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DIVISIONAL COURT.

JUNE 24TH, 1912.

WILEY v. TRUSTS AND GUARANTEE CO. ET AL.

3 O. W. N. 997, 1494.

Contract — Construction — Correspondence — Transfers of Land Held in Escrow — Undertaking not Registered — Action for Reconveyance.

Action by plaintiffs, executors of one Wiley, to compel defendants to reconvey certain mining properties to them. Defendants as trustees for a certain syndicate, and for those of the public who should become "special members" thereof, had taken transfers of the properties in question to themselves as such trustees pursuant to an unconditional undertaking of Wiley to give such transfers. Later, Wiley claimed that certain correspondence between the parties, with reference to the implementing of his undertaking, had superimposed thereon certain conditions which had not been fulfilled and that, therefore, he was entitled to a reconveyance of the properties.

TEETZEL, J., gave judgment for plaintiffs as prayed, with costs, without prejudice to the right of defendants to bring action in respect of the original undertaking.

DIVISIONAL COURT varied above judgment by directing a sale of properties by Court, payments to be made of proceeds: (1) to defendants, their costs of action and appeal as between solicitor and client; (2) their expenses, commission, etc.; (3) costs of all parties to reference; (4) remainder to be divided 40% to "special members" of syndicate, and balance to plaintiffs, or at plaintiffs' option on purchasing interests of "special members" and costs, expenses, commission, etc., of defendants, as above, they were to become entitled to a reconveyance of the properties.

If plaintiffs should not elect to take either alternative, appeal to be allowed and action dismissed, both without costs.

An appeal by the defendants from the following judgment.

I. F. Hellmuth, K.C., for the plaintiff.

J. W. Bain, K.C., and M. Lockhart Gordon, for the defendants.

HON. MR. JUSTICE TEETZEL (10th April, 1912):—As between the plaintiff and the defendants, the company, Warren and Stockdale, the right of the plaintiff to a reconveyance of the properties in question rests upon the letter of March 7th, 1907, from plaintiff's solicitors to the defendant company and the reply thereto of the same date.

The first letter enclosed the transfers and expressly states that they are only deposited with the company in escrow until the consideration money is paid, and that "if you cannot hold these transfers on the above conditions kindly return the same to us, as they are left with you on no other conditions." In the letter from defendants' manager to plaintiffs' solicitors acknowledging receipt of the transfers, he says, "All I can say is that I will hold the transfers unregistered subject to the terms of the undertaking I have." (This has reference to an undertaking, dated November 22nd, 1906, by the testator whose executors the plaintiffs are, to execute the transfers to defendant company as trustees for the Nipigon Syndicate). "I know of no arrangement by which Mr. Wiley is entitled to any consideration for these transfers, but in taking this stand I wish to state that the position of the parties is not to be prejudiced merely by the transfer of possession of the transfers from you to me."

Instead of holding the transfers "unregistered," and so that the "position of the parties is not to be prejudiced merely by the transfer of the possession of the transfers from you to me," as undertaken in the last recited letter, the company shortly afterwards without the knowledge or consent of the transferor or his solicitors, registered the transfers, and conveyed the properties to one of its officers in trust, who afterwards conveyed them to another officer in trust. These officers are both defendants and the plaintiffs' claim is for a reconveyance.

I think upon a proper construction of the letters above recited, and there being no pretence that the consideration for the transfers was paid, the plaintiffs are entitled to judgment directing the defendants to reconvey to them the lands described in the transfers free from any incumbrance done or suffered by them, but without prejudice to any action the defendant company may be advised to bring upon the above-mentioned undertaking.

The defendants must also pay the costs of this action.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL.

J. W. Bain, K.C., and M. Lockhart Gordon, for the defendants, appellants.

I. F. Hellmuth, K.C., and W. J. Elliott, for the plaintiffs, respondents.

HON. MR. JUSTICE RIDDELL:—At about the time of the height of the Cobalt "boom," one Campbell came to Warren, the manager of the Trusts & Guarantee Co., deposited a considerable sum of money with the company and stated to Warren his method of doing business. This was to acquire a Cobalt property, form a syndicate, obtain from or through the syndicate sufficient money to develop the property, and then sell or work it for the benefit of the syndicate. A. M. Wiley (now deceased) and Campbell both told Warren that Campbell had bought certain properties from Wiley and paid for them. It was necessary for Campbell to get the public interested in his scheme and to get money from the public: and this necessitated advertising.

It was arranged that the Trusts & Guarantee Co. should be trustees for the syndicate, i.e., of course, for all those who were to have an interest in the proceeds of the sale or working of the property. Warren says: "The question in my mind was as to whether I would insist upon the transfers being actually executed by Wiley, and recorded before permitting the Trust Company's name to be used in connection with the advertising; and upon an undertaking being give and Mr. E.'s assurance being given that everything was all right, I agreed to let the advertisements go just as if we had the transfers."

The undertaking was as follows: "To the Trusts and Guarantee Company, Limited, . . . I, A. M. Wiley, owner of the following properties (setting them out), agree that I hold the same in trust to be conveyed to you for the Cobalt Nipigon Syndicate Registered, and that I will execute proper conveyances vesting the title in you as soon as accurate descriptions can be obtained from Port Arthur, or within ten days from the date hereof." This was signed, sealed, and delivered by A. M. Wiley, November 22nd, 1906. Mr. E.'s assurance referred to was as follows. Mr. E. drew up the undertaking. Warren did not know Wiley and asked

E., "Now Mr. E., do you think this is all right?" and he said "certainly, you can depend on it; it will be all right."

The advertisement will be found in the report of the case of *McKim* v. *Bixel* (1909), 19 O. L. R., at pp. 82, 83—and as will be seen some subscribers were obtained. On November 29th, Warren writes E., the solicitor for Wiley: "You were to let me have on Monday last the actual transfers from Mr. Wiley covering particulars of agreement with Mr. Campbell. Will you please see that I have this in possession to-morrow morning." Such conveyances were urgently call for, as the advertisement which had been very extensively placed, read: "Title to all mineral lands is and will be vested in the Trusts and Guarantee Company, Limited," and an honourable company would see to it that this was done at the earliest possible moment. December 3rd, Mr. E.'s firm reply, saying: "Mr. W. wrote to his brother . . . for the original certificates so that a transfer could be drawn to you and deposited with you as arranged . . . I got Mr. W. . . . this morning to write to the Registrar for the necessary description. In the meantime I understand that Mr. Campbell has deposited with you a written undertaking from Mr. Wiley to transfer the property." December 31st, E. writes his client A. M. Wiley, enclosing "two separate deeds from yourself to the T. & G. Co. and one transfer under the Land Title from yourself to the T. & G. Co. This is for the purpose of carrying out your arrangement with Mr. Campbell," and January 8th, the documents are returned to E. executed, A. M. Wiley saying in the covering letter: "Now I want you to look after the transference of these documents to the Trust Company in such a way that I cannot possibly be tied up and that Campbell must pay me the $30,000 which he promised to do." February 14th, Warren writes E. again for "the transfers to us of the Wiley properties. Will you please let me have them at once in pursuance of the undertaking we have." February 16th, E. answers that he would be glad to hand over everything he has but, "I have instructions from Wiley that Campbell has not carried out his arrangement with him," and he asks for a copy of the undertaking. February 16th, Warren writes, "unless I receive the documents at once it seems to me that I must take immediate action. I do not know of any obligation on Campbell's part to Wiley. In fact Wiley told me verbally that there were no conditions, and I insisted upon that understanding being put in writing. I have been told by yourself that the only

delay was in getting the descriptions." February 25th, again a formal demand was made for the transfers and March 4th, E. writes Wiley's brothers: "I have a letter from the Trust Company insisting on Mr. A. M. Wiley carrying out his undertaking, which he gave to the Trust Company, that is, to transfer certain lands and premises to them . . I think it would be well in view of your brother's undertaking to hand these documents to the Trust Company with a letter that they are to be held by the Trust Company in escrow until the notes which Mr. Campbell was to give your brother are delivered." We are not informed how the solicitor conceived such a proceeding to be in accordance with the undertaking he had himself drawn up, and the assurance he had given Warren. March 5th, E. suggests to Warren that he (Warren) should see Campbell and tell him to carry out his part of the agreement, and March 6th, Warren replies: "You knew very well that Wiley's undertaking is absolutely unconditional, and I expect you, therefore, to carry it out and also your personal promise to me . . . We have the undertaking which must be carried out." March 7th, E. writes that if Warren does "not desire to wait till Mr. A. M. Wiley comes to the city," he had better take such proceedings as he may be advised. I venture to think that it would have been better if Warren had then taken proceedings—but he did not. Later on on the same day E. writes Warren's company: "In accordance with the writer's conversation with your manager to-day, we herein enclose you transfers of various properties from Andrew Marks Wiley to your company. The transfers are sent to you on the distinct understanding and agreement that they are not to be registered, neither are they to become the property of the Cobalt Nipigon Syndicate until the agreement between the Cobalt Nipigon Syndicate, George C. Campbell and Andrew Marks Wiley is carried out. The consideration for the transfer of these properties has not been paid nor any part of it and Mr. Wiley claims a vendor's lien on the same for it and only deposits them with you in escrow until that is paid. If you cannot hold these transfers on the above conditions kindly return the same to us, as they are left with you on no other conditions."

Warren answered:—

"I have to acknowledge the receipt of your two letters of this date. I telephoned you in reply to the first one saying that there was no intention on my part to accuse you per-

sonally of any breach of undertaking, but that what I wanted to make clear was that the undertaking to deliver the transfers was absolutely unconditional so far as Wiley and the Trust Company alone were concerned. I suggested that you send the papers with such a letter as you might see fit to write. Since then I have your letter enclosing the transfers. All I can say is that I will hold the transfers unregistered, subject to the terms of the undertaking that I have. I know of no arrangement by which Mr. Wiley is entitled to any consideration for these transfers, but in taking this stand I wish to state that the position of the parties is not to be prejudiced merely by the transfer or possession of the transfers from you to me."

No answer was made to this letter, and it must be taken that E. acquiesced in the terms of this last letter.

Subsequently Warren took advice as to what he should do, in view of the position of the syndicate, the subscribing members, who looked to the Trusts & Guarantee Co. to do what they could to protect them, and counsel advised that the transfers should be registered. Apparently without any reference to Wiley or his solicitor, the company registered the transfers about November, 1907, and thereupon further registered transfers from the company to J. J. Warren (their manager), and from Warren to Stockdale, Stockdale having a miner's license and the transfers being for domestic reasons—then Stockdale executed a declaration of trust in favour of the "Syndicate." May 29th, 1909, Wiley demanded a reconveyance, claiming that the transfers were held under the terms of E.'s letters of March 7th, 1907. Securing no reply to that letter or to another of June 7th, an action was brought, 2nd October, 1909, by the executors of A. M. Wiley against The Trusts & Guarantee Company, J. J. Warren, Stockdale and Cobalt Nipigon Syndicate—pleadings were noted, closed 3rd December, 1909, against Cobalt Nipigon Syndicate in default of defence—and the case came on for trial before Mr. Justice Teetzel, March 14th, 1912. That learned Judge's conclusions are to be found, 3 O. W. N. 997. The defendants (other than the syndicate) now appeal.

It seems to me too clear for argument, that for valuable consideration Wiley had undertaken to transfer the property to the Trusts & Guarantee Co.—that at a certain stage he desired to get away from his definite undertaking—that his solicitor advising a delivery as in escrow, an attempt was

made (in and by the letter of March 7th, 1907, to have the agreement made by Wiley modified in two particulars (1) the transfers were not to be registered; (2) they were not to become the property of the syndicate until an agreement between the syndicate, Campbell, and Wiley should be carried out—and that while the first change was acceded to by Warren (whether wisely or unwisely), the second was not. He says: "I will hold the transfers unregistered subject to the terms of the undertaking that I have."

It is argued that the last words of W.'s letter have some significance, but in view of all the correspondence, all they mean must be "neither the rights of Wiley nor those of the purchaser Campbell, etc., the parties to the agreement you speak of will be affected *inter se* by the transfers reaching our hands."

If these terms were not satisfactory to Wiley or his solicitor, they should have said so; but as I have already said, by their course of conduct, they must be taken to have acquiesced in the terms of this last letter.

Counsel for the Trusts & Guarantee Co. seems to have thought that, notwithstanding the express agreement to hold the transfers unregistered, the company being trustees were justified in registering them. No authority is cited for that proposition, and counsel before us expressly abandoned the position and admitted for the purpose of this action that his clients had done wrong. Therefore, however, the omission to register might have rendered the company liable to their *cestuis que trustent*, the registration must be vacated and the transfers declared "unregistered."

But with that done, I cannot see that the company are not entitled to hold the transfers in trust "for the Cobalt Nipigon Syndicate," as set out in the undertaking of November 22nd, 1906.

What is the "Cobalt Nipigon Syndicate?" Not simply Campbell, Dexter, and White, who in a proceeding to which the defendants were not party, were held to be "the only members on November 26th, 1906." See 19 O. L. R., at p. 86.

There is no doubt that confusion has arisen by reason of the ambiguity in the name "The Cobalt Nipigon Syndicate." There was a partnership formed by Campbell, Dexter, and White, evidenced by an indenture 24th November, 1906, exhibit 6, to continue for two years under the management of Campbell alone, he to have 80 per cent. of the profits and

each of the others 10 per cent, and he to have the right if either of the others should desire to retire to buy him out for $500.

This, if any, must have been the Cobalt Nipigon Syndicate, which had dealings with Wiley. Then there is a more extensive, "The Cobalt Nipigon Syndicate," provided for by another indenture of the same date, exhibit 5, to be composed of these three and "such other persons as may from time to time be entitled to membership in such syndicate," the number of memberships to be unlimited, the three persons named to be entitled to 60 per cent. of the profits and the "members" to 40 per cent. "Memberships" were advertised for sale in advertisements referred to by Warren (exhibit 3), and some favourable answers received with $120 enclosed for a "special membership" (see *McKim* v. *Bixel*).

It was this "syndicate" for which the Trusts & Guarantee Co. were to be trustees—a syndicate composed of three persons, who were partners, and an undetermined number of persons, who were not partners, but rather like shareholders in a company or co-owners, than members of a partnership. See 19 O. L. R., p. 87.

It is plain that the "memberships" so far as appears were brought on the advertisement, which states in so many words, "Title to all mineral lands is, and will, be vested in the Trusts & Guarantee Co., Limited," and "The Syndicate already own over 750 acres of valuable mining lands . . ."

It was clearly the duty of the Trusts & Guarantee Company to have this land vested in them before permitting the advertisement to issue—and having permitted the advertisement to issue before such vesting, the company were clearly right in insisting upon its being done as soon as possible. "Vested" must in this connection mean "effectively and safely vested," and I cannot understand the action of the company in waiving the right—which in their position as trustees may also have been a duty. It is possible that there were considerations which justified them in so doing; but, if so, they do not appear. But we need not consider this matter—the company consent now to be bound by their agreement—this consent and the judgment of the Court based upon it will not prejudice the right of the *cestuis que trustent* or any of them against the trustees for breach of trust, if any damages accrue from such breach of trust, which is not to be anticipated.

It is, and was, the duty of the Trusts & Guarantee Company to set up and actively assert their claim to the land and conveyances as such trustee—and they also had a legitimate claim for expenses, commission, etc., as such trustees. The judgment obtained against the Cobalt Nipigon Syndicate by default of pleading, must apply to the only Cobalt Nipigon Syndicate in existence in November, 1906, when A. M. Wiley is alleged to have agreed to sell to the "defendant, the Cobalt Nipigon Syndicate, for the consideration of $30,000" the lands mentioned—and that was the syndicate formed by the first agreement of November 24th, of the three persons named—the new syndicate had not been formed with "special members"—these came in in answer to the advertisement published after the sale and after the undertaking. No judgment against that syndicate can bind the "special members"—they are not partners: *McKim* v. *Bixel.*

So long as there are persons for whom the Trusts & Guarantee Co. are trustees, I think, they are entitled to retain these transfers.

It is claimed that the plaintiffs have a vendor's lien. It is not proved as against the Trusts & Guarantee Company or their *cestuis que trustent* that the amount was not paid—but waiving that, when the company accepted the trust, it was represented by the owner of the land that the land had been paid for; it is apparent that the company would not have allowed themselves to be represented in public advertisements as vested with the property if the land had not only not been paid for, but even wholly unpaid for. The representation was made that it should be acted upon, the advertisement represented the land as vested in the company—which, course, implies not subject to a vendor's lien, but paid for; subscriptions were received on this basis by the company from special members who are now *cestuis que trustent* of the company; and I think the vendor is now estopped from setting up that the land is unpaid for—at least, as against the "special members." I think from the evidence of Warren, the position of E. as solicitor for Wiley and the syndicate, and all the circumstances Wiley must have known, and did know, the whole plan. This, however, applies only to the "special members," who are entitled only to 40 per cent. of the proceeds of the lands—the judgment against the syndicate will apparently bind the partners in that syndicate, i.e., those who are entitled to the 60 per cent.

It would seem to be the best disposition to make of the case, to direct the sale of the lands, all parties to be at liberty to bid, pay out of the proceeds (1) the costs of the Trusts & Guarantee Co., between solicitor and client of action and appeal; (2) any expenses, commission, etc., to which the said company are entitled; (3) the costs of all parties of reference, and of the remainder divide 40 per cent. between the "special members," and pay the rest to the plaintiffs.

The plaintiffs consenting to this, it should be referred to the Master in Ordinary to sell, tax costs, fix expenses, commission, etc., determine the "special members," and generally to do everything necessary to carry out the judgment —disposing of the costs of the reference as above stated.

Or as a business proposition the plaintiffs may think it wise and profitable to purchase or otherwise acquire the claims and rights of the "special members"—who they are, or at least, who they were, originally must be known from the books of the syndicate, and of the defendant company. If this be done, upon the defendants being paid their costs, commission expenses as above, the plaintiffs would be entitled to a reconveyance of their property. The Master in Ordinary would fix the costs, etc., and dispose of the costs before him.

If the plaintiffs do not accept either course, I think the appeal should be allowed and the action dismissed, both without costs, but with a declaration that the defendants hold the transfers unregistered, according to their agreement.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and HON. MR. JUSTICE BRITTON, agreed in the result.

HON. MR. JUSTICE MIDDLETON. JUNE 24TH, 1912.

MALOUGHNEY v. CROWE.

3 O. W. N. 1488; O. L. R. .

Vendor and Purchaser — Contract for Sale of Land — Specific Performance—Statute of Frauds—Parol Evidence to Vary.

Action for specific performance of an agreement to sell certain lands which was evidenced by a receipt for the deposit paid sufficient to answer the requirements of the Statute of Frauds, but which was subsequently varied by parol evidence as to the times of payment and of delivery of possession. Defendant set up the Statute of Frauds as a defence to the action.

MIDDLETON, J., *held*, that, "where a plaintiff claims specific performance of a written contract, at the same time stating and offering to submit to subsequent parol variations, the Court will decree specific performance with the variations, if the defendant is willing to accept the same, and if not, according to the original contract."

Review of authorities.

Judgment for plaintiff for specific performance, with costs.

Action by purchaser for specific performance of agreement for sale of lands. Tried at Ottawa on the 19th June, 1912, without a jury.

Geo. D. Kelly, for the plaintiff.

J. E. Caldwell, for the defendant.

HON. MR. JUSTICE MIDDLETON:—I accept the plaintiff's evidence in this case, and where there is a conflict between the parties I give it the preference.

The plaintiff called at the residence of the defendant, for the purpose of purchasing, if possible, the property in question. He asked the defendant's price. The defendant said $5,500. The plaintiff unsuccessfully endeavoured to beat this price down; but, being informed that $5,499.99 would not buy the place, agreed to purchase it for the sum demanded, and paid ten dollars on account.

I think this was a completed agreement.

Thereafter the defendant suggested the giving of a receipt, and he prepared exhibit 1. This receipt I think correctly states the terms of the bargain and is sufficient to answer the Statute of Frauds.

After the receipt had been given, the plaintiff—not realising that he would as a matter of law be entitled to possession upon the payment of the price as stipulated, i.e., within ten days—asked the defendant when he would be given possession. The defendant then stated that he did not intend to give

possession for a month; whereupon some discussion took place as to the unfairness of this contention, the plaintiff thinking it unreasonable that he should have to pay the whole price in ten days and not receive possession for thirty days. Finally, the parties agreed that upon the plaintiff paying "a substantial sum" within ten days he should not be called upon to pay the balance of the price until the defendant was ready to yield possession.

This agreement constituted, I think, a subsequent parol agreement, modifying the former arrangement in the manner indicated.

When the parties met in Mr. Scott's office later, for the purpose of closing the transaction, the defendant demanded a thousand dollars as the "substantial sum" to be paid; and the plaintiff assented to this.

A new difficulty had in the meantime arisen. A real estate agent, in whose hands the property had been, appeared upon the scene and wanted commission. The defendant insisted on this commission being assumed by the plaintiff. The plaintiff would not assent. This, I think, was the real bone of contention.

The defendant then sought to recede from the parol agreement giving the extension for the payment of the balance of the purchase money in consideration of the delay in giving possession; and, although the plaintiff stated that he was ready to pay the whole price, if need be, the parties parted; and, at a subsequent meeting, when the controversy was renewed and carried through practically the same phases, nothing was done. The plaintiff throughout adhered to the position that he should have possession when he paid the whole price. The defendant throughout adhered to the position that apart from all other difficulties he would not convey unless the plaintiff would indemnify him against the claim of the agent.

The plaintiff was able to pay, as he had a substantial sum of money in his own possession, and his father was a man of means and stood ready to advance all that was necessary to complete the bargain. The defendant had no foundation whatever for his claim that the plaintiff should pay the real estate agent's commission; and his whole conduct in attempting to repudiate the bargain is discreditable. He has, however, for his refuge the last refuge of many dishonest men—the Statute of Frauds.

Upon the argument no authority was cited by either side directly dealing with the question which now arises. This is not a case of attempting to enforce an agreement some of the terms of which only are diclosed in the written evidence of the agreement. It is a case of an agreement complete and sufficient in all respects, fully evidenced by the subsequent written receipt or memorandum, with a subsequent parol agreement dealing with some of the terms.

The result of the authorities is that where by law a written receipt or memorandum, with a subsequent parol agreement dealing with some of the terms.

The result of the authorities is that where by law a written contract is necessary or a parol contract is required to be evidenced by writing, the subsequent parol variation may be ignored, and that specific performance may be granted of the original agreement; or, if the plaintiff admits the parol variation and the defendant desired to avail himself of these variations if specific performance is awarded, the Court will withhold specific performance unless the plaintiff assents to yield to the defendant any advantage which he is entitled to under the modification.

In the earlier cases a distinction was attempted to be drawn between the fourth and the seventeenth sections of the statute; the fourth providing that "no action shall be brought" and the seventeenth that "no contract . . . shall be allowed to be good." But the tendency is now to construe the sections as being substantially equivalent in this respect. As put by Lord Blackburn in *Maddison* v. *Alderson*, 8 A. C. 488, "It is now finally settled that the true construction of the Statute of Frauds, both the fourth and the seventeenth sertions is not to render the contracts within them void, still less illegal, but to render the kind of evidence required indispensable when it is sought to enforce the contract."

Statements contained in some of the earlier cases, in which the expression used is that the contract is void, or that writing is necessary to make the contract, must be treated as not being strictly accurate, and the cases must be read in the light of the passage quoted. *Noble* v. *Ward*, L. R. 2 Ex. 135, states the principle applicable although it is a decision upon the seventeenth and not the fourth section. There there was a complete contract for the sale of goods above ten pounds in value, to be delivered at a future time. Before the time for delivery arrived, the parties made a parol agreement extend-

ing the time. It was held that the parol agreement, being invalid under the statute, did not effect an implied rescission of the former contract. This judgment was based upon the principle that the parties could not be taken to have intended to destroy the contractual rights under the first agreement save by the substitution of an enforcible modification of the original agreement.

The language of Parke, B., in *Moore* v. *Campbell*, 10 Ex. 323, is quoted with approval where he says:—

"If a new valid agreement substituted for the old one before breach would have supported the plea we need not enquire, for the agreement was void, there being neither note in writing nor part payment nor delivery nor acceptance."

Stowell v. *Robinson*, 3 Bing. N. C. 928, is a case where the same principle was applied to an action on a contract within the fourth section. By written agreement an interest in land was to be sold. A day was definitely fixed for the completion of the purchase. By a parol agreement made subsequently, the parties undertook to substitute a new day for the completion. It was held that this attempt to engraft a modification upon the written contract was abortive.

Tindall, C.J., stated:—

"Can a day for the completion of the purchase of an interest in land, inserted in a written contract, be waived by parol agreement and another day be substituted in its place so as to bind the parties? We are of opinion that it cannot. . . . We cannot get over the difficulty which has been pressed upon us, that to allow the substitution of a new stipulation as to the time of completing the contract, by reason of a subsequent parol agreement between the parties to that effect, in lieu of the stipulation as to time contained in the written agreement signed by the parties, is virtually and substantially to allow an action to be brought on an agreement relating to the sale of land partly in writing signed by the parties, and partly not in writing, but by parol only, and amounts to a contravention of the Statute of Frauds.

In that case the plaintiff could not succeed unless he could rely upon the variation; so the case differs in that respect from the case now in hand, but I think the principle applies, for the statute is available to either party, and prevents the new contract being given in evidence at all, save for the purpose of affecting the conscience of the Court, which may in its discretion refuse to give specific performance if the party seeking its aid withholds from his opponent the benefit of the parol varia-

tion. Save as to this, the operation of the statute is the same in law and in equity. See *Emmet* v. *Dewhurst*, 3 MacN. & G. 597.

Goss v. *Lord Nugent*, 5 B. & Ad. 58, is a case very similar to *Stowell* v. *Robinson*. The contract was a contract with respect to real estate; it was duly evidenced by writing; there was a parol variation on which the plaintiff, the vendor, had to rely for success. It was held on the same principle that he failed.

In Halsbury's Laws, vol. 7, p. 422, the situation is thus summed up: "If the original contract is one which is required by law to be made in writing, it cannot be varied by a part of the contract which if it stood by itself would not be required to be in writing, but in such a case the contract can be rescinded altogether by a verbal agreement. If the original contract, though made in writing, is one which is not required by law to be made in that form, it can be varied by a verbal agreement."

Where this paragraph speaks of a contract "required to begin in writing," the learned author clearly means a contract "required to be evidenced by writing"; as the cases shew, and as a reference to this paragraph in a later portion of the same treatise indicates. On page 528 it is said that the parol evidence may be admitted "to prove that a written contract has been rescinded or varied by a subsequent oral contract, provided that proof of the oral contract is not excluded by any statute: e.g., by the Statute of Frauds. See p. 422 ante."

Leake on Contracts, 6th ed., 583, after examining the authorities at law, states: "Where a plaintiff claims specific performance of a written contract, at the same time stating and offering to submit to subsequent parol variations, the Court will decree specific performance with the variations if the defendant is willing to accept the same, and, if not, according to the original contract"; citing for this *Robinson* v. *Page*, 3 Russ. 121, a case which abundantly justifies the text.

Under these circumstances, I think the plaintiff is entitled to judgment for specific performance, with costs. If any difficulty arises in working out the details, I may be spoken to, and if necessary, a reference may be directed; but I desire to avoid all unnecessary expense.

HON. MR. JUSTICE MIDDLETON. JUNE 24TH, 1912.

SIBBITT v. CARSON.

3 O. W. N. 1491.

Principal and Agent—Agent's Commission on Sale of Land—Exclusive Agency for Time Limit—Sale after Expiration of.

Action by a real estate agent to recover a commission from defendants on the sale of certain property. Plaintiff had sought and obtained an exclusive agency for the sale of the property for a certain limited time. Within this time he endeavoured to interest several prospective purchasers, amongst them, one Grant, but was unsuccessful in concluding a sale, and so notified the defendants. A short time thereafter Grant, whose attention had been directed to the property by plaintiff, together with another, purchased the property from defendants, approaching them directly. Plaintiff claimed the sale had been brought about by his efforts, and claimed a commission.

MIDDLETON, J., dismissed action with costs.

Burchell v. *Gowrie*, C. R., [1910] A. C. 250.

Stratton v. *Vashon*, 44 S. C. R. 395, and

Rice v. *Galbraith*, 26 O. L. R. 43, distinguished.

[See *Imrie* v. *Wilson*, 21 O. W. R. 964; 3 O. W. N. 1145.—*Ed.*]

Action by a real estate agent to recover commission on the sale of land. Tried at Ottawa, 17th June, 1912, without a jury.

R. G. Code, K.C., for the plaintiff.

S. F. Henderson, K.C., for the defendants.

HON. MR. JUSTICE MIDDLETON:—Further consideration confirms the impression I formed at the hearing, that the plaintiff fails in the action.

The defendants, Carson and Bingham, owned land on Albert street. On the 23rd February, Bingham had some conversation with Sibbitt in his office as to the terms on which he would undertake the sale of the property. Nothing was concluded then. On the next day, Saturday the 24th, after consulting with his partner, Bingham again called, and placed the property with the plaintiff at $50,000, upon what was called in the evidence an exclusive agency or option, which was limited in time, and would expire on the Monday at two o'clock. This time was undoubtedly very short; but, owing to some excitement with reference to real estate in this particular locality, and to the fact that some properties in the immediate vicinity had changed hands several times, each time at an increased price, and owing to the extremely optimistic disposition of the plaintiff, he assented to take the

property upon these terms; and forthwith endeavoured to find purchasers, or to arrange a syndicate to take over the property.

An option or agency of longer duration was sought. A document giving an option until the 29th was prepared, and presented for signature, but the signature was promptly and emphatically refused.

Just before the expiry of the time limit, the plaintiff communicated with the defendants and was given until 2 p.m. next day to complete his arrangement. In the meantime the plaintiff had made some endeavour to find purchasers, and had failed. Various suggestions as to exchange were refused by the defendants.

During the search for a purchaser the plaintiff spoke to Mr. Grant, and obtained from him a verbal agreement to take some interest in a syndicate to be formed. Grant had heard of the property when offered for sale some time earlier than this at a smaller price, and was willing to take some share if acceptable co-adventurers could be found. A dispute ultimately arose between the plaintiff and Grant as to the amount of his contribution, and this ended by Grant withdrawing and declining to have anything further to do with the plaintiff. The plaintiff then made an endeavour to find some one who would take Grant's place in the proposed syndicate, but, as already stated, his efforts proved abortive.

In the meantime Grant, having had his attention thus drawn to the property, placed himself in direct communication with the defendants. This was after the expiry of the original option at two o'clock on Monday, but before the extension until two o'clock on Tuesday was up. Nothing further was done. The defendants communicated with the plaintiff at the expiry of the time limited, and he admitted his inability to find a purchaser. Subsequently the defendants sold the land for the stipulated price to Grant and another co-adventurer.

The plaintiff bases his claim upon the fact that the property was sold immediately after the expiry of the time limit, to Grant, and the property had been introduced to Grant's consideration by him.

The negotiations leading to the sale to Grant and his *confrere* were quite independent of any negotiations between the plaintiff and Grant. The case is not one where the

owner is endeavouring to defeat the agent's right, by himself taking up and concluding negotiations with a purchaser found by the agent. It differs in many important respects from the reported cases.

The point which appears to me to be vital, is that the plaintiff's right must rest upon his contract. The agreement which he made was one which entitled him to a commission if he procured a purchaser by the time limited. In this he failed, and the parties were, therefore, entirely at large so far as any contractual or other relationship is concerned.

The mere finding of a purchaser is not enough; there must be a contract to pay; and the terms of the contract, including all limitations as to time, must govern.

The cases relied upon by the plaintiff do not appear to me to help him. In none of them was there a limitation of time for the finding of the purchaser. *Burchell* v. *Gowrie*, C. R., [1910] A. C. 250, was a case of general agency. The plaintiff found the purchaser, and was regarded as the efficient cause of the sale, which was negotiated and carried on behind his back by the principal. *Stratton* v. *Vashon*, 44 S. C. R. 395, is upon precisely the same lines, affirming the right of the agent to his commission, when he brings the parties into relation and a contract ultimately results. Again there was no time limit.

This is quite apart from the alternative defence suggested by the defendant here, that upon the facts the plaintiff could not be regarded as having in any way brought about this particular sale. The plaintiff's suggestion to Grant was to take a $5,000 interest in a $50.000 purchase, the plaintiff to supply the capital to take up the remaining shares. The transaction, which was carried out, was a sale to Grant, and to another with whom the plaintiff had no connection, of the entire property for the $50,000. The plaintiff was not instrumental in any way in bringing this about, and is not in fairness entitled to claim commission upon this transaction.

Rice v. *Galbraith*, 26 O. L. R. 43, indicates that my brother Latchford had present to his mind what seems to me to be the vital point in this case, when he says, in deciding in the plaintiff's favour there: "No limit as to time was imposed when authority to find a purchaser was given."

Action dismissed with costs.

HON. SIR JOHN BOYD, C. JUNE 24TH, 1912.

YOUNG v. CARTER.

3 O. W. N. 1486; O. L. R. .

Contract—Convict Undergoing Confinement for Indictable Offence—Freedom to Contract—Criminal Code, s. 1033—Imp. Statutes, 33 & 34 Vict., c. 23—Not Applicable in Canada.

BOYD, C., *held*, that the fact that a person is undergoing confinement in a penitentiary as a punishment for an indictable offence does not deprive him of his property nor interfere with his freedom of contract.

Dumphy v. *Kehoe*, 21 Rev. Leg. 119, followed.

That Imperial Statutes 33 & 34 Vict., c. 23, providing for the appointment of an administrator to a convict's property and forbidding him to alienate the same or to contract, is not in force in Canada.

An action to set aside a lease of an hotel premises made by the plaintiff to defendants, for three years, from the 1st May, 1910, in renewal of a former lease.

The renewal lease was executed by the plaintiff on 15th August, 1910, while he was serving a term of imprisonment in a penitentiary. He was released on parol in January, 1911, and brought this action in April, which was heard by HON. SIR JOHN BOYD, C., without a jury, in June of that year, at Fort Frances.

G. S. Bouie, for the plaintiff.

A. D. George, for the defendants.

HON. SIR JOHN BOYD, C.:—The plaintiff seeks to undo the renewal of a lease of hotel premises, made by him to the defendants for three years from the 1st May, 1910. The renewal of the prior lease between the same parties was dated on 7th April, and was executed by the plaintiff on 15th August, 1910, while he was serving a term of imprisonment in the penitentiary at Stony Mountain, Manitoba. The nature of his offence is not disclosed in the plaintiff's evidence. But I am told it was for perjury. He was released on parol in January, 1911, and this action was brought in April of that year. No case was made out at the trial for relief on the ground of the plaintiff being over-borne by threats or pressure so that he was coerced into signing the document. There was a mortgage upon the property, and

foreclosure was threatened, if the interest was not paid, and there was no way of paying the interest except out of the rents, and the tenants would not pay unless they obtained a renewal for three years at the same rent, and the liquor license for the year was about expiring and needed to be looked after, if the hotel was to retain its chief value. All this combination of circumstances was considered by the plaintiff, and he found that (handicapped as he was under corporal confinement), the best thing to be done was to accept the proposition of the tenants. He was told by letter of their solicitor that if he did not wish to sign, to return the proposed renewal, which they had tendered; upon which he added a clause to the document and signed it and sent it back so executed. Evidence was also given that the rent was, all circumstances considered, a fair rent, and though more is now offered, that is probably the result of improved conditions and prospects in Fort Frances, where the hotel is situate.

I reserved judgment upon a ground of defence, which sounded like an anachronism. The plaintiff pleaded that being a convict undergoing sentence, he was at the date of execution incompetent to contract, and for this reason asks to have the renewal lease declared null and void. His term of imprisonment was for two years, from November, 1909, and would have expired in November, 1911, but he was released (as already said) on parol early in that year. He was no doubt, in actual custody and incarcerated at the time he signed; but had this bodily condition of penal servitude for the brief term any legal effect on his political status?

It is not necessary to deal with the old-time distinctions between attainder and forfeiture, the one pertaining to high treason and capital offences, and the latter to felonies of a less flagrant character. Felony generically meant a crime to be punished by forfeiture of lands and goods, to which death was generally superadded, but this method of punishment by depriving the convicted offender of lands and goods has been distinctly put an end to by the Canadian Code, and the property is left to the convict unaffected by any restrictive provisions. This amendment of the criminal law is in pursuance of the general plan of simplifying its provisions and of abolishing distinctions of obsolete and embarrassing character, which may well be displaced by the more humane policy of modern civilization.

The present English law is cited for the plaintiff; but it has really no direct application to the state of affairs in Canada. By the Forfeiture Act of 1870, 33 & 34 Vict., ch. 23 (Imp. Stat.), it was provided that no conviction or judgment of or for any treason or felony, should cause any attainder or corruption of blood or any forfeiture or escheat (sec. 1), and then it provided for the appointment by the Crown of an administrator of a convict's property, and it also declared that every convict should be incapable (during his servitude) of alienating or changing his property or of making any contract (sec. 8). But even as to this Act the effect is said to be that it leaves a convict for felony in possession of his property, just as the common law left a convict for misdemeanour in possession of his property: Lush, L.J., in *Ex p. Graves,* 19 Ch. D., at p. 5. Our legislators have had an eye on the English statute, for they have adopted the remedial provisions of sec. 1, into our Criminal Code, where it appears as sec. 1033 (R. S. C. ch. 146), where almost the identical language is used, viz., that no conviction or judgment for any treason or indictable offence shall cause any attainder or corruption of blood or any forfeiture or escheat. The variation from the word "felony" in the English Act to the phrase "indictable offence" in the Code, is because of sec. 14 of the Canadian Code, whereby the distinction between felony and misdemeanour is abolished, and all are treated as indictable offences. The grade of crime is with us determined by the gravity of the offence and the degree of punishment attached.

The effect of this section of the Code is equivalent to that of the English Act, leaving undisturbed in the possession of the convict all his property. The law in Canada has not gone further as has been done in England, so as to interpose certain obstacles on the action of the convict with respect to his property, and to vest the administration thereof in a statutory official. A convicted offender serving his term, may deal with his goods and lands as other men who are free from custody may deal with theirs, and no disability or restraint is put upon the convict so far as dealing with his property is concerned, beyond that which attaches to other owners.

I find that the point has been expressly decided by Mr. Justice Jette in *Dumphy* v. *Kehoe,* 21 Rev. Leg., p. 119 (1891), that the Imperial Statute relied upon by the plaintiff of 33 & 34 Vict., ch. 23, is not in force in Canada, pp.

126, 127. The other aspects of his decision have been superseded by the repeal of the clauses of the R. S. C. 1886, ch. 181, secs. 36 and 37, by the sec. 981 (1892) of the Criminal Code.

The result is that the plaintiff's action fails in all respects, and must be dismissed with costs.

HON. SIR JOHN BOYD, C. JUNE 25TH, 1912.

KERLEY v. LONDON AND LAKE ERIE TRANSPORTATION COMPANY.

3 O. W. N. 1498; O. L. R. .

Constitutional Law — Sunday Observance on Electric Railways — Ontario Railway Act, s. 193 (1)—Intra Vires.

Action under Ontario Railway Act, 1906, to recover from defendant $1,200, penalties for the operation of their cars on Sunday. Defendants operate a line of electric railway wholly within the province, but as at the date of incorporation it was contemplated that a line of lake steamers should be operated in connection therewith, connecting with Cleveland, Ohio, the work was declared one for the general advantage of Canada, and incorporation obtained by Dominion Statutes 9 & 10 Edw. VII., c. 120, wherein the company was empowered to hold, maintain, and operate the railway, subject to the provisions of the Railway Act of Canada.

BOYD, C., *held*, that 4 Edw. VIII., c. 32, providing that railways, wholly within one province of Canada, but declared, in whole or in part, to be for the general advantage of Canada, shall be subject, notwithstanding such declaration, to any provincial act prohibiting or regulating work on the first day of the week and providing, further, that the Governor-General-in-Council may by proclamation confirm such provincial Act, thereby making it as valid and effectual as if enacted by the Parliament of Canada, was valid and effectual legislation, and that the particular provincial legislation involved was not thereby rendered a delegate of the legislative powers of the Parliament of Canada, but merely its legislative agent.

That Ontario Railway Act (1906), s. 193 (1), providing that no person shall operate an electric railway nor employ anyone thereon (subject to certain defined exceptions), on the first day of the week, was *intra vires* the provincial legislature.

Review of legislation and authorities.

Judgment for plaintiff for $1,200 and costs.

An action to recover $1,200 as penalties from defendant company for running their cars on Sunday, contrary to the provisions of the Ontario Railway Act, 1906.

J. A. Paterson, K.C., for the plaintiff.

M. Cowan, K.C., and J. B. Holden, for the defendant Co.

HON. SIR JOHN BOYD, C.:—The simple question here is whether the defendants are liable to pay penalties for running their cars on Sunday. The answer is far from simple,

and involves difficulties in the application of constitutional law not covered by previous authority. It appears necessary to take a somewhat general survey of the whole field of pertinent legislation, Imperial, Canadian, and provincial. But first as to the legal status of the defendants, a body incorporated on the 17th March, 1910. On the ground, the line of track of the defendants extends over an area of some sixteen miles from London to Port Stanley on Lake Erie. Power is given by the charter to establish a line of lake steamers, and so communicate with the State of Ohio at Cleveland. Power is also given to construct various ramifications all near-by the present line, and all within the province of Ontario. The railroad is at present nothing more than an electric road within the province. Its possibly larger operation in the future over other provinces or over the great lakes is a matter of contingency that does not affect the present situation. Nevertheless, by reason of presenting in its application for incorporation this extended charter as in contemplation, it became a subject for incorporation by Dominion charter, and so was passed the statute 9 & 10 Edw. VII., ch. 120, wherein the undertaking was declared to be a work for the general advantage of Canada, and the company was empowered to hold, maintain, and operate the railway subject to the provisions of the Railway Act of Canada (R. S. C. 1906, ch. 37). That statute does not, nor does the private Act prohibit the running of cars on Sunday. The running in this case took place on the 11th, 18th, and 25th days of December, 1910. It is proved that on one of these days his Majesty's mail was carried by special request from London to Port Dover, in addition to the usual carriage of passengers and their belongings.

There has been a long standing attempt in this province to enforce cessation of labour on local railways during Sunday, and many efforts have been made to place the law in this respect upon a plain and intelligble footing. This is a most desirable result in regard to all penal or criminal law, which should be made simple and clear for all men. What has been attempted and decided will now be related as briefly as possible.

In January, 1897, it was decided by the Court of Appeal that a company incorporated for the purpose of operating street cars by electricity was not within the meaning of inhibited persons under the provisions of the Lord's Day Act

then in force, R. S. O. 1887, ch. 203: *Attorney-General* v. *Hamilton St. Rw. Co.*, 24 A. R. 170.

The Legislature forthwith proceeded to remedy this by passing a new Act, "to prevent the profanation of the Lord's Day." (R. S. O. 1897, ch. 246). This was of larger scope than the one of 1887, passed upon by the Court, and by secs. 7 and 8 expressly provides for the prohibition of Sunday excursions by railway, and forbids generally (with exceptions not now relevant), the operating of electric street railway cars on the Lord's Day. In 1901, a broader legal question was raised as to the power of the provincial Legislature to enact ch. 246. The whole Act was brought before the Court of Appeal for Ontario, upon questions submitted by the Lieutenant-Governor in Council. The first question was as to the validity of the whole Act, and in particular as to secs. 1, 7, and 8, and it was answered by a majority of the Court, and the answer affirmed the validity of the statute. Two subsidiary questions were also submitted: (1) as to the power of the province to prohibit Sunday work on railways subject to the exclusive legislative authority of the Dominion; and (2) as to the like powers in the case of railways declared to be for the general advantage of Canada. These latter questions were answered negativing such power in the province: *Re Lord's Day Act of Ontario*, 1 O. W. R. 312. An appeal was then taken to the Privy Council, and that tribunal reversed the opinion of the majority of the Judges below on the first question, and it was decided that the Act as a whole was *ultra vires*, for substantially the same reasons as those given by Armour, C.J., the dissenting Judge. Their Lordships held that the Act "treated as a whole," was one dealing with a subject falling under the classification of "criminal law," which by the distribution of powers in the British North America Act, 1867, sec. 91, sub.-sec. 27, was reserved for the exclusive legislative authority of the Parliament of Canada: *Attorney-General* v. *Hamilton St. Rw. Co.*, [1903] A. C., p. 524. Their Lordships held that this answer to the first question rendered it unnecessary to answer the second (as above set forth), thus in effect, as I understand, affirming the view expressed by all the Ontario Judges in appeal, that the clauses as to the operation of the Dominion railways was not within the competence of the provincial Legislature.

Other remaining questions (not now, it would seem, relevant to this litigation), the Lords of the Privy Council declined to entertain as being of hypothetical character, which

should be left for decision in concrete cases, as and when they might arise.

The next attempt to resolve the broad question was by the Dominion upon a special case referred by the Governor-General in Council to the Supreme Court of Canada in February, 1905. In the matter of the jurisdiction of a province to legislate respecting abstention from labour on Sunday: *Re Sunday Laws,* 35 S. C. R. 589. This case set forth a draft Act embodying legislation contemplated by the province of Ontario in 1904, and in particular asked for direction as to its competence to prohibit the operation of railways on the Lord's Day in the case of undertakings incorporated by the province, and those incorporated by the Dominion, and also as to those incorporated by the Dominion, which were declared to be for the general advantage of Canada, but authorized to operate within one province only (to wit, Ontario), and whose operations were confined to such province. The majority of the Judges (as it were, under protest and without prejudice), indicated their opinion to be that all such interferences making for the compulsory observance of the Lord's Day were beyond the proper competence of the province, and fell within the views expressed by the Privy Council in 1903, as being of criminal character, and so, within the ambit of the Dominion Parliament.

Pending the launching and the decision of this special case, the Dominion had been legislating, and we find the Canada Railway Act being amended by the statute of 4 Edw. VII., ch. 32 (passed on the 10th August, 1904), in which first appear the important clauses upon the force and effect of which the present litigation is mainly to be determined. One provision relates to every railway (electric and other), wholly situate within one province of Canada, but in its entirety or in part declared to be a work for the general advantage of Canada, and enacts that it shall, notwithstanding such declaration, be subject to any Act of the Legislature of the province in which it is situated, prohibiting or regulating work, etc., upon the first day of the week—which is in force at the time of passing the Act (sec. 6a). And by sec. 3, it is enacted that the Governor in Council may at any time, and from time to time, by proclamation confirm for the purposes of this section, and Act of the Legislature of the province passed after the passing of this Act (i.e., 10th August, 1904), for the prohibition or regulation of work, business, or labour upon the first day of the week. And

from and after the date of any such proclamation, the Act thereby confirmed, in so far as it is in other respects within the power of the Legislature, shall for the purposes of this section be confirmed and ratified, and made as valid and effectual as if it had been enacted by the Parliament of Canada. And, notwithstanding anything in this Act (i.e., the Railway Act), or in any other Act, every railway, steam or electric street railway and tramway, wholly situate within such province, but declared by the Parliament of Canada to be in its entirety or in part a work for the general advantage of Canada . . . shall thereafter, notwithstanding such declaration, be subject to the Act so confirmed, in so far as that Act is otherwise *intra vires* of the Legislature."

This first appears as an amendment to the Railway Act, and is carried into the revision of 1906, where it now stands as sec. 9, with some few immaterial verbal variations: R. S. C. 1906, ch. 37: "An Act respecting Railways." This large committal of powers to the provincial Legislature in respect of local railways was subject to some exception; the section was not to apply to any railway or part of a railway which forms part of a continuous route or system operated between two or more provinces or between any province and a foreign country, so as to interfere with or affect through traffic thereon, or

(b) between any of the ports on the great lakes and such continuing route or system so as to interfere with or affect through traffic thereon, or

(c) which the Governor in Council by proclamation declares to be exempt from the provision of the section (sec. 9, sub.-sec. 5).

In the year 1906, being that of the last revision of the Dominion Statutes, the province passed "The Ontario Railway Act, 1906," assented to on the 14th May, in which provisions are to be found respecting, and under the heading of "Sunday Cars." Section 193 (1) declares that no company operating a street railway, tramway, or electric railway, shall operate the same or employ any person thereon on the first day of the week, commonly called Sunday, except for the purpose of keeping the track clear of snow or ice, or for the purpose of doing any other work of necessity. With certain exceptions (not now relevant), the section is to apply to all railways operated by electricity, whether on a highway or a right of way owned by the company (sub-sec. 6).

The proclamation of the Governor-General in Council confirming sec. 193 of the Ontario Railway Act (just set
vincial). Nothing has been done, as I have said, by the
The defendant company came into existence on the 17th March, 1910, by Dominion Act 9 & 10 Edw. VII., ch. 120, under this condition of prior legislation (Federal and Provincial). Nothing has been done, as I have said, by the company, in the way of lake navigation in connection with their line.

No proof was given of any such facts as would indicate that this local road formed part of a continuous route or system carrying through traffic, within the meaning of these words as used in railway legislation. The cases shew that there must be a direct physical connection between the local road and the other through road, of which it is to form part, and that proper facilities by way of sidings and accommodations for the transfer of traffic must exist, and these generally should be sanctioned by the proper authorities (in this case the Board of Railway Commissioners) before the particular road can form part of a "continuous route or system:" *Hammans* v. *Great Western Rw. Co.*, 4 Ry. & Canal Traffic Cas. 181 (1883), and *G. C. R.* v. *L. & Y. R. R.*, 13 ib. 266 (1908). To the same effect is American Railway Law: *Black* v. *Delaware and Raritan Canal Co.*, 22 N. J. Eq. 131, 402.

I find as facts that the road has always been strictly a local concern with no such connection as would constitute it part of "a continuous route or system," and that the traffic of the company was in no sense "through traffic," within the meaning of the Dominion Railway Act, R. S. C. 1906, ch. 37, sec. 9. So that the road as operated at the time of the alleged offences was not within any of the exceptions expressed in such section of the Dominion Railway Act. Wherefore the net result is that the defendant company, though it be an undertaking which has been declared to be for the public benefit of Canada, is yet, by virtue of the Canada Railway Act, and the proclamation of December, 1906, subject to sec. 193 of the Ontario Railway Act, which prohibits the operation of electric railway cars on the first day of the week, commonly called Sunday.

The way is now cleared to consider the constitutional aspect of the controversy.

The Parliament of Canada, by the agency of the Governor-General in Council undertakes to confirm any Act of

the Ontario Legislature, within the legislative authority of the province, in so far as the Act prohibits or regulates work, business, or labour upon the first day of the week on any electric railway, wholly situate within the province, and which has been declared by the Parliament of Canada to be a work for the general advantage of Canada.

In the present case the Parliament of Canada has, through the agency of the executive proclamation, ratified and confirmed sec. 193 of the Ontario Railway Act, and made it as valid and effectual as if it had been enacted by the Parliament of Canada: R. S. C. 1906, ch. 37, sec. 9 (3). So far as express language can effect anything, this defendant company has been made subject to said sec. 193, in so far as it has been so confirmed (ib., sub-sec. 4).

All that remains, as I regard the case, is to consider whether what has been done by this conjoint legislation is within the scope and power of the respective Legislatures under the Imperial Constitutional Act, so as to justify this Court in exacting the penalties claimed.

The defendants' road is territorially within the province, and is, as operated, strictly a local work, respecting which Ontario might properly legislate. But authority to legislate in respect of this road by the province has been superseded by the intervention of the Dominion, because of its being regarded as a work for the general advantage of Canada: see B. N. A. Act, sec. 92 (10). The Constitutional Act there confers exclusive legislative authority as to this road on the Dominion (sec. 91 (29)). But the Dominion is invested with authority to make laws for the peace, order, and good government of Canada in all matters not assigned exclusively to the provinces; and this means, I take it, the exercise of large and liberal discretionary powers to be exercised for the well-being of the community, and for the right working of the constitution (sec. 91), and *R.* v. *Riel*, 10 App. Cas., p. 678, per Lord Halsbury.

The authority of the Dominion extends to such works as though wholly situate within the province are before or after their execution declared to be for the general advantage of Canada. Here the declaration was made before the execution and in anticipation of what was to be done. Suppose no steps to be taken as to the navigation of the lake by the company or in establishing part of a continuous route or system, it woud be competent for the Dominion to nullify the declaration and to subject the company to pro-

vincial legislation. I see no good reason why the Dominion should not suspend the effect of this declaration, either directly or indirectly, for sufficient cause, so as to restore (as it were) the power of legislation to the province in regard to the particular company. Legislative authority exists in the province as to all local works and undertakings, though it may be superseded by the paramount power of the Dominion in suitable cases. But the Dominion may still utilise the province as one of the agencies of government by inviting it to intervene with legislation considered desirable and not contrary to any controlling enactments passed by the Dominion Parliament. This may be regarded as supplementary legislation of which the Dominion is willing to avail itself or of which the Dominion is willing that the province should avail itself. The consideration in these cases is not grounded on the doctrine of ultra vires, but rather as to what is permissible reciprocally to a superior and a subordinate legislature in regard to subjects on which each has some right to make laws. The case in hand illustrates this position. We have to deal with two law-making bodies acting with plenary and exclusive powers within the ambit of subjects distributed to them by the Constitutional Act, and yet with some class of rights in which the exercise of power by one may infringe on the exercise of power by the other. The Court is not to deal with a legislative enactment or with a by-law. The legislature or Parliament is not called on to shew cause or give reasons why a certain law has been passed. The policy of the Dominion dealing with long lines of railway through the provinces and to foreign lands is against any breaking of carriage for any period of time, and insists on a continuous transit, and Parliament therefore places no restriction on the running of railways on every day in the week. The policy of Ontario appears to be in favour of a restricted use of the railways subject to provincial control on the first day of the week. If one assumes that after the many attempts to get judicial guidance to assist in formulating valid and efficient laws on the subject of the Lord's Day Observance, the law-makers came to the conclusion that no satisfactory statute could be framed on this head which would answer the demands and the requirements of the various provinces of the Dominion, e.g., that what would satisfy a new western community might not harmonise with the views of the oldest centres of population—that what

might satisfy Quebec would not satisfy Manitoba—and so on; this conclusion of inability might serve to explain why we have the present complexity of legislation, bringing into exercise apparently the ingenuity of the legal profession and the reserved resources of the constitution to find out some suitable and effective outcome. One is not to assume that legislation is futile; rather to seek to give effect to it, if possible.

The Parliament on this point, as to railways, means to leave it to each province to determine what shall be done with Sunday, or rather what shall be done on Sunday. What I have sought to express has been considered; also I find by Mr. Justice Barker in *Ex p. Green*, 35 N. B. S. C. 137, at p. 147. He says: "I am disposed to think that the Dominion Parliament, in designedly refraining from legislating on this subject, did so because it was one which did not concern the general public or affect them all to the same extent or apply to them all in the same degree; but was rather to be regarded and dealt with as a police regulation, local in its character and in its application, which required to be moulded so as to suit the requirements and meet the conditions of different localities and different classes of population, and in that way ensure a reasonable cessation from labour and worldly business on Sunday:" (1900). See *R.* v. *Halifax Electric Tramway Co.*, 30 N. S. R. 469.

Apart from the religious observance of the day which cannot be enforced by law, the legislature must have recognised the value of a recurring period or rest in railway life, more than ever needed in modern stress and competition. The political value of a rest-day is put thus by Macaulay: "During this cessation of labour a process is going on quite as important to the wealth of the nation as any process which is performed on more busy days. Man, the machine of machines, is repairing and winding-up so that he returns to his labour on Monday with clearer intellect, with livelier spirits, with renewed corporeal vigour." However the day of rest may be used or abused, the legislators may well consider the policy a wholesome one in so far as corporations are concerned over which they have creative and regulative power.

It seems to me possible as well as proper so to fit together these enactments as to induce harmonious and efficient action between the two governments, federal and provincial, in order to the attainment of an end which both

have had in view. One may wonder why the Sunday labour question was not dealt with directly and immediately by the Parliament of Canada. But, whatever the reason be, it is for the Court to explain and as far as possible to render effective the joint legislation (suggestion on the one hand and response on the other) so that by co-operation the desired end may be reached of securing one day of periodical rest.

The scheme of this two-fold legislation is not to be regarded as a delegation of legislative power in a matter of criminal law to a body having no capacity to legislate criminally, but rather the designation by the Dominion of a legislative agency to decide whether it is expedient to enact a law for the regulation of the Lord's Day in its secular aspect as to railways entirely within the province, and a legislative report being made by an appropriate enactment, then to be given full legal force and efficacy to such provincial action by accepting it and assuming responsibility for it as if it were a Dominion statute. The statute of the province indicates the policy accepable to the province, and the Dominion says "be it so." In this regard the legislative power of the province is no longer overridden by the Dominion, but is recognised as a power properly exercised. It appears to me that the Dominion may relax its hold on any internal provincial railway and lay it open in a defined degree to be regulated or controlled by the local legislature.

As I read the opinion given in *Re Sunday Laws,* 35 S. C. R. 581, the Court intimates that a province has no power to restrict the operation of companies of their own creation to six days in each week, because that restriction seems to be within the views expressed in the Privy Council and to be regarded as a matter of criminal law, *ultra vires* of the province. See pp. 582 & 592, in answer to question 5.

This point, in this limited way as to purely provincial corporations, was not before the Lords of the Privy Council, and their guarded deliverance would rather imply that this was one of the questions not passed upon. However, with all proper deference to the Judges of the Supreme Court, I cannot regard the opinion expressed on this head as a judgment binding on me, nor can I accept it as the law. I fail to see why the province may not legally and validly incorporate a railway company in Ontario as a local undertaking

with power to operate only on six days of the week. A refusal to allow work on the Sunday would not in this connection savour of the criminal law, but would be a supposed or an accepted salutary rule of conduct imposed for the benefit of the workman and the better working of the road itself. If the company accept such a charter with such a limitation, wherein is the constitutional Act offended against? The legislative working of the whole constitution in these cases of apparent conflict or discrepancy is to be accommodated or adjusted by the expedient worked out in the *Hodge Case* and others in the same direction; *Hodge* v. *The Queen*, 9 App. Cas. 117; *Fielding* v. *Thomas*, [1896] A. C. 611; *Grand Trunk Rw. Co.* v. *Attorney-General*, C. R. [1907] A. C. 1. The aspect of the law takes colour from its surroundings, i.e., the nature of the legislation and the object aimed at. Here is no general criminal intent, but the incorporation of a local concern over which the province has plenary power of legislation covering all things and conditions considered expedient and desirable by the incorporating power.

After the disposal of the special case in the Supreme Court, the province of Ontario passed their railway law which by its enactments imposes this limitation upon electric railways, 6 Edw. VII. ch. 30, sec. 193, and that has not been questioned as being ultra vires. The power to legislate as to the Lord's Day by the provincial law-makers as to railways subject to their legislative authority is recognised in the Dominion Lord's Day Act, R. S. C. 1906, ch. 153, sec. 3 (2).

Briefly to sum up the results. It is not to be overlooked that the defendant in this case takes the Dominion charter subject to the state of existing legislation. It is taken, therefore, with knowledge that the Dominion had permitted the province to legislate as to Sunday work on local railways (despite the declaration as to the undertaking being for the public advantage of Canada), and that the province had legislated to the effect that for six days only should the road be worked for profit and that the executive of the Dominion, under sanction of the Parliament of the Dominion, had approved and confirmed this provincial law. How then can the defendant defend this action on the ground that the charter was not taken on this footing? Can the company be allowed thus to "approbate and repro-

bate?" Can the privileges of the charter be enjoyed and the conditions be repudiated?

I may add a few words as to laws having more than one aspect. Marshall, C.J., said in *Gibbons* v. *Ogden*, 9 Wheat. 1, 204, that "all experience shews that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical."

Besides the constitutional cases already referred to, the point has arisen in the consideration of municipal and other by-laws.

In *Calder & Hebble Navigation Co.* v. *Pilling*, 14 M. & W. 76, a by-law that a canal was not to be used on Sundays was held invalid because not warranted by the general power of a local statute to make by-laws for the good government of the company and for the good and orderly using of the navigation and the work-governing of the bargemen, etc. The by-law was held to be one relating to matters which ought to be left to the general laws of the land as to the observance of Sunday. Rolfe, B., said that under peculiar circumstances the by-law might be upheld; as if for instance the company were to come to the conclusion that in order to procure a due supply of water in the canal it was necessary to have no navigation on it during one day out of seven in order to make navigation good during the other six, and then Sunday might be taken as the fittest day to close the canal, p. 90 (1845). In other words, though the by-law would be bad if made for merely moral purposes, *pro salute animarum*, it might be upheld if susceptible of another construction, and if regarded in a different aspect, bringing it within the competence of the corporation or law-making body.

Another illustration of this double aspect in a by-law, as to whether it deals with the morals of the community rather than with the good rule and government of the locality, may be found in *Thomas* v. *Sutters*, [1900] 1 Ch. 10, 15. In that case *Calder and Hebble Navigation Co.* v. *Pilling* is discussed, and it is pointed out that while a navigation company may have no legal concern about the behaviour or morals of those who use it, the power of a municipality dealing with the good order of their streets, goes far beyond that: pp. 16, 17. So there is a further advance in power and responsibility when the field of action is laid open to a legislative body,

such as one of the provinces of the Dominion. In this last case, every intendment will be made to support the legislation, and it is not the business of the Courts to pass upon the wisdom or reasonableness of the enactment, but simply to say whether it is fairly within the area of its constitutional powers.

By the legislation of the Dominion it has been left to the province to say whether any condition shall be imposed upon local electric railways in regard to the working of the road on Sundays. And the response made by the province is that it is fitting that there should be one day of rest in seven, and that Sunday is the fittest day for that purpose. Good reasons may easily be found for such a policy, having regard to Sunday as a secular institution; public economy requires for salutary reasons a periodical day of rest from labour, and this salutary rule may rightly and legally be imposed upon corporations which owe their existence to the provincial power which so legislates and creates. This is not, therefore, a general law extending to the public at large—to all clases and conditions of men—but to a corporate body over which the local legislature has inherently or by delegation from the Dominion Legislature, plenary power as to its conduct, governance, and operation.

The late decision of the Supreme Court on Sunday law in *Ouimet* v. *Basin*, is not in point for the present case. It is distinguishable both because it purports to be a general law framed for all persons, and the case did not involve the question of local corporations over which the province has constitutional power and competence.

The legislation is not to be regarded as a section of the criminal law of Canada, but as a particular penal law intended for the regulation of local electric railways within the province. So viewed, I would uphold the impeached legislation as *intra vires*, and would award to the plaintiff the penalties claimed.

There should be no exemption as to the day on which the mail was carried. The cars were not run for the purpose of carrying the mail, but the mail was carried as a favour because the cars ran that Sunday.

Costs to the plaintiff.

HON. MR. JUSTICE MIDDLETON. JUNE 25TH, 1912.

CANADIAN NORTHERN ONTARIO Rw. CO. v. HUGH BRADISH BILLINGS.

3 O. W. N. 1504.

Railway—Right to Cross Private Way—Adjoining Highway—Order of Dom. Rw. Board.

Action by plaintiffs to prevent defendant interfering with the construction by the plaintiffs of their railway across a certain road shewn in an order of the Railway Board dated May 10th, 1912.

Defendant counterclaimed for an injunction restraining plaintiffs from trespassing on the northerly 15 feet of the road, as shewn on the plan, claiming that it constituted a private road. The northerly 15 feet had been long used as a private road and, in 1892, a public road had been laid out, 25 feet wide, immediately to the south thereof, and since that time the two roads had been used together, without much distinction. In 1906, a will of a former owner of the private road had given to a devisee the whole parcel, except this 15 feet, which the testator declared: "I hereby reserve for a public highway."

MIDDLETON, J., *held*, that the facts as disclosed did not amount to a dedication, and that the order of the Railway Board could not be considered as adjudicating upon the question of ownership.

Simpson v. *Atty.-Gen.*, [1904] A. C. 493, referred to on question of dedication.

Action dismissed and injunction awarded as prayed in counterclaim with costs.

Judgment to remain inoperative for sixty days, to permit expropriation proceedings to be taken by plaintiffs as suggested in *Sandon* v. *Byron*, 35 S. C. R. 309.

Action tried at Ottawa on the 17th and 18th of June, 1912.

An action brought for an injunction to restrain defendant from interfering with the construction by plaintiffs of their railway across a certain road, shewn upon a plan referred to in an order of the Railway Board, dated 10th May, 1912. Defendant asserted that the order of the Railway Board did not apply to a strip of land 15 feet in width along the northern limit of the road in question, and that the road referred to in the order of the Railway Board was altogether upon lot 17. The 15 feet was in fact the southerly 15 feet of lot No. 16, and constituted a private roadway leading from the River road of the old Billings homestead, used as a private road many years prior to the dedication of the public road on lot 17.

At the trial it was proved that defendant and his predecessors in title had owned and occupied lot No. 16 for more than 80 years. The witness McKellar lived in the Billings' residence for 18 years, from early in 1857 to the year 1874. Mr. Charles M. Billings, son of the late Charles Billings and brother of defendant, carried the history of the *locus in quo* from 1874 down to the present time.

A road was originally constructed near the southern boundary of lot 16. In 1860 it was straightened; and, from that time on, until at any rate, quite recently there has been no material change. In 1860 the fence which had theretofore been to the south of this road was moved to the north; a ditch was constructed at the side of the road; and this road, for many years, was the only means of access to the house from the River road, which lies to the west of the railway track.

About 1854, the St. Lawrence and Ottawa Railway was constructed, crossing this private road. This railroad is now operated by the Canadian Pacific Railway, and is called in the evidence the Canadian Pacific Rw. Where this railroad crossed, the road gates were erected, and these were generally closed. Until quite recently the gates were maintained, and occasioned no difficulty, as there was no travel save by those going from the River road to the residence.

In 1892, the late H. O. Wood laid out lot 17 in building lots, and, according to his plan, laid out a street called Billings avenue, 25 feet wide, to the north of lot 17. This street was immediately to the south of the old farm road upon the Billings property, which was immediately north of the division line between 16 and 17. The plan, Exhibit 5, shewed the location of this street of the old private road and of the adjoining lots.

From some time shortly after this date, the two adjoining roads have been used without much distinction. The travelled portion of the road had been the middle of the 40 feet. This portion was said to be 12 feet wide, leaving a margin of 14 feet on each side. The gates were still maintained at the Canadian Pacific Rw. crossing, and were not removed until about 4 years ago, when, owing to the increased traffic arising from the erection of some houses to the east of the Canadian Pacific Rw., the travel had increased to an extent which rendered the keeping of the gates closed

a troublesome matter. The Canadian Pacific Rw. then of its own motion took down the gates, and constructed fences and cattle guards as shewn upon the plan, Exhibit 2.

G. F. Macdonnell, for the plaintiff.

D. J. McDougal, for the defendants.

HON. MR. JUSTICE MIDDLETON:—It may be that the travelled road encroached slightly upon lot 16; but the material question to be determined in the first place is whether any portion of the 15 feet in question still remains the private property of the defendant. An encroachment of one or two feet does not seem to me to be material.

Charles Billings, Sr., died on the 29th of November, 1906, and he left to his son, Charles M. Billings, all of lot 16, between the railway and the Rideau river, save and except a strip of land 15 feet in width, along the southern boundary, "which I hereby reserve for a public highway." He also gave to the present defendant all the remainder of lot 16. The residue of his estate is given to his two sons, share and share alike. This will is dated August 29th, 1904, prior to the location of the Canadian Northern Rw.; so that the railway referred to as constituting the division between the defendant and his brother is the Canadian Pacific Rw. line.

Upon this will, I think, it is clear that Charles M. Billings only took the land west of the railway and north of the 15-foot road in question. I think it is equally clear that it was not the testator's intention to give the road west of the railway to the defendant, as the "remainder of lot 16," means, I think, that which remains, not only after the devise to Charles of his portion, but after excepting from the lot the 15-foot strip to the south of Charles', which is reserved for a public highway.

It was conceded by counsel for both parties that this reservation was quite insufficient to amount by itself to a dedication, and, therefore, the road west of the Canadian Pacific Rw. would pass to the defendant and his brother, as residuary devisees.

It would have been more satisfactory if Charles M. Billings had been a party to this litigation, so that the matter might now be determined once for all; but, as it is plain

that what provoked the bringing of this action was the enclosure by the defendant of the land in question where the plaintiffs' line crosses the road, I think I must deal with the action as it is at present constituted; and, looking at the matter from the defendant's standpoint, I think I would also be bound to hold that one of two tenants in common is entitled to defend the land from trespass, if the railway has no title.

An application was made to the Dominion Railway Board by the railway, which had located its line immediately to the west of the land occupied by the Canadian Pacific Rw., for permission to cross "the public road between lots 16 and 17, . . . as shewn on the plan and profile on file with the Board;" and on the 7th of February, 1911, an order was made by the Board, giving the permission sought. Upon the hearing before the Board, Mr. Billings was present. Some discussion took place as to whether he was present in his capacity as property owner or as municipal officer. I do not think this makes any difference, as the order of the Board is in its nature a judgment *in rem*, and is binding upon all.

I am, however, unable to follow the plaintiffs' counsel when he asks me to read into this order an adjudication by the Railway Board that this 15 feet constituted part of the public road. The order itself deals only with the public road between lots 16 and 17. The description is not particularly apt, as the road is not between 16 and 17. The road, as shewn on the registered plan, was originally part of lot 17. The private road in question is entirely part of lot 16.

The plan is said to be drawn on a scale of 400 feet to the inch; and an engineer, applying his scale, states that the road as shewn upon the sketch or plan scales forty feet. From this I am asked to built up an adjudication that the 15 feet had become a public road.

The plan, although no doubt substantially correct, is not correct in other matters when tested by a scale. Stanley avenue, for example, is shewn as of much greater width than it is upon the ground or upon the registered plan.

I think the fair test as to what is concluded by the order of the Board, is to consider precisely what was before the Board for adjudication. The railway, before it can enter upon private lands, must take proper expropriation proceedings. Before it can cross a public road, it must obtain the

leave of the Board. The contest before the Railway Commission, was as to the terms upon which the railway should be permitted to cross the public road. Nothing was said about the adjoining private way; no contest was raised as to whether this 15 feet was or was not part of the public road; and I do not think that the Board ever adjudicated, either intentionally or unintentionally, upon the matter now in issue.

The title to the right of way of the railway was not disclosed before me, and I must, therefore, assume that the railway has not acquired any title to the 15 feet, and that their action must fail, unless there has been a dedication to the public.

On the facts I do not think there was a dedication. As said by Lord Macnaghten in *Simpson* v. *Attorney-General,* [1904] A. C. 493, "it is clear law that a dedication must be made with the intention to dedicate, and that the mere acting, so as to lead persons into the supposition that a way is dedicated to the public does not of itself amount to dedication."

I do not think, in this case, that the defendant has done anything amounting to a dedication. In this view the action of the plaintiff fails, and must be dismissed. For the like reason an injunction should be awarded to the defendant upon his counterclaim.

The railway, undoubtedly, has a right to expropriate; and the piece of land to be taken is of such trifling value that it is a great pity that the parties have not up to the present been able to settle. The defendant and his brother take this piece of land, impressed with the expression of their father's intention that it should be made a public highway. Probably the defendant himself will, sooner or later, desire to convert the strip of land to the east of the railway track into a highway, so widening the road from 25 to 40 feet. In the meantime the proper course is, I think, indicated by the Supreme Court, and I ought not to dissolve the injunction which has been granted to the plaintiffs or make operative the injunction which I now award to the defendant, until an opportunity is given to the railway to take expropriation proceedings. This course is justified by what is said in the Supreme Court in *Sandon* v. *Byron,* 35 S. C. R. 309.

This judgment will, therefore, not be operative for 60 days, so as to allow the suggested proceedings to be taken.

The defendant is, I think, entitled to his costs.

HON. MR. JUSTICE MIDDLETON. JUNE 25TH, 1912.

McDONALD v. EDEY.

3 O. W. N. 1514.

Architect—Negligence—Damages—Counterclaim for Commission.

Action by plaintiff for $2,500 damages, for negligence of defendant, an architect, in supervising the erection of a building. Defendant counterclaimed for $200 commission.

MIDDLETON, J., found plaintiff entitled to $200 damages, which he set-off against defendant's commission. No costs to either party.

Plaintiffs claimed that defendant, who was employed by them as an architect, in the erection of a house on Spadina avenue, Ottawa, was liable for damages by reason of his careless, negligent, and unskillful conduct in and about the building in question. The damages claimed were $2,500. Defendant denied this, and counterclaimed to recover his commission.

J. J. O'Meara, K.C., for the plaintiffs.

T. A. Beament, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—Most of the specific claims put forward by the plaintiffs were negatived by the evidence at the trial. All claims were very much exaggerated. Yet in the result, I think that there was some negligence on the part of the defendant.

The two matters in which I think he was to blame are allowing the building to be so erected that the eave overlaps the eave of the adjoining building, also owned by the defendant; and his failure to compel the carpenters to use flooring in accordance with the specifications.

It is said that the overlapping of the eaves will interfere with the selling value of the premises. I think this claim is very much exaggerated. The fact that the over-

lapping eave keeps the 18 inches of space between the houses dry and prevents the walls becoming wet and so injured, is not to be overlooked. The plaintiffs stood by and did not in any way complain of this, when the building was located; and while I think some allowance should be made upon this head, I do not think it should be large.

As to the flooring, the specifications called for flooring not exceeding 4½ inches in width. About 30 per cent. of that actually laid down was 5½ inches in width. This renders the floor boards more liable to warp and to have wider cracks in shrinking.

I have difficulty in assessing what the real damage is. The architect was to be allowed five per cent. commission upon the erection, or $200 in all. He has received $50.

After giving the matter the best consideration I can, and having in view the exaggerated claims originally made—some of which were pressed at the trial—I think that the best solution of the matter is to direct the defendant to refund this $50, and to set off the plaintiffs' claim for damages against the defendant's claim for commission. In other words, I assess the damages at $200, the amount which would be payable for commission.

I give neither party any costs.

HON. MR. JUSTICE MIDDLETON. JUNE 26TH, 1912.

RE MCKAY.

3 O. W. N. 1555.

Will—Construction—Annuity—Residue—Remainder—Maintenance of Infants—Powers of Trustees.

Motion by executors for construction of will of the late Hugh McKay, who died July 3rd, 1897, leaving an estate of about $60,000. The will directed the realization of the assets by the trustees, and the setting apart of the sum of $35,000, out of which his widow was to receive an annuity. On her death or remarriage, this fund was to become "part of and form the residue of my estate." The remainder of his estate was to be divided into as many shares as there were children living at his decease, and the interest on each share was to be paid to sons on reaching the age of 27, and daughters at 21. The principal sum of each share was to be given on the decease of each child "to their issue, if any," and in the event of their dying without issue, to be equally divided amongst the other children, share and share alike. Provision was made for the payment of marriage portions, sums for medical attendance, etc., from the "residue" which was "to be divided among my surviving grandchildren, and the interest accruing thereon to be paid to my children, each to share and share alike."

MIDDLETON, J., *held*, that the sum of $35,000 was to be held until the death or re-marriage of the widow, or the coming of age of the youngest surviving child, whichever was the latest; that this fund was the fund out of which the marriage portions, sums for medical attendance, etc., were to be paid, and that any surplus income from the same should be divided amongst the children.

That the gifts of the shares of the so-called remainder are not absolute, but each share is to be held in trust for each child for life, and on his death, is to go to his issue, or failing any, to the fund of the surviving children.

That the attempt to postpone the receipt of the interest, by the sons, until they should attain 27, was nugatory.

Costs to all parties out of estate.

Motion for the determination of certain questions arising upon a construction of the will of the late Hugh McKay. Heard at London Weekly Court, on Saturday, the 22nd of June, 1912.

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

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

T. G. Meredith, K.C., for James R., E. B., and H. McKay, adult children.

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

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

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

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

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

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

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

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

By the sixth clause the principal sum invested for each son and daughter is given "to their issue, if any;" but in the event of any son or daughter dying without issue the

amount of the portion that would be his if he had lived is to become part of the principal and to be equally divided among the other children, share and share alike, and "to be governed by paragraph No. 5;" the widow of any son to have a third interest paid to her during widowhood. By the same clause the "residue of my estate is to be divided among my surviving grandchildren, and the interest accruing thereon to be paid to my children, each to share and share alike."

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

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

It is then argued that the testator has attempted, with reference to what he calls "the remainder," to create an estate tail in his personal estate. The income is to be invested until each daughter attains the age of 21, when she is to receive the income on her share including accumulations. The income on the share of the son is to be invested until the son attains the age of 27, when he is to receive the income including accumulations. The principal invested is to go to the issue of the son or daughter who dies, and in the event of a son or daughter dying without issue then the shares of the other children are to be augmented,

subject to the dower provision made for the widow of a deceased son. When the residuary estate, so called—that is, the $35,000—is free from its primary burden of providing an income for the maintenance of the wife and family at home, or the minor children in the case of her death, then this residue is to be divided among the testator's surviving grandchildren.

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

No third theory for the construction of the will has been suggested.

Each theory has its defects. The theory advocated by the children involves the rejection of the words "to be part of," in the clause dealing with the $35,000, where the testator directs it upon the death of the wife "to become part of and to form the residue of my estate." Yet the opposite theory presents a similar difficulty, as it involves the rejection of the words "to form," found in the same expression. It is also unlikely that the testator would mean to postpone the division of the estate until the death of the last surviving child, and that this should be the time when the surviving grandchildren would take.

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

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

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

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

The result of this is that the shares of the children in everything over the $35,000 will utimately be distributed among the grandchildren *per stirpes,* while the granchchildren will share in the $35,000, when it comes to be divided, per capita. The children are given nothing but the interest, the interest on the shares being theirs absolutely; and the attempt to postpone payment in the case of sons to the age of 27 being nugatory, on well understood principles. The right of the children to receive interest on the $35,000 will terminate on the arrival of the period of distribution.

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

The first order was made on the 16th May, 1898, in the matter of the estate and in the matter of the infant children. The widow had claimed certain insurance money, and the order recites, as a term of its being made, that she was to withdraw all claims thereto. The allowance was increased from $1,500 to $2,300 per annum; the infant Gordon Alexander to have no part or share therein save that the executors were to retain out of this $2,300, $166.66 for his support and maintenance; this increased allowance to be charged against the estate of the infants other than Gordon Alexander.

By another order, dated the 24th May, 1902, it is declared that the children under paragraph 5, take vested interests in the income of the estate, and are entitled to have the same or a sufficient portion applied for maintenance respectively. The same order provides that the allowance for maintenance be increased for a period of four years to $2,500 per annum; this increased allowance to be charged against the respective shares of the infant children other than Gordon Alexander.

On the 23rd February, 1903, an order was made for payment of $200 for two years for the education of infants. No provision is made how this shall be charged.

On the 27th June, 1905, an order was made directing payment by the trustees of the medical expenses of Gordon Alexander McKay, these expenses amounting to $555. No provision is made as to how this shall be charged.

On the 23rd of March, 1906, a further order is made for payment of $600 for medical treatment of Gordon Alexander McKay.

On the 1st June, 1906, the allowance under the 4th paragraph of the will is made $2,000 for a period of three years, to be charged in equal proportions against the children, other than Gordon Alexander McKay.

On the 30th June, 1906, an order is made providing that out of the share of Gordon Alexander McKay, moneys may be expended for his medical treatment.

On the 10th July, 1909, the annual allowance is continued at $2,000 for two years; and on the 10th June, 1911, this is continued for a further period of three years; this order providing that the increased allowance shall be charged against the shares of the children other than Gordon Alexander.

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

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

On this application the married daughter, Ethel M. Parker, asks for a direction that the trust company should

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

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

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

I think that the foregoing covers all the different matters discussed, and that there ought to be no difficulty in making out accounts upon the footing indicated.

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

DIVISIONAL COURT.

JUNE 26TH, 1912.

RE SANDERSON v. SAVILLE.

3 O. W. N. 1560; O. L. R. .

Mines and Minerals—Prospecting and Discovery by Miner on Crown Lands after Expiry of License—Renewal after Discovery and Staking—Effect of Ontario Mining Act, ss. 22 (1), 84, 85 (1) (a), 176 (1), 181 (1)—Criminal Offence.

DIVISIONAL COURT, *held*, that the holder of a miner's license can acquire no rights by a discovery and a staking after the expiry of the term covered by the license and before its renewal, prospecting without a subsisting license being a criminal offence.

Cleaver v. *Mutual Reserve F. L. Assn.*, [1892] 1 Q. B. 147, and *McKinnon* v. *Lundy*, 24 O. R. 132; 21 A. R. 560, *sub nom.* *Lundy* v. *Lundy*, 24 S. C. R. 650, discussed.

Judgment of Mining Commissioner for Ont., affirmed, with costs.

An appeal by Sanderson from a judgment of the Mining Commissioner, reversing a decision of a Mining Recorder,

and declaring Eliza Saville was entitled to be recorded as the holder of two mining claims in the mining district of Sudbury.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL.

J. W. Bain, K.C., and M. Lockhart Gordon, for Sanderson.

G. F. Shepley, K.C., and H. S. White, contra.

HON. MR. JUSTICE RIDDELL:—In this appeal from the Mining Commissioners there are several matters to be considered, one of them a matter of law of considerable importance though susceptible of short and simple statement.

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

The Act provides sec. 22 (1) that "no person . . . not the holder of a miner's license shall prospect for minerals upon Crown lands, etc., or stake out, record or acquire any right or interest therein." Sec. 176 (1) provides: "Every person who prospects . . . any Crown lands . . . for minerals otherwise than in accordance with the provisions of this Act or 6 Edw. VII. ch. 11, sec. 103 . . . shall be guilty of an offence against this Act and shall incur a penalty not exceeding $20 a day . . . and upon conviction thereof shall be liable to imprisonment for a period not exceeding three months unless the penalty and costs are sooner paid." Sec 181 (1) directs the prosecution before a police magistrate or justice of the peace, the Commissioner, or a Recorder. This express provision excludes the application of sec. 164 of the Criminal Code: but the offence is none the less a crime. If for any reason sec. 164 of the Code does apply then the Act was a crime quite beyond question. "*Nullus commodum capere potest de injuria sua propria?*" and "*Nul prendra advantage de son tort demesne*" (2 Inst. 713); "*Nemo ex suo delicto meliorem*

suam conditionem facere potest," are but a few of the forms of statement of a principle recognised in our law. This is stated by Fry, L.J., in the following words: "No system of jurisprudence can with reason include amongst the rights which it enforces, rights directly resulting to the person asserting them from the crime of that person:" *Cleaver* v. *Mutual Reserve Fund Life Assn.*, [1892] 1 Q. B. 147, at p. 156. Maybrick had insured his life in favour of his wife and died by poisoning: his wife was convicted of his murder, her sentence being commuted to penal servitude for life. The executors of Maybrick sued the insurance company and it considered that Mrs. Maybrick had no right to receive the insurance, but there was a resulting trust in favour of the estate.

This case was much canvassed in our own case, *McKinnon* v. *Lundy* (1893), 24 O. R. 132, 21 A R 560; *sub nom. Lundy* v. *Lundy*, 24 S. C. R. 650.

Mrs. Lundy had made a will devising certain lands to her husband: he killed her and was convicted of manslaughter. Lundy's grantee claimed the land: the trial Judge (Ferguson, J.), held that Lundy could neither take under the will nor inherit and that the lands should go as on an intestacy except that Lundy could not inherit any interest. The Court of Appeal unanimously reversed this judgment, drawing a distinction between murder and manslaughter, "something little removed from accident when all intent to bring about the death and thereby bringing about the existence of the fund for the profit of the criminal was necessarily absent." Another distinction is drawn between the *Cleaver Case* and the *Lundy Case* by one of the Judges, namely, that in the former the plaintiff was seeking the assistance of the Court—in the *Lundy Case* the defendant Lundy is not seeking the aid of the Court. He does not require it, the validity of the will is not disputed. "It is admitted to be a good will. . . ." per Maclennan, J.A., at pp. 566, 567. The Supreme Court, 24 S. C. R. 650, reversed the judgment of the Court of Appeal and restored that of Mr. Justice Ferguson, pointing out that "the principle upon which the devisee is held incapable of taking under the will of the person he kills is, that no one can take advantage of his own wrong," p. 652.

The principle must, of course, be subject to two qualifications, the rights in question must be property rights—Mrs.

Maybrick and Lundy after their release could not be prevented from taking another spouse.

So, too, while rights cannot be acquired by a wrong doer from his wrong, "the rule applies to the extent of undoing the advantage gained where that can be done, and not to the extent of taking away a right previously possessed. Thus if A. lends a horse to B., who uses it and puts it in his stable and A. comes for it and B. is away and the stable is locked and A. breaks it open and takes his horse, he is liable to an action for the trespass . . . and yet the horse could not be got back, and so A. would take advantage of his own wrong. So though a man may be indicted at common law for a forcible entry, he could not be turned out if his title is good . . ."

See also *Ackford* v. *Preston* (1861), 6 H. & N. 464.

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

Sec. 85 (a) does not purport to be in any way in modification of secs. 22, 23, 27. Section 27 provides for the ordinary case of the renewal of a license "before the expiration thereof;" this renewal is to "bear date the 1st day of April, and deemed to have been issued and shall take effect immediately upon the expiration of the license of which it is a renewal." But sec. 85 (a) provides for an entirely different case for what is called a "special renewal license," both in the section itself and in the tariff, item No. 23. This so far as appears need not be dated 1st April —at all events it is not provided that it shall come into effect retroactively. It is only issued "to save forfeiture" (Tariff item No. 23), a forfeiture under sec. 84. This as will be seen is forfeiture of "all the interest of the holder of a mining claim before the patent thereof has issued." The "special renewal license" is not operative to make that rightful which was wrongful, that innocent which was a crime, but only to prevent from forfeiture the interest already rightfully and lawfully acquired of "the holder of a mining claim."

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

The other branch of the case is on a simple question of fact, which in the view I take, is not necessary to be set out.

After a careful examination of all the evidence, I am not able to say that the conclusions of the learned Commissioner are not wholly justified by the evidence; much depends upon the credibility of Saville, who gave testimony before the Commissioner in conflict with what he had previously said before the Recorder. The explanation given is not wholly satisfactory, but the Commissioner saw the witness, and he chose to give credit to the testimony before himself—we cannot, I think, interfere.

In a matter of credit to be given to witnesses the Master (or Commissioner), is the final Judge of the credibility of these witnesses "according to the well established practice in Ontario."

Booth v. *Ratte*, 21 S. C. R. 637, 643; *Hall* v. *Berry* (1907), 10 O. W. R. 954; *Bishop* v. *Bishop* (1907), 10 O. W. R. 177.

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

HON. MR. JUSTICE BRITTON:—I agree that appeal should be dismissed with costs.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—And I.