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DIVISIONAL COURT.

REX v. REEDY.

Police Magistrate — Jurisdiction — Appointment — Date of Commission—Date of Order in Council—Police Magistrate for Town—Municipal Council not Elected—Creation of Town by Proclamation—Offence Committed outside of Town—Appointment of Police Magistrate for Part of District where Offence Committed—Police Magistrates Act—Powers of Police Magistrate as ex Officio Justice of the Peace — Liquor License Act — Conviction for Keeping Liquor for Sale without License—Evidence Returned on Certiorari—No Evidence to Justify Conviction—Failure to Connect Evidence with Time and Place of Offence.

Motion to quash the conviction of the defendant made by one R. H. C. Brown, who described himself in the conviction as police magistrate for the town of Cobalt, of an offence against the provisions of the Liquor License Act.

J. B. Mackenzie for defendant.

J. R. Cartwright, K.C., for the informant and the magistrate.

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

MEREDITH, C.J.:—By the conviction returned it appears that the applicant was convicted before Mr. Brown, as police magistrate in and for the town of Cobalt, in the district of Nipissing, for having on 8th September, 1907, in the town-

ship of Carr, in the district of Nipissing, on his premises, unlawfully kept liquor for the purpose of sale, barter, and traffic therein, without the license therefor required.

By the conviction the magistrate imposed a penalty of $50 and a sum of $ .00, as it appears by the conviction—that may be a mistake—for costs, and adjudged that, upon failure of the payment of the fine and costs forthwith, the applicant should be imprisoned without hard labour in the common gaol at North Bay, and there be kept for 3 months unless the fine and costs were sooner paid.

Various objections have been made to the conviction, some of them based upon the absence of any jurisdiction in Mr. Brown to entertain the complaint or to make the conviction.

One of these objections is that Mr. Brown was not appointed police magistrate for the town of Cobalt until after the date of the proceedings which are in question. A copy of his commission was put in, which bears date 18th October, 1907, and, if that were the governing date, it is a date subsequent to the adjudication, but the order in council appointing him was put in, and that bears date 11h January, 1907, so that, if the order in council is, as we think it is, the effective act by which the appointment was made, the power being conferred under the Act upon the Lieutenant-Governor in council to appoint a police magistrate, the objection fails.

Then it is said that Cobalt was not at that time a town. Cobalt had been by proclamation erected into a town prior to the date of the proceedings, but it is argued that, because there was no council at that time, it was not a town within the meaning of the Act.

I fail to follow or appreciate the argument of Mr. Mackenzie upon that point. The Act is perfectly clear, I think, and the meaning to be given to the words of the section, I think, is plain, and admits of no question.

Section 6 of the Police Magistrates Act, R. S. O. 1897 ch. 87, provides that the "Lieutenant-Governor in council may at all times, notwithstanding anything in this Act contained, appoint a police magistrate without salary for any town."

Cobalt was erected into a town by proclamation, and I think it is not necessary to follow the argument that because there is in this Act a provision that the council of a town with a population of less than 5,000 may ask for the

appointment of a police magistrate and fix the salary to be paid—it follows that the provisions of the Act cannot be applied until a council has been elected. It seems plain that where is an existing town, the powers conferred upon the Lieutenant-Governor by sec. 6 may be exercised.

The next objection to the jurisdiction of the magistrate was that there was a police magistrate appointed for the part of the district of Nipissing where the offence was committed—Macdougall's Chute, in the township of Carr—and, that being so, it was argued that Mr. Brown had no jurisdiction over the offence or to try the offence within the territorial jurisdiction of the magistrate appointed for that part of the district.

We think there is nothing in that objection. The provisions of the Act are clear, subject to what I shall say as to the powers conferred by sec. 30.

By sec. 30, a police magistrate, sitting as such, has "power to do alone whatever is authorised, by any statute in force in this province, relating to matters within the legislative authority of the legislature of the province, to be done by two or more justices of the peace; and every police magistrate shall have such power"—i.e., the power to do alone whatever is authorised by any statute in force in this province relating to matters within the legislative power of the province, to be done by two or more justices of the peace—"while acting anywhere within the county for which he is ex officio a justice of the peace."

There is nothing in the Act to exclude the jurisdiction of the magistrate in the territory for which the police magistrate for the part of the district of Nipissing in which Macdougall's Chute was situate, was appointed.

The provisions of sec. 7 which deal with the case of a city or town are that "no justice of the peace shall admit to bail, or discharge a prisoner, or adjudicate upon or otherwise act in any case for a town or city where there is a police magistrate, except at the Court of General Sessions of the Peace, or in the case of the illness, absence, or at the request of the police magistrate;" so that the jurisdiction of the justice is excluded in those cases.

Then by sec. 15: "(1) Where the county council of a county passes a resolution affirming the expediency of the appointment of salaried police magistrates, or a salaried police magistrate, for the county or part of the county,

the Lieutenant-Governor may from time to time make such an appointment, the salary to be paid by the county."

Then by sec. 17, "In a county in which there is a police magistrate appointed under sec. 15, no justice of the peace shall admit to bail or discharge a prisoner," etc., following the language of sec. 7.

But, when the case with which we have to deal is dealt with, the provision is entirely different. Section 19 is the section, and it is: "The Lieutenant-Governor may appoint more police magistrates than one for any county or union of counties or district or part of a district," &c. Then the provision, analogous to secs. 7 and 17, is that in sec. 22: "No justice of the peace shall admit to bail or discharge a prisoner or adjudicate upon or otherwise act until after judgment in any case prosecuted under the authority of any statute of Ontario where the initiatory proceedings were taken by or before a police magistrate;" so that in the case of the police magistrate as appointed by the Lieutenant-Governor for part of the district of Nipissing, the jurisdiction of a justice of the peace for the district is excluded only if the initiatory proceedings had been taken by the police magistrate for the district or part of the district, which was not the case in regard to the prosecution in this case.

The only question remaining upon this branch is as to whether Mr. Brown, under the provisions of sec. 30, had authority to make the conviction, and whether he properly describes himself in making it as police magistrate for the town of Cobalt.

It is quite clear that under the provisions of sec. 30 he had all the powers conferred by sec. 30, while acting anywhere within the district for which he is ex officio a justice of the peace, and he is ex officio a justice of the peace for the district of Nipissing,

According to the decision of the Court of Appeal in Hunt v. Shaver, 22 A. R. 202, he was acting, while exercising this jurisdiction, as police magistrate for the town of Cobalt, and so properly described himself.

In Hunt v. Shaver the question was as to whether a police magistrate for a village, who was ex officio a justice of the peace for the county in which the village was situate, was exempt from making the return of convictions which is required to be made by justices of the peace; and it was held that he was not. The judgments are short, and I may

therefore read what was said. The Chief Justice of Ontario said, p. 204: "I have no doubt as to the correctness of the judgment appealed from, and the appeal must therefore be dismissed. A police magistrate, it is true, may ex officio act as a justice of the peace, but when he acts he acts not strictly as a justice of the peace, but as a police magistrate, and convictions made by him are made by him in that capacity, so that no return of the conviction to the clerk of the peace is necessary." Mr. Justice Osler said, p. 204: "I am of the same opinion. Section 6 of R. S. O. ch. 77 gives individual exemption. The police magistrate has the powers of a justice of the peace, but when he acts he acts as a police magistrate." Mr. Justice Maclennan concurred in the judgment.

All these objections, therefore, fail; but other objections remain to be considered: (1) whether upon the papers returned there was any evidence which warranted a conviction for the offence of which the applicant was convicted; and (2) whether, assuming that there was that evidence, the Criminal Code applies so as to enable the Court to amend the conviction with regard to the punishment imposed, which, it is admitted by Mr. Cartwright, was in excess of the authority of the police magistrate.

We think it is unnecessary to express any opinion upon the second question, because we are of opinion that the first objection argued by Mr. Mackenzie—that no offence was disclosed upon the evidence—is entitled to prevail. All that is returned by the magistrate as the evidence before him is a document headed "Copy of evidence, Rex v. Reedy," and reading: "J. J. Reedy charged with unlawfully keeping liquor for the purpose of sale, barter, and traffic therein without the license therefor by law required. Pleads not guilty. G. E. Morrison, sworn: visited Reedy's pool room and saw bar, glasses, &c. Had all kinds of soft drinks. Produced invoice from wine company. Got a barrel of cider containing a good part of alcohol. J. J. Reedy, sworn: admitted having the goods as represented by Mr. Morrison, but said, 'I did not buy it for alcohol.'"

There is nothing in all this to shew that the evidence was directed to the act of the applicant upon which the charge was based. For all that appears, what was deposed to by Morrison, and what is admitted by Reedy, may have had application to a different time and a different place.

Mr. Cartwright reliee upon Regina v. McGregor, 26 O. R. 115, for the Court reading the evidence in connection with the information and as referring to the time and place mentioned in it. But the case does not support that contention. The question in Regina v. McGregor was as to the jurisdiction of the magistrate. It was contended that there was nothing upon the face of the proceedings to shew that the offence of which the defendant was convicted was committed within the district of Nipissing. It appeared by the papers returned that this minute preceded the depositions returned: "Sep. 6. Magistrate's Court at North Bay, 3 this p. m. Mrs. McGregor appeared charged with unlawfully selling liquor at her house in the township of Dunnett on the 10th August, 1894. The charge having been read over to her, she pleaded not guilty." The Court in delivering judgment said: "It may well be that the charge read over to the defendant was the charge as stated in the warrant under which she had been apprehended and, if that be so, it was to that charge that the evidence was directed, and the description of the place where the offence was committed is shewn to be in the township of Dunnett, which we know judicially to be within the district of Nipissing; and sufficient, therefore, appears to enable us to say that, upon a perusal of the depositions, we are satisfied that an offence of the nature described in the conviction was committed over which the justice had jurisdiction, and that without in any way questioning the correctness of the decision in Regina v. Young, already referred to."

The case does not disclose what the evidence was or what the depositions returned shewed; but I apprehend that, upon looking at the papers, it will be found that they were not as bald as the depositions here, and that the only vice, if vice there was in them, was that the evidence did not in terms point to the place where the act charged was done as being in the township of Dunnett, and therefore within the jurisdiction of the magistrate.

We do not think that this case applies, and, while it is very probable that in this case everybody understood what the evidence was directed to, and that the objection is most technical in its character, in the sense that it is a means of escaping from the penalty for an offence which was actually committed, and but for the carelessness of the magistrate the conviction would probably have been sufficient to en-

force the provisions of the law, we think we must give effect to the objection.

The conviction will, therefore, be quashed, but it will be quashed without costs, and with the usual order for the protection of the magistrate.

CARTWRIGHT, MASTER. JANUARY 13TH, 1909.

CHAMBERS.

HAZELTINE v. CONSOLIDATED MINES LIMITED.

Mortgage—Action for Foreclosure or Sale—Application by Owners of Equity of Redemption for Stay of Action upon Payment of Interest and Costs—Rule 389—R. S. O. 1897 ch. 126, schedule, cl. 14 — Practice — Judgment — Final Order of Foreclosure—"Defendant."

Motion by the present owners of the equity of redemption, who became so after judgment, in an action for foreclosure or sale, for a stay of proceedings or other relief under Rule 389. The applicants had been served with an order appointing a new day for foreclosure in default of payment.

J. F. Hollis, for the applicants.

W. R. Wadsworth, for plaintiff.

THE MASTER:—The usual practice has been to accept payment of interest and costs without any motion. Here, however, through some mistake, the money for interest and costs was not paid into the proper account, and plaintiff thereupon moved for a final order of foreclsure, as he was entitled to do.

The scope of R. S. O. 1897 ch. 126 seems wide enough to cover this case. Clause 14 (on p. 1188) in its extended form in column 2 clearly covers it. The only decision that looks at all the other way is Wilson v. Campbell, 15 P. R. 254. There the Chancellor's decision seems to have gone on the ground that the action was on the covenant, under which judgment had been recovered and execution issued. It was analogous to the decision in Scottish American Co. v. Brewer, 2 O. L. R. 369. Just as here, if the final order of foreclosure had issued, the right to redeem would only be granted on payment in full. As it is, Rule 389 seems exactly to meet the present case.

As there was a mistake on the part of the applicants, they should pay to the plaintiff the costs of this motion and of the abortive proceedings to obtain the final order of foreclosure, within 10 days.

I note that the applicants are clearly within the term "defendant," as defined by O. J. A., sec. 2, sub-sec. 7, being "entitled to attend any proceeding," and having been served with order to pay or be foreclosed.

BRITTON, J. JANUARY 14TH, 1909.

WEEKLY COURT.

McDONALD v. CURRAN.

Injunction—Sale of Land—Promissory Notes Given for Purchase Money—Claim by Plaintiff—Injunction to Restrain Defendants from Dealing with Notes or Proceeds of Sale of Notes—Payment into Court—Rule 1096—Scope of.

Motion by plaintiff to continue until the trial two interim injunctions granted on the ex parte application of the plaintiff. One of the injunctions restrained the defendants Elizabeth Curran and John Curran from negotiating or dealing with certain promissory notes given by the defendant Eugene Horan to the defendant Elizabeth Curran in part payment of the purchase money of a farm bought by Horan. The second injunction was obtained because it appeared that the defendants Elizabeth and John Curran had sold the notes and obtained the money therefor before being served with the first injunction, and restrained those defendants from parting with or disposing of or in any way dealing with the money said to have been received by them for the notes. On the return of the motion to continue the injunctions, the plaintiff asked that the defendant Elizabeth Curran be ordered to pay $600 into Court to abide the result of the trial of the action.

G. C. Campbell, for plaintiff.

L. V. McBrady, K.C., for defendants.

BRITTON, J.:—The injunctions against the Currans will be continued until the trial.

There is no reason for continuance against Horan. The matter of the purchase by Horan has been decided, and there is no reason to suppose that he has anything to do with or control over the promissory notes in question, or the money that has been received for them, if they were sold. He is liable to pay his notes to the lawful holder.

The plaintiff applied under Rule 1096 for an order for payment into Court by the defendant Elizabeth Curran of the money in her hands or of some substantial part of it. This Rule, in my opinion, was not intended to apply to such a case as this. This is not a case where property is to be inspected or may go to waste or spoil or be stolen or changed in its condition, or be lost, by neglect or otherwise.

This is more like the case of an action for a debt where the debt is disputed. The principle to be adopted in applying Rule 1096, as laid down in Wanklyn v. Wilson, 35 Ch. D. 185, is that, in the fair exercise of its judicial discretion, the Court may order a sum of money to be paid into Court, when it has been sufficiently ascertained that such a sum will in the end be surely payable to the party claiming it. Can I, without trying the case, at least in part, say that any sum will assuredly become payable to the plaintiff, or is there here a sufficient probability that the case will result in plaintiff's favour so as to warrant the transfer of the custody of money from the defendant to the Court?

In my opinion, this is not a case for the application of Rule 1096.

Costs may be in the cause to be disposed of by the trial Judge.

CARTWRIGHT, MASTER. JANUARY 18TH, 1909.

CHAMBERS.

RE SOLICITORS.

Solicitor—Bills of Costs—Taxation—Delivery of New Bills—Action—Election—Costs.

Motion by one Dunbar for an order for taxation of bills of costs rendered by the solicitors.

N. F. Davidson, K.C., for the applicant.

J. W. Payne, for the solicitors.

THE MASTER:—The affidavit filed in answer to the motion states as follows: The solicitors first acted for the committee of creditors of one Setros, and so acted from 11th June to 12th October, when Setros made an assignment to Dunbar. Thereafter the solicitors acted for Dunbar as such assignee. On 16th October an agreement was arrived at whereby the assets were sold, and the purchaser was to pay a sum equal to 50 per cent. of all creditors' claims accrued prior to 11th June, 1908—the rest to be paid in full, "together with the assignee's costs and charges, as well as his solicitor's costs, but the aggregate of said sums was not to exceed $15,000."

In order to adjust the sale, Dunbar requested a statement of the amount of the costs, which the solicitors put at $400, but Dunbar, for greater certainty, put them at $450. The sale was accordingly carried out for $15,000, after the items of the estimated liabilities, including this $450, had been gone over and agreed to.

Afterwards the solicitors were requested by the chairman of the inspectors to put in a bill, so that it might appear among the records, but not to go into too great detail—to summarise as much as possible. The bills in question were thereupon forwarded, but only on that understanding.

The contention of the solicitors is, that they are entitled to the $400 as money paid for their use to the assignee by the purchaser. Whether they can, under the authorities, maintain that position, is not for me to say. But it is clear that, if there is to be a taxation, they should be allowed to deliver new bills for that purpose—undertaking not to ask for more than $440 in any event.

They must either do this or else bring action for what they think they are entitled to, within a week, in which case the defendant will have in effect a security for costs. If they elect to take action, the costs of this motion will abide the result. If they submit to taxation, the costs will be in the discretion of the taxing officer, who will, no doubt, consider whether or not any such substantial gain accrues thereby to the client as to justify that proceeding and this motion, on which it is founded.

MULOCK, C.J. JANUARY 18TH, 1909.

TRIAL.

NORTH AMERICAN TELEGRAPH CO. v. BAY OF QUINTE R. W. CO.

Contract — Construction — Telegraph Company — Railway Company—Free Carriage of Servants, Tools, and Stores of Telegraph Company—Limitation to Purposes of Construction and Maintenance along Railway Line—Recovery of Moneys Paid for Fares—Voluntary Payments—Mistake of Law—Counterclaim—Damages—Failure to Maintain Telegraph Line in Working Order—Breach of Covenant—Telegraph Service—Maintenance and Repair of Poles—Property in Poles—Declaration—Costs.

In this action the plaintiffs claimed, under the terms of two certain agreements, referred to in the judgment, the right to free transportation by all the ordinary passenger trains running over the defendants' railway, for their inspectors, linesmen, and repairers, when travelling for any purposes whatsoever, and they alleged that such transportation was refused them, whereby they were obliged to pay a large sum of money for railway fares for these employees, and this action was brought for its recovery.

The defendants denied the plaintiffs' right to such unlimited transportation; admitted a limited right which they said they were at all times ready and willing to grant; and counterclaimed for certain relief.

A. B. Cunningham, Kingston, for plaintiffs.

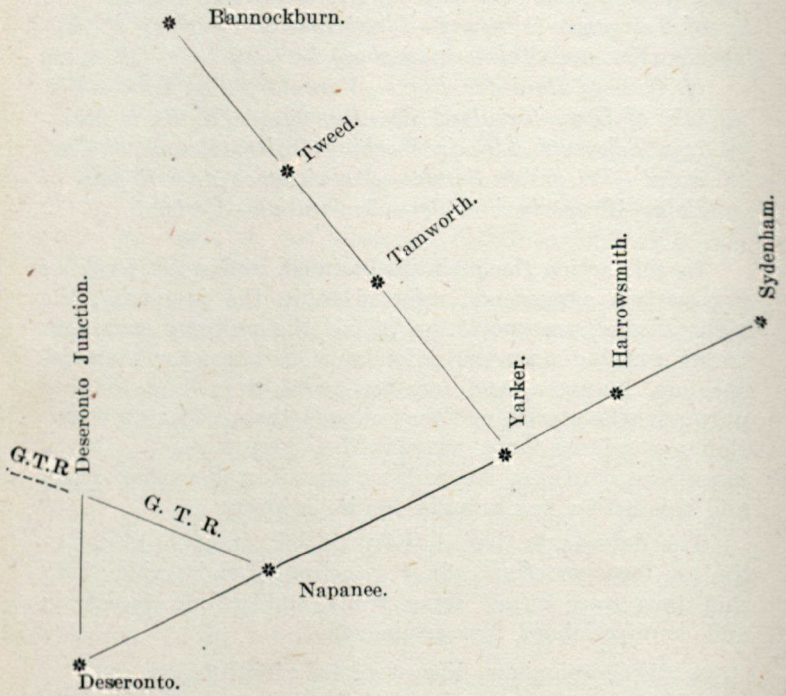
G. F. Shepley, K.C., and C. A. Masten, K.C., for defendants.

MULOCK, C.J.:—Dealing first with plaintiffs' claim, its determination depends upon the effect to be given to the terms of these agreements, each dated 11th June, 1888, and made, one between the plaintiffs and the Bay of Quinte Railway and Navigation Company, and the other between the plaintiffs and the Napanee, Tamworth, and Quebec Railway Company.

It was admitted at the trial that, by reason of certain legislation, the defendants were liable for all the obligations

of the Bay of Quinte Railway and Navigation Company and the Napanee, Tamworth, and Quebec Railway Company, under said agreements, and also were entitled to all benefits accruing to the respective railway companies, and therefore, the agreements may be construed as if made in the first instance between the parties to this action.

The following is a copy of exhibit No. 2, shewing the defendants' railway system:—



When these agreements were entered into, the defendants' railway system, then in actual operation, consisted of a section of railway between Napanee and Yarker; another section between Yarker and Tamworth; and a third between Deseronto and Deseronto Junction, connecting with the Grand Trunk Railway. At this time the defendants also owned certain telegraph pole lines, one running along their right of way from Deseronto to Deseronto Junction; another along a right of way owned by them lying alongside of the Grand Trunk Railway's right of way, and extending from Deseronto Junction to Napanee; and a third run-

ning along their right of way from Napanee to Tamworth via Yarker.

Subsequently the defendants constructed extensions of their railway between Yarker and Sydenham, between Tweed and Tamworth, and between Tweed and Bannockburn, and between Napanee and Deseronto. The latter extension was built in 1903, when the defendants ceased to operate their line of railway between Deseronto and Deseronto Junction, removing part of the material which had entered into its construction, and practically abandoning this section of railway.

The extension of the railway from Tweed to Bannockburn, above referred to, was built in the year 1903, but the plaintiffs did not construct a telegraph line directly between these points, but, instead, built, for commercial purposes, in order to serve the general public, a line which took a circuitous route, and, this not meeting the requirements of the company, the latter, in consequence, built a direct telegraph line of their own between the two points in question, in the year 1906, at a cost of $4,509.24.

Subsequent to these agreements, the plaintiffs, at intervals, built a telegraph line upon the defendants' right of way between Deseronto and Sydenham, and between Yarker and Tweed, and also certain branch lines therefrom, running off the defendants' lands, over which the defendants enjoyed no rights under the agreements. The plaintiffs' telegraph system in all embraces about 2,000 miles of pole line, 56 miles thereof only being along the defendant company's right of way, the remainder extending throughout the country, for the purposes of the plaintiffs' business with the general public. These agreements each contain a clause in the following words: "The railway company to pass free the inspectors, linesmen, and repairers of the telegraph company, and their tools and stores for construction and maintenance of said lines and any extensions thereof."

Prior to the year 1904 annual railway passes for the pliantiffs' inspectors, linesmen, and repairers, were issued, good for all the defendant company's passenger trains, but for the years 1904, 1905, and 1906 passes were issued good only on trains Nos. 1 and 6, between Deseronto and Napanee, not good north of Tweed, and part of the plaintiffs' claim is for railway fares paid during these years for transportation of their inspectors, linesmen, and repairers, by other than trains Nos. 1 and 6. For the year 1907 no

passes were issued, and part of the plaintiffs' claim is for railway fares paid for their inspectors, linesmen, and repairers during that year.

After the pass system had been in force for some years, a dispute arose between the parties as to the extent of the right of the plaintiffs to free transportation, they contending that they were entitled thereto by all regular passenger trains, and for all purposes whatsoever in respect of their named employees, whilst the defendants contended that the right was limited to transportation for the purposes of construction and maintenance of the plaintiffs' line and extensions thereof, along the defendants' line of railway, and to this latter extent the defendants were always ready and willing to grant such free transportation.

The plaintiffs, however, refused to accept any limited transportation, paid the railway fares of their men when travelling on the defendants' railway, and brought this action to recover the amount so paid.

One question then to be here determined is the meaning of the clause above quoted. The original agreements containing the clause were not filed, and a copy only of the agreement with the Bay of Quinte Railway Company appears amongst the exhibits.

It was at the trial admitted that the two agreements, mutatis mutandis, were identical in language, but plaintiffs' counsel, in his written argument put in, states that in one of the agreements, though not in the other, a comma appears after the words "telegraph company." The presence or absence of such comma in no way affects the meaning of the clause. In my opinion, the words "construction and maintenance" qualify the words, "inspectors, linesmen, and repairers," and also the words, "their tools and stores."

It may further be observed that if such is not the legal interpretation of the clause, then it would provide two different kinds of free transportation, namely, unlimited transportation for the men and limited transportation for the tools and stores. It does not, I think, admit of such interpretation. The only object of such free transportation is clearly stated, namely, "construction and maintenance," &c. The named employees, it may be assumed, would require tools and stores in connection with the work of construction and maintenance. These tools and stores, for such purposes only, were entitled to be passed free, and also the

men who were to use them in connection with the work of construction and maintenance.

For these reasons, I think the defendants were not bound to furnish unlimited passes, as demanded by the plaintiffs, but only such free transportation as was reasonably necessary in connection with the plaintiffs' work of construction and maintenance. This the defendants expressed themselves to the plaintiffs as at all times willing to furnish, and they did in fact from time to time furnish free transportation. There is no evidence to shew that the fares paid and here sued for were for trips in respect of which the plaintiffs are entitled to free carriage of their employees. For this reason alone the action must fail. But, even if this were shewn, are there any circumstances in this case which would entitle the plaintiffs to succeed in an action for money had and received, which is, in substance, the nature of this action?

The principle upon which relief is granted in an action for money had and received is that the circumstances are such as make it inequitable to permit the defendant to retain the fund, and therefore entitle the Court to declare the defendant a trustee thereof for the plaintiff. Here there is an entire absence of any question of trust affecting the money in question, nor did any fiduciary relationship exist between the parties. They were dealing with each other at arm's length with respect to a dispute as to their legal rights growing out of an ordinary business contract. The plaintiffs demanded more than their rights; the defendants were willing to grant them their rights. This the plaintiffs refused to accept, and voluntarily made the payments now sought to be recovered. The payments were made with full knowledge of all the facts, and not under any mistake of fact but of law. The moneys thus came honestly to the hands of the defendants, and became their property absolutely, and cannot now be regarded as a fund held in trust for the plaintiffs.

As stated by Mellish, L.J., in Rodgers v. Ingham, 3 Ch. D. 357: "There is no doubt as to the rule of law that money paid with a full knowledge of all the facts, although it may be under a mistake of law of both parties, cannot be recovered back . . . Nothing, in my opinion, would be more mischievous than for us to say that money paid, for instance, under a mercantile contract, according to the construction which the parties themselves put upon that contract, might, years afterwards, be recovered, because perhaps some court

of justice, upon a similar contract, gave to it a different construction from that which the parties had put on it."

For these reasons, I am of the opinion that the plaintiffs are not entitled to recover the moneys in question, and that their action fails.

As to the counterclaim, the defendants claim: (a) damages because of the plaintiffs' failure to maintain their telegraph line in working order; (b) damages for breach of covenant to construct and maintain a wire and instrument worked by sound for the use of the defendants, between Tweed and Bannockburn; (c) a declaration that the plaintiffs are bound to maintain the poles that were erected on the defendants' right of way at the date of the agreement; (d) a declaration that poles erected by the plaintiffs on the defendants' right of way in excess of those mentioned in the agreements are the property of the defendants, subject to the plaintiffs' right to string wires thereon.

As to item (a) of the counterclaim, namely, damages because of failure on the part of the plaintiffs to keep their telegraph lines in working order, the evidence shews that for about 3 years, namely, from 1903 to 1906, the telegraph lines were allowed to fall into disrepair, thereby occasioning inconvenience and expense to the defendants in operating their lines. The defective condition of the telegraph lines delayed the movements of trains and caused a greater consumption of coal and also loss in wages. Mr. Rathbun admitted that it was difficult to estimate the damages thus occasioned to the defendants, but swore that the actual loss in money would be from $300 to $500 a year. I award the defendants $900 damages for this item of their counterclaim.

As to item (b), namely, damages because of the plaintiffs not erecting and maintaining a telegraph line between the stations Tweed and Bannockburn: by the agreement the railway company granted to the telegraph company the right forever "to erect their lines of poles along the right of way of said company for the carrying of telegraph, telephone, or other wires, on the right of way of the said railway company (including the right of running all or any of the said wires into all the stations and offices of said railway company and also including the goodwill and assistance of the agents and officials of the railway company) and all its extensions and branches built or to be built and all other railway lines leased or which hereafter may be leased by the

railway company and over which this right can be legally exercised, provided always that in erecting such poles or any of them the said telegraph company shall not do or cause any damage or injury to the track or roadbed of the railway company," and then, after providing for payment by the telegraph company of the cost of certain wires, arms, and insulators, the agreement proceeds as follows:—

"In consideration of the premises, the telegraph company also agrees to furnish a wire and instrument worked by sound for the use of the railway company at each railway station free of charge, and to keep the same in repair, and the said wire and instruments may be used by the telegraph company for commercial business, but railway business is to have the preference over this wire.

"The trackmen of the railway company are to make all usual and ordinary repairs necessary to keep the telegrph lines in working order until the telegraph company's repairer can reach the place where damage has occurred, the telegraph company furnishing tools for this work."

Interpreting the plaintiffs' obligation under this covenant in the light of the surrounding circumstances and by a reference to the whole agreement, it seems to me that its fair meaning is that pari passu with the extensions of the railway the telegraph lines were to be extended along the railway right of way and in position to furnish the railway company with telegraph service, which, according to common knowledge, is absolutely necessary for the safe and efficient operation of train service. By the agreement the railway company granted to the telegraph company the right to erect and maintain pole lines along the railway's right of way, and the railway company covenanted that their trackmen would make all usual and ordinary repairs necessary to keep the telegraph lines in working order until the telegraph company's repairers could reach the place where the damage had occurred. The telegraph line which the plaintiffs contend meets their obligation as regard telegraph service between Tweed and Bannockburn, does not proceed along the defendants' right of way, but, in order to serve the general public, takes a long and circuitous route, a considerable distance from the line of railway between Tweed and Bannockburn. How could the defendants' trackmen, who, I assume, are men daily and hourly required to proceed along the railway track in order to examine its condition and to make needed repairs thereto, how could they make

the emergency repairs to the plaintiffs' telegraph line between Tweed and Bannockburn? To do so would, doubtless, seriously interfere with their duties as trackmen. The telegraph lines which these trackmen are required to repair by this agreement are clearly telegraph lines along the railway company's right of way, which is being traversed by the trackmen. Breaks in telegraph lines used for the operation of railway trains, require repair at the earliest possible moment. If a telegraph line is so remote from the railway track that a break in it cannot be promptly repaired temporarily by the railway trackmen, it must fail to furnish reasonable telegraph service to the railway. The telegraph service contemplated by the parties to be furnished under the terms of said agreements, was a service reasonably necessary for the proper working of the railway, namely, a service along the railway's right of way. The plaintiffs' line between Tweed and Bannockburn does not, I think, meet their contractual obligation, and because of such default on the part of the plaintiffs, the defendants have been obliged to build and maintain a telegraph line along their right of way between those two points. The cost of this line was $4,509.24, and the defendants claim that sum by way of damages, and also the sum of $1,127, being interest thereon, and $1,100 costs of maintenance for the 5 years since their erection of the line, making in all $7,736.24. The plaintiffs at the trial did not challenge the correctness of these figures. I therefore find that the defendants are entitled to damages to the amount of $7,736.24 in respect of plaintiffs' failure to build and maintain a telegraph line between Tweed and Bannockburn. On payment of this amount the line will become the property of the plaintiffs, subject to the rights of the defendants under the agreements; until payment of this sum the plaintiffs to continue liable to pay to the defendants the cost of maintenance of the line and interest on the sum of $4,509.24.

As to item (c), that the plaintiffs are bound to maintain the poles that were erected on the defendants' right of way at the date of the agreements, I fail to find in these agreements any obligation on the part of the plaintiffs to keep the poles in repair. As to the pole line between Deseronto and Deseronto Junction, the defendants sold to the plaintiffs the wires, insulators, and arms then erected, but retained the property in these poles. The plaintiffs were not bound by the agreement to maintain those wires on these poles, and could have placed them on other poles not the property of

the defendants. As to the other lines of poles owned by the defendants at the time of the agreements, namely, the line from Deseronto Junction to Napanee, and the line from Napanee via Yarker to Tamworth, the plaintiffs are by the agreements given the right to string wires along these poles, but they are not bound to do so, nor are they bound to keep the wires strung along these poles in repair, it being competent for them to erect pole lines of their own on the defendants' right of way under the terms of the agreements. There being then in the agreement no obligation on the part of the plaintiffs to keep the defendants' poles in repair, item (c) of the counterclaim fails.

As to item (d) of the counterclaim, which asks for a declaration that poles erected by the plaintiffs on the railway right of way in excess of those mentioned in the agreements are the property of the defendants, subject to the plaitiffs' right to string wires thereon, there was no evidence shewing the erection by the plaintiffs of such poles. The agreement gives the plaintiffs the right to erect lines of poles along the right of way of the railway company for telegraph and telephone purposes. The number of lines which for such purposes they may so erect is not limited, and therefore whatever lines for such purposes they erect remain their property, subject to the defendants' rights under the agreements.

The plaintiffs' claim is dismissed with costs, and items (a) and (b) of the counterclaim are allowed, and items (c) and (d) of the counterclaim are disallowed. Owing to the divided success of the parties in respect of the counterclaim, no costs of the counterclaim are awarded to either party.

CARTWRIGHT, MASTER. JANUARY 19TH, 1909.

CHAMBERS.

ONTARIO ASPHALT CO. v. COOK.

Pleading—Statement of Defence—Motion to Strike out—Action by Judgment Creditors to Set aside Conveyances of Land—Defence that Judgment Satisfied—Qui tam Action—Amendment.

Motion by plaintiffs to strike out all of the statement of defence of defendant B. A. Cook, except the first two paragraphs.

A. G. Ross, for plaintiffs.

J. M. Ferguson, for defendant.

THE MASTER:—According to the style of cause, the plaintiffs sue on behalf of themselves and all creditors of defendant B. A. Cook.

The statement of claim alleges that the plaintiffs recovered judgment on 17th October, 1907, against B. A. Cook for over $4,000; that executions were issued on such judgment, which were returned nulla bona, and are still unsatisfied; that on 25th January, 1907, B. A. Cook mortgaged his real estate to one co-defendant—his uncle—and on 1st October, in the same year, conveyed his equity of redemption therein to his wife, the other co-defendant; that these two conveyances were fraudulent, void, and made to defeat and hinder the plaintiffs and all other creditors of said B. A. Cook; and the relief asked for is: (1) and (2) to have these conveyances declared void as against the plaintiffs and the other creditors of B. A. Cook; (3) "to have the said lands sold and the proceeds applied in satisfaction of the plaintiffs' claim;" (4) further relief; and (5) costs.

Defendant B. A. Cook (1) pleads that he owed one co-defendant $3,600, and executed the mortgage to him in consideration of such indebtedness; (2) denies all allegations of fraud and conspiracy. He then sets up that plaintiffs' judgment has been more than satisfied by the proceeds of certain claims due to defendant and by him assigned to plaintiffs as security for the defendant's indebtedness to them, and that in this case there is a balance due to plaintiffs by defendant. And he asks: (1) a declaration that the plaintiffs' judgment has been satisfied; (2) an account of the dealings of the plaintiffs with the securities assigned to them.

In the way in which the action is framed, the motion must be dismissed. Although styled in a class action, yet no relief of that character is asked. The plaintiffs only ask to have the mortgage declared void as against themselves and the other creditors of B. A. Cook, to have the conveyance of the equity of redemption set aside, and then to have their own judgment satisfied by a sale. Nothing is asked such as is proper in a class action, nor is there any allegation that the defendant B. A. Cook is indebted to the plaintiffs beyond the judgment, though indebtedness to other persons is alleged.

An affidavit of plaintiffs' manager is filed on this motion, which says that there is due to them a sum of several thousand dollars over and above their judgment. But this would

be more useful on a motion to amend the statement of claim than for the present purpose.

At present the action is based on the judgment. No defence surely can be more appropriate than that set up. If it can be proved, it will ensure a dismissal with costs, even if it does not result in a judgment for the defendant B. A. Cook as the result of the account which he asks for.

If the plaintiffs really wish to have the impeached conveyances set aside as preferential as to the mortgage and void as to the equity of redemption, and to ask for the usual reference for enabling all the creditors of B. A. Cook to come in and share equally, they may do so. In that case the order will dismiss the motion, with liberty to plaintiffs to amend as they may be advised—all costs lost or occasioned thereby, together with the costs of this motion, to be to the defendants in any event. If, however, the plaintiffs only desire to realize on their own judgment, there will be a simple dismissal of the motion, with the same disposition of the costs. The plaintiffs should make their election in a week. If they intend to rely on their judgment, it is unnecessary to allege other indebtedness to themselves or to others. If they really wish to make further claims and in respect to both to share with other creditors pari passu, then the appropriate relief, and that only, should be asked.

JANUARY 19TH, 1909.

DIVISIONAL COURT.

USSHER v. SIMPSON.

Broker—Purchase of Shares for Customer—Contract—Repudiation—Tender—Evidence—Letter Written "without Prejudice"—Delivery of Shares—Sufficient Number Kept on Hand—Principal and Agent—Damages—Indemnity.

Appeal by defendant from judgment of MACMAHON, J., 12 O. W. R. 396.

G. H. Watson, K.C., and Grayson Smith, for defendant.

E. F. B. Johnston, K.C., and A. C. McMaster, for plaintiffs.

The judgment of the Court (BOYD, C., MAGEE, J., LATCHFORD, J.), was delivered by

MAGEE, J.:—The plaintiffs, a firm of brokers in Toronto, allege that they purchased, on 30th November, 1907, for the defendant and by his order, 1,000 shares of Green-Meehan mining stock at $1.76 per share, and paid therefor $1,760 on 8th December, 1907, which they here ask to be reimbursed with interest. The defendant disputed the order and repudiated the transaction. Judgment was given against him after the trial, and from that judgment he now appeals.

So far as direct testimony is concerned, the question whether the order was given lies between the defendant and Mr. Scott, of the plaintiffs' firm. Scott affirms that on Wednesday 28th November, in a conversation over the long distance telephone, the defendant inquired as to the price of Green-Meehan stock, and expressed a desire to buy 1,000 shares at $1.76, and, on being told that they were then at a higher figure, gave him (Scott) an order to purchase that number at that price, and that the order was expressly stated to be an "open order," that is, not limited to the day on which it was given, but continuing operative till fulfilled or cancelled. He also says that on the following morning (Thursday), on being informed over the telephone by him (Scott) that they had not been able to get the stock at the price, but were doing their best to get it for him, the defendant again said he would take it at $1.76.

The defendant does not confine himself to a denial that he gave an open order, but asserts that he gave no order whatever at any price, and did not, on either day, mention the price of $1.76, but only spoke of $1.75 as that at which he would like to get 1,000 shares.

Had the contradiction between the two been less wide, the trial Judge might possibly have found more difficulty in deciding.

Mr. Scott, in speaking of the Wednesday, says: "He told me he would not pay over $1.76. I told him it would be impossible to do that at the moment, but, if he would leave an order with us, we would do our best to fill it. He said, 'All right, if you can get 1,000 at $1.76, I will take it.'" The witness does not here speak of "open order," but, on being asked by plaintiffs' counsel, "then how long was that order for?" replies, "That was an open order," and adds, "As I explained to Mr. Simpson at the time, it was $1.76,

but it would be very doubtful if we could get it that day, but, if he would leave an open order with us, then we could endeavour to get it to-morrow." And he goes on, "He said, 'All right,' or something to that effect, confirming the order." Later on he says, "I gave him a fresh quotation, and he told me—I don't know that he said it in those exact words—that he would take 1,000 at $1.76, if he could get it . . . or he might not have said 'if you can get it.' He said, 'I would like to get' or 'I will take it.'" Elsewhere the witness says positively that he used the words "open order," and for greater care repeated it over the telephone. The defendant admits that, though he had not heard the expression "open order" then or before, his common sense would tell him what it meant.

As the communication was only over the telephone, misunderstandings might more readily occur. It behooved the plaintiffs to establish clearly the instructions given to them, when seeking to impose such a liability. Had the defendant's contention been merely that the order was not an open order, or that it was confined to the Wednesday and Thursday, or that he had only expressed a desire to get the shares at $1.76, this evidence of Mr. Scott might not have been convincing against clear evidence to the contrary.

It appears, however, that the plaintiffs had manifestly acted in good faith on Mr. Scott's understanding of the communication, and, although they had not recommended the defendant to buy that stock, but rather to buy other stocks, they had carried the order forward on their lists from Wednesday, on Thursday and Friday, as one still outstanding and to be filled as opportunity offered. On Friday morning, accordingly, they bought from another broker, Mr. Mitchell, 1,000 shares at $1.76, and at once telegraphed the defendant at Bowmanville, stating number and price, and sent him an advice note by mail. The telegram was prompt, and arrived at the Bowmanville telegraph office at 10.35 a.m. The defendant says he received it between 12 and 1 p.m., when in a buggy about to drive to attend a Court. But he did nothing about the shares until the following day—Saturday—after he received the advice note by mail. Then he did not telegraph or telephone his surprise or repudiation, as one might expect, but contented himself with writing to the plaintiffs, posting the letter between 4 and 6 p.m., which would reach the plaintiffs only on Monday 3rd December. According to

his evidence, "on the 30th November a sort of panic struck the market—everything in mining stocks went down."

Now, although he had the telegram on Friday, and these telephone communications had been on Wednesday and Thursday, Mr. Simpson in this letter of Saturday 1st December speaks of the first conversation as being "some days ago, perhaps a week, I am not sure exactly," and he says, "I told you that, if you could give me 1,000 shares at $1.75, I would take it." In that letter, after referring to the quotations in that day's newspapers and the drop in price on Friday to $1.70, he says: "I cannot understand this at all. I was under no contract to buy, and do not want the stock at all."

Alluding to the conversation which had taken place only on Thursday, he writes: "Next day, I think it was, you called me up. . . . I said to you I had noticed several sales at the morning board, including a block of 1,000 at $1.76, and you said you had not got it. At the afternoon board the stock went up to $1.78 and better, and so of course I did not get it." He explains this apparent complaint as meaning that, if they asserted that he had agreed to buy at $1.76, they should have got it for him on that day. But as, in his own view, he did not on Thursday know that they were so asserting, that can hardly be the correct explanation—of a complaint that he had not got it at a price which he had not offered. Again on 15th December Mr. Simpson wrote the plaintiffs' solicitors, and put the telephone talk about 10 days before the information of the purchase.

On 11th March the defendant was examined for discovery, and he then thought the conversation of Wednesday 28th November had taken place between 3 and 4 weeks before 30th November. Mr. Simpson is stated to be a very busy man. It would appear that his memory as to this transaction was not clear. It would seem manifest that he did give an order; though he says it was at the lower figure, we find him complaining of not getting the stock at the price Scott says he named, and we find him on Saturday putting the conversation of Thursday nearly a week before, and afterwards 9 days before and 3 or 4 weeks before. The trial Judge, who had the advantage of seeing the witnesses, has come to the conclusion that defendant's memory was at fault, and that Mr. Scott's recollection was the more to be relied on, and I do not see that there is ground for disturbing his finding.

Then it appears that the plaintiffs had a good many transactions in this stock, some for themselves, some as underwriters with the company of an issue of the stock, and some for other persons. They usually held numbers of shares for themselves or others considerably in excess of 1,000. They do not appear to have attempted to keep separate for any principal the identical shares purchased for him, but contented themselves with making sure that they had enough for all. In the case of this purchase of the 1,000 shares for the defendant, they received on Monday 3rd December from the vendor's broker two scrip certificates each for 500 shares in favour of one Anderson, with a transfer in blank indorsed, signed by Anderson. Instead of holding these for the defendant on this transaction, they, on 11th December, sent to him one of these scrip certificates as in fulfilment of a purchase of 500 shares previously made for him earlier in November. In doing so, they did not acquaint him with the fact that the scrip had really been received on the disputed transaction, and he was in ignorance of that fact in accepting it. The other Anderson certificate they delivered to one Bell on 4th or 5th December. Both certificates were so disposed of by the plaintiffs after they had received the defendant's letter of Saturday 1st December. The defendant now contends that, even if the plaintiffs had had authority to make the purchase of 30th November for him, they, having so disposed of the shares received for him on the purchase, cannot now recover the amount they paid.

The evidence given for the plaintiffs as to the custom of brokers is, that it is not usual to keep the particular shares of each customer separate and apart for him. No evidence was offered to the contrary. It does not appear that the shares themselves are numbered or separately identified in any way. Although the scrip certificates are numbered, they are treated merely as evidence of ownership of so many shares, not of any particular shares.

Reference was made for defendant to Ames v. Conmee, 10 O. L. R. 159, 12 O. L. R. 435, 6 O. W. R. 89, 8 O. W. R. 337; S. C., sub nom. Conmee v. Securities Holding Co., 38 S. C. R. 601; but that case does not in any way support the defendant's objection. It was decided on the ground that, so far as the evidence went, the stock had never been purchased or subsequently held by the brokers in accordance with their principal's instructions, that is, clear of any debt

beyond the purchase price, less the margin he had deposited, and each of the Judges of the Supreme Court who agreed in dismissing the broker's action, used language consistent with and apparently recognizing the claim that the broker is not bound to hold any particular shares for the customer, as long as he holds ready to deliver to him an equal number: Davies, J., at pp. 609, 610; Maclennan, J., at p. 615; Duff, J., at p. 617. In his judgment at the trial of that case (10 O. L. R. p. 161, 4 O. W. R. 460), the Chancellor said: "The law appears to be recognized in this country, as it is in the United States, that, so long as the broker retains and has in hand shares sufficient in number and kind to answer what have been bought for the principal, no sale of like shares bought for the principal ends the contract." This statement of the law was not controverted in any of the subsequent appeals. In the Divisional Court, Britton, J. (10 O. L. R. at p. 166) and Anglin, J. (ib. 170), quote with approval the language of Cameron, C.J., in Clarkson v. Snider, 10 O. R. 561, 565: "It is quite true that stock, so to speak, is not ear-marked, one share being as good as another, and it is not necessary that the identical shares bought for a client shall be kept separate from other shares to be delivered when required by the client. To so hold would be holding against common sense, and imposing, for no good, trouble upon the broker." In Mara v. Cox, 6 O. R. 359, at p. 387, the same rule is recognized.

Here the evidence is clear—and the trial was adjourned to enable an examination of the plaintiffs' books to be made on this particular point—that the plaintiffs, at all times after the purchase for defendant, held enough shares of this stock to cover not only the 1,000 for him, but also the purchases for all other customers, except, it is alleged, upon one occasion. That occasion was on 5th December, when a member of the plaintiffs' firm, who was at the Stock Exchange, having an order to sell some Green-Meehan shares, unintentionally sold 100 shares more than he should, and, as the plaintiffs then held only 50 shares for themselves, that left them 50 shares short. This was discovered on his return to the office after the close of the Exchange, and on the following day they repurchased to make good the oversale.

Now at that time, that is, at the opening and close of 5th December, they held in all 13,800 shares for customers and others, including 1,500 shares for the defendant. The oversale is certainly not shewn to have been made out of the

1,000 shares represented by the two Anderson certificates. One at least of these certificates they still held. The defendant was neither the first nor the last contributor to that fund of 13,800 shares. The utmost degree to which, on the evidence, he could claim that his shares were depleted by the oversale of 50, would be in the proportion of 1,000 to 13,800, that is, less than 4 shares, of the value of about $7. As one Anderson certificate was untouched, and the plaintiffs had done nothing to put it into a common fund, I think the depletion could not be put at more than the proportion of 500 to 13,300—for the 500 shares represented by that certificate were still ear-marked as the defendant's, and I see no reason why he could not have claimed that certificate and those particular shares from the plaintiffs and all other customers and creditors. The rule that brokers so buying on margin are not found to hold the same identical shares for each customer, so long as they keep an equal number of the same sort for him, is not inconsistent with the right of such customer to claim his shares, as against the broker and the broker's creditors and other customers, so long as they have not been put in a common fund, and can be identified. Nor is it inconsistent with the liability of each customer to be restricted to those particular shares. It might work much injustice if, on the receipt of shares by a broker for his principal, they became ipso facto part of a common fund consisting of all shares held by him.

But, whether the defendant's proportion would be $7 or $3, it is urged on his behalf that the oversale has the effect of disentitling the plaintiff to recover from him the $1,760 which they had paid for him; because, by the over-delivery, the plaintiffs rendered themselves unable to deliver to the defendant the 1,000 shares, and he was not bound to accept a less number, and because, the defendant having repudiated the contract, the plaintiffs, by a sale of some of the shares, accepted that repudiation as a breach, and, it is said, would only be entitled as damages to the full value of the shares between the purchase and the breach.

Without considering whether the effect of the over-delivery was not at the most to entitle the defendant to counterclaim, or whether the plaintiffs were not entitled to sell all or any of the shares to realise their lien, or how there could be any acceptance of repudiation as a breach, without an intention to accept, and whether that would change the right of indemnity to a right of damages—obviously the first

question is the existence of the fact from which those results are alleged to flow. Considering the trifling nature of the plaintiffs' mistake, which was at once corrected, the evidence should be of the clearest that the defendant was affected at all. After several times going over the testimony and the two statements (exhibits 16 and 17) put in to shew the plaintiffs' dealing with the shares held by them, I am unable to ascertain that there was any actual delivery of 50 shares more than the plaintiffs held for themselves. The witnesses do not always distinguish between sale and delivery. It is admitted that there was an over-sale, although just how it occurred or in what transaction is not shewn. The daily statement of "holders" and "owners" (exhibit 16) contains each day the names, apparently, of other brokers under both headings, indicating that on each day a considerable number of shares had not been actually delivered, but were held by or for the plaintiffs for or by the others, and that that is not a statement of shares actually delivered or actually received, but of shares which the plaintiffs were liable or entitled to delivery of. Yet it is upon that statement that the alleged shortage is based. Thus on 6th December, which, it appears, means 5th December, as the entries were made on the following day, the number of shares is only 13,800, whereas under "owners," that is, those to whom shares held belonged, the number is 13,850. Then on that date we find that 12,500 shares are entered as "on hand," and 1,300 under the name of "other holders," among whom Mr. Bell appears for 500 shares from 5th December to 10th December. Obviously that is a statement of things as they ought to be, and not of things as they were. If we turn to the other statement, exhibit 17, of daily transactions, we find throughout that shares "purchased," though not marked like others "received," are included among those "held for customers;" that on 6th December (i.e., 5th December) 1,950 shares were delivered and 1,900 were received, besides 50 purchased; of those 1,000 were apparently sold for one customer, Loomis, and bought for others. Here the 50 purchased are included in the number "held for customers." On that day, in the statement of "owners" (exhibit 16) the reduction is 1,050 shares (Loomis 1,000 and plaintiffs 50), which gives no indication of any over-delivery, and there are 4 new names for 1,100 shares. I think it is obvious that neither of these statements is restricted to actual receipts and deliveries, and, even if all the shares sold

on 5th December were delivered on that day, that does not prove that all those on previous days had been delivered, or that those previously bought had been received. The evidence and the statements appear to be directed to the sales and purchases, and, as I have said, based on exhibits 16 and 17, neither of which is restricted to delivery and receipts. If, then, there was merely an over-sale and not an over-delivery, there would be nothing more than the plaintiffs' own personal engagement with some purchaser to sell those 50 shares, an engagement which was completely filled through their purchase subsequently to comply with it. Their liability on such an engagement could not affect the right of the defendant or render themselves less able or less liable to deliver to him the full quantity bought and held for him. Such being the state of facts, that, so far as is proven, they actually bought and at all times held for the defendant and all their customers enough shares free to cover all their purchases for them, the objection on account of the disposal of the two Anderson scrip certificates cannot be given effect to. Even if they had disposed of the 50 shares intentionally, as the defendant's, the decision in Ellis v. Pond, [1898] 1 Q. B. 438, shews that it would be merely ground for counterclaim.

Then it was urged that the plaintiffs were not entitled to recover the full amount they paid, but only damages. However, the original right of the agent to be indemnified for his outlay is clear. The defendant by repudiating the contract could not require the plaintiffs to accept that repudiation and dispose of the shares as if their own, when they were actually holding them for him. He wrongfully took the position that he had nothing to do with the shares, instead of admitting the liability which it is held he incurred, and saving himself by disposing of them. The cases cited to shew that between vendor and purchaser only damages and not purchase money could be recovered, have no application, as between the principal and the agent, to the latter's right of indemnity.

Objection is made to the reception of defendant's letter written to plaintiffs and marked "without prejudice." But, as mentioned by the trial Judge, he had refused to admit the letter to the record of evidence for the plaintiffs, and only admitted it afterwards when referred to by the defendant, it being in fact the letter in which he made his first repudiation of the transaction, and which was written not

with any view to settlement, but in repudiation of the plaintiffs' claim, and which affected them and was intended to affect them adversely by notice of that fact. The cases of Re Daintry, [1893] 2 Q. B. 116, and Grau v. Boynton, 21 Sol. J. 631, referred to by the trial Judge, fully warranted the reception of the letter.

The judgment appealed from should be affirmed, and with costs.

JANUARY 19TH, 1909.

C.A.

BANK OF NOVA SCOTIA v. BOOTH.

Appeal to Court of Appeal—Order of Judge Refusing Leave to Appeal—Application to Court of Appeal.

Motion by the Dominion Fish Co., garnishees, for an order for leave to appeal to the Court of Appeal from an order of a Divisional Court.

A motion for the same leave, upon the same material, had been previously made before MACLAREN, J.A., and refused: ante 209.

F. Arnoldi, K.C., for the applicants.

C. A. Masten, K.C., for the plaintiffs.

THE COURT (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), refused to entertain the application, on the ground that the applicants had exhausted their right by applying to a Judge in Chambers.

JANUARY 19TH, 1909.

C.A.

HOBLEY v. GRAND TRUNK R. W. CO.

Railway—Injury to and Consequent Death of Person Crossing Tracks — Engine Shunting Reversely — Absence of Statutory Warning — Evidence — Negligence—Contributory Negligence—Findings of Jury.

Appeal by the defendants from the order of a Divisional Court affirming the judgment at the trial before MULOCK, C.J., and a jury, in favour of the plaintiffs.

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

H. H. Bicknell, Hamilton, and W. M. McClemont, Hamilton, for plaintiff.

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

GARROW, J.A.:—The action was brought by the plaintiffs, the widow and infant children respectively of Henry Hobley, who was killed at the city of Hamilton, on 13th January, 1908, by a shunting engine then being operated by servants of the defendants, under circumstances of alleged negligence.

The acts of negligence charged in the statement of claim were: (1) no watchman on the rear end of the train (which was proceeding backwards); (2) the engineman and fireman not keeping a sharp look-out; (3) the train should have been stopped in time to prevent the injury; (4) the method of operation was negligent because the train was first drawn westerly with the engine in front, until it crossed the sidewalk where deceased was walking, and then immediately and without warning and without any watchman on the rear end of the train, it was backed across the street with a swift movement or "kick;" (5) the bell was not rung.

The facts are quite simple. The deceased on the morning in question was proceeding northerly along the sidewalk on the east side of Ferguson avenue, when in front of him passed, going westerly, an engine with a car loaded with coal attached. This the deceased must have seen. The engine stopped after the street had been cleared, and almost immediately commenced to back towards the street, with steam almost, if not quite, fully turned on, so as to give the necessary impetus to the coal car to send it up an incline of several feet at what is known as Connel's dock, and in this quick backward movement the deceased was struck and killed.

The jury, in answer to questions, found that the defendants were guilty of negligence in not having a watchman on the end of the car approaching the sidewalk; no contributory negligence; deceased was struck while on the sidewalk; and assessed the damages at $3,000; $1,000 to the widow, and the balance to be applied in rearing the children.

Objection was taken to the charge of the learned Chief Justice as to several matters, but whatever force there origin-

ally was in the objections seems to have been wholly removed by what was subsequently said by the learned Chief Justice to the jury by way of further instruction. And the result arried at seems a reasonable and proper one, if it can be fairly said that there was evidence to justify the finding.

The duty to have such a watchman where a train is reversing across a highway is statutory: see R. S. C. 1906 ch. 37, sec. 276. The duty and its breach are alleged in the statement of claim, so that the defendants were not taken by surprise by the evidence given at the trial. The plaintiffs were, of course, bound to give some evidence of the negligent act upon which they relied, but, under the circumstances, it seems to me that slight evidence in proof of the negative was sufficient.

For the plaintiffs reliance was placed upon the evidence of Garside, who was walking about 25 feet behind deceased when he was struck, and saw the whole occurrence. Garside was asked:—

"Q. Did you see the crew on this train—the train crew? A. I saw the fireman—that was the only one of the crew I seen.

"Q. You could not see any of the others? A. No.

"Q. . . Where was the fireman? A. He was on the left side of the engine.

"Q. What was there in the nature of a warning of any kind? A. There was no warning given.

"Q. Was there anybody, so far as you could see, protecting the sidewalk? A. No, sir.

"Q. You could see straight down the sidewalk? A. Yes, sir.

"Q. And you could see none of the train crew excepting the fireman? A. Excepting the fireman."

Garside, as his evidence shews, had closely observed all that happened. He had been a fireman, and knew the yard well in which he had at one time been employd. It is a pity, perhaps, that he was not asked specifically as to a watchman on the rear of the reversing car—but, if there had been such a man stationed there, it is not unfair to assume that Garside would have seen him at least as readily as he saw the fireman. And that there was no such man there is further, although perhaps indirectly, supported by the evidence of the other trainmen, who were called, and who, while accounting for the situation of each at the time of the accident,

quite failed to place any one at the place required by the statute.

There was, therefore, in my opinion, sufficient evidence, if believed, upon which the jury might reasonably have found against the defendants as they did.

The appeal should, therefore, be dismissed with costs.

JANUARY 19TH, 1909.

C.A.

JEWELL v. JACOBS.

Contract—Interest in Mining Property—Assignment of—Release of Interest by Assignor—Settlement—Evidence—Trust.

Appeal by plaintiff from judgment of MABEE, J., of 16th January, 1908, dismissing the action without costs.

The action was brought by J. H. Jewell, carrying on business in the firm name of J. H. Jewell & Co., against Jacob A. Jacobs, Lazarus P. Silver, and the Shamrock Silver Co., to obtain a declaration that the defendants were trustees for the plaintiff of a certain mining property in the township of Coleman, and of the proceeds thereof, to the extent of a one-third interest, and for an injunction and damages and other relief.

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

S. H. Blake, K.C., and C. S. MacInnes, K.C., for plaintiff.

I. F. Hellmuth, K.C., for defendants.

MOSS, C.J.O.:—This is an unfortunate case, but, however hardly the result appears to bear upon the plaintiff, I am unable to discover any valid ground for relieving him from it.

It is borne in mind that the plaintiff is not here standing upon independent rights of his own. He is claiming and must claim through the Beaver Silver Cobalt Mining Company, and can occupy no higher position than that company, for he depends for his title upon an instrument dated 1st February, 1907, whereby the company purport to grant, bar-

gain, sell, assign, transfer, and set over unto him all the company's estate, right, title, interest, claim, and demand in, to, or out of the property in dispute. This instrument was executed on behalf of the company, in pursuance of a by-law passed by the board of directors on 29th December, 1906. The consideration is expressed to be $4,000 paid by the plaintiff, and it is proved that before the date of the by-law he had advanced that sum or its equivalent for the benefit of the company. It does not appear that when he advanced the money there was any bargain or understanding that he was to receive a transfer of the property in dispute or any of the company's property in repayment. It seems to have been contemplated, in the first instance, that he was to obtain repayment in cash, but the company, not having any money, assumed to recompense him by transferring to him their rights in the property in dispute, and the personal property of the company at Cobalt, which was probably of inconsiderable value.

The rights which the company were supposed to have in the property in dispute depended upon some arrangement or understanding alleged to exist between the company and the defendant L. P. Silver, whereby the company were to be entitled to a one-third interest in any mining discoveries made by Silver in the locality of the property.

Whether an agreement to that effect existed or not was not determined by the learned trial Judge, and the evidence on the subject is by no means satisfactory. There is, however, some evidence to the effect that there was a paper of some kind drawn up by Silver and handed to Mr. Devine, the then president of the company, which was lost or mislaid, and was not produced, nor were its contents satisfactorily proved. It is not improbable, however, that there was some such agreement or undertaking under which the company would be entitled to share to the extent of one-third or one-fourth in Silver's discoveries. But before the date of the by-law there had been a dealing between the Beaver Company and Silver, the effect of which the learned trial Judge held was to extinguish and put an end to the arrangement and any claim arising out of it. The circumstances seem to have been that, under some other arrangement between the Beaver Company and Silver, the latter claimed to be entitled to a share in discoveries made by others on behalf of the company. Amongst other properties in which he claimed an interest by virtue of this alleged arrangement, was the

north half of the north-west quarter of the north half of lot 1 in the 3rd concession of Coleman. In August, 1906, he assigned this interest, for a nominal consideration, to one W. H. Syms, a clerk. The learned trial Judge was of the opinion that, notwithstanding this assignment, it was probable that Silver continued to be the beneficial owner, and this does not seem an unreasonable assumption, for Silver appears to have been consulted and to have taken an active part in the subsequent dealings and transactions with regard to it, and the plaintiff says he does not believe Syms got anything out of it for himself. Some time after the assignment, an action was brought in the name of Syms to enforce a claim against the property, and a caution was registered against it in the land titles office. The plaintiff at this time was negotiating, or had succeeded in obtaining options, for the purchase of a large block of the company's shares; and for that reason, and because he was endeavouring to effect a transfer of the Beaver Company's properties to the Erie Cobalt Company, in which he was interested, and probably for other reasons, it was important to get rid of the Syms action and the claims on which it was based. Negotiations to that end were entered into with Syms and Silver. The plaintiff intervened, and, he says, brought about a settlement, the terms of which were that, upon payment to Syms or Silver of $2,000, their claim was to be released, the action dismissed, and the caution withdrawn. But at this time he was not a director or officer of the company, and was not possessed of authority to bind the company. It followed that any arrangement he made was not binding on any of the parties until adopted by the company, but unfortunately this view of the case was not presented to him. Under the impression, apparently, that there was a concluded settlement, he sent a cheque to the solicitor for the Beaver Company for $3,000 and a certificate of 1,000 shares in the Erie Cobalt Silver Mining Company, to cover this and another claim, but he did not specify in detail the terms of the settlement in his letter to the solicitor, who was not present when it was arrived at. One or two days later—30th November, 1906—Mr. Devine, the president of the company, and Silver came together in the office of the solicitor, and there concluded a settlement, the terms of which were reduced to writing by the solicitor, under instructions from Devine, and the instrument was signed by Silver and by the solicitor as representing the company. Owing to Devine being obliged

to leave for Cobalt before the instrument was ready for signature, it was not then signed by him, but later on he appended his signature to it. One of the terms of the agreement was that the company's claims against Silver for a one-third interest or any other interest in and to the property now in dispute were withdrawn. And it was on the basis of this agreement that Silver and Syms acted in executing and confirming the instrument of 3rd December, 1906, whereby they abandoned and gave up all claims against the Beaver Company in respect of the north half of the north-west quarter of the north half of lot 1 in the 3rd concession of Coleman—on the strength of which Syms's action was dismissed and the caution removed from the register of title.

The company were thus enabled to deal with the property and to go on with the arrangements which had been interrupted and prevented by the existence of this claim. And it was after this, and not until 29th December, 1906, that the company assumed to authorize a transfer of the claim to the plaintiff.

The company are not before the Court in this action repudiating Devine's action. No case of fraud is set up or proved, nor is there any offer to restore Silver or Syms to their former position. And it is quite apparent that they could not be. Syms is not a party to the action. The evidence shews that Silver would not have agreed to the release of the claim against the company without the agreement for the release to him of the company's claims against the property now in dispute. It is unfortunate that the plaintiff was not communicated with before the agreement was finally concluded, with the result that his money was applied in giving effect to an agreement which he says was not that which he understood or intended to be carried out. On the other hand, the company, through whom he claims in this action, having through their then president, procured Silver to agree to give or obtain the release of his claims against the company, and having accepted the benefit of his action, cannot now be heard to contend that he is obliged to give up the benefit of the release to him which formed part of the consideration on which he accepted the settlement. If the settlement, as made and embodied in the agreement of 30th November, 1906, is to stand at all, it must stand as a whole. And no ground has been shewn on which, after all that has taken place, the company can seek to undo it

in part while adhering to the remainder. Even if it be assumed that Devine's action in the matter was unauthorised and not binding on the company at the time, which is by no means so clear as the plaintiff contends, the company, having afterwards accepted the benefit of it, should be held to have adopted all its terms. The company's subsequent action in filing cautions and assuming to transfer the claim to the plaintiff, which seems to have been mainly brought about by the plaintiff himself, cannot prejudice Silver's position nor the rights of those now claiming under him in respect of the property in dispute.

For these reasons, as well as for the reasons given by the learned trial Judge, I think the judgment ought to be affirmed and the appeal dismissed.

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

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

JANUARY 19TH, 1909.

C.A.

CANADIAN PACIFIC R. W. CO. v. BROWN MILLING CO.

Railway—Expropriation of Lands Owned by City Corporation—Right of Lessee to Compensation—Possession after Expiration of Lease—Provision in Lease for New Lease—Interest in Land—Railway Act—Date of Ascertaining Compensation—Deposit of Plan—Damages—Costs.

Appeal by plaintiffs from the judgment of RIDDELL, J., 11 O. W. R. 919.

E. D. Armour, K.C., for plaintiffs.

E. E. A. Du Vernet, K.C., and Armour Miller, for defendants the Brown Milling Co.

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

GARROW, J.A.:—In the case stated the questions to be determined are:—

1. Have or had the claimants any interest in the said lands entitling them to receive compensation from the re-

spondents under the circumstances stated? If so, what is the "interest" and on what principle ought compensation to be ascertained?

2. If the claimants are entitled to receive compensation from the respondents, with reference to what date ought compensation to be ascertained?

This differs somewhat but not materially, I think, from the special case stated by the arbitrators, which had three questions, but all involving practically the same point.

The material facts, about which there is no dispute, all appear in the pleadings and in the judgment. The judgment proceeds upon this, that, although the claimants had no legal title, they still had possession under the lease which expired on 30th June, 1902, and that such possession, with the possibility of obtaining a renewal, for which they had asked, was sufficient upon which to found a valid claim. And the whole question really is whether that conclusion correctly interprets the law.

In considering the numerous cases upon the subject, regard must of course be had to the statutory provisions under which they arose and were decided. The Imperial statutes 8 & 9 Vict. ch. 20 and 8 & 9 Vict. ch. 8 have now been in force many years without material alteration. And, while their provisions are much more extensive and minute than those to be found in the Canadian statutes, I agree with Riddell, J., that for the purpose of the present inquiry there is no such essential difference as to make the cases decided under the Imperial statutes inapplicable in construing ours.

Our Railway Act, R. S. C. 1906 ch. 37, as consolidated in 1906, did not, I think, alter the law in any material particular from the condition in which it stood in 21st September, 1903, when the plan was deposited and the rights of the parties to that extent fixed (see sec. 192), and my references will for convenience sake be to it.

Section 155 provides that "full compensation" shall be made "to all persons interested for all damages by them sustained" by reason of the exercise of the powers of expropriation conferred by that Act. Throughout the statute the estate or interest (with some trifling exceptions) assumed to be expropriated in the fee simple; and the compensation when fixed shall, it is provided, stand in place of the land: see sec. 213.

By sec. 191, after the expiration of 10 days from the deposit of the plan, &c., and the due publication of notice, application may be made to the owners of, or to persons empowered to convey or interested in, lands which suffer damage from the taking of materials or the exercise of powers, and such agreements and contracts as both parties may deem expedient may then be made touching the lands or the compensation, or for damages, or as to the mode in which the compensation is to be ascertained; and, if they cannot agree, all questions which arise between them shall be settled as thereinafter provided, namely, by arbitration.

In the Imperial statutes provision is made for compensation to tenants of various terms, down to that of "a tenant having no greater interest than as tenant for a year, or tenant from year to year." See sec. 121 of the Land Clauses Consolidation Act, 1845, the second of those above mentioned. And sec. 122 provides for the compulsory production of the lease in the case of any tenant claiming compensation, and having a greater interest than as tenant at will. For the latter no provision of any kind is made, which seems to indicate that a tenant at will was not regarded as a person having an interest in the land. And yet the Imperial Acts extend to "occupiers"—a word not found in our statute—and contain also the more general words "persons interested in the lands" common to both, in this respect being therefore more favourable in its language to a claimant situated as these claimants are than the Canadian statute.

Notwithstanding the use of this word, it was recently said in the Court of Appeal by Collins, M. R., that the subject matter for compensation under the Imperial statute is land or an interest in land: see Ward v. London County Council, [1904] 1 K. B. 713, at p. 717; and the Court there sustained a judgment denying the right of a claimant to what was undoubtedly a valuable privilege to occupy land, simply because the privilege did not create an interest in the land itself.

And the same construction must, in my opinion, be placed upon the Canadian statute. The persons "interested" must be persons who have some definite interest in the land itself. The mere possession or occupation as tenant at will, which correctly expresses the legal position of these claimants after their lease expired, is not, I think, sufficient.

In the case referred to by Mr. DuVernet of McGoldrick v. The King, 8 Ex. C. R. 169, the facts were very different, for it was there found that the tenant, after the original lease had expired, remained in possession as tenant from year to year; in other words, he was not a tenant at will when the expropriation took place. And he was therefore held entitled to compensation for the unexpired portion of his term as such tenant, and also for his improvements.

In Rex v. Liverpool and Manchester R. W. Co., 4 A. & E. 650, the tenant had had several renewals, and even had a verbal promise of a further renewal for 7 years, from his landlord, on the faith of which he had expended money, and yet the Court held that he had no interest in the land, his lease having in fact expired, and could not therefore claim compensation. The language of the statute there in question is very similar to that of the general Imperial Act from which I have quoted, and included, as that statute does, "occupiers," as well as owners and persons interested. And in Syers v. Metropolitan Board of Works, 36 L. T. 277, it was held by Jessel, M. R., and affirmed by the Court of Appeal, that a tenant whose term had been duly determined by notice to quit could not claim compensation, although he, with at least some show of reason, claimed that but for the expropriation proceedings he would probably not have been disturbed. In the recent case referred to in the judgment of Riddell, J., of Zick v. London United Tramways, [1908] 1 K. B. 611, also affirmed by the Court of Appeal in 24 Times L. R. 577, it would have been a simple proposition if the plaintiff's possession alone had been sufficient. He, too, was a tenant in possession, but for an unexpired term, which fortunately for him had not merged, owing to the imperfect surrender, and the recovery was had, not in respect of the possession, but clearly of this unexpired term alone.

These cases are not inconsistent with such cases as the one so much relied on of Perry v. Clissold, [1907] A. C. 73: and Ex p. Chamberlain, 14 Ch. D. 323, and Stewart v. City of Ottawa, 30 O. R. 599.

In the last of these cases the learned Chancellor pointed out the scope and principle of such statutes, and shewed that there are really two stages, one the ascertainment of the party to be dealt with in proceeding to fix the compensation, the other the right to the compensation itself after it is fixed. And as to the first it was there

held, quite in accordance with the more recent case in the Privy Council, that where a person is found in possession apparently as owner, which is not at all the position of these claimants, he may be dealt with for the purpose of the first stage as if he was in fact the owner, and that the statutory body cannot at that stage put him to proof of title. But, after the compensation has been fixed, and has been paid into Court, as it may be (see sec. 210), the person applying for it, who need not have been named in the award (see sec. 205 (2)), would certainly then be required to prove his title before obtaining the money out of Court.

None of these cases, nor indeed any of the other cases which after a somewhat diligent search I have been able to find, affords any foundation, in my opinion, for the proposition that a person having no estate and no interest in the land itself, nothing in fact but mere possession, has any right to share in the compensation provided for by the statute.

The cases decided under the statute 11 Geo. IV. ch. 20, the Hungerford Market Act, referred to by Riddell, J., are not, in my opinion, at all in point. Section 19 of that statute, the foundation for such decisions, has no counterpart in our statute, nor in the general Imperial Acts. And that they are exceptional was pointed out by Lord Denman, C.J., who presided in them all, in the later case before referred to of Rex v. Liverpool and Manchester R. W. Co., 4 A. & E. at p. 656. The cases to which I refer are, Ex p. Farlow, 2 B. & Ad. 341 (to which Riddell, J., referred with apparent approval), and Ex p. Gosling, 4 B. & Ad. 596. Section 19, before mentioned, is as follows: "All tenants for years or from year to year or at will who shall sustain any loss, damage, or injury, in respect of any interest whatsoever, for goodwill, improvements, tenants' fixtures, or otherwise, which they now enjoy, by reason of the passing of this Act, shall be entitled to compensation."

I have not attempted to follow all the arguments addressed to us by the learned counsel for the claimants. As will have appeared, the material fact upon which I proceed is of the very simplest, and it is this, the claimants are not entitled to compensation because they had on the date in question no estate or interest in the lands. It matters not, in my opinion, how the severance of the reversion, which stood in the way of the renewal, came about, nor whether such severance was compulsory or voluntary, or

even whether there ever had in fact been a severance at all, the undisputed fact being that the prior lease had expired on 30th June, 1902, and had not been renewed, and no new tenancy created, thus leaving the claimants entirely without title or interest in the land. The lessors were not even bound to renew or to grant a new lease. They had the option to refuse, and in that case to pay for the tenants' improvements. They did refuse, and what (if any) obligation between the claimants and the city follows upon such refusal, we are not at present required to, nor in a position to, deal with.

In my opinion, the claimants, for the reasons stated, have failed to make out a valid claim to compensation, and the appeal should therefore be allowed with costs.

JANUARY 19TH, 1909.

C. A.

RE MARSHALL AND ANCIENT ORDER OF UNITED WORKMEN.

Death—Presumption—Seven Years' Absence—Declaration under Sec. 148 (3) of Insurance Act—Evidence—Affidavit——Appeal—Costs.

Appeal by the society from the order of a Divisional Court, 12 O. W. R. 153, allowing an appeal from an order of RIDDELL, J., 11 O. W. R. 1078, and declaring that the presumption of the death of Frederick C. Marshall, whose life was insured by the society, was established.

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

A. G. F. Lawrence, for the society.

T. N. Phelan, for Mary Ann Marshall.

MOSS, C.J.O.:—Appeal by the Ancient Order of United Workmen from an order of a Divisional Court reversing an order of Riddell, J., upon an application made on behalf of the appellants under sec. 148 of R. S. O. 1897 ch. 203, as amended by 7 Edw. VII. ch. 36, sec. 3.

The Grand Lodge of the Ancient Order of United Workmen had issued a beneficiary certificate to one Frederick C. Marshall, conditioned, upon his death, to pay to Mary Ann Marshall, his wife, the sum of $2,000.

Frederick C. Marshall disappeared on 17th May, 1900, and has not been since heard of, and the application was for a declaration as to the presumption of his death. Riddell, J., was of opinion that the presumption of death had not been established. But upon appeal the Divisional Court was of the contrary opinion, and pronounced the order now appealed from.

As part of the evidence going to prove that nothing had been heard of Frederick C. Marshall from the date of his disappearance, a letter from an aunt, with whom, it was said, he was a favourite and used to correspond, was put in. Riddell, J., commented upon the fact that no affidavit from this lady was produced, and on the argument on the appeal much stress was laid by counsel for the appellants on the omission to supply such an affidavit.

At the conclusion of the argument counsel for Mrs. Marshall, while not conceding that an affidavit was necessary, asked permission to supply it, and time was given for that purpose. An affidavit from her is now produced, but, beyond verifying the fact that she wrote the letter in question, very little further information is contained in it.

It is true that upon an application under the Act the question to be determined is not whether Frederick C. Marshall was drowned on 17th May, 1900. If that were the question, there seems to be evidence quite sufficient to justify a jury in finding that he actually perished by drowning on that day. But the question is whether, in this proceeding, enough has been shewn to raise the presumption —he not having been heard of for a period of 7 years and over—that he is now dead. The view of the Divisional Court is that there was ample evidence to support the presumption that he is dead, and that, under the circumstances disclosed, there was no absolute need for an affidavit from the aunt—that the information contained in a letter received in response to inquiries made was evidence, though of course not strict proof, and might be acted upon in connection with the other evidence, there being no suggestion of dishonesty or improper conduct on the part of the writer or the person producing it.

It is suggested that there were reasons why Marshall should have thought it desirable to leave home and conceal his whereabouts, but this is not justified by what is shewn upon the material before the Court. So far as appears, he was not involved in debt or any business difficulty that could furnish a reasonable motive for abandoning his home and concealing himself from his wife and relatives.

The judgment of the Divisional Court might well be supported without the aid of the additional affidavit. The appellants have now, however, the benefit of the oath of the writer of the letter to the fact of her having written it, and the truth of the statements it contains. There is now no good reason why the amount of the certificate should not be dealt with as directed by the order of the Divisional Court.

The appeal should be dismissed with costs, but not of the additional affidavit.

OSLER, J.A.:—I agree with the reasons given by MEREDITH, C.J., in the Divisional Court, and would dismiss the appeal with costs.

MEREDITH, J.A., for reasons stated in writing, was also of opinion that the appeal should be dismissed, but thought it should be without costs.

GARROW and MACLAREN, JJ.A., agreed with MOSS, C.J.O.

JANUARY 19TH, 1909.

C. A.

RE KURTZE AND McLEAN LIMITED.

PETRIE v. LONDON AND WESTERN TRUSTS CO.

Sale of Goods—Conditional Sale—Right of Vendor to Resume Possession upon Default—Contract—Alteration—Evidence—Company—Powers of Provisional Directors—Conditioanl Sales Act—Goods Marked with Name of Vendor—Contract not Filed with Clerk of County Court.

Appeal under the Dominion Winding-up Act by the London and Western Trusts Company, liquidators of Kurtze and McLean Limited, and by one Lawrence, a trustee for the

city of Stratford, and cross-appeal by plaintiff Petrie, from the order of TEETZEL, J., 12 O. W. R. 564.

R. S. Robertson, Stratford, and Featherston Aylesworth, for the trusts company.

G. T. Blackstock, K.C., for Petrie.

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

MACLAREN, J. A.:—The claim was made by the plaintiff Petrie, Toronto, respecting machinery which he had sold to Kurtze and McLean Limited under an order from them bearing date 22nd April, 1907, by which the property in the goods in question and in any other goods ordered by them was not to pass from the vendor to the purchasers until all moneys payable under such orders should have been fully paid and satisfied. The terms of payment were "one-third cash, balance 3, 6, and 9 months, with 6 per cent. interest;" and the order was signed "Kurtze and McLean Limited, C. F. R. Kurtze, M.D." (understood to mean managing director), "W. J. McLean, sec.-treas."

The purchasers were acquiring the machinery for a factory which they were erecting in the city of Stratford, and for which they were to receive a bonus of $10,000 in city bonds and to give a first mortgage to a trustee for the city on the land, machinery, &c. They had obtained a charter under the Ontario Companies Act on 12th April, 1907—Kurtze, McLean, and one Youngs, being the provisional directors.

After returning from Toronto, Mr. Kurtze and Mr. McLean read over the document, and saw that under its terms they could not, on account of the lien, give the city a first mortgage, as they had agreed, and McLean 2 or 3 days later returned to Toronto to get the matter adjusted. The evidence is conflicting as to what actually took place, but as a result the clause as to the terms was erased, and the following substituted, "2 per cent. 30 days from shipment."

The goods were subsequently shipped from time to time, and on 30th April, 1907, Petrie drew a bill of exchange upon Kurtze and McLean Limited for $2,458.20 at one month, which they accepted. The organization of the company was completed, and the factory and its contents duly made over to the new company, on 7th June, 1907.

Petrie omitted to file a copy of the lien order with the clerk of the County Court at Stratford, as required by sec. 2 of the Conditional Sales Act, R. S. O. 1897 ch. 149, and a considerable portion of the machinery supplied had not his name and address upon it, as provided by the first section of the Act.

About the end of June the mortgage to the city corporation was being completed, and the solicitors wrote to Petrie enclosing a certificate to be signed by him declaring that he had no lien on the machinery. A telegram was sent in reply by Petrie's son on 3rd July, stating that the papers would be forwarded on Mr. Petrie's return to the city. On 4th July the mortgage to Lawrence as trustee for the city was completed, the city debentures for the $10,000 handed over, and $2,000 raised upon them paid on Petrie's draft.

On 5th July Petrie wrote that he had just returned to the city, that he had sold the machinery under a lien, but that his draft was to be paid out of the city money, and he would then give a release. But meantime the debentures had been handed over and negotiated.

The claim as to the lien was tried before the local Master at Stratford, who held that when McLean returned to Toronto he understood that the lien agreement was abandoned, and that Kurtze and McLean did not really agree to give any lien, and that Petrie allowed them to get the impression that there was no lien, but intended to hold on to it if the necessity should arise.

From this order an appeal was taken and heard by Teetzel, J. The order was attacked on other grounds than those taken by the local Master, as to its not being properly executed on behalf of the company, as to the prices of some of the goods being left blank, &c. He overruled these objections, and held that there was no sufficient evidence to warrant a finding that the written agreement was obtained by fraud, or that it should be set aside or varied on the ground of mutual mistake. He held that the change made in the copy of the document which McLean took away with him was quite inconsistent with the claim afterwards put forth on his behalf; and that, although he may not have fully understood its import, he appears to have relied rather upon their ability to pay within the 30 days than upon there being no lien. He also held that a written document should not be set aside upon the unsupported

testimony of an interested party, especially when his evidence was contradicted and was so improbable.

He consequently upheld Petrie's lien as to the articles that bore his name and address at the time they were delivered, and on account of the want of filing a copy of the document in the clerk's office disallowed it as to those that were not so marked.

On the appeal to this Court Mr. Robertson strongly urged the same grounds as he had urged before Teetzel, J. I am of the opinion that the signatures of Kurtze and McLean to the lien order were sufficient to bind them, even if they were insufficient to bind the new company for want of authority or otherwise; and the goods were subsequently shipped to Kurtze and McLean, and the draft of 30th April addressed to and accepted by them.

As to what took place on McLean's return to Toronto, I am also of opinion that Teetzel, J., arrived at the proper conclusion. McLean was fully aware of the nature and effect of the lien part of the agreement, as that was what made him go back to see Petrie. When the terms were changed and the document altered and returned to him, he saw that the lien part of the agreement had not been altered, and he appears to have thought that the shortening of the time, and the allowance of the discount, would meet his requirements, as he says: "They said they could change it to 30 days and the discount, and I said that would be satisfactory to us, for by that time we would have our financial situation together that we could meet the obligations." He admits in cross-examination that he knew there was no other part of the document struck out, and adheres to the statement that the arrangement for payment in 30 days on getting a discount would be satisfactory, as they could make arrangements to meet their obligations.

Objection was taken that the order was not signed by Petrie. This is not necessary, as sec. 1 of the Act only requires that it be "evidenced in writing, signed by the bailee or his agent."

The company cannot claim to be purchasers without notice. When they acquired the property on 7th June, the name and address of Petrie on those articles that bore his mark were notice to them; and their director and secretary, McLean, had in his possession the document which clearly shewed that the articles were purchased subject to the lien.

The same marks were also notice to the city corporation when they acquired their mortgage on 7th June.

Mr. Robertson also argued strongly in favour of an estoppel against Petrie on the ground of his son's telegram of 3rd July. This, however, was wholly unauthorized by Petrie, and on his return to the city he wrote the city's solicitors advising them fully of the position that he took.

Petrie has cross-appealed as to that part of the machinery which did not bear his name and address; but he failed to shew that the corporation or their trustee Lawrence had notice of any lien.

The appeal and cross-appeal should both be dismissed with costs, and the judgment of Teetzel, J., affirmed, maintaining Petrie's lien as to those articles that were properly marked, and disallowing it as to those that did not bear his name and address at the time possession was given to the purchasers.

JANUARY 19TH, 1909.

C.A.

CITY OF TORONTO v. WARD.

Landlord and Tenant—Encroachment by Tenant upon Unenclosed Lands of Landlord Adjoining Demised Premises—Compensation for Use and Occupation — Acquisition of Title by Possession — Statute of Limitations — Possession Taken before Lease but in Contemplation of Lease — Repudiation—Estoppel—Renewal Lease—Right of Tenant to have Premises in Dispute Included—Equitable Right—Improvements.

Appeal by defendant from order of a Divisional Court, 12 O. W. R. 426, affirming judgment of BRITTON, J., 11 O. W. R. 653.

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

E. D. Armour, K.C., and W. H. Lockhart Gordon, for defendant.

J. S. Fullerton, K.C., and W. Johnston, for plaintiffs.

OSLER, J.A.:—I am of opinion that the judgment of the Divisional Court should be affirmed. As regards the defence of the Statute of Limitations, although the defendant states that he took possession or was in possession or partial possession, before the execution of his lease from the plaintiffs, of what has since been discovered to be lot 44, which adjoined but was not included in the premises demised, it is plain from his own evidence that from that time forward he occupied and dealt with it under the belief that it was covered by the lease, and that he was not occupying it adversely to the plaintiffs.

The instrument evidencing his sublease of the lot in question, or part of it, to Flynn, clearly shews this, as it describes the property as leased as "the site now occupied by his house on my leasehold property known as Ward's Island," and refers to the termination of Flynn's holding as "the expiration of my present lease of this portion of the Island."

There are here circumstances which, taken in connection with the further fact that when the defendant first entered upon the lot he was an official in the employment of the plaintiffs upon their Island property, strongly prove that his possession was not adverse to the owners, and that he acted as their tenant in respect of it, notwithstanding that such possession may have actually commenced before the execution of the lease. These circumstances, as there pointed out, were wanting in Dixon v. Baty, L. R. 1 Ex. 259, and exclude the application of that case as an authority governing the present. The defendant is, therefore, not in a position to assert that by such possession, continued throughout the term of his lease, he has acquired title under the Statute of Limitations, and the case presented is, so to speak, the ordinary one of an encroachment by the tenant, without the landlord's assent, upon property of the latter which was not part of the land demised, but which he, nevertheless, holds as belonging to the landlord, and possession of which he must deliver up at the expiration of the term, or pay for its continued use and occupation: Whitmore v. Humphries, L. R. 7 C. P. 1; Woodfall on Landlord and Tenant, 18th ed. (1908), p. 826; Redman & Lyons on Landlord and Tenant, 5th ed. (1901), pp. 239, 240; Foa on Landlord and Tenant, 2nd ed. (1895), p. 587.

The defendant, however, contends that, if he is regarded as having dealt with lot 44 under circumstances which repel any other presumption than that he was treating it as part of his holding, the plaintiffs cannot sue for use and occupation, because he is equitably entitled to have it included in the renewal lease of the premises which were actually demised. I fail to see how any equity of that kind arises. The defendant did not enter with the sanction of his landlords, who appear to have been ignorant until shortly before the expiration of the term that he was in possession of any property not covered by the lease. In consequence of this, he has been fortunate enough to hold it rent free for many years, and, even if the equity he sets up would, if proved, have been sufficient to establish the right he asserts, I think that his right of renewal is confined to what the covenant in the lease gives him. I do not think it is necessary to go over the cases of Hastings v. Sadler, 79 L. T. N. S. 79; Tabor v. Godfrey, 64 L. J. N. S. Q. B. 245; White v. Wakley (No. 1), 26 Beav. 17; Attorney-General v. Tomlins, 15 Ch. D. 150; and other cases referred to and relied upon by the defendant in support of his several contentions. This has been done in the judgments in the Court below, where these cases have been very fully and clearly distinguished on their facts from the case at bar.

Agreeing with these judgments, I would dismiss the appeal.

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

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., also concurred.

JANUARY 19TH, 1909.

C.A.

SOVEREIGN BANK v. PARSONS.

Pleading — Counterclaim — Defendants to Counterclaim — Receivers and Managers under Order of Court—Proceeding against, without Leave of Court — Motion to Strike out Counterclaim—Appeal.

Appeal by the original defendants from order of a Divisional Court, 11 O. W. R. 968, affirming order of MERE-

DITH, C.J., 11 O. W. R. 845, reversing an order of the Master in Chambers, 11 O. W. R. 615, whereby a motion by Craig and Edwards, defendants to the counterclaim, to strike out the counterclaim, was dismissed. By the order of MEREDITH, C.J., the defendants were allowed to amend.

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

I. F. Hellmuth, K.C., W. E. Middleton, K.C., and G. L. Smith, for the defendants, appellants.

R. B. Henderson, for Craig and Edwards, respondents.

W. J. Boland, for plaintiffs.

MEREDITH, J.A.:—This appeal has been argued at great length, not only upon the question of practice involved in it, but upon the merits of the whole case, notwithstanding the fact that there is plainly no right of appeal in any respect; the order in question in no respect affecting the ultimate rights of the parties, but only the mode of procedure to enforce them.

The single question involved is, whether the defendants should be allowed to counterclaim in the action to any greater extent than enough to answer the plaintiffs' claim against them; it is purely a question of procedure; substantial rights are not, and cannot be, precluded by it. It is true that the reasons given by the Divisional Court for dismissing the appeal from the order made at Chambers, limiting the extent of the counterclaim, deal with the question of the nature and validity of the claims against the parties added by the counterclaim. But its order, not the reasons given for it, prevail; the parties are estopped only in so far as the order which it affirms estops them. Conclusions may be right, though based upon erroneous reasons. The Divisional Court did nothing, and meant to do nothing, but dismiss the appeal to them, whatever they may have said, and whether that was right or wrong: they did not intend to prevent litigation, by the usual methods, between the parties, upon the substantial questions in dispute between them.

The order in question, whether it does, or does not, lead to the most convenient way of dealing with the substantial questions intended to be raised by the counterclaim against Craig and Edwards, in no manner affects such substantial rights; such questions may be litigated in another action, or

in any other manner in which it is competent in the parties to litigate them; and no substantial wrong or injustice is done in leaving them to be so litigated.

Mr. Boland's argument covered the whole ground without a superfluous word, a thing as helpful as it is refreshing in these days of interminable words.

I would dismiss the appeal.

MOSS, C.J.O. (for reasons stated in writing), and OSLER, GARROW, and MACLAREN, JJ.A., agreed that the appeal should be dismissed, and it was dismissed with costs.

JANUARY 19TH, 1909.

C.A.

DURANT v. CANADIAN PACIFIC R. W. CO.

Railway — Injury to Brakesman—Railway Act, sec. 264—Breach of Statutory Duty—Condition of Brakes—Cause of Injury—Liability at Common Law—Negligence of Fellow-servant—Workmen's Compensation Act—Damages.

Appeal by defendants from judgment of MACMAHON, J., 12 O. W. R. 294, sub nom. Darrant v. Canadian Pacific R. W. Co., in favour of plaintiff in an action for damages for negligence, tried without a jury at Perth.

The plaintiff, a young man, was in defendants' employment on their railway as a brakesman, and, while so employed, was on 18th November, 1907, so injured in attempting to couple cars that he lost his left arm below the elbow, for which injury the trial Judge awarded him $4,500 as damages.

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

I. F. Hellmuth, K.C., for defendants.

G. F. Henderson, K.C., and H. A. Lavell, Smith's Falls, for plaintiff.

OSLER, J.A.:—I agree with the judgment of my brother MacMahon, with some reservation as to the amount of damages awarded by him.

I do not think that the plaintiff's right to recover depends upon the Workmen's Compensation Act, following upon the proved negligence of his fellow-servant, the engineer in charge of the engine and tender. No doubt, he was grossly negligent, and, apart from the provisions of the Railway Act, R. S. C. 1906 ch. 37, sec. 264, there would be a right of action under the former Act to recover damages up to the amount thereby limited. But, in my opinion, the plaintiff has proved a right of action based upon a breach of the statutory duty imposed by the Railway Act, sec. 264, to provide and cause to be used on all trains modern and efficient apparatus, appliances, and means to securely couple and connect the cars composing the train and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars.

The plaintiff was engaged or about to engage in the operation of coupling the engine and tender of a train to an oil tank car. There should have been an efficient automatic coupler on the tender and on the tank car or on one of them. Both of those which were attached were unworkable by the levers by which they should have been capable of being operated so as to make the automatic coupling, for there was no chain on the tank car connecting the lever with the coupling pin, and the rivet itself was rusted in its place, while the lever on the tender was, as the plaintiff expressed it, all twisted up, and the chain from the lever to the coupling pin was, I suppose because of that, too short to allow the pin to drop into its place. The coupling, in these circumstances, could only be effected by hand, and for that purpose the plaintiff went to the coupler on the tank car to knock out the rusted pin, having first ordered the engineer to draw away the engine and tender for a short distance. While he was working at the pin, the engineer negligently backed down again, and the plaintiff was caught between the tender and the car. I cannot agree that the case is one in which it ought to be held, upon the evidence, that the plaintiff was engaged in anything like a work of repair upon the coupler, as in the case of Course v. New York, Lake Erie, and Western R. R. Co., 2 N. Y. Suppl. 312. Nothing that he was doing was intended to make it, or could make it, an efficient automatic coupler, as, wanting a chain connecting the lever with the pin, it could not be worked from the

side of the car, or couple automatically. After loosing the pin, it could be dropped in for the purpose of coupling in the old and dangerous way, namely, by the plaintiff getting between the car and the tender to place it in position, and this is what he was engaged in doing.

The danger always was, that, carelessly or otherwise, the engineer might back down his engine against the cars before the brakesman could get out from between them, after placing the pin in position, and that is what happened here. It was by reason of the coupling apparatus not being efficient that the necessity arose for the adoption by the plaintiff of the dangerous method of coupling which the Act intended to do away with, and the statutory liability which follows from the defendants' breach of duty in this respect is not minimised or altered by the fact that it was the negligence of the engineer which caused the unexpected impact between the tender and the car, where, but for the defendants' breach of duty, the plaintiff need not have been: Voelker v. Chicago, Milwaukee, and St. Paul R. R. Co., 116 Fed. Repr. 867.

I have read the case of Brinscombe v. Missouri Pacific R. R. Co., 93 Pac. Repr. 631, 50 Am. & Eng. Ry. Cas. N. S. 441, cited by Mr. Hellmuth, but, considering the difference between the Act there in question and our own, I cannot regard it as laying down a principle which should govern the construction of the latter. Compare sec. 288, relating to the duty of packing frogs, and for the right of action see sec. 427.

If the result of the appeal depended upon my judgment, I should be disposed to reduce the damages, the case having been tried without a jury, to $3,000, the amount the plaintiff was willing to accept before action, on the ground, with all respect to my learned brother, that they are, under all the circumstances, excessive. They are certainly unreasonably large, even for so serious an injury as the plaintiff has suffered.

GARROW, J.A. (after stating the facts):—I do not see how a recovery as at common law can be sustained. The coupling may have been as defective as described, but the defect would, so far as appears, have been quite harmless if plaintiff's fellow-servant, the engineer, had not negligently backed down upon him in the manner described.

The plaintiff was not in fact engaged in making the coupling when injured, but in getting ready to make it, which he would probably have done from a place of safety at the side, although that is, of course, inference only. But, whatever his ultimate intention was, it is quite clear that the proximate cause of his injury was the engineer's carelessness, and not the defective coupling.

For this the plaintiff is not without remedy, but the recovery must, in my opinion, clearly be under the statute, and not at common law. See R. S. O. 1897 ch. 160, sec. 3, sub-sec. 5. And the amount which he should recover should, therefore, be reduced to such a sum as he might recover under that statute. Under the statute the minimum is $1,500 or 3 years' wages. His wages, as the evidence shews, were about $75 per month, or $900 per annum. And, adopting the latter as the basis, that would give a total of $2,700, for which I think he should have judgment, upon which, of course, the sum paid into Court will be applied. He should also have his costs of the action, but of the appeal there should be no costs to either side.

Moss, C.J.O., agreed with GARROW, J.A., stating reasons in writing.

MACLAREN and MEREDITH, JJ.A., also agreed with GARROW, J.A.

JANUARY 19TH, 1909.

C.A.

PIRIE AND STONE v. PARRY SOUND LUMBER CO.

Highway—Closing up—Conveyance of Part of Road Allowance—Title to Land—Statute of Limitations—Appurtenance—Former Action—Res Adjudicata—Estoppel—Deed—Municipal Corporation — By-law — Ejectment — Declaration of Title.

Appeal by plaintiffs from judgment of RIDDELL, J., 11 O. W. R. 11, dismissing an action of ejectment.

F. E. Hodgins, K.C., and C. E. Hewson, K.C., for plaintiffs.

L. G. McCarthy, K.C., and Frank McCarthy, for defendants.

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

MEREDITH, J. A.:—There is, in my opinion, no good ground for the contention that the judgment in the Lafex case is binding upon the parties to this action. It is true that the plaintiffs are now the owners of the land Lafex then owned, adjacent to the land in question in this action, but the judgment in that case in no sense depended upon or was connected with Lafex's land. The action was brought by the defendants in this action against Lafex, for trespass to the land in question, and failed because they failed to prove title to such land; the Divisional Court found that the land originally was a highway, and that the evidence was not sufficient to prove that it ever ceased to be a highway. It is quite clear that the success of Lafex in that action was not in any sense dependent upon his ownership of the adjacent land, or any other land, but must have followed had he not owned any land. How then can the plaintiffs merely as owners of such adjacent land, now claim any rights under the judgment?

Apart from the question whether the council of the municipality in question was one of those councils upon which power to convey original road allowances was conferred, the root of this case is one of fact, and I can find no good reason for differing from the trial Judge regarding any of the material facts which he has found.

The case is eminently one for the application of the rule omnia rite acta præsumuntur. For very many years the action of the municipality in closing an impracticable road allowance has been acted upon. To rip up the whole matter now would be to unsettle titles and occupations all along that part of the Sequin river and Mill lake, and to disturb the whole long-settled state of affairs based upon the action of the municipal council, duly evidenced in the by-law and deed in question. A mere glance at the maps filed will partly indicate the extraordinary results that would logically flow from giving effect to the plaintiffs' claim in this action, which directly affects only an infinitesimal part of the closed part of the road allowance. It is unquestionable that Beatty laid out, and opened, many highways upon his lands abutting on the road allowance in question; highways which made this road allowance unnecessary, even if it ever could have been made a practicable road.

Upon the question of law, I find no difficulty in considering that the provisions of sec. 426 of the Act of 1873 were applicable to the council of the municipality in question at the time when the by-law and deed in question were passed and made.

There is no sort of doubt that the land in question in this action is part of that land which was intended to be conveyed, under such legislation, by the council to Beatty; and I think the by-law and deed sufficiently describe it.

For the purposes of this action it was not necessary for the defendants to prove any title in them to the land in question. The plaintiffs could succeed only upon the strength of their title, not on any weakness, if any there were, in the defendants' title. There was no counterclaim.

I would dismiss the appeal.

JANUARY 19TH, 1909.

C.A.

SUTHERLAND v. GRAND TRUNK R. W. CO.

Railway—Carriage of Horses — Liability for Loss—Negligence — Damages — Contract Limiting Liability—Approval of Board of Railway Commissioners — Specific Contract — General Approval of Class — Railway Act, R. S. C. 1906 ch. 37, secs. 284, 340.

Appeal by plaintiff from judgment of FALCONBRIDGE, C. J., in favour of plaintiff, but for the recovery of $1,200 only. The plaintiff's claim was for $16,000 for the loss of horses shipped by plaintiff, in a collision on the defendants' line of railway at Trenton, by reason of defendants' negligence, as alleged. The plaintiff sought to increase the amount awarded.

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

E. D. Armour, K.C., and J. H. Campbell, St. Catharines, for plaintiff.

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

OSLER, J.A.:—The contract under which the plaintiff's horses were delivered to the New York, New Haven, and Hartford Railway Company, was a through contract, executed by the parties, for the carriage of a car-load of horses from Brockton, Mass., to Grimsby, Ontario, over that company's line and the lines of connecting carriers to the place of delivery.

By this contract the plaintiff declared and agreed that the horses had been received by the carrier for itself and on behalf of connecting carriers for transportation, subject to the official tariffs, classifications, and rules of the company, and upon certain expressed terms and conditions which were admitted and accepted by the shipper as just and reasonable. One of such terms was that the shipper or consignee was to pay freight to the carrier at the rate of which was the last published tariff rate, based upon the express condition that the carrier assumed liability on the said live stock, sc., horses, to the extent only of the agreed valuation, upon which valuation was based the rate charged for the transportation, and beyond which valuation neither the carrier nor any connecting carrier should be liable in any event, whether the loss or damage occurred through the negligence of the carrier or connecting carrier or their employees or otherwise. In respect of horses the valuation was not to exceed $100 on each animal, and in no event was the carrier's liability to exceed $1,200 upon any car-load.

By the contract the plaintiff declared that he had the option of shipping the horses at a higher rate of freight according to the official tariffs, &c., of the carrier and connecting carriers, but had voluntarily decided to ship them under the contract at the reduced rate of freight first mentioned.

For the loss of a car-load of horses destroyed during their carriage in a collision caused by the admitted negligence of the defendants, one of the connecting carriers, this action was brought. The defendants pleaded the contract as exempting them from liability beyond the stipulated sum. The value of the horses was found to be $16,000, but the learned trial Judge held that the plaintiff was bound by the terms of his "very solemn contract," and that he could recover no more than $1,200, for which sum he gave judgment. The plaintiff appeals, contending that the condition is not binding upon him.

According to the principles laid down in Hall v. North Eastern R. W. Co., L. R. 10 Q. B. 437, applied and acted upon in this Court in Bicknell v. Grand Trunk R. W. Co., 26 A. R. 431, where the authorities on the subject are cited, the defendants, as connecting carriers, are, speaking generally, entitled to rely upon the terms and conditions of the contract made with the first carrier, under which the property in question was delivered and received for through transportation and carriage.

In Robertson v. Grand Trunk R. W. Co., 21 A. R. 204, 24 S. C. R. 611, sec. 246 (3) of the Railway Act of 1888, 51 Vict. (D.), was considered. That section provided that every person aggrieved by any neglect in the premises, i.e., neglect in the carriage and transporting of goods received for carriage, should have an action therefor against the company, from which action the company should not be relieved by any notice, condition, or declaration, if the damage arose from any negligence or omission of the company or its servants. It was held that this claim did not prevent a railway company from entering into a special contract for the carriage of goods limiting its liability as to the amount of damages to be recovered for loss of or injury to such goods arising from negligence.

"The distinction made was between the contract for exemption from all liability and one fixing or limiting the amount of damages beyond which no claim could be made or recovered in any case whatever, including cases of negligence:" per Maclennan, J.A., in St. Mary's Creamery Co. v. Grand Trunk R. W. Co., 8 O. L. R. 1, 4, 3 O. W. R. 472. In that case, as in Vogel v. Grand Trunk R. W. Co., 10 A. R. 162, 11 S. C. R. 612, the contract was held to be one for complete exemption from liability, and was consequently invalidated by the express language of the section.

Unless, therefore, the provisions of more recent legislation make a difference, Robertson's case is an authority in favour of the defendants, and the plaintiff cannot recover more than the agreed value of the goods.

The Railway Act of 1903 is now consolidated in R. S. C. 1906 ch. 37, which was in force when the contract now in question was made.

"Company" means a railway company; "traffic" means the traffic of passengers, goods, and rolling stock: sec. 2 (4a) and (31). And the Act applies (subject as therein provided) to all persons, companies, and railways, other than

government railways, within the legislative authority of Parliament: sec. 5.

Section 284, under the heading "Accommodation for Traffic," enacts that the company shall, according to its powers, (a) furnish at the place of starting, and at the junction of the railway with other railways, an adequate and suitable accommodation for the receiving and loading of all traffic offered for carrriage upon the railway; (c) without delay and with due care and diligence receive, carry, and deliver all such traffic.

Sub-section 7: Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage arises from any negligence or omission of the company or its servants.

This clause is substantially the same as sec. 246 (3) of the Act of 1888, and, except in so far as it is controlled or qualified by the words "subject to this Act," it must, following the Robertson case, be held that if it does not prevent the shipper and the company from contracting for a limited liability, even in the case of negligence on the part of the latter, if nothing is to be elsewhere found in the Act restricting their power to do so.

The plaintiff relies on sec. 340 as the qualifying clause, and contends that, notwithstanding the contract, the defendants are liable for the full value of the horses, because the contract has not been approved by the Board of Railway Commissioners. This section enacts that no contract, condition, by-law, regulation, or notice made or given by the company, impairing, restricting, or limiting its liability in respect of the carriage of any traffic, shall, except as hereafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration, or notice shall have been first authorised or approved by order or regulation of the Board.

2. The Board may in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted, or limited.

3. The Board may, by regulation, prescribe the terms and conditions under which any traffic may be carried by the company.

The provisions of this section must be read with those of sub-sec. 7 of sec. 284. It is the section or one of the sections to which the latter section is made subject. Section 340 was the only section expressly referred to on the argument, but I cannot assume that the other was overlooked, as the case was argued as if, subject to sec. 340 (sec. 275 of the Railway Act of 1903), the law remained as had been decided in the Robertson case, which was cited by the respondents, in which the power to restrict, impair, or limit the liability as regarded the amount of damages recovered, even in cases of negligence, was affirmed. We must take it that Parliament was aware that this had been so held, notwithstanding the provisions of sec. 246 of the Railway Act of 1888, and that they intended by sec. 340 of the present Act to qualify the rights of the shipper and the railway company in this respect, and to declare that, unless authorised by the Board of Railway Commissioners, no contract, condition, declaration, or notice, &c., limiting liability, should be valid, but that if and to the extent to which such a class of contract was affirmed by the Board, it should stand good.

Whether sec. 340 confers upon the Board power to authorise the railway company to adopt a form of contract exempting them from liability in cases of negligence, it is not necessary to decide. It does not in terms purport to do so, and it may stand quite consistently with the earlier section, the predecessor of which had already in Robertson's case, where the conditions of the contract were in the same terms as those in the present case, and where the loss had occurred through negligence, been construed as not disabling the company from contracting for the limitation of the amount of damages recoverable in such a case. Section 340 now prevents them from doing that, unless the Board has authorised such a class of contract.

The words "subject to this Act" in sec. 284 (7) must have some meaning given to them, if possible, and the only section of the Act to which they naturally relate is sec. 340. That section does not purport to empower the Board to authorise a contract which absolutely relieves the company from liability in the case of negligence. It provides only that no contract, &c., impairing, restricting, or limiting liability shall relieve them, unless such class of contract has been authorised or approved by the Board, and the question

is whether the contract on which the defendants rely is valid under the section.

I am of opinion that it is.

On 17th October, 1904, on the application of the defendants and of other Canadian railway companies for the approval of their form of bills of lading and other traffic forms, the Board made an order, in pursuance of sec. 275 of the Railway Act of 1903, now sec. 340 of the revised Act, permitting the applicants to continue the use of their present forms until the Board should otherwise order. One of the forms approved is a form of "live stock special contract," which contains a clause by which a shipper accepting a lower specified rate of transportation charges, agrees that the company's liability for loss or damage to individual animals, or for a car-load, shall in no case exceed certain specified sums of the same amount as those mentioned in the contract now in question. In effect the restriction clause in the contract, although differently expressed, is the same as that of the form authorised by the Board. In some other respects there are differences between them, which, however, in the view I take of the meaning of the section, are not important. I construe the words "unless such class of contract, &c., is authorised or approved by the Board," as meaning, unless the Board authorises or approves—not necessarily of the whole terms of any particular contract of carriage—but of the general use of a contract containing a provision restricting or limiting the company's liability; in other words, unless the Board approves of the principle of a contract of that class or kind.

This the Board has certainly done by its order of 17th October, 1904, and, if sec. 340 applies to the case of a contract made with a foreign railway company, involving the carriage of traffic by means of the connecting lines of different companies to a point in Canada, the class of contract into which the plaintiff entered has been approved, and the condition is binding. But, as the authority of the Board extends only to persons, companies, and railways within the authority of Parliament, it may, perhaps, be doubted whether the section extends to a contract with a foreign railway company under which traffic is carried into or through this country by means of another and connecting railway. Section 336 provides, inter alia, that, as respects all traffic which shall be carried from any point in a foreign country into Canada by any continuous route owned or operated

by by any two or more companies, whether Canadian or foreign, a joint tariff for such continuous route shall be filed with the Board, but nothing that I see in the Act contemplates a new contract being entered into between the consignee and the Canadian railway company which receives the goods from the foreign railway company for the purpose of carrying them on to their place of destination here. Indeed, sec. 337, which provides for the carriage being continuous to that place from the place of shipment, looks the other way. However, upon this point I express no final opinion.

Whether, therefore, sec. 340 applies or not to such a case as the present, the action must fail. If it does apply, the class of contract limiting liability under which the goods were carried has been approved. If it does not, the plaintiff has executed such a contract, and ex proprio vigore is bound by its terms. I note sec. 306 (4) merely to shew that it has not been overlooked. It seems to refer to proceedings under such Acts as the Fatal Accidents Act or the Workmen's Compensation Act or other provincial laws.

I refer also to Hayward v. Canadian Northern R. W. Co. (Man.), 4 W. L. R. 299; Mercer v. Canadian Pacific R. W. Co., 12 O. W. R. 1212; Sheppard v. Canadian Pacific R. W. Co., 16 O. L. R. 259, 11 O. W. R. 697; Booth v. Canadian Pacific R. W. Co., 5 Can. Ry. Cas. 389, 7 O. W. R. 593; Costello v. Grand Trunk R W. Co., 7 O. W. R. 846, where secs. 284 (7) and 340 were considered.

Appeal dismissed with costs.

MACLAREN and MEREDITH, JJ.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., and GARROW, J.A., also concurred.

JANUARY 19TH, 1909.

C.A.

WATSON v. TOWN OF KINCARDINE.

Highway—Dedication—Survey—Plan—Evidence — Title — Onus—Statutes — Lien for Improvements — Municipal Corporation—Rights of Public

Appeal by plaintiff from judgment of MABEE, J., who tried the action without a jury, dismissing it with costs: 11 O. W. R. 669.

The plaintiff, as the holder of two instruments of conveyance dated 1st April and 5th June, 1907, respectively, and purporting to be executed by the heirs and executors of the will of the late William Sutton, claimed a declaration that certain portions of farm lots 12 and 13 in concession A. in the township of Kincardine, lying to the west of a street now in the town of Kincardine, called Saugeen street, were the plaintiff's property, and that a certain by-law passed by defendants on 7th June, 1907, and numbered 524, was illegal and void. Plaintiff further claimed that the by-laws should be set aside or quashed and the defendants be restrained from trespassing upon the lands, and ordered to pay damages for trespasses already committed.

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

E. D. Armour, K.C., and D. Robertson, K.C., for plaintiff.

J. H. Moss, K.C., and W. C. Loscombe, Kincardine, for defendants.

MOSS, C.J.O.:—By an Act of the legislature, 7 Edw. VII. ch. 72, which was assented to and came into operation on 20th April, 1907, after reciting the petition of the municipal corporation of the town of Kincardine, setting forth, amongst other things, that the owners of a large tract of land adjoining on the north the original town plot of the town of Kincardine, divided the same into town lots, streets, and highways, and registered their plans of said subdivisions, the lands so subdivided being known as Williamsburgh, and that afterwards the whole of the lands known as Williamsburgh were incorporated in the town of Kincardine, and became part thereof; and that ever since the registration of the plans a certain street designated thereon as Saugeen street and running north from the north limit of the original town plot of the town of Kincardine to the north limit of the part formerly known as Williamsburgh, and having for its westerly boundary that part of the east shore of Lake Huron immediately in front of the said lands known as Williamsburgh, had been used as a public street or highway, and that during the last 50 years the said street had, by reason of the gradual receding of the waters of Lake Huron, been greatly increased in width, and had now a width greatly in excess of what was needed as a public highway, and that the corporation had, since the addition of the street, laid out and ex-

pended large sums of money in improving and beautifying the said street or strand, and now seek control of all that part of the said street, highway, or strand which is in excess of 66 feet, so that they might lease the same for the purposes authorised by the Act, it was, amongst other things, enacted that the council of the town of Kincardine might from time to time by by-law provide for leasing, upon such terms and conditions as to the council might seem reasonable, for a term or terms of years, to any person or persons, all or any portion or portions of that part of Saugeen street north of Durham street and running north along the lake shore to the north limit of the town, for the purpose of erecting thereon summer cottages or houses, or of beautifying and improving the same. The Act also provides for maintaining the width of Saugeen street at not less than 66 feet at the narrowest point, and for access to the shore of the lake. Finally there is a proviso to the effect that nothing therein contained is to be held or construed to affect the right of the corporation to bring any action against any person, or of any person to bring any action against the corporation or its assigns, lessee, or lessees.

The by-law now attacked was passed by the defendants' council in pursuance of the Act, setting apart and dividing into lots a portion of the land referred to in the Act, and this action followed.

Whatever may be the full significance of the last proviso of the Act, it cannot reasonably be supposed that it was the intention of the legislature to encourage actions to be brought by the assignees of pretended rights, more especially when the assignment was procured after the Act came into force, which is the case with regard to the conveyance of the 5th June, 1907, under which the plaintiff claims in respect of that part of the land described as being composed of lots lettered from A. to W. inclusive on the west side of Saugeen street. Indeed the evidence strongly suggests as to both conveyances that they were procured for the purpose of enabling the plaintiff to institute an action which the parties having the interest, if any exists, will not prosecute for themselves. It can scarcely be supposed that the legislature intended to countenance litigation of that sort or to preserve rights of such a character.

But, however that may be, I am of opinion that the trial Judge's conclusion ought to be affirmed.

There was much argument as to the rights and powers of a municipal corporation to accept a dedication of a street or highway of a greater width than 90 feet, and as to the property in accretions to the lake shore whereby the width of Saugeen street was increased beyond 90 feet. It is to be borne in mind, however, that what is in dispute here is not the highway. The plaintiff concedes that the defendants are entitled to a street 66 feet in width to the west of the front tier of lots shewn on the plan of Williamsburgh town plot. He also concedes that the defendants are entitled to a strip of land now lying to the west of that street and known as "The Lovers' Walk," while rather inconsistently putting forth a claim to an intervening space. What is really in dispute is the portion of the strand or shore of the lake now existing to the west of the western line of the portion called the "Lovers' Walk," so far as it extends, and beyond that of the western line of the 66-feet wide highway.

Two questions arise: first, whether William Sutton's title ever extended beyond the last line of the street shewn on the plan of Williamsburgh town plot, to which he was a party, and second, if it did, whether he did not dedicate all beyond that line to the use of the public.

It is to be remembered that at the time when the plan was prepared and registered, in 1856, the lands lay in the township of Kincardine. They did not form part of the village or town of Kincardine, and there was no independent incorporation—there was no municipality of Williamsburgh. William Sutton's land had been granted to him by the Crown by a general description, viz., 213 acres, be the same more or less, being composed of lots Nos. 12 and 13 in concession A., in the township of Kincardine.

The plan of the town plot of Williamsburgh was prepared by John Denison, provincial surveyor, and bears all the proper certificates required by the law then governing the filing of such plans, and was recorded in the registry office of the county of Huron and Bruce on 29th August, 1856. It was, doubtless, prepared with reference to the plan of survey of the township. A small copy of that plan produced from the registry office shews two parallel lines in front of the township bordering on the lake. It is not marked as a road, but neither are the roads between the concessions.. The field notes were not produced. But, so far as the matter in question in this action is concerned, it appears to be concluded by the certificates and

declarations appearing upon the registered plan of the Williamsburgh town plot. In the first place, there is the statement by John Denison, the surveyor, as to the location and laying out of the plot, the width of streets, etc. Among other statements is the following: "Saugeen street is the allowance for road in front of concession A."—referring, no doubt, to the allowance for road shewn on the plan of the original survey. The plan shews the town lots in concession A. as terminating at the east side of Saugeen street, and the west side as bordering on the lake shore. Then there is Mr. Denison's certificate as follows: "I hereby certify that the above map or plan of Williamsburgh town plot, with the lots and blocks, streets, roads, and lanes, contents, lines, and distances marked and laid down thereon, is correct and in accordance with the survey and location thereof." And, finally, there is a certificate signed by William Sutton and the other proprietors as follows: "We, the undersigned proprietors of Williamsburgh town plot, certify that the above map or plan thereof is correct and in accordance with the survey and location thereof." There is evidence of some fences on the east side of what the plan shews as Saugeen street, and of a travelled roadway along the lake shore, before the making of the plan. There is no evidence that William Sutton, before the making of the plan, or at any time, ever asserted a right to anything to the west of the east line of Saugeen street, as shewn on the plan. The plaintiff has failed to shew title in William Sutton to any part of the land to the west, and on this ground his action should fail.

But, if it be assumed that the Crown grant to William Sutton gave him title to the water's edge of Lake Huron, there is ample evidence of intention on his part to dedicate and an actual dedication by him to the public for the use and enjoyment thereof by the inhabitants of Williamsburgh, though that was not at the time an incorporated municipality.

In Washburn on Easements, ch. 1, sec. 5, para. 19, it is said that there may be a dedication to the use of a town before it shall actually have been incorporated, or it may be to the public—a body not capable of taking a grant—the only limit being that what is indicated is suited to the wants of the community at large. This statement is well supported by decisions in the Courts of the United States, and, among others, the case of New Orleans v. United States (1836), 10 Peters 661, in which similar questions were very elaborately

argued and fully considered by the Supreme Court, may be referred to. The judgment of the Court, which was delivered by McLean, J., dealt with the subject, amongst others, of the law of dedication to the public use, and he observed (p. 713): "The importance of this principle may not always be appreciated, but we are in a great degree dependent upon it for our highways, the streets of our cities and towns, and the grounds appropriated as places of amusement or of public business which are found in all our towns, and especially in our populous cities. It is not essential that this right of use should be vested in a corporate body; it may exist in the public, and have no other limitation than the wants of the community at large." See also Trustees M. E. Church, Hoboken, v. Council of Hoboken (1868), 33 N. J. (Law) 13.

The whole circumstances of this case, as shewn in the evidence, demonstrate a clear intention to leave the front of Williamsburgh open, and there were acts of user and enjoyment by the public from the earliest days of the settlement. There never was the slightest assumption of property or right over it by William Sutton from the date of the filing of the plan to the time of his death, over 40 years afterwards, although it is altogether likely that he was aware of the use that was being made of it during a considerable portion of that period. If it was his intention to dedicate, it seems plain that he did intend to and did dedicate it in such manner as to now preclude his heirs or any one claiming under him from revoking it: Guelph v. Canada Co. (1854), 4 Gr. 632. Any person inspecting the place without knowing anything of the title would almost certainly be led to the conclusion, from the way in which Saugeen street is shewn thereon, that the intention was to leave the front open. That impression would be strengthened by the fact that, while there were fences on the east side, there never were any on the water's edge side, and that the public traversed the strand at their will. Even the defendant corporation might not have been able to deprive the public of their rights without the aid of the legislature, which they obtained through the Act 7 Edw. VII. ch. 72—but it is not necessary further to discuss this question.

The plaintiff's case fails, and this appeal should be dismissed.

OSLER, J.A.:—I agree in dismissing the appeal.

MEREDITH, J.A., also agreed, for reasons stated in writing.

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

BOYD, C. JANUARY 19TH, 1909.

TRIAL.

CONIAGAS MINES LIMITED v. TOWN OF COBALT.

CONIAGAS MINES LIMITED v. JACOBSON.

Mines and Minerals—Patentees of Mining Rights—Owners of Surface Rights—Roadway from Mines—Right of User—Right to Search for Minerals—Town Site—Streets and Lots—Plan—Survey—Dedication—Sale of Town Lots—Discovery of Minerals—Order in Council—Statutes—Substituted Way—Priority of Claim—Declaration of Rights—Injunction.

Actions for declarations of the plaintiffs' mining rights in respect of streets and lots forming part of the town site of Cobalt, and for injunctions restraining the defendants from interfering with their rights.

H. H. Collier, K.C., for plaintiffs.

E. D. Armour, K.C., for defendants.

BOYD, C.:—The contention in these cases is between the plaintiffs as patentees of mining rights and the defendants as owners of certain lots and streets in the town site of Cobalt. The plaintiffs are the owners of mining rights over the locality wherein the defendants have surface rights, and the present dispute is of chronic character, going back to the time while yet the whole estate was in the hands of the Crown represented by the Ontario government. I have read and considered all the evidence, and the mass of documentary exhibits put in, and, while much of it is not without significance in the narration of events, and as to the situation of the parties, yet, it appears to me, the case falls to be decided upon the legal rights and incidents of the parties under their respective documents of title.

There are two matters presented for decision: (1) as to the right of the plaintiffs to use the roadway from their now worked mines; and (2) as to the right to search for minerals; such user and search affecting the town site lots and streets of the defendants in both actions.

The plaintiffs' definitive title to the mining location J. B. 6 in the township of Coleman was first acquired under the Crown patent dated 9th December, 1905, implementing the record of their mining claim made on 15th June, 1905. The status of the individual defendants arises under titles made to purchasers at the public sale of town site lots made on 18th August, 1905, which was registered under the Land Titles Act on 17th and 29th March, 1906. The defendants the town corporation of Cobalt hold the highways and streets under dedication from the Crown manifested on the plan of the town site made by Mr. Clarke, Ontario land surveyor, dated 28th September, 1905, and carried out by order in council of 19th January, 1906, vesting the whole site in the Temiskaming and Northern Ontario Railway Commission. It was under this that title was made to the purchaser of the lots in question.

The sale of the town lots was only of the surface rights, and the purchasers well knew of the mining rights of the plaintiffs over the town site of Cobalt dealt with at the sale. And the Railway Commission took under the vesting order with reservation of the mines and minerals and mining rights over the location J. B. 6 owned by the plaintiffs.

The plaintiffs' rights originated through the claim of discovery by one Trethewey on 24th May, 1904, almost contemporaneously with the direction given by the government to Mr. Surveyor Blair to make a survey of the township of Coleman (which was on 16th May, 1904), then being waste and ungranted lands of the Crown. There was a dispute touching this claim between Trethewey and McGonigle, which was not disposed of in Trethewey's favour till 18th May, 1905. Meanwhile, in June, 1904, the committee appointed by the government to advise as to the location of town sites in the newly surveyed township through which the Temiskaming and Northern Ontario Railway ran, reported in favour of a town site of 160 acres being set apart and established on Loney Lake—the place now known as the town of Cobalt, and the very locality now under consideration. This report, made on 27th June, 1904, was followed by its adoption and instructions being issued to Mr. Blair to survey the town site, a plan of which was enclosed. On 22nd July, 1904, Mr. Trethewey was advised by the department that his claim as to the 40 acres lay within the town site of Cobalt; that, though the town site covered the surface rights only, the department was not in a position to deal with the min-

ing rights in the town site "until some arrangement has been formulated." Unfortunately, no such arrangement for the adjustment . . of the . . apparently conflicting rights was ever formulated—hence these actions. I need not follow up further the details. Suffice it to say that the attention of the government was called to this township by the opening of the railway through it and the discoveries of valuable minerals which led in succession to its survey, and the location of town sites at various points likely to be of importance in the development and settlement of the country. It would seem obvious, whatever the order of dates may be as between Trethewey and the plaintiffs claiming under him, on the one hand, and the government, on the other, that the inception and progress of the mining claim, before it matured into a valid and recognised right, should be subject to any modifications which result from the general policy of the government touching the establishment of town sites and laying out of streets in the public interest in this township of Coleman. Therefore, while one may regret the fact that the mutual rights of the surface owners and the mining patentees upon the same territory were not defined and declared by the government, while yet the absolute control and ownership was in its hands, there is no ground for suggesting, as appears in some of the papers, that there was any unfair dealing in letting the outcome be shaped as it now appears. The plaintiffs could not secure the particular form of conveyance they desired for themselves or for the purchasers, but took what they could get, apparently with the impression that if the title was first made to them in accordance with the priority attaching to the discovery made in May, 1904, they would in some measure be bettered. This was done, and the patent to the plaintiffs is first issued and then the conveyance to the defendants, which is made subject to the mining rights of the plaintiffs. That is the situation I have to deal with.

An objection was made to the order in council vesting the lands being ultra vires. This rests on the proposition that the term used in the enabling statute 4 Edw. VII. ch. 7, sec. 3 (O.), giving power to transfer to the Commission "ungranted lands" is not apt as to town sites dealt with. There is no definition referred to as to what is meant by "ungranted lands," but I cannot doubt that it applied to any land or any estate in land which it was in the power of

the Crown to grant. The fact of the plaintiffs having mining rights in the land did not derogate from the power of the Crown to dispose of the surface rights—which is all the Crown purported to grant. I would not give effect to this objection.

The way is thus cleared to take up the first point in controversy, as to the right of passage claimed by the plaintiffs over the lots sold to the defendants. This way was formed for the purposes of mining prior to April, 1906, and after the New Year, by the removal of logs and stumps so as to form a partial clearing of irregular diagonal course across the town site, used by waggons and sleighs over the snow, and was defined upon the ground. It led from the Coniagas mine on the north-west, trending westerly and south to the outlet on what is now called Prospect avenue. It was used as being the easiest and most accessible course to be taken over a new, wild, rocky country, and is, doubtless, more convenient and less hilly than any alley or road laid out upon the town site which would give access to the mine then and now being worked. To block up this first way and restrict the plaintiffs to the use of the public dedicated way would involve some detriment to the plaintiffs, but letting it be as it is, carrying the travel over the lots purchased from the Commission and ultimately from the Crown, would involve still greater grievance to the lot-owners, and quite destroy the privacy of and the right to fence their holdings. The maintenance of this first road is not necessary to the enjoyment of the mine, and the ways of access substituted by the Crown are fairly available, and will every year become more and more improved with the growth and needs of the inhabitants. I cannot conclude from the circumstances of the case and the method of user that this road should be continued to the general detriment. So far as this phase of the action is concerned, I think the plaintiffs fail, and the injunction should be removed which forbade the lot-owners protecting their property by fences and other barriers. To refer briefly again to dates, the town site and lots and streets were defined upon the ground and in recorded plans before the irregular road was made by the plaintiffs. Mr. Clarke, Ontario land surveyor, made an authorised survey of the town site, marking lots and streets, in October, 1905, which was filed of record in the land office on 29th January, 1906, before the way in question was begun. This was done at the

instance of the Temiskaming and Northern Ontario Railway Commission with a view to the sale of the lots, because of the anxiety and urgency of people to settle in that place. On 19th January, 1906, an order in council vested the town site in the Commission, as delineated in plan made by Mr. Surveyor Clarke of 26th September, 1905, of record in the Department of Mines. And this order in council, recorded in the land titles office at North Bay on 29th January, 1906, is the registered basis of all the surface land titles and streets in the town site in question. The Clarke plan first recorded was in some particulars incorrect, and it was superseded by a subsequent plan of his, recorded 7th April, 1906. In both, the lots and streets are practically in the same place on the ground. Clarke is not called as a witness, but the evidence is, that he changed his plan and work before the sale of the lots in August, 1905, and the lots and streets were restaked accordingly at the time of the sale. This is the recollection of Mr. Smith, then the chairman of the Commission. The result is, that public streets dedicated by the Crown existed before the plaintiffs had made their own way across the town site. The evidence of the working conditions having been complied with by Trethewey gives the date of performance as between 1st July and 23rd September, 1905. As far as I can make out from the evidence and papers, all these dates are correct, and they demonstrate that the plaintiffs' work in making this road was all done after they were aware of the town site and the lots and streets being laid out. They afford additional reason for negativing the claim in derogation of the rights of the defendants and others of the inhabitants.

Next comes the question, of more substance and financial importance, regarding the enjoyment of the mining rights as affecting the street and lot-owners. First, as to the streets, I think the legislature has spoken by enactments which bind the plaintiffs. Earlier statutes as to the Temiskaming and Northern Ontario Railway are repealed and substituted provisions supplied by the Act of 1907, 7 Edw. VII. ch. 18, and in particular secs. 23 and 24. Before this statute, the rights of the mining owner would have to be exercised with due regard to the rights of the public interested in the streets over which the mining rights existed. The Crown is the custodian of the public rights, and may well legislate to define and regulate the way in which mining operations

shall be conducted on the highways. That is the purpose of the Act—regulating but in no wise extinguishing the rights of the plaintiffs. Section 20 of the Act of 1907 is in pari materia with sec. 3 of the Act of 1904, under which the town site of Cobalt became vested by order in council in the Railway Commission. I read sec. 23 and sec. 24 as applying to town sites existing at the date of the Act whereon and whereunder mining rights had been reserved. And there the obligation is cast upon the grantee of such rights to submit plans with specifications and details as provided by the enactment in order to obtain the approval of the engineer of the municipality to the proposed operations on the street. That, binding the plaintiffs, as I think, disentitles them to maintain their injunction against the town of Cobalt, for they have failed to take these preliminary steps before entering upon the roadway.

Different considerations arise as to the private lot-owners, for as to them there has been no regulation provided or agreed upon, and the dispute must turn upon the terms of the patent, which is prior to the title of the defendants, and subject to which they obtained their conveyances of the surface rights.

The grant to the plaintiffs' predecessors is of mining claim J. B. 6 in fee simple, and expressed as the mines, minerals, and mining rights on, upon, and under all that parcel of land, etc., etc., being 40 acres situate in the township of Coleman, within the limits of the town plot of Cobalt, as shewn on plan of survey by Ontario land surveyor W. J. Blair, dated 26th August, 1904—reserving 5 per cent. of the assays for roads and the right to lay out the same when the Crown or its officers may deem necessary. It may be noted that the patentee takes subject to the right of the Crown to lay out roads in the property granted. So that the patentee's rights are deemed subsidiary to those of the public, as regards roads over the property.

The prepositions used, "in, upon, and under," mark more than (as was argued) subterranean rights—"in and upon" would carry rights on the surface where minerals exist.

The patent issued under R. S. O. 1897 ch. 36, of which sec. 2 defines various important words, e.g., "mining" shall include any mode of working whereby the soil or earth may be disturbed, removed, . . . or otherwise dealt with for the purpose of obtaining any mineral therefrom, whether

the same may have been previously disturbed or not. "Mining rights" shall mean the ores, mines, and minerals on or under any land where the same are dealt with separately from the surface of the land. "Surface rights" shall mean lands granted for agricultural or other purposes and in respect of which the minerals thereupon or under the surface thereof are reserved by the Crown. This will, of course, extend to the case of patentees to whom the Crown has granted the mining rights.

By sec. 32 of the revised statute the first discoverer is entitled to a free grant of a location of 40 acres ($60 was paid for this location).

"Surface rights and mining rights" are dealt with in a group of sections, 41-43, but do not much help at present. Section 41 provides for the surface owner getting the ores and minerals unless a patent has been previously applied for by the first discoverer of valuable ore in or upon the premises, in which case he shall have the priority. The Crown appears to have acted on this principle in regard to the respective titles of the plaintiffs and defendants. Section 42 provides for surface rights having been granted, leased, or located, and a patent of mining rights shall thereafter be granted in respect of the same land, in which case compensation must be made for injury or damage to the surface rights, i.e., occasioned by the working of the mining rights. That section is invoked by the defendants, who claim compensation if the surface is disturbed by the plaintiffs—but it is to me very clear that the section does not apply, and I negative any such claim. It would only arise when the surface rights have first been granted and subsequently the mining rights. The reverse is the order as to these litigants. A like provision is in force in Nova Scotia, which was under consideration in Palgrave Gold Mining Co. v. McMillan, [1892] A. C. 460.

Section 43 casts negative light on the situation. It provides that no person shall have the right of entry as prospector or explorer upon the surface rights of that portion of any lot used as a garden, etc., or pleasure ground, or upon which crops that may be damaged by such entry are growing . . . or any dwelling-house, out-house, etc., unless with the written consent of the owner, etc., i.e., of the surface rights. It might be a fair inference from this that in the case of the prior patentee of mining rights, he would

have a right of cutting upon the surface rights of one who was subsequent in his acquisition of title thereto. Beyond those sections the statute is silent, and I have to proceed further for the ground of decision.

In British Columbia the mining law provides for the relative rights of the two classes of owners. Crown grants of all minerals underneath the land are there drawn so as to give the grantee certain easements over the surface, i.e., the right to the use and possession of the surface . . . for the purpose of winning and getting from and out of such claim the minerals contained therein, including all operations connected therewith or with the business of mining: In re Reliance Gold Mining Co., 13 B. C. R. 482 (1908).

In the United States the present situation is avoided under the existing state of the law, by which grants for town sites are not allowed upon or over minerals lands: 27 Cyc., p. 606, note 11; Defflebach v. Hawke, 115 U. S. 392.

The language of Lord Chelmsford is pertinent to the plaintiffs' patent. The minerals, he says, are a species of property which can be made profitable only by removal, and the grant therefore carries with it as a necessary incident a right to use all proper means for obtaining the minerals, but nothing further: Duke of Hamilton v. Graham, L. R. 2 Sc. App. 166, 171 (1876). And, pursuing the same thesis, in Ramsay v. Blair, 1 App. Cas. 703 (1876), the same Judge says: "Upon a grant or reservation of minerals, prima facie it must be presumed that the minerals are to be enjoyed, and therefore a power to get them must also be granted as a necessary incident. . . . The power to dig would, of course, be futile unless it involved the right of bringing to the surface."

On the same lines, and based on English authorities, has been laid down manfully the law in New York. I may cite a well-considered case of Marvin v. Brewster, 55 N. Y. 538 (1874), which holds that the right to mine carries a right to penetrate to the minerals through the surface for the purpose of digging out and removing them, and to do so in such manner as is convenient and advantageous to the owner of the right, so that the surface is not wholly destroyed. The right is to sink a shaft vertically or drive a way horizontally or to do both in different places, so as to reach and remove the minerals, with the restriction that what is done must be necessary for the reasonable use and enjoyment of the minerals.

The silver ore in this locality rests in vertical veins and not in horizontal strata, in many cases coming up to or close to the surface. The terms of the patent and the language of the Mining Act agree in giving the owner of the mines the property in the minerals which are upon, in, or under the surface. When the ore crops up through the soil, it forms part of the surface, and is covered by the patent as minerals. It is incident to the enjoyment of the patent that there be the right to enter upon the lots to search or prospect for minerals, and in so doing to uncover or discover them by the removal of the soil. This is, of course, a disturbance of the surface, but it is an incident or easement which necessarily appertains to the mining rights of the plaintiffs. There is, I take it, the power to get at the minerals either by open or by subterranean working: in one case the opening may need to be surrounded by fencing or other safeguard; and in the other to be supported by underpropping to maintain the surface in its natural state: In re Williams v. Groucott, 4 B. & S. 149; Locker Lampson v. Staveley Coal and Iron Co., 25 Times L. R. 136. There may be cases fraught with difficulty between these two extremes, where the surface is so thin over the vein that it is a mere skin of little or no value, or where it is not of sufficient depth or substance to admit of effective support. These cases it is not needful to deal with, and indeed each may have to be decided according to its special circumstances. The parties may find it to be to their mutual advantage to come to terms upon some fair workable system, remembering the suggestion that in a case of conflicting interests it is better to have a modus vivendi than to be in a continual attitude of qui vive.

I think the result of the cases is, that, whatever support of the surface is to be supplied, it is only in so far as regards that surface in its natural state, and the right of support does not extend to the burden of buildings or superstructures afterwards erected on the surface.

The plaintiffs are entitled to a declaration, in the words of the British Columbia law, that they are to have the use and possession of the surface for the purpose of mining and getting from and out of the lots over which the mining rights extend the minerals contained thereunder or therein, including all operations connected therewith or with the

business of mining; and the injunction granted is to this extent continued: see Hayles v. Pease, [1899] 1 Ch. 581.

Success being about equally divided, it is best not to give costs to either side.

CARTWRIGHT, MASTER. JANUARY 20TH, 1909.

CHAMBERS.

LESLIE v. McKEOWN.

Discovery—Physical Examination of Plaintiff—Rule 462—Refusal to Submit to Examination—Motion to Dismiss Action—No Provision for Report by Surgical Examiner—Right of Plaintiff to Insist on Report.

Motion by defendant to dismiss the action or postpone the trial for the refusal of the plaintiff to obey an order made under Rule 462 requiring plaintiff to submit to a physical examination by a surgeon.

J. T. White, for defendant.

N. F. Davidson, K.C., for plaintiff.

THE MASTER:—It was contended that defendant should have moved to commit the plaintiff as for contempt of Court in disobeying the order of 11th instant. I do not agree with this. This examination is in the nature of discovery, and is found in that division of the Rules. The motion is, therefore, regular and appropriate.

But the main ground was that the plaintiff was entitled to have the surgeon appointed under the order make a written report, and furnish a copy to plaintiff's solicitor. In this case the defendant did not require one, and the plaintiff's solicitor, who was present, declined to allow the examination to proceed otherwise. He contends that the order should have so provided. The order, however, did not contain any such direction. No doubt, it is usual to have one. I am not sure, however, that this can be insisted on as a term of the order. The point has never been raised, and I do not express any opinion on it. In Clouse v. Coleman, 16 P. R. 541, Osler, J.A., said (p. 542): "The medical examiner is not required to report the result of the examination

to the Court . . . nor does it seem to have been intended that any record should be made or kept of it."

In the present case the defendant's solicitors are quite willing that the examiner should tell the plaintiff's solicitor what his opinion is, after the inspection has been made. This, I think, is sufficient.

The plaintiff should attend again without further payment, but, as the point is new and the practice has been otherwise, the costs of the motion will be in the cause. The trial must be stayed meantime.

BRITTON, J. JANUARY 20TH, 1909.

WEEKLY COURT.

RE LESTER.

Life Insurance—Benefit Certificate — Allotment by Insured among Preferred Class—Variation by Will—Power to Provide that Allotment to Widow be in Lieu of Dower.

Motion by the widow of Richard Lester, deceased, for an order declaring the construction of the will of the deceased, and ascertaining and declaring the interest, if any, of the applicant in certain money paid into Court by the Independent Order of Foresters.

L. A. Smith, Ottawa, for the applicant and for Edith Brethour and Gertrude Holstrom.

H. P. Hill, Ottawa, for the executrix of Richard Lester.

BRITTON, J.:—Upon the argument the question for decision was narrowed to whether or not the applicant is entitled to one-fourth of the money in Court as an apportionment of the insurance money in the Independent Order of Foresters. The applicant contends that she is so entitled, and that she cannot be called upon to abandon her original claim or her right under the original certificate, or under the indorsement, as to one-quarter, because her deceased husband, whatever he has done as to three-fourths, has not varied the destination as to this one-fourth.

If the applicant takes the one-fourth as part of deceased's residuary estate, then she must take in lieu of dower, whereas, if she takes it as part of the money mentioned in the certificate, and as to which there has been a declaration and apportionment, then it will be quite independent of the residuary estate. It will not, in fact, be part of the residuary estate or of the estate of the deceased, and so it will be independent of any question of election by the widow. She can have this in addition to dower, if she elects to take dower in lieu of the benefit under the will, apart from the mere question of varying the apportionment of this money.

The money in question is one-quarter of $969.80. This is the money secured by a mortuary benefit certificate in the Independent Order of Foresters, for $1,000, dated 17th September, 1888, numbered 16339, in which the money was made payable to the "widow or orphans" of the deceased.

After the date of the certificate, the deceased in his lifetime, by indorsement, varied the certificate, making the sum payable to the widow alone.

The deceased made his will on 24th December, 1906, which contains the following: "All the rest, residue, and remainder of my property, of whatsoever nature, kind, or quality, and wheresoever situate, and whether in possession or expectancy, including my said lot 2 on the north side of Primrose avenue aforesaid, according to said plan, but subject to the said right of way, also including my life insurance policy in the Confederation Life Association for $1,000, dated the 3rd day of November, 1876, and numbered 4862, also including my life insurance policy in the Independent Order of Foresters for $1,000, dated the 17th December, 1888, and numbered 16339, and also including my life insurance policy in the Unity Protestant Benefit Society for $350, numbered 36, and dated in or about the year 1868, I give and bequeath unto and to the use of my said executrix and trustee hereinafter named, upon trust to sell and convert the same into money, and to divide the proceeds of said sale or conversion into 4 equal parts or one-fourth part each, and to pay and hand over to my daughter Edith May Brethour one of such one-fourth parts, and to pay and hand over to my daughter Gertrude Garrett one of such one-fourth parts, and to pay and hand over to my said daughter Mabel Wallace Lester (in addition to the specific devise of real estate hereinbefore devised) one of such one-fourth parts for her

own sole, separate, and exclusive use absolutely and forever, and to pay and hand over to my wife Annie Lester the remaining one of such one-fourth parts."

The decision in Re Harkness, 8 O. L. R. 720, 4 O. W. R. 533, governs this case to the extent that the words "including life insurance" do not constitute this life insurance money as part of the residuary estate, but these words mean that the life insurance was different from residuary estate, and was given or dealt with in addition to the residuary estate. If this policy was not part of the estate which could be disposed of, irrespective of any rights of beneficiaries, then dealing with it by will must be regarded only as a variation of the former allotment or appropriation. By the will there is an absolute appropriation of the one-fourth to the applicant, and no provision for this fourth going to any one else in the event of the applicant not accepting. There was no power to vary except to members of the preferred class. What was done must, in my opinion, be regarded as a variation by limiting the widow's right to the one-fourth, and allotting the other three-fourths to the 3 daughters of the deceased.

It was not questioned on the argument that there was power to vary, and that the power could be exercised by will, so long as the allotment was confined to beneficiaries of the preferred class: see Re Lynn, 20 O. R. 475; McKibbon v. Feegan, 21 A. R. 87; Re Cheesboro, 30 O. R. 639.

This money could not be made liable for debts of deceased.

Upon the whole, I am of opinion that the deceased could not, except by express variation of the allotment and apportionment of the insurance money amongst the preferred class, deprive the widow of her share, and he could not make the acceptance by the widow of the sum so allotted conditional upon such acceptance being in lieu of dower. See also Fisken v. Marshall, 10 O. L. R. 552, 6 O. W. R. 611; Griffith v. Howes, 5 O. L. R. 349, 2 O. W. R. 293; In re Cochrane, 16 O. L. R. 328, 11 O. W. R. 956.

The applicant may well bear her own costs out of her share of the insurance money, and practically no costs have been incurred by Mrs. Brethour and Mrs. Holstrom.

The costs of the executrix should be paid out of the residuary estate.

MACMAHON, J. JANUARY 20TH, 1909.

TRIAL.

LEHMAN v. KESTER.

Release—Judgment Recovered by Plaintiff—Release without Consideration—Undue Influence of Strangers—Threats —Religious Influence — Absence of Solicitor's Advice — Invalidity of Release.

Issue directed by a Divisional Court to determine the validity of a release from a verdict obtained by the plaintiff against the defendant.

J. M. Godfrey, for plaintiff.

J. W. Curry, K.C., for defendant.

MACMAHON, J.:—The action of Lehman v. Kester, for the seduction of the plaintiff's daughter, was tried on 30th September, 1908, and Lehman obtained a verdict for $1,200. On the morning of Sunday 8th November, while an appeal from the verdict was pending before a Divisional Court, one Hoover met the plaintiff in the Mennonite Church in the locality where they lived, and I accept Hoover's evidence as to what the plaintiff then said. Plaintiff stated "he was sorry for what he had done, and if Mr. Wideman (the bishop of the church) came over to the church in two weeks, he would make a confession to the church; that he had been misled by others."

Hoover and Bishop Wideman did not wait for the two weeks to elapse to meet the plaintiff at the church, but on 16th November drove to plaintiff's house, when the bishop asked the plaintiff if he was going to make a confession to the church. The reply he received from the plaintiff was "no," and the plaintiff told Bishop Wideman to take his name off the church's books. Hoover then told the plaintiff he had expelled himself from the church by taking proceedings in a court of law; and Bishop Wideman then said to plaintiff that, if he did not make a confession, he would be expelled from the church.

While the plaintiff was in a repentant mood on the 8th, when he spoke to Hoover, on the 16th he was not so repentant or submissive until he was told by the bishop that he would be expelled, unless he went with them to Kester's.

Hoover then asked the plaintiff if he would drop the judgment, and he demurred, saying he had nothing with which to support the child. Hoover replied that the child would be taken care of. Bishop Wideman asked the plaintiff if he would not drop the judgment if Kester paid the costs. The plaintiff did not believe that Kester would pay them, and the bishop then said that, if Kester would not pay, he would. Hoover said, "Come and see Kester and hear what he says." Bishop Wideman, Hoover, and the plaintiff then started to drive to Kester's. When three-quarters of a mile from the plaintiff's house, the plaintiff wanted to get out of the vehicle and return home. Hoover said he told him to remain quiet in his seat. When they arrived at Kester's (the plaintiff then being virtually in charge of and under the control of the bishop and Hoover), Bishop Wideman asked Kester whether, if the plaintiff would drop the judgment, he (Kester) would pay the costs; and Kester said "yes." Bishop Wideman says that Kester then spoke about a release from the judgment. A discussion then took place as to who should draw the release, and the plaintiff stated it should be drawn by some disinterested person, and Kester suggested that Mr. McCullough, a solicitor in Stouffville, should draw it; Hoover, the plaintiff, and Kester went to Mr. McCullough's house; and Mr. McCullough said he received instructions from Kester and the plaintiff to draw the release, and, when prepared, he said, he explained to the plaintiff that he was releasing the judgment, and Kester was to pay the costs of the plaintiff's solicitor and his own costs. Mr. McCullough said that the plaintiff executed the release without any intimation that he did not desire to execute it. According to Mr. McCullough, he was executing it of his free will.

The plaintiff is 62 years old, a cripple from his youth, not strong physically, and of a somewhat nervous temperament; and I find that he was induced to execute the release by reason of the threat used by Bishop Wideman of expulsion from the church. Neither the bishop nor Hoover was satisfied with a mere confession to the congregation; both seemed to be bent on a release of the verdict being given to Kester, and the bishop went so far as to promise that, if the plaintiff released Kester from the judgment, he (the bishop) would become personally responsible for the payment to the plaintiff's solicitors of their costs.

The case is somewhat different from any case to which I have been referred. Neither of the persons exercising influence over the plaintiff was a beneficiary in any way; but that does not, in my opinion, prevent the transaction from coming under the rule that where undue influence has been exercised in obtaining a benefit, even if the benefit results to a third person, the impeached transaction cannot stand.

The rule is shortly stated in Snell's Equity, 15th ed., p. 454: "The law requiring that there shall be free and full consent to bind the parties—such consent supposing 3 things, namely, a physical power, a moral power, and a free exercise of these powers—it follows that if either of the two powers is defective (or, if the exercise of either is hindered), the act is not binding."

Lord Justice Lindley in Allcard v. Skinner, 26 Ch. D. at pp. 182-3, said: "Nor can I find any authority which actually covers the present case. But it does not follow that it is not reached by the principle on which the Court has proceeded in dealing with the cases which have already called for decision. They illustrate, but do not limit, the principle applied to them. . . . What, then, is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? Or is it that it is right and expedient to save them from being victimised by other people? In my opinion, the doctrine of undue influence is founded upon the second of these two principles. . . . As no Court has ever attempted to define fraud, so no Court has ever attempted to define undue influence which includes one of its many varieties. The undue influence which courts of equity endeavour to defeat is the undue influence of one person over another; not the influence of enthusiasm on the enthusiast who is carried away by it, unless, indeed, such enthusiasm is itself the result of external undue influence. But the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence; and the Courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render proof of it

impossible. The Courts have required proof of its non-existence, and, failing that proof, have set aside gifts otherwise unimpeachable."

On cross-examination, Bishop Wideman, in answer to Mr. Godfrey, said: "Q. And you and Mr. Hoover went there for the purpose of inducing him to drop this judgment against Kester? A. I went there moved by the spirit. Q. For that purpose? A. Yes.

Although, when the parties went to Mr. McCullough's house, the plaintiff was consulted about the release which was to be prepared, he was acting from the fear—loss of moral power — engendered by Bishop Wideman's threat that he would be expelled from the church unless a release to Kester of the judgment was executed by the plaintiff.

I think the plaintiff should have been permitted to see his solicitor before being taken to Kester's, as he was virtually giving Kester the $1,200 judgment recovered against him.

I find that the release was executed by the plaintiff without the advice of his solicitor and under the undue influence of Bishop Wideman and Mr. Hoover, and is not a valid release of the judgment.

ANGLIN, J. JANUARY 21ST, 1909.

TRIAL.

LANGLEY v. BEARDSLEY.

Bankruptcy and Insolvency—Sale and Transfer of Business and Stock of Goods by Insolvent Husband to Wife—Knowledge by Wife of Insolvency and Intent to Prefer Creditors—Reality of Transaction—Bona Fide Advance of Money—Payment of Wife's Claim as Creditor of Husband out of Proceeds of Sale—Assignment of Husband for Benefit of Creditors—Assignee Attacking Transfer of Business and Payment to Wife—Failure of Attack on Transfer—Payment of Wife's Unsecured Claim Forming Part of Consideration for Purchase of Business—Colourable Payment — Repayment for Benefit of Creditors — Costs.

Action by the assignee for the benefit of creditors of the defendant William Beardsley to set aside a transfer of that

defendant's business to his wife, the defendant Sarah Beardsley, as fraudulent as against creditors, and also for relief in respect of a payment of $610.

G. F. Henderson, K.C., for plaintiff.

I. F. Hellmuth, K.C., and J. O'Meara, Ottawa, for defendant Sarah Beardsley.

M. J. Gorman, K.C., for defendant William Beardsley.

ANGLIN, J.:—The plaintiff is the assignee for the benefit of creditors of the estate and effects of the defendant William Beardsley under assignment dated 3rd November, 1908. The defendant Sarah Beardsley is the wife of the defendant William Beardsley, and on 29th October, 1908, became the purchaser of the retail boot and shoe business carried on by him in Rideau street in the city of Ottawa. The defendant Sarah Beardsley was also a creditor of the defendant William Beardsley, and, out of the proceeds of the sale to herself of his business, obtained payment of the sum of $610, on account of his indebtedness to her.

The plaintiff attacks both the transfer of the business to the defendant Sarah Beardsley and the payment to her of the sum of $610, as fraudulent as against the creditors of William Beardsley.

Prior to the year 1905, William Beardsley's retail boot and shoe business was apparently prosperous and successful. In that year, in partnership with his son, he commenced a wholesale business. He put a considerable amount of his available capital into the wholesale business, which proved unsuccessful. Upon the stock-taking of his retail business in the year 1906 there appeared to be assets of about $14,000 and debts of about $2,000, the surplus being in the neighbourhood of about $12,000. Upon stock-taking on or about 26th October, 1908, the assets of the retail business were found to have dwindled to about $6,000, and the liabilities to have increased to a sum between $5,000 and $6,000, exclusive of indebtedness to the Standard Bank, the Bank of Ottawa, and his wife, amounting, roughly, to $3,500 more. The correctness and the fairness of this stock-taking is not seriously questioned.

During the years while the retail business was successful Beardsley had given considerable sums of money to his wife. She had purchased a property and built upon it a residence, both together being worth about $7,000. She also had some

further savings accumulated. Out of these, at her husband's instance, she lent him, for the purpose of the wholesale business, which he told her was in need of money, a sum between $900 and $1,000. According to the evidence of both husband and wife—and in this particular I credit their evidence —Beardsley concealed from his wife the financial embarrassment which resulted from the difficulties of the wholesale business, at all events, until 25th or 26th October, 1908. Upon the evidence, I find it established that up to that time Mrs. Beardsley fully believed that her husband's business was successful. I further find that she was then the real and bona fide owner of the house and premises in which she lived with her husband; that she had actually advanced to her husband a sum between $900 and $1,000 out of her own moneys; and that at the time of the transfer of the business to her she was a creditor of her husband in respect of this advance, a portion of it being collaterally secured by commercial paper of the wholesale business.

After the stock-taking on or about 26th October, Beardsley, fully realising his insolvent condition, and with the intent of preferring certain of his creditors, including his wife, determined to sell his business. His wife became aware of his purpose to sell, but both he and she insist that she did not know of his intent to prefer creditors or of his insolvent condition. Both husband and wife say that the proposition that the wife should become purchaser came spontaneously from her. Both swear that they dealt with one another as strangers, bargaining as to the sum to be paid, the wife first proposing 50 cents on the dollar according to the stock-taking, the husband demanding 67 1-2 cents; the wife then raising her offer to 55 cents, the husband dropping to 62 cents, and both finally agreeing on 60 cents. Both say that while this bargaining was in progress the wife was in ignorance of the result of the stock-taking, and did not know what sum of money would be required to enable her to pay for the stock at 60 cents on the dollar. According to the wife's evidence, she then approached a young man, Mr. Younghusband, who was interested in the family, and who happened to be at the house, with a request that he should obtain for her a loan of $3,000, and with little difficulty she persuaded him to undertake to do so. He corroborates this testimony, and also states that, when he promised to procure this sum for Mrs. Beardsley, although he knew that she intended to

use it to purchase her husband's business, he did not know the reason for the sale being made, did not know the husband's insolvency, and did not know the amount that would be required to complete the purchase. After an ineffectual attempt to secure the money from an insurance company, he went to the manager of the Standard Bank, with which his employers did business. That bank was also a creditor of William Beardsley in respect of an overdraft, and in respect of commercial paper held under discount. The manager of the bank agreed to lend the sum of $3,000 to Mrs. Beardsley upon her promissory note, to be indorsed by her young friend, upon the understanding that he would secure himself and the bank by taking from her a mortgage upon her house, which he would assign to the bank, if required.

This loan having been arranged for, Mr. Beardsley was apparently informed that his wife was prepared to purchase, and he instructed his solicitor, Mr. Gorman, to prepare a bill of sale from himself to her. Mr. Gorman was also instructed by Mrs. Beardsley's young friend to prepare a mortgage from her to him for the sum of $3,000. Mr. Beardsley, when giving evidence, professed entire ignorance of this mortgage transaction, stating that he was not present when the mortgage was executed by Mrs. Beardsley, and did not know until afterwards from what source the money was coming, or how she had raised it. He is contradicted by Mrs. Beardsley and Younghusband, who both state that he was present when Mrs. Beardsley executed the mortgage, and that this was done at the same time that he executed the bill of sale. Mr. Gorman having brought both together for execution at the Beardsley residence on the afternoon of 29th October. According to the evidence of Mrs. Beardsley and Younghusband, they then for the first time ascertained the amount which it would be necessary to pay for the business, purchasing it at the rate of 60 cents on the dollar, according to the stock-taking of 26th October. This sum was computed by Mr. Gorman in their presence, and it was found that $3,520 would be required. In addition to the $3,000, the proceeds of the bank loan, for which Mrs. Beardsley gave her cheque to her husband, she also signed two promissory notes in his favour, making together the sum of $520. Mr. Beardsley thereupon took the $3,000 cheque and one of the notes, and deposited them to his own credit in the Standard Bank. He immediately drew against the moneys so deposited 3

cheques, one in favour of the Bank of Ottawa for $1,500, one in favour of the Standard Bank for $871.75, the amount of the promissory note held by the bank from the wholesale business, and which had been renewed only 10 days before, and the third for $610 payable to Mrs. Beardsley. In addition to the amount of these 3 cheques, the Standard Bank took for itself the amount of an overdraft in Mr. Beardsley's account. The effect of these payments was to leave the sum of 30 cents to the credit of Beardsley with the Standard Bank. This sum, with book debts amounting to $16.51, and Mrs. Beardsley's second note for $260, making in all $276.81, represented the total assets of the retail business which passed to the plaintiff under William Beardsley's assignment. The creditors' claims presented against this business amount to $6,081.76, according to the assignee's statement.

The $610 obtained by Mrs. Beardsley was immediately applied in reduction of the loan upon the house. She raised a further sum of about $1,600 on an endowment insurance policy on her husband's life, payable to herself. From the business, of which she at once took possession, she has already obtained sufficient money to pay off the balance of her liability to the bank, amounting to $3,260 in all. The balance of Beardsley's indebtedness to his wife, above the $610 so paid to her, was collaterally secured by business paper which she held. The effect of the entire transaction was to transfer the Beardsley business from the husband to the wife at 60 cents on the dollar, and to pay in full 3 creditors of that business—the Standard Bank, the Bank of Ottawa, and Mrs. Beardsley—leaving unsecured creditors, with claims amounting to $6,081.76, to look for payment to the assets delivered to the assignee, amounting to $276.85.

I find myself unable to accept the testimony of either Mr. or Mrs. Beardsley, or that of the young gentlman who procured her the $3,000 loan, as to Mrs. Beardsley's ignorance of the circumstances under which her husband was selling the business. It is to me utterly incredible that the husband and wife should have bargained, as they say they did, over the purchase price of the business, he holding out for the highest obtainable price, and she trying to beat him down to the lowest possible figure. There are contradictions between the testimony of the husband and wife upon several material particulars which serve to confirm my opinion of their unreliability. Neither can I believe that the balance of the purchase price over the $3,000 obtained from the

Standard Bank, was divided into two promissory notes of such amounts that with the proceeds of one of them, in addition to the $3,000, the husband could pay the Standard Bank and the Bank of Ottawa in full, and also the unsecured portion of his wife's claim, and leave merely a few cents in the bank, and that Mrs. Beardsley and her adviser were in entire ignorance of the purpose of this division of the purchase money.

While it is said that the purchaser must be shewn (not suspected) to have been privy to the intent to defraud creditors—Hickerson v. Parrington, 18 A. R. 635, at pp. 640, 641—the circumstances of this case are such that knowledge on the part of the wife of her husband's intent to prefer certain creditors and to defeat others, is not, in my opinion, merely a matter of suspicion, but is a fair and legitimate inference from the circumstances in evidence. It is not a case of finding a fact to be proved merely because the witnesses who swear to the contrary are discredited. Of the fact itself there is no direct evidence; but other facts are established from which the only fair and reasonable inference seems to be that Mrs. Beardsley, the purchaser, had knowledge of her husband's insolvency, and of his purpose to prefer herself and other creditors in making the sale of his business to her. In transactions between relatives having the effect of defeating the claims of creditors, if the circumstances are suspicious, the onus is shifted to the purchaser of establishing judicially the bona fides of the transaction: Merchants Bank v. Clark, 18 Gr. 594.

Yet where it is shown, as it is here, that the purchaser had means of her own, that she actually raised the money to make the purchase, that that money was actually paid over to the vendor, and was by him paid out to creditors, the reality of the transaction is established: Webb v. Hamilton, 12 O. W. R. 380; and, although knowledge of the intent of the vendor to prefer certain of his creditors to others should be imputed to the purchaser, that knowledge does not of itself suffice to invalidate the sale and transfer of the business. If Mrs. Beardsley had not been herself a creditor of her husband—if she had not as such creditor obtained for herself a portion of the moneys advanced on her account to purchase the business—this case would have clearly fallen within Campbell v. Patterson, 21 S. C. R. 645. See Burns v. Wilson, 28 S. C. R. at p. 216. Notwithstanding the facts that

Mrs. Beardsley was a creditor and obtained payment, this case seems to me to be within the principle of the decision in Campbell v. Patterson, and it is, therefore, my opinion that, upon the present state of the law, the sale and transfer to her cannot be successfully attacked.

But what of the repayment to her of $610 out of the proceeds of the sale? If the proper view to be taken of the evidence is that the whole purchase money of the business was paid over by Mrs. Beardsley to her husband, so that it was absolutely under his control, and without any bargain or arrangement that his unsecured indebtedness to his wife should be paid out of the proceeds, her receipt of the $610 would be "a payment of money to a creditor," within sub-sec. 1 of sec. 3 of the Assignments Act, R. S. O. 1897 ch. 147, and therefore unimpeachable. But, if the proper inference to be drawn from the evidence is that the payment of the sum of $610, as part of the consideration from Mrs. Beardsley to Mr. Beardsley, and the repayment by him of this amount to his wife, were merely colourable acts, and that the real transaction between these parties was that part of the consideration for the transfer from Beardsley to his wife was the payment of her unsecured debt, and that only the balance of the purchase money should belong to Beardsley to be dealt with as he saw fit, the situation may be quite different. The former portion of the consideration would in that case be something for which the insolvent debtor could not validly make a transfer of his property; only the latter portion would be actual present advance made bona fide by the transferee. As to such latter part, the transaction might be sustained, while, as to the former, it might be held invalid: Mader v. McKinnon, 28 S. C. R. 652, 653.

There is no suggestion that the Bank of Ottawa were in any way cognizant of the circumstances surrounding the sale of the business to Mrs. Beardsley, and of the payment of their claim out of the proceeds of such sale. As to the Standard Bank, while it is impossible to avoid a suspicion that the manager must have known that the indebtedness to his bank would be wiped out as a result of his advance of $3,000 to Mrs. Beardsley and her acquisition of her husband's assets, the evidence would not warrant a finding of knowledge on the part of the bank of Beardsley's insolvency or of his intent to prefer the bank to other creditors. There is no doubt that Mrs. Beardsley actually advanced the moneys which were

used to pay both the Bank of Ottawa and the Standard Bank. As to this portion, therefore, of the consideration for which she purchased her husband's property, she must be regarded as having made a bona fide advance of money.

But, in the circumstances of this case, I find it impossible to reach any other conclusion than that payment of the unsecured part of Mrs. Beardsley's claim formed part of the consideration for her purchase of her husband's business. I have no doubt that her husband, and, if not Mrs. Beardsley herself, Younghusband, who was acting for her, and whose knowledge must be taken to be her knowledge, were fully aware that she could not make payment of her own claim against her husband part of the consideration for the transfer of the business, and that, if she attempted to do so, to that extent, she would be regarded as a debtor of the estate, liable to pay the amount of such claim to the husband's assignee for the benefit of creditors. In order to give the transaction the appearance of an actual bona fide payment by her to the husband of the whole consideration, and a voluntary repayment by him to her of the amount of her claim out of the moneys under his control, it was given the form of her handing to him a cheque for the whole sum of $3,000, and also a promissory note for the sum of $260, which would furnish just sufficient moneys, when the note was discounted, to enable payment to be made in full to the banks and to herself. It was undoubtedly part of the understanding that she would at once be repaid the sum of $610.

In my opinion, therefore, the transaction should be regarded as a purchase by Mrs. Beardsley of the business of her husband, in consideration of her advancing to him the sum of $2,910 and obtaining payment of her claim of $610.

If, instead of being a creditor for a sum equal to about one-sixth of the purchase price of the business, Mrs. Beardsley had been a creditor for a sum equivalent to the total price, and, having purchased the business, had paid to her husband in actual money the total purchase price, which had been immediately repaid to her by her husband's cheque, in satisfaction of her claim as a creditor, the case would, I think, have fallen directly within Burns v. Wilson, 28 S. C. R. 207; Allan v. McLean, 8 O. W. R. 223, 761. It is, I think, inconceivable that, in such circumstances, any Court should find that there had been a bona fide advance or payment by the wife to the husband. The inference that it was a colourable payment merely, and that it was the in-

tention that the whole purchase money should immediately find its way back to the wife, would be irresistible.

Here, as to the sum of $610, which was immediately repaid to Mrs. Beardsley, having regard to all the circumstances of the case, and particularly to the intervention of Mrs. Beardsley's astute young friend, the inference seems to me almost equally irresistible that it was part of the consideration for Mrs. Beardsley's purchase of the business that she should be paid in full her unsecured claim. Treating the transaction, therefore, as one in which Mrs. Beardsley's actual advance was limited to the sum of $2,910, she should, in my opinion, he regarded as a debtor of the estate for the balance of $610, and should be required to pay that amount to the plaintiff for the benefit of the general creditors of William Beardsley, amongst whom she may rank in respect of this sum. There will accordingly be judgment against the defendant Sarah Beardsley for payment to the plaintiff of the sum of $610. As the plaintiff has succeeded upon a substantial part of his claim, and the costs have not been materially increased by his presenting the other claim upon which he has not succeeded, and because of the unsavoury character of the entire transaction, I will exercise my discretion over the costs by directing that the defendant Sarah Beardsley shall pay the costs of the plaintiff.

As against the defendant William Beardsley, the action will be dismissed without costs.

CARTWRIGHT, MASTER JANUARY 22ND, 1909.

CHAMBERS.

RE SOLICITOR.

Solicitor—Delivery and Taxation of Bill of Costs—Payment or Retention of Lump Sum for Costs—Waiver of Bill—Subsequent Application within a Month—Bill for Larger Amount than that Paid.

Motion by a client for an order for delivery and taxation by the solicitor of a bill of costs.

H. R. Frost, for the client.

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

THE MASTER:—The action of Barron v. Michigan Central R. R. Co. was coming on for trial in April last, when it was settled by payment of $3,000 to the plaintiff and $150 on account of costs to his solicitor.

When the cheques were received, the plaintiff was handed that for $3,000, and he gave his own cheque for $350 to his solicitor for the balance of his costs. This had been agreed on before settlement, as the solicitor says, and there is no impeachment of his affidavit in any way. He says that he asked his client at the time if he required a bill, and that the answer was: "No, never mind that. Fill out a cheque for the $350, and I will sign it." If this is true, the client's affidavit is not candid when he says the solicitor "has retained in his hands $350 to meet his charges."

It was argued that this was a waiver of a right to have a bill; but, in view of the cases in 18 P. R. 331 and 19 P. R. 37, Re Solicitors, it does not seem that a bill can be refused when, as here, the client (however unreasonably) repented of his generosity within a month. While he is entitled to an order, it may well be that, in view of such cases as Curry v. MacLaren, 12 O. W. R. at p. 1115, and the other authorities, he will gain nothing by a taxation. But that will be for him to consider. Under the decision in In re Walsh and Fitch, Solicitors, 7 O. L. R. 41, 3 O. W. R. 1, the solicitor will not be debarred from recovering more than $350 if he is able to shew himself so entitled in respect of this and of the other business done for the client, as he admits on his cross-examination.

The taxation may be by one of the taxing officers in Toronto.

CARTWRIGHT, MASTER. JANUARY 22ND, 1909.

CHAMBERS.

LAWLESS v. CROWLEY.

Security for Costs—Assignment by Plaintiff for Benefit of Creditors pendente Lite—Judgment Sued on Included in Assignment—Re-assignment by Assignee to Plaintiff—Pleading—Stay or Dismissal of Action—R. S. O. 1897 ch. 147, sec. 9—Venue—Irregularity—Waiver—Costs.

Motion by defendant for stay or dismissal of the action or for security for costs, in the following circumstances.

The action was begun in February, 1908. Defendant was not served until May. In July plaintiff made an assignment for the benefit of creditors, which necessarily included the judgment against defendant on which this action was founded. Whether or not this assignment was known to defendant did not appear. In October a statement of claim was delivered, and a statement of defence followed in due course.

On 2nd December the present motion was launched. On 18th December the Master directed notice to be served on the assignee, under Rule 403, which was made returnable on 23rd December, when it was enlarged at the request of the assignee and defendant until it came on for argument on 18th January, 1909.

W. H. Wallbridge, for defendant.

Grayson Smith, for the plaintiff and assignee.

THE MASTER:—It appeared that on 8th instant the assignee had, by instrument under seal, transferred the judgment on which the action is founded "and the full benefit and advantage thereof" to the plaintiff.

Mr. Wallbridge objects that this cannot be done except in compliance with the provisions of R. S. O. 1897 ch. 147, sec. 9, and with the sanction of the creditors.

Even if these contentions are right, I think they cannot be given effect to on an interlocutory motion. Being matters of evidence, they must go to trial if disputed, and cannot even be disposed of under Rule 261.

However, in my judgment, the section of the Act relied on applies only to proceedings to set aside something done by the insolvent, and it has, therefore, no application to the present motion.

As to the other objection, that, I think, cannot be taken advantage of by a defendant. If the assignee acts without proper authority, he may have to answer for it to the creditors like any other trustee dealing injuriously with the property of the beneficiaries.

In its present condition the action is good on its face, and is being carried on for the benefit of the plaintiff. There can, therefore, be no order either to stay or dismiss or for security.

The statement of claim does not name any place of trial. Peterborough is so named in the writ of summons unneces-

sarily—see Dellebough v. Frederick, 12 O. W. R. 1121—and should therefore have been named in the statement of claim. But the defendant seems to have waived this.

The statement of claim, however, in the more important respect, was clearly invalid. It does not appear if defendant or his solicitors were aware of the assignment of 6th July, before delivering the statement of defence. When that is ascertained, I will dispose of the costs of the motion. If they had this knowledge, these costs will be in the cause.

LATCHFORD, J. JANUARY 22ND, 1909.

WEEKLY COURT.

RE NIPISSING PLANING MILLS LIMITED.

RANKIN'S CASE.

Company—Shares—Subscription—Necessity for Allotment—Evidence as to Allotment—Winding-up—Contributory.

Appeal by the liquidator of a company in course of winding-up from an order or report of the local Master at North Bay, refusing to settle R. Rankin on the list of contributories of the company.

J. A. Macintosh, for the liquidator.

C. A. Masten, K.C., for R. Rankin.

LATCHFORD, J.:—The company was incorporated by letters patent under the Ontario Companies Act, R. S. O. 1897 ch. 191, on 4th April, 1907, before the Companies Act of 1907 came into force.

Rankin was not one of the applicants for incorporation, and did not sign the memorandum of agreement executed in duplicate, which, by sub-sec. 2 of sec. 10 of ch. 191, is required to accompany the application for incorporation. In this his case differs from Re Provincial Grocers Limited, Calderwood's Case, 10 O. L. R. 705, 6 O. W. R. 744. The memorandum which was filed with the Provincial Secretary appears upon its face to have been signed and sealed on 28th March, 1907, and is in the form prescribed in schedule A. to the Act.

A memorandum in the same form had been signed under seal by the applicant and others, including Rankin, at various dates from 22nd March to 27th March, and after the issue of the charter, from 18th April, 1907, to February, 1908, other signatures were appended. It is argued that, by subscribing under seal to this memorandum, Rankin made an irrevocable application for shares in the company; that shares were allotted to him about January, 1908; and that he is liable to be put upon the list of contributories for the par value of such shares—$500.

The learned Master at North Bay has not stated his reasons for his refusal to consider Rankin a contributory, and the matter has therefore to be considered at length upon the evidence.

The agreement which Rankin admittedly executed is as follows:—

"We, the undersigned, do hereby severally covenant and agree each with the other to become incorporated as a company under the provisions of the Ontario Companies Act, under the name of the Nipissing Planing Mills Limited of North Bay, or such other name as the Lieutenant-Governor in council may give to the company, with a capital of $40,000, divided into 400 shares of $100 each.

"And we do hereby severally and not one for the other subscribe for and agree to take the respective amounts of the capital stock of the said company set opposite our respective names as hereunder and hereafter written, and to become shareholders in such company to the said amounts.

"In witness whereof we have signed."

Then follow the names of the subscribers, their seals, amounts, dates and places of subscription, residence, and the names of the respective witnesses.

When Rankin signed this memorandum, he intended to subscribe for $500 stock in the proposed company. His evidence is that his subscription was not meant to be binding unless an attempt was made by the company to buy out a firm or company in North Bay engaged in the business contemplated. This effort, he learned, was not made; and he thereupon notified one McLaren, the secretary of the company, that he would not take shares. When this notification (which was oral) was given, does not appear clearly; but upon the organization of the company, on 16th April,

1907, when shares were allotted to all who up to that date had signed the memorandum executed by Rankin, no shares were allotted to him. To hold him liable there must exist "some response either in writing or verbally or by conduct communicating to the defendant that the company had accepted his application and himself as a shareholder:" per Gwynne, J., in Newman v. Ginby, 29 C. P. 34, cited in Re Haggart Brothers Manufacturing Co., 19 A. R. 582, and there approved. No list of shareholders is produced. In a book lettered on the front cover "stock register," and headed on the page opposite to that on which the name of the first subscriber to the memorandum appears, "register of ," the name of Robert Rankin is found at p. 17. The entry beneath is, "1907, Mch. 26. Allotment—5 shares—$500."

This entry is manifestly erroneous, if intended to mean that 5 shares were allotted to Rankin on 26th March. The company was not then in existence, and it is not pretended that any allotment was made to him until about a year afterward. Two drafts were passed upon Rankin in 1907, for "calls," of which there is no record in the company's minutes; but Rankin refused to accept the drafts. No stock had been allotted to him at this time. Shareholders to whom stock was allotted on 16th April paid a tenth of their subscription monthly during 1907, beginning in May or June.

The company was not successful, and in January, 1908, under advice from their solicitor, passed a resolution allotting stock to all who had signed the memorandum signed by Rankin, including those to whom stock had been allotted on 16th April, 1907. Notice of this appears to have reached Rankin, and a letter was written to him by the solicitor for the company claiming payment of the $500. Rankin attended a meeting of the shareholders on 6th April, 1908, not as a shareholder, but to protest against being so considered. He did not attend any other meetings of the company, and no stock certificate was issued to him.

If he is a shareholder, he must have become so by reason of the memorandum referred to and the allotment of January, 1908. It is contended on behalf of the liquidator that Rankin, by subscribing to the memorandum before the charter issued, became a shareholder by virtue of the statute (sec. 9) and charter, creating and constituting the petitioners for the charter "and any others who have become subscribers to the memorandum of agreement a body corporate and

politic." This would be unanswerable, I think, if Rankin had been one of those who signed the memorandum of agreement referred to in the statute. But that memorandum is clearly the memorandum which accompanies the petition for incorporation. This Rankin did not sign. He did not become a shareholder or incorporator by virtue of the statute.

The memorandum signed by Rankin, though probably intended by him to be an application for shares, must be considered to mean what it says. It is an agreement between Rankin and others to become incorporated under a certain name "or such other name as the Lieutenant-Governor in council may give to the company." The subscribers mutually agree to take certain shares "and to become shareholders in such company." In terms it anticipates the formation of a company, and is in fact the form prescribed by the statute to accompany the petition for incorporation. As in Re London Speaker Printing Co., 16 A. R. 508, "the instrument he signed was not an agreement with the company:" per Osler, J.A., at p. 521. It was used, however, without regard to its true purpose or meaning. In fact, all the business of the company relating to its stock appears to have been conducted very loosely. The agreement may be enforceable as between the parties to it, if, by the breach of some, others suffer damage. If it had been followed by allotment to Rankin and participation by him in the affairs of the company, payment by him of calls, or acceptance of a stock certificate, it would not be open to him to deny that he was a shareholder. But no allotment was made to him when shares were allotted to others who had signed when he signed. The company in the beginning appears to have treated his application as an oral one, which he had the right to withdraw and did withdraw before the company was organized on 16th April. Long afterward, when one at least of the officials of the company, with whom Rankin had negotiated, had left North Bay, and the company had become insolvent, an attempt was made to allot stock to him.

It is not necessary to consider the manner in which the second allotment was made. I regard it as wholly ineffective as far as Rankin's case is concerned.

I think the learned Master was right in refusing to place Rankin on the list of contributories, and the motion must be refused with costs.

LATCHFORD, J. JANUARY 22ND, 1909.

WEEKLY COURT.

DOMINION EXPRESS CO. v. KRIGBAUM.

Principal and Agent—Agency for Sale of Money Orders—Contract—Construction—Undertaking of Agent to Account for Orders and Proceeds—Theft and Forgery by Servant of Agent—Payment of Orders Forged—Liability of Agent to Account—Bailment.

Motion by plaintiffs for judgment upon the pleadings and the admissions contained in defendant's examination for discovery and the exhibits therein referred to.

Shirley Denison, for plaintiffs.

R. J. McLaughlin, K.C., for defendant.

LATCHFORD, J.—The plaintiffs issue what are called "express money orders," by which, when countersigned by agent at point of issue, they agree to pay to the order of a person whose name is filled in by the agent, a certain sum of money. The orders are issued in books which are delivered to those desiring to act as agents. The defendant received such a book of money orders from the plaintiffs, early in 1908. He signed an agreement, which, so far as appears material, is in the following words: "I, L. A. Krigbaum, of the city of Toronto, having been appointed by the Dominion Express Co. as agent for the sale of its signed money orders, do hereby accept the responsibility of due issue and sale thereof, and undertake to account for each money order and the proceeds thereof . . . to hold in trust such proceeds . . . and to pay over the whole of said proceeds from time to time to the express company, as required, after deducting, as may be authorized by it, my lawful commission, and not to deal with or use such money orders or the proceeds, either in whole or in part, in any other manner."

The defendant had acted as agent for the plaintiffs in issuing similar orders from November or December, 1906, and used the orders in remitting to his creditors.

The commissions charged upon the orders were divided between the agent and the company, the agent retaining one-third and paying the company two-thirds.

In January, 1908, one Heyburn, an employee of the defendant, stole a book of money orders, and, forging the defendant's name, and on two occasions the name of a fellow-employee, issued orders to the amount of $470, which the plaintiffs, who were unaware of the forgeries, paid. They claimed the $470 by the indorsement of the writ of summons and in the statement of claim, but that amount has since been reduced by $100 which they recovered, and they now seek to hold the defendant liable for the balance, $370.

The defendant says he did not issue the orders in question, and that it is impossible to return the orders received from the plaintiffs.

It is not disputed that the defendant did not take reasonable and proper care of the book of money orders delivered to him. If he were an ordinary bailee without more, he would not be responsible. But his liability must be determined upon his contract. "A bailee may assume a greater obligation than the law would impose upon him under the circumstances, that is to say, the law will enforce against him the very terms of his contract in the fair meaning:" Grant v. Armour, 25 O. R. 7, at p. 10. The defendant accepted responsibility for the "due issue and sale" of the orders. The stolen orders were not duly issued and sold. He undertook to account for "each money order" and for the proceeds thereof and to pay over such proceeds to the plaintiffs. He says he is excused, because of the impossibility to account for the orders resulting from the theft committed by Heyburn. The defendant, however, took upon himself to warrant the return of each money order and of the proceeds of each money order, and it is not, upon his contract and authority, open to him to object because of the impossibility: Grant v. Armour, supra; Clifford v. Watts, L. R. 5 C. P. 586. The fact that Heyburn forged Beatty's name to two of the orders and defendant's name to all of them, does not, in view of the terms of the contract, relieve the defendant from the liability he assumed.

It is also said that, as the orders were not countersigned by the defendant, the plaintiffs should not have paid them, and Imperial Bank of Canada v. Bank of Hamilton, [1903] A. C. 49, and other like cases, are relied on to sustain this contention. This argument would be cogent but for the defendant's contract. His liability has to be determined by the fair meaning of that.

I think that he is liable under it for the amount claimed, and direct that judgment be entered against him for $370, interest, and costs.

LATCHFORD, J. JANUARY 22ND, 1909.

WEEKLY COURT.

RE MILLINGTON ESTATE.

Will—Construction—Devise—Life Estate Contingent on Survivorship.

Application by the executors, and by one Edith Adelaide Martin, a devisee, under the will of James Millington, late of the township of Ancaster, deceased, for a summary order determining what interest the said Edith Adelaide Martin had in certain lands under a devise contained in the will.

A. L. Baird, Brantford, for the applicants.

M. A. Secord, Galt, for Wellington Kirkland and others.

F. W. Harcourt, K.C., for infants.

LATCHFORD, J.:—The testator devised certain lands to his executors and trustees. One of such executors renounced his right to probate, and probate duly issued to the other two, a sister of the testator and her husband.

The trustees were to hold for the trustees now acting during their lives. The will then proceeds: "At the decease of the survivor of them, I give and devise the said parcels of land and premises to my niece, their daughter, Edith Adelaide Conn (now Mrs. Martin), to hold to her during her natural life, and I direct my surviving trustee, the said James Galloway,"—who renounced probate—"his executors or administrators, within one year after the decease of the survivor of my said sister Sophia Conn, her husband George Conn, and my said niece, the said Edith Adelaide Conn, to sell and convert into money the said parcels of land and premises . . . and to divide the same equally between the children of my said niece Edith Adelaide Conn, share and share alike, but in case of the death of my said niece without leaving any children her surviving, then to divide the same equally between my then surviving brothers and sisters." The last mentioned division is to be made per stirpes.

Mrs. Martin and her parents have left Ontario, and now desire to sell the lands. She has 5 children, of ages from 2 years to 12, and is said to be herself about 38 years of age.

The testator had 8 brothers and sisters, including the said Sophia Conn. All have died except Sophia Conn, some childless and others leaving children. One of such children, Wellington Kirkland, has been served with notice of the application, and by counsel submits his rights to the Court. I have ordered his counsel to represent upon the motion the whole class to which Mr. Kirkland belongs.

It may be highly improbable that at Mrs. Martin's death the children she now has or those she may hereafter give birth to shall all have passed away; but that contingency is quite within the limits of possibility. It is a possibility provided for by the will, and one to which I must have regard.

So considered, it seems to me clear that Mrs. Martin has merely a life estate contingent upon her survival of her father and mother. The devise to her is neither in fee nor in tail.

There will be an order accordingly, if the applicants care to have an order issue. In any event, the costs of the official guardian and of Mr. Secord should be paid by the applicants.

I may add that the cases cited in support of the contention of the applicants have no bearing upon the facts: Jarman, 5th ed., p. 1639; Re Johnston and Smith, 12 O. L. R. 262, 7 O. W. R. 845.

MAGEE, J. JANUARY 22ND, 1909.

TRIAL.

NATIONAL STATIONERY CO. v. TRADERS FIRE INSURANCE CO.

NATIONAL STATIONERY CO. v. BRITISH AMERICA ASSURANCE CO.

Fire Insurance—Amount of Loss—Evidence—Finding—Right of Action of Assured—Loss Payable to Bank—Assignment of Benefit to Bank—Addition of Bank as Defendants—Costs—Insufficiency of Proofs of Claim—Actions Brought Prematurely—Successful Plaintiffs Ordered to Pay Costs—Statutory Conditions—Burden of Proof—Waiver.

Actions on fire insurance policies.

E. E. A. Du Vernet, K.C., and O'Sullivan, for plaintiffs.

G. T. Blackstock, K.C., and G. H. Sedgewick, for defendants the Traders Fire Insurance Co.

H. D. Gamble, K.C., for defendants the British America Assurance Co.

Judgment was pronounced on 29th December, 1908, but the written opinion of MAGEE, J., was not delivered until 22nd January, 1909.

MAGEE, J.:—These two actions have been tried together by consent. The action against the Traders Fire Insurance Co. is upon a policy insuring $3,000 on stock in trade and $1,000 on furniture, fixtures, and fittings, for one year from 15th January, 1908. The action against the British America Assurance Co. is on a policy insuring $6,000 on stock, etc., for one year from 17th January, 1908. By the policy in the Traders company, loss, if any, is made payable to the Crown Bank of Canada. Since the loss and before action the insurance in the British America Assurance Co. was assigned to the same bank.

Each policy expressly permitted further insurance, and also contained a specially added co-insurance clause requiring the insured to keep up insurance to the amount of 80 per cent. of the value. The policy in the Traders company, though commencing two days earlier, states that there is further insurance in the British America company to the extent of $6,000.

The plaintiffs by their statements of claim allege that by a fire on 22nd March they sustained loss to the extent of $9,231.81 on the stock in trade and $1,082.84 on the furniture, etc., and consequently they claim the full amount of both policies.

The statements of defence, besides other matters which were not referred to at the trial, put in issue the loss, and denied the receipt of proper proofs of claim, as required by the 13th statutory condition of the policies, and asserted that the actions were brought before the lapse of 60 days from the completion of the proofs of loss, and alleged that there was in the statutory declaration furnished by plaintiffs fraud and false statements such as to vitiate the claim under the 15th statutory condition.

At the trial the defendants abandoned the allegations of fraud and false statement, and also abandoned the two other defences, as to the sufficiency of the proofs of claim and the prematureness of the actions, except in so far as those two defences should affect the costs.

The actions, except as to costs, thus resolve themselves into the question of the amount of the plaintiffs' loss. To substantiate that the plaintiffs produce a stock list, alleged to have been made out on 1st August, 1907, which shewed their stock in trade at $6,704.36, and their furniture, etc., at $1,484.78, making a total of $8,189.14. To this they add their subsequent purchases, and from the total deduct their subsequent sales of stock and the wear and tear on the furniture, etc.; and, the balance thus found being the value of the goods on hand at the time of the fire, and deducting the salvage, they claim the difference as their loss. The defendants challenge the correctness of the August list, and the subsequent dealings and the salvage on the furniture.

Let us first take the claim as to the furniture, etc., which I will call the plant. . . . I place the total loss on the plant at $230.

Then as to the stock in trade. . . . The total loss by fire on stock in trade was $4,132.70. Of this the defendants the British America Assurance Co. are liable for two-thirds, $2,755.13; the Traders company should pay the other third, $1,377.57, and also the loss on plant, $230, in all $1,607.57. To these sums add interest from 10th June, 1908.

In arriving at these figures, I recognize that they may not, and in the nature of things cannot, be exact, but, having in view the interests of all concerned, I have endeavoured to get at them as best I could. . . .

There remain the two questions of the right of the plaintiffs to sue and the disposition of the costs.

As to the plaintiffs' right to sue, the position is not the same in both actions. In the Traders company's policy the loss is made payable to the Crown Bank. In the other case a document addressed to the British America Assurance Co., and dated 24th April, 1908, was signed by the plaintiffs, per the manager, whereby, in consideration of $1 and other valuable consideration, the plaintiffs assigned to the Crown Bank all the benefit in and to the moneys due to the plaintiffs by reason of the claim therein being made

under this policy for loss by fire, and nominated any officer of the bank their attorney to sign all necessary papers to secure to the bank the payment of the loss under the policy. The Crown Bank, now amalgamated into the Northern Crown Bank, were, at the date of the policies and at the date of the fire and down to the trial, creditors of the plaintiffs for more than the amount payable by the Traders company. No reference was made in the pleadings by either party to the interest of the Crown Bank. The plaintiffs' statements of claim alleged that the defendants by their policies agreed to insure and did insure the plaintiffs. The defendants denied that such were their policies. At the trial, on the production of the Traders company's policy, and on the cross-examination of the plaintiffs' president and his admissions of the assignment referred to, the interest of the Crown Bank appeared. When withdrawing their pleas of fraud and misrepresentation and other pleas, as already mentioned, the defendants stipulated that the Crown Bank should be a party to the actions so as to be bound by the result, and the plaintiffs' counsel then undertook to have the bank joined as co-plaintiffs. It subsequently appeared that, for some reason, they were unable to obtain the consent of the bank to become co-plaintiffs or to arrive at an agreement that the bank should be added as defendants without due process, and the question of the necessity of the bank being a party to either action was discussed by counsel. The plaintiffs and the bank having since arranged matters, counsel to-day appears for the bank and consents to their being added as defendants in each action, and submits their interest under the policies and the assignment to the Court, and I have directed them to be so added. The defendants do not waive their objections that the plaintiffs had no right of action.

As to the Traders company, the plaintiffs are the parties with whom the contract was made, and, not having assigned it, are the parties to sue upon it, although by it the money was payable to the bank.

As to the British America Co., the assignment to the bank of the "benefit in and to the moneys due" is practically the same as the assignment to the bank of "all moneys due," which was in question in Hughes v. Pump House Co., [1902] 2 K. B. 190, where it was held that the action was not properly brought by the assignors, and, per Mathew, L.J.,

that the action must be brought in the name of the assignee, and, per Cozens-Hardy, L.J., that the plaintiff had no right of action. It must be held to be an "absolute assignment" and "not purporting to be by way of charge only," within sec. 58, sub-sec. 5, of the Judicature Act. The British America Co. had written notice of it on 9th May, 1908. Not having set it up as a defence before the trial, that company, if succeeding only upon that ground, should not get their costs. Whatever might have been the position if the Northern Crown Bank were not before the Court, that is now changed. In the recent case of Thompson v. Equity Fire Insurance Co., 12 O. W. R. 373, 17 O. L. R. 214, where also the insured brought action after assigning to a bank, the bank were allowed to be added as plaintiffs ab initio, although the time for the bank to bring a new action had expired, and it was held that the plaintiffs had an interest in the insurance, and that the actions, therefore, were not nullities, but at the utmost defectively constituted. It does not appear here that the bank were asked or refused before the action to bring or join in it, but they have since refused to join, although now submitting to be dealt with by the Court as defendants. Had they taken that attitude of refusal before action, the plaintiffs would undoubtedly have had the right to make them co-defendants. Having now the right to maintain the original action if the bank were added as co-plaintiffs, and being refused the bank's consent thereto, the plaintiffs should not be in a worse position, aside from the question of costs, to go on with the action, than they were in to bring it originally. I cannot give effect to the defendants' contention that the action should be dismissed, all parties interested being now before the Court, and the bank being added practically as soon as the objection to their absence from the record appears or is raised.

Then as to the question of costs. As already mentioned, the defendants are entitled to the benefit of their pleas of the insufficiency of the proofs of the claims and the prematureness of the actions, so far as the costs are affected. It therefore becomes necessary to consider the validity of those pleas. The action was commenced on 10th June, 1908. Under statutory condition No. 17, the loss does not become payable till 60 days after completion of proofs of loss. What proofs had been furnished 60 days previously, i.e., on or before 11th April?

Statutory condition 13 requires the assured to deliver, as soon after the fire as practicable, as particular an account of the loss as the nature of the case permits, and furnish therewith a statutory declaration that the account is just and true, and, if required, the assured is to furnish account books, stock list, invoices, and other vouchers.

The burden is not thrown upon the insurance company to find out the loss for themselves without such an account being furnished to them.

On 8th April Taylor, the plaintiffs' president, had made a statutory declaration as to the British America Assurance Co.'s policy, in which he stated that the statement thereto annexed was a just and true account of the loss which the plaintiffs had suffered by reason of the fire, and that, to the best of his knowledge and belief, the amount of the stock on the premises at the time of the fire amounted approximately to $10,800, and that the amount which had been saved, including salvage, which was partly destroyed, he had valued at $760.74, leaving a total loss, so far as the stock in trade was concerned, of $10,039.26. The statement (schedule A.) annexed to the declaration was as follows: "Approximate value of stock in trade at date of fire, $1,200; total $12,000; approximate value of salvage on premises at present, $760.74; stock in trade and furniture, $189.95; approximate loss $950.69, $11,049.31."

He also made a declaration in the case of the Traders company policy, to the like effect, except that it omitted the word "approximately" before $10,800, and added thereto that the value of the fixtures amounted to $1,200. The statement annexed to that declaration was the same as the other. In both the statements the words "approximate loss" were, evidently by clerical error, placed opposite $950.69, instead of $11,049.31. There was nothing to shew how these approximate figures were arrived at. The approximate amounts stated do not appear in the declaration or by the evidence to be the summary or the result of any accounts or particulars previously furnished to the defendants. They are not pretended to be the result of any attempt at arrangement or adjustment which might excuse absence of particularity. On the contrary, the solicitor's letters enclosing the declarations complains that there was no adjustment. The defendants had had access to the plaintiffs' account books from 24th March, but those books gave no indication of the

stock which should be on hand. Such as it was, the book-keeping was only single entry, and there was no merchandise account or other account of that character. The adjuster was informed that the invoices were to a large extent burned, and, though he told the plaintiffs' president that duplicate invoices could readily be obtained, nothing whatever in that direction appears to have been done, and all that the defendants had up till 8th April was a so-called stock list of 1st August, 1907, the amount of which they were justified in doubting, and partial subsequent invoices of goods bought, and entries of payments without particulars, and a very large number of sale orders, from which, if they so choose, they may try to make out what goods had been disposed of.

I do not find that there was any waiver by the defendants of as particular an account as the law entitled them to, nor that there was any unreasonable requirement on their part on or before 11th April, nor that they had in fact been furnished with any reasonable information outside of the statutory declaration as to the amount they were asked to pay. The statutory declaration was forwarded to each insurance company with a letter of 8th April, 1908, for the plaintiffs' solicitors, which does not indicate any reliance on any waiver of rights. On 13th April the defendants' solicitor wrote to the plaintiffs' solicitors pointing out that only approximate bulk sums were stated, and asking particulars. I do not find that anywhere in the correspondence did the defendants waive this objection to the proofs of 8th April.

The plaintiffs' solicitors were quite alive to the question of the sufficiency of these proofs, for on 27th April they wrote asking if the defendants would waive the benefit of the 60 days' notice, and on 29th April the defendants' solicitors wrote declining to consider that at present, and that the first thing to do was to furnish correct proofs of loss. On 11th May the plaintiffs delivered to each company another statutory declaration by the president, but without prejudice to their claim that the former one was sufficient, and on 21st May their solicitors wrote that they would issue a writ on expiry of 60 days from the filing of the first proofs of loss. As an excuse for the meagre information in those first "proofs" the plaintiffs' president says he could not make it fuller because the August stock list was then in possession of the defendants. This excuse is, I think, insufficient. Had he desired to have it, there would have been no difficulty

in getting it, but I do not find that he had made any request for it before that.

The plaintiffs have never been misled by any attitude of the defendants into thinking that the 60-day requirement would be waived. The defendants' position throughout was asking more information, and I see no justification for furnishing such insufficient proofs, and then insisting on strict rights as if they had been sufficient. The defendants are, in my view, entitled to the benefit of the condition, and both the actions were premature. In consequence, the defendants are entitled to their costs, and, in view of the unjust claim put forward by the plaintiffs as to the amount of loss, and the necessity of shewing the propriety of their demand for information, I do not think the defendants should be limited to the costs of that issue, but be entitled to their whole costs of defence, which will be set off pro tanto against the amounts payable by the defendants.

Unless otherwise arranged between the plaintiffs and the Northern Crown Bank, the balance will be payable to the bank.

During the trial, at the instance of the Court, Mr. Lawson, agreed upon by the parties, was called in to examine and report upon the mass of invoices, sale orders, and other items. His reasonable fees, unless otherwise arranged by the parties, should be allowed as part of the costs in the cause.

JANUARY 22ND, 1909.

DIVISIONAL COURT.

EVANS v. BANK OF HAMILTON.

Promissory Note—Accommodation Indorsement — Transfer to Bank as Collateral Security for Debt of Maker of Note —Transactions between Bank and Maker—Release of Note —Payment—Action to Recover Amount Paid — Fraud and Misrepresentation—Statute of Limitations — Appeal —Costs.

Appeal by plaintiff from judgment of RIDDELL, J., 12 O. W. R. 791, dismissing the action.

P. D. Crerar, K.C., for plaintiff.

G. T. Blackstock, K.C., and L. F. Stephens, Hamilton, for defendants.

The judgment of the Court (BOYD, C., BRITTON, J., MAGEE, J.), was delivered by

BOYD, C.:—We think this judgment should be affirmed, but without costs, on the ground that the Statute of Limitations shuts out the plaintiff from relief which might have been obtained had earlier action been taken.

JANUARY 22ND, 1909.

DIVISIONAL COURT.

OSTRANDER v. JARVIS.

Contribution—Co-sureties—Equitable Principle—Proportion of Contribution.

Appeal by defendant from judgment of County Court of Prince Edward in favour of plaintiffs, husband and wife, for the recovery of $384.90 in an action by sureties against a co-surety for contribution.

A. H. F. Lefroy, K.C., for defendant.

W. E. Middleton, K.C., for plaintiffs.

The judgment of the Court (BOYD, C., BRITTON, J., MAGEE, J.), was delivered by

BOYD, C.:—The principle of contribution among co-sureties does not rest on contract, but upon principles of equity which may be modified by the extent to which each has engaged himself. As put by Eyre, L.C.B., in Dering v. Earl of Winchelsea, 1 Cox 318, 323: "It is clear that one surety may compel contribution from another towards payment of a debt to which they are jointly bound. On what principle? Can it be necessary to resort to the circumstance of a joint bond? What if they are jointly and severally bound? What difference will it make if they are severally bound and by different instruments, but for the same principal and the same engagement? In all these cases the sureties have a common interest and a common burden: they are joined by the common end and purpose of their several obligations as much as if they were joined in one instrument, with the difference

only that the penalties will ascertain the proportion in which they are to contribute, whereas if they had joined in one bond, it must have depended on other circumstances."

In the report given in 2 B. & P. 273* this last sentence is thus expressed: "They are bound as effectually as if bound in one instrument with this difference only, that the sums in each instrument ascertain the proportions, whereas, if they were all joined in the same engagement, they must all contribute equally."

The text in Bosanquet and Puller's report makes plain what should be the proportion of contribution in this case. There was, first of all, Jarvis liable as surety to the extent of $3,000; Ostrander, husband and wife, liable for $3,000 also; and the last surety, Everard, liable for $1,000. The total sum of all the common suretyship for the one debt was $7,000, and the set of sureties should be liable in sevenths according to the proportion of the amounts in which they engage themselves, i.e., for husband and wife three-sevenths, for Jarvis three-sevenths, and for Everard one-seventh.

The judgment should be, to this extent, modified, and make Jarvis liable for three-sevenths of the sum paid by Mrs. Ostrander. The appeal with this change should be dismissed with costs.

The neat point is worked out very clearly in Re MacDonaghs, 10 Ir. R. Eq. 269 (1876).

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*Dering v. Earl of Winchelsea was decided in 1787, and was first reported from MS. note by Bosanquet and Puller in 1814, and afterwards by Mr. Cox in 1816. The manner of its appearing in Bosanquet and Puller would indicate that the source of information was Lord Eldon, who was of counsel in the case: see 14 Ves. p. 169. I would prefer the text in Bosanquet and Puller to that in Cox: THE CHANCELLOR.