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COURT OF APPEAL.

MARCH 24TH, 1910.

METROPOLITAN TRUST AND SAVINGS BANK v. OSBORNE.

Foreign Judgment—Action on—Regularity of Judgment—Submission to Jurisdiction—Defences to Original Cause of Action not Open.

Appeal by the defendants from the judgment of CLUTE, J., in favour of the plaintiffs in an action upon a judgment recovered in the Circuit Court of Cook County, Illinois, and alternatively upon the promissory note which was the subject of the action in the foreign Court.

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

H. S. Osler, K.C., and W. S. Edwards, for the defendants.

W. J. Elliott, for the plaintiffs.

The judgment was pronounced on the 24th March, 1910, dismissing the appeal.

The written opinions were given to the Registrar on the 17th May, 1910.

MOSS, C.J.O.:—The preliminary difficulty in the way of the defence is the existence of the judgment recovered by the plaintiffs against the defendants in the Circuit Court of Cook County, Illinois. As between the plaintiffs and defendants, it must be taken that the instrument upon which the recovery and judgment are based was signed by the defendants with a knowledge of its contents and with the intention to bind themselves according to

its tenor and effect. At the trial it was admitted on behalf of the defendants that the judgment was regularly obtained in the State of Illinois, and that under the laws of that State it was regular, it being at the same time understood that no personal service was effected upon the defendants, who did not enter any appearance or otherwise attorn to the jurisdiction of the Illinois Courts, except in so far as they might have done so by signing the instrument in question. The instrument in effect contained (amongst other things) a warrant of attorney to confess judgment without process in favour of the holder, and, it being admitted that the judgment was regularly obtained, it must be assumed that everything essential to entitle the plaintiffs to obtain it without further notice to the defendants duly happened, and that every step necessary to be taken in order to procure its entry according to the laws of the State of Illinois was duly taken. The defendants must be regarded as having voluntarily submitted themselves to the jurisdiction of the Illinois Court, thereby rendering it competent to deal with the matter.

So far, therefore, as the Courts of this province are concerned. effect must be given to the judgment, and the defendants are precluded from insisting here upon defences that might be open to them if there was no judgment of a Court of competent jurisdiction, and the plaintiffs were suing upon the instrument.

The learned trial Judge, while expressing himself as of the opinion that these defences were not sustained, entered judgment for the plaintiffs upon the footing of the judgment as sued upon. For the reasons above stated, the appeal therefrom fails, and should be dismissed.

MEREDITH, J.A.:—The judgment in the Illinois Court cannot be set aside in this Court; nor can it be disregarded, so long as the plaintiffs seek to recover upon it. It is admittedly a judgment regularly entered up, according to the practice of that Court, in a matter within its jurisdiction, and there is no suggestion that it was obtained by fraud.

If the writing, upon faith in which that Court acted, were signed by the defendants in ignorance of its contents, that, no doubt, affords a ground for seeking to be let in to defend that action; but not for treating it here, or anywhere else, as invalid.

If the judgment had been entered up in any of our own Courts, no one would have mistaken the proper way to seek relief; nor, perhaps, doubt that, upon proper terms, the case would be reopened, if the mistake were proved.

The claim is one which, it is admitted, was within the jurisdiction of the Illinois Court; and judgment was, as it is also admitted, regularly entered up, in that Court, upon the writing, signed and delivered by the defendants, authorising such an entry of judgment in that Court. What valid objection, then, can there be to that judgment? How can it be, here, treated as of no effect, as long as it stands? The mistake of the defendants, in no way induced by the plaintiffs, may be a sufficient ground for being let in to defend, but it cannot, in my opinion, be a good ground for anything more than that.

The defendants can, of course, apply to the High Court here to stay proceedings in this action pending the result of an application to be let in to defend the action in the foreign Court, and pending the result of that action if they shall be so let in to defend.

So long as the plaintiffs maintain their claim upon the foreign judgment, and are successful in it, they cannot recover upon their alternative claim, nor can I think it proper to consider it; if they had chosen, or should choose, to discontinue their claim upon the judgment, they would be entitled to have the alternative claim considered.

I would dismiss the appeal.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

HIGH COURT OF JUSTICE.

SUTHERLAND, J., IN CHAMBERS. MAY 10TH, 1910.

REX v. GRAVES.

Liquor License Act—Conviction—Warrant of Commitment—Interlineation—Previous Conviction—Police Magistrate — Evidence—"Unlawful Sale"—Charges for Conveying to Gaol—Amendment of Conviction—Habeas Corpus—Motion for Discharge.

Application, on the return of a writ of habeas corpus and certiorari in aid, to discharge the defendant from the common gaol at Kingston, where he is now confined. He was, on the 7th January, 1910, by the police magistrate for the county of Frontenac, at Kingston, convicted for that he unlawfully sold liquor without the license required by law, and that he was previously, to wit, on the 8th day of August, 1908, convicted of having unlawfully sold liquor without the license by law required.

The grounds of attack were: (1) that the warrant was void on its face, as having an unverified interlineation of a material character; (2) that there was no statement in the conviction of the capacity in which William Lawson acted when the previous conviction was made; (3) that the commitment did not say with reference to the first offence that it was an unlawful sale; and (4) that, in any event, and mainly, there was an adjudication by the convicting magistrate without authority, among other things, that, in default of payment by the defendant of the charges of conveying him to the common gaol at Kingston, he was to be imprisoned therefor.

J. B. Mackenzie, for the defendant.

J. R. Cartwright, K.C., for the Crown.

SUTHERLAND, J.:—In reference to the first objection, the word "liquor" said to be interlined in the warrant without verification appears in the conviction, which is therefore complete in that respect, and, as it is perfectly plain upon the warrant what is meant, I do not give effect to this objection.

As to the second objection, the police magistrate is described both before and afterwards in the conviction as the police magistrate in and for the county of Frontenac, but, in any event, on the papers before me, namely, in the evidence of John A. Ayearest, there is the statement that he was present on the 8th August, 1908, when the defendant was convicted before William Lawson, police magistrate, county of Frontenac, of selling intoxicating liquor at his hotel, &c. I cannot, therefore, give effect to this objection.

As to the third objection, that no "unlawful" sale is mentioned in the conviction, it was pointed out in argument that the word is not part of the language used in the Liquor License Act, and that the remaining words used are clear and sufficient under it to shew the charge. I agree with this view of the matter.

As to the fourth objection, there are large powers of amendment in a proper case. It appears here that the conviction is clearly right. It is suggested that the words "and charges of conveying the said Daniel Graves to the said common gaol" may be struck out of the conviction. Authority for this is cited, namely, Rex v. Degan, 17 O. L. R. 366.

I think, in the circumstances of this case, that course might well be taken, and I order and direct accordingly.

The application for the prisoner's discharge is therefore refused, without costs.

DIVISIONAL COURT. MAY 12TH, 1910.

TRENCH v. BRINK.

Contract—Illegality—Transactions on Grain Market on Margin—No Actual Purchase or Delivery—Gambling—Criminal Code, sec. 231—Joint Transaction—Moneys Advanced—Refusal of Court to Aid Recovery — Transaction on Foreign Market — Dealing in Ontario.

Appeal by the plaintiff from the judgment of the County Court of Bruce dismissing an action to recover from the defendant $229.37 alleged to be due from him to the plaintiff pursuant to an agreement between them for the purchase and sale of wheat on joint account, whereby a loss of $1,178.75 was sustained, of which the plaintiff paid $818.75, and the defendant $360. There was also a counterclaim by the defendant, which was dismissed without costs.

The appeal was heard by BOYD, C., MAGEE, J.A., and LATCHFORD, J.

W. Proudfoot, K.C., for the plaintiff.

H. E. Rose, K.C., for the defendant.

BOYD C.:—Having read the evidence, I see no good reason to differ from the conclusion of fact reached by the Judge, that these were not real business transactions, but gambling deals on the Chicago wheat market.

Through the agency of Toronto brokers, the plaintiff and defendant entered into joint transactions to buy and sell Chicago wheat on margins. There was no money put up for the purchase of any wheat, nor was there delivery of any wheat, nor was such actual purchase or actual delivery ever spoken of or contemplated. Any indicia of reality, such as the payment of storage of the grain or payment of interest upon bank loans or brokers' advances, were lacking. The defendant swears that the "understanding was that we were not to take delivery of the wheat. It is never done in deals like ours. Trench never thought of doing it. He never expected to do so. That could only be done by putting through wheat on the Chicago market, and we hadn't the money to do it:" p. 91. Though the plaintiff is recalled immediately after this, he does not say a word against it.

Earlier in the case the plaintiff had said: "These were legitimate transactions. I could have demanded every pound, and I am prepared to prove that every bushel that was bought must be delivered if they want it:" p. 39. But he also made these answers, at p. 24: "These deals in 1908 and 1909 were not real wheat deals? A. Well, we couldn't say. Q. There was none as a matter of fact? A. No."

One of the brokers, called Bickell, says, "In cases of this kind there was delivery of the grain, and as to payment of the price, that it was properly margined:" p. 56. The other, Carolan, gives reasons for thinking there was no delivery of the grain in any of these transactions: p. 66.

Bickell, when asked, said it was not for him to judge whether this was a pure case of buying with expectation that the market would rise or selling with the expectation that it would fall, and that he could not tell what the parties intended to do: p. 58.

The trial Judge, however, whose duty it was to come to a conclusion on the evidence, has in effect found that the whole affair was a speculation, based on the rise and fall of prices, without any bona fide intention of acquiring or selling or of making or receiving delivery of the commodity.

This is within the prohibition of the Criminal Code, sec. 231, so far as the parties are concerned (I do not include the brokers), and, as being an illegal contract, the Courts abstain from rendering any help to any participant: Scott v. Brown, [1892] 2 Q. B. 724.

It was mooted during argument whether the Dominion statute R. S. C. 1906 ch. 146, sec. 231 (above cited), covered a case where the broker in Toronto acted through an agent in Chicago; but this difficulty seems resolved by the view taken in the Supreme Court, that the dealing or contract began and ended in Ontario—though an intermediate part might be transacted out of Canada: Pearson v. Carpenter, 35 S. C. R. 380, followed and applied by the Court of Appeal in Rex v. Harkness, 10 O. L. R. 562.

Apart from this view, I would be disposed to follow the doctrine of Kaufman v. Gibson, [1904] 1 K. B. 598: that is, that a contract, valid where made, if in conflict with what are deemed to be essential public or moral interests, cannot be enforced in an English Court.

The judgment should be affirmed; no costs.

MAGEE, J.A., concurred, for reasons stated in writing.

LATCHFORD, J., also concurred.

DIVISIONAL COURT. MAY 12TH, 1910.

*BROWN v. CITY OF TORONTO.

Jury Notice—Action against Municipal Corporation — Personal Injury to Pedestrian—Bad Condition of Sidewalk—Judicature Act sec. 104—"Non-repair"—Nonfeasance and Misfeasance.

Appeal by the defendants from the order of BOYD C., ante 580, restoring the plaintiffs' jury notice, which had been struck out by the Master in Chambers, ante 526.

Leave to appeal to a Divisional Court was given by FALCONBRIDGE, C.J.K.B., ante 608.

The appeal was heard by BRITTON, TEETZEL, and RIDDELL, JJ.

H. Howitt, for the defendants.

S. H. Bradford, K.C., for the plaintiffs.

RIDDELL, J.:—The plaintiffs allege that the female plaintiff, "by reason of a hole or depression in the boulevard caused by the negligence of the defendants taking up the old sidewalk and not filling in . . . tripped and was thrown on to the roadway," and was injured. . . .

In both the Courts below the motion has been considered to turn upon the question whether the action is based upon nonfeasance or misfeasance. Were I able to convince myself of the correctness of this, I should have no hesitation in dismissing the appeal, for, even if the statement of claim were held in strictness to allege nonfeasance only, the plaintiffs might amend by alleging misfeasance, and have their jury notice reinstated. I considered a question not dissimilar in Moore v. City of Toronto, 9 O. W. R. 665.

Counsel for the defendants takes the position that, even though the action is for misfeasance, he is entitled to have the jury notice struck out—and this is the position to be examined.

The section relied upon is sec. 104 of the Ontario Judicature Act: "All actions against municipal corporations for damages in respect of injuries sustained through non-repair of streets, roads, or sidewalks, shall be tried by a Judge without a jury. . . ."

There are two kinds of actions which in Ontario can be brought against municipalities in respect of injuries sustained through something wrong (I purposely use the indefinite expression) in their highway. The "something wrong" was caused by: (1) mis-

* This case will be reported in the Ontario Law Reports.

feasance occasioning a nuisance in the highway; this was actionable at the common law: Borough of Bathurst v. Macpherson, 4 App. Cas. 256; or by (2) nonfeasance, e.g., omitting to keep in repair or to put into repair after a harmful interference with the highway itself by third persons or a freshet, etc., etc. This, while it might give occasion to an indictment, could not give a cause of action at the common law, but it required a statute to give a right of action to one injured: Municipality of Pictou v. Geldert, [1893] A. C. 524.

As early as 1850, by 13 & 14 Vict. ch. 15, sec. 1, the corporations of cities and incorporated towns in Upper Canada were made civilly responsible for all damages sustained by any party by reason of their default in keeping their roads in repair. This in 1858 and 1859, at the consolidation, was extended; and in the C. S. U. C. ch. 54, sec. 337, appear much the same provisions as in our present sec. 606 of the Municipal Act. . . . .

In regard to sec. 104 of the Judicature Act, it is to be observed that the cause of the injury is what is particularised, not the cause of the condition of the street, etc.; the section does not say "actions against municipalities for failing to repair," etc. or "for not repairing," etc., or "because they did not repair," etc., or "in respect of injuries sustained through the failure of the municipalities to repair," or any similar language. Nor is this section an amendment of the Municipal Act. . . . Nowhere is there any intention apparent to restrict the generality of the provision —and it would seem that in every case in which an action is brought against a municipality "for damages in respect of injuries sustained through non-repair of streets," the action is directed to be tried by a Judge without a jury, whatever be the cause of the non-repair.

"Non-repair," in my view, is an abstract noun, being the name of a state or condition of the street, and not a verbal noun meaning "not repairing."

If, then, a street which has something wrong in it by reason of the misfeasance of the municipality can be fairly said to be in a state of non-repair, I am unable to see why the section does not apply to the case of an accident occasioned by such state or condition of the street. . . .

The word "non-repair" can, I think, mean only "the state of being out of repair"—"the state of not being in repair." It is clear that such a state may be occasioned by the misfeasance of the municipality: Borough of Bathurst v. Macpherson, 4 App. Cas. at pp, 265, 266, 267.

I am unable to say that the legislature, in the section referred to, intended to restrict its application to the case of nonfeasance. Had this been the intention, it would have been easy to have expressed it clearly. . . .

[Reference to Robinson v. Mills, 19 O. L. R. at pp. 172, 173.]

I am aware that in a number of cases in our Courts the word "non-repair" is used in contrast or quasi-contrast with "obstruction" and the like, but in very many also the word "non-repair" has been considered to include obstructions on the road. . . .

[Reference to Castor v. Uxbridge, 39 U. C. R. 113, 122; Lucas v. Moore, 43 U. C. R. at p. 339; Gilchrist v. Township of Carden, 26 C. P. 1; Rounds v. Stratford, 25 C. P. at p. 128, 26 C. P. at p. 19; Foley v. East Flamborough, 26 A. R. at p. 51; Atkinson v. City of Chatham, 26 A. R. 521; Huffman v. Bayham, 26 A. R. 514; Maxwell v. Clark, 4 A. R. 460, 465; Rice v. Whitby, 25 A. R. 197.]

There are a number of cases to the same effect, and I do not find that there are any authorities compelling us to limit the meaning of the word "non-repair." The cases cited are not, of course, decisions upon sec. 104 of the Judicature Act.

The cases since the Act are mentioned in the judgment of the Master in Chambers, except perhaps Armour v. Peterborough, 10 O. L. R. 306, . . . and Clemens v. Berlin, 7 O. L. R. 23, a judgment of my learned brother Teetzel. The latter alone calls for remark. . . . I am not prepared to overrule this judgment, as at present advised . . . . At all events, the case has no application here, where the injury is undoubtedly due to a defect in the highway itself. So far as the decision is based upon a distinction between nonfeasance and misfeasance, I am not (with great respect) prepared to follow it.

I think the appeal should be allowed.

We are not deciding that this is a case in which notice is necessary under the statute, or anything but the one point.

Costs should be costs in the cause.

BRITTON, J., agreed with the interpretation placed by Riddell, J., upon sec. 104 of the Judicature Act, and in the result of his opinion, for reasons stated in writing.

TEETZEL, J., agreed in the result.

Appeal allowed and jury notice struck out; costs in the cause.

RIDDELL, J. MAY 13TH, 1910.

FOSTER v. RADFORD.

Contract—Exchange of Lands — Allowance for Expenditures — Rental—Reference—Report—Interest—Possession—Time Allowed for Payment of Amount Found Due by Report—Costs.

Appeal by the defendant from the report of Mr. Kappele, an Official Referee, in respect of the interest allowed to the plaintiff; and motion by the plaintiff for judgment upon the report.

J. R. Roaf, for the defendant.

H. Cassels, K.C., and R. G. Hunter, for the plaintiff.

RIDDELL, J.:—The action was brought in 1907 by the plaintiff upon an agreement made in 1904. The agreement was, in effect, for the exchange by the plaintiff of 93 Carlton street, at a price of $17,500, subject to incumbrances amounting to $9,000, leaving an equity of $8,500, for buildings known as St. James Chambers, . . . at a price of $41,000, subject to incumbrances of $25,000, leaving an equity of $16,000—the difference, $7,500, to be paid in cash. The defendant was to make certain specified repairs, etc., in St. James Chambers by the 1st January, 1905, and the plaintiff was not to be required to convey 93 Carlton street until after these repairs, etc., were completed. The work was not done in time, and the plaintiff found in March, 1905, a certificate of lis pendens registered against this land of the defendant in March, 1905, at the suit of one Barwick. The plaintiff, too, did much work that the defendant should have done; and paid Barwick $850 and costs to settle the action. He remained in possession of the Carlton street property; and brought this action.

At the trial, the Chief Justice of the Common Pleas, after deciding that the plaintiff could not charge against the defendant the Barwick expenditure, referred it to Mr. Kappele to make all necessary inquiries, and reserved further directions and all costs until after the Referee's report.

The Referee found that the plaintiff was entitled against the defendant: (1) for work the defendant should have done, $1,643.67—on this interest is allowed from the 1st September, 1905; (2) for work the defendant should have done, $190; (3) damages for not performing work, $2,000, and interest from the 1st September, 1905. Then the Referee finds that the plaintiff remained in possession of the Carlton street property up to the time of his report, the 3rd May, 1909, and that $780 per annum is a fair

rental, and the plaintiff should be charged with this sum and interest from the end of each year. The plaintiff was then held entitled to $1,246.50 paid by him to the Toronto General Trusts Corporation, with interest, less $120 paid by him at a day named, also with interest; and it was found that he had paid $5,075.60 in 1909 on the Carlton street property which the defendant should have paid.

On an appeal, Boyd, C. (14 O. W. R. 224), reduced the first item to $258 on the Weekes account; . . . he reduced the 3rd item to $1,000 without interest; and also disallowed the interest on the rental against the plaintiff.

The Court of Appeal (ante 572) varied the judgment by increasing the rental of the Carlton street property to $1,000.

In the meantime the matter had gone back to the Referee on the order of the Chancellor; and the Referee reported on the 22nd November, 1909, that the plaintiff was entitled to: (A) $2,929.91; (B) $6,193.20; that the defendant was entitled to (C) $3,459.60; and on the balance the plaintiff was entitled to (D) $5,663.51, as of the 1st April, 1910.

The chief of the defendant's complaints is in respect of the interest allowed by the Referee, contending that, as the plaintiff was in possession of the Carlton street property, he should not be allowed to charge interest upon his expenditures, etc., so long as these did not exceed the amount which he should be charged for rental, or at least the interest should be charged only on the excess above the amount of rental with which he should be charged from time to time.

This seems to me a highly reasonable contention, but I think I am prevented from giving effect to it by the course of litigation and decision.

The Referee decided that the plaintiff should be charged with $780 per annum, with interest; the Chancellor reversed the finding that the plaintiff should be charged interest, the formal judgment reading: "And this Court doth further order that the defendant be not allowed interest upon the amount found payable to him in respect of the rental of 93 Carlton street, in the said report mentioned." Upon appeal . . . the Court of Appeal said in their formal certificate: "1. It is ordered . . that the said appeal on all items save that of the rental of 93 Carlton street should be and the same is dismissed with costs. 2. It is further ordered . . that the item of rent charged to the plaintiff for 93 Carlton street . . at $780 per year, as appears by paragraph No. 6 of the report of the Referee dated the 3rd day of May, 1909, be increased to a rate of $1,000 per annum."

Remembering that the judgment appealed from had reversed, not the amount found by the Referee, but the interest chargeable, and that the question of interest is a substantial question, the fact that the Court of Appeal refrained from reversing the express provision in the judgment of the Chancellor that no interest was to be allowed upon the amount found due for rent, seems to conclude me to hold that the direction not to allow interest was not overruled or intended to be reversed: Burland v. Earle, [1904] A. C. 590.

If I am wrong, it is not too late to ask the Court of Appeal to amend their certificate. At all events, I am bound by the clause cited in the judgment of the Chancellor, unless the same has been definitely overruled—and, as I have said, this has not been done.

The second point is as to the time to be given the defendant for payment of the balance found due before the Carlton street property be offered for sale. . . . The practice of the Court is to allow one month from the date of the judgment. There is no reason why that period should be enlarged or shortened.

The question of costs is a troublesome one . . . I exercise the discretion given me, as follows. The plaintiff will have the general costs of the action; the plaintiff will pay the costs of and incidental to the trial before the Chief Justice, in January, 1908; the plaintiff will have half the costs of the references without a set-off. (The costs of the appeals to the Chancellor and the Court of Appeal have been disposed of by the appellate Courts.) The costs of the motion for judgment will be to the plaintiff; and there will be no costs of the appeal from the report with which I am now dealing. . . .

DIVISIONAL COURT. MAY 16TH, 1910.

FEDERAL LIFE ASSURANCE CO. v. SIDDALL.

Mortgage—Redemption—Expenditures of Mortgagees by Agent or Purchaser in Possession — Allowance for Crops in the Ground—Insurance Premiums—Taking Possession, Expenses of—Lien on Mill Machinery—Payment in Settlement—Permanent Improvements Made by Agent—Interest—Costs.

Appeal by the defendant Robert H. Siddall from the order of FALCONBRIDGE, C.J.K.B., ante 234, dismissing an appeal from a Local Master's report.

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

W. M. Douglas, K.C., for the appellant.

J. G. Farmer, for the plaintiffs.

The judgment of the Court was delivered by MIDDLETON, J.:— This appeal raises several questions of some difficulty. The mortgagees having brought an action for foreclosure, after judgment and before the time for redemption had expired, fearing a loss, and realising that, in the event of the mortgagor failing to redeem on the 27th May, the loss would be augmented by reason of the farm remaining unworked for the year, entered into an agreement with one John W. Siddall by which they undertook to sell him the land in case the mortgagor failed to redeem. Under the terms of this agreement the purchaser was allowed to take possession in the meantime, and farm the property in question. The purchaser so in possession could have no greater rights than the mortgagees, and no reason can be suggested why he should have any less. As the mortgagees and purchaser are acting in harmony, there is no reason why, for the purpose of this appeal, the right of the mortgagor should not be determined as against the mortgagees, regarding the purchaser as acting under and for them.

There is not on the material any ground for suggesting that the plaintiffs were not throughout acting in entire good faith. True, the mortgagor was always asserting his intention to redeem, but a mortgagee, particularly when, as here, the security is scant, is not bound to rely upon the assurance of an apparently impecunious although sanguine mortgagor. Here the mortgagor admits that he had sold all his own chattel property, and sets up title in his relations as to the remaining horses, etc., with which he contemplated operating the farm, and there was much in his conduct to cause the mortgagees to doubt, as they apparently did, his ability ultimately to perform his promises.

The mortgagor complains that the Master has allowed the mortgagees $325 as compensation for crops put in in the spring of 1908, prior to redemption. These crops have been reaped by the mortgagor since redemption.

The Master has charged the mortgagees with the proportionate part of the rental value for the entire year for the time it was in possession, but no appeal is had from this finding. The mortgagor contends that, as the mortgagees knew that there might be redemption at the day fixed, the crops were put in at the risk of the mortgagees, who knew that upon redemption he was bound to reconvey the land, and so might lose all title to the crops.

This argument is based upon a misconception of the position. A mortgagee in possession is bound to act towards the mortgaged

premises as a prudent owner, and no prudent owner would allow a farm to lie fallow for a season. Had the mortgagees adopted the course suggested, it is quite certain that this mortgagor would have complained loudly. It must be also remembered that in this case the mortgagees, at the instance of the mortgagor, had undertaken to be charged with an occupation rent, and it cannot be supposed that the intention was that the farm should be in the meantime idle.

Neither counsel cited any cases bearing upon the question, and the dearth of authority is singular. The judgment of Chancellor Halsted in Schaeffer v. Chambers (1847), 6 N. J. Eq. 548, commends itself to me. "A mortgagee by taking possession assumes the duty of treating the property as a provident owner would treat it, and of using the same diligence to make it productive that a provident owner would use. If it be a farm, he is not at liberty to let it lie untilled . . .; he ought to cause the farm to be tilled, and that in a husbandlike manner."

That an allowance for crops in the ground can be made, is plain from the case of Oxenham v. Ellis (1854), 18 Beav. 233, a case not unlike the present, where the mortgagee had placed a tenant in possession, upon the terms that upon redemption there should be an arbitration as to the value of the crops. There it was said, "assuming neither the agreement nor the arbitration to be binding on the plaintiff, and that the occupation of the tenant is that of the mortgagee, some allowance must be made for the crops in the ground, either to the tenant or the mortgagee if he pays the tenant."

The mortgagor presented his appeal upon this head upon the unwarranted assumption that compensation for crops in the ground falls within the cases relating to permanent improvements.

The allowance made by the Master is a "just allowance," and it is conceded that, if any allowance is to be made, the sum allowed is reasonable.

The second item discussed is the amount paid one Whitelaw, the vendor of certain fixed machinery, as the balance due him upon the machinery under a lien or conditional sale agreement. The machinery formed part of the equipment of a mill upon the premises. There had been litigation between Whitelaw and the mortgagor, and an agreement was arrived at by which the litigation was settled. By this settlement, the validity of the lien was recognised, and the amount to be paid Whitelaw was ascertained, and the time for payment was fixed. Whitelaw undertook to tighten the bolts in a "sifter," one of the machines in question, and fix the bushing in it, and generally put it in a satisfactory

condition as soon as possible. The obligation of Whitelaw was not made a condition precedent to the obligation of Siddall to pay, but was independent. The machinery in question, though affixed after the mortgage, was regarded as an integral part of the mortgaged property, both by the mortgagees and its prospective purchaser. In order to place itself in a position to make title, they induced Whitelaw to accept less than the amount coming to him under the settlement. This sum has been allowed to the mortgagees upon the accounting, and I think properly so.

Two main objections are made to the allowance. It is said Whitelaw did not perform his obligations—but apparently an ample allowance was made on the settlement. Then it is said that the mortgagees did not retain all the machines sold, but allowed Whitelaw to retain one minor article, for which credit was given. This, it seems to me, has no real bearing on the mortgagees' right to discharge the lien on the remaining fixtures. It is not clear that the article removed was a fixture.

The next items are two sums paid for insurance, $78.75 and $25. Upon the facts, the mortgagees seem to have been justified in placing the insurance, costing $78.75, as the mortgagor had been guilty of default under the covenant, but the $25 seems to have been paid without justification, in view of the existing policy.

The item of $124 paid Paisley cannot be supported. The mortgagees were in possession and bound to care for the property.

Both the mortgagees and the sheriff seem to have misunderstood the sheriff's duty under a writ of possession; under that writ the sheriff's function is at an end when possession is given; he is not to provide a caretaker for the property.

Interest has been allowed the mortgagees on the sums paid by them. Interest should not be given on the sum allowed for the crops, but should be allowed on all sums paid out by the mortgagees and allowed to them. Costs will bear interest from the certificate of taxation.

There is no reason for interfering with the disposition of costs below; the mortgagees have acted in good faith, and, even though they have failed as to some items, are entitled to the general costs. As to items in respect of which there has been failure, ample justice will probably be done by giving neither party costs of this appeal.

The accounts can probably be adjusted in accordance with the findings without a reference back. This can be ascertained when the order is settled.

RIDDELL, J., IN CHAMBERS. MAY 17TH, 1910.

FRASER v. ROBERTSON.

Lunatic—Action Brought in Name of Alleged Lunatic by next Friend—Motion by Nominal Plaintiff to Dismiss Action — Action to Declare Marriage Ceremony Void — Inquiry as to Mental Condition of Plaintiff—Issues Directed to be Tried—Parties — Statutory Inquiry — Stay of Action—Retention of Motion.

Motion on behalf of the plaintiff for an order dismissing this action, which was brought in his name by one Catherine McCormick, his cousin, as his next friend, but, as he alleged without his authority.

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

A. McLean Macdonell, K.C., for the next friend.

RIDDELL, J.:—This action is, I am informed, wholly without precedent.

The plaintiff, Michael Fraser, is an old retired farmer, over 80 years of age (84 it is said); the defendants are a lady about 30, with whom it is said the plaintiff went through a ceremony of marriage on the 13th January, 1910, and her father . . . .

Catherine McCormick, alleging that the plaintiff was of unsound mind, brought this action, with herself as next friend, in the name of the plaintiff . . . charging the defendants with conspiracy and forcing an entrance into the plaintiff's house. It is further alleged that the defendants assert that the plaintiff and the female defendant were then married—but that such a ceremony was performed, the pleader denies, and says further that, if it was performed, the plaintiff was wholly incompetent, mentally and physically, to enter into such a contract, and had no reasonable perception or understanding of the same. The claim is made to have the said ceremony declared a nullity and void, for a committee of the person and estate of the plaintiff, and general relief.

The defendants deny all charges of conspiracy or wrongdoing, assert the capacity of the plaintiff, and that the marriage was entered into by him with deliberation and full competence—they say that the plaintiff is not the real plaintiff, but that he is dragged into Court against his will. . . .

Many affidavits are filed, and the evidence of the female defendant was taken before an examiner. The plaintiff presents affidavits by Dr. Clark, of the Asylum at Toronto, who examined

him on the 28th April, and says he shews no evidence whatever of insanity or of mental unsoundness, and although, as was to be expected, there are some evidences of senility, his judgment seems to be excellent. Dr. Raikes swears to the like effect. . . . If the affidavits of the medical men are to be accepted, it would be absurd to allow this action to proceed against the will of the plaintiff. But the next friend files affidavits which indicate that, in the opinion of the affiants at least, the plaintiff is non compos mentis; and set out alleged facts which, if true, rather point to that conclusion. If this be true, and the plaintiff is non compos mentis, the action should not be dismissed, as a whole at all events.

The next friend says that her whole desire is for the good of the plaintiff and submits to any order. . . .

[Reference to Palmer v. Walesby, L. R. 2 Ch. 732.]

Following that case, it would seem that where a plaintiff denies and the next friend asserts mental incapacity, the action will not be allowed to proceed without a judicial inquiry of some kind into such mental capacity of the plaintiff.

In Howell v. Lewis, 65 L. T. R. 672, 40 W. R. 88, it was held, in such a case, that the Court would direct an inquiry as to the competency to act of the person alleged to be of unsound mind.

No fixed rule is laid down, so far as I can see, which obliges me to take any particular course in respect of this inquiry—and counsel agree that, in case such inquiry be ordered, it shall be before myself in Toronto at the non-jury Court, on the 5th June, 1910.

Instead, therefore, of sending the inquiry to be otherwise made, I shall direct an issue to be tried before myself at Toronto on the 5th June, 1910, in which issue the next friend shall be plaintiff, and the plaintiff and defendants, defendants, and the issues to be tried: (1) whether Michael Fraser was on Saturday the 14th May, 1910, incompetent to retain solicitors to make a motion to dismiss the action; (2) whether the said Michael Fraser on the 17th January, 1910, was of unsound mind and incapable of managing himself or his affairs; and (3) whether the said Michael Fraser is on the day of the trial of unsound mind and incapable of managing himself or his affairs.

This is not to subject the plaintiff herein to examination for discovery—the affidavit of Dr. Raikes, filed, shews that such an examination might have evil effects upon him. The next friend waives all right to examine him upon condition that he be examined by another medical man—and suggests Dr. Bruce Smith. That is a reasonable proposition. . . . The examination should

be, if the plaintiff desires it, in presence of Dr. Clark or such other medical man as the plaintiff may name.

The next friend, on the one hand, and the defendants, on the other, are disputing as to the condition of the mind of the plaintiff—it is obviously improper that the solicitors of either side should represent the plaintiff upon the issue; and the Official Guardian will so represent him.

The above is what seems to me best adapted to arrive at the result all say they desire—but, if any party objects to this disposition, there will be an inquiry directed under the statute R. S. O. 1897 ch. 65, sec. 5, with all the inconveniences or otherwise of that proceeding.

The reason for trying more than the simple issue of the plaintiff's capacity at the day of trial is obvious, in view of the action. It may well be that the next friend was justified, and, indeed, to be commended, in respect of the bringing of this action. The costs of the action must be considered.

To dispose of the motion, it might be sufficient to find the first issue alone; but, of course, there are other considerations which must be borne in mind, in view of the advanced age and possible weakness of mind of the plaintiff.

In directing an issue I seem to be following a precedent made by Blake, V.-C., in Re Alpaugh, 21st March, 1881 (note book No. 43, pp. 54, 89, 104, 128, 146, 211). . . .

The order then will be for a stay of the action until after the trial of the issues aforesaid (or, at the election of either party, till after the inquiry under sec. 5 of the statute)—the issues aforesaid (or inquiry) will be directed—and the motion retained until further order; costs to be reserved to be dealt with upon the disposition of the motion.

If the parties prefer the statutory inquiry, I may be spoken to as to the frame of the order to be made.

BRITTON, J. MAY 18TH, 1910.

HETHERINGTON v. McCABE.

Vendor and Purchaser—Contract for Exchange of Lands—Time for Completion Fixed by Contract — Waiver by Conduct — Notice — Unreasonably Short Time — Rescission—Breach — Mortgage—Reduction—Matter of Conveyancing—Damages.

Action for damages for breach of an agreement.

The defendant, being the owner of the equity of redemption in a city lot, offered to the plaintiff to exchange it for a farm of

which the plaintiff owned the equity of redemption. The defendant was to pay $2,160, representing the difference in the value of the two properties. The plaintiff accepted the offer on the 9th April, 1909. Objections to title were to be made within ten days, otherwise title to be considered perfect. Time was to be of the essence of the agreement. Deeds, agreement, transfers, etc., were to be completed and handed over on or before the 25th April. The plaintiff made no requisitions as to title; the defendant made none within the ten days. On the 18th April the plaintiff's solicitor submitted a draft deed of his farm property. On the 22nd April the defendant's solicitor returned the draft, approved, subject to title, and sent a draft deed of the defendant's property for approval. On the 23rd April the plaintiff's solicitor returned the draft, approved, subject to title. On the 28th April the defendant's solicitor made formal requisitions on title. This was followed by a conversation between the solicitors and by correspondence between the defendant's solicitor and the registrar of deeds. As the result of these, the defendant's solicitor wrote to the plaintiff's solicitor on the 6th May stating that the requisition as to two discharges of mortgage had been satisfied, but he insisted upon a discharge of a mortgage to the Bank of Toronto. This letter also asked that adjustments be submitted. On the 7th May the defendant's solicitor wrote to the plaintiffs solicitor that, if the objection to the title was not removed by the 10th May, the agreement should be considered at an end. The plaintiff's solicitor was unable to get the discharge and have it registered by the time mentioned. On the 10th May the defendant declared the agreement at an end, and the plaintiff then commenced this action.

A. R. Cochrane, for the plaintiff.

R. G. Smythe, for the defendant.

BRITTON, J.:— . . . Time was originally made of the essence of the agreement. It was completely waived by the negotiation for completion after the time had expired. The defendant, having waived this, could not rescind without reasonable notice. Then was the time given by the notice of Friday the 7th May to close at or before 3 p.m. on Monday the 10th, a reasonable one? . . . I am of the opinion that the notice was not reasonable; the time was too short: see Crawford v. Toogood, 13 Ch. D. 152.

At the trial I was of the opinion that the fact of the plaintiff not reducing the mortgage to the amount which the defendant was to assume was a matter of title, and that the defendant could take objection, as the amount recoverable upon that mortgage

then exceeded the amount that the defendant was to pay. It was not reduced at the time, and in fact it never was reduced. Consideration of the authorities satisfies me that this was a matter of adjustment, and so of conveyance and not of title.

The contract . . . was that the defendant should take subject to an incumbrance fixed at a certain amount. It was an agreement for a continuance of the charge if the mortgagees would agree to it, or, if not, for an assumption and payment of it by the defendant. . . .

[Reference to Dart on Vendor and Purchaser, 6th ed., p. 324.]

Here the time, as extended by waiver, had not been fixed for completion. There was some evidence that arrangements had been made for payment of the $300 or whatever sum above that amount would be necessary to reduce the mortgage to $4,210. See Townsend v. Chumperdown, 1 Y. & J. 449; Dart, p. 1181; Armour on Titles, 3rd ed., p. 47.

So I must hold that the non-payment by the plaintiff up to the time of the attempted rescission of the contract by the defendant cannot avail as a defence in this action.

Upon these findings the plaintiff is entitled to recover.

The damages claimed by reason of the alleged loss of the plaintiff's land because it was sold under the mortgage which the defendant was to assume cannot be allowed.

The measure of damages is the difference between what the plaintiff was to pay for the defendant's land and its actual value. No evidence was given on that.

The proved damages were very small. . . . The plaintiff should get the expenses of conveyance and the expense he was put to by reason of this purchase falling through.

In estimating the plaintiff's damages at $125 I am allowing him liberally for everything lost by him. Anything further would be purely speculative.

Judgment for the plaintiff for $125 with costs on the proper scale. Counterclaim dismissed without costs.

STILWELL v. TOWNSHIP OF HOUGHTON—MASTER IN CHAMBERS
MAY 14.

Particulars—Statement of Claim—Highway — Defects—Injury—Damages.]—Motion by the defendants, before pleading, for particulars of the statement of claim in an action for dam-

ages for injury to property and personal injuries sustained by the plaintiff owing to defects and obstructions in a highway, as alleged. The Master was of opinion that the statement of claim should have been more according to precedent No. 67 in Odgers on Pleading, 6th ed., pp. 412, 413; and that particulars of the injury to the plaintiff's vehicle and harness should be given, as well as of his expenses for medical attendance, nursing, and loss of time; this would enable the defendants to pay into Court such sum as they might be willing to give. It should also be made clear that the defects and obstruction of the highway alleged were all that the plaintiff would rely on at the trial, so that he might be confined thereto. Order for particulars accordingly. Costs in the cause. J. H. Spence, for the defendants. J. T. White, for the plaintiff.

BURNS v. LOUGHRIN—MASTER IN CHAMBERS—MAY 14.

Security for Costs—Property in Jurisdiction.]—Motion by the defendants for an order for security for costs under R. S. O. 1897 ch. 89, secs. 1, 2. The only question raised was whether the plaintiff was possessed of property sufficient to answer the costs of the action if he should fail therein. It appeared that the plaintiff was doing a prosperous business, but he did not shew ownership of any realty and nothing very definite as to chattels. The Master referred to Bready v. Robertson, 14 P. R. 7, at pp. 9, 10; Sills v. Alexander, ante 622, and cases there cited; and said that the plaintiff should have a further opportunity of shewing that he had assets sufficient in value and seizable under execution. If the plaintiff, within two weeks, files an affidavit shewing how the $900 at which he values his business is made up, and submits to cross-examination if the defendants so desire, the motion may be renewed. In default of such affidavit, the usual order for security for costs will be made; costs in the cause. J. A. Macintosh, for the defendants. J. R. Meredith, for the plaintiff.

RE COPEMAN AND VILLAGE OF DUNDALK—DIVISIONAL COURT—MAY 17.

Municipal Corporations—Local Option By-law—Voting on—Oath — Majority — Third Reading — Scrutiny.]—An appeal by George Copeman from the order of FALCONBRIDGE, C.J.K.B., ante

624, dismissing a motion to quash a local option by-law, was dismissed by a Divisional Court (MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.). J. Haverson, K.C., for the appellant. W. E. Raney, K.C., for the village corporation.

DURYEA v. KAUFMAN—MASTER IN CHAMBERS—MAY 17.

Pleading — Statement of Claim—Amendment—Rule 300.]—After the order of the Master, ante 738, since affirmed on appeal, ante 773, and while the appeal was pending, the plaintiff on the 7th May assumed to amend the statement of claim under Con. Rule 300. The defendants moved to strike out the amendments or for a direction that the trial should proceed forthwith, on the ground that the amendments were embarrassing and made solely for delay. The Master was of opinion that the amendments were not objectionable, and that the plaintiff could not be put on any terms as to speeding the trial. Motion dismissed; costs in the cause. D. L. McCarthy, K.C., for the defendants. Casey Wood, for the plaintiff.

REX v. SAM LEE HING—MIDDLETON, J.—MAY 18.

Liquor License Act—Conviction—Keeping for Sale—Chinese Wines—Evidence.]—Motion to quash a magistrate's conviction for an offence against the Liquor License Act. Held, that there was ample evidence to justify the magistrate in finding, as he did, that the Chinese wine in question was a beverage, and when a large quantity was found in the possession of the accused, a merchant engaged in the sale of Chinese imports, it could not be said that the magistrate was wrong in his finding that it was "kept for sale;" far less could it be said that there was no evidence upon which he could convict. If the magistrate had believed the defence evidence, there was ample to justify an acquittal, but, unfortunately for the defendant, the magistrate did not accept his version of the case. This was not an appeal, and could not be so treated, and the conviction must stand if there was any evidence whatever. Motion dismissed. T. H. Crerar, for the defendant. J. R. Cartwright, K.C., for the Crown.

RE BEARD—MIDDLETON, J.—MAY 18.

Lunatic—Sale of Lands—Confirmation—9 Edw. VII. ch. 37, sec. 16(a).]—Motion by the committee to confirm a sale of the lunatic's lands. Held, that at the time the order was made for sale there was probably no power to direct a sale unless the provisions of the statute then in force were strictly complied with (see R. S. O. 1897 ch. 65, sec. 11); and this does not seem to have been brought to the attention of the Judge making the order. The Court has now much wider power; and an order may now be made under 9 Edw. VII. ch. 37, sec. 16 (a), authorising the sale of the lands in question and the signing by the committee of the necessary deed for the purpose of carrying out the contract already entered into. T. H. Bull, for the committee.

RE COOTS—MIDDLETON, J.—MAY 18.

Death—Presumption—Jurisdiction—Surrogate Court—Absentee—Money in Court—Payment out.]—Motion for an order declaring that the death of John Coots should be presumed. Held, that the Surrogate Court alone has jurisdiction to determine whether John Coots is dead, and whether he died intestate, and, if so, to appoint an administrator. The administrator must give security (unless a trust company is appointed), and must assume the responsibility of paying the money to those beneficially entitled. John Coots may have left creditors, and their rights cannot be ignored. There is no presumption that he died without issue, and the presumption of death only arises when the person has not been heard from under circumstances which indicate that his silence can only be explained on the assumption of death. In the case of a roving illiterate with no home-ties, the presumption will not easily arise. That, however, is a question for the Surrogate Court. Upon production of letters of administration, an order may issue for payment out of Court to the administrator. See In re Jackson, [1907] 2 Ch. 354. W. W. Vickers, for the applicants. F. W. Harcourt, K.C., for the absentee.

ONTARIO PIPE LINE CO. v. DOMINION POWER AND TRANSMISSION CO.—RIDDELL, J., IN CHAMBERS—MAY 18.

Discovery—Examination of Officer of Defendant Companies—Questions—Relevancy—Duty of Officer to Procure Information.]—The plaintiffs had gas pipes and mains and supplied natural

gas to their customers in the city of Hamilton. The defendants were three companies, also operating in Hamilton, and, the plaintiffs alleged, supplying or using electricity. The plaintiffs complained that the defendants, by allowing electricity to escape, had set up electrolytic action and damaged the plaintiffs' gas pipes, etc., and claimed damages and an injunction. The plaintiffs examined for discovery one Hawkins, as an officer of all three defendant companies, and upon the examination Hawkins refused to answer a number of questions, and the plaintiffs moved for an order compelling him to answer, or, in default, for the usual alternative. RIDDELL, J., held: (1) that Hawkins should disclose who his employees are and the terms of his employment; (2) that he should give information as to the kind, conductivity, etc., of the defendants' wires, the number of cars run, their average mileage, and generally all information that will enable an expert to compute or determine the amount, tension, etc., of the electrical current; (3) that he should disclose the means adopted to prevent the escape of the electricity; the plaintiffs are entitled to all the information the defendants have, and the officer examined must inform himself: Harris v. Toronto Electric Light Co., 18 P. R. 285; Clarkson v. Bank of Hamilton, 9 O. L. R. 317; and, if he does not know, he should say who does, that that person may be examined; (4) that he should tell what instructions he gave to his subordinates at the sub-station, and who those subordinates were; (5) that information should also be given as to whether a measurement had been made of the current, as to the sectional area and conductivity of the wires of the defendant street railway company, as to the tracks and bonding, &c.; (6) and that information should be given as to what are the necessary and proper precautions taken by the defendants to confine the electric current to their own wires and apparatus. Order accordingly, if an order is desired. Costs to the plaintiffs in any event. J. G. Gauld, K.C., and A. M. Stewart, for the plaintiffs. W. W. Osborne, for the defendants.

CORRECTION.

Page 752, ante, 10th line from top: for "D. O'Connor" read "D. O'Connell."