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APPELLATE DIVISION.

FEBRUARY 16TH, 1914.

GUEST v. CITY OF HAMILTON.

Municipal Corporation — Expropriation of Land — By-law — Notice of Expropriation—Repealing By-law—Expropriation of Smaller Portion—New Notice—Liability for Damages for Passing of first By-law and Entry—Municipal Act, 1903, *sec.* 463—*Municipal Act*, 1913, *sec.* 347.

Appeal by the plaintiff from the judgment of MIDDLETON, J., ante 310.

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

J. L. Counsell, for the appellant.

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

THE COURT dismissed the appeal with costs, reserving to the appellant all rights outside of the claims in the action.

FEBRUARY 18TH, 1914.

DAVID DICK & SONS LIMITED v. STANDARD UNDERGROUND CABLE CO.

Contract—Breach—Delay—Damages—Counterclaim—Interest—Costs—Third Parties.

Appeal by the plaintiff from the judgment of MIDDLETON, J., ante 82.

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

J. L. Counsell, for the appellant.

D. L. McCarthy, K.C., for the defendants, the respondents.

H. A. Burbidge, for the third parties.

THE COURT varied the judgment by reducing the amount allowed on the counterclaim by $1,693; and, with this variation, dismissed the appeal with costs.

FEBRUARY 18TH, 1914.

*PEDLAR v. TORONTO POWER CO.

Fatal Accidents Act—Death of Young Child—Action by Parents—Reasonable Expectation of Pecuniary Benefit from Continuance of Life—Cause of Death—Negligence—"Allurement"—Invitation—Contributory Negligence.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., ante 319, 29 O.L.R. 527.

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

W. M. McClemont, for the appellants.

D. L. McCarthy, K.C., for the defendants, the respondents.

THE COURT dismissed the appeal with costs.

FEBRUARY 20TH, 1914.

HOLDEN v. RYAN.

Contempt of Court—Disobedience of Judgment—Injunction—Manner of Erecting Building — Structural Alterations — Building Restrictions—Plans—Undertaking—Costs.

Appeal by the plaintiff from the order of BRITTON, J., 4 O.W.N. 668, dismissing a motion by the plaintiff to commit the defendant for contempt of Court in disobedience of a judgment.

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

A. C. McMaster, for the appellant.

J. R. Roaf, for the defendant, the respondent.

The judgment of the Court was delivered by MULOCK, C.J. Ex.:—Upon the defendant carrying out the amended plans, as further amended by Mr. Currie, and in accordance with his report, and upon payment of the costs of this appeal and of the

*To be reported in the Ontario Law Reports.

motion below, including Mr. Currie's fees to date, this appeal is dismissed.

If the civic authorities require any changes from the said plans and report, and both parties assent to such changes, they may be carried out; but, if either party objects to any such changes, such objecting party may bring the question of such changes before this Court. The defendant, within one week, to file an undertaking to comply with the above-mentioned terms; otherwise this appeal is allowed with costs here and below.

FEBRUARY 20TH, 1914.

MILLER v. COUNTY OF WENTWORTH.

Highway—Nonrepair—Insufficiency of Guard-rail at Curve of Road—Dangerous Hill—Negligence of Municipal Corporation — Motor Vehicle — Injury and Death of Occupants — Knowledge of Danger—Taking Risk—Negligence of Persons Killed and Injured—Findings of Trial Judge—Dismissal of Action—Appeal.

Appeals by the plaintiffs in two actions from the judgment of MIDDLETON, J., ante 317.

The appeals were heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

W. S. McBrayne, for the plaintiffs.

J. L. Counsell, for the defendants.

THE COURT dismissed the appeals without costs.

HIGH COURT DIVISION.

BOYD, C. FEBRUARY 14TH, 1914.

*RICKEY v. CITY OF TORONTO.

*SCHOFIELD-HOLDEN MACHINE CO. v. CITY OF TORONTO.

Water and Watercourses—Lands Fronting on Ashbridge's Bay —Legal Right to Access by Water—"Riparian Rights"— Navigable Waters — Toronto Harbour — Title to Lands— Broken Front — History of Harbour — Statutes — British North America Act—Dominion Property—1 Geo. V. ch. 119, sec. 4 (O.)—Toronto Harbour Commissioners—1 & 2 Geo. V. ch. 26 (D.)—Boundary between Broken Front Lots and Marsh — Building to Water's Edge — Encroachment on Crown Property—Nuisance—Pollution of Water and Air— Injury to Individuals—Public Rights—Attorney-General— Injury to Business—City Corporation—Delay in Putting Street in Order after Laying of New Sewers—Reference— Damages—Costs.

Actions against the Corporation of the City of Toronto and the Toronto Harbour Commissioners for a declaration that the waters of Ashbridge's Bay are navigable waters, and that the plaintiffs are entitled to riparian rights as owners of land bordering on the bay, that the defendants the Corporation of the City of Toronto had created a nuisance in the bay, for an injunction, and other relief.

H. E. Irwin, K.C., and W. E. Raney, K.C., for the plaintiffs.

G. R. Geary, K.C., and C. M. Colquhoun, for the defendants the Corporation of the City of Toronto.

A. C. McMaster, for the defendants the Toronto Harbour Commissioners.

BOYD, C.:—These two actions were begun at the same time (the 30th November, 1912), and were tried together. They are brought mainly to vindicate the claim to "riparian rights" on Ashbridge's Bay as an arm of Lake Ontario and part of the harbour of Ontario.

The same question was litigated and an action begun on the 11th November, 1903, in the conduct which the then owners of

*To be reported in the Ontario Law Reports.

the land now owned by the plaintiffs were interested, and to the costs of which they contributed: Merritt v. City of Toronto (1911-12), 23 O.L.R. 365, 2 O.W.N. 817, 27 O.L.R. 1, 3 O.W.N. 1550. The broad distinction between that case and the present is, that Merritt's property abutted on almost dry marsh land, while the plaintiffs' lots have water in front. You can go by motor boat of light draught from Toronto Bay to the water front at Carlaw avenue, where the plaintiffs carry on business, and to the south one sees a body of water affording easy access to the harbour.

The question is, whether this present access by water is a well-founded legal right.

"Riparian," the word used in the pleadings, is not accurate, as it applies to a river and flowing water. There is no apt epithet expressive of this unique situation; and so, for the sake of convenience, "riparian" may be used. . . .

[Reference to the title to the lands; the meaning of "broken front;" historical account of the harbour of Toronto, with reference to maps, plans, surveys, reports, and other documents; reference to statutes 4 Wm. IV. ch. 23, secs. 2, 13; 3 Wm. IV. ch. 32, sec. 2; 13 & 14 Vict. ch. 60; 18 Vict. ch. 145.]

In 1867, the British North America Act declared that the public works and property of each Province enumerated in the 3rd schedule were to be the property of the Dominion of Canada: sec. 108. This schedule includes (item 2) "public harbours." The proprietary rights in this harbour, as defined by the statute of 1834, 4 Wm. IV. ch. 23, sec. 13, became vested in Her Majesty as sovereign head of the Dominion, subject to the license of occupation granted in 1847, and confirmed by statute in 1855, to the City of Toronto. This result as to ownership is the effect of the decision of the Privy Council in Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario Quebec and Nova Scotia, [1908] A.C. 700.

There is no peradventure as to what may be required for or comprised in "Toronto harbour," as a matter of evidence; because a competent Legislature had already designated and set apart this whole area as part of the harbour. The Imperial statute was passed on the 29th March, 1867; but it did not take effect in the creation of the Dominion till this was so declared by order in council and Royal proclamation of the 1st July, 1867. pursuant to sec. 3 of the Act.

Before this change the Province had conveyed that part of the harbour called "the Island" or "Peninsula" to the city by patent of the 26th June, 1867. Delay from various causes oc-

curred in the grant of the marsh area and water, which had been sanctioned by order in council prior to Confederation, and was at last carried out by the Province clothing, as far as it could, the city with proprietary rights by patent of the 18th May, 1880. . . .

By 1 Geo. V. ch. 119, sec. 4 (O.), the city was empowered to convey all the marsh and water property included in the Ontario patent of May, 1880, to a Board of Harbour Commissioners to be incorporated by the Dominion, and also to convey adjacent property. Thereupon the city conveyed the premises in question to the other defendants on the 29th December, 1911. By concurrent legislation of the Dominion, 1 & 2 Geo. V. ch. 26, the Board of Harbour Commissioners was constituted, in whom all the harbour property was to be vested, to take, hold, develope, and administer the area known as Ashbridge's Bay and other dock and water property owned by the city in the harbour, as defined by the Act, sec. 15. . . .

Having dealt with the original boundary between the broken front lots and the marsh, it is now in order to consider the more recent delimitation of boundary under which the parties now hold. . . .

From the earliest days of Toronto, a well-defined policy obtains as to the harbour and the marsh adjoining, namely, to preserve the harbour and utilise the marsh. The aim of the city was to obtain control of the marsh, primarily in the interests of the natural harbour, but, that being secured, for the benefit of the municipality. . . .

[Consideration of the evidence given at the trial and the local condition of the marsh.]

There can be no reasonable doubt that the same relative condition of the marsh existed at the time the patents were granted as existed in 1872, when one McKee first placed his icehouse at the water's edge. My conclusion from the evidence is, that this was an act of encroachment upon the property of the Crown and on the possessory rights of the city.

The boundary then, as at the date of the patents, was, I think, the edge of the marsh—not the water's edge. . . .

I have reached . . . the conclusion that the plaintiffs have no claim to riparian rights, and have no right of access by water to what may be the navigable water or may be made the navigable water in Ashbridge's Bay. . . .

As to the nuisance from the pollution of the water and the air by reason of the discharge of fœcal and other malodorous substances into Ashbridge's Bay, no case is made out for interfer-

ence on behalf of an individual. In these respects of water and air, no special and particular injury to the plaintiffs, at the date of the writ of summons, has been proved by the evidence. No doubt, pollution existed as a necessary result of the sewage discharged into the water; but the prejudicial effects were common to all the neighbourhood. Wherever the wind blew, in that direction nauseous smell was carried, and so as to the foul water. It was a public nuisance. Both causes of injury might have been proper matters for investigation by the Court at the instance of the Attorney-General or upon criminal prosecution. . . . The whole locality was infected in the same way. . . . The whole situation was one for redress, not by individual suit, but by some representative of the injured public. This legal aspect was referred to by me in a late case, Cairns v. Canada Refining and Smelting Co. (1913), 5 O.W.N. 423, in which I followed the practice laid down by Kindersley, V.-C., in Saltau v. De Held (1851), 2 Sim. N.S. 133, 142.

No doubt, the business of both plaintiffs was affected injuriously by the floating filth that got on the shore and clung to the sides of their boats; but that was damage resulting from the use they made of the water in order to reach Keating's Cut. . . The plaintiffs had no right to go over the city property to get to Keating's Cut, or to use Keating's Cut, except sub modo. . . .

I do not find in the evidence that the plaintiffs the Rickeys make any complaint or that they have sustained damage as to the landward side of their business.

A good collection and review of cases is in Stevenson v. Corporation of Glasgow, [1908] Sess. Cas. 1034. . . . .

As to the damages claimed by the plaintiffs the Schofield Company for interruption of their business on the landward side, I think that the city was justified, upon and after the ratepayers' vote for the money required, in going on with the work forthwith in respect of the new sewer system. . . . There is, however, some evidence to shew that the city failed to exercise reasonable expedition in completing the restoration of Carlaw avenue to a travellable condition alongside the Schofield place. The Schofield company appear to have sustained loss of business, probably for some months, on this account, for which they may recover in this action.

For other injuries, if any, arising from the method of construction, compensation must be sought by process of arbitration, and not by action.

It will be referred to the Master to assess damages for injury suffered by the plaintiffs the Schofield company for want

of proper access by land to their business premises by reason of delay in completing the restoration of Carlaw avenue after it had been opened alongside their premises for the purpose of putting in the concrete sewer in the year 1912 and prior to the 30th October, 1912. Costs of this part of the case and costs of the reference will be reserved till further directions.

As to the Harbour Commissioners, both actions are dismissed with costs.

The Schofield company's action against the city, so far as water rights are concerned, is dismissed with costs; so far as nuisance and sewage are concerned, it is dismissed without costs; so far as damage to business is concerned, costs reserved till after reference.

As to the city, the Rickeys' action concerning water rights is dismissed with costs; for the nuisance and sewage, dismissed without costs.

The earlier maps and plans referred to have been collected by the indefatigable zeal of John Ross Robertson, Esquire, in his valuable publications on the "Landmarks of Toronto," issued in five volumes or series, 1894-1908. . . .

MIDDLETON, J. FEBRUARY 16TH, 1914.

*HARRIS ABATTOIR CO. LIMITED v. MAYBEE & WILSON AND BOYD.

Bills and Notes—Cheque—Dishonour—Delay in Presentation—Unreasonableness—Banks and Banking—Bills of Exchange Act, secs. 101, 121, 126—*Liability of Endorser—Protest—Notice of Protest—Time for—Clearing-house.*

Action against the drawers and endorser of a bank cheque, which was dishonoured, to recover the amount of the cheque, it having been endorsed to and cashed by the plaintiffs.

R. J. McLaughlin, K.C., for the plaintiffs.
J. W. McCullough, for the defendant Boyd.
No one appeared for the defendants Maybee & Wilson.

MIDDLETON, J.:—Maybee & Wilson were commission dealers upon the Western Cattle Market, Toronto. Boyd, a drover, sold through them 13 cattle, receiving in settlement the cheque of

*To be reported in the Ontario Law Reports.

Messrs. Maybee & Wilson, dated the 29th September, 1913, in his favour, for $1,245.77. This cheque was drawn upon the market branch of the Standard Bank, corner of King and West Market streets, Toronto. On the afternoon of the same day, about two o'clock, Boyd, having closed some trifling transaction in the office of the Harris Abattoir Company, the plaintiffs, in the St. Lawrence Market, and desiring to pay them a small balance, offered to give them Maybee & Wilson's cheque, receiving their cheque for the difference. Both parties regarded Maybee & Wilson as in good credit; so this was done, and Boyd endorsed the cheque in question to the abattoir company. The same afternoon, the abattoir company deposited this cheque, with others, to their own credit in the market branch of the Canadian Bank of Commerce. Neither Boyd nor the abattoir company heard anything more concerning the cheque until the 6th October, when they learned that the cheque had been dishonoured.

In the meantime, the cheque had many adventures. On the morning after the deposit, the 30th September, the cheque was taken by the main office of the Canadian Bank of Commerce, who had in the meantime received it from the branch, and in the process of clearing it was handed to the main office of the Standard Bank. The clerk of this main office took exception to the endorsement of the cheque, and immediately returned it to the Bank of Commerce, saying that the endorsement was irregular. The Bank of Commerce, as usual in cases of this kind, gave the messenger its cheque, and returned the cheque in question to its market branch. The cheque reached the market branch the following day, the 1st October. On that day, the market branch stamped the cheque "prior endorsements guaranteed by the Canadian Bank of Commerce, market branch, Toronto. T. A. Chisholm, manager." (The cheque had already been endorsed in the ordinary way on passing through the clearing-house.) The cheque was then returned to the head office, and on the 2nd October it was again put through the clearing-house. Thus, owing to the supposed irregularity in the endorsement, two days had been lost, as the cheque was on the morning of the 2nd in precisely the same position as it had been on the morning of the 30th.

The main office of the Standard Bank apparently took a day to transmit it to the branch, as it is said that it did not reach the branch until the morning of the 3rd. On the 3rd, the teller of the Standard Bank, market branch, found that there were not sufficient funds to pay the cheque, but he retained it until the 4th (a Saturday), when he returned it to the main office of the

Bank of Commerce. The main office of the Bank of Commerce then mailed the cheque to its market branch, where it was received on Monday the 6th. The market branch on that day, early in the morning, telephoned the abattoir company advising of the dishonour, and the abattoir company wrote to Boyd advising him of the fate of the cheque. The cheque was also, on that day, protested at the instance of the abattoir company, notice of protest being mailed to Boyd at Toronto, and on the following day to him at Markham, although the protest erroneously states that both notices were mailed on the 6th.

There was no foundation for the supposition that the cheque was improperly endorsed. It was made payable to "Mr. Alex. Boyd," the endorsement being "Alex. Boyd." The supposed irregularity arose from the fact that the clerk in the main office of the Standard Bank thought that "Mr." was "Wm." He also took exception to the appearance of the word "Boyd" in the body of the cheque, although it is by no means badly written. If it is material, I find as a fact that there was no justification for the supposition of an irregularity in the endorsement of the cheque.

Under the Bills of Exchange Act, the obligation of the holder of a cheque to the endorser is to present for payment "within a reasonable time after its endorsement;" the reasonable time being a fact to be determined, having regard to the nature and usages of trade with reference to similar bills, and the facts of the particular case.

The facts of this case are that the cheque was endorsed in the office of the abattoir company, a few yards from the office of the Standard Bank, market branch, upon which it was drawn. It was deposited in the market branch of the Bank of Commerce, which is within a few yards of the other two offices. There was no physical difficulty in the way of the cheque being presented for payment at once. The abattoir company were guilty of no kind of delay, as they had the cheque deposited in the Bank of Commerce before the close of banking hours on the day they received it. The market branch of the Bank of Commerce was guilty of no delay, because it had the cheque at the main office of the Bank of Commerce before ten o'clock on the 30th September. The main office of the Bank of Commerce was guilty of no delay, as it had the cheque in the clearing-house on the morning of the 30th, so that it would reach the main office of the Standard Bank by half-past ten, or at the latest eleven o'clock, on that day. There was no reason why the cheque should not

have been presented to the market branch of the Standard Bank on that day; instead of which, it did not reach the market branch of the Standard Bank until the 3rd October, three days later. I do not think that this was "presentation within a reasonable time," nor do I think it was reasonable to take a day to send the cheque from the main office of the Standard Bank to its market branch.

This, however, is beside the real question, which is, whether, having regard to the matters that have to be considered under the statute, the cheque was in fact presented within a reasonable time after its endorsement; to which I have already given a negative answer.

There is also, I think, another defence to the action. The cheque was in fact dishonoured on the 3rd October; certainly it was dishonoured on the 4th; and yet it was not protested until the 6th. The statute requires that protest shall be made upon the day of dishonour (sec. 121). Notice of protest may be given the following day (sec. 126). Section 101, relating to notice of dishonour, does not operate to extend the time for protesting, although the contrary was assumed by counsel in the argument.

Nothing would be gained by any extensive review of the authorities, as, in my view, the case depends entirely upon the statute, and the question to be determined under it is one of fact. . . .

[Reference to Boddington v. Schlencker, 4 B. & Ad. 753; and to American cases bearing upon the matter collected in 13 L.R.A. at p. 43; 22 L.R.A. at p. 785; 59 L.R.A. at p. 934; 4 L.R.A. N.S. at p. 132; 10 L.R.A.N.S. at p. 1153.]

From these authorities it appears that, because a cheque is intended for payment and not for general circulation, the time allowed for presentation will not be enlarged by transfer or by successive transfers; and, although the usage of trade fully sanctioned the deposit by the endorsee of the cheque in his own bank, and the use of the machinery of the clearing-house for the presentation of the cheque, this does not justify an extension of time which is in fact unreasonable. There was no reason in this case why the cheque in question should not have been at the market branch of the Standard Bank on the 30th. I am not called upon to say that a delay to the 1st October would have been unreasonable. What I determine is that a failure to present until the 3rd was unreasonable.

The action fails, and must be dismissed with costs.

MIDDLETON, J. FEBRUARY 16TH, 1914.

BECK v. LANG.

Solicitor—Action for Bill of Costs—Husband and Wife—Action Brought in Name of Wife—Liability of Husband—Absence of Written Retainer—Credit Given to Wife—Finding of Fact.

Action to recover the amount of a bill of costs.

H. T. Beck, the plaintiff, in person.
A. B. Armstrong, for the defendant.

MIDDLETON, J.:—The action is upon a bill of costs incurred in an action of Lang v. Williams. It appears that some time prior to the transactions giving rise to this action, Mr. R. S. Lang was in financial difficulty. He had undertaken to carry on business in his wife's name. A declaration had been registered under the Partnership Act by which the wife was put forward as the sole member of the firm of R. S. Lang & Co. With the merits or demerits of this device it appears to me I am not concerned.

The situation was known to Mr. Beck. The attention was brought in the name of R. S. Lang & Co.; and, later on, some objection being taken to the right of an individual to sue in the firm name, Mrs. Lang was added in her own name as a plaintiff. The action appears to have been long drawn out and expensive. In the result it was unsuccessful, the counterclaim succeeding to an amount largely overtopping the claim of the plaintiff. This disaster put an end to the wife's trading. All the business was in fact carried on by the husband under a power of attorney from the wife. The healing hand of the Statute of Limitations has now removed Mr. Lang's financial troubles, and, if anything, he is a better financial mark than his wife. Mr. Beck now sues the husband; and the husband, no doubt with his wife's consent, takes the position that the liability is hers, not his.

There was no retainer in writing for that action, although there had been a retainer in writing, in respect of other actions in which Lang, and possibly his wife, were parties defendant. That was the personal retainer of Lang, and he contends that it refers to his business only. The question is, upon whose credit was this work done? If on the credit of the wife, there is no pretence that the husband guaranteed payment, quite apart from any defence that the Statute of Frauds would afford.

I cannot help thinking that the question of credit was not present to the mind of either party at the commencement of the litigation. Mr. Beck knew the husband's financial position, and knew the scheme that had been devised of his trading as agent for the wife; and I think that in truth credit was given to this trading company, and not to the husband individually. He was then known to be impecunious. The wife was supposed to be of some financial substance.

Primâ facie, when litigation is undertaken, it is undertaken upon the credit of the party in whose name and on whose behalf the litigation was instituted; that is, in this case, the wife. If it is sought to hold any one else liable, it is incumbent upon the solicitor to take adequate steps to protect himself by receiving a formal written retainer from the party to whom the solicitor intends to look for payment.

I have no doubt that in undertaking this expensive and troublesome litigation Mr. Beck expected the husband, as a man of honour and honesty, to see that his bill was paid; and, although I am unable to give judgment in Mr. Beck's favour, I still hope that the husband will feel sufficient moral obligation to do his best to make some reasonable payment for the services rendered.

At the hearing I did all I could to bring about a settlement, but the parties were so far apart that I was unable to accomplish anything.

The action fails, but it is certainly not a case in which costs should be awarded.

MIDDLETON, J. FEBRUARY 17TH, 1914.

RE WOLFENDEN AND VILLAGE OF GRIMSBY.

Municipal Corporation—Bonus in Aid of Industry Established elsewhere—Municipal Act, 1913, *sec.* 396(*c*)—*Branch Business to be Established in Bonusing Municipality—By-law—Order Quashing.*

Motion to quash a bonus by-law.

D'Arcy Martin, K.C., for the applicant.

G. Lynch-Staunton, K.C., for the village corporation, the respondents.

MIDDLETON, J.:—The by-law is a bonus by-law to aid the Pelee Island Wine and Vineyards Company Limited, a company which now has a plant at Pelee Island and a warehouse, etc., in Brantford.

Those who have heretofore grown grapes in the Pelee Island district are now growing tobacco, and the company now desires to establish a branch at Grimsby, near which place grapes are grown in abundance, and the intention is to remove part of the plant to that place.

Under the Municipal Act, 3 & 4 Geo. V. ch. 43, sec. 396 (*c*), a bonus may not be granted "in respect of a business established elsewhere in Ontario."

Mr. Lynch-Staunton argues that this only prevents a bonus being granted to aid an industry established in another municipality, and has no application to a bonus in aid of a branch business to be established in the bonusing municipality.

The wording of the statute has been changed to some extent since the decision in Re Village of Markham and Town of Aurora (1902), 3 O.L.R. 609; but it serves to indicate that the Legislature intended to prevent any municipality from granting any aid to an industry which is in fact established elsewhere. There is no exception made to the wide words of this prohibiting clause.

Mr. Lynch-Staunton's argument is met by what is said by Mr. Justice Osler in answer to a somewhat similar argument based on the words of the old statute (3 O.L.R. at p. 618): "No municipality ever had authority to grant a bonus in aid of an industry to be established outside its own limits, and the Legislature never meant to enact anything so absurd as to forbid them to do so."

In this view, I do not need to consider any of the other formidable objections to this by-law—it must be quashed with costs.

LENNOX, J. FEBRUARY 17TH, 1914.

HEDGE v. MORROW.

Title to Land—Conveyance by Husband and Attorney of Grantor —Power of Attorney — Forgery — Evidence — Death of Grantor—Presumption—Lapse of Time—Interest of Husband—Alleged Murder of Wife—Failure of Proof—Will of Grantor—Claim by Devisee—Revocation of Will by Marriage — Alternative Claim of Devisee as Heiress-at-law — Letters of Administration not Applied for — Interest of other Heirs-at-law.

Action for possession of the west half of lot A. in the 6th concession of the township of Roxborough, for a declaration of the plaintiff's ownership thereof, for damages for the unlawful cutting of wood and timber thereon, and for an account of rents and profits.

G. A. Stiles, for the plaintiff.
D. B. Maclennan, K.C., for the defendant.

LENNOX, J.:—Isabella Gilchrist was lawfully married to Leo H. Johnston, at Nome, in Alaska, on the 15th June, 1905. The plaintiff admits that a marriage was in fact duly solemnised between these parties, and that they afterwards lived together as man and wife, but contends that at the time of the ceremony Johnston could not contract a lawful marriage with Isabella Gilchrist, as he had previously married Cora Tosh, who was then and is still alive. It would be sufficient to say that there is no evidence of a previous marriage, but I may add that the evidence of Cora Tosh and Mr. Warren makes it clear that, whatever deception may have been practised upon this woman, she was not legally married to Johnston, and she does not now claim or think that she was.

The defendant obtained what purported to be a conveyance of the land in question from the owner (Isabella Gilchrist Johnston) in good faith, and paid for it the sum of $2,700 in cash, on the 8th December, 1906. At that time the defendant was in possession of the land as tenant, and has remained in possession as owner. He should not be disturbed until the plaintiff has clearly established her title. In consideration of the purchase, the rent for the part of the current year which had elapsed was abated; and I find that, with this abatement counted, the

$2,700 paid by the defendant was the full and fair value of the property at that time.

The plaintiff alleges that the power of attorney under which Leo H. Johnston purported to execute the deed to the defendant was a forgery, in so far as it refers to land in Canada, and that in any case it was revoked by the death of Isabella Gilchrist Johnston before the execution of the defendant's deed.

I think that there is evidence to support the allegation of forgery. I am not satisfied that the authorities referred to by the defendant's counsel meet this case. It is easy enough to argue that crime is not to be, and good faith is to be, presumed, where there is nothing more than the fact that an alteration appears upon the face of an instrument without explanation—but here there is, to my mind, the clearest evidence that at the time this power of attorney was executed and registered there was no provision in it for sale of land in Canada. It is argued that, if Mrs. Johnston subsequently authorised or consented to the additional clause, this would be sufficient in law. Possibly it would. The difficulty I have is with the question of fact. I cannot find any evidence that this was done with Mrs. Johnston's knowledge or approval. It is a question, however, upon which an appellate Court will have the same means of forming an opinion that I have. If I have come to a proper conclusion upon this point, the question of revocation by death is of no importance.

There is, perhaps, no evidence upon which I can find as a matter of fact that Isabella Gilchrist Johnston is dead. The statements attributed to Johnston after he was arrested may or may not have been made, and, if made, may or may not be true; but, in any event, they are not evidence of his wife's death at a particular time or of his wife's death at any time. Even with the assistance of the presumption which has arisen since, through lapse of time, and drawing any inference which I may be justified in drawing from the discovery of the remains of a human being in the fall of 1908, I cannot find that there is any evidence that Mrs. Johnston was dead when the deed was executed in December, 1906. Those who allege death at a particular time or before a specific event must prove it: In re Lewes' Trusts (1871), L.R. 6 Ch. 356; Phipson on Evidence, 4th ed., pp. 626-7; Taylor on Evidence, 9th ed., cases collected in pars. 198 to 202; Thompson's Trusts (1905), 39 Ir. L.T.J. 372.

But Mrs. Johnston's relatives were in the habit of writing her and receiving letters from her from time to time. How frequently was not stated. The last communication from Mrs.

Johnston, in her own handwriting, was in October, 1905. I have no faith in the letters written by the husband's "nephew" or the typewritten letters. It was not stated in evidence, that I remember, whether Mrs. Johnston was known to be rheumatic. There is no evidence of any person seeing Mrs. Johnston later than towards the end of 1905—but there is amazingly little evidence of any kind upon this point. For the purpose of dealing with her estate, seven years' unexplained absence and silence raises an inference of death of which the next of kin can avail themselves. Of course, in the absence of actual evidence of death, they must wait the full seven years. The inference may be always growing or ripening, but it is never ripe until every moment of the seven years has run. . . . No one can administer, then, until the seven years have gone by; the three years during which the personal representative retains the estate begin at the end of the seven years; and at the end of this period; subject to statutory exceptions, the estate vests in the heirs-at-law.

The plaintiff claims the property in question as devisee of her sister Mrs. Johnston, under a will dated and executed on the 15th December, 1897, and she commenced this action on the 14th March, 1912. At that time, her sister had been lost track of for something over six years. Leo H. Johnston had also disappeared, and had not been heard of since the autumn of 1908. The officials who are blameable for his escape from custody suggest, argue in fact, that he must be dead. There is no evidence that he is dead, and, of course, no presumption that he is dead has yet arisen. I have no idea that he committed suicide. . . . I am very far from sure that the last has been heard of Mr. Johnston. At all events, if either side desired to establish Johnston's death, and I am not sure that either party did, I have only to say that what has been shewn does not satisfy me that he is dead.

Coming back then to the plaintiff's claim as devisee. The will was revoked by the marriage of the testatrix on the 15th June, 1905, as above stated, and the plaintiff fails.

Alternatively, the plaintiff claims as an heiress-at-law and as assignee of four other heirs and heiress-at-law of her sister; and if, as I have found, the defendant cannot protect himself as a bonâ fide purchaser for value under the power of attorney, he claims that he is, at all events, entitled to hold the one-half share of the property which descended to Leo H. Johntson from his wife; and to this the plaintiff rejoins that Johnston did not inherit anything, because, as the plaintiff alleges, he murdered his wife.

I will dispose of this last point at once. There were a lot of newspaper clippings deposited with the exhibits. I am prepared to assume that they make out a clear case against somebody. I have not opened the envelopes containing them. Whether there is good ground for suspicion or not, I do not know; but this much is clear that there is no evidence whatever that Johnston murdered his wife—if in fact she is dead. On the contrary, a statement attributed to Johnston—most improperly insisted upon and elicited by the plaintiff's counsel, one of a long list of transgressions of this kind—if it were evidence at all, but it is not, would establish that Mrs. Johnston died by her own hand. . . Accepting and acting upon the presumption of Mrs. Johnston's death, I find and declare that when the property is administered in Canada the defendant will be entitled to be allowed one-half the value of the farm—to be increased or decreased by rent, improvements, and other items of account.

What is the position of the plaintiff? On the facts, as they are in evidence before me, she was not entitled to either probate or administration at the time she issued the writ. As it turns out, she was not entitled to a grant of probate at all, and the sealing in Ontario, if desired, will be annulled. It is true that, contrary to the view at one time entertained, it is sufficient now if administration is procured before the case comes on for trial: Trice v. Robinson (1888), 16 O.R. 433; and Dini v. Fauquier (1904), 8 O.L.R. 712, where the cases are discussed. And, when granted, the administration relates back to the date of the death: In the Goods of Pryse, [1904] P. 301. And where steps have been taken promptly, and administration applied for, the Court may even grant an injunction so as to preserve the property until administration can be obtained, as was done, at the instance of the sole heir-at-law, in Cassidy v. Foley, [1904] 2 I.R. 427. But here administration has not even been applied for, and the plaintiff has been fighting against the suggestion of intestacy. Two of the heirs-at-law are not before the Court, but this in itself is not a serious objection. The other questions are; and the plaintiff is not in a position to maintain this action.

But, on the other hand, further litigation should be avoided if possible. To dismiss the action is not going to benefit the defendant in the end. The parties should get together, and, with or without my assistance, come to a settlement. In the interest of all parties, a reference and judicial sale should be avoided.

If the two outstanding shares can be got in—the defendant's title confirmed—and he pays to the plaintiff and other parties entitled one-half the value of this part of the estate, the rent

and improvements being taken into account, that is what will yield the best net result for all parties concerned. If the two shares cannot be got in, the matter is not so simple; but, by administration, or in some other way, the difficulty can be met. If an adjustment along these lines should be come to, it would be a case of divided success, and the usual result should follow—each party should bear his own costs. Even if I should conclude to find for the plaintiff, in the action as it is, in proportion to the five-sevenths of one-half which she appears to represent—either with or without amendment or administration—the costs would be disposed of, I think, in about this way.

I have gone into this matter fully so that the parties may know just about what to expect. I will hear counsel upon any point in connection with a settlement or determine any question in that connection if they desire it; but it will be better still if the counsel and parties can settle it themselves.

If no arrangement is come to, the view I entertain at present is that the action should be dismissed; but I shall be glad to have it pointed out that this need not, or should not, be done. If I dismiss the action, unless the failure to settle is owing to the unreasonable attitude of the defendant, I shall probably dismiss it with costs. But, if I am compelled to do this in the end, it will be a loss to both the plaintiff and defendant.

MIDDLETON, J. FEBRUARY 17TH, 1914.

MAROTTA v. REYNOLDS.

Vendor and Purchaser—Agreement for Sale of Land—Time Made of Essence—Failure of Purchaser to Make Payment—Fault of Solicitor—Termination of Agreement by Notice from Vendor.

Action by the purchaser for specific performance of an agreement for the sale and purchase of land, dated the 28th February, 1913.

Gideon Grant, for the plaintiff.
J. C. MacBeth, for the defendant.

MIDDLETON, J.:—There is no dispute as to the sufficiency and validity of the contract. It provided for a purchase of the land

in question for $5,700; $100 paid as a deposit, the balance by the assumption of certain incumbrances and the giving of a second mortgage. The terms called for completion on the 1st April, 1913; time to be of the essence of the agreement.

The parties placed the matter in the hands of their respective solicitors for completion; Mr. McBrady acting for the purchaser. Mr. McBrady had in his hands, as the result of some previous transactions, more than sufficient money belonging to his client to complete this transaction; and his client instructed him to use this money for the carrying out of the contract. The vendor needed the money for the purpose of enabling him to carry out another contract entered into upon the faith of its receipt. This fact was known to Mr. McBrady and his client, not merely from oral notice, but by a letter sent by the vendor's solicitor, Mr. Wherry, on the 3rd April.

Matters proceeded in the ordinary way between the solicitors, conveyances being prepared and approved, title being searched, requisitions made and answered; and Mr. Wherry was ready to close by the time named. Mr. McBrady failing to close, the letter already referred to of the 3rd April was written, followed by others pressing for closing. In the meantime, the vendor met the purchaser and complained of the delay. Mr. McBrady had made the excuse that his client had not placed him in funds. On learning this, the purchaser stated, as the fact was, that Mr. McBrady had always been in funds, and that there was no possible reason why the transaction should not be closed.

Nevertheless, it seemed to be impossible to bring matters to a focus. The purchaser stated his plight to the vendor's solicitor. Communication was had with the Crown Attorney, and the result was that the money was supposed to be forthcoming. On the 17th April, a letter was sent to Mr. McBrady by Mr. Wherry, pointing out the delay; that Mr. McBrady had now stated that he was in funds; and appointing Saturday the 19th to close the transaction; otherwise the whole matter would be called off, and the deposit forfeited; and stating that no extension would be allowed. This letter was delivered at Mr. McBrady's office on the 18th.

The appointment for the 19th was not kept. On the 21st, McBrady came, said he was ready to close, and the vendor and his solicitor proceeded to close the transaction. It was then stated and believed that Mr. McBrady had the funds required for this purpose. The closing did not take place until after banking hours and until after the registry office was closed. Mr. McBrady then gave his cheque for the amount payable on the

adjustment, $845.43, and also paid some small correction in the computations, $1.60. The cheque was handed to Mr. Wherry, who also received the mortgage for the purchase-money. The deed was handed to Mr. McBrady. A memorandum was made embodying the understanding that the deed should not be registered until the cheque was marked on the 22nd, and that the cheque should not be used until the necessary search at the time of registration was made.

Upon returning to his office, Mr. Wherry communicated with the bank and learned that only a small amount stood to McBrady's credit. He then realised that he had been imprudent in parting with the deed for a cheque which he believed to be worthless; and, returning to McBrady's office, accused him of defrauding him by giving a cheque for which there were no funds, as McBrady knew. McBrady did not deny the condition of his bank account, and surrendered the deed, receiving back his cheque. In the confusion Mr. Wherry forgot to hand back the second mortgage, although he had taken it to McBrady's office for that purpose. Later on, he returned it.

On the 22nd, McBrady made no deposit in the bank, and his cheque still remained worthless, and would have been rejected had it been presented, instead of being returned. Mr. Wherry then (22nd April) wrote a letter definitely and finally stating that the transaction was at an end, and that nothing further would be done.

On the 23rd, McBrady wrote letters seeking to re-open the matter, which were ignored by Mr. Wherry; and on the same day McBrady procured the bank to mark his cheque as good. There is nothing to indicate that he ever communicated this fact to the vendor or his solicitor. There was some unsatisfactory evidence looking towards tender, but no tender was made. The cheque that was marked on the 23rd April was redeposited and cancelled on the 25th, so that it could not have been a factor in these supposed tenders. The purchaser apparently accepted the situation, and entered into negotiations looking for some salvage from the sale deposit. Unfortunately these came to nothing. Mr. McBrady registered the agreement and brought this action, which has dragged its weary way through the Courts ever since notwithstanding an order made on the 2nd June, 1913, to expedite the hearing.

It is argued that, although time was of the essence of the contract in the first place, the parties treated the contract as subsisting after the date fixed, and that the notice of the 17th, de-

livered on the 18th, to close on the 19th, was not reasonable. If necessary to determine this, I would hold that the notice was reasonable, having regard to the circumstances. The purchaser had said that the money was in his solicitor's hands. The solicitor said that he had the money. Nothing remained to be done except to make some minor adjustments and to hand over the papers. But, quite apart from this, when the parties met on the 21st, any default that had then been made was waived. The inadequacy of any notice theretofore given was also waived, and the parties then undertook to close the transaction. All this was predicated upon the statement that the money was there, ready to be paid over, and that there were funds for the cheque. The waiver by the vendor of the delays that had theretofore taken place was conditional upon the truth of this. The waiver by the purchaser of any further notice was unconditional, for he then accepted that time as being a reasonable time for the payment over of the money.

I am sorry for the unfortunate purchaser; but he is in law answerable for the conduct of his solicitor. The solicitor's fault is his fault; and I think that he cannot succeed in obtaining specific performance under the circumstances outlined, and that the action must be dismissed.

In case the matter is carried further, I think I should say that the plaintiff, Marotta, is an Italian, not too familiar with the English language. He impressed me with his entire honesty and his endeavour to tell the truth. Owing to his unfamiliarity with English, he made many slips in attempting to answer questions; but this is in no way against him, for any such errors were, I think, due to misunderstanding, and were not intentional. He is a victim, much to be pitied. The whole litigation was unwise, as the land had been sold to another purchaser at a $100 advance, which the vendor offered to divide with him to compensate in some way for the loss of the deposit, which had been retained by the agent, who claimed, and was, no doubt, entitled to, commission.

The case is one in which Mr. McBrady ought to pay the costs of both parties. If he does not see fit to do so, possibly Marotta may be able to compel him. In the meantime, I can see no course open but to dismiss the action with costs.

LATCHFORD, J. FEBRUARY 19TH, 1914.

RE DOYLE.

Will—Bequest towards Establishment and Maintenance of Temperance Hotel—Charitable Bequest—Conditions of Gift—Uncertainty of Fulfilment—Vagueness—Invalidity.

Motion by the executors of Michæl Patrick Doyle, deceased, for an order determining a question arising upon the will of the deceased as to the validity of a bequest of a fund of $1,000.

G. C. Campbell, for the executors.
J. A. Mowat, for the residuary devisees.
P. Kerwin, for the trustees of the fund.

LATCHFORD, J.:—The testator bequeathed $1,000 to his trustees and executors to be invested by them until a hotel where no intoxicating liquor is kept or sold should be established in the city of Guelph. Then the interest is to be added to the principal, and "the interest of the accumulated sum shall be paid towards the establishment and maintenance of said hotel so long as it remains a hotel where no intoxicating liquors are kept or sold, and no longer." If this hotel is closed, the fund is "to remain at interest and accumulate until a hotel as I have described herein shall be established. The said hotel shall in all respects be required to have accommodation for the public equal to requirements in this respect of a licensed hotel under the law. No payment of money shall be made by the said trustees for the purpose of the said hotel until the approval of the Roman Catholic Bishop of the Diocese of Hamilton shall first have been obtained."

It was conceded upon the argument that, if the purpose of the bequest was not generally charitable, the gift must fail as offending against the rule regarding perpetuities.

It seems to me that the promotion of temperance is more truly a charitable public purpose than many which have been so considered by the Courts, such as teaching shooting, encouraging good domestic servants, preventing cruelty to animals, or promoting vegetarianism. See Halsbury's Laws of England, vol. 4, p. 116, where cases in which many similar purposes were held charitable are cited.

A gift to promote the adoption by Parliament of legislation prohibiting the manufacture or sale of intoxicating liquor has

been held in our own Courts, in a considered judgment, to be for a lawful purpose of a public character proper to be ranked under the head of "charitable:" Farewell v. Farewell (1892), 22 O.R. 573.

But on another ground the gift fails. It is dependent upon conditions which may never be fulfilled—the establishment in Guelph of a hotel where no intoxicating liquor is kept or sold; the existence of a certain standard of accommodation in such a hotel, if established; and, finally, when these conditions are satisfied, the approval of any payment by the Bishop of Hamilton.

In In re Swain, [1905] 1 Ch. 669, one of the principles flowing from Chamberlayne v. Brockett (1872), L.R. 8 Ch. 206, is stated to be that a gift in trust for a charity, conditional upon a future or uncertain event, is subject to the same rules as an estate depending on its coming into existence upon a certain event.

Such a hotel as the testator had in mind may never be established in Guelph; and, even if it should be, the approval made a prerequisite to payment may not be given. The bequest is too vague and indefinite to be supported, and fails: In re Jarman's Estate (1878), 8 Ch.D. 584.

Costs out of the fund.

MEREDITH, C.J.C.P. FEBRUARY 20TH, 1914.

*RE LORD AND ELLIS.

Land Titles Act—Rectification of Register—Purchaser at Tax Sale—Registration as "Owner" after Long Delay—Intervening Rights of Purchaser for Value without Notice—Time for Registration—Application for Registration—Notice to Registered Owner—Failure to Appear—Evidence—Priorities—Direction for Trial of Issue—Costs—1 Geo. V. ch. 28, secs. 42, 66, 112, 113, 115, 116.

Application by Mrs. Lord and one Hay to rectify the register of a Land Titles office.

R. G. Agnew, for the applicants.

G. H. Sedgewick, for William Ellis and Richard Ellis, the respondents.

*To be reported in the Ontario Law Reports.

MEREDITH, C.J.C.P.:—The substantial question involved in this application is, whether the applicant is, or the respondents are, really entitled to the land in question; which land is, and has been since the year 1892, within and subject to the provisions of the Land Titles Act.

One Manton was, for a number of years, the registered owner; and he, in the year 1908, transferred the land to one Lord, who, in the same year, became the registered owner. This is proved to have been a transfer for valuable consideration. . . Later in the same year, 1908, Lord transferred the land to one Hay, who, also in the same year, became the registered owner. This also is proved . . . to have been a transfer for valuable consideration. In the year 1911, Hay deeded the land to the applicant Mrs. Lord, for, according to the evidence adduced, valuable consideration; and it is under this deed that the applicant Mrs. Lord seeks to be registered as owner of the land. Such registration is prevented by the registrations of the respondents, and of him through whom they acquired title, as owners, under the deeds through which the respondents claim title: and so the direct object of this application is to have such registrations removed from the register, on the ground that they were improperly made, to make the way clear for the registration of the applicant Mrs. Lord as owner.

In the year 1901, apparently, whilst Manton was the registered owner, the land was sold for taxes to one Phillip Ellis, who seems to have obtained his deed, under that sale, in October, 1902; but no attempt to become registered owner under it, or to give notice, in any manner, of it, seems to have been made until the month of May, 1911, between nine and ten years after the sale. In September, 1911, Ellis was registered as owner of the land, under this tax sale deed; and, in the next following month of November, he deeded the land to the respondents, William Ellis and Richard Ellis, trustees for the Bedford Park Company, and in the same month they were registered as owners under this deed; and it is by virtue of these transfers only that the respondents claim title.

In these circumstances, if the respondents were transferees for valuable consideration, the application would doubtless fail. . . . As far as the evidence has gone, however, it is proved that the respondents are not transferees for valuable consideration; that in fact the purchaser at the tax sale bought merely as their agent for them. And, therefore, for the present, I must deal with this case, in fact, as if the respondents are not transferees for valuable consideration, but are, substantially, in the same

position as if they were directly the purchasers of the land at the tax sale.

At the time when the tax sale registration, and the registration following it, were made, Hay was the registered owner; and he is a party to this application. . . .

There are two substantial questions for consideration now: (1) Was the registration of the tax sale purchaser as owner wrong? And, if so, (2) can it be rectified now, at the instance of the applicant Mrs. Lord? And it would be in better order to consider the second question first.

Each of these questions depends very much, if not altogether, upon sec. 66 of the Land Titles Act, 1 Geo. V. ch. 28, that part of the Act dealing especially with "sales for taxes." . . .

Notice of the application for registration of the purchaser at the tax sale as owner was sent by post to Hay; and I assume that the provisions of the Act in this respect were complied with; see sec. 112; but the notice never reached Hay; it was returned to the sender by the post-office officials unopened; and neither Hay, nor any one through whom he acquired title, nor any one claiming under him, ever had any actual notice of the application for such registration.

Whatever might be said if Hay had appeared upon that application, I cannot consider that, not having appeared upon it, nor indeed ever having had any kind of actual notice of it, he would have been forever precluded from asserting his rights as registered owner; I can but consider that, as long as no new rights were acquired under the provisions of the Act for valuable consideration, he might still have asserted his rights. The sixty-sixth section does not expressly or impliedly declare that he should not: why should it? Why should he, or she who claims through him, be worse off now, except on the question of costs, than he was when the registration had not been effected. Nor is there anywhere else in the Act anything so expressly or impliedly enacted. Section 113 of the Act, which cures the omission to send and the "non-receipt" of notices, cures them only for the benefit of a purchaser for valuable consideration when registered, and does not, I think, apply to a question of validity between the original parties.

Section 66 provides that the purchaser at the tax sale, after the requirements of the section have been complied with, shall be registered as owner of the land with an absolute title. But secs. 116 and 115 provide for the rectification of the register. Can any good reason be advanced for contending that sec. 116 does not apply to this case—for contending that a registration

under sec. 66 stands in any different position from a registration under any other part of the enactment? These sections are expressly made subject to rights acquired by registration under the Act; that I hold to mean such rights as a purchaser for valuable consideration from the registered owner would acquire. . . .

And so I proceed to consider the first and wider question: Was the registration of the tax sale purchaser as owner, in the face of the registrations between the time of the tax sale deed and the time of registration under it, right or wrong?

I can come to no other conclusion than that it was wrong. To give it validity would lead to this extraordinary state of affairs, opening wide a gate of injustice: namely, that there is no limit to the time in which a tax sale purchaser may come in and be registered, under his tax sale deed, as owner with an absolute title; and notwithstanding that in the meantime there may have been any number of transfers in good faith and for valuable consideration from registered owner to registered owner. So that, instead of the Act making titles simple, plain and sure, it would, in regard to sales for taxes, be but a snare to the wary and unwary alike. . . .

Mr. Agnew, for the applicants, relied upon the Assessment Act, R.S.O. 1897 ch. 224, sec. 204, and the Registry Act, ib. ch. 136, sec. 91, as each providing a limitation in time within which deeds of lands sold for taxes must be registered to preserve their priority. But I cannot consider either enactment applicable to registration under the Land Titles Act. . . .

For the respondents, it is then said that, there being no statutory limitation of the time within which a tax sale purchaser might be registered, he may be registered at any time, however remote, with the same effect as if immediately registered; but that by no means follows. There is no time limited by statute within which a purchaser for valuable consideration must be registered, yet if he delay he may be cut out. Why should it be different with a purchaser at a tax sale?

Section 66 of the Land Titles Act provides that a purchaser at a tax sale may, at any time after the sale, "lodge a caution against the transfer of the land." For what purpose? Assuredly to retain priority. . . .

Given the power to "lodge a caution" immediately after the tax sale purchase, there was no need to limit a specified time within which the deed must be registered to retain priority. . .

[Reference to sec. 42.]

So that, notwithstanding the tax sale and the deed under it,

both Lord and Hay became, under sec. 42, each absolute owner of the land, unless the tax sale purchaser's rights can be considered "municipal taxes," subject to which each took. But, as their transfers were made and registered long after the tax sale, and after the deed under it was made, that is out of the question. By and at the sale, the municipal taxes in respect of which the sale was made, were paid, and so ceased to be taxes: the right which the purchaser acquired was ownership of the land subject to redemption for a limited time after the sale; a right in respect of which he might and ought to have been entered upon the register in order to save it. It need hardly be added that, if the sale had been for taxes for which Hay was liable, the case would be a very different one.

Therefore, upon the evidence adduced on this application, relief should be given to the applicant Mrs. Lord: the register should be rectified by removing from it the registrations under which the respondents claim and have title; and the applicant Mrs. Lord should be registered as owner, under her deed from Hay: but there should be no order as to costs of this application, or of the rectification of the record: the respondents ordinarily should pay all costs in such a case as this; but, in all probability, there would have been no need for this application—the respondents would never have been registered as owners—if the application for registration under the tax sale deed had been opposed, and in all probability it would have been opposed, if Hay had taken the precaution to "furnish a place of address in Ontario," under the provisions of sec. 112 of the Land Titles Act. Though I cannot think that, in providing for notice by mail in sec. 66 of the Act, the Legislature had in mind any objections to registration under a tax sale deed such as that in question in this matter, because that cannot be a recurring one, but is one which it would be thought was plainly provided for in the Act, and one which, if not so made plain, could occur but once—once settled the settlement would be applicable to all cases alike; and though I cannot but think that that which was in the mind of the Legislature in providing for this notice was objection to the validity of the tax sale—an objection which could be made as well by one who was liable for the payment of the taxes in respect of which the sale took place as by any one else, and an objection so favoured at one time in some Courts, especially those of the neighbouring States, as to make the common saying of some years ago that "a tax sale is primâ facie bad," not wholly unjustifiable; though in these days, in these Courts, especially since the final decision in the case of Russell v. City of

Toronto, [1908] A.C. 493, it assuredly would be unjustifiable; yet—notwithstanding all these things—I cannot but think that the question of priority of registered owner or tax sale purchaser, might have been raised before the Master during the three months suspension of registration of the tax sale purchaser; and that, if so raised, the tax sale purchaser would not have been registered.

But the evidence adduced upon this application is meagre, and it may not have been known, when evidence might have been given, what facts would be material; therefore, if the respondents desire to controvert any of the essential facts which I have found against them, they may take an issue for the trial and determination of them in the usual manner, and in the meantime this application will stand adjourned sine die, with liberty to either party to bring it on again on two days' notice; and further directions and all questions of costs will be reserved for consideration after the determination of the issue.

MIDDLETON, J. FEBRUARY 21ST, 1914.

RE PALMER.

Will—Construction—Reference by Testatrix to Will of Husband—Bequest of "What he Gives me and for my Disposal"—Husband Dying Intestate—Wife's Bequest Inoperative as to Share of Husband's Property Coming to her upon his Intestacy—Intestacy of Wife as to that Share.

Motion for an order determining the proper construction of the will of Rhoda B. Palmer, deceased.

The motion was heard in the Weekly Court at Toronto on the 19th February, 1914.

J. H. Fraser, for the executors.

A. Monro Grier, K.C., for those opposed in interest.

A. C. McMaster, for the children of Josiah Packard.

MIDDLETON, J.:—The question arises with reference to the provision made in the first clause of the will for the family of the testatrix's brother Josiah. It is admitted that this clause operates to give to them the life insurance, the silver, and the contents of the house, save the articles particularly bequeathed. The point in question is as to some $13,000 to which the testatrix

became entitled upon the death of her husband, intestate. The clause is as follows: "This is my last will and testament. My husband made his will. Its contents I know not. What he gives me and for my disposal I wish to give to the family of my brother Josiah."

It is argued by Mr. Grier, I think correctly, that this clause cannot operate upon the property which the wife has taken upon her husband's intestacy. She thought that her husband had made a will. Under it she expected to take some benefit; what, she did not know. Whatever she took in this way from her husband she desired should go to the family of the brother, who, according to a later clause in the will, had shewn her greater kindness than she could ever repay.

I have little doubt that, if the testarix had supposed that her husband was going to die intestate, she would have given to Josiah or his family all that would in that event have come to her from her husband's estate. But the difficulty is, that I am not allowed to make a will for the testatrix, but merely to interpret the language which she used. In the construction of wills the Courts lean against intestacy; but where there is in fact an intestacy the law must take its course.

It is argued that the expression used here is capable of being so construed as to cover this property. I do not think that the language permits the construction suggested. When the testatrix used the expression "what he gives me and for my disposal," it can be fairly interpreted, having regard to the context, only as relating to that which the husband by his will gives to the wife and for her disposal. It would be juggling with words to read it as suggested by Mr. McMaster—"what he gives me by his will or leaves by intestacy for my disposal;" because it is quite plain that what the testatrix had in her mind was a will which she thought was in existence and which she expected would confer some property rights upon her. In Re Lenz, 2 O.W.N. 721, I discussed the principle which I think is here applicable, and I need not again refer to the cases.

One of the brothers has, I understand, conveyed his interest to the family of Josiah, thus recognising the real, as against the expressed, intention of his sister. Those entitled to the other third have not seen fit to adopt this course, and they are entitled as upon an intestacy so far as this fund is concerned.

Costs of all parties to be paid out of the estate.

BRITTON, J. FEBRUARY 21ST, 1914.

SKEANS v. HAMPTON.

Covenant—Restraint of Trade—Agreement between Master and Servant—Consideration—Servant Employed in Soliciting Orders for Master's Goods—Undertaking not to Engage in Similar Business within Limited Territory for Defined Period after Termination of Employment—Reasonableness—Validity—Breach—Injunction.

Action for an injunction to restrain the defendant from engaging in the business of selling teas or coffees within the city of Toronto, or within a radius of five miles adjacent thereto, for three years from the 27th December, 1913.

E. E. A. Du Vernet, K.C., and J. C. McRuer, for the plaintiff.
H. E. Irwin, K.C., for the defendant.

BRITTON, J.:—The plaintiff is a tea and coffee merchant, and his mode of doing business has been and is, to establish certain routes on or over which his agents canvass and take orders for and deliver tea and coffee.

Negotiations were entered upon for the employment by the plaintiff of the defendant to take charge of one or more of these routes, as the vendor of tea and coffee, at a salary of $10 a week.

The defendant understood that, preliminary to entering upon his regular work, he required to be instructed; and, following and pursuant to negotiations, he entered the plaintiff's employ and served for some days. Before putting the defendant upon and in charge of a regular route, the plaintiff submitted a contract which he required the defendant to sign.

The defendant is not an illiterate man but quite the reverse, and, if he did not read the contract, or understand it fully, it was his own fault. No compulsion was used, no threat, no concealment, no attempt to overreach. The only words indicating haste were those that the plaintiff used when the defendant was reading the contract, viz., "Hurry up, the horse is waiting at the door." That was true; the defendant signed, and his signature was witnessed by one of his fellow-workmen.

I must accept the recitals in this agreement as true, and known by the defendant to be so, and these recitals set out that practically what the defendant agreed to in the negotiations is what is evidenced by the writing.

I am of opinion that the giving the defendant employment, the acceptance by the defendant of employment, and his continuance therein, shew sufficient consideration for the contract.

The restraint for three years is not invalid; nor is the area, viz., within Toronto or in territory adjacent for five miles, unreasonable. The contract is not invalid by reason of the time or territorial restriction.

The contract, for the alleged breach of which this action is brought, is that the defendant will not engage in the business of selling teas or coffees in Toronto or within five miles, for the period of 3 years from the termination of his employment as mentioned, either directly or indirectly.

The termination of the defendant's employment with the plaintiff took place on the 27th December, 1913. There was no complaint of the defendant's dismissal. He accepted it, and does not now complain. The defendant seems not to have considered himself bound. He announced his intention of leaving the plaintiff's employ. He, as I think may be inferred, suggested that his brother-in-law should go into the tea and coffee business in Toronto; and the defendant told his brother-in-law where one of the plaintiff's waggons could be purchased, and it was purchased. The defendant did solicit orders from some of the plaintiff's customers. The plaintiff does not claim damages, but asks for the continuance of an interim injunction which was granted. The defendant, having broken his agreement, must be enjoined from further acts in breach of the agreement.

The judgment will be for the plaintiff for an order restraining the defendant from engaging in the business of selling teas or coffees in Toronto, or within a radius of five miles from Toronto, for the period of three years from the 27th December, 1913, as above-mentioned, either directly or indirectly.

An interesting case, in regard to unreasonable restraint of trade, is the case of Mills v. Dunham, [1891] 1 Ch. 576. Wicher v. Darling, 9 O.R. 311, is in point in the plaintiff's favour.

I sympathise with the defendant in his being unable, with this injunction upon him, to find work for the support of his family, but the agreement, the contents of which the defendant knew or ought to have known, must be obeyed.

The judgment will be with costs, if the plaintiff exacts costs. The defendant's claim for damages will be dismissed.

FALCONBRIDGE, C.J.K.B. FEBRUARY 21ST, 1914.

McNIVEN *v.* PIGOTT.

Vendor and Purchaser—Agreement for Sale of Land—Action by Purchaser for Rescission—Possession—Alterations in Property—Title to Land—Objection—Validity—Order under Vendors and Purchasers Act — Notice of Termination of Agreement—Costs.

Action by the purchasers for rescission of an agreement for the sale of lands in Hamilton.

W. S. McBrayne and W. M. Brandon, for the plaintiffs.
E. D. Armour, K.C., and F. Morison, for the defendant.

FALCONBRIDGE, C.J.K.B.:—The plaintiffs paid $7,000 on account of purchase-money, went into possession, and made alterations in the property, removed buildings, gates and fences, and cut down, or at least cut branches off, trees.

It is true that the agreement provides that the purchasers (plaintiffs) should have possession at once; but, in view of the fact that a firm of solicitors on the 5th May, then acting for both parties, certified that the defendant had a good title, subject only to a certain mortgage, and of the other surrounding circumstances, it seems to me that the purchasers are not in a position to ask that the contract be rescinded.

These solicitors' certificate of title would appear to be, in view of my brother Middleton's judgment in Pigott v. Bell, 5 O.W.N. 314, quite correct.

But the plaintiffs retained other solicitors, and an objection to the title was argued before me. I thought the purchasers might be exposed to a "reasonable probability of litigation," and so the title was classed as doubtful: Re Pigott and Kern, 4 O.W.N. 1580.

I am informed that no order was taken out on this judgment —and it is contended that it is competent for me now to hold, in view of subsequent events, that this objection is not a valid one. In Re Consolidated Gold Dredging and Power Co., 5 O.W.N. 346, no order has been issued on a judgment of mine in Chambers; and, it being represented to me that the facts had not been quite correctly placed before me, the matter was re-opened and again argued, and I dismissed the original application.

Be that as it may, I am of the opinion that the plaintiffs are not now in a position to maintain this action; and it must, therefore, be dismissed.

It is doubtful whether, in any aspect of the case, proper notices were given by the plaintiffs to rescind or put an end to the contract.

It will be seen from the above narrative of events that the plaintiffs, who bought for speculative purposes, have had a pretty hard time, and I make no order as to costs.

BRITTON, J., IN CHAMBERS. FEBRUARY 21ST, 1914.

TORONTO DEVELOPMENTS LIMITED v. KENNEDY.

Pleading—Statement of Defence—Motion to Strike out Portions —Embarrassment—Title to Land—Land Titles Act—Res Judicata.

Appeal by the defendant from an order of the Master in Chambers striking out paragraphs 2, 3, 4, and 5 of the statement of defence.

W. N. Tilley, for the defendant.
W. M. Douglas, K.C., for the plaintiffs.

BRITTON, J.:—The plaintiffs allege that they are the registered owners of lots 15 and 16 in registered division D for Toronto; and this action is brought against the defendant for trespass and for an injunction.

The defendant in the first paragraph of the statement of defence denies all the allegations in the statement of claim.

The objectionable paragraphs in the statement of defence are as follows:—

"2. If the plaintiffs, as alleged (which this defendant does not admit, but denies), are the registered owners of parcels 15 and 16 in register for section D in the office of Land Titles at Toronto, then this defendant says that they wrongfully and improperly obtained such title from one James H. Kennedy, the executor of the will of the late David Kennedy, who had no right, authority, or power to sell the lands in question in this action to the plaintiffs or to any other person, persons, or corporation.

"3. The defendant pleads, and the fact is, that in a certain action in the High Court of Justice, wherein David Kennedy is plaintiff, and the said James H. Kennedy, this defendant, and others are defendants, the Judicial Committee of the Privy Council dismissed the appeal of the said James H. Kennedy from the judgment of the Court of Appeal, which last-named Court declared that the clauses in the will of the said deceased David Kennedy, dealing with the residuary estate of the deceased, were void.

"4. Under the judgment of the Judicial Committee of the Privy Council aforesaid, to which the defendant craves leave to refer more particularly at the trial, it has been finally determined that the said David Kennedy died intestate as to his residuary estate, of which residuary estate the lands claimed by the plaintiffs are a part, if the deed given by the deceased David Kennedy in his lifetime to this defendant of the lands in question herein is set aside.

"5. The defendant submits, therefore, that the plaintiffs have no title to the lands in question, and never did have, and consequently cannot maintain this action."

The defendant by this pleading seeks to get behind the registered ownership, for reasons he gives in the pleading. Can he do this? I do not think that the Master in Chambers or a Judge on appeal from the Master in Chambers should be called upon to decide this question.

Then it is said that the defendant cannot any further litigate the question of ownership, registered or otherwise, because the matter is res judicata as between these parties. If that is established, the defendant will not succeed; but, again, it appears to me that the question of res judicata, in this matter of protracted and complicated litigation, ought not to be tried at this stage and merely upon objection to the pleadings. If I correctly understand the plaintiffs' contention, it is, that, upon proof of registered title, they are entitled to succeed, notwithstanding what is alleged by the defendant. I am not able to agree with that proposition.

The plaintiffs further contend that they now establish by judgments and papers produced that the matter is res judicata. That may be so, but so important a question should not be decided in an interlocutory proceeding.

The pleading is not embarrassing. It is not an attempt improperly to retry a matter already tried. It is, as it appears to me, properly enough raised by way of defence to the plain-

tiffs' action. The plaintiffs object to the substance of the defence sought to be raised by these paragraphs, not that they state evidence which it is proposed to adduce in support of these facts. In that respect the paragraphs are to a slight extent objectionable, but that is not the substantial part of this motion.

I think the appeal should be allowed and these paragraphs restored to the statement of defence. Costs to be costs in the cause.

MURPHY v. LAMPHIER—MEREDITH, C.J.C.P., IN CHAMBERS—FEB. 18.

Trial—Jury—Validity of Will—Motion in Chambers Referred to Trial Judge—Venue.]—This action, concerning the validity of a will, was transferred from a Surrogate Court to the Supreme Court of Ontario. The defendants asked for an order for a trial by jury. The learned Chief Justice said that they were not entitled to that: it was a matter in the discretion of the Court; and the onus was upon those who sought it, to shew that it would be the better mode of trial. There was not sufficient evidence now upon which the question could be best determined: the trial Judge would be in a better position to deal with it; and there was no good reason for saying that any one would be prejudiced by the delay necessary in having it considered by him. The parties failed to get down to trial, as was expected, at the Toronto non-jury sittings last week; and there was no certainty when they could now get the case tried there; in addition to that, it was not a York but a Peel case. The provision of the order made on transferring the case into this Court, that the case should be tried at the York assizes, was an error. The venue should be changed back to Peel: the action set down for trial there at the next ensuing assizes; and this motion enlarged to be brought on before the presiding Judge at such assizes, at the earliest moment possible after the opening: costs of the motion to be costs in the action. A. Ogden, for the defendants. J. G. O'Donoghue, for the executors.

RE WESTACOTT—BRITTON, J., IN CHAMBERS—FEB. 20.

Infants—Custody—Rights of Father—Custody of Young Children—Habeas Corpus—Welfare of Children.]—An application by George W. Westacott, father of Marshall Edgar Westa-

cott and Edward Westacott, infants, for a writ of habeas corpus directed to Margaret M. Westacott, mother of the infants, and for an order that the custody of the children be given to the applicant. Notice of the application was served upon the mother, and she appeared by counsel. An affidavit made by Hannah Webb, mother of Margaret Westacott, was filed in opposition to the application. She stated that on one occasion, not very long ago, the applicant denied the paternity of the younger child, and doubted being the father of the older one. Marshall was about the age of six years, and Edward only seven months old. An affidavit was also made by the mother. The learned Judge said that it appeared beyond reasonable doubt that the children were being well cared for. Marshall was with the deponent Mrs. Webb, and Edward was in charge of a Mrs. Paddon, at Milton. The mother was paying Mrs. Paddon. It must be assumed that the children were so far in the custody of their mother that the mother could get and produce them in Court if so ordered, so that the custody of them could be given to the father; but, considering the welfare of the children, the age of each, and having regard to the facts leading to the separation of the parents, the order asked for should not be made. Motion dismissed. No costs. R. H. Holmes, for the applicant. Macdonald (Owens & Proudfoot), for the respondent.

LAVECK v. CAMPBELLFORD LAKE ONTARIO AND WESTERN R.W. CO. —FALCONBRIDGE, C.J.K.B.—FEB. 20.

Damages — Railway — Injury to Property by Blasting— Agreement as to Compensation—Admission of Liability at Trial —Quantum of Damages—Item for Disturbance by Fear of Injury—Costs—County Court Scale—Certificate to Prevent Set-off.]—Two actions tried without a jury at Napanee. The first was brought by Thomas H. Laveck against the railway company. The plaintiff was the owner of lands through which the defendants were constructing a line of railway. He complained of trespass by the defendants and damage caused by their excavating rock on their right of way by blasting, whereby quantities of rock had been thrown over upon a portion of the plaintiff's lands, causing damage to the farm and buildings. The learned Chief Justice finds in favour of the plaintiff, and assesses his damages thus: (1) damages to buildings and contents, $150; (2) damages for injury to lands, loss of crop, etc., $50; (3) damages for loss, inconvenience, fear and anxiety to the plaintiff

and his family in flying from his house to escape injury from blasts, $200: total, $400.—The plaintiff had given the defendants an option to purchase the right of way at a certain price, "to include compensation for all damage which may be sustained by reason of the exercise upon the said lands of the railway company's powers;" and counsel for the defendants contended that this disentitled the plaintiff to claim damages, or at any rate to claim damages under the third head above; but the learned Chief Justice said that this contention was not in consonance with the admission of the defendants' counsel, at the opening of the case, that there was liability, and that it was a mere question of how much should be allowed as damages.—The second action was brought by Patrick Laveck against the railway company for a similar claim. Patrick was not the owner of his lot, but a tenant of Mrs. Carroll, who gave an option to the defendant company in the same terms as that given by Thomas H. Laveck; but there was no option given by Patrick with reference to his own possession and tenancy. The learned Chief Justice assessed Patrick's damages thus: in respect of crops and fences injured, loss of access to creek, and other items, $50; for loss, etc., in flying from the house as in Thomas's case, $200: total, $250.—Judgment for the plaintiff Thomas for $400, and for the plaintiff Patrick for $250, in each case with County Court costs and with no set-off to the defendants. The learned Chief Justice adds that, if he had come to the conclusion that the last item of damage in each case was not recoverable, he would not have certified to prevent a set-off of costs. E. G. Porter, K.C., and J. English, for the plaintiffs. W. S. Herrington, K.C., for the defendants.

PECK v. LEMAIRE—MIDDLETON, J., IN CHAMBERS—FEB. 21.

Summary Judgment—Rule 57—Specially Endorsed Writ of Summons—Affidavit under Rule 56—Amount Claimed Disputed—Failure to Give Details—Onus—Account.]—Appeal by the defendant from a summary judgment, under Rule 57, granted by the Master in Chambers. The defendant entered an appearance, under Rule 50, disputing the amount of the plaintiff's claim. The writ of summons being specially endorsed, it was necessary for the defendant to file the affidavit required by Rule 56. The affidavit filed, the learned Judge said, was most

unsatisfactory, as it admitted the debt to some extent, but disputed the amount claimed, stating that money paid had not been credited. No amounts were stated or details given. The plaintiff had then the option of proceeding to have an account taken under Rule 50 or of moving for judgment under Rule 57. He chose the latter course. The Master gave judgment on this defective affidavit for the amount of the claim, rightly holding that the onus was on the defendant to state specifically the sums which he claimed to have paid, but which had not been credited. An opportunity was then given the defendant to supplement his material, but the defendant refused to give the information desired. On this appeal the like opportunity was given, but no further affidavit was forthcoming. Appeal dismissed with costs. R. W. Hart, for the defendant. M. H. Ludwig, K.C., for the plaintiff.

TORONTO DEVELOPMENTS LIMITED v. KENNEDY (No. 2)—BRITTON, J., IN CHAMBERS—FEB. 21.

Stay of Proceedings—Another Action for same Cause Pending—Application for Stay—Refusal.]—Motion by the defendant to stay proceedings in this action until another action, in which the same questions are involved, should be determined. The learned Judge said that, if the trial in one action was expedited, it would be in the interest of all parties to have an agreement by which all the questions in dispute should be determined in that action; but he could not make the order asked for, upon the material before him. Motion dismissed. Costs to the successful party in this action. W. N. Tilley, for the defendant. W. M. Douglas, K.C., for the plaintiffs.