiving the money in hand, is any less a conversion into something else, so as to adeem the legacy, than the destruction of a ''something else'' in possession of the owner and changing that into the right to receive money.

I am of opinion that the claim of C. Rally cannot prevail.

There will be no costs: none to the claimant—he was wholly wrong in his claim; and none to the executor—he was wrong in his practice, and he escaped paying the costs of a dismissed petition simply through the complaisance of the claimant.

The following authorities may be looked at: Innes v. Johnson, 14 Ves. 568; Sidebotham v. Watson, 11 Hare 170; Ellis v. Walker, Amb. 309; Nelson v. Carter, 5 Sim. 530; Day v. Harris, 1 O.R. 147; Smallman v. Goolden, 1 Cox Eq. 329; Jarman on Wills, 6th ed., pp. 1063, 1067, 1971, note (*m*); Bevan v. Attorney-General, 4 Giff. 361, 369; Robertson v. Broadbent, 8 App. Cas. 812, 815; Higgins v. Dawson, [1902] A.C. 1, and cases cited.

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MULOCK, C.J.Ex.D. NOVEMBER 24TH, 1911.

## *HELLER v. GRAND TRUNK R.W. CO.

*Railway—Injury to Passenger—Special Contract—Shipper of Animal—Privilege of Travelling for Half Fare—Condition—Freedom of Railway Company from Liability for Injury—Approval of Board of Railway Commissioners—Railway Act, sec. 340—"Impairing"—Right to Contract for Total Exemption—Knowledge of Passenger of Terms of Contract—Immateriality—Findings of Jury.*

Action for damages for injury sustained by the plaintiff while travelling upon the defendants' railway, under the terms of a special contract, as the shipper of a horse. The contract provided that in case of the defendants granting to a shipper a pass or a privilege at less than full fare, the defendants were to be "entirely free from liability in respect of his death, injury, or damage," whether "caused by the negligence of the company, or its servants, or employees, or otherwise howsoever." The contract was signed by an agent of the company; and at the foot these words were printed: "The shipper declares that he fully understands the meaning of this special contract." This was signed by the plaintiff as the shipper. Thereupon he was given a ticket for himself, at half fare, and permitted to proceed in charge of his horse by the same train. The plaintiff was thrown from his seat by a sudden check in the speed of the train, and injured.

*To be reported in the Ontario Law Reports.

The action was tried with a jury, who found: (1) that the defendants were guilty of negligence which caused the accident; (2) that the negligence consisted in "fault of engineer applying brake too quick;" (3) that the plaintiff had no opportunity of knowing that the special contract in question contained a term relieving the defendants from liability in respect of injury to him when riding on the train in which his horse was being carried; (4) that he did not, when riding on the train, know of the contract containing such term; and (5) they assessed the plaintiff's damages at $500.

W. S. Brewster, K.C., for the plaintiff.
I. F. Hellmuth, K.C., and W. E. Foster, for the defendants.

MULOCK, C.J. (after setting out the facts):—The evidence shews that the plaintiff signed the shipping bill in question at the request of the defendants' agent. The plaintiff said that he was urged by the agent to hurry up and sign it and get into the caboose, and that he did so without reading it or knowing its contents.

The plaintiff is not an inexperienced shipper by the defendants' railway, and his signature was not obtained by fraud. It is, therefore, immaterial that he may not have read the contract or even may not have known its contents: Parker v. South Eastern R.W. Co., 2 C.P.D. 416; Taylor v. Grand Trunk R.W. Co., 4 O.L.R. 362.

The defendants rely on the special contract, which was approved of by the Board of Railway Commissioners for Canada, as relieving them from liability; and the question is, whether it is competent for the company thus to contract themselves out of liability. . . .

[Reference to secs. 284 and 340 of the Railway Act, R.S.C. 1906 ch. 37.]

The effect of sec. 340 has been considered in various cases, which are collected . . . in Sutherland v. Grand Trunk R.W. Co., 18 O.L.R. 139; and it may be accepted as settled law that a railway company may by special contract *limit* their liability for negligence, where the Board of Commissioners has approved of the general form of the contract; but in none of those cases was it necessary to determine whether, even with the sanction of the Board, the company could *contract themselves out of liability*. Goldstein v. Canadian Pacific R.W. Co., 23 O.L.R. 536, was cited as supporting that view; but in that case the defendants admitted liability, and the Court was not called upon to determine the point involved in the present action.

The prohibition against railway companies contracting themselves out of liability for damages because of their negligence, substantially borrowed from Imperial legislation, first appears in Dominion legislation in the Railway Act of 1868 (31 Vict. ch. 68, sec. 20), and was in force (3 Edw. VII. ch. 58, sec. 214) when power was conferred on the Board of Railway Commissioners (3 Edw. VII. ch. 58, sec. 275, now sec. 340 of the Railway Act) to sanction contracts affecting a railway company's liability for negligence.

Reading the whole of sec. 340, it seems to me that the intention of Parliament was to change the law by enabling a company to do what they could not do before, viz., contract themselves either wholly or partly out of liability. The words "restricting or limiting" meet the case of a partial exemption from liability; and the word "impairing" was, I think, intended to cover the case of total exemption from liability. . . . Unless . . . it is given the meaning of "exempting from" liability, it is meaningless. My opinion is, that it was used in that sense; and, therefore, under sec. 340, the defendants, having the approval of the Board of Railway Commissioners to their form of contract, were entitled to make the special contract in question, whereby they are relieved from liability to the plaintiff.

The action, therefore, fails, and should be dismissed with costs.

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CLUTE, J. NOVEMBER 25TH, 1911.

## STOCKS v. BOULTER.

*Fraud and Misrepresentation—Sale and Purchase of Farm—Completed Transaction—Reliance on Representations Made by Vendor—Inspection of Farm—Purchase Induced by Representations—Rescission—Damages.*

Action for the rescission of an agreement of the 9th November, 1910, for the purchase by the plaintiff and the sale by the defendant Wellington Boulter of a farm in the township of Sophiasburgh and certain chattels, and for rescission of the conveyance made by the defendant Wellington Boulter to the plaintiff and a mortgage made by the plaintiff to the defendant Nancy Helen Boulter, wife of the defendant Wellington Boulter, upon the ground of misrepresentations alleged to have been made by the defendant Wellington Boulter, upon which the plaintiff relied and which induced him to purchase.

The defendant Wellington Boulter advertised the farm for sale, and the plaintiff came from British Columbia, saw the farm, and entered into the agreement to purchase, for $22,000.

R. McKay, K.C., for the plaintiff.
C. A. Moss, for the defendant.

CLUTE, J. (after setting out the facts and making certain findings) :—It is true that the plaintiff had the opportunity to inspect the farm, and to a certain extent did inspect the farm, assisted by McLaren; but I entertain no doubt, and find as a fact, that, so far as he is concerned, he commenced, continued, and concluded the negotiations in the belief of the truth of the representations contained in the advertisement and letter of the 6th October, 1910; that he had no suspicion that his acreage was being curtailed; that he accepted the statements of the number of apple trees, the condition of the farm, and the quantity of fall wheat, without question, having full confidence in the defendant.

I find that there was no such new bargain as the defendant now alleges, whereby the plaintiff knowingly consented to the exception in the agreement as impairing the quantity of land he was to get.

The defendant says he decided to make the exception five or six days before the plaintiff arrived. He admitted that the plaintiff came with the expectation of getting the full acreage. The defendant is uncertain as to when and where this new bargain was made. My view is, that he has forgotten much that was said at the time when the plaintiff went to see the farm on the 7th or 8th November; that, having shewn the plaintiff the limits of the land he conveyed, he has possibly persuaded himself or been persuaded into the belief that the plaintiff was willing to give up some 46 acres, out of a total of 300 acres, without a word of protest and without any diminution in the price.

The plaintiff never supposed or had reason to suppose that the land south of the road formed any part of the farm. It is impossible to say that he would have accepted the farm at the price, even if this exception had been pointed out as included in the 300 acres, as it is of poor quality and worth but $10 an acre. It was not inspected by either the plaintiff or McLaren, as it doubtless would have been if they had not thought that the complement of land was complete without it.

It was the duty of the defendant, I think, having regard to all that had taken place before the plaintiff's arrival, to make it perfectly clear to him that a new deal was proposed, and

what it was. This, I find, was not done. He was allowed to proceed on the assumption that the old deal was still on. The price had not been questioned; it was already settled. I find it impossible for me to accept the story now put forward of a new deal. I think the plaintiff knew or ought to have known that the statements made in the advertisement and letter of the 6th October, and his statement that the farm was clear and free of noxious weeds, were not true in many particulars. There was less than half of the complement of trees; there were not 200 acres seeded down; there was not 30 acres (but 20 acres) of fall wheat; there was 254 acres, instead of 300 acres; the farm was not in the highest state of cultivation, but was foul with herrick and yellow clover and other noxious weeds. The canning factory was not in "A1" order. Some of these are minor matters, as the quantity of land in fall wheat and seeded down and the condition of the factory, etc., and would not probably of themselves be sufficient to justify a cancellation of the agreement.

The three matters which, to my mind, were wholly misleading and of a nature to justify rescission, are the quantity of land, the number of apple trees, and the condition of the farm. At the time of the plaintiff's visit there was no evidence of weeds. They had been cut and burned or drawn into the barns with the hay. It appeared from the evidence that there were many tons of this stuff cut and treated as hay, which the plaintiff bought and paid for.

I reluctantly reach the conclusion that the plaintiff was overreached in the deal. The defendant had resided upon these premises all his life. He planted the orchard. He was living upon the farm when the advertisement was put out and the letter written. The letter of the 6th October was written in answer to a request for particulars, to be used in an endeavour to effect a sale. He must or should have known that the representations were untrue.

The law applicable to the present case may be found in the cases referred to in McCabe v. Bell, 15 O.W.R. 547, 1 O.W.N. 523. As pointed out in Redgrave v. Hurd, 20 Ch.D. 1, it is no defence to an action to rescind a contract induced by false representation, that the person to whom the representation was made had the means of discovering and might with reasonable diligence have discovered that it was untrue, or that he made a cursory and incomplete inquiry into the facts. If a material representation is made to him, he must be taken to have entered into the contract on the faith of it; and, in order to take away his right to have the contract rescinded, if it is untrue, it must

be made to appear either that he had knowledge of the facts which shewed it to be untrue, or that he did not rely on the representation. I think it clear from the evidence, giving it such weight as its credibility deserves, that the plaintiff's mind was not, prior to the contract, disabused of the untrue representations which were made, and that he relied upon them throughout the whole transaction.

The plaintiff, noticing a few spears of mustard near the buildings, was lulled into security by the assurances which he received.

With reference to the orchard, it is said that the plaintiff might have known that the number of trees represented were not there, or he might have counted them. Much more justly it may be said that the defendant ought to have known that they were there before he made the representation upon which the plaintiff was willing to rely and did rely. The representations made in the advertisement and letter of the 6th October were confirmed by what was said to the plaintiff on his visit to the farm. There can be no sort of doubt that the defendant intended the purchaser, whoever he might be, to act upon the representations made; and there is as little doubt in my mind that these representations were most material and produced on the plaintiff's mind an erroneous belief which influenced his conduct and induced him to purchase the farm.

Judging of the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the defendant in making them, and the intention which the law imputes to every man to produce those consequences which are the natural results of his acts, I think there was fraudulent misrepresentation within the principle laid down in Smith v. Chadwick, 9 App. Cas. 187, at p. 190, and Brownlee v. Campbell, 5 App. Cas. at p. 950, and that a case for rescission is made out. See also Arnison v. Smith, 41 Ch.D. 367; Atwood v. Small, 6 Cl. & F. 232, 330, 395. The same principle was acted upon after the conveyance was executed: Atwood v. Small, at p. 396, and cases cited; In re Reese River Silver Mining Co., L.R. 2 Ch. 604; Wentworth v. Lloyd, 10 H.L.C. 589; Torrance v. Bolton, L.R. 8 Ch. 118. As to completed contract, see Jones v. Clifford, 3 Ch.D. 779.

It is clear that the sale of the chattels was the result of the sale of the farm, and would not otherwise have been entered into. Both were included in the one agreement and should fall together.

The agreement of the 9th November and the deed and mortgage registered in pursuance thereof are set aside and cancelled. The plaintiff is entitled to a return of the purchase-money, both for the farm and chattels, with interest. In case the plaintiff cannot return all the chattels, by reason of sale or otherwise, the value of those not replaced, or a difference in value of those taking the place of chattels sold, to be allowed the defendant.

The plaintiff is to allow a reasonable sum for use and occupation of the canning factory. In case the parties differ about the same, it is referred to the Master at Picton to take an account: (1) of the value of those chattels not replaced and the difference in value of those chattels taking the place of chattels sold or otherwise disposed of by the plaintiff; (2) the claim for damages of the plaintiff in the pleadings mentioned by reason of the misrepresentations complained of, from which is to be set off a reasonable allowance for use and occupation by the plaintiff of the farm and chattels and of the cheese factory.

For the information of another Court, if the case should be carried further, and rescission of the contract is considered not to be the appropriate remedy, I assess the damages as follow:—

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| For shortage of acreage, 46 acres at $55 per acre | $2,530.00 |
| For shortage in the number of trees. The defendant's witnesses stated that a bearing orchard like the plaintiff's was worth from $200 to $300 per acre. In 20 acres, if the trees were set 30 ft. apart, there would be 960 trees. Taking the lesser estimate, and making due allowance for the land without the trees, I assess the damages under this branch of the case at | 3,100.00 |
| For difference in value of land on account of its foul condition, and shortage of wheat crop, etc. | 2,000.00 |
| Or a total of | $7,630.00 |

The plaintiff is entitled to the costs of the action. Further directions and costs subsequent to judgment reserved.

DIVISIONAL COURT. NOVEMBER 25TH, 1911.

## *RE MACK AND BOARD OF AUDIT OF THE UNITED COUNTIES OF STORMONT DUNDAS AND GLENGARRY.

*Sheriff—Criminal Justice Returns—Fees—Reports—Liability of County Corporation—Reimbursement out of Consolidated Revenue Fund of Province—10 Edw. VII. ch. 41, sec. 3 (O.)—Lunatics—Duplicate Report—Board of Audit—Mandamus.*

Appeal by the Board of Audit from the order of BRITTON, J., 2 O.W.N. 1413.

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

J. A. Macintosh, for the appellants.

R. A. Pringle, K.C., for the original applicant, the Sheriff.

RIDDELL, J.:— . . . I see no reason to differ from the judgment appealed from as to the practice—and agree, for the reasons Mr. Justice Britton has set out.

In re Stanton and Board of Audit of County of Elgin, 3 O.R. 86, is quite different; as is In re Hamilton v. Harris, 1 U.C.R. 513.

And, notwithstanding, or perhaps because of, the high and dignified position of the Sheriff or Vice-comes at the common law, he was by the common law entitled to fees, but must have served the King's writs, etc., without reward, and he must have been able to point to some definite statute to entitle him to any fees—and this is still his position; he can claim only such fees as are given him by statute.

The statute now in force is 10 Edw. VII. ch. 41. Section 3 is the important section. . . . "'Such' prosecution, matter, or proceeding," it is argued, must refer to the "prosecutions, matters, and proceedings" previously referred to, *i.e.*, in sec. 2; and these are "criminal prosecutions, matters, and proceedings in the High Court or Court of General Sessions of the Peace, or under any Commission or Special Commission, or relating to the King's Revenue." . . .

The five classes of fees in question are claimed under one or other or perhaps two of the items in schedule A, 12, 13, and 16. . . .

*To be reported in the Ontario Law Reports.

[Examination of the course of legislation.]

I am unable to find anything whatever to indicate that the Legislature intended to change or restrict the meaning of the words "criminal justice" so as now to exclude such reports as we are considering—and I think the interpretation must be as broad now as formerly.

There might be some difficulty in respect of the reports as to lunatics; but it seems clear that "lunatics" are to be considered "prisoners" for the purposes of this tariff. . . .

I agree also with the learned Judge . . . that any return which—to make it official—is transmitted through the Sheriff, is a return for which the Sheriff is entitled to be paid.

I think, however, that a report required to be made in duplicate is still but one report. . . .

The appeal will to this extent be allowed, but otherwise dismissed. The appellants will pay the costs of the appeal.

FALCONBRIDGE, C.J., and LATCHFORD, J., agreed in the result.

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RIDDELL, J. NOVEMBER 27TH, 1911.

*RE J. H.

*Will—Construction—Trust for Investment—Direction as to Nature of Investments—Powers of Trustees—"Securities"—Company Shares—Second Mortgages—Land—Building Used in Business.*

Motion by the executors of J. H., deceased, for an order declaring the construction of his will.

C. A. Moss, for the executors.
T. Moss, for a beneficiary.
W. B. Milliken, for another beneficiary.
F. W. Harcourt, K.C., for infants and unborn issue.

RIDDELL, J.:—The late J. H. died in 1900, having made his last will and testament a short time before. The will was duly admitted to probate.

In and by the will, he named certain persons as his "executors and trustees," and to them he devised all his estate, upon the following, among other, trusts:—

"To invest my said estate as hereinafter directed and collect the income derivable from all my said estate and pay said income" as is particularly directed by the will.

*To be reported in the Ontario Law Reports.

"I empower my personal representatives . . . to continue investments existing at the time of my death or to change them from time to time as they . . . may think advisable. . . .

"I empower my personal representatives . . . to invest the moneys of my estate, including those produced by sale or otherwise, in such reasonably safe income-producing securities as . . . they may approve, without thereby rendering themselves . . . liable for any loss."

The executors were directed, if they thought advisable so to do, to continue the testator's business until they should agree that it was advisable to sell it, and they were given full discretion as to the time to sell.

The widow was given, durante viduitate, the use of the house "and all the household furniture, books, and other contents of such residence at the time of my death, except any money or securities for money there may be therein."

Shortly before his death and before the date of his will, J. H. had removed to his house certain scrip, which theretofore had been in a safety deposit vault—and this was in the house at the date of the will and of the death. This consisted of stocks . . . and debentures . . . . He had nothing else in the way of "securities" in his house.

The executors are of the opinion that it would be for the advantage of the estate to invest in municipal debentures of a British Columbia city, bonds of a packing company in Toronto, debenture stock of the Canadian Northern Railway Company, preferred stock in the Nova Scotia Steel and Coal Company and in certain manufacturing companies, and common stock of the Canadian Pacific Railway Company and of the Pennsylvania Railway Company. They are also desirous of increasing the building and outbuildings used in the business in Winnipeg. . . . The executors also wish to invest moneys in second mortgages on land in Canada and the United States, and in the purchase of land, improved and vacant, in Canada and the United States. . . .

The Official Guardian objects, pointing out that interest at a fair rate can now be obtained on unexceptionable security in Canada.

The executors are not petitioning for advice, but asking for an interpretation of the will.

As to the powers of investment, it is clear that "securities" does not include shares in a joint stock company, if the word be used in its ordinary legal and primary meaning. A "secur-

ity'' is something which makes the payment of money more secure—such ''as binds lands or something to be answerable for it . . . :'' per Boyd, C., in Worts v. Worts, 18 O.R. 332, at p. 341.

And, in the absence of something in the will modifying the bequest, while ''security'' would pass stock in the funds (Bescoby v. Pack, 1 Sim & Stu. 500); a vendor's lien (Callow v. Callow, 58 L.J. Ch. 698); a paid-up life policy (Lawrance v. Galsworthy, 3 Jur. N.S. 1049, Bank of Montreal v. McTavish, 13 Gr. 395, Canadian Mutual Loan and Investment Co. v. Nisbet, 31 O.R. 562); bills of exchange, promissory notes, etc. (Barry v. Harding, 1 Jo. & Lat. 475); it would not pass shares in a company (Hudleston v. Gouldsbury, 10 Beav. 547.)

But there can be no doubt that the words ''security'' ''securities'' . . . are used colloquially and in business transactions in a much extended sense. . . .

[Reference to Murray's New English Dictionary, sub voc. ''Security.'']

While ''securities'' does not, strictly speaking, cover shares . . . (Bank of Commerce v. Hart, 20 L.R.A. 780), it does in its broadest sense (Thayer v. Wathem, 44 S.W. Repr. 906, 909.)

It is shewn that, at the date of the will, the testator had no money invested in what are properly speaking securities . . . (except, indeed, $3,000 of the debentures of the Board of Trade), and that he was not in the habit of investing his money in such securities.

On the whole, it seems to me that the testator called the various stocks, etc., be removed and had in his house, at the time of the will and the death, ''securities.'' He thus makes a dictionary for his will. And I think that the executors have the power to invest not only in what are really ''securities,'' but also in stocks, etc., similar to the stocks, etc., which the testator held at the date of will and death. In re Rayner, [1904] 1 Ch. 176, and Re Johnson, 89 L.T.R. 84, are in point. (It is, of course, plain that the power is intended to be given to invest in securities beyond those given by the Act—otherwise there would be no need for giving the executors indemnity.)

The answer will be, then, that the executors have the power to invest in the debentures and stock named in the list. A second mortgage is a security, no matter where the land may be; but land is not.

The building is no part of the business; the direction to carry on the business does not justify spending the money of the

estate upon a building which is no part of the business; nor is such a building a "security" such as the testator had at his house. In re Gent and Eason's Contract, [1905] 1 Ch. 386, does not, therefore, apply. The same remark applies to land, either Canadian or foreign.

I am not to be understood as advising the executors to make any such investment as is mentioned above; my advice is not asked for; and the executors must use their own judgment bona fide for the good of the estate.

Nor do I decide what could or would be done on an application in another form.

Order accordingly; costs out of the fund. . . .

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TEETZEL, J. NOVEMBER 27TH, 1911.

## McGARRITY v. THOMPSON.

*Will—Action to Set aside—Undue Influence—Want of Testamentary Capacity—Failure to Prove—Evidence—Reversal of Finding of Master—Costs of Unsuccessful Action.*

An appeal by the defendants from the report of the Local Master at Brockville, to whom the action was, by consent order, referred for trial.

The plaintiff was a niece of the late Alexander Wardner, who died on the 5th February, 1911; the defendant Mary E. A. Thompson was the sole beneficiary under the will of the deceased; and the other defendants were the executors of the will.

The action was to set aside the will and codicil, dated respectively the 27th August and the 9th September, 1910, and admitted to probate on the 4th March, 1911, on the ground that the same were procured by the defendant Thompson and her husband by undue influence and fraud, and on the ground that the deceased was not in a fit mental condition to make the same.

The learned Master found in favour of the plaintiff on both grounds, and he reported that the will and codicil and the probate thereof should be set aside; that the executors should account for the assets of the estate to the administrator when appointed; and that costs of all parties should be paid out of the estate.

The estate was of the value of about $6,000.

D. C. Ross, for the defendant Mary E. A. Thompson.
Grayson Smith, for the defendants the executors.
J. H. Rodd, for the plaintiff.

TEETZEL, J.:—At the time of his death the deceased was in his eightieth year, was a retired farmer, and had lived most of his life in the county of Grenville. His wife had died on the 21st August, 1910, and he had no children and no relatives, except the plaintiff and her brother, and, I understand, some other nephews and nieces.

The plaintiff as a child had lived near the home of the deceased and his wife, but in 1865 had left for the neighbourhood of Detroit, and had never since seen the deceased until 1908 and again in 1910, shortly after the death of the deceased's wife; and it does not appear by the evidence that she and they had corresponded, although for some years a brother of the deceased, who lived with him, did keep up a correspondence with the plaintiff's family; and there was some correspondence between the plaintiff and the wife of the deceased after 1908.

There is nothing in the evidence to shew that the deceased had taken the usual interest of an uncle in his nephews and nieces, none of whom lived near him; or that they ever gave him any assistance or were upon terms of intimacy with him, except to the extent of the plaintiff's two visits.

During the time the deceased lived on the farm, Donald Thompson, the defendant's husband, had worked for the deceased, about nine years before his marriage, and nearly three years after, when he lost his health, and moved to the village about ten years ago. About a year and half after that, the deceased and his wife moved into the same village (Burritt's Falls). Upon the death of his wife, the deceased went to live with Mr. and Mrs. Thompson, and continued living with them until his death. They were near neighbours; and Mrs. Thompson says that since her marriage and until Mrs. Wardner's death she did most of the pastry-cooking for them, and that since the old people moved into the village she did a large amount of their baking, also washing and housecleaning for them, and never charged or was paid for these services.

In explanation of this, she swore that, both before he left the farm and since he came to the village, the deceased had said, on different occasions, that he would give her husband whatever he had in the end, and that they "were all the ones ever did anything for him."

The plaintiff did not call any medical witness as to the mental capacity of the deceased, but depended upon the observations of

herself, when she visited him for about an hour in August, 1910, and the evidence of some neighbours, to prove both charges. She says that on that visit he spoke "very lightly" of his wife's memory—"he was quite changed." The plaintiff or her husband was present during the whole visit. She thought it very strange for them to sit in the room and not allow her to speak to her uncle in private; but she did not ask for a private interview; was suspicious that they were intentionally intruding themselves to prevent a private talk with her uncle.

As to the evidence of loss of memory, she said that he had forgotten the receipt of a letter a few days before from her brother, who was also present at this time, but who was not called as a witness; and, when Mrs. Thompson reminded him that her husband had read it to him, he said, "I can't mind it."

. . .

[Extracts from the evidence of the plaintiff's witnesses.]

I have given above the substance of the evidence offered by the plaintiff; and, beyond the fact that the deceased did not give anything to relatives, but gave all his property to Mrs. Thompson, and the suspicion in the mind of the plaintiff and of Mrs. Stewart that the deceased was being unduly influenced by the Thompsons, there is not, in my opinion, a scintilla of evidence to support the charge that the will was procured by fraud or undue influence by them or either of them.

I also think, upon the question of his mental capacity to make his will and the codicil, which simply changed the appointment of one of the executors and in other respects confirmed the will, which were made respectively six days and nineteen days after his wife's death, the evidence is exceedingly weak and falls far short of what is necessary to establish that at those dates or either of them the deceased was mentally incapable of making a will.

For the defence the principal witnesses were Dr. Merrick and Dr. Bedell, who met and conversed with the deceased the day the will was executed, Mr. Baker, a solicitor, who drew the will, and the defendant Mrs. Thompson.

Dr. Merrick, who had known the deceased fifty years, describes him as an honest and very strong-minded man. He was called to Mr. Baker's office to see him before the will was drawn, and had some conversation there with the deceased before the will was drawn, and in reply to the question, "Did you come to any conclusion as to his capacity to make a will?" said, "I thought he was perfectly capable of making a will."

Dr. Merrick further says that he saw the testator after the will was made and before his last illness, when he was the attending physician, and says, "I did not see much change in him until he got sick," and that he had had frequent little talks with him.

On cross-examination he was asked: "Q. And he was getting weaker physically and mentally? A. Yes, I suppose so, but his mind seemed to be pretty good and strong. I never saw anything about him—he may have been—old age and that, you know—perhaps not just as active, but otherwise his mind seemed all right."

Dr. Bedell, who also knew the deceased for many years, and who called at Mr. Baker's office professionally to examine the testator on the day the will was drawn, was asked:—

"Q. And did you make an examination of him as to his capacity? A. I did.

"Q. And what conclusion did you come to? A. I concluded he was a normal man of his age.

"Q. What as to his mental capacity? A. I thought it was good.

"Q. Did he appear to you to be capable of making a will and understanding the effect of it? A. Yes; he explained the will he had already been making and explained his reasons to me and talked about different matters. I drew him out in the way of finding out what condition he was in.

"Q. He discussed all that intelligently, did he? A. He did."

Mr. Baker, who practises as a solicitor at Merrickville, and who knew the deceased for many years, drew the will, and the following extracts are from his examination:— . . .

"I closeted the two medical men with Mr. Wardner, and went out myself. . . . The medical men came out, and I asked them —after twenty minutes or half an hour—as to Mr. Wardner's capacity. After they departed I took instructions from Mr. Wardner, no one being present. On these instructions the will was drawn and executed.

"Q. Had you any doubt in your own mind as to his capacity to make a will? A. No, I have done business with him, and I never noticed any difference in this man.

"Q. Had he given any reason to you for making the will as he did? A. Yes.

"Q. In what way? A. He told me he wanted those people to have it. He said that he had no relations that he cared to have anything of his. That they never came round him except they wanted to get something. He was so determined about it, that I ceased to ask him any questions further in the matter.

"Q. And the codicil, you drew that too? A. Yes.

"Q. From whom did you receive the instructions for that? A. . . . That would be probably a week or two after the will was executed. When I went down, he was on the sidewalk near Mr. Thompson's. I went in and asked him what he wanted. I did not have either Mr. or Mrs. Thompson in the room. I thought he wanted to see me about something. At any rate, he told me that he wanted to change his executor. . . . And he gave me his reasons. He explained to me that Mr. Taylor, one of the executors, who was one of his oldest friends, had approached him, trying to persuade him to accept a sum much less than the face value of a mortgage he held against him, and that he had earned his money too hard to do anything like that. He thought that he had better get another executor, and named Dr. Merrick. I took the instructions for the codicil. It was executed in Burritt's Rapids."

In her evidence, Mrs. Thompson relates the services she and her husband had performed for the deceased, and that upon his wife's death he came to live at their house and remained there until his death.

Two other witnesses, Hutchins and White, relate conversations with the deceased after the will was made, shewing that he acted and talked in a rational manner.

Hutchins was asked:—

"Did he tell you where he had made his will? A. Yes.

"Q. Did he say where? A. Yes, he said he got Mr. Thompson to drive him to Merrickville to Mr. Baker's office, and he made his will there."

Thompson was not called by either party, and as to this the learned Master in his judgment says: "I was and am impressed with the fact that the husband of the defendant Mary E. A. Thompson, whose name was mentioned so often by witnesses and who took the testator from Burritt's Rapids to Merrickville, to Mr. Baker's office, where the will was drawn, was not called as a witness."

While it would have been more satisfactory to have had his evidence, there was in fact nothing developed from the beginning of the case which I think called for a denial or explanation by him; for, beyond the fact that he went with the testator the day the will was drawn, and the fact that the will was made in his wife's favour, there is not a tittle of evidence that either he or his wife exercised or attempted to exercise any undue influence upon the testator. I do not think, therefore, that omitting to call him as a witness should weigh against the very

strong affirmative evidence offered by the defence, that not only was the testator of sufficient mind and memory to make the will, but that he thoroughly understood it and that it was his own free and voluntary act.

In his judgment, the learned Master makes no reference to or comment upon the very clear and, to my mind, very satisfactory evidence of Mr. Baker; and also, I think without reason, rejected the medical testimony, which, to my mind, established beyond reasonable doubt the testamentary capacity of the testator when both the will and codicil were executed.

The appeal must be allowed, and the judgment of the learned Master reversed, and the action dismissed; and as to the costs I shall follow the course of the learned Chancellor in a recent similar case, McAllister v. McMillan, ante 192, and award the costs of the appeal and of the action to be paid by the plaintiff. . . .

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DIVISIONAL COURT. NOVEMBER 27TH, 1911.

## *McMANUS v. ROTHSCHILD.

*Mechanics' Liens—Liability of Owner to Material-man—Building Contract—Contractor Failing to Complete Work in Due Time—Provisions of Contract—Allowance for Delay—Penalty or Liquidated Damages—Extinguishment of Balance Due to Contractor—Claim of Lien—Disallowance of.*

Appeal by the plaintiff from the judgment of the Local Judge at North Bay, in an action to enforce three mechanics' liens.

The defendant Rothschild, a merchant, was the owner of certain land in Cohrane. The defendant Eloy contracted to build upon this land a store in which to carry on the defendant Rothschild's business. The plaintiff supplied materials for the building. The Local Judge held that the plaintiff was entitled as against the defendant Rothschild to the amount of the third lien, but was not entitled to enforce the other two.

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

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

T. P. Galt, K.C., for the defendant Rothschild.

*To be reported in the Ontario Law Reports.

RIDDELL, J.:—The building contract is dated the 29th August, 1910, and provides for the payment of $6,700, in instalments, to the contractor, after the rate of 80 per cent. of value of work and material, every fourteen days as the work proceeds. Then (clause 5): "Time shall be the essence of the contract, and the whole of the premises shall be erected and completed internally so as to be in a fit and proper condition for commercial occupation and use within six weeks of the date of this document, under a penalty of $20 per day for every day the said building-owner shall be denied the full and proper use of the said premises." Clause 6: "Notwithstanding any proviso by law or custom which may be pleaded, the contractor hereby specially agrees with the building-owner to pay to him the said sum of $20 per day . . . for every day the building-owner shall be denied full possession of the premises, either directly from party to party, or as an allowance from any sum that may be due or that may become due to the said contractor."

The evidence shews that the building was not completed within the time agreed, and indeed was never completed by Eloy—he threw up the contract.

The contract-price had not been paid in full for the work done by Eloy. . . .

| | | |
|---|---|---|
| The contract price . . . was | | $6,700.00 |
| It will cost to complete | | 783.50 |
| Leaving the value of work done | | $5,916.50 |
| Of this the owner has paid Eloy | | 4,058.97 |
| Leaving apparently due | | $1,857.53 |
| But the owner has also paid to wage-earners under sec. 15 | $ 246.53 | |
| To the plaintiff | 1,000.00 | |
| | | 1,246.53 |
| Real balance still in hand | | $ 611.00 |

The learned Judge then says that long after the time at which the building should have been finished, the contractor abandoned his contract; and, allowing the owner $20 per day for this delay, even before (as I understand it) the abandonment of the contract, this sum of $611 is more than eaten up.

Following Farrell v. Gallagher, 23 O.L.R. 130, he holds that there is no sum "justly owing" or "payable" by the owner to the contractor, and dismisses the claim in respect of the two liens in question. . . .

The building contract is express that the "penalty" may be "an allowance from any sum that may be due or that may become due to the contractor." If, then, the "penalty" can be exacted at all, it may be, at the option of the owner, deducted from any sum that would otherwise be due, to arrive at the sum actually due.

As we are not bound by . . . Farrell v. Gallagher, I have examined the legislation and the decisions, and find no reason for disputing the corrections of the conclusions in that case.

The only other matter is . . . whether the "penalty" can be exacted by the owner at all. . . .

"Whether a sum is a penalty or liquidated damages in any given case is a question of construction for the Judge alone:" Laws of England, vol. 10, p. 329, sec. 605. . . .

[Quoting the section and giving the authorities cited.]

In the present case it is clear that, while the parties call the money a "penalty," sec. 6 shews that it was, so far as the necessary payment of it was concerned, intended to be, not a penalty, but a liquidated sum. That, however, is not at all conclusive . . . . The evidence, however, plainly shews that the non-completion of the building was a serious loss to the owner, at least $3,000, and is equally clear that there would be much difficulty, and indeed impossibility, in determining the exact amount of damage. . . .

I think, on the whole, that, notwithstanding the use of the word "penalty," this sum is really liquidated damages. The cases nearest to this are, perhaps: Duckworth v. Alison, 1 M. & W. 412; Errington v. Aynesly, 2 Bro. C. C. 341; Bonsall v. Byrne, I.R. 1 C.L. 573; Law v. Local Board of Redditch, [1892] 1 Q.B. 127; Clydebank Engineering and Shipbuilding Co. v. Don José Ramos Yzquierdo y Castaneda, [1905] A.C. 6. . . .

If an attempt was made to estimate the damages, the average profits to be made by the owner, the likelihood of his customers being lured away by others, or becoming insolvent, the chance of losing competent help, of bad weather, and a hundred other "minute . . . somewhat difficult and complex" inquiries, would require to be made. Who can tell what a merchant may lose by not getting into his shop in time?

I think the appeal must be dismissed with costs.

FALCONBRIDGE, C.J., and LATCHFORD, J., agreed in the result.

DIVISIONAL COURT. NOVEMBER 29TH, 1911.

## NORFOLK v. ROBERTS.

*Municipal Corporations — Waterworks—Board of Water Commissioners—Action against—Arrears of Water Rates before Constitution of Board—Parties—Municipality—Leave to Add—Terms—Costs.*

Appeal by the plaintiff from the judgment of SUTHERLAND, J., ante 111.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

W. N. Tilley and H. S. White, for the plaintiff.

E. D. Armour, K.C., for the defendants the trustees of the Dale estate.

T. J. Blain, for the other defendants.

The judgment of the Court was delivered by BOYD, C.:— There is a claim for arrears for water rates said to be exigible from the Dale estate. This is a matter primarily between the Corporation of Brampton and the estate, as the claim arose before the appointment of the present Water Commissioners of that town. The Corporation of Brampton, in whose time the arrears arose, were not disposed to levy them, for some reason not disclosed; and there may be a valid excuse for their abstention, or it may be that they are inexcusable, and the arrears not collectable as between the Dale estate and the Municipality, in such circumstances as would render the members of the Council liable to make good the amount. At all events, the Municipality did not regard these arrears as an asset, and they were not passed on to the new Commissioners, on their appointment, as an asset to be collected by them. The dispute on this head (claim or no claim) should be properly litigated, and can only be properly litigated with the Municipality as a party before the Court. Complete justice cannot be done unless the party who imposed the rate in arrear and who abstained from collecting it, or who assumed to cancel it, is before the Court.

There may still be a *locus pœnitentiæ* for the plaintiff; and, if he elects to amend by making the Corporation of Brampton a party defendant and to litigate that branch of the case touching these arrears, he may do so, on payment of costs of appeal. In that event, the costs of so much of the action as relates to the arrears will be reserved and dealt with on the further trial. If this offer is refused, the appeal is dismissed with costs.

MIDDLETON, J. NOVEMBER 30TH, 1911.

## RE BRECKON AND DELANEY.

*Vendor and Purchaser—Contract for Sale of Land—Petition under Vendors and Purchasers Act—Reference as to Validity of Objections to Title—Vendor Offering no Evidence—Disposition of Petition—Costs.*

Motion by the purchaser for an order disposing of a petition under the Vendors and Purchasers Act and the costs thereof.

A. J. Keeler, for the purchaser.
L. F. Heyd, K.C., for the vendor.

MIDDLETON, J.:—An order having been made referring this matter to James S. Cartwright, Esquire, an Official Referee, to inquire and report upon the facts in dispute, to enable the validity of the objections taken by the purchaser to the vendor's title to be determined, and the vendor having failed to adduce any evidence before the Referee, although he assented to this course being adopted, and his counsel now stating that his non-attendance was not inadvertent, the matter raised by the petition cannot be dealt with in a summary way. The proper disposition of the motion is to make no order upon the petition, save that the vendor should pay the costs, leaving the parties to assert their rights in an action. The order will provide that it is to be without prejudice to any rights of either party in any action that may be brought for specific performance, return of deposit, or damages. I cannot deal either with the validity of the objections, or any of these questions, upon this material; but award costs against the vendor, as he should not play fast and loose in this way.

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LATCHFORD, J. NOVEMBER 30TH, 1911.

## RE SHERWOOD.

*Trusts and Trustees—Fund in Hands of Trustees—Application of—Terms of Trust.*

Motion on behalf of Alice Sherwood for an order declaring her to be entitled to $265 held by the Royal Trust Company

under an agreement made in June, 1905, whereby, in consideration of a deposit of $1,000, then made by Joseph Sherwood with the company, the company covenanted to pay him $15 monthly during his life, or until the fund should become exhausted. After his death, $15 a month was to be paid to his widow, Amelia Sherwood, "out of any balance then remaining;" and upon her death the company was "to hold the whole balance of the trust premises (if any such there be) for and shall pay the same to Alice Sherwood."

W. C. McCarthy, for the applicant.

J. F. Orde, K.C., for the Royal Trust Company.

Travers Lewis, K.C., for the Official Guardian, representing the next of kin of Amelia Sherwood, deceased.

LATCHFORD, J.:—Joseph Sherwood received $15 monthly from the trust company till his death in July, 1908. His widow withdrew $50 for his funeral expenses—his daughter Alice Sherwood consenting—and was also paid two monthly instalments of $15 each. She then entered a home for the aged, and instructed the manager of the trust company not to send her any monthly payment until she notified him so to do. Mrs. Sherwood died on the 10th May, 1910, intestate. She had given no notice as to further payments, and $265, to which she was entitled, remained to her credit with the trust company. The balance of the fund was paid out to Miss Sherwood, who now claims the $265. This, she contends, is payable to her as part of "the whole balance of the trust premises."

I think this contention cannot be maintained. The $265 does not form any part of the balance of the trust premises. It is made up wholly of the instalments to which Mrs. Sherwood was entitled, and which, by her direction, were held for her by the trust company. She could, on the last day of her life, have assigned or bequeathed the $265. It was her property, and now forms part of her estate.

The application fails. Costs of the trust company and the Official Guardian to be paid out of the fund.

MULOCK, C.J.Ex.D. NOVEMBER 30TH, 1911.

## 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—Refusal of Vendor to Carry out Contract—Tender of Purchase-money and Conveyance Unnecessary—Specific Performance—Costs.*

Action, tried without jury, at Toronto, for specific performance of a contract for the sale of a parcel of land in the city of Toronto, or, in the alternative, for damages from the defendant William A. Johnson for breach of contract.

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

D. I. Grant, for the defendants.

MULOCK, C.J.:—Briefly the facts are as follows. Shortly before the making of the contract, the plaintiff inquired of the defendant William A. Johnson whether the land in question was for sale, and, being informed by him that it was, and desiring to purchase it, employed Mr. Hopkirk as his agent to complete negotiations. Thereupon Mr. Hopkirk put himself in communication with the defendant William A. Johnson, when a verbal bargain was reached that Johnson would sell the property to the plaintiff for $5,125, of which $100 was to be paid as a deposit, and the balance on the 1st July, 1911. Thereupon the plaintiff made a written offer for the purchase of the land in the words and figures following:—

"Offer to Purchase.

"To William A. Johnson,

"I, Vivian E. F. Morgan, of the city of Toronto (as purchaser), hereby agree to and with you (as vendor) to purchase all and singular, etc. (describing the lands), at the price or sum of $5,125, as follows: $100 in cash as a deposit on acceptance of this offer, and covenant, promise, and agree to pay $5,025 on the 1st July, 1911; possession to be given me of the property on the 1st August, 1911." (Then follow certain conditions as to title, possession, taxes, etc.) "Time shall be of the essence hereof.

"Dated 15 May, A.D. 1911.

"V. E. F. MORGAN."

At the foot of this written offer, the defendant William A. Johnson signed an acceptance thereof, in the following words: "I hereby accept the above offer and its terms, and covenant, promise, and agree to and with the said Vivian E. F. Morgan to duly carry out the same, on the terms and conditions above mentioned. Dated 15 May, A.D. 1911." This offer and acceptance constitute the contract sued on. The deposit of $100 called for by the contract was duly paid.

In the course of Hopkirk's negotiations with Johnson, and before the contract was made, the latter informed Hopkirk that he had had the property put in the name of his brother, his co-defendant, Charles Calvin Johnson, "but that it would be all right," and Hopkirk reported to the plaintiff what William Johnson had thus stated. The plaintiff and Hopkirk were thus led to believe that William Johnson was the owner, but for some private reason had caused the property to be vested in his brother.

The 1st July, the time named for completing the purchase, being a statutory holiday, and the day thereafter being Sunday, Monday the 3rd July became the day when the remainder of the purchase-money became payable. The plaintiff had made arrangements for his money, but on the 3rd July his solicitors received a letter from William A. Johnson's solicitors, containing a cheque for the deposit of $100, and stating that the vendor was not prepared to proceed with the transaction. The reason assigned for the vendor withdrawing from the purchase was the unwillingness of the plaintiff to carry out certain alleged arrangements "made at the time when the proposed deal was negotiated." This letter further states: "We regret that this should be the outcome of the negotiation, but our client's instructions are imperative."

On the following day the writ in this action was issued, the action being brought against Charles Calvin Johnson, in whose name the title stands, and also against his brother William, who entered into the contract. On the same day, the plaintiff's solicitors returned the cheque to the defendants' solicitors. On the 5th July, the defendants' solicitors sent their cheque for $100 by letter to the plaintiff, who on the 6th July answered, stating that "I cannot accept it" (the cheque), "as my solicitors advise me that the negotiations made between Mr. Johnson and myself are perfectly legal and binding, and they have therefore, under my instructions, entered an action for specific performance of contract. I will retain the cheque pending the settlement of this suit."

In his statement of claim the plaintiff states that Charles duly authorised William to sell the land in question. One defence is, that William had no authority from Charles to make the contract in question.

At the trial a power of attorney was put in bearing date the 28th February, 1910, whereby the defendant Charles Calvin Johnson appointed his co-defendant his attorney to sell all or any of his lands in Canada; and this power was in full force when William accepted the plaintiff's offer. The contract in question being between the plaintiff and William Johnson, Charles contends that, as a matter of law, he is not bound by it.

The defendants further contend that Charles, notwithstanding the written power, had given to his brother William certain verbal instructions requiring him to reserve a portion of the rear part of this lot; and it is contended that these verbal instructions limited William's power accordingly. As a matter of fact, no such verbal instructions were given by Charles to William after he received the power of attorney. Prior to receiving the power of attorney in question, the defendant William held another power from Charles; and at the time, it is said, there was an understanding between the two that, in exercising the power of sale, William should reserve a portion of the back part of the lot in question; but there was no such understanding between them after the giving of the second power, which accordingly superseded all prior verbal instructions. But, even if, at the time of making the contract, William had received from Charles verbal instructions not to sell a portion of the land in question, that circumstance, if not communicated to the plaintiff (and it was not), would not affect the transaction. When the plaintiff was about to enter into the contract, William gave him to understand that he held a power of attorney from Charles, fully authorising him to enter into the contract. Such was the case, and what William did was within the scope of such authority and is binding on Charles, the plaintiff being unaware of any such alleged instructions.

The law on this point is thus stated in Westfield Bank v. Cornen, 37 N.Y. (10 Tiff.) 322: "Whenever the very act of the agent is authorised by the terms of the power, that is, whenever, by comparing the act done by the agent with the words of the power, the act is itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts aliunde. The apparent authority is the real author-

ity." This statement of the law is quoted with approval in Bryant Powis & Co. v. La Banque du Peuple, [1893] A.C. 170, and in Hambro v. Burnand, [1904] 2 K.B. at p. 22. Even if a duly authorised agent abuses his authority, nevertheless the act of the agent, if within the scope of his apparent authority, is binding on the principal, if the other party to the contract has acted in good faith. In this case, the plaintiff acted in good faith, and is not affected by any verbal limitation of the agent's authority as conferred upon him by the written power: Duke of Beaufort v. Neeld, 12 Cl. & F. 291.

Another defence is, that Charles Calvin Johnson is not bound by the contract because not named, and that parol evidence is inadmissible to shew that he was the real principal. The point thus raised is dealt with in Higgins v. Senior, 8 M. & W. 834, where Parke, B., says: "It is competent to shew that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the Statute of Frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shews that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal." This view of the law has been adopted in numerous cases. (See Heard v. Pilley, L.R. 4 Ch. 548; Calder v. Dobell, L.R. 6 C.P. 486; Rossiter v. Miller, 3 App. Cas. 1125; McClung v. McCracken, 3 O.R. 596; McCarthy v. Cooper, 12 A.R. 286.)

I, therefore, think it was competent to shew that William was acting as agent for Charles, who is bound by his act.

The conduct of the defendant William Johnson, in returning the cheque for the deposit and refusing to complete the contract, relieved the plaintiff from the necessity for tendering the balance of his purchase-money or the conveyance before action. In view of William's attitude, it would have been useless for the plaintiff to have made the tender.

The plaintiff impressed me as a thoroughly truthful witness; and I accept his evidence against that of William A. Johnson, wherever they contradict one another.

The plaintiff is entitled to specific performance and to an order for possession as against Charles, and also William, who

took possession of and was performing certain work on the lands when the action was commenced, together with costs of the action to be paid by Charles.

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DIVISIONAL COURT. NOVEMBER 30TH, 1911.

## MAGNUSSEN v. L'ABBÉ.

*Master and Servant—Injury to Servant—Negligence—Act of Foreman—Personal Negligence of Master—Judge's Charge—Objection not Taken at Trial—Findings of Jury—"Accident"—Nondirection—New Trial.*

Appeal by the plaintiff from the judgment of BOYD, C., at the trial, upon the finding of a jury, dismissing the action.

The plaintiff, a labourer, working for the defendants, who were contractors engaged in the construction of a trench in the city of Port Arthur, was injured, while in the bottom of the trench, shovelling earth off the rock, by a log falling upon him and striking him on the head; and he brought this action to recover damages for his injuries, alleging negligence on the part of the defendants or their foreman, Polson.

The jury found as follows: "We believe the plaintiff was injured by accident, through no fault of his own or the defendants. The man Polson evidently started log moving, whether accidentally or not, we are not prepared to say."

The plaintiff asked for a new trial.

The appeal was heard by MULOCK, C.J.Ex.D., RIDDELL and SUTHERLAND, JJ.

D. C. Ross, for the plaintiff.

H. Cassels, K.C., for the defendants.

SUTHERLAND, J.: . . . It is urged . . . that the learned Chancellor in charging the jury should have gone further than he did and told them that, if they found that the log had been started negligently, the defendants were liable. It is admitted that no objection was taken at the trial to the charge on behalf of the plaintiff. But the case of Woolsey v. Canadian Northern R.W. Co., 11 O.W.R. 1030, is cited as authority for the proposition that the "rule against giving effect to objections

not taken at the trial is not an absolute one." See, also, Martin v. Great Northern R.W. Co., 16 C.B. 179, and Brenner v. Toronto R.W. Co., 15 O.L.R. 195.

It is also argued that the jury should have been asked the usual questions; and, if they had been, the matter would not have been left in the doubtful and unsatisfactory way in which their findings have left it: Furlong v. Hamilton Street R.W. Co., 2 O.W.R. 1007, at p. 1009; Spence v. Alaskan Packers' Association, 35 S.C.R. 362.

The plaintiff asks, what do the jury mean by the word "accident" in the first part of their finding, and by the word "accidentally" in the second part? See Ede v. Canada Foundry Co., 12 O.W.R. 809, at p. 814.

The defendants . . . contend that . . . the learned Chancellor placed the law and facts fairly and fully before the jury, in his charge, inclusive of the fact that Polson was the foreman in control; and that, no objection having been taken to the charge, the plaintiff assumed the risk of letting the case go to the jury in that way, and is now bound by the findings against him. See Australian Newspaper Co. v. Bennett, [1894] A.C. 284; Brisbane v. Martin, *ib.* 249; Toronto R.W. Co. v. King, [1908] A.C. 260.

A perusal of the evidence will lead one, I think, clearly to the conclusion that the trial proceeded largely on the basis of the alleged negligence consisting in the lack of shoring and consequent caving-in of the earth. Not much attention seems to have been paid to the question whether or not, if the foreman Polson, negligently, in the course of the work, started the log in such a way as to cause the accident, the defendants might be liable.

The Chancellor in his charge asked the jury to find whether the log was started by Polson canting it over, or by the earth caving in. . . . I am, with respect, of opinion that the charge should have gone further, and that the jury should have been instructed that, if Polson, in the circumstances disclosed in the evidence, negligently started the log, they might find the defendants guilty of negligence. Again, while there must be "reasonable evidence of negligence," yet the mere "occurrence of an injury" is, in certain circumstances, "sufficient to raise a prima facie case:" Beven on Negligence, 3rd (Can.) ed. (1908), pp. 117, 118. . . . See Byrne v. Boadle, 2 H. & C. 722; Bisnaw v. Shields, 7 O.L.R. 240.

It seems to me that once the plaintiff shewed that he was where he was, in the trench, in the proper discharge of his work, and went there under the orders of the defendants, in

whose employment he was, and then proved, in addition, that a log was placed by the defendants on the margin of the ditch and so close to it that when, in the course of the defendants' operations, and when an attempt was about to be or was being made to move it, it being then under the defendants' control and care, it fell upon the plaintiff and injured him, it then became incumbent upon the defendants to shew not only that it fell "by accident through no fault of theirs," that is, no fault of theirs personally, but also, when it was shewn, in addition, that it was started by their foreman in charge at the time of these operations, incumbent on them to shew that it was so started accidentally and not negligently. They have not obtained such a finding.

It was suggested during the argument that such a view might result in the plaintiff obtaining on this appeal relief that he had not in his notice of appeal expressly asked for, viz., that, as the plaintiff had traced the accident to the defendants so as to impute negligence and justify a verdict in default of the defendants answering by shewing mere accident in so far as both themselves and their foreman are concerned, there should now be pronounced a judgment for the plaintiff with a reference back to assess the damages.

It seems to me, however, that, in view of the course of the trial, it would be a more appropriate remedy to send the case back for a new trial, reserving the costs of the former trial and of this appeal to be disposed of by the Judge who shall preside thereat.

I would allow the appeal in that way.

MULOCK, C.J.:—I agree.

RIDDELL, J.:—With some doubt, I concur in the result.

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DIVISIONAL COURT. NOVEMBER 30TH, 1911.

## *LESLIE v. HILL.

*Contract—Interest in Oil Leases—Oral Agreement—Evidence to Establish—Finding of Fact by Trial Judge—Reversal on Appeal—Partnership—Interest in Land—Statute of Frauds.*

Appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Haldimand, sitting for FALCONBRIDGE, C.J.K.B., dismissing the action, after trial without a jury.

*To be reported in the Ontario Law Reports.

The plaintiff claimed a one-third interest in certain oil leases which were ultimately taken in the name of the defendants Hill and Paget, and asked to have these defendants and the defendants Waines and Root, to whom the leases had been assigned, declared trustees for her as to the one-third interest. The plaintiff also claimed an account and $1,500 as the value of the leases mentioned in paragraph 6 of the statement of claim and $1,000 as the value of her interest in these mentioned in paragraph 9. This was probably intended as an alternative claim, though not so expressed.

The trial Judge held that the plaintiff had failed to establish the agreement, and did not pass upon the defence of the Statute of Frauds.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and RIDDELL, JJ.

G. Lynch-Staunton, K.C., for the plaintiff.

W. M. Douglas, K.C., for the defendants Hill and Paget.

E. Sweet, for the defendants Waines and Root.

MEREDITH, C.J. (after an elaborate statement of the facts and testimony given at the trial):—I am unable to agree with the finding of fact of the learned Judge. The evidence, in my opinion, very much preponderated in favour of the appellant's contention that the agreement was, that she was to be entitled to a one-third interest in the venture which was being embarked upon and in the leases which should be obtained.

The testimony of the four lessors from whom leases were at first taken, with the name of the appellant as one of the lessees, Gülck, Dilse, Finch, and Bloomfield, and of Robert E. Johnson, affords strong corroboration of the testimony of Leslie; they are, according to the admission of the respondent Hill, "respectable, reputable farmers;" and their testimony is not open to the same criticism as testimony as to conversations is properly subjected to. They were interested in the matters as to which they testify; and it is more than probable that the nature of the venture in connection with which the leases were obtained was the subject of discussion when the first leases were executed, and the reasons for the change the subject of discussion when the new leases were obtained. These witnesses . . . have no interest in the question between the parties; and I am unable to understand why, because of the bald denial by Hill—unsatisfactory as, in

my opinion, it was—the learned Judge came to the conclusion that "they might have been mistaken," though he did not disbelieve them.

The fact that the name of the appellant appeared in the leases at first prepared and executed by the lessors strongly supports her contention; and the theory that the appellant's name was included, not because she had any interest in the leases, but to assist her husband in getting work if the leases were disposed of, which the learned Judge accepted, is, in my opinion, an improbable one, and so much out of the ordinary course of things that it would require corroboration to warrant its being accepted; and of corroboration there is none; but there is a body of testimony which, if true, is quite inconsistent with it.

I would reverse the finding of fact and substitute for it a finding that, according to the agreement of the parties, the appellant and the respondents Hill and Paget were to be jointly and equally interested in the venture and in the leases that were obtained.

If the appellant is entitled to enforce this agreement, notwithstanding the defence based on the Statute of Frauds, she is not, in my opinion, entitled to any relief against the respondents Waines and Root.

My conclusion upon the evidence is, that it was contemplated by all the parties to the agreement that the leases should be disposed of, and that they should share equally in the proceeds of the sale of them; and the full extent of the relief to which, on the hypothesis I have mentioned, the appellant is entitled, is, to be paid by the respondents Hill and Paget one-third of the proceeds of the sale to the other respondents.

There remains to be considered the effect of the Statute of Frauds.

In In re De Nicols, De Nicols v. Curlier, [1900] 2 Ch. 410, Kekewich, J., says (pp. 416-417): "It is settled that there may be an agreement of partnership by parol, notwithstanding that the partnership is intended to deal with land; and that in an action to enforce such agreement the plea of the Statute of Frauds will not avail. In such an action, therefore, the rights of the parties to the land, their respective interests in it, and their mutual obligations respecting it, may and must be determined and enforced notwithstanding that there has been no compliance with the statutory provision. The authorities for this are not numerous, but they are conclusive—namely, Forster v. Hale, 3 Ves. 695, 5 Ves. 308, and Dale v. Hamilton, 5 Hare 369, 2 Ph. 266. In the

latter case, Wigram, V.-C., applied this ruling to a case where the partnership was intended to deal exclusively with land. Lord Lindley in his work on Partnership, 6th ed., p. 89, says that the latter case goes a long way towards repealing the Statute of Frauds, and that it is difficult to reconcile it with sound principle or the more recent decision of Caddick v. Skidmore, 2 DeG. & J. 52. This is a strong adverse comment, but yet I am bound to treat the decision as sound, and I did so in Gray v. Smith, 43 Ch. D. 208. Whether it is competent for the Court of Appeal now to disturb the ruling above quoted, or whether, being competent, the Court would be willing to do so, is not for me to say; but at any rate I must take the ruling to be established."

In the 7th ed. of Lindley on Partnership, p. 97, it is said, referring to this ruling: "In the absence, however, of any decision of the Court of Appeal to the contrary, the law on the point now under discussion must be taken to have been correctly stated in Forster v. Hale and Dale v. Hamilton, which have been treated as binding authorities in the most recent cases"—referring to Gray v. Smith and In re De Nicols.

This paragraph does not appear in the earlier edition, and has been added since these cases were decided.

My conclusion is, that, following these cases, we must hold that the Statute of Frauds is not an answer to the appellant's claim.

I would, therefore, reverse the judgment appealed from, so far as it dismisses the action against the respondents Hill and Paget, and substitute for it a judgment declaring that the appellant is entitled to one-third of the proceeds of sale of the leases to the respondents Waines and Root, and for an account (if the parties do not agree as to the amount), and to judgment for the one-third with costs, and dismiss the appeal against the judgment in favour of the respondents Waines and Root; and I would not give costs of the appeal to any of the parties.

TEETZEL, J., agreed with the conclusion of the Chief Justice. He made some references to the evidence, and concluded his written opinion thus:—

If we are convinced, as we are, that the trial Judge has erred in failing to give due effect to strongly preponderating evidence against the respondents Paget and Hill, or that he has misapprehended the effect of such evidence, it is our duty to reverse his findings and direct the proper judgment to be entered. In this

respect, the rule adopted in Coghlan v. Cumberland, [1898] 1 Ch. 704, and Beal v. Michigan Central R.R. Co., 19 O.L.R. 502, applies.

RIDDELL, J., dissented as to reversing the judgment on the facts, and was in favour of dismissing the appeal.

*Appeal allowed;* RIDDELL, J., *dissenting.*

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*BATEMAN v. COUNTY OF MIDDLESEX—DIVISIONAL COURT—NOV. 27.

*Damages—Personal Injuries—Obstruction in Highway—Absence of Warning—Liability of Municipal Corporation—Assessment of Damages—Evidence—Refusal to Submit to Operation—Reasonableness—Neurasthenia.*]—Appeal by the defendants from the judgment of RIDDELL, J., 24 O.L.R. 84, 2 O.W.N. 1238. The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ. The Court dismissed the appeal with costs. 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.

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WILLIAMS v. TAIT—MASTER IN CHAMBERS—NOV. 30.

*Particulars—Statement of Claim—Infringement of Patent for Invention.*]—Motion by the defendant for particulars of paragraph 5 of the statement of claim, the cause being at issue, and both parties having been examined for discovery. The action was for the alleged infringement of the plaintiff's patent. By paragraph 5 it was alleged that "the defendant has infringed the said letters patent, and has made, constructed, and used, and vended to others, . . . lenses made according to the invention in respect of which the letters patent were granted." The defendant stated that he was in doubt whether the plaintiff alleged and intended to prove an infringement by using the process described in the letters patent, as well as in selling the finished product. On examination for discovery, the plaintiff said that he was claiming to restrain the defendant from the output

*To be reported in the Ontario Law Reports.

of the product, whether manufactured according to the plaintiff's specifications or according to other specifications; but he afterwards qualified this; and on the 11th May, 1911, a demand was made that the plaintiff should state definitely, by particulars, whether he intended to prove both of these allegations or only the second. In answer, a statement was delivered to the effect that the plaintiff was not aware of how the defendant made the lenses he sold, but that they infringed the plaintiff's patent. On the argument, the plaintiff's counsel declined to give any more definite information as to the course to be taken at the trial. The Master said that it seemed probable that, if the second ground only were relied on, it would be unnecessary to prepare any evidence to meet the question of the defendant having used the process, and that a great deal of expense would be saved in that way; and the defendant should not be left in doubt on this point, and obliged to procure the evidence of patent experts at a large cost, which might in the end prove to be unnecessary, yet which he must be prepared to adduce if the question of the process were gone into at the trial. The motion was entitled to succeed, and the plaintiff should give the information asked for in ten days. Costs of the motion to be in the cause. W. A. Logie, for the defendant. M. H. Ludwig, K.C., for the plaintiff.