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JUNE 16TH, 1906.

C.A.

RE CARTWRIGHT AND TOWN OF NAPANEE.

RE KNIGHT AND TOWN OF NAPANEE.

Costs—Motion to Quash Municipal By-law—Intervening Statute Validating By-law—Costs Left to Discretion of Court—Costs in Court of Appeal.

Appeal by Sir Richard John Cartwright from order of MEREDITH, J. (6 O. W. R. 773), refusing to quash a by-law of the town of Napanee providing for the erection and equipment of a municipal electric light plant and for the issue of debentures; and appeal by Alfred Knight from order of MEREDITH, C.J., refusing Knight's application to quash the same by-law.

The appeals were heard by MOSS, C.J.O., OSLER and GARROW, JJ.A.

W. E. Middleton, for the appellants.

A. Bruce, K.C., and W. S. Herrington, K.C., for the town corporation.

MOSS, C.J.O.:—After the argument on appeal, and while the cases were standing for judgment, the respondents procured the passage through the legislature of an Act, which has been duly assented to by the Lieutenant-Governor, and we have been furnished with a copy. There is a lengthy preamble, to which the curious may refer for a history of the proceedings up to and inclusive of the appeals to this Court.

By the enacting part, the by-law is confirmed and declared to be legal, valid, and binding on the corporation of the town of Napanee and the ratepayers thereof, notwithstanding any defect or error in substance or form or in any proceeding relating thereto or in the manner of passing the same. It is further enacted that nothing in the Act contained shall affect the costs of any appeal now pending, but the same shall be in the discretion of the Court, and may be determined and awarded in the same manner as if the Act had not been passed.

So far, therefore, as our views with regard to the objections made to the by-law are concerned, the legislation has rendered it of little consequence whether or not we give expression to them, for they cannot now affect the validity of the by-law. Probably it would have been better if the legislature, having gone so far, had seen fit to dispose of the whole matter, including the question of costs. But, as the determination of the costs has been left in our discretion, the parties are entitled to our award in respect of them.

In general the incidence of costs depends upon the result of the proceedings taken, and, as a rule, when that result is ascertained, little difficulty is experienced in determining upon which party the payment of the costs should fall. But here the respondents, by their action in obtaining curative legislation, have deprived the appellants of the chance of obtaining any substantial benefit from their appeals.

The learned Judges in the Court below appear to have been of the opinion that the respondents were in the wrong in neglecting to properly comply with the requirements which the Municipal Act imposes as conditions precedent to the passage of a valid by-law of the nature of that in question here. And in appeal the respondents were really compelled to rely upon the excuses put forward in their affidavits as sufficient to justify waiver of the provisions of the statute. Many of these had little or no bearing on the real question. No circumstances were shewn upon which the appellants could be held to be estopped of their rights as ratepayers; and their relations to the Napanee Water and Electric Light Company and the Napanee Gas Company, their attitude on the policy of the town in undertaking the construction and installation of an electric light plant, and their motives in moving against the by-law, were beside the

question. The appellants were quite within their rights in objecting when and as they did to the . . . municipality . . . assuming to act upon a by-law which was passed without due regard to the provisions of the statute.

On the whole we think that, in the exercise of our discretion, the costs of the appeals should be awarded to the appellants.

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

GARROW, J.A., also concurred.

CARTWRIGHT, MASTER. JUNE 18TH, 1906.

CHAMBERS.

CAMPBELL v. CROIL.

Money in Court — Ownership of — Partnership — Judgment Creditors—Stop Orders—Creditors' Relief Act—Payment out to Sheriff for Distribution.

Motion by creditors of the firm of Croil & McCullough for payment out of Court of $530 standing to the credit of defendant McCullough.

G. A. Stiles, Cornwall, for the applicants.

Grayson Smith, for defendant McCullough.

W. E. Middleton, for an opposing creditor.

THE MASTER:—The facts of this case appear from the reports to be found in 6 O. W. R. 933, 7 O. W. R. 379, 475.

There is still in Court $530, which is standing to the credit of defendant McCullough, and was virtually determined to be his separate property by the report of the local Master, as well as by the order of 15th December last, affirmed as above. The Divisional Court did not in any way vary the disposition of the fund.

Against this there have been lodged 6 stop orders by creditors either of defendant McCullough or of Croil & McCul-

lough. The present motion is on behalf of all these creditors (except one, whose execution is against McCullough only) for an order for payment out to them. . . .

It was still contended that this money belonged to the firm of Croil & McCullough and should go to the creditors of the partnership only. But this is no longer an open question, so far as I can see.

The Creditors' Relief Act was passed in 1880. Its effect on money in Court against which execution creditors have lodged stop orders was first considered in Dawson v. Moffatt, 11 O. R. 484. There a Divisional Court decided that such money should be applied in accordance with the Act. They, however, directed distribution to be made by the local Master, and not by the sheriff.

In consequence, as it would seem, of this decision, the Act was amended by the addition of what is now sec. 24 of the Act as found in the last revision: see 49 Vict. ch. 16, sec. 37 (O.)

The effect of the Act itself on the rights of creditors was dealt with by the Court of Appeal in Re McDonagh v. Jephson, 16 A. R. 107.

It would seem clear that the proper order to make is that the money in question be paid out forthwith to the sheriff of Stormont, Dundas, and Glengarry, and be deemed to be money levied under execution against defendant McCullough and be dealt with as the Act provides.

As a motion was necessary to get the money out of Court, the costs of all parties may be added to their claims.

MAGEE, J. JUNE 18TH, 1906.

CHAMBERS.

MURPHY v. CORRY.

Costs—Taxation—Stenographer's Fees—Evidence on Reference —Rule 1143—Consent—Certificate of Master.

Appeal by defendant from taxation of plaintiff's costs.

J. R. Code, for defendant.

R. McKay, for plaintiff.

MAGEE, J.:—I dismissed the appeal except as to the item of stenographer's fees on the reference before the local Master at Ottawa. . . .

Canadian Bank of Commerce v. Rolston, 4 O. L. R. 106, 110, 1 O. W. R. 351, does not help Mr. Code, as there the judgment itself deprived plaintiff of costs.

As to the stenographer's fees, it was stated by counsel that they had been incurred by consent of parties. If so, Rule 1143, as amended by Rule 1270, authorizes the allowance, on the certificate of the local Master. I have nothing to shew whether or not such consent was given, and cannot say that the taxing officer was wrong. The reasons for that officer's allowance of the various items was not before me. If plaintiff files the Master's certificate under Rule 1143, the appeal will be dismissed on this ground also, and the dismissal will be with costs. If such certificate be not filed, it should be shewn under what circumstances the stenographer was called in, and whether his fees were paid by the Master or by plaintiff; and the matter may be spoken to again.

MAGEE, J. JUNE 18TH, 1906.

CHAMBERS.

RE GREER, GREER v. GREER.

Costs—Administration Proceeding—Taxed Costs in Lieu of Commission—Special Circumstances—Consent.

Motion by plaintiffs, on consent of all parties, for an order allowing taxed costs in lieu of the usual commission in a proceeding for the administration of the estate of Thomas Greer, deceased.

Grayson Smith, for plaintiffs.

MAGEE, J.:—The Master's certificate does not shew any unusual proceedings or difficulties such as arose in Wright v. Bell, 16 C. L. T. Occ. N. 193. The adding of parties, advertising for creditors, considering claims, and sale of lands, and examination of accounts, are the most ordinary experiences. It is stated that the executors' accounts were

intricate and badly kept, and gave rise to many questions, some difficult to determine, and required much time and trouble to adjust, and covered about 300 items on each side, the receipts being over $9,000 and the disbursements about $11,500, the estate now being about $3,400 and some personalty specifically bequeathed, outside of the balance, if any, due from the surviving executor. Some 74 pages of evidence have been taken and 135 hours spent in attendance before the Master.

The Master had power to direct the accounts to be brought in in proper shape, and the parties beneficially interested should not be put to greater expense because of the executors' neglect of duty. It does not appear on what sum the commission under Rule 1146 would be calculated in this case: see Re Brown, 19 C. L. J. 367. But, as pointed out by the Chancellor, in Re Stubbing, 20 C. L. J. 193, the Rule was not intended to do strict justice, but only to afford a convenient mode of fixing the remuneration, though in some cases it might be too little, or, as alleged in that case, too much. And, as he points out, if a departure from it is desired, it should be asked at an early stage.

The solicitors for all parties agree in the application, but if, as is to be assumed, the clients also approve, there should be no difficulty in getting what may be considered proper remuneration. On the material before me I do not think Rule 1146 should be departed from.

MAGEE, J. JUNE 18TH, 1906.

WEEKLY COURT.

RE MANUEL.

Will — Construction — Bequest to Widow — "Dower of One-third of my Estate"—Non-technical Use of "Dower"—Absolute Gift of One-third of Whole Estate.

Application by the executors for an order declaring the construction of the will of Obed Manuel, deceased, as to the interest taken by his widow thereunder in his estate.

M. F. Muir, Brantford, for the executors.

T. R. Slaght, K.C., for the widow and for Frederick Manuel, a legatee.

E. E. A. DuVernet, for Christiana Stoddard.

MAGEE, J.:—After appointing executors and directing them to pay his debts and funeral expenses and probate, the testator further directs them to sell "the whole of my real estate and personal property and chattels"—excepting certain household goods reserved for his wife — "turning the same into money." The will then proceeds: "After the payment of my said debts, funeral expenses, etc., and my wife Sarah Manuel receives her dower of one-third of my estate, I give and bequeath to my wife Sarah Manuel the whole of the interest of my estate as long as she shall live (that is, the interest of the balance thereof after she receives her dower.) Upon the decease of my wife Sarah Manuel, I will and bequeath to my son two-thirds of the balance of my estate. And the remainder one-third of the balance of my estate I will and bequeath to my brothers Orman Manuel and Charles Manuel and to my sister Christiana Stoddard, to be divided between them share and share alike."

The testator died on 25th April, 1905, and probate of the will was granted by the Surrogate Court of the county of Brant.

The widow contends that the word "dower" is not to be construed in its technical sense of a life interest in one-third of her husband's realty, but that by it the testator intended one-third share not merely for life but absolutely, and not merely in his real estate, but in his whole estate real and personal. The son and the brother Orman Manuel acquiesce in this view. The other brother and the sister dispute it.

There is, no doubt, a very prevalent idea that a wife's dower is a right to one-third of her husband's property, and one would not be surprised to find the word used in that sense in a will written, as this one is said and appears to have been, by a non-professional person. The rule, however, is that "technical words or words of known legal import shall have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense: per Lord Denman in Doe v. Gallini, 5 B. & Ad. 640, citing Lord Redesdale in Jesson v. Wright, 2 Bligh 1.

We have to look within this will to see if the testator has furnished means for its interpretation, and must start with the presumption that he intended to dispose of his whole

estate. A construction which would result in intestacy as to any part of his estate is to be avoided.

It will, I think, be convenient to work backward in this case. At the wife's death "the balance of my estate" is divided among the testator's own relatives, his son and brothers and sister. What does he mean by "the balance?" The words imply that something has been taken out. As we are not to presume an intestacy, what has the testator done with that something which has been taken out to leave a "balance?" If the widow had only a life estate, that would end at her death, and, instead of there being only a balance to divide, the whole estate would be available. What then does he mean by the "balance" which he gives his relatives at his wife's death? One answer might be that it meant the balance after payment of the debts and expenses which he directs the executors to pay, and that would be a reasonable answer, in the absence of any other. In the words immediately preceding, the testator throws some light on what he means. There he gives to his wife for her life the interest of his estate, "that is, the interest of the balance thereof after she receives her dower." It is, I think, evident that the "balance" on which she is to receive interest during her life is the same "balance" which in the very next sentence is directed to be divided at her death. If so, it is not the whole of his estate, it is the balance thereof after she receives her "dower"—whatever that may mean. And here it may be noted that it is not the balance of the interest, but the "interest of the balance" which is given to her. Whatever he does mean by "dower," it is evidently something which reduces the fund of his estate during his wife's life, and that reduction continues after her death. If that be so, it must be part of the corpus of the estate. Then to find its meaning we go back, in the same sentence, to the phrase, the only other place in which it is used, and there it is spoken of as "her dower of one-third of my estate." Is it used there in a technical sense? If the words "my estate" are limited to real estate, there would be reason in such a construction. But the testator, within the next few lines, thrice uses the same words "my estate," and always manifestly referring to his whole estate resulting from both real and personal property. Only once previously has he used the word "estate," and then he expressly refers to "real estate." It is, I think, a reason-

able conclusion that he uses the words "my estate" throughout in the sense of "my whole estate," which is also their natural meaning. That being so, it follows that when he speaks of "her dower of one-third of my estate," he is not using the word "dower" in the technical sense which would limit it to realty.

We have thus a non-technical word used, the quantity of which—one-third of his estate—the testator here indicates, and we find that that one-third does not cease with the wife's life, but, as shewn in the subsequent dispositions in the will, is a permanent reduction of the corpus of the estate, and we are driven to the conclusion that the word "dower" is used in the sense of a gift or endowment (vide Imp. Dict. sub "Dower," 4) of one-third of the whole estate absolutely to the wife.

Against this conclusion Mr. DuVernet urged that the technical word should receive its ordinary technical construction, and argued with much force that the dower is coupled by the testator with debts and expenses, shewing in his mind a contemplation of only those paramount claims which must, in any event, come out of his estate and override any disposition he might make, and evincing an intention of dealing with his estate only subject to these claims. . . . I was much impressed by his argument, to which, it must be said, much colour is lent by the fact that there is not a direct but only an implied gift to the wife of the dower, and that it is not the only endowment or gift provided for her. I am not unmindful also of the consideration that the testator may well have contemplated a sale of his lands subject to her dower, or the payment to her of its value out of the proceeds of sale, thus leaving a "balance" to be disposed of. But the conclusion at which I have arrived is, I think, more concordant with the various expressions and dispositions in the will.

It was said . . . that the estate is small (under $3,000), about one-third being personalty. That would not render less probable an intention to make such a provision for the wife as I have attributed to him.

It will be declared that under the will the widow is entitled absolutely to one-third of the proceeds of the real and personal property of the testator after payment of his

debts and funeral and testamentary expenses, and entitled during her life to the interest from the "balance" or two-thirds thereof.

Costs of all parties out of the estate.

ANGLIN, J. JUNE 18TH, 1906.

WEEKLY COURT.

CONNOLLY v. CONNOR.

Evidence—Master's Office—Reference to Take Partnership Accounts—Preliminary Examination of Defendant as to Surcharge—Discretion of Master to Direct—Appeal—Place of Examination—Defendant Resident out of the Jurisdiction—Power to Direct Attendance at Place within Jurisdiction—Foreign Commission—Naming Master as Commissioner.

Appeal by defendant from a direction of the local Master at Ottawa requiring defendant, though resident in New York, to attend at Ottawa, and submit to preliminary examination before the Master, respecting items of surcharge and falsification upon plaintiff's accounts filed with the Master upon a reference to him in a partnership action.

T. A. Beament, Ottawa, for defendant.

Glyn Osler, Ottawa, for plaintiff.

ANGLIN, J.:—Defendant contends that the material before the Master was insufficient to enable him to exercise any reasonable discretion as to the necessity or propriety of a preliminary examination being had, and that in any event he had no jurisdiction to require the attendance of defendant at Ottawa to submit to such examination.

The discretion conferred upon the Master by Rules 668 and 669 is very wide. In the exercise of that discretion he has determined that a preliminary examination of defendant should now be had. Although the material does not, perhaps, specify with as much particularity as may be desirable the items of surcharge or falsification in respect of which this examination is sought, I must assume that

these were specified in argument before the Master. Plaintiff had in fact already specified them in writing upon a former abortive attempt to procure the examination of defendant. He must, he concedes, give formal notice of the items upon which he proposes to examine before proceeding with the examination: Daniel's Chy. Prac., 7th ed., p. 853. I should not, I think, interfere with the discretion exercised by the Master in determining that a preliminary examination of the defendant should now be had.

But I am unable to agree in his direction that defendant should attend for such examination at Ottawa. The proposed examination is said to be somewhat in the nature of an examination for discovery for the purpose of obtaining from defendant admissions, if possible, and, if not, such information as will the better enable plaintiff to prepare for and shape his case in the prosecution of the reference. The Court will not, under the code of Rules regulating discovery, require the attendance of a non-resident defendant at a point within the jurisdiction: Lefurgey v. Great West Land Co., 7 O. W. R. 738. Although this code of Rules does not apply in the Master's office, yet the practice there should, I think, in such matters, by analogy, conform to the practice prescribed in regard to discovery. If, because of the right of a defendant not to be taken away from the locality of his residence for examination, the Court or a Judge will not require him to attend elsewhere for the ordinary examination for discovery, a fortiori it would seem that a Master or referee, in the conduct of a reference, should respect that right. The prima facie right of a non-resident defendant to have his testimony taken on commission for use at trial is well established. Moreover, Rule 499 (2) confers on the Master express power to direct that a commission shall issue to take this evidence, and in ordinary cases this is manifestly the practice which should be adopted.

But in the present instance the Master has apparently deemed it very desirable that the evidence of defendant should be taken before himself rather than before a commissioner to be appointed by him. If it were certain that defendant would appear as a witness before the Master at a later stage of the reference, it might not be so important that the Master should himself take the examination now proposed. But if, as is quite possible, defendant will not give any evidence upon the pending reference except such as he

may give upon the examination now in contemplation, it may be of the greatest moment that the Master should have the advantage of observing his demeanour as a witness and of controlling the conduct of his examination. . . . The Rules rather seem to contemplate that all evidence upon a reference shall be given viva voce before the Master or referee, unless upon special grounds it should be otherwise ordered: Rule 484.

The Master cannot direct the issue of a commission in which he shall himself be named as commissioner. It is possible that he could under Rule 485 make an order for the attendance of defendant for examination before himself at New York. This Rule, however, differs somewhat from the corresponding English Rule, No. 487, which enables the Court or a Judge to make an order for the examination of any witness or person before "the Court or Judge or any officer of the Court or any other person and at any place," whereas our Rule empowers the Court or a Judge to direct such examination "before any officer of the Court or any other person and at any place"—not contemplating, apparently, that such examination should be had before the Court or Judge pronouncing the order.

But the Court or a Judge under Rule 499 (1) may direct that a commission should issue for this purpose, and I see no reason why, in such a case as the present, the Master should not be named as the commissioner. The expense of having the Master himself execute such a commission will be only slightly, if at all, greater than would be entailed were the commission directed to some suitable person resident in New York. Probably both parties will consent to an order being pronounced for the issue of a commission to the Master. If not, and if plaintiff desires it, such order may issue upon plaintiff filing a certificate of the Master that it is, in his opinion, desirable that the examination of defendant should take place in his presence. Otherwise the Master may exercise the power conferred upon him by Rule 499 (2).

Success upon this appeal being divided, there will be no costs to either party. The costs of the commission, if issued to the Master, will be costs in the reference.

JUNE 18TH, 1906.

DIVISIONAL COURT.

GOODWIN v. CITY OF OTTAWA.

Assessment and Taxes—Income Assessment—Dividends on Shares in Ottawa Electric Company—Agreements between Company and City Corporation—Exemptions—Special Statutes—Assessment Act.

Appeal by plaintiff from judgment of TEETZEL, J., 7 O. W. R. 204, dismissing action.

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

T. McVeity, Ottawa, for defendants.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), dismissed the appeal with costs.

MEREDITH, C.J. JUNE 19TH, 1906.

CHAMBERS.

CROWN BANK OF CANADA v. BULL.

Summary Judgment—Rule 603—Defence—Failure to Shew—Refusal of Leave to File Second Affidavit—Conditional Leave to Defend—Payment into Court.

Appeal by plaintiffs from order of Master in Chambers, ante 8, upon a motion for summary judgment, giving plaintiffs conditional leave to defend.

F. Arnoldi, K.C., for plaintiffs.

J. F. Hollis, for defendant.

MEREDITH, C.J., dismissed the appeal; costs to defendant in the cause.

MEREDITH, C.J. JUNE 19TH, 1906.

TRIAL.

TORONTO R. W. CO. v. CITY OF TORONTO.

Municipal Corporations—Expropriation of Land—Property of Street Railway Company Designed for Car Barn—Action to Restrain Council from Passing By-law—Failure to Shew Intention to Pass—Illegality of Proposed By-law —Remedy—Declaratory Judgment.

Plaintiffs alleged that they were the owners of certain lands in the city of Toronto which had been acquired and were required for the purpose of their undertaking, and were contended to be used for a "car barn;" that defendants were taking steps to appropriate these lands compulsorily for park purposes; that these steps were not being taken in good faith in the public interest; and that in any case defendants had no power to take the lands compulsorily; and plaintiffs claimed a declaration that defendants had no power to expropriate the lands; that the lands were "not liable to be expropriated;" that defendants were not entitled to raise the money required to pay for the lands without obtaining the approval of the ratepayers of a by-law for that purpose; that defendants' proceedings for expropriation were not in the public interest; and an injunction restraining defendants from taking any expropriation proceedings or interfering in any way with the use and enjoyment of the lands by plaintiffs for the purposes for which they had been acquired and were intended to be used.

The action was tried without a jury.

W. Laidlaw, K.C., for plaintiffs.

H. L. Drayton, for defendants.

MEREDITH, C.J.:— . . . Admissions were made to the effect that plaintiffs are the owners of the lands in question; that it was their intention to erect on them a car barn according to a plan which was submitted to the defendants' architect; and his report upon the plan, and certified copies of the minutes of the proceedings of the council and its board of control and committees, were also put in evidence.

These minutes shew that in the latter end of 1905 the council had under consideration the setting apart, as a public park or playground for the north-western section of the city, certain lands on the north-west corner of Bloor street and Christie street; and that on 18th October of that year a deputation of the property owners and ratepayers in the neighbourhood of the lands in question waited upon the board of control and presented a petition asking that a permit to plaintiffs for the erection of the car barn on the lands in question should be refused, and that permission should be also refused for the laying of tracks on certain neighbouring streets for the purpose of providing an entrance to the car barn.

This petition was on the same day referred to the corporation counsel "for an opinion stating exactly what power the city has or can exercise" in relation to the matter of the petition; and on 12th December following the board instructed the city architect not to deal with the plans for the car barn submitted by plaintiffs "pending the result of the proposed expropriation proceedings."

The committee on parks and exhibition, some time prior to 11th December, 1905, recommended that the lands in question, with two other lots, should be expropriated and dedicated for park and playground purposes, under the provisions of the statutes; and upon the instructions of the committee the city solicitor drafted a by-law for the purpose of giving effect to this recommendation.

On 11th December, 1905, the city council struck out the recommendation of the committee from its report, and referred it back to the committee for further consideration; and on the same day the writ in this action was issued.

The statement of claim contains no allegation that the city council intend to and will unless restrained pass the proposed by-law, and . . . the contrary is indicated by the action taken on 11th December . . .

No oral evidence was offered to establish the allegation that the proceedings of the board of control and the committees . . . were not taken in good faith, in the public interest, for the sole purpose of acquiring the lands in question for the purposes of a public park.

The documents themselves do not afford any such evidence. They shew, indeed, that the committees of the coun-

cil had under consideration, up to the time when the ratepayers' petition was presented, the acquisition of another property for the purpose of a public park or playground for the section of the city in which the lands in question are situate; but the documents also shew that the matter of acquiring that property was still under consideration on 11th December, 1905, for on that day the recommendation as to the other site was referred back to the committee for further consideration. The instructions of the board of control to the city architect not to deal with the plans "pending the result of the proposed expropriation proceedings" was not given until the day after this action was begun, and in any case does not appear to me to afford any evidence of bad faith or to shew that what was being done was dictated by anything else than the public interest.

I am far from thinking that the fact, if it were the fact, that the council, having under consideration the providing of a park in a particular section of the city, was induced to reject a site which it had under consideration and to choose another, because upon that other buildings of a character not desirable for a residential section were about to be put up, would afford any ground for the interference by the Court with a discretion which the legislature has vested in the council of the municipality and not in the Court, and which the Court ought not to and cannot properly interfere with, control, or supersede, unless the council is not in good faith exercising its powers but using them to serve an ulterior purpose, which it could not directly accomplish lawfully.

Nor is there any evidence to justify the Court in restraining the council . . . from passing the by-law which, it is suggested, but neither alleged nor proved, it intends to pass, even if plaintiffs be right in their contention that the lands in question cannot be compulsorily taken.

What right have I to assume that the council will do an illegal act? For all that appears, if plaintiffs are right, the council will be properly advised and will refrain from passing an illegal by-law. But if it should not so refrain, what harm will be done? The by-law, if illegal, may be quashed, and, if ultra vires, will, I apprehend, even though not quashed, give no authority to defendants to take the lands or interfere with plaintiffs' possession of them.

I do not deem it necessary to consider whether, as contended by plaintiffs' counsel, the lands in question are de-

voted to a public use, and therefore cannot be taken under the compulsory powers conferred upon municipalities by the Municipal Act, for the case is not one in which a judgment simply declaratory of the rights of the parties should be pronounced. That such a judgment may be pronounced is not open to question, but it is rarely done, and whether it shall or shall not be rests in the discretion of the Court.

That discretion, I think, should be exercised against pronouncing a declaratory judgment in this case. . . .

I do not wish to be understood as having formed any opinion for or against the contention of plaintiffs as to the land in question not being liable to be taken compulsorily, and I ought not, I think, to determine anything as to it, because, in my view, it is unnecessary for the purpose of deciding this case to do so.

The result is that the action is dismissed, and I see no reason why the costs should not follow the result.

JUNE 19TH, 1906.

DIVISIONAL COURT.

RE VANDYKE AND VILLAGE OF GRIMSBY.

Municipal Corporations—Local Option By-law—Irregularities—Publication of Notice of Day for Taking Votes—Mistake — Correction — Passing of By-law by Council — Validity of Election of Members—De Facto Councillors —Signing of By-law by Reeve—Resignation—Acceptance.

Appeal by J. W. Vandyke from order of TEETZEL, J., 7 O. W. R. 739, dismissing the appellants' motion to quash a local option by-law of the village corporation.

J. Haverson, K.C., for appellant.

W. E. Middleton and T. Urquhart, for the village corporation.

THE COURT (MULOCK, C.J., ANGLIN, J., CLUTE, J.), dismissed the appeal with costs.

JUNE 19TH, 1906.

DIVISIONAL COURT.

PASSMORE v. CITY OF HAMILTON.

Water and Watercourses—Municipal Corporation—Sewerage Works—Construction of Dam and Ditch—Overflow of Private Lands—Injury to Crops—Liability—Cause of Injury—Finding of Referee—Natural or Artificial Watercourse—Leave and License—Acquiescence—Evidence.

Appeal by plaintiff from order of BRITTON, J., 6 O. W. R. 847, setting aside report of S. F. Lazier, K.C., special referee, and directing that the action be dismissed with costs.

W. A. H. Duff, Hamilton, and J. Harrison, Hamilton, for plaintiff.

W. R. Riddell, K.C., for defendants.

The judgment of the Court (MEREDITH, C.J., MACLAREN, J.A., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—The appellant is the owner of the undivided four-fifths of a farm, consisting of parts of lots 13 and 14 in the 4th concession of Barton, and at the time the acts of defendants of which he complains were done was in occupation of the farm.

His complaint is that defendants wrougfully built on the easterly line of a road called "the Stone road," without the limit of their municipality, and within the township of Barton, a stone wall which had the effect of damming back the waters which before then flowed northerly in a natural watercourse on the east side of the Stone road, and were discharged over the brow of the mountain, and eventually found their way down its side into the city of Hamilton, and of forcing them eastward into a drain which defendants had constructed in a highway called Moore street, which runs at right angles to the Stone road, and from it easterly through lots 13 and 14; that this drain had not sufficient fall or capacity to carry away the waters which were diverted into it from the watercourse on the Stone road; that the result of this was that Moore street and the land adjacent to it were overflowed by these waters whenever a heavy fall

of rain occurred, as well as when the melting snow and ice were passing away in the spring of the year; and that defendants had also constructed an embankment on plaintiff's land on the boundary between it and Moore street immediately north of the drain, and several feet in height, which had the effect of preventing the waters carried eastward from flowing, as they otherwise would have done, northward in the natural depressions on plaintiff's land north of Moore street, and ultimately over the mountain, and of causing those waters to be penned back and to stand upon Moore street and the land of plaintiff south of that street, to a considerable depth and covering a large area.

In respect of these alleged wrongs plaintiff claims damages: (1) for injury done to his crops growing upon the part of his farm lying south of Moore street in . . . January, 1904, owing to its having been overflowed by the waters which were carried eastward by defendants' works and penned back by the embankment; and (2) for the trespass to his land by the making of the embankment on it, and other injuries to his land north of Moore street, alleged to have been caused by the embankment, as well as for the cost of removing the earth which had been thrown up to form it.

Plaintiff also claims an injunction to restrain defendants from continuing their works to his prejudice.

The action . . . was referred to Mr. Lazier for trial.

The referee found in favour of plaintiff, and assessed his damages at $548.12, but did not give effect to his claim for an injunction.

In reaching this conclusion, the referee found that the drain or ditch on the east side of the Stone road was a natural watercourse.

On appeal my brother Britton reached a different conclusion on this latter point; and he also decided that the injury to plaintiff's crops, of which he complains, was not proved to have been caused by the works of defendants; and he found that any case the defence of leave and license . . . was established.

I agree with the conclusion of my brother Britton that a natural watercourse was not proved to exist, and that, as plaintiff alleged in his pleading, what is now alleged to be

a natural watercourse is but "a deep ditch" for the carrying off of the surface water. Everything points to the conclusion that the ditch is an artificial one, probably made at the time the Stone road was built, for the drainage of the road and the carrying off of the surface water from the neighbouring lands, and to prevent the road from being flooded by these waters.

I am, however, unable to agree with the view of my learned brother that the injury to plaintiff's crops was not proved to have been caused by the works which defendants have made. There was, no doubt, some evidence that pointed to another cause for the damming back of the water which flooded the land in which the crops were, viz., the existence of banks of snow and ice, which themselves, it is said, formed a dam and prevented the waters from flowing northward, as well as caused them to be penned back and to lie on the land of plaintiff south of Moore street. There was, however, a very considerable body of evidence adduced to shew that it was not these banks of snow and ice which did the injury to plaintiff, and that it was caused by the works of defendants. The referee saw and heard the witnesses, and, upon conflicting testimony and after a view of the premises, found in favour of the contention supported by plaintiff and his witnesses, and that finding, I think, ought not to have been disturbed. An independent review of the evidence also leads me to the conclusion that plaintiff satisfied the onus which rested upon him of proving that the damage done to his crops was occasioned by the works of defendants.

I have the misfortune also to differ from the view of my brother Britton that leave and license to do the acts complained of was made out.

One is not left, in order to determine whether defendants had the leave and license of the predecessor in title of plaintiff to do the acts of which plaintiff is now complaining, to draw inferences from oral testimony, or even from acts of more or less doubtful import. The circumstances under which the Moore street drain was constructed, and the extent of the authority which the council of the township of Barton assumed to give to defendants to construct it, appear in the records of that body. The authority was given by resolution of 5th October, 1878. By that resolution it is provided that defendants shall construct the "ditch in a workmanlike manner, and keep it in such repair that the

water shall flow in a uniform descending grade of not less than 5 feet in the mile, in an eastwardly direction to the Hamilton and North-Western Railway," and that they shall fence the drain, and be responsible for all damages which private persons should sustain in consequence of the drain between the Stone road and the side line between lots 12 and 13 (the Moore street drain).

Defendants have wholly disregarded their undertaking as to the fall to be given to the drain, and, instead of one of 5 feet, have provided scarcely any fall in that part of the drain which passes through lots 13 and 14.

In order to enable defendants to carry out one of the terms of their agreement with the corporation of Barton, it was necessary for them to acquire a strip of land about 15 feet wide, lying south of Moore street as it then existed, and extending from east to west across lots 13 and 14. They accordingly bought this strip of land, and obtained a conveyance of it from Joseph Jardine and his wife and the adult children of Richard Passmore, deceased, who had been the owner, and they also obtained a bond from their grantors binding the latter for the conveyance by 4 of the children of Passmore who were minors, as they should respectively attain the age of 21, of their interests in the land conveyed.

The land of which plaintiff is now a four-fifths undivided owner, and this strip, had belonged, as I have said, to the father of plaintiff, who died on 14th August, 1872, having devised his real estate to his wife Elizabeth (who afterwards became the wife of Joseph Jardine) for life, and directed that it, with the exception of 10 acres, should after her death be equally divided among his surviving children.

The bond recites that defendants "have excavated a ditch along the northerly side of the road known as Moore street, on the top of the mountain, running in an easterly direction from the Hamilton and Port Dover stone road across lots 14 and 13 in the 4th concession of the township of Barton, and have obtained from the municipality of the township of Barton permission to excavate such ditch for the purpose of carrying off and diverting freshets of water from running over the mountain precipice and damaging property in the city of Hamilton, the corporation of the city of Hamilton agreeing to pay for a strip of land of equal width on the southerly side of the said road known as Moore street, said strip being 15 feet in width."

Putting the case on the highest ground possible for the respondents, reading these documents together, if any license is to be inferred from what was done or agreed to by the then owners, who were parties to the agreement with the respondents, it was, I think, clearly only a license to do what the resolution of the council of Barton had assumed to authorize defendants to do, and was, therefore, a license to construct a ditch in accordance with the terms of that resolution and subject to compensation being paid to property owners for any damages caused by it. I do not wish, however, to be understood as saying that, even if this were otherwise, the defence of leave and license would be made out. The license, if any, was by parol, and plaintiff was not a party to the giving of it, and it is at least open to question whether the license, if any, by the persons who joined in the bond was not revoked when they conveyed away their interests in the land.

My brother Britton seems also to have thought that plaintiff had acquiesced in what defendants have done, and that coupling his acquiescence with the leave that, as he found, had been given, plaintiff was not entitled to recover for the damage done to his crops in 1904, even if the parol license alone would not have had the effect of disentitling him to recover.

The tenant for life, it may be noticed here, did not die until 3rd January, 1896, and it is difficult to see how the fact that no action was brought in her lifetime should make against the claim which plaintiff has put forward in this action.

Nor do I understand how acquiescence short of such delay as will constitute a statutory bar to recovery, or as gives a prescriptive right, can affect the right of plaintiff to recover damages by what under the old practice would be an action at law. Acquiescence may be an answer to a claim for equitable relief, and full effect has been given to any acquiescence with which plaintiff may be chargeable by the refusal of the relief by injunction which he claimed, and for the reasons already given an agreement to grant the right claimed by defendants is not to be inferred from acquiescence in this case.

It was argued by Mr. Riddell that the waters which were brought down by the ditch on the Stone road were flood

waters, which defendants were entitled to prevent from flowing into the city of Hamilton, to the damage and injury of the streets there, and that for that purpose it was lawful for them to erect a dam in the Stone road, and that in "fighting the common enemy" they were not answerable for injuries to other property owners caused by the existence of the barricade which they had set up.

Assuming that such is the law, where the property owner erects a barricade on his own land, no authority was referred to to shew that he has the right to put up a barricade at a distance from his own land with the same immunity from the consequences of injury to others caused by it, and on principle it appears to me that no such right exists. If he may erect the barricade 100 yards away from his own property, why not a mile away, or a further distance? The barrier erected on his own land might injure only his immediate neighbour, while, if erected at the greater distance, might injure some one who would escape altogether if the barrier were placed on the owner's land.

However, it is not, in the view I take, necessary to pursue this inquiry. The entry on the land now owned by plaintiff and the construction of the embankment there and its subsequent maintenance were clearly wrongful acts of the defendants, unless they are in a position to justify what they have done under some authority derived from the owners which conferred that right, and none has been pleaded except the defence of leave and license, with which I have already dealt, and none has been proved.

The embankment and the drain on Moore street were the proximate causes of the flooding of plaintiff's land, and it was not argued, as indeed it could not well be, that these works were such as a land owner may lawfully erect to ward off flood waters, even if the right to bar them off be as wide as that claimed by defendants' counsel.

It may be that all the acts done by defendants, if they were done under the authority of the council of Barton, must stand in the same position as if they were the acts of that municipality, and, if that be so, defendants, I think, would be clearly without defence, because Barton, having brought the surface waters from the neighbouring lands into the road drain on the Stone road, clearly would have no right to dam them back and force them eastward, where they would otherwise not have gone, at all events in so large

a volume, and that by means of a drain quite insufficient to carry them away, nor would that municipality have had any right to construct the emankment on the land of plaintiff.

I have come to no conclusion on this point, but suggest it as possibly a formidable difficulty in the way of defendants succeeding, if the grounds upon which I am proceeding are untenable.

On the whole, I am of opinion that the appeal should be allowed with costs, the order of my brother Britton be reversed, and that plaintiff should have judgment against defendants for the damages as assessed by the referee, with costs.

MABEE, J. JUNE 19TH, 1906.

TRIAL.

CORBETT v. CORBETT.

Improvements—Mistake of Title—Improvements made after Demand of Possession—Delay in Bringing Action—Lien —Reference—Costs.

Action to recover possession of land and for mesne profits, and counterclaim by defendant, in the event of plaintiff succeeding, for the value of improvements made unaer a mistake of title.

M. J. Gorman, K.C., and A. E. Lussier, Ottawa, for plaintiff.

G. F. Henderson, Ottawa, for defendant.

MABEE, J.:—At the trial I disposed of the questions arising in this action, save as to what rights defendant had under the statute for improvements made under mistake of title. Defendant made the improvements in good faith. and in circumstances that entitled her to a reference to ascertain the amount, she supposing that after the death of the tenant for life the property would belong to her under her husband's will, and acting under this mistake is said to have expended moneys in improvements during the lifetime of May Corbett, who owned the life estate. I think she is entitled to have an account of these expenditures taken. . .

Re Smith's Trusts, 4 O. R. 518, is authority that repairs made by the tenant for life, however substantial and lasting, are not within the statute, but that is not this case; here defendant was living upon the property with the life tenant, and the expenditures are said to have been made by defendant, and not by the life tenant, and I think were made under the mistaken belief that the property either was hers or would be hers upon the death of May Corbett. The latter died in August, 1896, and during various years down to 1905 defendant and her daughter, who resided with her, have made permanent improvements.

On 18th February, 1898, a notice was served upon defendant at the instance of plaintiff to the effect that he demanded possession, and that unless such possession was given quietly, within a reasonable time, he would be compelled to issue a writ of ejectment without further notice. Defendant denied ever receiving such a notice, but it was shewn that on 19th February Mr. MacCraken, acting for defendant, wrote the following letter to plaintiff's solicitor: "I understand that you are acting for some person named James Corbett, who assumes to claim some property occupied by Mrs. Ellen Corbett on the corner of Dalhousie and Redpath streets. Will you kindly call and see me with reference to the matter or let me know when I can see you to ascertain how the claim is being made." Defendant is unable to read or write, and from defects of memory that were apparent during her examination I think she had entirely forgotten receiving the notice or consulting her solicitor about it. Nothing further was done, no information was supplied or particulars given of the claim, and the next defendant heard of the matter was a written demand for possession served upon her on 18th February, 1905, and during this 7 years the bulk of the improvements were made. The writ was issued on 16th September, 1905, and it does not appear that any expenditures were made between February and September, 1905.

Plaintiff contends that defendant cannot be allowed for expenditures made after and in the face of his notice of February, 1898. . . .

[O'Grady v. McCaffery, 2 O. R. 309, distinguished.]

The words of the statute (R. S. O. 1897 ch. 119, sec. 30) are: "In every case in which a person makes lasting

improvements on land under the belief that the land is his own . . . he shall be entitled to a lien," etc. . . . .

[Reference to Chandler v. Gibson, 2 O. L. R. 442.]

In my view, the receipt of this notice by defendant is an element in determining the bona fides of her belief, but does not necessarily debar her from compensation for improvements made since its service upon her. The notice states that unless she gives up possession within a "reasonable time" a writ will issue, and, doubtless, if the matter had been prosecuted and a writ issued within a "reasonable time," so that there was some connection between the notice and the action, the defendant would not have been entitled for improvements made after service upon her of the notice, as that might fairly be regarded as the beginning of the litigation; but here nearly 8 years elapsed before the writ was issued, and exactly 7 years between the service of the first and second demands. In view of the delay, and no explanation having been given to defendant or her solicitor of how plaintiff claimed title, I think it was not unreasonable for defendant to continue under the belief that the land was hers.

In this case a search in the registry office would not disclose any defect in defendant's title. The difficulty arose over the will of Martin Corbett, made in 1861, which provided that, subject to the life estate of his widow, the lands should go to the "eldest son of Michael Corbett." Defendant claimed under the will of her husband, believing him to be the eldest son of Michael. In this she appears to have been mistaken. In these circumstances, the notice of February, 1898, could in no way fairly be regarded as establishing that it was not reasonable for defendant to continue under the impression that the property was hers.

Some of the moneys expended were said to be those of a widowed daughter of defendant living with her. The facts are not sufficiently before me to dispose of the contention of plaintiff that defendant cannot claim for those moneys: the Master will consider that.

In the result, then, the reference will be to the Master at Ottawa to ascertain what sum defendant is entitled to for improvements upon the property in question, including the moneys expended by the daughter if the Master considers they were expended under circumstances entitling defendant

to claim for them. The Master will also take an account of the rents and profits chargeable against defendant. The latter will be declared entitled to a lien for the balance found in her favour, if any.

The costs of the reference, if the parties cannot agree upon the amounts, will be reserved until after the Master has made his report. There will be no costs of the action, success being divided, defendant denying plaintiff's title and plaintiff resisting the claim for compensation.

MABEE, J. JUNE 20TH, 1906.

TRIAL.

DE ROSIERS v. DE CALLES.

Vendor and Purchaser—Contract for Sale of Land—Mistake of Vendor as to Quantity—Specific Performance as to Part only of Land Contracted to be Sold.

Action for specific performance by defendant of a contract for the sale by defendant to plaintiff of certain land.

F. H. Chrysler, K.C., and N. G. Larmonth, Ottawa, for plaintiff.

N. A. Belcourt, K.C., for defendant.

MABEE, J.:—The agreement provides for the sale by defendant to plaintiff for $5,000 of "all that property belonging to the said A. D. De Calles situate on the north side of Daly avenue in the said city of Ottawa, being street No. 171 Daly avenue." Defendant owned lot No. 16 on the north side of Daly avenue and lot No. 16 on the south side of Besserer street. These lots abut each other, and extend from street to street, the house being on the Daly street lot, facing that street, and being No. 171. There is no apparent dividing line between these lots; the only entrance is from Daly avenue. Fences surround the entire property, and both lots are used with and form the land surrounding the house known as No. 171. Defendant owns no other property on the north side of Daly avenue. Defendant is willing to convey

to plaintiff the lot facing on Daly avenue with the house, contending that plaintiff is not entitled to the lot facing on Besserer street; that he did not intend selling the lot, and did not understand it to be included in the agreement; he alleges that he values the whole property at about $7,500; and another witness, Colonel Gordeau, thinks it worth $6,000 to $6,500.

The good faith of defendant was attacked by plaintiff's counsel, and it was argued that he intended the agreement to cover the whole property. Against the objection of defendant's counsel, I permitted evidence to be given shewing the conversation between the parties at the time the bargain was discussed, plaintiff and her husband both stating that at that time defendant told them the property he was asking $5,000 for was 66 feet by 200 (this is the size of the two lots), and it was argued that from that statement defendant must be taken to have fully understood what he was selling. Defendant denies making the statement, and a young lady, defendant's secretary, who was present most of the time, states that no such statement was made in her presence. Defendant says he was not taking much interest in the conversation, as he did not look upon plaintiff or her husband as likely to buy the property. After the interview plaintiff went to her solicitor and had the agreement prepared; it was taken to defendant and executed by him, being also executed by plaintiff.

I think both parties were and are acting in entire good faith; that plaintiff expected she was to get the whole property, and had no idea of offering $5,000 for the Daly avenue lot alone; and I think also that defendant was under the belief that he was selling the Daly avenue lot alone, and did not understand that the Besserer street lot was included in either the verbal negotiations or covered by the agreement he signed; if he made the statement regarding the size of the lot, it was not done with any intention of misleading plaintiff or her husband, and was not intended as a representation that he was offering both lots for the $5,000. Defendant, although a man of education and refinement, is not a man of business, and at the time that plaintiff thought he was selling the Besserer lot to her, one-half of it was under a verbal option to Colonel Gordeau, the owner of an adjoining residence, at $1,000 or $1,200.

Having regard to this and the value of the whole property, together with the statement of defendant, which I unhesitatingly accept, it is perfectly apparent that he was under a

mistake in connection with the whole bargain, and I do not think this view is in any way shaken by the subsequent correspondence between the parties. This mistake that defendant has made was in no way caused by plaintiff, and she is in no way to blame for the position of matters. Is she entitled, in these circumstances, to specific performance?

I think the evidence discloses the whole property to have been worth at the date of the contract at least $6,000; so if, upon the authorities, plaintiff is entitled to performance, she will have gained an advantage over defendant to at least the sum of $1,000. It is said that to entitle a plaintiff to specific performance the contract must not be hard or unconscionable; it must be free from mistake, for where there is mistake there is not that consent which is essential to a contract in equity: non videntur qui errant consentire: Fry, 4th ed., p. 329; Wilding v. Sanderson, [1897] 2 Ch. 534; . . Hickman v. Berens, [1895] 2 Ch. 638.

The Courts will not enforce specific performance against a defendant even where the mistake is purely due to the defendant, and the plaintiff is in no way to blame: Jones v. Rimmer, 14 Ch. D. at p. 592.

The result, therefore, is, that plaintiff cannot have this contract enforced against defendant in the manner claimed. If plaintiff desires, she may take a conveyance of the Daly avenue lot at $5,000; otherwise the action must be dismissed, and defendant must return to plaintiff the money paid to him, with interest from the time he received it. Each party will bear his and her own costs of the litigation.

JUNE 20TH, 1906.

DIVISIONAL COURT.

THOMAS v. CANADIAN PACIFIC R. W. CO.

BUSH v. CANADIAN PACIFIC R. W. CO.

Malicious Arrest and Prosecution — Arrest by Person Employed as Watchman by and Appointed Constable on Recommendation of Railway Company—Liability of Railway Company — Express or Implied Authority — Interference—Railway Act.

Appeals by plaintiffs from judgments of MORGAN, Jun. Co. C.J., withdrawing from the jury and dismissing actions

in the County Court of York for false arrest and malicious prosecution of plaintiffs.

The appeals were heard by MULOCK, C.J., BRITTON, J., MABEE, J.

W. T. J. Lee, for plaintiffs.

Shirley Denison, for defendants.

MULOCK, C.J.:— . . . One James Jardine was a watchman in the service of defendants, and, under the provisions of sec. 241 of the Railway Act, 1903, had apparently been appointed constable to act upon and along the line of defendants' railway. This section provides that such an appointment may be made on the application and recommendation of the railway company desiring it, and requires the person so appointed to take an oath or declaration in the form or to the effect therein set forth. . . . Jardine, on 29th April, 1904, made oath to his appointment, and on 2nd September, 1904, caused this affidavit to be filed in the office of the clerk of the peace for the county of York. It does not appear when he ceased to be such constable, and it may be assumed that he was still constable at the time of the arrest and prosecution in question.

There is evidence from which the jury might have concluded that Jardine was in defendants' employment as watchman on Sunday 11th December, 1904. On the evening of that day he met plaintiffs near the corner of King and Jordan streets, in Toronto, when he seized them both, saying "I want you," and marched them off to the police station. On arrival there, he handed them over to the sergeant in charge, saying, "Here's two more." Plaintiffs were detained in custody until the following Wednesday. On 12th December Jardine swore to an information charging plaintiffs with having broken into a freight car of defendants with the intent of stealing therefrom, in this information describing himself as "James Jardine, C. P. R. constable, of the city of Toronto." Plaintiffs were remanded until 16th December, when their cases were proceeded with. On this inquiry Jardine swore that he was a "C. P. R. constable, and that a freight car of the C. P. R." in Toronto had been broken into, but his evidence in no way connected plaintiffs with the matter, and they were thereupon discharged, and these

actions are brought because of Jardine's part in the arrest and prosecution in question.

In order to establish liability against defendants, it is not sufficient to shew merely that Jardine was in their employment, but plaintiffs must shew that he acted with defendants' authority, express or implied. . . .

[Reference to Roe v. Birkenhead and Lancashire R. W. Co., 7 Ex. 36.]

It was not attempted to be shewn that Jardine had any express authority, and the onus is upon plaintiffs to give evidence justifying the jury in finding that from the nature of his duties he had implied authority from defendants to make the arrest: Goff v. Great Northern R. W. Co., 3 E. & E. 674.

Jardine was at the same time watchman for defendants and constable appointed under the statute with such duties and powers as the Act conferred upon him.

This dual position involves a consideration of his implied authority in each capacity. As watchman, deriving authority from the company, it was his duty to protect the property on their premises which they had intrusted to his care, and he was thus clothed with implied authority from them to do such reasonable acts as he might, on the exigency of the moment, deem necessary in order to prevent injury to their property. If, therefore, he had found plaintiffs on the premises of defendants, endeavouring to steal the property placed by them under his charge, it would have been within the scope of his authority, as their servant, to arrest plaintiffs, if he deemed it advisable so to do, in order to perform his duty of watchman of preventing injury to the property in question. But such was the limit of his implied authority, and any of acts his in excess of such authority would not bind defendants: Poulton v. London and South-Western R. W. Co., L. R. 2 Q. B. 540; Lyden v. McGee, 16 O. R. 108; Abraham v. Deakin, [1891] 1 Q. B. 517; Bank of New South Wales v. Ousten, 4 App. Cas. 270. . . .

Here the arrest was made after the attempted robbery and in a public street some distance from defendants' premises, and on the following day Jardine swore to an information charging plaintiffs with having endeavoured to break into a freight car with intent to steal therefrom. There was no evidence that anything in fact had been stolen.

Defendants' property was safe before the arrest. Therefore, that act and the subsequent events complained of were not in the interests of defendants, either for the purpose of preventing a theft or of recovering stolen property; but were simply punitive in their character, in vindication of the law, an object in which defendants in common with the general public were interested.

Under the Railway Act defendants had no authority to do what Jardine had thus done, and it ought not to be inferred that defendants had conferred on him authority to do what they could not themselves lawfully do: Allan v. London and South-Western R. W. Co., L. R. 6 Q. B. 65; Jones v. Duck, The Times, 16th March, 1900.

I therefore think that, as watchman, Jardine had no implied authority from defendants either to arrest or prosecute plaintiffs. . . .

The next question is, whether, assuming that the arrest and prosecution were made by Jardine in his capacity of constable, the defendants are liable therefor. At their instance he was, under the provisions of sec. 241 of the Railway Act, appointed to act as constable on and along their railway.

Sub-section 2 empowers a person so appointed to "act as constable for the preservation of the peace and for the security of persons and property against unlawful acts on such railway and on any of the works belonging thereto . . . and in all places not more than a quarter of a mile distant from such railway, and shall have all such powers, protections, and privileges for the apprehending of offenders, as well by night as by day, and for doing all things for the prevention, discovery, and prosecution of offences, and for the keeping of the peace, which any constable duly appointed has within his constablewick."

Sub-section 2 enacts that "every such constable who is guilty of any neglect or breach of duty in his office of constable shall be liable on summary conviction . . to a penalty . . ."

There was no evidence that defendants gave any instructions or directions to Jardine in the discharge of his duties as constable at any time. On the contrary, they appear to have wholly abstained from interfering with him, leaving

him to perform, in accordance with his own judgment, the duties cast upon him by the statute.

Thus, Jardine having no express authority from defendants to make the arrest and lay the information, they would not be liable, unless an implication of authority would arise because of their having brought about his appointment as constable.

In Hart v. Bridgeport, 13 Blachford Cir. Ct. R. 294, Eastman v. Meredith, 36 N. H. 284, Maximilian v. New York, 62 N. Y. 160, Baker v. West Chicago Commissioners, 66 Ill. App. 507, and numerous other cases that have come before the Courts of the United States, the view has been expressed that the preservation of the peace, protection of property, prevention and punishment of crime, are public duties, in the discharge of which the whole community is interested, and which the State is bound to perform for the benefit of society generally, and that if, for convenience, the State delegates to municipalities the power of appointing peace officers, these latter, in the exercise or non-exercise of their police powers, are not servants or officers of the municipalities, which may have appointed them, but which have no control over them in the discharge of their duties.

For the like reason, such peace officers appointed on the recommendation, under the authority of competent legislation, of a railway company, must be regarded as officers of the law, and not as servants of the company.

Under the Act in question, whilst the railway company may apply to the authorities to appoint constables, and may in that connection make recommendations of persons for appointment, the company have no power to appoint . . .

The only interference allowed by the statute to the company is to dismiss "any such constable who is acting on such railway." . . .

Unless, therefore, the company should actively interfere by directing his movements, he is no more an agent of the company than he would be if at the request of a private citizen he were detailed by his superior officer to guard a man's private property.

There is no evidence to shew that in either of these cases defendants exercised any control over Jardine's action as

constable, and therefore, as held in O'Donnell v. Canada Foundry Co., 5 O. W. R. 216, they are not liable therefor.

In Dennison v. Canadian Pacific R. W. Co., 36 N. B. Reps. 263, Macleod, J., expressed the view that a railway company, simply because of procuring the appointment of a constable under the Act, did not thereby become responsible for his action as constable.

I think the appeal should be dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

MABEE, J., also concurred.

JUNE 20TH, 1906

DIVISIONAL COURT.

ROSSI v. OTTAWA ELECTRIC R. W. CO.

Street Railways—Injury to Passenger—Negligence in Operating Car—Contributory Negligence— Conflicting Evidence—Findings of Jury—Refusal of Court to Interfere.

Appeal by defendants from judgment of TEETZEL, J., at the trial, in favour of plaintiff, upon the findings of a jury, for $750, in an action for negligence.

H. S. Osler, K.C., for defendants.

A. E. Fripp, Ottawa, for plaintiff.

The judgment of the Court (MULOCK, C.J., BRITTON, J., MABEE, J.), was delivered by

MULOCK, C.J.:— . . . The case as shewn by plaintiff at the trial was, briefly, as follows:—On 3rd September, 1905, plaintiff desired to visit the hospital on Water street in Ottawa, and for that purpose became a passenger on one of defendants' cars, changing from this to another car at the intersection of Rideau and Sussex streets. This latter street, after proceeding northerly a short distance, crosses Water street. On plaintiff entering the car, she gave the

conductor to understand that she desired to alight at Water street. When the car was within about 10 feet of the south side of Water street, the conductor rang the bell once, which was the signal for it to stop when it reached the proper stopping place, being at the north or far side of Water street. Thereupon its speed slackened, when a young man got off the car, which was still in motion. Plaintiff, however, reached the conclusion that it was not going to stop, and motioned to the conductor, who was some seats behind her, giving him a signal. The conductor looked at her, but did nothing. Plaintiff then arose and pulled the bell cord once, causing one sound on the gong—the proper signal to the motorman to stop the car. The car was an open car; the seats running across it, and passengers alighted by stepping out from between the seats upon the step, which ran lengthwise with the car. Plaintiff, having thus rung the bell, looked towards the conductor, who was at the rear end of the car, and she says that, instead of stopping, the car suddenly started, with a jerk, to go faster, which threw her off the car upon the street, when she sustained the injuries on account of which this action is brought. She stated that at the time of her thus being thrown off, she was standing about a foot from the edge of the car, that is, not upon the step, but between the seats, and was waiting for the car to stop.

There was some conflict of evidence as to whether plaintiff rang the bell once or twice, but, in view of the findings of the jury, it does not appear to me material to deal with that phase of the evidence.

The questions submitted to the jury and the answers thereto are as follows:

"1. Was the defendant company guilty of any negligence? A. Yes.

"2. If yes, in what did such negligence consist? A.—By not stopping car in due time and motorman starting car too quick while almost stopped.

"3. If the defendant company was guilty of negligence, did such negligence cause the plaintiff's injury? A.—Yes.

"4. Was the plaintiff guilty of any negligence which caused her injury? A.—No.

"5. If yes, in what did such negligence consist? A.—(No answer).

"6. At what sum do you fix the damages which the plaintiff suffered? A.—$750." Jury 10 to 2.

The only negligence found by the jury which would afford the plaintiff a cause of action against defendants is that part of the answer to question 2, which finds defendants guilty of negligence because of the "motorman starting the car too quick while almost stopped." The earlier part of the answer, "by not stopping car in due time," could not be the proximate cause of the injury.

In view of plaintiff's evidence I do not see how the case could have been withdrawn from the jury. Plaintiff was by right a passenger on the car, and it was the duty of defendants to exercise reasonable care in its operation, so that she would not be exposed to unnecessary danger. Her evidence shews that the speed of the car was suddenly increased, and to such an extent as to throw her from the car to the street with great violence, causing serious injury. This testimony was evidence of a breach of duty on defendants' part, and the case was properly left to the jury.

Defendants endeavoured to prove that, instead of being thrown off by the unskilful management of the car, plaintiff jumped off whilst the car was in motion, and thereby by her own negligence caused the accident.

If the jury had accepted defendants' view of the occurrence, it could not be said that there was no evidence to support it, but they have not done so; on the contrary, they have rejected it, and have accepted the view presented by plaintiff that she was thrown from the car by reason of its negligent management. Where a case admits of two conflicting views, it is for the jury to consider all the facts and circumstances and to determine which is the proper inference to be drawn from the evidence: Dublin, Wicklow, and Wexford R. W. Co. v. Slattery, 3 App. Cas. 1155. They having done so here, I see no reason for disturbing their finding.

As to the amount of damages. The accident was a serious one. When brought into the hospital plaintiff was in a dangerous condition, and for some days thereafter her life was in danger. . . . At the trial her eye was still slightly bulged out. Her attending physician says: "She must have come down with an awful bang." She remained in the hospital for 4 weeks, and had been under medical treatment intermittently up to the time of the trial, which was 7

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months after the accident. She has not been in good health since, and her hearing in both ears is affected. Dr. Gardiner gave the opinion that it would not improve. He also considered that her sight had been permanently impaired. . . .

During the argument of the appeal I formed the impression that her injuries were slight, and that the amount of damages awarded by the jury might possibly be considered as somewhat high, but, having since carefully read the medical evidence at the trial, I find that the injury was of the serious nature above described, and am of opinion that $750 is a moderate verdict, and should not be disturbed.

The appeal should be dismissed with costs.

MABEE, J. JUNE 21ST, 1906.

TRIAL.

HOBIN v. CITY OF OTTAWA.

Highway—Non-repair—Injury to Person—Loose Iron Lid of Catch Basin in Sidewalk—Absence of Defect in Construction, Negligence, or Notice—Municipal Corporation—Failure of Action against.

Action for damages for personal injuries sustained by plaintiff from a fall upon a highway in the city of Ottawa, owing, as alleged, to the negligence of defendants in not keeping the highway in repair.

A. E. Fripp, Ottawa, for plaintiff.

T. McVeity, Ottawa, for defendants.

MABEE, J.:—The plaintiff, an elderly lady, met with a painful accident on the corner of Bank and Gladstone streets, in the city of Ottawa, on 17th November, 1905, for which she claims damages from the corporation. Placed in the concrete walk on the street corner, at its outside edge, level with the surface of the walk, is an iron frame about 2 feet square, having in its centre a large round iron top or lid weighing some 40 or 50 pounds, held in place by its own weight; in the face of the frame is an iron grating extending down to the level of the street pavement from 6

to 8 inches, to enable the water to reach a drain or sewer from the gutters upon Gladstone and Bank streets, meeting at that corner. The concrete walk is not constructed with a square or right angled corner, but has a circular front, and the face of the iron frame is also circular, following the radius or curve of the walk. This iron structure, firmly built into the walk and covering part of it, forms a catch basin, the lid or top being movable, so that the city employees may clean out any refuse that may obtain access to the basin through the iron grating at the front.

It is impossible to remove this heavy top or lid without some iron tool inserted in a small hole at one side; it was said a pick axe was generally used. The whole of this iron structure is most solid and endurable; it is practically in the same condition now as when originally placed in position; it is apparently in no way worn, and no defect of any kind was shewn to exist in it, or the adjacent portions of the cement walk.

Plaintiff had left a Bank street car, and was waiting at this corner for a Gladstone car, and, stepping back to let some children pass, one foot and leg went down through this catch basin—the top or lid tipping or tilting as the plaintiff stepped upon the edge. She was seriously hurt, unable to get out alone, and was assisted from this position and taken to her home by some gentlemen who were passing at the time. Plaintiff had seen the iron surface of the catch basin before stepping upon it; she says she did not think it was raised up on either side; a young lady who was with her says that, as far as she could see, the cover or top was in place, or "on all right." There was no snow on the walk.

The city engineer said there were a number of similar contrivances on the streets, which had been there prior to his taking the office some 7 years previously; that the top could be fastened or locked down, but that he did not regard it as necessary; and that the same kind of catch basins were used in other cities. The corporation foreman said the basins had not been cleaned out for two weeks prior to the accident. There was no evidence of any employee having been at work at the basin and omitting to put the top back in proper position, nor anything from which any such inference could be drawn. There was no notice of any kind to

the corporation, either express or implied, that the basin was out of order, or could become out of order, except that an employee might not place the top back in proper position. The engineer said a heavy dray or van turning the street corner might jar the top loose by hitting the outside or face of the frame, but there was no evidence that any such thing had ever happened at this or any other corner.

I do not think, in these circumstances, plaintiff can recover. There is no statutory non-repair, and the only ground upon which liability could exist would be original defective or negligent construction. I do not think there was negligence in the original construction simply because the top was not provided with some lock or bolt. An iron top of this weight might reasonably be expected to hold itself in position. A plan or system of carrying away the surface water from the pavements and walks is, in good faith, adopted, part of which is the use of this kind of basin . . .

Plaintiff then, to succeed, I think, must shew that there was negligence in the kind of catch basin selected, that it was necessarily dangerous, and in effect a trap for pedestrians to fall into. A remote possibility of an accident is not evidence of negligence. There is no evidence to shew how this top got out of place; it seems a mysterious and unaccountable accident, and the whole matter is left in conjecture. I do not think res ipsa loquitur applies.

If plaintiff is able to satisfy some other Court that she is entitled to hold defendants accountable for her misfortune, in order that the expense of another trial may be avoided I assess her damages at $500, and would of course give her the costs of the action.

In the meantime I feel compelled to dismiss the action, but without costs.

Reference may be had to the following cases: Thomas v. Annapolis, 28 N. S. Reps. 551; Cowley v. Newmarket Local Board, [1892] A. C. at p. 349; Geddes v. Bacon Reservoir, 3 App. Cas. 455; Bathurst v. MacPherson, 4 App. Cas. 256; White v. Hindley Local Board, L. R. 10 Q. B. 219; Rhinelander v. Lockport, 38 N. Y. St. Rep. 567; Johnston v. City of Toronto, 25 O. R. 312; Carr v. Northern Liberties, 35 Penn. 324.

JUNE 21ST, 1906.

DIVISIONAL COURT.

REX v. LAFORGE.

Municipal Corporations—By-law Fixing License Fees for Hawkers — Conviction — Motion to Quash — Attacking Validity of By-law—Prohibition under Guise of License —Finding of Magistrate—Review by Court—Objections to By-law upon Extrinsic Grounds—Repeal of Amending By-law—Effect of—Statute Authorizing By-law—Proviso —Negativing—Amendment of Conviction—Costs.

Motion by defendant to quash his conviction under by-law No. 757, sec. 374, of the town of Berlin, as amended by by-law 821, for a violation of such by-law "by going from place to place with an animal bearing or drawing or otherwise carrying goods, wares, and merchandise for sale, without a license therefor."

W. Proudfoot, K.C., for defendant.

J. E. Jones, for the informant.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

ANGLIN, J.:—Upon the argument we held that the by-law conforms to sub-sec. 14 of sec. 583 of the Municipal Act, 1903; and we amended the conviction, in accordance with the evidence, by inserting before the word "going," the words "carrying on the trade of a hawker and." So amended, the conviction is, in our opinion, warranted by the terms of the by-law.

Defendant, however, impugns the validity of the by-law, upon the ground that, under the guise of licensing, it prohibits the exercise of the calling or trade of hawking or peddling in the municipality, and that it was in fact passed for this purpose at the instance of the retail merchants of the town, and not for regulating or licensing persons following these callings.

While there is much evidence to support these views—and such might be our conclusions, were we trying defendant, or hearing an appeal from the conviction, or considering

a motion to quash this by-law—the finding of the magistrate who made the conviction "that the license fee is not prohibitory in its nature," based upon a consideration of the evidence, may not be impeached in this Court upon the ground that it is against the weight of evidence. Though it may be very slight, we cannot say that there is no evidence whatever to support a finding that the by-law is not prohibitive in character or effect, or that the magistrate was bound to hold the evidence before him sufficient to satisfy the burden, which lay upon defendant, of proving the by-law to be prohibitory.

But, in thus disposing of these objections to the validity of the by-law, we must not be understood to accede to the contention that it is open to a defendant, upon trial before a magistrate, or upon motion to quash a conviction, to attack the validity of the by-law under which he is prosecuted, on grounds such as these, not apparent upon the face of the by-law, and to be established, if at all, by extraneous evidence. Upon this question we find it unnecessary to express an opinion.

Defendant further objects that, although by-law No. 779 amended sec. 374 of by-law 757 by striking out the words "twenty, five, and four," being the words stating the amounts of the several license fees imposed, and substituting therefor the words "seventy-five, fifty, and fifty," respectively, by-law No. 821, which wholly repealed by-law 779, did not in terms restore to by-law 757 the words "twenty, five, and four," but merely directed the substitution of the words "seventy-five, fifty, and fifty" for the words "twenty, five, and four," respectively, as if those words were restored to the original by-law by the repeal of the amending by-law, which had removed them. In the absence of any legislation making applicable to by-laws the rule which, under sub-sec. 46 of sec. 8 of the Interpretation Act, restricts the effect of the repeal of repealing statutes, this contention cannot prevail: Maxwell on Interpretation of Statutes, 4th ed., p. 622.

The repeal of by-law 779 restored sec. 324 of by-law 757 to its original condition, and by-law 821 was therefore properly drawn, and effected the purpose for which it was intended.

The conviction does not, upon its face, negative the applicability of the proviso to sub-sec. 14 of sec. 582 of the Municipal Act, which exempts from the operation of that

sub-section a hawker selling to a retail dealer or selling goods manufactured in the province by himself or his employer. But the evidence sufficiently shews that defendant was not within this saving proviso, and we should, therefore, we think, yield to the request of counsel for the informant that the conviction be amended to meet this objection.

We cannot find that defendant has been, as he urged in his last objection, convicted of two separate and distinct offences. . . .

Motion dismissed. In view of the amendments required to support the conviction, there should be no costs of the motion.

MABEE, J. JUNE 22ND, 1906.

TRIAL.

RIDEAU CLUB v. CITY OF OTTAWA.

Assessment and Taxes — "Business Assessment" — Club — Members' or Non-proprietary Club — Liability to Assessment—4 Edw. VII. ch. 23, sec. 10 (O.)

Action to obtain a declaration that a certain "business assessment" imposed upon plaintiffs was illegal and void.

Travers Lewis, Ottawa, for plaintiffs.

Taylor McVeity, Ottawa, for defendants.

MABEE, J.:—The Assessment Act, 4 Edw. VII. ch. 23, sec. 10 (O.), provides, among other matters, as follows: "Irrespective of any assessment of land under this Act, every person occupying or using land in the municipality for the purpose of any business mentioned or described in this section shall be assessed for a sum to be called "business assessment," to be computed by reference to the assessed value of the land so occupied or used by him as follows . . . (e) Every person carrying on the business of what is known as . . . a club, in which meals or spirituous or fermented liquors are sold or furnished . . . for a sum equal to 50 per cent. of the said assessed value."

The real estate of the Rideau Club is assessed at $33,300, and, acting upon the foregoing section, the assessment officers of the city have assessed upon the club a further sum of $16,650 for "business assessment," and from that assessment the club appealed to the Court of Revision, and, that appeal being dismissed, a further appeal was had to the County Court Judge, who, upon objection being taken by the defendants, held, upon the authority of Toronto R. W. Co. v. City of Toronto, [1904] A. C. 809, that he had no jurisdiction to determine the validity of the asssessment.

The Rideau Club was incorporated by 29 Vict. ch. 98, which was amended by 52 Vict. ch. 99 (O.), and a further amendment was 59 Vict. ch. 122. By the original Act it is recited that a large number of persons therein named, together with others, have associated themselves for the establishment of a club "for social purposes." These and such other persons as should thereafter become members of the association were then declared to be a body politic and corporate in deed and in name, by the name of the Rideau Club, with power to purchase, acquire, hold, possess, etc., real estate, etc., for the purposes of the club. Provision was made for a constitution and rules regulating the affairs of the club. There is no capital stock; there being nothing to declare any dividends upon, none has ever been declared or paid; there was no intention from the formation of the club that there should be any division of earnings ever made. The secretary, the only witness called, says it is a social club, as distinguished from a proprietary club; that the members own and run it; no member has any proprietary interest that he can sell or assign; in the event of death nothing passes to his representatives; he has personal privileges only, which are regulated by the by-laws and rules in force from time to time; the membership is about 425, consisting of prominent business and professional men throughout Canada; it is maintained by entrance fees and annual subscriptions; meals and liquors are furnished to members and their guests; an annual loss is made in connection with the dining room; and the price charged for liquors is only intended to cover cost and breakages. The chief source of revenue for the up-keeping of the club is from the entrance and annual fees, which last year were about $21,000, and about $3,000 received by the club from tenants who have parts of the club property rented. . . .

I am of opinion that this assessment falls within sec. 10, and is a valid one.

There are several instances of incorporated clubs that have a capital stock upon which dividends might be earned or paid, and it was suggested that those are the clubs that are aimed at, where the stockholders are the proprietors, and there are individual rights and holdings. I do not see how this distinction can be made—the statute does not make it.

It was said that, to be taxable under this section, a club or its members must intend to make a profit or gain. . . . I do not think that this is necessarily so. The Standard Dictionary gives, among others, as the meaning of the word "business," an occupation that requires energy, time, and thought—any matter or affair, especially one requiring energy or diligence. Then synonyms are "affairs" or "concerns." Now, if the section read "every one who carries on the affairs of a club," I think it could not be argued that the case did not fall within the section in question; and to prevent the application of it, the word "business" must be held to mean something from which profit or gain is intended. I do not think this view is in conflict with Smith v. Anderson, 15 Ch. D. at p. 258, cited for plaintiffs.

This certainly is a members' club, as distinguished from a proprietary club, but, upon the wording of the section, why is one within it, and the other not? The English cases collected in Wertheimer's Club Law, 3rd ed., do not give much assistance.

In another view plaintiffs may be said to be "using land" for "carrying on the business of a club" for gain or profit, if the latter is necessary. They derive $3,000 a year from rentals; this must be from real estate not actually in use for club purposes, and represents an accumulated profit from the operations of the club, or money borrowed upon debentures or mortgages, both of which the club has power to do. . . .

[Reference to the statutes affecting the plaintiffs.]

May there not be a large "gain" to the members? It need not be in the form of dividends, but may be from the enjoyment of the club premises, access to the library, and a large number of current magazines, papers, etc., getting meals, according to the evidence, at less than cost; all this, it seems to me, is the conduct of the affairs or concerns of this club by its members, through the committee, from which

they reap material advantages and profits. One may think of instances in which some organization in the nature of a club would or might not fall within this section, but this is of no assistance in determining the case in hand.

I think, in either view of the matter, the action fails and must be dismissed with costs.

TEETZEL, J. JUNE 22ND, 1906.

TRIAL.

CARTWRIGHT v. CARTWRIGHT.

Life Insurance—Benefit of Wives and Children—Attempted Change of Beneficiary from Wife to Children—Application of Law Existing at Time of Attempt—Statute—Amendment Conferring Power to Change — Interference with Vested Right—Retroactivity—Estoppel.

Action for a declaration that certain insurance moneys paid into Court were the property of plaintiff and for payment thereof to plaintiff.

J. B. Clarke, K.C., and C. Swabey, for plaintiff.

C. A. Moss, for defendants.

TEETZEL, J.:—I think the rights of the parties must be determined by the state of the law on 16th December, 1886, the date when the assured attempted to change the beneficiary from his wife, the plaintiff, to his children, the defendants. Mingeaud v. Packer, 21 O. R. 267, followed by Neilson v. Trusts Corporation of Ontario, 24 O. R. 517, and Re Harrison, 31 O. R. 313, abundantly establishes that under the statute then in force (47 Vict. ch. 20) the first certificate became a trust in favour of plaintiff, and ceased, so long as she lived, to be under the control of her husband, except under the provisions of secs. 5 and 6 of that Act, which, however, did not authorize him to surrender the first certificate and replace it by the second. This could only be done with her consent, under 48 Vict. ch. 28, sec. 1, sub-sec. 3.

Mr. Moss argued with great ingenuity that the subsequent Act 59 Vict. ch. 45, sec. 2, now R. S. O. 1897 ch. 203,

sec. 160, which supersedes the effect of Mingeaud v. Packer, is declaratory, and that the effect of sub-sec. 5 of sec. 160 is to validate the second certificate and declaration in favour of the children as against the wife.

I am unable to adopt this construction.

Sub-section 5 reads as follows: "This section shall apply not only to any future contract of insurance and to any declaration made on or relating to any such contract, but also to any contract heretofore issued and declaration heretofore made."

Before 59 Vict. ch. 45, there was not, without consent of the wife who had been named beneficiary, any power "wholly to divest" the right acquired by her.

I think the proper construction to be given to sub-sec. 5 is that the powers given by sub-secs. 1 and 2 of sec. 160 may be exercised with reference to any contract heretofore issued or declaration heretofore made, and not that any such contract or declaration shall be valid notwithstanding that at the time it was issued or made it was not in accordance with existing law.

The construction contended for would result in an interference with the vested interests of plaintiff, and, unless the language of the legislature is very explicit, no such construction should be adopted.

While the section in question is in part retrospective, one should not give a larger retrospective power to it than one can plainly see the legislature intended; and I confess I can see no intention to do more than confer the additional power on the assured which may be thereafter exercised with reference not only to future but to past contracts and declarations. The assured did not avail himself of this power, and plaintiff's rights under the first policy have not been divested.

Plaintiff is not, in my opinion, estopped either by the agreement of separation or the invalid divorce. . . .

Judgment for plaintiff without costs.

JUNE 21ST, 1906.

DIVISIONAL COURT.

COLLINS v. BOBIER.

Contract—Division of Estate—Release—Action to Set aside—Delay—Statute of Limitations—Misrepresentations—Undue Influence—Improvidence—Failure of Proof.

Appeal by plaintiff from judgment of BOYD, C., dismissing without costs an action brought by William H. Collins against his sister, Mary Bobier, to set aside, as improvident and procured by undue influence, an agreement between them with respect to the division of their deceased father's estate and a certain release, and for other relief.

The appeal was heard by MULOCK, C.J., ANGLIN, J., CLUTE, J.

R. T. Harding, St. Mary's, for plaintiff.

A. Shaw, K.C., for defendant.

CLUTE, J.:—By will dated 23rd February, 1884, the testator gave the residue of his estate, real and personal, not reserved for the payment of debts, to his son William H. Collins, the plaintiff, and his daughter Mary Collins (now Mary Bobier), the defendant, to be equally divided between them. By codicil dated 13th October, 1884, the testator gave and bequeathed to another daughter, Matilda Draper, "the use during her lifetime of the brick cottage and grounds as now used and occupied by her, being part of lot 298 C. C. Town of Stratford."

The testator died on 24th December, 1887.

Probate was granted to the executors, James Wright and George Hunter, on 23rd January, 1888.

The value of the personalty was proven by the executors in the Surrogate Court at $3,305.75, and the real estate at $3,746, making a total of $7,051.75.

On 20th February, 1888, the real estate was divided between the plaintiff and defendant, and mutual conveyances were executed on that date, in which the executors joined. The deeds contained the recital that plaintiff "had agreed

to take as a part of his share of the estate" the parcel therein described at $1,500, and that defendant "has agreed to take as part of her share of the said estate" the parcels therein described at $1,500 and $500.

On 1st October, 1891, plaintiff and defendant executed a deed of release to the executors, which recites that, "whereas the parties of the first part some time ago agreed upon a division of the said estate, and certain conveyances were executed for the purpose of partly effectuating the intention of the said parties of the first part in that regard," and, after releasing the executors from all claims, contains the following: "And the said parties of the first part do hereby declare that they have respectively received the shares of the estate of the said Mark Collins which they are entitled to under and by virtue of the said will, and that the division of the said estate which they mutually agreed to between themselves is satisfactory to them."

In pursuance of the said release the executors conveyed to plaintiff and defendant the property on Wellington street, subject to the interest of Mary Draper as mentioned in the will.

On 24th July, 1894, plaintiff and defendant entered into a certain agreement under seal, which recites that they have settled and arranged all matters between them and the executors of the estate of their said late father, except certain personal property and securities in which they have a joint interest, and a certain piece of land described in a certain deed from said executors to them bearing date 29th June, 1892, and have arranged that the party of the second part retain all the personal property now held by them and pay to plaintiff $550 as follows, $150 on the date of the agreement and $100 a year without interest, the first of such payments of $100 to be made on 24th July, 1895." And the plaintiff, in consideration thereof, assigns said personal property to defendant, "thus leaving open between them, not separated into parts, said city lot only."

The plaintiff now asks the Court to declare that the release of 1st October, 1891, and the agreement of 4th July, 1894, are not binding upon the plaintiff and for administration of the estate, and for an injunction.

The ground upon which this relief is sought is that both the release and the agreement were procured by misrepresentation, undue influence, and untrue statements in refer-

ence to the will, and also on account of undue influence that the defendant exercised over the plaintiff, who, it is alleged, "is a man of weak intelligence and unable to manage his own affairs," and on the ground of improvidence and lack of independent advice.

The Chancellor finds that there has been no proof of any misrepresentation or untrue statements with reference to the will, or release; and the evidence, I think, fully supports this finding.

Plaintiff called three witnesses, viz., George Hunter, one of the executors, the plaintiff, and James Sherman, the assessor.

Hunter says there were three parcels of real estate, valued at $3,746. The homestead was valued at $1,500, and he does not remember the value placed on the other two. The probate papers were taken out by Mr. Smith to the satisfaction of both parties. After probate was granted it was agreed between the two that Mary Collins, the defendant, who had done her father's business, would look after the estate business and take all moneys. The executors handled no moneys of the estate. He does not remember the particulars of the deed of 28th February, 1888, and has no recollection of any division of the estate by the executors, and states that no complaint was ever made "about the way things had been done." "When we drew up the valuation and the moneys that was in the estate and how it had to be divided, they were perfectly satisfied there."

Plaintiff says defendant had the whole control of the business. He does not remember what amount he received altogether. He says he signed the release because his sister asked him to; that he had confidence in her; and that he signed the other deeds in the same way; that he has forgotten all about the different transactions. From first to last there is not one word in his evidence that would lead one to think there was misrepresentation or undue influence practised upon him.

James Sherman, assessor for 1888, is the only other witness called for plaintiff, and from the assessor's roll it appears that in that year the homestead was assessed at $1,600, and the Draper property, on which was the blacksmith shop, at $1,700, which was reduced by the Court of Revision of that year to $1,375. The part on which is the blacksmith shop is placed at $750.

Portions of defendant's examination were also put in by plaintiff. From this it appears that the solicitor who acted for the estate was engaged by defendant and plaintiff apparently on the suggestion of the doctor. The brother and sister lived on the homestead from December, 1887, until 1891. She says plaintiff wished to take the property on Wellington street, and for her to take the homestead, and it was decided by the executors and divided in that way. The executors had nothing further to do with the estate after the release was given. She says her brother agreed to the release, which was prepared by Mr. Shaw and signed in the presence of Dr. Devlin, and there was never any friction between them.

This closed plaintiff's case, and I can find no proof whatever of any misrepresentation or undue influence. The solicitor who prepared the deeds and release and the doctor who witnessed the final agreement were not called, and, in my opinion, it being a family settlement, plaintiff entirely failed to make out his case, had it stopped here.

For the defence, however, both the solicitor and the doctor were called. I will shortly refer to the defendant's evidence. She explains that the solicitor, Mr. Smith, was the son of Dr. Smith, the family doctor, and that is how he happened to be retained as solicitor for the estate.

The parties with the executors and Mr. Smith made the valuations put upon the property, and there was a partial division of the real estate according to these valuations, the brother preferring to take the corner lot. The result of this division would be that, according to the valuations put upon the lots as appears in the deeds, she would have an advantage of half the value of the Scanlan lot, viz., $250.

There was a loss on bad loans of $900. The loans were made, she says, with plaintiff's knowledge and consent, to relatives, to get a higher rate of interest. She says the matter was talked over between herself and brother, and he thought the settlement by which she was to receive $550 very satisfactory, and so the final settlement of 1894 was made. They had lived together for 4 years and a half after the father's death, and all the money of the estate had been used up, except the $150 which was paid to defendant at the time of settlement. She says she paid the expenses of the housekeeping, and paid for his clothes, etc., out of the estate moneys, the two living together.

Mr. Smith is called by defendant, and says he was the solicitor for the executors. He never knew defendant before. He does not recollect distinctly about the transaction of 1888 when the real estate was partly divided. His recollection is that the parties had agreed among themselves as to the division. "Q. Have you any doubt that at that time William Collins understood what he was doing? A. Well, I never allowed him to sign a document if I did not think he did. I certainly would not, and certainly when I knew him in my early days he was a man who would understand what he was doing."

"Q. And would understand the business? A. Oh, I would say so.

"Q. You had no doubt of it? A. No, I would not have let him sign the deed if I thought there was any doubt about it."

He says with reference to the release that, plaintiff being about to marry, the executors and he thought it right that there should be a division, and the parties came together, and the release was signed, but the further division of the estate was not made at the time, as neither the plaintiff nor the defendant thought it necessary.

Dr. Devlin, who has known the parties for the last 15 years, was called by defendant. He witnessed the agreement of 1894. He says they talked over matters between themselves, and came to a settlement, and that he "was impressed that William thoroughly understood it." He thinks a detailed statement of the estate was given at the time the bad loans were spoken of.—"They were both willing at the time it was lent, but the circumstances of it I could not give. I know they talked that over." "It was read and explained, to the best of my knowledge, read a couple of times."

All the witnesses say that after this length of time they remember very little about the different transactions material to the case.

There is nothing in the evidence from first to last that I can find shewing misrepresentation of any kind. During the time the parties lived together, the greater part of the personalty was spent or lost.

No evidence was given by plaintiff as to his mental condition, and he is put forward as a witness in his own behalf. His answers are intelligent, and afford no evidence, to my mind, that he did not understand what he was doing.

It is now sought to disturb this family settlement, when, from the nature of the case, it is impossible to say what are the real facts of the case, and 11 years after the settlement was made in the presence of a doctor who heard their affairs all talked over and agreed to, and who says he was impressed with the fact that plaintiff thoroughly understood it.

Plaintiff's counsel relied on Waters v. Donnelly, 9 O. R. 391; Sheard v. Laird, 15 O. R. 533; Disher v. Clarris, 25 O. R. 493. I do not think any of these cases apply here. . . .

I do not see any ground for intervening at this date to disturb what was done by the consent of all parties in the valuation put upon the lands.

Taking the personalty at $3,307, and deducting for bad loans $900, it leaves $2,407; out of this were paid the funeral and testamentary expenses . . . amounting to about $200—leaving $2,200. I think it quite probable that a very considerable portion of this money was expended in household expenses during the time plaintiff and defendant lived together. It was a common household, continued from the death of the father, and I have no doubt this arrangement was made to the entire satisfaction of plaintiff.

Defendant may have received more than her share of the estate — probably she did have some advantage — but without proof of fraud or undue influence I do not see how at this late date plaintiff can succeed. The parties most likely to have a knowledge of the transactions were called by the defendant, and, while they all say that they remember very little about it, they declare that plaintiff seemed to understand what he was doing and was satisfied with the disposition of the estate that was made.

After more than 10 years it is sought to undo all this.

When the personal estate was collected by defendant it was money had and received by defendant for plaintiff, and 6 years in respect of that would be a bar: Kirkpatrick v. Stevenson, 3 O. R. 361.

I think the judgment of the Chancellor is right and ought to be affirmed.

ANGLIN, J., gave reasons in writing for the same conclusion.

MULOCK, C.J., also concurred.

Appeal dismissed without costs.