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C.A.

WOODRUFF v. ECLIPSE OFFICE FURNITURE CO.

Patent of Invention — License — Royalties — Assignment of License by Licensees—Formation of Company—Contract to Pay Royalties—Statute of Frauds—Consideration.

Appeal by defendants from judgment of MEREDITH, C.J. (2 O. W. R. 691) in favour of plaintiff upon the findings of a jury.

Action to recover royalties at the rate of $300 per annum for the years 1896, 1897, 1898, and 1899, alleged to be due by defendants for the manufacture and sale by them, under license from plaintiff, of a certain patented invention belonging to him.

A. W. Fraser, K.C., for appellants.

F. A. Magee, Ottawa, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

OSLER, J.A.—There are two questions to be considered. The first is, whether any agreement was proved by which defendants were bound to pay the royalties for the whole or any part of the period sued for. The trial Judge held that there was, and gave judgment for plaintiff for the full amount for the years 1896, 1897, 1898, inclusive, and for the year 1899 up to the date of the expiration of the patent, at the rate of 10 cents for each article manufactured during that year $234, or in all $1,134. The other question is, whether the articles in respect of which the royalties are claimed were in fact manufactured under the license, or whether as

to some or all of such articles plaintiff's remedy must be sought in an action for the infringement of his patent. This question, from the view taken of plaintiff's rights in other respects, was not dealt with in the Court below.

It appeared that plaintiff was the patentee of an invention called an "improvement in document and letter files or holders." His patent was granted 15th November, 1889, and remained in force, having been once renewed, for ten years thereafter.

He granted to one Gottwalls, on 5th March, 1891, a license to manufacture in Canada during the life of the patent, for a royalty of 10 cents per holder, and a minimum, for the first year commencing 1st April, 1891, of $200; for the second year, of $300; for the third year, of $400; and for the fourth year, commencing 1st April, 1895, and each following year, of $500. The terms of this agreement need not be further referred to, as, except as to dates and amounts, they were the same as those of the agreement next to be mentioned, which appears to have been substituted for it. Gottwalls soon afterwards entered into partnership with one Orme under the name of Gottwalls & Co., and by an agreement under seal bearing date 1st June, 1892, between plaintiff and Gottwalls & Co., duly executed by both parties, plaintiff granted to the firm a license to make, use, and sell in the Dominion of Canada, document and letter files or holders containing the said improvement, upon the following conditions and considerations, viz., the licensees to pay, and they thereby agreed to pay, a royalty of 10 cents for each file or box holder containing the improvement, made by them in Canada or elsewhere; 2nd, the licensees to render a monthly statement of all files sold, and to pay the royalty within thirty days thereafter; 3rd, during the first year, beginning on 1st June, 1892, the royalty not to be less than $200, even though less than 2,000 files sold, and during the second and following years the royalty not to be less than $300; 4th, the license not to be transferable without consent of the licensor; 5th, the agreement, contract, and license were to last for the lifetime of the patent and any extension or renewals thereof, provided that the foregoing conditions were observed and kept, unless their observance was expressly waived by plaintiff.

By indenture dated 10th February, 1893, reciting the agreement of 1st June, 1892, Orme, with the assent of plaintiff, assigned to Edward Seybold and James Gibson his interest in the said invention and all his right, title, and interest in and to the said agreement, and the covenants and

conditions therein contained, and all benefit and advantage to arise therefrom.

Articles bearing the last mentioned date were entered into between Seybold, Gibson, and Gottwalls, who formed a partnership under the name of "Eclipse Office Furniture Co." for carrying on the business of the manufacturing of files, cabinets, and office furniture. Part of the assets brought into the partnership consisted of the last mentioned license to manufacture plaintiff's invention, though there was no formal consent by plaintiff to its transfer to the new firm, nor any express reference to it in the articles.

On 24th April, 1893, a new partnership was formed under the same name, by the introduction of other partners, with a view to the incorporation of a joint stock company, the manufacturing of the invention being continued by them as if under the license.

In June, 1893, the partners procured such a company to be incorporated under the name of the "Eclipse Office Furniture Company, Limited," for the purpose, inter alia, of acquiring and extending the business theretofore carried on by the partnership. Letters patent incorporating defendants were issued on 28th June, 1893. And on 12th July, 1893, the partners, by deed, assigned and transferred to the company their interest in the business, together with "all the goods, chattels, patents of invention, goodwill, book debts, and other assets of the business."

There was no formal assent by plaintiff to this transfer or to that of 24th April, 1893, but the manufacture of the invention was continued, and it is to be assumed that plaintiff was satisfied, in some way, for his royalties up to the end of the year 1893. In March, 1894, Seybold, the general manager of the company, went to Washington, D.C., and proposed to plaintiff a new agreement and license, which was afterwards provisionally executed by the company and forwarded to plaintiff for acceptance.

This instrument, while in other respects like that of June, 1892, provided that "during the first year beginning on 1st January, 1894, the royalty so paid by the parties of the second part to the party of the first part should not be less than $200, even though less than 2,000 file boxes or holders be so sold by the parties of the second part, and during the second and following years the royalty so paid should not be less than $300," and it was further provided, differing in this respect also from the former agreement, that defendants should be at liberty to terminate the agreement at any time previous to the expiration of the patent, upon giving 12 months' notice in writing of their intention

to do so. The agreement was sent to plaintiff for his consideration, and on 19th April he wrote defendants that he was advised by his attorney that "it would not be best for him to change the existing agreement."

On 31st January, 1895, defendants wrote plaintiff at Washington, enclosing a cheque for $84.30, "being amount in full for royalty on document files for the year ending 31st December, 1894. We may say that the number of files sold has not amounted to 2,000, but under our agreement we pay you the full $200, and have already remitted the following amounts;" specifying three sums amounting to $115.70, as from 1st January to 7th November, 1894.

On 2nd February, 1895, plaintiff wrote acknowledging receipt of the cheque as "balance due in full for royalty on document holder for the year ending 31st December, 1894."

On 4th February, 1896, plaintiff wrote defendants thus: "Not hearing from you, I write to inquire when I may expect account and settlement of royalties for the year 1895 as per our agreement."

Defendants replied on 22nd February, 1896, with a statement shewing $252.36 balance due plaintiff for the year 1895, after debiting themselves with royalty of $300 for that year, and enclosing cash on account $152.36. On 24th March, 1896, they remitted cheque for $100, "being balance of account to 31st December, 1895." This was the last payment made by defendants, though they continued to manufacture the invention.

In the autumn of 1896 Seybold was again in Washington, where he had an interview with plaintiff, and told him that from that time forward the company would not pay any more royalties. The reason assigned for taking this stand was that the patent had, as defendants contended, become invalid in consequence of certain irregular importations, made as it would seem at the request of defendants themselves. They also demanded a return of the sum overpaid in the year 1896, but refused to pay anything more unless plaintiff would, as they said, come to terms, that is, accept ten cents royalty on each article then and afterwards manufactured, and repay the excess which had been overpaid qua minimum.

A letter of 17th November, 1896, from defendants to plaintiff was proved, referring to their recent interview in Washington, confirming the stand then taken by defendants, and asking for refund of the amount overpaid, "less what we are willing to keep to your credit on account of any future business." This letter does not seem to have been answered, but on 13th January, 1897, plaintiff wrote to de-

fendants a letter in which, after referring to the original agreement with Gottwalls, and the subsequent reduction of the minimum royalty payable, he says, "please inform me if you desire to continue the manufacture of my file-holders under the existing contract, which gives you exclusive right or license as covered by the Canadian patent." The letter was not answered, and nothing further passed between the parties until shortly before the commencement of the action. Defendants continued to manufacture, but rendered no accounts and paid nothing more on account of royalties.

The first difficulty in this case is to ascertain what was the real contract, if any, between the parties. When defendants came into existence as a corporation in June, 1893, there was no privity of contract between them and plaintiff in respect of the agreements of June, 1892, and 7th February, 1893, between Gottwalls and Gottwalls & Co. and plaintiff. They were not bound thereby, nor could they, by any dealings or contracts between themselves and their predecessors, adopt or ratify those agreements. The facts may shew that a new contract has been made between the parties directly upon similar or different terms, and it is to evidence of this kind that plaintiff must appeal.

It can hardly be necessary now to cite authority for this, but the cases of Howard v. Patent Ivory Manufacturing Co., 38 Ch. D. 156, and Bagot Pneumatic Tire Co. v. Clipper Pneumatic Tire Co., [1902] 1 Ch. 146, mentioned in the judgment below, and the recent case of Natal Land and Colonization Co. v. Pauline Colliery Syndicate, [1904] A. C. 120, may be referred to.

Defendants may have thought that they were bound by the contract of 1892, and their attempt to get plaintiff to accept the contract proposed by them in March, 1894, perhaps shews that they were under that impression. But they were not in fact liable upon it, and had done nothing from which a new contract in similar terms could be inferred. They had at most paid, as may be inferred, all that plaintiff claimed under it up to the end of 1893. But this would not bind them to pay royalties under it in the future, even though, under the mistaken assumption that they held plaintiff's license, they continued to manufacture his invention until March, 1894, when an agreement between plaintiff and defendants was proposed by the latter. Up to this time there was, as I have said, no agreement between the parties, though both of them perhaps, and certainly plaintiff, supposed that the agreement of 1892 was binding on them. Plaintiff refused to enter into the new agreement, but he

permitted defendants, and may be said to have licensed them by parol, to continue to manufacture his invention.

But on what terms? Not on those of the agreement of 1892, although at first sight it might seem so from his letter of 19th April, 1892. Something must have passed between the parties, the effect of which we can only infer from the correspondence of January-February, 1895. The agreement of 1892 is not referred to, but quite a different one, namely, an agreement to pay $200 for royalties for the year ending 31st December, 1894. Not only is the yearly period for which the royalty was paid different, viz., January to December, instead of June to May, but the amount payable and paid for that year was $200, instead of $300, as it would have been under the agreement of 1892. Again, for the year 1895 we find in the subsequent correspondence the admission that the royalty was $300, and was payable at the end of December, instead of May. There is no evidence that the agreement between the parties, whatever it may have been, or whenever made, contained any other terms than a license or permission on plaintiff's part to manufacture his invention, and on defendants' part to pay him the sums of $200 and $300 as royalties for the years 1894 and 1895 respectively. These terms so far correspond with those in the proposed agreement of 1894, but plaintiff's express and continued repudiation of that agreement precludes us from holding that it was ever accepted so as to make the other terms therein expressed binding on defendants. The Chief Justice does not so hold, and indeed upon the evidence could not have done so, but treats the words "our agreement" in the letter of 31st January, 1895, as referring to an agreement with plaintiff that he should receive from defendants the same royalties that Gottwalls & Co. had agreed to pay under the agreement of 1892. As I have pointed out, this can hardly be so, the periods for which they were paid, and, as to the first year at all events, the amount, being different.

As, however, defendants continued in 1896 and subsequent years to manufacture plaintiff's invention, I think that, if nothing else had occurred, it would not be difficult to infer that this was done under his continued license and assent, and that the sum paid for royalty for 1895 might properly be regarded as the measure of what defendants should pay for those years, except 1899, which was not a full year. In this way the result would not be different from that which has been reached in the Court below.

Defendants, however, contend that in the fall of 1896 they gave notice to plaintiff that they would no longer pay

him any royalty, regarding the patent as invalidated by transactions to which they had themselves been parties.

Plaintiff relies upon the terms of the agreement of 1892; contends that the notice was ineffectual; and that defendants are bound thereby to pay royalties during the life of the patent, and in any case that they cannot repudiate the license and yet continue to manufacture his invention without paying compensation.

There is, as I have said, no evidence that defendants renewed with plaintiff any of the terms of the agreement of 1892. A new agreement of some kind there undoubtedly was, but I cannot find that it contained any other terms than those already stated, viz., a license to manufacture, on the one side, and on the other to pay the specified royalties. That being so, both parties were at liberty to revoke or withdraw from and determine the license, and thus put an end to any agreement existing between them. Defendants might desire to do so in order to test the validity of the patent, which they were of course bound to recognize so long as they acted under the license. Their right to withdraw from the agreement, supposing that they were not disabled by the terms of it from doing so, and to refuse to act under the license, is clearly recognized by the House of Lords in Crossley v. Dixon, 10 H. L. Cas. 293, cited and followed by Collins, J., in Redges v. Mulliner, 10 R. P. C. 21. While the agreement is subsisting, to adopt the language of Lord Chelmsford, defendant is not at liberty to use plaintiff's invention and to refuse to pay the royalties. "He cannot act under the agreement, and at the same time repudiate it. He may, if he pleases, put an end to the agreement, and he may use (the plaintiff's invention), but he must do so at his peril; he must do so under liability to be treated as an infringer and to be subject to an action for damages for that infringement."

That, as it appears to me, was the situation of the parties after November, 1896. To an action for damages and an injunction at the suit of plaintiff after that date it is clear that defendants could not have pleaded the license as a defence, for they had repudiated the terms upon which alone it was granted, and refused it except upon terms to which plaintiff had never assented. Plaintiff is, therefore, entitled to recover in this action only the royalty for the year 1896, which, for the reasons already given, may properly be placed at the sum of $300, even though that year had not expired when the license was repudiated, as we see that defendants in the statement rendered by them for the previous year debit themselves with the minimum royalty at the end of

November. To such a claim the statute forms no defence, the action resting on the continued parol license or consent of plaintiff to the use of his invention, and the sum awarded being in the nature of a quantum meruit ascertained by what had been agreed upon and accepted for the previous year.

For what defendants did in the years 1897, 1898, and 1899, plaintiff's remedy is by an action for the infringement of his patent, the issues in which have not been tried in the present action.

The appeal will be allowed with costs, and the judgment below varied by reducing it to the sum of $300, with full costs (of an action in the High Court).

SEPTEMBER 19TH, 1904.

C.A.

HOEFFLER v. IRWIN.

Partnership—Oral Contract—Purchase and Sale of Timber Limits — Interest in Land — Statute of Frauds — Part Performance—Findings of Jury.

Appeal by defendant from judgment of TEETZEL, J. (2 O. W. R. 714), in favour of plaintiff upon the findings of a jury.

Plaintiff sought for an account and payment of one-sixth of the profits arising from the sale of a certain timber limit in the township of Merritt, in pursuance of an alleged agreement between the parties by which plaintiff acquired from defendant a one-sixth interest in the said limit, in consideration of his transferring to defendant one-half of his own interest in certain contracts for driving logs and lumber on the Spanish river, in the spring of 1902. Defendant denied the alleged agreement, and further pleaded as a defence the 4th section of the Statute of Frauds.

At the trial it was proved that defendant and one William Irwin and one Thomas H. Sheppard were the joint owners of a timber limit covering the township of Merritt, under a license in the usual form, dated 13th September, 1901.

The case made for plaintiff was that he being equally interested with William Irwin in two contracts dated 29th March, 1902, for driving logs and lumber on the Spanish river in the spring of that year, defendant proposed that he should give him an interest in these contracts in exchange for which defendant would give him an interest in the Merritt limit.

The agreement was an oral one, and its terms were proved by the testimony of plaintiff alone, though there was

evidence of other persons of admissions or statements by defendant that plaintiff had an interest in Merritt, or that he would do what was right with him in respect of it.

The limit was sold by the license holders about 12th December, 1902.

The case was left to the jury generally without written questions. They found for plaintiff "that there was a verbal agreement." The learned Judge, holding that there had been a part performance of the agreement sufficient to take it out of the statute, directed judgment for plaintiff for $2,392.85, being one-half of the sum received by defendant as his share of the proceeds of the limit after deducting what he had paid for his interest therein.

W. M. Douglas, K.C., for appellant, contended: 1st, that the subject of the agreement was an interest in land within the meaning of the statute, and that, the agreement not being evidenced by writing, plaintiff could not recover; 2nd, that there had been no such part performance as to take the case out of the statute; and 3rd, that, even if these objections failed, the verdict was so manifestly against evidence and the weight of evidence that there ought to be a new trial.

A. B. Aylesworth, K.C., and J. H. Clary, Sudbury, for plaintiff.

The judgment of the Court (Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.A.), was delivered by

Osler, J.A. (after setting out the evidence):—It is unnecessary to examine or attempt to reconcile the numerous and not altogether consistent decisions bearing upon the question under what circumstances an ordinary contract for the sale of growing timber or trees or other things usually treated as part of the realty, to be cut or pulled down and taken away, will be regarded as a contract for the sale of an interest in land, or for the sale of goods and chattels. See, e.g., Marshall v. Green, 1 C. P. D. 35, which was considered and followed in St. Catharines Milling Co. v. The Queen, 2 Ex. C. R. 202, 229, and Bulmer v. The Queen, 3 Ex. C. R. 184, 217, 218, affirmed 23 S. C. R. 488, 495. See also Lavery v. Purcell, 39 Ch. D. 508; Summers v. Cook, 28 Gr. 179. The subject of the contract in the present case, namely, an interest in a timber limit, differs widely from all of those dealt with in the cases referred to, and appears to me to be clearly a contract for an interest in land within the statute, conferring as it does upon the purchaser something more than a mere interest in and right to cut and remove the trees

and timber growing upon the limit. Under the Crown Timber Act, R. S. O. 1897 ch. 32, a timber license is to describe the land, i.e., the limits, upon which the timber may be cut, and (1) shall confer for the time being upon nominee the right to take and keep exclusive possession of the land so described; (2) shall vest in the holders thereof all rights of property whatsoever in all trees, timber, and lumber cut within the limits of the license during the term thereof; and (3) shall entitle the holders thereof to institute any action against any wrongful possessor or trespasser and to prosecute all trespassers and other offenders to punishment and to recover damages, if any. . . .

[Reference to McDonald v. McKay, 15 Gr. 391, 18 Gr. 98; St. Catharines Milling Co. v. The Queen, supra; Bulmer v. The Queen, supra; Breckenridge v. Wooton, 3 Allen (N. B.) 303; Sinnott v. Noble, 11 S. C. R. 581, 584; Bennett v. O'Meara, 15 Gr. 296.]

I am unable, with all deference to my learned brother, to see that there has been any such act of part performance as to take the case out of the statute. The only thing relied upon in this respect, though it is not specially referred to in the judgment, seems to have been the division of the proceeds of the drive contracts, but this, at the most, can only be regarded as the payment of the purchase money, which, as it now appears to be settled, is not sufficient: Maddison v. Alderson, 8 App. Cas. 467, 479; Fry on Spec. Perf., secs. 613, 614.

Plaintiff also contended that the timber limit was held as partnership property, or that defendant's interest therein was to be held as such, as between defendant and himself, and that the statute was not applicable, on the principles laid down in Dale v. Hamilton, 5 Hare 369; Archibald v. McNerhanie, 29 S. C. R. 564. Of this, however, I see no evidence. The licensees were, so far as appears, co-owners and nothing more, nor, taking it to be that there was such an agreement as plaintiff sets up, was the situation as between himself and defendant different in respect of the intent dealt with by that agreement. Even if the limit was in fact held by the three licensees as partners, it would not follow that the transfer by one of them of his own or part of his own interest would not be within the statute: Black v. Black, 15 Georgia.

The case of Stuart v. Mott, 23 S. C. R. 384, does not assist plaintiff, as the only agreement proved was for the transfer of an interest in the limit, not, as in that case, an agreement for the division of the proceeds of the property when sold.

In the result we are of opinion that the action as framed ought to be dismissed. Had the evidence of the alleged agreement been clear and satisfactory, we should probably have thought it right to allow plaintiff to amend and to recover the consideration paid on the footing of the contract. The verdict of the jury is, however, so manifestly against evidence and the weight of evidence, that, had we come to a different conclusion on the other points I have dealt with, we must have granted a new trial, and, as we ought under these circumstances now to do so at most only on payment of costs, we think the proper course is to allow the appeal and dismiss the action, with liberty to plaintiff, if he should be so advised, to bring a new action to establish the oral agreement and to recover the purchase money. Such an action, we venture to say, would be more satisfactorily tried, as the present would have been, without a jury.

The appeal is therefore allowed and the action dismissed with costs.

SEPTEMBER 19TH, 1904.

C.A.

GODERICH ELEVATOR CO. v. DOMINION ELEVATOR CO.

Principal and Agent — Contract Made by Agent — Scope of Authority—Principal not Bound.

Appeal by plaintiffs from judgment of FERGUSON, J., 2 O. W. R. 684, after trial without a jury, dismissing the action.

Plaintiffs' claim was to recover the price of certain storage space in their elevator which they allege they reserved for defendants between 15th November, 1901, and 1st May, 1902, but which defendants did not use, and for which they refused to pay.

Plaintiffs said that the contract or agreement to take and pay for the storage space, on which they relied, was made on behalf of defendants by or through one Cavanagh, whom plaintiffs alleged to have been defendants' duly authorized agent. Defendants denied the agency and said that, if Cavanagh assumed to enter into or make the contract alleged, he did so without authority, and there was no contract binding on defendants.

The trial Judge found that Cavanagh was not a general agent of defendants, but only a special agent having no authority by implication, but only such authority as was

given to him by defendants; that he was not authorized to make the contract sued upon; that the contract was not proved; and that plaintiffs were not entitled to recover.

W. Proudfoot, K.C., for appellants.

A. B. Aylesworth, K.C., and C. A. Moss, for defendants.

The judgment of the Court (Moss, C.J.O., Osler, Maclennan, Maclaren, JJ.A.), was delivered by

Moss, C.J.O.—A perusal and consideration of the evidence, oral and documentary, shew that the conclusions of the trial Judge are well founded. Plaintiffs were the first to open communication with respect to the reservation of storage space in their elevator for the winter of 1901-2, by letter to Cavanagh. The evidence shews that at this time Cavanagh was not defendants' agent or authorized by them to deal on their behalf with respect to any such matter. He was a grain broker doing business in the city of Toronto, and as such had conducted sales of grain and arranged for terms of shipping for defendants when specially directed to do so.

It was to his interest to persuade defendants to make winter storage in Ontario as affording an opportunity of his being engaged by them in the ultimate dispositions of the grain so stored, and he wrote defendants enclosing a copy of plaintiffs' letter to him. This led to the correspondence which followed and which has been put in evidence.

Plaintiffs' chief reliance is upon a letter from defendants to Cavanagh dated 3rd September, 1901, in reply to a letter from him to them dated 30th August, 1901. In their letter defendants say they will send over 150,000 bushels to Goderich for winter storage—"You put in the application for us." And on 9th September Cavanagh wrote plaintiffs informing them that he had a letter from defendants instructing him to arrange space for 150,000 bushels wheat winter storage, and asking them to reserve this space and write him at their early convenience. But these letters and the application are to be considered with reference to the understanding of Cavanagh and defendants as to the rate to be charged and the period of time it covered, and also with regard to plaintiffs' way of dealing with applications for space. There had been an interview on the 12th August between plaintiffs' manager and Cavanagh in which rates were discussed, and as a result of which Cavanagh wrote defendants that plaintiffs had decided to charge 1½ cents per bushel winter storage from 1st November to 1st May, on grain coming down for distribution to millers, and that meantime they would charge ½ cent per bushel for as long a term as they had room. This

was the only intimation as to rates given by plaintiffs until they had dealt with the applications for space received from all quarters. Cavanagh's and defendants' understanding was that these were not what are called flat rates, i.e., a rate imposed once for all on grain if it enters the elevator at all, but accumulative rates, i.e., a rate proportioned to the time the grain is in storage, and increased from time to time according as the grain continues in storage until the maximum rate is reached. That plaintiffs on 12th August or 11th September, when they replied to Cavanagh's letter of 9th September, had not decided to impose a flat rate for winter storage, is apparent from the letter of plaintiffs' president to the manager, dated 19th September, where for the first time the flat rate is spoken of. But this, though apparently then decided upon by plaintiffs, was not communicated to Cavanagh or defendants at that time. And it seems plain that plaintiffs had no idea that they had made a contract with defendants on 11th September. The terms of the letter of 31st October indicate this pretty clearly. According to plaintiffs' practice applications for space are not accepted by them as entitling the applicant to what he asks for or to anything. They leave the applications open until they can consider at the same time and together all that are received—with all before them they consider the space to be allotted.

They are under no obligation to give any space or any particular quantity of space to any applicant. In 1901, with all the applications before them, they decided on 31st October to give defendants space for 150,000 bushels, but not on the terms which had been indicated on 12th August. Their letter of 31st October is their final answer to the letters of 9th and 21st September, but it proposes changed terms both as regards the rate to be charged and the period which the payment would cover. Cavanagh then understood for the first time that the rate was to be a flat rate and that it only covered from 15th November, 1901, to 1st May, 1902, instead of from 1st November to 1st May.

Not only had Cavanagh no authority to confirm this or accept for defendants the proposition then made, but he informed plaintiffs of that fact, and that he must first refer to defendants. Plaintiffs, however, assured him that they would protect him, and by that means induced him to write saying in reply to their letter that their proposition was satisfactory. Nowhere in the case is there to be found any authority from defendants to Cavanagh enabling him to bind them to the new terms by his acceptance. The letter of 3rd September falls far short of authorizing it. And as soon as defendants knew of the terms on which their application for

space was being granted by plaintiffs, they at once declined to accept them. There was no concluded bargain or agreement binding defendants to accept or pay for the space at the rates and on the terms insisted upon by plaintiffs.

The appeal should be dismissed with costs.

SEPTEMBER 19TH, 1904.

C.A.

O'HARE v. TOWNSHIP OF RICHMOND.

Municipal Corporations — Drainage — Neglect to Maintain and Repair Drain—Damages—Mandamus.

Appeal by defendants from the judgment or report of the Drainage Referee. The plaintiff took his proceedings under the Municipal Drainage Act, R. S. O. 1897 ch. 226, for a mandamus to compel defendants to maintain and repair Otter Creek drain in the township of Richmond, and for damages alleged to have been caused through the neglect and refusal of defendants to maintain and repair the drain. The Referee's report dismissed the plaintiff's claim for damages, but found plaintiff entitled to a mandamus against defendants, limited to the proper repair of the drainage work.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.

E. G. Porter, Belleville, for appellants.

W. S. Herrington, K.C., for plaintiff.

OSLER, J.A.—The learned Referee has explained his views in a somewhat full and careful opinion, his conclusion being that plaintiff is not entitled to damages, but that defendants are in default for not keeping the drain in repair, and that a mandamus should go to compel them to perform their duty in this respect.

The evidence was supplemented by the Referee's personal view and inspection of the locus in quo.

After a careful examination of the evidence and further consideration of the several objections taken to the proceedings by the appellants' counsel, I remain of the opinion I formed at the conclusion of the argument, namely, that no sufficient grounds had been adduced for interfering with the judgment of the Referee, which appears to me to be entirely in accord with the merits of the case, and ought, therefore,

to be affirmed, in the absence of any valid technical objections to the procedure before him.

I think the appeal should be dismissed with costs.

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

MOSS, C.J.O., MACLENNAN and GARROW, JJ.A., concurred.

SEPTEMBER 19TH, 1904.

C.A.

MERCHANTS BANK v. GRIMSHAW.

Promissory Notes — Action against Indorser — Indorsements Procured by Fraud—Discount—Notice to Agent of Holder —Notice to Bank—Property in Notes not Passing—Conflicting Evidence.

Action to recover the amount of two promissory notes made by defendant Grimshaw and indorsed by defendants Irvine and Evans. No defence was made by defendants Grimshaw and Evans.

Defendant Irvine defended on the ground that his indorsement had been procured by fraud practised upon him by defendants Grimshaw and Evans, of which plaintiffs had notice and knowledge before they became the holders of the notes, and that they are not holders thereof in due course.

The notes were made by Grimshaw payable to Irvine, who, for Grimshaw's accommodation, indorsed them in blank. They were then handed by Grimshaw to one Robson, an agent of Evans, who delivered them to Evans, who subsequently delivered them to the plaintiffs for discount.

FALCONBRIDGE, C.J., who tried the action without a jury, found (2 O. W. R. 729) that Irvine's indorsement was procured by fraud, that Evans was not a holder in due course, and that before the property in them passed to plaintiffs they had notice and knowledge of the fraud and the infirmity of Evans' title, and he dismissed the action as against Irvine.

From this decision plaintiffs appealed.

W. R. Riddell, K.C., and G. L. Smith, for appellants.

G. F. Shepley, K.C., and W. E. Middleton, for defendant Irvine.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, JJ.A.), was delivered by

MOSS, C.J.O.—It was scarcely, if at all, contended that it was not proved that Irvine's indorsement was procured by fraud.

On this branch of the case the evidence is all one way. But plaintiffs' counsel contended that neither Evans nor plaintiffs were affected with notice, and that they were holders in due course. It would be sufficient for plaintiffs if either they or Evans could be found to be holders in due course for value in good faith. Here, however, the burden of shewing this to be the case had been cast on plaintiffs by the proof of fraud in obtaining Irvine's indorsement: Bills of Exchange Act, 1890, sec. 30 (2); . . . Tatam v. Haslar, 23 Q. B. D. at p. 349 . . .

As regards the position of Evans, not only did plaintiffs fail to discharge the onus, but sufficient evidence was adduced to support the finding that he was not the holder in due course, even if the onus had rested on Irvine.

The real question was as to the position of plaintiffs, and whether they had succeeded in establishing that they acquired the notes in good faith and for value without notice of the fraud.

The evidence bearing on this branch of the case is strangely conflicting, and it seems impossible to reconcile the statements of the principal witnesses. Some circumstances appear to support plaintiffs' witnesses, while others, equally if not more cogent, seem to support the witnesses for the defence.

It is agreed that the first intimation of the defect in Evans's title which plaintiffs received was through their manager, Simpson, on the night of 2nd October, 1902. Plaintiffs contend that before that there had been a completed transaction of discount of the notes, and that the property in them had become absolutely vested in plaintiffs.

Defendant Irvine contends, on the other hand, that the notes had not then been discounted, but were held by plaintiffs subject to the result of inquiries as to Irvine's financial ability and standing, and to the initialling by Grimshaw, the maker, of certain alterations apparent on the face of the notes.

According to the testimony of Simpson, the manager, and of Evans, the notes were discounted on 1st October. In support of their statements it is shewn that on that day the discount clerk, whose duty it was to enter them on the discount sheet, the proceeds sheet, and the discount diary, did make

the usual entries in the ordinary course of business, and during business hours of the 2nd October Evans's cheques were honoured to an extent which shewed an overdraft of $331.55 at the close of the day, unless he was entitled to credit for the proceeds of the discount alleged to have been made on the previous day. It also appears that on the morning of the 3rd October Simpson received a telegram from the head office at Montreal instructing him to discontinue discounting for Evans, as his statement was most unsatisfactory, but, nevertheless, the proceeds of the discount of these notes was placed to his credit, and his cheques to the amount of $725 were honoured.

Against these circumstances it is shewn that on 1st October Simpson wrote to the manager of plaintiffs' branch at Brampton, where Irvine resided and carried on business, requesting him to give his opinion in confidence as to Irvine's means, character, and standing, and to say what he would consider of him as an indorser on the notes of Grimshaw to the extent of $1,500; that on 2nd October he enclosed the notes to the manager at Brampton, with a request to obtain Grimshaw's initials to certain alterations; and that as a fact the proceeds of the notes were not entered to the credit of his account in the ledger until the morning of 3rd October.

It may be that these circumstances standing alone would not outweigh the direct testimony of Simpson and Evans, fortified by the first mentioned circumstances.

But on the night of 2nd October an interview took place between Simpson, Irvine, and Mr. Heggie, a solicitor practising at Brampton, who accompanied Irvine at his request. Irvine and Heggie testify that at this interview Simpson, in answer to a question from Heggie, informed them that the notes had not been discounted, that they were being held pending inquiry as to Irvine's rating, and that they had been sent to Brampton for Grimshaw's initials to some changes. Simpson was then informed very fully of the circumstances under which Irvine's indorsement had been obtained, and told that he must not discount them, and he was asked not to let them get back into Evans's hands until proceedings could be taken to prevent him from negotiating them. Simpson said he thought he could aid them in this, as the notes had been sent to Brampton. To this testimony Simpson gives a denial. He says he told them that the notes were discounted, and after that there was very little other conversation that he can remember.

On the evening of 3rd October Irvine and Heggie again called on Simpson. They had been advised to serve a notice in writing, and they did so. The notice was to the effect that

the notes were obtained by fraud, and requiring him to keep the notes in his possession until Irvine had an opportunity of obtaining an injunction restraining Evans from discounting or otherwise dealing with them. They testify that Simpson then told them they were too late; that the notes had been discounted; that some cheques had come in and he was obliged to put the notes through to cover the overdraft, and he also mentioned having received instructions that day to discontinue discounting for Evans. Simpson says that on being served with the notice he told them, as he had told them the previous night, that the notes were discounted, and he denies that he spoke of cheques coming in or the overdraft. Another matter to be mentioned is, that Simpson and the discount clerk testify that when the notes were sent to Brampton on 2nd October they bore on their face the letters and figures indicating that they were discounted bills and plaintiffs' property stamp, which now appear upon them. Heggie testifies that he saw and examined them in Brampton on 4th October, and that these marks and indications were not then upon them.

Dealing with this very conflicting evidence the learned Chief Justice says: "I accept the evidence of Mr. Heggie as to what took place on the nights of the 2nd and 3rd October, basing my preference for his account of the conversations both on the demeanour of the witnesses and the cogency of the circumstances. I accept his statement also as to the plight and condition of the notes on the 4th day of October, when he saw them in Brampton."

In view of the evidence and these findings, and having regard to the burden of proof, the conclusion must be that plaintiffs have failed to shew that as holders in due course they had given value in good faith for the notes without notice of the defect in Evans's title to them. . . .

The appeal should be dismissed.

SEPTEMBER 19TH, 1904.

C.A.

DEYO v. KINGSTON AND PEMBROKE R. W. CO.

Railway—Trains Passing under Bridge—Railway Act, 1888, sec. 192 — Statutory Obligation as to Height of Cars — Violation — Death of Brakesman — Liability of Railway Company — Ownership of Bridge — Omission to Stop Train before Crossing another Railway—Proximate Cause of Death—Disobedience of Rules of Company—Prohibition against Standing on Top of Cars.

Appeal by defendants from judgment of BRITTON, J., in favour of plaintiffs, upon the findings of the jury, in an

action under the Fatal Accidents Act, brought by the widow and daughter of Frederick Deyo, a brakesman in the employment of defendants, to recover damages for his death, caused as alleged by defendants' negligence. The neglect or breach of duty alleged was the omission to comply with the requirements of sec. 192 of the Dominion Railway Act, 1888, and, contrary to the provisions of that section, using higher freight cars on their railway than such as admitted of an open and clear headway of at least 7 feet between the top of the car and the lowest beam of a bridge under which the railway passed, by reason of which the deceased, who was employed on a train of defendants, came into collision with the bridge and was killed. A further cause of action put forward at the trial was defendants' neglect to comply with the obligation imposed on them by sec. 258 of the Act, viz., to stop their train for at least one minute before crossing the track of the Grand Trunk Railway Company at rail level under the bridge.

I. F. Hellmuth, K.C., and W. F. Nickle, Kingston, for defendants, appellants, contended that the bridge over their line had been constructed many years before the passing of the Act, and before defendants ran their trains under it at all; that the Grand Trunk Railway Company, and not the defendants, were the owners of the bridge; that in these circumstances they were at liberty to use freight cars of any height they pleased which could go under it, and were under no obligation to raise the bridge, and had no authority to interfere with it; that in any case the proximate cause of the accident was the deceased's own non-compliance with and non-observance of the company's rules of service, to which he was bound to conform.

D. M. McIntyre, Kingston, for plaintiffs, contra.

The judgment of the Court (Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.A.), was delivered by

Osler, J.A. (after setting out the evidence).—Upon the proper construction of sec. 192 of the Railway Act, I am of opinion that defendants, whether owners of the bridge or not, were guilty of a violation of the obligation imposed upon them by sub-sec. 2 of the section, for which, by force of sec. 289, an action lies at the instance of any person injured thereby, subject of course to any grounds of defence which may be open to them.

The language of the section is open to criticism, but the Legislature has sufficiently expressed its intention that a rail-

way company shall not use higher freight cars than such as admit of an open and clear headway of seven feet between the top of such cars and the bottom of the lower beams of any bridge which is over the railway.

The question is not of the ownership of the bridge, but of the user of the cars. "Company" means any company or person operating a railway under a bridge, and is not confined to the company which has built it or is the owner of the bridge.

The section does not contemplate, in reference either to bridges in existence when a company begins to operate its line, or bridges afterwards constructed, a user of cars which do not admit of the prescribed headway, except where that is permitted by the Governor-General in council, in the case provided for by sub-sec. 5.

Taking the section as a whole, the following appears to me to be its proper exposition. Sub-sections 1 and 2: Every bridge shall be so maintained as to admit of an open and clear headway of at least 7 feet between the top of the highest freight car used on the railway and the bottom of the lower frame of the bridge over the railway. To an existing bridge, whether owned by the railway company or any one else, the company must accommodate the height of their cars so as to ensure that headway. Before they use higher cars than such as will admit of that headway, they must raise the bridge. If they are the owners of the bridge they can, of course, do so without any one's consent, but if they are not the owners, and cannot procure the consent of the owners, they must be content to leave things as they are, and to use freight cars which will leave the prescribed headway, though they may be not so high as they would wish to use.

Sub-section 3 deals with the construction of a new bridge and the reconstruction and repair of old ones. For the first it must be constructed so as to leave the prescribed headway with reference to the cars *then* used on the railway, and for the latter, the cars *then* in use have, by the hypothesis, i.e., of the application of sub-sec. 2, been such only as admitted of such headway, and the bridge must be reconstructed or repaired in reference to them, and so that it shall not be lower than it was before.

And lastly, sub-sec. 4 deals with the company's right to use higher cars than those in use at the time of construction, reconstruction, or repair of the bridge. If they desire to change the existing state of things, they must get the consent of the municipality or bridge owner, and raise the bridge so as

to admit of the prescribed headway over the top of the highest freight cars *to be used* on the railway.

It is possible that in using the word "maintained" in sub-sec. 5 of sec. 192, the Legislature assumed that railway companies had complied with the obligation of sec. 15 (5) of the Consolidated Railway Act, 1879, and its amendment, 44 Vict. ch. 24, sec. 5 (D.) and had altered and reconstructed additional bridges which had not admitted of the 7 clear feet headway over the style of car in use before this legislation. Mr. Hellmuth referred to McLaughlin v. Grand Trunk R. W. Co., 12 O. R. 418, and Gibson v. Midland R. W. Co., 2 O. R. 658, as deciding that defendants, not being the owners of the bridge, were not under any obligation to raise it, and were therefore not liable for damages resulting from the user of the higher car. In both of these cases, however, the question was upon whom the absolute obligation to raise or reconstruct the bridge was cast, in the one by the Dominion Act of 1881 and in the other by the Ontario Act of the same year, 44 Vict. ch. 22. It was held to rest, though plaintiffs failed upon other grounds, upon that company which was the owner of the bridge. In neither case was there any question upon the clause which corresponds with sub-sec. 2 of sec. 192 of the Act of 1888—a section which is framed so differently from the former provisions on the subject that these do not throw much light upon its construction. Atcheson v. Grand Trunk R. W. Co., 1 O. L. R. 168 (C.A.), which in principle, I think, supports the view I take of the meaning of sec. 192, may be referred to.

The other ground of negligence relied on, viz., the omission to stop before crossing the track of the Grand Trunk Railway, as required by sec. 258, even if the fact was sufficiently proved, affords, in my opinion, no cause of action. The object of the section is to prevent collisions at crossings, and non constat, if defendants' train had been stopped, that the deceased would have left the car or would not have met with the accident.

There remains the question whether the violation of the statutory duty of defendants under the other section was the proximate cause of the death of the deceased, or whether this must not be said to have been wholly owing to his own unfortunate neglect of the rules of the company. I feel compelled to say that on this ground the defence has been made out, and that the action must fail. Even to an action founded on the breach of a statutory duty, contributory negligence may be a defence, as we constantly see in actions

arising under the Workmen's Compensation Act or the Factories Act: Groves v. Wimborne, [1898] 2 Q. B. 402, 419. A fortiori, it must be an answer to such an action that the injury was caused by the deceased's own act or omission, that it was caused by or could not have happened but for the servant's direct disobedience of some order or rule of his employers, intended though that may have been to prevent accidents arising from the continued failure of the latter to perform their statutory duty: Holden v. Grand Trunk R. W. Co., 5 O. L. R. 301; Anderson v. Mikado Gold Mining Co., 3 O. L. R. 581; Fawcett v. Canadian Pacific R. W. Co., 32 S. C. R. 721.

The prohibition contained in defendants' rule Q. against employees standing on the top of box cars passing under the bridge in question is distinct and unequivocal. Rule 32 is slightly wider in its terms, forbidding brakesmen and others to ride on the top of such cars, and the deceased either should not have been there at all or should not have been standing there. That he knew of rule Q. cannot be controverted. These rules were made to be observed by employees at the particular place specified in them, a place known to the deceased, the danger incident to which he had also been warned of. There is no ground for saying that these rules are inconsistent with other rules, as, if he was forbidden to be or to stand on the box cars at the place in question, no others required him to be there in order to apply the brakes. Nor is there evidence that any emergency had arisen or was likely to arise which might be thought to excuse a breach of these rules, as the train was properly proceeding at a rate of speed which enabled it to be sufficiently controlled by the engine brakes or by the brakes on the flat cars, which the deceased could have used. It was suggested that he was properly on the top of the car for the purpose of connecting the bell-cord with the engine, but the evidence does not bear this out; nor indeed does it appear that the cord had not in fact been connected before the train started, as the duty of the deceased required that it should be. There was, in short, no evidence of anything which could have justified the deceased in being on the box car at the time and place in question in contravention of the rules of the company. He met with his death in consequence of being there, and I think it follows that the appeal must be allowed and the action dismissed.

SEPTEMBER 19TH, 1904.

C.A.

KNY-SCHEERER CO. v. CHANDLER AND MASSEY.

Sale of Goods—Action for Price—Ascertainment — Counterclaim for Breach of Contract — Representations not Amounting to Contract.

Appeal by defendants from judgment of MEREDITH, C.J., 2 O. W. R. 215, in favour of plaintiffs.

By their statement of claim plaintiffs set up several distinct causes of action, but at the trial the only ones pressed came under the head of goods sold or furnished to or received by defendants.

Defendants, besides denying plaintiffs' causes of action and alleging payment and satisfaction of all claims, counterclaimed for damages in respect of breaches of an alleged agreement by plaintiffs to establish and maintain in Canada a wholesale and export department of their business with a well assorted stock of the value of at least $50,000. By an amendment allowed to be made at the trial defendants also counterclaimed for damages for default by plaintiffs in supplying defendants with certain price lists or catalogues.

At the trial plaintiffs' prima facie case in respect of goods sold or supplied and received was admitted, subject to reduction or extinction in the event of defendants shewing that the prices charged were not the prices which they were liable to pay for the goods, and defendants entered upon their case against plaintiffs. The counterclaim was first dealt with, and subsequently the question of reduction of prices.

The trial Judge held against defendants on both branches, and gave judgment for plaintiffs for $7,122.02 with costs of the action, and dismissed the counterclaim with costs.

E. B. Ryckman and C. W. Kerr, for defendants, appellants.

G. F. Shepley, K.C., and W. E. Middleton, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.—In dealing with the counterclaim . . . it was made a question whether it amounted to an allegation of an agreement by plaintiffs or whether it was to be deemed an allegation of representations made with the purpose of influencing defendants' conduct or inducing them

to enter into the agreement of 31st January, 1900. But it does not appear to be very material to ascertain in which view the pleader intended to present the case. In either view the proof to support the pleading must amount to proof of a promise. In the present state of the law the argument that the Courts will compel a person to make good a representation not amounting to a contract cannot be supported. . . . [In re Fickens, [1900] 1 Ch. at p. 334, referred to.]

Defendants have not counterclaimed for rescission or specific performance. Their claim is for damages, and in order to recover they must shew a contract and a breach. Have they proved that plaintiffs promised and agreed to establish and maintain in Canada a wholesale and export department of the character alleged? . . .

The testimony does not go the length of shewing an agreement binding plaintiffs to the establishment of the department if defendants agreed to buy their lines of surgical instruments from them. It is a circumstance of no small weight against defendants—though of course not conclusive—that every other term of the agreement between them and plaintiffs was carefully reduced to writing, and there is no satisfactory explanation of the omission of this most important part from the formal document. . . . There was nothing respecting it to put into writing because there was no agreement. . . . On the whole there is no good ground for disturbing the Chief Justice's conclusion on this branch of the case. . . .

The remaining questions are governed by the writings between the parties.

The first is the other item of the counterclaim, i.e., the failure to supply catalogues according to the terms of the agreement of 31st January, 1900. . . . It appears that plaintiffs were proposing to prepare and publish a price list or catalogue for the use of their retail customers, and by the terms of the agreement that in form it was to be similar to a sample copy submitted, with an addition of orthopedic catalogue and sundry accessories. Defendants were to be entitled to not less than 3,000 copies, paying therefor not less than half the actual cost thereof, those provided to have defendants' name printed on the cover and title page, instead of plaintiffs', but retaining plaintiffs' trade mark. . . . It does not appear that there was any improper delay, but the volume was not ready until November, 1901, by which time plaintiffs and defendants were at arms' length over the terms of the arrangements between them. Defendants did

not complain of the delay, but when they received plaintiffs' circular announcing their readiness to prepare and send them copies for their use, defendants wrote treating the contract as at an end but expressing their willingness to take the catalogues at $195 a thousand. They, however, gave no definite order and made no tender of the money or of the freight. Plaintiffs were not bound to deliver them in Canada, and defendants never followed up their letter. The claim under this head fails, and the judgment dismissing it must stand.

There remains the question of the prices to be charged to defendants for the goods supplied to them, and of those taken over by them, as stated in their letter of 30th October, 1901.

The words of the contract which seem to govern the sales to defendants are found in the 7th paragraph of the agreement. Plaintiffs are to supply defendants their products at the lowest wholesale prices. There is nothing uncertain or ambiguous in the phrase "lowest wholesale prices." It means in this contract the lowest price at which manufacturers and dealers in the same class as plaintiffs are selling goods by wholesale to customers who purchased from them in ordinary course for the purpose of retailing to consumers or users. Obviously it would not extend to goods supplied to branches of the same business, but would include all independent dealers. Such being the general right of defendants, the method of ascertainment of prices is found by reference to the confidential wholesale catalogues as regards goods furnished from New York, and to the provision for fixing new prices as regards goods furnished from Montreal or by direct shipment from Europe.

The course of dealing adopted by the parties worked out these provisions in a practical way. Prices in the confidential catalogue were taken as the basis, but from time to time alterations were made by both parties as the prices varied. Invoices and statements were received by defendants and entered in plaintiffs' account at the prices mentioned. Occasionally there were objections on one side or the other, but the correspondence shews no serious complaint as to prices in general. . . .

In view of these dealings, extending over a period of 20 months, it is too late to ask us to enter upon an inquiry involving the revision of the prices thus fixed and acted upon by both parties.

The appeal fails and should be dismissed.

SEPTEMBER 19TH, 1904.

C.A.

OTTAWA ELECTRIC CO. v. CITY OF OTTAWA.

Contract—Breach—Damages—Allowances and Deductions—Accounts—Interest.

Appeal by defendants from order of STREET, J., dismissing an appeal from the report of the Master at Ottawa upon the taking of the accounts pursuant to the judgment of the Court of Appeal (2 O. W. R. 596) affirming the judgment of BOYD, C. (1 O. W. R. 508) as to the proper interpretation of certain clauses in the contract for the street lighting of the city of Ottawa, difficulties having arisen after the great fire of April, 1900, by reason of plaintiffs' works having been destroyed.

C. Millar and T. McVeity, Ottawa, for appellants, contended that the Master had erred to the disadvantage of defendants in his mode of calculating the allowances and deductions to be made from plaintiffs' original claim; and that he had erroneously allowed interest.

G. F. Henderson, Ottawa, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

GARROW, J.A.—As stated in the judgment of this Court when the case was before us on a former occasion, plaintiffs' cause of action is based upon the contract itself, and not upon a quantum meruit.

Plaintiffs agreed to light by means of electricity the streets of the city of Ottawa for the term of ten years, and to supply for such purpose 331 lamps of not less than 2,000 candle power, and such additional lamps as the city might require, for which payment was to be made at the rate of $65 per annum for each lamp. Express provision was made in the agreement for the case of what might be called a negligent default on the part of plaintiffs, in which case a deduction of 50 cents per lamp per night as liquidated damages was agreed upon, but no express provision was made for the not improbable event of a temporary failure from unforeseen or accidental causes not attributable to negligence. Such an event actually occurred in the destruction

of plaintiffs' plant, together with a large section of the city, in the serious conflagration of 26th April, 1900.

Plaintiffs' covenant to supply and keep the lamps lit was absolute and unconditional, and the breach of such covenant caused by their inability to supply the stipulated light for a time after the fire is admitted.

Both parties, however, treated the contract as still subsisting, and plaintiffs proceeded with due despatch to restore the destroyed plant, and within 4 days were supplying some light, the quantity gradually increasing until the normal was reached about the following October.

Under the circumstances it is clear that performance by plaintiffs according to the letter of the agreement was not a condition precedent. The covenant, which I have called the penal clause, alone would so indicate. And the proper construction of the agreement, therefore, clearly required and requires that plaintiffs' covenant to perform should be treated simply as an independent covenant, the breach of which by the temporary failure caused by the fire gave to defendants a cause of action for such damages as naturally followed from the breach.

The question, therefore, was really one of the proper measure of damages, the defendants contending that the penal clause allowing a deduction of 50 cents a lamp per night was applicable, while plaintiffs contended that that clause was inapplicable under the circumstances. Plaintiffs' contention was approved by the learned Chancellor, and his judgment was affirmed by this Court, and the measure of damages in the case of breaches caused by accident such as the fire was fixed at payment, at the contract rate, for the light actually supplied, leaving the penal clause in full force as to failures and omissions within plaintiffs' control, and with these declarations the matter of the accounts was referred back to the Master.

He has now with care and intelligence wrought into final results the direction of the Court, and has, in my opinion, reached proper conclusions.

Such being my opinion, it is perhaps unnecessary to examine minutely in the light of defendants' criticism the several details of the learned Master's findings, and yet a word or two as to some of them may not be out of place.

It is said he should not have allowed for lights which were only lit for part of a night, and that deduction should

have been made for lights which were out for periods of two hours or under. But for both allowances the learned Master had at least the warrant of Mr. MacDonald, the defendants' own superintendent of fire alarm, who was in charge of the city lighting before he was interfered with by the city council and its officials, and while free to exercise his own judgment. . . .

Then it is said it was erroneous to calculate the value of the omitted service by what are called lamp hours, instead of, as I understand it, nights, or equal 1-365ths of the year, but, bearing in mind that the question is one of damages, it is obvious that the learned Master's method is the fair one, inasmuch as it regards, in estimating the damages, the short nights of summer, the period in question, as properly favourable to plaintiffs, who had still to perform the contract, and no doubt did so, during the longer nights of the succeeding winter. The service was not a nightly any more than an hourly service, but was a yearly service, including the long nights of winter as well as the short ones of summer, at $65 per lamp per year.

With reference to the important item of interest I have had, I confess, more doubt.

But upon the whole, the finding can, I think, be supported. The facts are not unlike those in the case of McIntosh v. Great Western R. W. Co., 4 Giff. 683-689, approved of by Lord Watson in the House of Lords in London, Chatham, and Dover R. W. Co. v. South Eastern R. W. Co., [1893] A. C. at p. 442.

See also per Osler, J.A., in McCullough v. Clemow, 26 O. R. 467, at p. 477.

There can now, I think, be little doubt upon the whole evidence that Mr. MacDonald was improperly interfered with by defendants, and that, if left to himself and to the exercise of his own judgment, as he should have been, he would have so certified as to have made plaintiffs' claim clearly a liquidated and interest-bearing claim, and under the circumstances defendants should take no advantage by their improper interference.

The appeal should, I think, be dismissed with costs.

SEPTEMBER 19TH, 1904.

C.A.

McGILLIVRAY v. TOWNSHIP OF LOCHIEL.

Municipal Corporations — Drainage — Action—Damages—Injunction — Reference to Drainage Referee — Powers of Local Judge — Overflow on Plaintiff's Lands — Outlet — Riparian Proprietors — Drainage into Natural Watercourse—Award of Township Engineer—Damages—Causes of Action—Joinder of Defendants—Costs.

Appeal by defendants from judgment of Drainage Referee in favour of plaintiff, upon a reference to him of the matters in dispute between the parties. The writ was issued in the High Court of Justice against some 70 defendants, including the corporation of the township of Lochiel.

The statement of claim set forth that plaintiff was the owner of certain lands in the township of Lochiel, and that defendants, other than the corporation of the township, were the owners of certain other lands in the township, from which they had, by means of certain drains, some of which had been made under the provisions of the Ditches and Watercourses Act, and defendants the corporation of the township had by certain ditches along the highway, unlawfully caused surface water to flow upon plaintiff's lands, and he claimed damages and an injunction.

Defendants pleaded separately denying the joint cause of action, denying also the injury, alleging that if injured it was from natural causes and not from acts of theirs, and setting up the engineers' awards in the cases of the defendants who were parties to such awards, as an answer, and other defences upon which nothing turned.

The action was referred to the Drainage Referee under an order made by a local Judge in Chambers dated 17th September, 1901, and the Referee made his report on 29th April, 1903, whereby he found that no evidence had been advanced against defendants the individual owners who had constructed ditches on their own lands for the purposes of draining their own farms, and he dismissed the action as against these defendants with costs to them, which he fixed at $100; (2) that the defendants who were parties to award drain No. 4, which had not been constructed, but was abandoned, were also entitled to be dismissed from the action, and he fixed their costs at $50; (3) that the other award

drains did cause water to overflow plaintiff's lands injuriously, and that the defendants parties to such award drains, namely 1, 2, 3, and 5, were responsible for the damages caused thereby, because such drains had not been carried to a sufficient outlet, and he assessed as one sum against all these defendants the sum of $500, which he ordered them to pay as such damages, and he awarded an injunction restraining these last named defendants as claimed by plaintiff, restraining the use of these award drains, unless these defendants should within nine months provide a sufficient outlet for the waters sent down by the said award drains; and he allowed to plaintiff his costs.

All the defendants except Alexander Cameron appealed; the defendants who were dismissed from the action on the question of costs, and the others generally.

M. Wilson, K.C., E. H. Tiffany, Alexandria, and F. T. Costello, Alexandria, for appellants.

J. Leitch, K.C., for plaintiff.

The judgment of the Court (Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.A.) was delivered by

Garrow, J.A.—An objection was urged before us that there was no power, unless by consent, to refer the action to the Drainage Referee, but this objection cannot now be given effect to. The order does not upon its face express that it was made by consent, and must therefore be assumed to have been made by the local Judge in the exercise of his judicial discretion. And if such discretion was improperly exercised defendants should have appealed against the order.

Spring creek is a natural watercourse rising in the neighbourhood of the boundary line between the townships of Kenyon and Lochiel, flowing easterly for a distance of several miles until it reaches the lands of plaintiff, where it turns northerly, and, after a further course of about two miles, empties into the DeGrasse river. Upon the lands of plaintiff the banks of the stream are low and the current very slight, but up stream from him there are well defined banks and a considerable fall. There are obstructions in the channel on plaintiff's lands, and also on the next lot below him, which impede the flow, but, if these obstructions were removed down to what are called the "falls," ample outlet could be obtained, to the great advantage apparently not only of plaintiff but of all the others who use Spring creek as the outlet for their surface drainage.

As it is, plaintiff's lands are severely flooded in time of freshet, and probably would be to some extent flooded even with the best outlets because of their low situation and of the shallow banks of the channel there.

To the extent that the injury to his land proceeds from natural causes he has of course no cause of complaint.

Nor is it a proper subject of complaint by him that the individual riparian properties above him have made what appears to be only a reasonable use of the stream as it flows past their lands as an outlet for their drains constructed on their own lands to drain them for agricultural purposes. . . .

[Reference to Miller v. Laubach, 47 Penn. St. R. 154; Re Township of Elma and Township of Wallace, 2 O. W. R. 198; McCormick v. Horan, 81 N. Y. 86; Gould on Waters, 3rd ed., sec. 274; Young v. Tucker, 26 A. R. 162.]

But this right of individual riparian proprietors to drain directly through their lands into the stream is not at all the same thing as the right, if any, which accrues to two or more persons not riparian proprietors seeking drainage outlet under the provisions of the Ditches and Watercourses Act. Such latter right is purely statutory, and has in no way interfered with or curtailed the common law right of a riparian proprietor to have the stream flow through his land in its accustomed volume without sensible diminution or increase, except, as before pointed out, by the drainage into the stream directly from the lands of the upper riparian proprietors. No one not a riparian proprietor has such a right, nor can the upper riparian proprietor himself confer such a right upon one whose lands do not touch the stream, to the prejudice of a riparian proprietor down stream. The right of persons not in the position of riparian proprietors, and who proceed for relief under the Ditches and Watercourses Act, is to have the ditch or drain carried to a proper outlet, and a proper outlet is one which, as defined in the statute, enables the water to be discharged without injuriously affecting the lands of another. The lands of a riparian proprietor below the outlet are under no such servitude in respect of the waters thus cast into the stream as they are subject to in respect of the reasonable use of the stream for drainage purposes by the upper riparian proprietors. If his lands are overflowed by waters coming from the drain, the outlet is not a proper one, and he is not compelled to submit to it.

Of course a running stream with sufficient banks to contain the water would usually be a sufficient outlet. But the

question is one of fact. For instance, a stream already fully occupied in carrying the water properly belonging to it would not be a proper outlet for foreign water brought to it by a ditch constructed under the Act, if the inevitable result would be to cause the water to overflow upon the lands of the owners down stream. And that appears to be the situation in the present case. Plaintiff asserts, and the Referee has found upon apparently sufficient evidence, that the effect of these award drains, as they are called, and particularly of numbers 1 and 2, is to increase the overflow upon plaintiff's lands, and he therefore reached the conclusion that the outlets were insufficient.

I agree with his conclusions as to these award drains 1 and 2. These carry a considerable body of foreign water into the stream immediately above plaintiff's lands, where the stream has already lost its current and has almost become a lagoon, and must very considerably increase the flooding of plaintiff's lands.

But I am unable to agree that the same result should follow in the case of drain number 3, which is a very small affair, too small to sensibly affect the stream, and moreover is apparently entitled to stand upon the footing of a drain by a riparian proprietor directly into the stream, nor in the case of drain No. 5, which apparently begins and ends in a branch of the stream some miles above plaintiff's lands, and which does not therefore bring into it foreign water. There is nothing to prevent a riparian proprietor from straightening, cleaning out, deepening, or widening the stream itself as it passes through his own land, provided he discharges it as it leaves his land in its usual channel, which is all that was apparently done in the case of drain No. 5. And what one riparian proprietor may do, several in combination may do with or without an award.

And this brings me to the important question so much urged upon us by counsel for defendants, that, whether the outlets are or are not sufficient, they are the outlets provided in his awards by the township engineer, and are binding upon plaintiff, although no party to them, as well as upon the defendants who were parties. This point has apparently not been before passed upon in any reported case where the question was as between the rights of a third party in conflict with those claimed by the parties to the award, although in In re McLellan and Chinguacousy, 27 A. R. 355, the effect of an award as between the parties themselves was

considered, and was held to limit these rights to those obtainable by a reconsideration of the award under the provisions of the statute.

But, in my opinion, a third party, that is, a person not a party or privy to the award, cannot be affected by it. It would I think, be contrary to every settled principle if he could. He receives no notice of the proceedings. He may be non-resident, and yet it is said his property may be, behind his back, injuriously affected, and, in fact, confiscated, without remedy, except such, if any, as he may be able to obtain under the Act. Nothing in the Act requires such an extraordinary effect to be given to the award.

The statute in force when these drains were constructed was R. S. O. 1887 ch. 220.

The engineer is an officer of the corporation: sec. 2. But he need not be a qualified engineer, as any one may be appointed. He has no power to initiate proceedings under the Act. The persons who may set him in motion are those mentioned in sec. 4, namely, the owners of lands, whether immediately adjoining or not, which would be benefited by making a ditch or drain, etc., to enable the owners or occupiers thereof the better to cultivate or use the same, and such owners are thereby charged with the duty to open, make, and maintain a just proportion of such ditch or drain according to their several interests in the same, and it is only in case of dispute among themselves that the engineer is to be called in: sec. 5. If there is no dispute, the owners interested may do all that the engineer has power to direct. His interference confers no extended jurisdiction, but is really confined to adjusting the disputed points which arise in the performance of the statutory duty imposed upon the owners by sec. 4. There is nothing to prevent all parties interested agreeing to call in some other engineer to settle their differences, instead of the township engineer. Such other person would not, of course, possess the statutory powers of the township engineer, but a ditch constructed in that way would, when completed, be a ditch under sec. 4 exactly in the same way and to the same extent as if it had been made under an award of the township engineer. The award itself in fact confers no authority and imposes no duty except in the mere matter of the details of performing the statutory duty already prescribed and imposed upon all owners by sec. 4.

The statute requires the water to be taken to a sufficient outlet so that no person's land shall be flooded or overflowed. The duty to provide such an outlet is the same whether the engineer is called in or not. He has no power to finally determine what is or what is not a proper outlet, not even as against a resisting party to his proceedings, who could certainly before the work proceeds bring that question into Court for adjudicating notwithstanding the award. The question of proper outlet is really in the nature of a condition precedent to the authority of the engineer in the premises. If it does not exist, the proposed drain can not be made, and he has no jurisdiction, and an injunction might be obtained to restrain all proceedings under the award.

Of course it is important for these parties to obtain good and sufficient drainage, and the law has, I think, made provisions which, if adopted, would have secured that end, and have obviated the present situation. The Ditches and Watercourses Act was not intended for such a case as the present, but for the simpler case of a comparatively short and inexpensive ditch to reach an undoubted outlet. The proper remedy in the present case would, I think, be found in the provisions of the Municipal Act under which the whole stream could be so deepened and enlarged as to afford ample drainage facilities for all the neighbouring lands, including those of plaintiff, at an expense which, while no doubt considerable, would still be far below its great advantage to all concerned. And to that remedy plaintiff, we were informed, has repeatedly invited defendants, but so far without success. That being so, I have the less compunction in supporting the Referee's conclusion that the defendants who were parties to drains 1 and 2 must be restrained from continuing to use the award ditches in question.

As to the damages. The Referee has treated the wrong complained of as a joint tort, and has awarded a lump sum of $500 against all the defendants. But the cause of action was not, in my opinion, joint, but several, and each party is liable not for what his neighbour did, but for what he did himself. In fact, strictly speaking, there was no right to join the defendants at all in one action for damages: Hinds v. Town of Barrie, 6 O. L. R. 656, 2 O. W. R. 995: although such a joinder may be permissible where an injunction only is sought to restrain a nuisance contributed to by all the defendants.

And even in an action for damages the parties to each of the awards might have been joined in one action, because their acts in creating the ditch was joint. But it is obvious

that there is no joint connection between the several sets of defendants as among themselves, and they should not have been jointly sued if damages only were sought.

To make a separate assessment of damages would be, in the circumstances, extremely difficult, if not impossible. There is no evidence to shew to what extent each defendant or set of defendants has contributed to the total injury. If plaintiff could do so, he should have supplied the evidence. Without it his case for damages is not complete, with the result that he is only entitled to nominal damages, and that, I think, with the injunction, is what he should have.

With reference to the question of the costs of the defendants who were dismissed from the action by the judgment of the Referee, no reason is suggested why these defendants should not be paid their proper taxable costs instead of the lump sums allowed, except that it was considered that they should have joined in one defence. But they were not obliged to do so if separate defences were necessary, and that is, I think, a matter to be considered by the taxing officer, who will not, of course, allow the costs of unnecessary proceedings. The judgment should therefore be amended in this respect, simply dismissing the action as against them with costs. And they must have their costs of this appeal.

And the same result as to costs must follow in the case of the defendants who were held liable by the Referee as parties to the 3rd and 5th award drains. The action should be dismissed with costs as against them, and they must have their costs of the appeal.

Plaintiff should have the costs of the action against the defendants who are parties to the 1st and 2nd awards, as if they had alone been sued, and as against these defendants there should, I think, be a similar order as to the costs of this appeal.

MAGEE, J. SEPTEMBER 20TH, 1904.

CHAMBERS.

RE ESTATES LIMITED.

Company—Winding-up—Several Petitions—Conduct of Proceedings—Costs.

Petitions by Archibald McMillan and May Manderson for winding-up orders under the Dominion statute.

C. Elliott, for petitioner McMillan.

S. B. Woods, for petitioner Manderson.

S. King, for the company.

MAGEE, J.—There are two petitions for a winding-up order. All parties consent to an order being made, and the case is a proper one. Both petitions come on together, but the one first filed is by Mr. McMillan, who alleges that the company are indebted to him for services rendered, but gives no other particulars either in his petition or affidavit. No objection was made on that score, but I do not desire to be considered as approving of such a statement of indebtedness as being all that is required by the Act. The second petition was filed on the day after Mr. McMillan's by Mrs. Manderson, who alleges that she is a creditor under a contract which is put in, and under which she made payments to the company.

The question is between the petitioners, as to which of the petitions shall be allowed, and who shall have the conduct of the proceedings.

It appears that there are some 250 such contracts as that with Mrs. Manderson outstanding with other persons. On perusal of the contract, which is on a printed form, one can only wonder how persons could be so simple as to be induced to enter into it. Manifestly none of those who did could have had any professional or independent advice or any business experience. . . .

It appears that the petitioner Mr. McMillan was an agent of the company, employed in selling stock of the company, and in close touch with the officers and management of the company and friendly to them, and on behalf of Mrs. Manderson the belief is expressed that he will not act in hostility to them nor take the same interest in the prosecution of the winding-up as would she, who has relations and friends in the same position as herself.

The fear is, I think, a reasonable one; although it is fair to say that Mr. McMillan disclaims collusion; and, as the affairs of the company and its methods should be probed to the bottom, and the creditors should not have any reason for misgivings in that regard, the prosecution of the winding-up should be in other hands. . . .

In ordinary circumstances the first petition has the preference, and a second petition would be unnecessary, and the second petitioner would lose her costs if she had notice of the previous one, unless there were other reasons for filing a second, such, for instance, as fear of collusion.

Under the circumstances, the order for winding-up will go under both petitions, but Mrs. Manderson will have the

conduct of the winding-up proceedings. The costs of both petitions and of the company therein to be paid out of the estate. See In re Constantinople and Alexandria Hotel Co., 13 W. R. 851. All parties consenting, Mr. Clarkson, the present assignee, will be the interim liquidator. Usual reference to J. A. McAndrew.

SEPTEMBER 20TH, 1904.

DIVISIONAL COURT.

SCOTT v. BUCK.

Mortgage—Redemption—Default on Final Day Fixed—Refusal of Defendant to Accept Redemption Money—Application to Court to Open up Order — Exceptional Indulgence—Relief from Forfeiture—Terms—Costs.

Appeal by defendant from order of BOYD, C., 3 O. W. R. 629.

H. M. Mowat, K.C., and G. A. Sayer, Chatham, for defendant.

W. H. Blake, K.C., for plaintiffs.

THE COURT (MEREDITH, C.J., IDINGTON, J., MAGEE, J.), dismissed the appeal without costs.

CARTWRIGHT, MASTER. SEPTEMBER 21ST, 1904.

CHAMBERS.

MOFFAT v. LEONARD.

Discovery—Examination of Person for Whose Benefit Action Defended—Rule 440—Affidavit on Production.

Motion by plaintiff under Rule 440 to examine for discovery A. B. Cowan and William Cowan as persons for whose immediate benefit this action was defended, and for a better affidavit on production.

G. H. Kilmer, for plaintiff.

C. A. Moss, for defendants.

THE MASTER.—The grounds on which the motion is based are the answers given by C. W. Leonard, a member of the defendant firm, on his examination for discovery on 12th September instant. The action is for alleged infringement by defendants of certain inventions which plaintiff has patented . . . infringement by the manufacturer of the "Dakin Heater." The statement of defence denies all allegations in statement of claim. It also says that the right to manufacture the "Dakin Heater" was acquired from Cowan & Co. In the examination for discovery C. W. Leonard sets this all out and mentions having received a letter from Cowan of 19th September, 1902, and also one from plaintiff and certain agreements and transfers from the Cowans to defendants made in 1897 and 1902. The plaintiff is entitled to have these produced, and so a better affidavit on production should be made.

As to the other branch of the motion, I do not think it should succeed. No case is to be found where a motion such as the present has been made. . . . All the cases on the Rule have been on application of defendants to examine the real plaintiff. This has always been the case from the first one, Macdonald v. Norwich Union Ins. Co., 10 P. R. 462. . . .

Without having the documents before me, it is impossible to say positively that the Cowans do not come within the Rule: and, if plaintiff so desires, the motion may be renewed on these documents being produced.

But in the present state of the case the motion cannot succeed. There is no evidence that the action is being defended for "the immediate benefit" of the Cowans. At the most a successful defence may relieve them from a possible liability to defendants. But the main benefit will be to defendants themselves, who will then be able to go on with what would appear to be a profitable industry.

In order to invoke with success this Rule 440 the facts should answer the tests proposed by Street, J., in the analogous case of Major v. Mackenzie, 17 P. R. 18 . . .

I gather from the depositions of Mr. Leonard that there was nothing done by the Cowans in any way after this action was brought, nor before it, in reference thereto. . . . It seems to me that the same principle that has been applied to defendants' applications must be applied to this now made by plaintiff. If the note of the case of Menzies v. Toronto

and Ottawa Co., Holmested & Langton, p. 616, is correct, then this motion cannot succeed, and must be dismissed.

As the point is new, and there are no authorities to guide, the costs will be in the cause.

Wallbridge v. Trust and Loan Co., 13 P. R. 67, indicates what would appear to be the principle of decision here: that defendants are vitally interested and are not defending for the immediate benefit of the Cowans, though the latter may have an indirect interest in defendants' success.

CARTWRIGHT, MASTER. SEPTEMBER 22ND, 1904.

CHAMBERS.

HANRAHAN v. WELLINGTON COLD STORAGE CO.

BAYLY v. WELLINGTON COLD STORAGE CO.

Venue—Change—Preponderance of Convenience—Witnesses—Expense—Fair Trial—Affidavits—Examination for Discovery.

Motion by defendants to change the venue from Ottawa to Guelph.

C. A. Moss, for defendants.

A. Hoskin, K.C., for plaintiffs.

THE MASTER.—Both actions arise out of work done for defendants at Fergus, in the county of Wellington. In the first action Hanrahan claims for services as an expert in devising cold storage systems. Bayly is the architect who was employed in the same work. The causes of action would seem, therefore, to have arisen in the county of Wellington. From this it may be inferred that the bulk of the evidence may be looked for there.

The distance from Guelph to Ottawa is over 300 miles, and the return fare is nearly $16.

In the first action defendants swear to 20 witnesses, of whom 18 reside at or near Guelph. Plaintiff swears to 10 witnesses, all residing at Ottawa.

In the second action defendants swear to 11 witnesses, of whom 9 reside at or near Guelph. Plaintiff swears to 7

witnesses, all resident at Ottawa; of these he says 5 are experts, who will give professional evidence as to the value of his services. . . .

It seemed to me to be conceded on the argument that the two actions should be tried at the same time.

There has been no cross-examination on any of the affidavits. Assuming that they are correct, there would be a preponderance of 10 witnesses on the side of defendants in the two actions. This would be an extra cost in railway fares of at least $160. There would be in addition the extra days of the witnesses in going to Ottawa and back, making at least $30. and perhaps more, as the assizes at Ottawa usually last longer than at Guelph, making in all $200.

On this ground, therefore, the motions are entitled to succeed.

Plaintiffs, however, state that they cannot have a fair trial at Guelph. For the reasons given in Brown v. Hazell, 2 O. W. R. 785, no weight can properly be given to such fears. If necessary, the presiding Judge will on request dispense with the jury.

It was further argued for plaintiffs that the examination for discovery of defendants' secretary shewed that the pleadings were misleading, and that on the trial of the real issues between the parties there could not be more than 3 or 4 witnesses on each side.

Mr. Moss objected that these depositions could not be used on the present motion; that, if such evidence was thought useful by plaintiffs, it should have been got by cross-examination on the affidavits filed in support of the motion. I reserve this question for future consideration, and at present give no opinion.

It is sufficient to say that I do not think we can now forecast the procedure at the trial with such confidence as to dispose of the motions on the ground of what will then take place.

In view of Halliday v. Armstrong, 3 O. W. R. 410, and McDonald v. Dawson, ib. 773, it is difficult to have a change of venue. Here there is no allegation of financial inability to take the necessary witnesses from Ottawa to Guelph—a circumstance to which great weight was attached in the last case.

Under all the facts now before me, I think the motions must prevail. It is also to be noted that if the cases go to Guelph they can be tried on 16th October. If at Ottawa not until the end of this year or even January next.

The costs as usual will be in the cause.

MAGEE, J. SEPTEMBER 22ND, 1904.

WEEKLY COURT.

ST. LEGER v. T. EATON CO.

Party Wall—Excavations under—Rights of Adjoining Owners — Rights of Reversioners — Landlord and Tenant — Interim Injunction.

Motion by plaintiff for an interim injunction to restrain defendants from excavating so as to undermine a wall between plaintiff's and defendants' premises.

J. H. Moss, for plaintiff.

G. F. Shepley, K.C., for defendants.

MAGEE, J.—It is admitted by counsel for both parties that the wall in question is used as a party wall. This may mean, in the case of two adjoining owners of land, that part of the land covered by it belongs to one and part to the other, or that the whole belongs to both as tenants in common. In the absence of evidence to the contrary, the common user is prima facie evidence of a tenancy in common: Cubitt v. Porter, 8 B. & C. 257. Such a tenancy in this country is, I think, at least unusual in fact. In this case there is some evidence as to the ownership on the papers before me. . . Upon the evidence, I would come to the conclusion that the wall is a party wall, but the land covered by it was owned partly by plaintiff's lessors and partly by defendants or their grantors of the adjoining property. Plaintiff is lessee. Defendants are assignees of the reversion (in fee, presumably) and owners of the adjoining property. They claim to be entitled to do what they have done in virtue of their rights in the party wall as owners of the adjoining property and also as plaintiff's landlords. Defendants are doing the work not for the purpose of renewing or repairing the party wall, but wholly for the purpose of constructing a wall beneath

it and supporting a wall above. Defendants are not confining their excavations or proposed construction to the width of the party wall, but are proposing to lay foundations (some 9 feet wide) for pillars, and about one-half of the width of these foundations of 10 pillars will be upon the land of which plaintiff is lessee. If defendants are entitled as of right to do this for a building six storeys high, then conceivably they could go all the way across plaintiff's premises for the foundations for a higher building.

Whether there was a tenancy in common in the land covered by the wall, or whether, as I think appears upon the evidence, that land was owned separately part by each, I do not know of any authority or principle which would entitle either owner to trespass by widening it upon the land of the other farther than the width of the existing foundation. . . .

Finding, as I do, a separate ownership to the line of the wall, I think defendants are entitled to cut upright channels in their side of the wall for the reception of pillars, not going beyond the separating line and not substantially weakening the wall so as to interfere with the right of support which plaintiff has in defendants' part of the wall. . . .

If there is a separate ownership, then neither owner in consenting to the erection of a party wall, in the absence of agreement, can be taken to have consented to burden his land with more than the wall actually constructed, whether that wall be 6 feet or 60 feet in height or length.

Unless, therefore, plaintiff is in some other way barred from objecting, defendants have no right, as adjoining owners, to construct a wall beneath the present one, and thereby encroach farther on plaintiff's land.

It was urged for defendants that plaintiff as tenant could not object to defendants as his landlords making the excavations beneath the wall, as they did not affect his beneficial enjoyment of the premises, and the lessor's covenant being merely one in the statutory short form for quiet enjoyment, that was the measure of her right as lessee, and that the excavations (except in so far as the actual damage which accrued was concerned) were not a breach. But during the term the lessee is in effect the owner, so far at least as to be entitled to prevent all intrusion, and even to make repairs a landlord has no right to enter during the term without a distinct stipulation to that effect: Barker v. Barker, 3 C. & P.: and may be restrained by injunction: Stocken v. Planet Building Society, 27 W. R. 877.

By this lease the lessor is entitled to enter and view the state of repair, but for no other purpose unless under the usual proviso for re-entry.

Then it is urged that there was on plaintiff's part not only acquiescence but license for the work done and proposed (other than the actual damage to the wall). This plaintiff denies, and he says he was only spoken to about the hoarding, and the evidence against him is not so clear as to disentitle him to have the question tried before his apparent right of property is interfered with.

The assertion that the injury to the wall arises from a drain on plaintiff's premises is not sufficiently proved by the evidence given.

For the present plaintiff is, I think, entitled to an interim order restraining defendants, their servants, etc., until the trial from entering upon or making excavations or erecting walls on the land covered by plaintiff's lease, and from interfering with the party wall beyond the line of that land, or so as to weaken the same or substantially lessen plaintiff's right of support from that part of it adjoining the part of the wall, and from interfering with that part of the wall adjoining plaintiff's line on the ground beneath the same, without taking all proper and necessary precautions to guard against injury to the wall.

Costs in the cause unless otherwise ordered by the trial Judge. The plaintiff to expedite the cause and bring it on for trial at the first available Court.

MAGEE, J. SEPTEMBER 23RD, 1904.

WEEKLY COURT.

CITY OF HAMILTON v. HAMILTON STREET R. W. CO.

Street Railways — Contract with Municipal Corporation — Sale of Workmen's Limited Tickets—Specific Performance —Mandatory Injunction—Interim Order—Convenience.

Motion by plaintiffs for an interim injunction or mandamus commanding defendants to fulfil their contract with plaintiffs as to the sale of limited tickets.

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

E. D. Armour, K.C., and G. H. Levy, Hamilton, for defendants.

MAGEE, J.—Plaintiffs base their application upon defendants' agreements of 26th March, 1892, and 13th September, 1898, to perform, observe, and comply with all the terms of plaintiffs' by-law No. 624 passed 26th March, 1892, as modified by their by-law No. 955 passed 13th September, 1898. By-law No. 624 and the agreement of 26th March, 1892, are set out in the schedule to the Ontario statute respecting defendants, 56 Vict. ch. 90, passed in 1893 on defendants' petition. by which Act, among other things, defendants were empowered to issue debentures and to secure them upon the undertaking, assets, rights, powers, and franchises of defendants, including the rights, powers, and franchises under the said by-law and agreement, and provision was made for effectuating the security.

The by-law was passed to enable defendants to use electric power, instead of horses or mules, to which, as recited therein, defendants were previously by earlier city by-laws restricted.

By sec. 19 of this by-law No. 624 the following specifications regulating the running of the street railway shall be observed by defendants: (c) The company may charge and collect for every person on entering any of their cars, for riding any distance, a sum not exceeding 5 cents . . . and shall issue workmen's tickets at 8 for 25 cents good during the following hours, namely, 6.30 to 8 a.m., 11.50 to 1.30 p.m., 5.15 to 6.30 p.m., and shall also carry children between 5 and 12 years of age for a cash fare of 3 cents, or give 10 children's tickets for 25 cents. (o) Any conductor collecting more than the fare prescribed by the by-law shall, on conviction thereof in the police court, pay a fine of not less than $5. (p) The company shall keep tickets for sale at some place in the business portions of the city, convenient for the people, and also upon their cars, and they shall sell tickets to persons desiring the same at a rate not exceeding 25 cents for 6 tickets for fare to any point within the city limits.

By the subsequent by-law No. 955 clause (c)of sec. 19 of by-law No. 624 was amended by providing that limited tickets may be used from 5 to 6.30 p.m., instead of from 5.15 to 6.30 p.m., and by adding thereto the following, "and shall give to any child between 5 and 14 years of age, when going to school, a ticket to go and return on the date of issue, for 5 cents. . . . The company shall put up inside each car . . . a notice stating the hours within which limited tickets may be used."

It is alleged in plaintiffs' statement of claim, which is verified by the affidavit of the assistant city clerk, that after the passing of the said by-law defendants sold upon their cars to all persons desiring the same limited tickets at 8 for 25 cents, marked "good only from 6.30 to 8 a.m. and 11.50 to 1.30 p.m., also 5 to 6.30 p.m.," and continued to sell such tickets in their cars until 1st September, 1904, and that on that date they ceased to sell at that rate on their cars tickets good during these hours, and that in August, 1904, defendants issued and posted in their cars and otherwise advertised a notice as follows: "The sale of workmen's tickets, 8 for 25 cents, will hereafter be strictly confined to workmen (or workwomen), and may be had at the company's head office, King street east, or the traction manager's office, corner James and Gore streets. For the convenience of workmen special arrangements may also be made for the sale of such tickets at offices of manufactures in different parts of the city, but such tickets shall not be sold on the cars."

It appears from the affidavits of Mr. Kent and two other deponents, described as labourers . . that on 1st September, 1904, between 12 m. and 1 p.m., they severally, on defendants' cars, asked and offered to pay for the limited tickets at the rate of 8 for 25 cents, and were refused.

Plaintiffs claim specific performance of defendants' agreement and a mandamus or mandatory injunction to compel defendants to continue to sell upon their cars, to persons desiring the same, tickets for the conveyance of passengers on their railway at the price of 8 tickets for 25 cents, good during the hours above specified. . . .

Defendants' Act of incorporation empowered them to construct and operate their railway upon the city streets under and subject to any agreement to be made between them and the city council and under and subject to the by-laws of the city corporation made in pursuance thereof. They obtained from plaintiffs the use of the streets upon the faith of their agreement, and they should be required to live up to it, unless there is some strong reason to the contrary.

In reading the agreement it is difficult to come to any other conclusion than that the parties intended that all classes of tickets thereby provided for should be sold in places convenient for the public. . . . The word "tickets" in the clause as to sale in convenient places is not restricted . . to the class of tickets mentioned later in the same clause, there being no specially connective word implying such restriction. . . .

[Reference to the judgment of Meredith, J., in City of Hamilton v. Hamilton Street R. W. Co., ante 47.]

If, then, the agreement is binding on defendants, and they are committing a breach of it, what remedy is open? . . .

It is not necessary to consider here whether plaintiffs would be entitled to a mandamus, a question which was dealt with by the Court of Appeal in City of Kingston v. Kingston, etc., Electric R. W. Co., 25 A. R. 462. If it is proper to issue a mandatory order, that is sufficient for plaintiffs at present.

Defendants say that plaintiffs should be left to an action for damages and to recover whatever they as a corporation could prove they had sustained. To offer that remedy is practically to say that defendants are entitled to break their agreement when they please. . . .

There is here, as it appears to me, no such difficulty in the carrying out of the order as has frequently led the Court to refuse to make a direction which it could not practically enforce. . . . Here it is asked that defendants be ordered to do something of the simplest character—to keep a certain class of tickets for sale and sell them. . . . It requires no skill, no outlay, no inconvenience, and no loss of profits, for defendants profess willingness to sell at the same price, but elsewhere.

It is not desirable that on an interlocutory application a conclusion should be expressed which the trial Judge, with the benefit of full argument after hearing further evidence, may be unable to agree with, and I was at first inclined to adjourn this motion till the trial. But the consideration of convenience on each side has led me to believe that it is better to make now the order which, as the case stands before me, seems to be the proper one. It causes no expense, trouble, danger of loss, or inconvenience to defendants, while, on the contrary, to let matters remain as they now are must daily entail either inconvenience to many persons in Hamilton, or a submission to pay fares upon which they did not count. . . . As in my view, on the facts before me, defendants are in clear breach of their agreement, it is more convenient that for the short time before the trial they should be made to keep matters as they were, than that many others should unfairly have to submit to even slight loss.

Defendants will until the trial be restrained from ceasing to keep for sale, and selling, and be ordered to

keep for sale, or sell, upon their cars, to workmen, at the rate of 8 for 25 cents, workmen's tickets such as provided for in clause (c) of sec. 19 of plaintiffs' by-law No. 624, and good during the hours mentioned in that clause, as modified by by-law No. 955; plaintiffs to be bound so to expedite the cause that it may without default of plaintiffs be entered for trial at the first sittings at Hamilton, and to enter it for trial then if in proper state for trial.

Costs of motion to be costs in the cause, unless trial Judge otherwise orders.

In restricting the order to a sale to workmen I do not desire to express any opinion as to defendants being bound to sell their tickets to any person applying for them, or as to who will be entitled to use the tickets. These questions may arise at the trial. . . .

SEPTEMBER 23RD, 1904.

DIVISIONAL COURT.

RE TAYLOR.

Will—Construction—Bequest to Widow—Dower—Election.

Appeal by Letitia Taylor, widow of John Thomas Taylor, from order of FALCONBRIDGE, C.J., in Chambers (3 O. W. R. 745) declaring that the appellant was put to her election whether she would take under her husband's will or take dower in his lands.

C. A. Moss, for appellant.

J. H. Spence, for executors.

V. A. Sinclair, Tilsonburg, for Rose Ann Sprowl.

C. A. Masten, for Jane Whalen and Ruth Lyman.

THE COURT (MEREDITH, C.J., IDINGTON, J., MAGEE, J.), allowed the appeal and made an order declaring that the appellant was not put to her election. Costs of all parties out of the residuary estate.

SEPTEMBER 23RD, 1904.

DIVISIONAL COURT.

PUGH v. HOGATE.

Costs—Taxation—Distribution between Plaintiff and Defendant — Plaintiff Failing on one Claim and Succeeding on Another—Jurisdiction of Taxing Officer—Objection —Waiver.

Appeal by defendant from order of ANGLIN, J. (3 O. W. R. 799), allowing appeal by plaintiff from taxation of defendant's bill of costs by the senior taxing officer at Toronto.

Grayson Smith, for defendant.

C. A. Moss, for plaintiff.

THE COURT (MEREDITH, C.J., IDINGTON, J., MAGEE, J.), dismissed the appeal with costs.

SEPTEMBER 23RD, 1904.

DIVISIONAL COURT.

STROUD v. SUN OIL CO.

Partition—Summary Judgment — Local Master—Appeal— Question of Title — Independent Title of Defendants — Direction that Action be Brought.

Appeal by plaintiff from order of BRITTON, J., in Chambers (3 O. W. R. 806), allowing appeal from a summary order for partition and directing that an action be brought.

J. Dickson, Hamilton, for plaintiff.

W. M. McClemont, Hamilton, for defendants.

THE COURT (MEREDITH, C.J., IDINGTON, J., MAGEE, J.), dismissed the appeal with costs to defendants in any event in the action to be brought, and extended the time for bringing the action.