CORRECTIONS.

On p. 636, ante, line 9 from top, omit the words "there is no evidence that."

Line 4 from bottom of same page, for "a" read "no."

On p. 661, ante, in line 11, insert a comma after the word "car," and in line 12 strike out the words "apparently a barrel of oil and some iron pipe."

On p. 669, ante, in line 20, substitute "requested" for "instructed."

THE

ONTARIO WEEKLY REPORTER

VOL. X. TORONTO, NOVEMBER 14, 1907. NO.

OCTOBER 30TH, 1907.

DIVISIONAL COURT.

McCANN MILLING CO. v. MARTIN.

Chattel Mortgage—Renewal—Time of Filing—Computation of Year—Validity.

Appeal by plaintiff from judgment of MACMAHON, J., ante 264.

The appeal was heard by MULOCK, C.J., ANGLIN, J., CLUTE, J.

W. R. Smyth, for plaintiff.

A. Abbott, Trenton, for defendants.

ANGLIN, J.:—An appeal by plaintiff from the judgment of MacMahon, J., holding, inter alia, that a chattel mortgage filed in the office of the County Court clerk on 26th April, 1904, at 10 a.m., was validly renewed by renewal filed on 26th April, 1905, at 10 a.m.

The Chattel Mortgage Act, R. S. O. 1897 ch. 148, sec. 18, enacts that "every mortgage or copy thereof filed in pursuance of this Act shall cease to be valid, as against the creditors of the persons making the same, and against subsequent purchasers and mortgagees in good faith for valuable consideration, after the expiration of one year from the day of the filing thereof, unless within 30 days next preceding the expiration of the said term of one year a statement, etc., is filed in the office of the clerk of the County Court."

For the appellant it is contended that the renewal statement was filed too late; that to be in time it should have been filed at the latest at some time on 25th April, 1905.

In my opinion, it is only necessary to read the language of the statute to see that this contention cannot prevail. The year within which the renewal is to be filed is to be computed "from the day" on which the mortgage itself was filed. This necessarily means that the year begins at the first moment of time after that day has been completed. Were the language "from the time of filing," the appellant's contention might have much weight. If authority be needed to support the view that the year within which the renewal is to be filed must be computed exclusively of the day upon which the mortgage itself was filed, the case of Goldsmith's Co. v. West Metropolitan R. W. Co., [1904] 1 K. B. 1, affords it. At p. 5 Mathew, L.J., says: "The rule is now well established that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded."

A number of American cases cited in Cobbey on Chattel Mortgages, at p. 592, were referred to by counsel for the appellant. Of these it is sufficient to say that on examination it appears that the language of the several statutes upon which these American decisions turn is not identical with that with which we are now dealing.

The appeal fails and should be dismissed with costs.

MULOCK, C.J., gave reasons in writing for the same conclusion.

CLUTE, J., concurred.

CARTWRIGHT, MASTER. NOVEMBER 1ST, 1907.

CHAMBERS.

PROUSE v. TOWNSHIP OF WEST ZORRA AND DAWES.

Parties — Joinder of Defendants — Pleading — Joint Cause of Action — Negligence — Dangerous Fence — Highway — Private Owner — Municipal Corporation.

Motion by defendant Dawes for an order requiring plaintiff to elect against which defendant he will proceed.

C. J. Holman, K.C., for defendant Dawes.

F. J. Dunbar, for defendants the corporation of the township of West Zorra, supported the motion.

George Wilkie, for plaintiff, contra.

THE MASTER:—The statement of claim alleges that Dawes owns lands adjacent to the road in the township of West Zorra; that he "unlawfully and negligently built and maintained a barbed wire fence in front of said lands, and so near to the travelled portion of the said road allowance and highway as to render it dangerous to use the said travelled way as a highway." It then alleges that Dawes built a portion of the fence "out into the road allowance so as to enclose a portion thereof within the said fence, and so as to leave the said fence dangerously near to the travelled portion of the said highway, and to leave the remaining portion of the highway so narrow as to be dangerous to travellers using the same."

Paragraph 6, which follows, says: "The defendants the municipal corporation of the township of West Zorra negligently and unlawfully allowed and permitted the said fence to be so built and maintained as aforesaid, and the highway to remain in such dangerous condition."

It then alleges that a valuable horse of the plaintiff was injured by the encroaching fence, and claims unstated damages.

For the motion Baines v. Town of Woodstock, 6 O. W. R. 601, 10 O. L. R. 694, was relied on. The exact words of the statement of claim in that case are not given in the report, and I do not now recall them. That case, however, was, as I understand, disapproved by Meredith, C.J., in Campbell v. Cluff, 8 O. W. R. 780. It can, therefore, no longer be considered as binding.

In these cases much depends upon the exact form of words used, and from what is stated about the pleading in the Baines case, there seems to have been a distinct allegation of negligence on the part of the corporation after knowledge of the wrongful act of the Patricks.

Here the pleader seems to have paid attention to that case and also to that of Collins v. Toronto, Hamilton, and Buffalo R. W. Co., 10 O. W. R. 84, which was affirmed by the Divisional Court, ib. 263.

For the reasons given in the Collins case, and following the decisions there cited, I think the 6th paragraph sufficiently alleges a joint cause of action, and that the plaintiff cannot be required to elect if he chooses to run the risk of having his action dismissed at the trial as against one of the defendants.

The motion will be dismissed; costs in the cause. . . .

CARTWRIGHT, MASTER. NOVEMBER 1ST, 1907.
ANGLIN, J. NOVEMBER 8TH, 1907.

CHAMBERS.

TRETHEWEY v. TRETHEWEY.

Evidence — Motion to Divisional Court for New Trial — Discovery of Fresh Evidence — Examination of Witnesses on Pending Motion — Appointment for — Motion to Set aside — Rules 491, 498.

On 19th October defendant served notice of motion to a Divisional Court to set aside the judgment at the trial, and dismiss the action, or for a new trial, on the usual grounds, and, among others, on the ground of alleged discovery since the trial of material evidence which, if true, would defeat the action, in defendant's opinion.

In the notice it was stated that the motion would be supported by the examination of 5 named witnesses, as well as by the affidavit of the defendant filed.

In pursuance of this notice the defendant obtained an appointment from a special examiner for the examination of the 5 witnesses on 26th October, on the pending motion.

On 24th October plaintiff moved to set aside this appointment as irregular and unauthorized by the practice, because leave had not first been obtained from a Divisional Court, and that, in any case, the proposed evidence could not be received as shewing grounds for a new trial.

W. E. Middleton, for plaintiff.

R. McKay, for defendant.

THE MASTER:—The affidavit of defendant referred to in his notice of motion was not filed or made until 29th October.

It sufficiently explains the nature of the proposed evidence, and states that he had no way of discovering this evidence before the trial. It was argued with much confidence that Rule 491 does not apply to the present case, but that it is governed by Rule 498 (3). Whatever may be the view which ultimately prevails on this question, I do not feel myself at liberty to go contrary to the deliberate opinion expressed by that eminently careful Judge the late Mr. Justice Street in Rushton v. Grand Trunk R. W. Co., 2 O. W. R. 654, more fully reported in 6 O. L. R. 425. There it was distinctly said that evidence in cases like the present could be taken under Rule 491. The appointment was set aside, but it was because it was held that the proposed evidence could not be received. But, if the attempted examination was irregular, there would have been no necessity to consider whether the evidence sought to be adduced was or was not admissible. This is sufficient, perhaps, to enable me to dispose of this motion. But I venture to point out that a great deal of time may be saved and the recovery of the plaintiff be accelerated by allowing the examination to proceed. For it may turn out that when these witnesses come to be examined they may entirely negative what the defendant hopes to prove.

In any case no more harm can result to the plaintiff from the proposed evidence being taken on an examination than if the witnesses had made affidavits. In neither case can the evidence be used without the leave of the Divisional Court. It will be for them to consider how far the principle of Rule 312 requires a new trial if the evidence of the proposed 5 witnesses appears to be admissible, and sufficiently likely to lead to a different conclusion from that arrived at on the first trial.

It was argued as a reason for setting aside the appointment that the defendant's affidavit was not filed until after the date of the proposed examination. That, however, does not appear to be a condition precedent. It might be a more serious objection that it does not state that the proposed witnesses will not make affidavits. But from the character of the evidence expected to be given by them, it may well be assumed that they do not wish to appear as volunteers.

The motion will be dismissed with costs to the defendant in the appeal to the Divisional Court, unless otherwise ordered. But the examination should be stayed until the time for appealing from this order has expired.

Plaintiff appealed from this decision to a Judge in Chambers.

W. E. Middleton, for plaintiff.

R. McKay, for defendant.

ANGLIN, J., allowed the appeal with costs, and set aside the appointment, holding that Rule 491 did not apply to appeals and motions in the nature of appeals, which are governed by Rule 498, and that fresh evidence could not be adduced upon the pending motion or appeal to the Divisional Court except by leave of the Court under Rule 498.

CARTWRIGHT, MASTER. NOVEMBER 1ST, 1907.

CHAMBERS.

CANADA SAND LIME BRICK CO. v. OTTAWAY.

Mechanics' Liens — Statutory Proceeding to Enforce Lien — Time for Filing Statement of Claim — Computation — Long Vacation.

Motion by defendants the owners to dismiss a proceeding under the Mechanics' Lien Act and vacate the certificate of lis pendens.

W. A. McMaster, Toronto Junction, for the applicants.

R. G. Agnew, Toronto Junction, for the plaintiff.

THE MASTER:—Four objections were taken to the proceedings, but of these it will only be necessary to consider one, as the others might be cured by amendment.

The one which appears to be fatal is that the statement of claim was filed too late. It was conceded that this was so, unless the time of the long vacation was to be excluded in reckoning the 90 days prescribed by sec. 24 of the Act. This, however, cannot be allowed in the absence of any authority to that effect. The Act requires effective proceedings to be commenced within 90 days from the date of the last work done. But, if the long vacation is to be excluded, then at certain times of the year this period would be nearly doubled and enlarged from 90 days to 152.

So far as I can see, the Rules of the Court do not in this respect apply to the Mechanics' Lien Act. For, although the initial step in an action under this Act is called a statement of claim, it differs materially from the pleading of that name in an ordinary action.

Here it is the first step in a proceeding to enforce a statutory remedy—and this step the Act itself expressly requires to be taken within a fixed period. To extend that period by excluding the vacations would be in effect to amend the Act, and materially enlarge the time which must elapse before proceedings under it will be barred.

The action must be dismissed, and the certificate of lis pendens vacated. . . . .

CARTWRIGHT, MASTER. NOVEMBER 1ST, 1907.

CHAMBERS.

METHODIST CHURCH v. TOWN OF WELLAND.

Pleading — Statement of Defence — Motion to Strike out Paragraph—Action for Negligence Resulting in Destruction by Fire of Plaintiffs' Buildings — Insurance Moneys — Application in Reduction of Damages — Objection in Law.

This action was brought to recover from the defendants damages, to the amount of $15,000, caused to the plaintiffs by the destruction of buildings by fire resulting from the breaking of the main which supplied natural gas to the users in the town.

The plaintiffs alleged that this breakage was caused by the negligent use of a heavy steam roller by the defendants.

The 5th paragraph of the statement of defence was as follows: "The defendants by way of counterclaim further say that the said church and contents were insured for the sum of $5,000 or thereabouts against loss or damage by fire, which amount of insurance has been or will be paid the plaintiffs or other owners of the said property, and the defendants are entitled, in the event of being held liable for the amount

of damage sustained, to receive the benefit of the amount of such insurance and to have the same applied in reduction of such damage."

The plaintiffs moved to strike out this paragraph, because it "is immaterial and tends to prejudice and embarrass the plaintiffs in the fair trial of the action."

H. E. Rose, for plaintiffs.

C. A. Moss, for defendants.

THE MASTER:—In support of the motion Flynn v. Toronto Industrial Exhibition Association, 2 O. W. R. 1047, 1075, 6 O. L. R. 635, was cited. That case, however, is not in point. There the allegation by the plaintiff that the defendants had insured themselves against liability resulting from the use of the machine in question was clearly not one of the material facts on which the plaintiff could rely. Here the plaintiffs are asking to have a part of the statement of defence struck out, on the ground that what is alleged therein cannot be given in evidence at the trial.

Since the judgment in Stratford Gas Co. v. Gordon, 14 P. R. 407, approving the decision in Glass v. Grant, 12 P. R. 480, it is but seldom that a defendant's pleading should be interfered with in Chambers. According to the Chancellor in Glass v. Grant, supra, this should never be done "unless the pleading is so plainly frivolous or indefensible as to invite excision." Is that the case here?

Doubtless Brown v. McRae, 17 O. R. 712, decided that in cases like the present "the defendants cannot deduct from the amount of damages to be paid by them a sum received by the plaintiff from insurers in respect of such damages:" p. 714. From this it would seem probable that the plaintiffs here could successfully demur to this defence. But, however that may be, in Knapp v. Carley, 7 O. L. R. 409, 3 O. W. R. 187, it was pointed out that no application which is equivalent to what was formerly the argument of a demurrer can be heard except by a Judge in Court. Following the reasoning of the learned Judge in that case, I do not think I have power to give effect to the motion, which I think must be dismissed without prejudice to any application under Rule 259 or otherwise, after reply, which plaintiffs may be advised to make.

Costs in the cause. . . . .

MACMAHON, J. NOVEMBER 1ST, 1907.

WEEKLY COURT.

RE MCRAE.

Will—Construction—Life Estate — Power of Appointment to Children in Fee—Debts Due by Devisee of Life Estate Charged against Property Devised — Charge against Life Estate only.

Motion by David Haigh McRae and Norman J. Fraser, executors of the will of William Ross McRae, under Con. Rule 938 and sec. 91 of the Judicature Act, for the determination of the question arising in the administration of the estate of William Ross McRae, and affecting the rights and interests of the devisees under his will, namely: Is the indebtedness of William Duncan McRae, charged against him in the testator's books at his death, by the provision of the testator's will charged against the fee simple of the property devised for life to William Duncan McRae, being the centre portion of lot 1 fronting 22 feet on Princess street, in the city of Kingston, or only charged against the life estate of William Duncan McRae in that property?

J. L. Whiting, K.C., for the executors.

John McIntyre, K.C., for Ernest J. B. McRae and Jessie R. McRae, two of the children of R. W. R. McRae.

J. M. Farrell, Kingston, for W. D. McRae.

W. Mundell, Kingston, for the official guardian.

MACMAHON, J.:—The testator died on 19th April, 1901, having made his last will dated 31st January, 1885.

By clause 4 the testator devised the centre portion of lot number 1 fronting 22 feet on Princess street, in the city of Kingston, measured in an easterly direction from the easterly limit of said west part, and comprising the centre house on said lot, known as "the Pantry store," to his son William Duncan McRae for his life.

The testator devised to several of his sons and daughters various properties in the city of Kingston for the respective terms of their natural lives.

And by the 11th clause of his will the testator directed that "from and after the death of any of my said sons and daughters, I devise the land hereinbefore devised for life to

such son or daughter to my said trustees in trust for such of the children of such son or daughter and in such shares as he or she shall by will appoint, and in default of any such appointment in trust for such children in equal shares, with power to the trustees for the time being of this my will to lease or sell any land which they shall so hold in trust, and invest the proceeds of any sale in manner hereinafter mentioned, and apply the income of the share to which any of such children shall be presumptively entitled for his or her maintenance and education during his or her minority and to pay such share to him or her on attaining majority."

The testator by a codicil dated in October, 1893, altered his will as follows:—

"I hereby alter and amend my said will and provide that my son William Duncan McRae shall be charged with any and all sums of money in which he may be indebted to me at my decease, or which then stand charged against him in my books, and remain unpaid, and whether barred by the Statute of Limitations or not, and all such moneys are hereby charged against any and all the property, real and personal, devised or bequeathed to him, and the benefits he may take under said will, and shall be deducted therefrom and paid thereout so that he shall only receive the balance remaining after such deduction or payment."

William Duncan McRae was at his father's death indebted to him in the sum of $11,870.35.

The parcel of land devised by the 4th clause of the will to William Duncan McRae for life is the only property devised to him, and the fee simple thereof is not worth the amount of his indebtedness.

The other beneficiaries under the will contend that the indebtedness of William Duncan McRae is charged upon the said parcel in fee simple, and not merely on the life estate therein devised. William Duncan McRae and the official guardian, acting for his children, contend that the indebtedness is charged only on the life estate of William Duncan McRae in the property.

The beneficiaries interested under the will, to wit, William Duncan McRae, Walter Ross McRae, Ernest John Bright McRae, Jessie Riddell McRae, David Haig McRae, Allan Haddin McRae, and Margaret Angelique McRae, are all living and of full age, and their children are all infants represented by the official guardian, who has also been appointed to represent any unborn grandchildren of the deceased.

In Jordan v. Adams, 6 C. B. N. S. 748, John Jordan by his will (paragraph 5), executed in 1825, devised certain real estate in the county of Warwick to his son William Jordan for life, and after his decease to the "heirs male of his body" for their natural lives in succession according to their respective seniorities, "or in such parts and proportions, manner and form, and amongst them, as the said William Jordan, their father, shall by deed or will duly executed and attested, direct, limit, or appoint." It was held by the Court of Common Pleas that "by heirs male of his body," as explained by the context, testator meant sons, and consequently that William Jordan took only an estate for life. In the Exchequer Chamber, 9 C. B. N. S. 483, Cockburn, C. J., and Wightman, J., affirmed the judgment of the Court below, while Martin, B., and Channell, B., held that William Jordan took a life estate. . . .

But in the present case the testator by the 4th clause of the will gives only a life estate to his son William Duncan McRae; and as to the remainder, he simply gives to his son William Duncan McRae a power to appoint amongst his children.

It is, I think, clear that William Duncan McRae takes only life estate in the property devised to him, and the indebtedness to his father is only chargeable against such estate.

All the parties are entitled to costs out of the general estate of the testator—those of the executors to be as between solicitor and client.

RIDDELL, J. NOVEMBER 1ST, 1907.

TRIAL.

McCULLOUGH v. HUGHES.

Vendor and Purchaser—Contract for Sale of Land—Offer in Writing—Acceptance—Administrator of Estate—Consent of Official Guardian — Binding Contract — Specific Performance — Perjury.

Action to compel specific performance of a contract for the sale to plaintiff of certain land.

H. Lennox, Barrie, for plaintiff.

C. E. Hewson, K.C., for defendant.

RIDDELL, J.:—The defendant is administrator of the estate of Mary Hughes. He determined to sell certain land belonging to the estate, and, the leave of the official guardian having been obtained (this being necessary by reason of a lunatic being interested), the land was offered for sale, subject to a reserved bid.

Before this time the plaintiff, who had been a tenant of the land, had, as I find, given up possession to the plaintiff, although he kept a few articles upon the premises by permission of the plaintiff.

The reserved bid was not reached, and plaintiff, who had bid at the sale, and defendant, went to the office of the defendant's solicitor, and, after considerable discussion, the plaintiff offered the sum of $1,400 for the land. This was accepted by the defendant, but, as it was less than the reserved bid, which had been fixed by the official guardian, the plaintiff was informed that the consent of the official guardian must be obtained. He said that he must have the land at once or not at all, and the solicitor wrote out an offer on the back of the conditions of sale, which the plaintiff signed.

The defendant accepted this offer, so far as he was concerned, and signed below the offer of the plaintiff the following:—

"I think the above offer should be accepted. Thomas Hughes, administrator."

It was arranged then and there that this should be sent to the official guardian with a letter asking the official guardian to telegraph the plaintiff on receipt of the letter if the offer was to be accepted.

This took place on Saturday 1st June, 1907. The defendant now pretends that he does not remember what took place on the Saturday in the solicitor's office, and that he was or must have been intoxicated. This, I find, is without the slightest foundation in fact—and I find that he was perfectly competent to do business and thoroughly understood what he was doing and intended to do it. On Monday morning 3rd June the official guardian telegraphed to the plaintiff accepting the offer on behalf of the lunatic—and afterwards the defendant telephoned to the office of the official guardian that he had received an offer for $1,500. Before the receipt of the telegram the plaintiff had done a little work on the land, but had stopped—and he awaited the receipt of the telegram to take possession and do substantial work. I find as a fact that he did take possession on the strength of this

telegram of the official guardian and the contract which the defendant had made so far as he could, on the Saturday before.

Even if the writing of the defendant be not a signing of the contract or in itself an acceptance of the offer, parol acceptance is enough: Boys v. Ayerst, 6 Mad. 316; Flight v. Bolland, 4 Russ. 301; Warner v. Wellington, 3 Drew. 523; Reuss v. Picksley, L.R. 1 Ex. 342; Lever v. Koghler, [1901] 1 Ch. 543. And therefore the contract was complete so far as the defendant was concerned. It is true that it was conditioned upon the acceptance of the official guardian; but there was no term express or implied that the defendant should have a locus pœnitentiæ until after the acceptance by the official guardian. Whether the defendant might have withdrawn from the contract by notifying the plaintiff before the acceptance by the official guardian had been communicated to him, I need not consider. He did nothing of the kind, and said nothing to the plaintiff until the evening of the Monday, when he indulged in expressions the reverse of complimentary to the plaintiff, to his own solicitors, and to the official guardian; and said the contract was no good.

Nor need I consider how the case would stand if the defendant had in fact received a more favourable offer for the land, belonging as it does to an estate, though, as at present advised, I do not think the Court would sanction the dishonest repudiation of a fair bargain deliberately entered into, though that were by an executor in the interest of an estate. There is no credible evidence that any such offer was made—I decline to hold anything proved which rests upon the unsupported oath of the defendant.

The defence fails, and the usual judgment for specific performance will be made with costs. The defendant will reimburse his estate for the costs the plaintiff is entitled to, and will not be allowed his own costs against the estate.

The necessary result of my findings is that the defendant committed wilful and corrupt perjury. I, therefore, requested the County Crown Attorney to institute proceedings against him. This crime seems to be alarmingly on the increase, and all legitimate means should be taken to punish it and thereby prevent its repetition.

NOVEMBER 1ST, 1907.

DIVISIONAL COURT.

PETERBOROUGH HYDRAULIC CO. v. McALLISTER.

Landlord and Tenant—Action for Rent—Claim for Indemnity —Agreement between Tenant and Bank—Disposal of Business — Authority of Agent of Bank—Assumption of Liabilities—Implied Obligation to Pay Rent—Transferees of Lease — Power of Bank to Carry on Business — Implied Obligation—Third Parties.

Appeal by the Ontario Bank, third parties, from judgment of BOYD, C., ante 109.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

J. Bicknell, K.C., and G. B. Strathy, for appellants.

D. O'Connell, Peterborough, and G. N. Gordon, Peterborough, for defendants.

F. D. Kerr, Peterborough, for plaintiffs.

RIDDELL, J.: . . . . In drawing up the formal judgment the Ontario Bank, the third parties, were ordered to pay to plaintiffs both the sum of $765.82 awarded against defendants and the plaintiffs' costs ordered to be paid by defendants, and also to pay the defendants their costs of the action, so far as they relate to the claim for rent, and the costs of the third party proceedings.

The third parties appeal from the judgment upon the merits, and also contend that in any case no judgment should be entered against them in favour of plaintiffs.

The circumstances under which the defendants claim indemnity from the Ontario Bank appear in the reasons for judgment given by the Chancellor. I am, however, unable to agree in the conclusion at which he has arrived.

Whatever may have passed between McGill and the defendants in Toronto, the agreement between the defendants and the bank was reduced to writing—the documents were considered by the solicitor for the defendants—and I do not think any case has been made out for reformation. I agree that the documents are binding upon the bank, but I think

that no liability under the documents and facts of the case attaches upon the Ontario Bank. . . .

On 19th September, 1905, an agreement is executed reciting that the McAllister Co. are indebted to the bank in the sum of $69,200 as part security for which sum the bank hold a lien under sec. 74 of the Bank Act, and also an assignment of all the company's book debts and other claims, etc., and the company are unable to pay the bank in full. A further recital is that it has been agreed that upon payment to the bank of $10,000 and the absolute surrender of all the company's assets, the bank assuming payment of certain liabilities set out in a memorandum attached, the bank shall release the company and the individuals thereof from all further liability in respect of said indebtedness. Then comes the operative part of the instrument: "The company hereby surrender to the bank all their" assets, etc. 2. The company shall forthwith pay to the bank $10,000, "the bank assuming the payment of certain of the company's liabilities, as particularly set out in the memorandum hereto attached," etc. 3. Further assignments and assurances. 5. In consideration whereof the bank, etc.

The agreement of even date referred to in paragraph 5 provided that C. B. McAllister should carry on the business in the name of the company for the bank under the supervision of the local manager of the bank; and by paragraph 4 the bank agreed to indemnify the company and the members thereof against any liabilities incurred while the business should be continued in the company's name.

The bank admittedly did pay the recited indebtedness and all the rent and all other liabilities the company became liable for during the time the business was so carried on—and thus carried out the express provisions of the two agreements.

And I do not think that any indemnity can be implied. It is, I think, apparent that the agreement to assign the lease was introduced for the advantage of the bank, and might by the bank be waived—and that the company could not have compelled the bank to accept an actual assignment of the lease, even if the consent of the landlord had been obtained, which it was not. And this is especially the case when it is more than doubtful that such transaction could be lawfully carried on by the bank. See R. S. C. 1906 ch. 29, secs. 76, 79, 80, 81, 82.

Moreover, the expressed indemnity should in this case,

I think, exclude any indemnity to be implied—if it had been intended that the bank should indemnify against all future rents, the documents should have, and would have, so provided when providing for other future indebtedness.

It was in effect admitted upon the argument—and the cases cited make it clear—that, unless by some contract of indemnity to be implied, the bank cannot be rendered liable. The question as to whether and in what circumstances any stated contract is to be implied has received much attention. Long before the leading case of Aspdin v. Austin, 5 Q. B. 671, the matter had been considered by the Courts in England. It would serve no good purpose to go through the cases, adopting as I do the language of Lord Alverstone, C.J., in Ogdens v. Nelson, [1903] 2 K. B. 287, at p. 297, where he says: "The other line of authorities . . . establishes that where the parties have made a contract which contains a variety of stipulations and is silent as to others, no stipulation or agreement which is not expressed ought to be implied, unless it is necessary to give to the transaction the effect and efficacy which both parties must have intended that it should have." . . . .

[Reference also to The Queen v. Demers, [1900] A. C. 103, and Hill v. Ingersoll Road Co., 32 O. R. 194.]

I am of opinion, therefore, that the appeal should be allowed, the claim against the bank should be dismissed with costs to be paid by defendants, and that the bank should have judgment for the costs of this motion against both plaintiffs and defendants.

FALCONBRIDGE, C.J., and BRITTON, J., agreed, for reasons stated by each in writing.

RIDDELL, J. NOVEMBER 2ND, 1907.

TRIAL.

BOYLE v. ROTHSCHILD.

Company—Directors—Breach of Trust—Sale of Machinery to Company—Consideration—Shares in Company—Fraud—Contract—Setting aside Transaction—Payment of Fair Value of Machinery.

Action by one Boyle and the Canadian Klondyke Mining Co. against the Detroit Yukon Mining Co. and 5 individuals.

directors of both companies, to set aside a transaction whereby certain machinery belonging to the defendant company was sold to the plaintiff company, in consideration of $500,000 worth of stock in that company allotted as fully paid up to the 5 individual defendants, and for other relief.

Wallace Nesbitt, K.C., and A. H. Clarke, K.C., for plaintiffs.

Walter Cassels, K.C., and R. F. Sutherland, K.C., for defendants.

RIDDELL, J.:—. . . . The plaintiff Boyle received a lease from Her late Majesty, 5th November, 1900, of certain gold-bearing lands in the Yukon Territory. After some time, and on 27th June, 1904, he made an agreement with the Detroit Yukon Mining Co., whereby he agreed to sell and transfer this lease to that company for $750,000, payable in certain instalments mentioned, the last on or before 1st November, 1907. As the property was by this time standing in the name of H. B. McGiverin, of Ottawa, as trustee, all the money (except the down payment of $7,500) was to be paid to McGiverin.

This arrangement fell through, the defendant Rothschild, who was president of the Detroit company . . . informing the plaintiff Boyle that it would not be carried out (see letter of 27th August, 1904.) Boyle had certain machinery upon the property, and some work at least was done by him.

In the letter already spoken of Rothschild suggested the formation of a new company to take over the "Boyle concession;" and, after considerable negotiations at Ottawa, an agreement was entered into, 14th September, 1904, between Boyle, McGiverin, and Rothschild and his co-defendant Murphy, whereby Rothschild and Murphy undertook to form and incorporate a joint stock company to take over the lease. It was "understood"—so says the document—that the company so to be formed should be capitalized at $750,000, of which $500,000 should be used by Rothschild and Murphy to provide machinery for the operation of the company, and $250,000 should be given in stock to Boyle as part consideration for the transfer by him to the company of his rights in the lease. And the balance of the consideration was to be paid to Boyle in cash $250,000 by the company from time to time out of the gross output of the company's mining opera-

tions at the rate of 25 per cent. of the gross daily output. It will be seen that the new arrangement differed materially from the former—the consideration is different, the terms are different.

It is contended by the defendants that it was a term of the arrangement—an understanding between the parties—that certain machinery owned by the Detroit company should be taken over by the new company at. . . . $500,000, and that the $500,000 mentioned in the contract should be applied to the purchase of that machinery. I find that not only is such arrangement or understanding not proved, but, upon such of the evidence as I believe, is substantially disproved. I give credence to the evidence of the plaintiff and McGiverin and decline to accept the evidence on the part of the defendants to the contrary. My conclusions, based as they are upon the conduct and demeanour of the witnesses in the box, would be strengthened, if they needed strengthening (which they do not), by the fact that in the application for charter made to the authority at Ottawa, and signed by the defendants Rothschild, Murphy, Moran, and Dwyer, and by McGiverin (McGiverin signing as trustee for Boyle), it is expressly stated that the stock subscribed for by McGiverin was "to be paid for by the transfer to the said company of lease No. 18 . . . in favour of . . . Boyle . . . according to the terms of an agreement entered into between said . . . McGiverin and . . . Boyle and the provisional directors of the company, and dated 30th September, 1904;" while it is said that "the stock subscribed for by the said . . . Joseph Murphy . . . Moran . . . Dwyer and . . . Rothschild is to be paid for in cash." Each of these defendants subscribed for $100,000, as did one Palms, not a party to this action.

I do not believe that these defendants would have signed any such document if it did not set out the truth. I do not believe that they would or could have overlooked the express provision for payment by the transfer of property of the stock subscribed by McGiverin, and the equally express provision for the payment in cash of the stock subscribed for by them. They are men of business, and it is quite incredible, and I do not believe, that if the arrangement had been as now set up, the document could have been sent to the department at Ottawa in the form already mentioned. I find as a fact that the defendants did not at that time intend to state a

falsehood to the government of Canada, and that the application truly states that the $500,000 stock was to be paid for in cash.

This was the impression I had formed at the trial. Mr. Cassels offered as evidence certain parts of the examination for discovery of Rothschild (who is now dead) in an action of Boyle v. O'Brien. I rejected the evidence, but, on careful consideration, I think that I—to avoid the necessity or possibility of a new trial in case I should be held to have been wrong in my view of the admissibility of the evidence—should have admitted the evidence, subject to objection. I am unable to understand upon what principle this can be evidence; but, for the reason I have given, I have now allowed it to be put in, subject to objection and quantum valeat. A perusal of this evidence has not in the least changed or modified the impression I formed at the trial, and, even with this evidence, I find as I have done.

No doubt, there was an understanding in advance of incorporation that the machinery owned by the Detroit company should be taken over by the new company, but it was to be taken over at a fair price, and to be paid for out of the cash funds of the company, to be paid in in cash by the 5 subscribers as payment for their stock.

It is possible that the defendants have since that time made themselves believe that this meant or implied the paying of $500,000 in stock for it—but nothing of the kind was said or intended by the plaintiff or McGiverin, or said by the defendants or any of them, or any one acting in their behalf. There never was any arrangement or understanding at any time that the stock other than that to be allotted to McGiverin should be paid for otherwise than in cash.

Letters of incorporation were issued to the new company under the name of "The Canadian Klondyke Mining Company Limited," 2nd October, 1904; in the charter it was provided that the defendants Rothschild, Murphy, Moran, Dwyer, and also Palms and McGiverin, should be the provisional directors, and the company were authorized to issue shares of stock to McGiverin in consideration of the transfer of the mining property to the company. In the meantime, pending the granting of the charter, the plaintiff and McGiverin made an agreement with the Canadian company and the 6 gentlemen mentioned, "who are nominated as provisional directors of said company and act herein as trustees therefor," agreeing to transfer the property on being allotted

$250,000 in stock of the company, and upon receiving the promise of the company to pay the $250,000 in cash, as had been agreed upon.

A meeting of the new company for organization, etc., was held 25th October, 1904, in Detroit, at which place all the provisional directors except McGiverin resided. After the routine business McGiverin said that the $500,000 had been subscribed for in cash, and that the directors would deal with the machinery. He also said it would be advisable to have an independent valuator appointed to determine the value of the machinery contemplated to be taken over. Rothschild said that a full statement of cost, etc., would be prepared and laid before the directors.

The machinery stood in the books of the Detroit company at $181,854.67, and was at the time worth, as I find as a fact, $50,000.

After this time the affairs of the Canadian company were managed by the 5 persons named; McGiverin took no further part in the management of the company. These 5 persons, on or about 5th December, 1904, caused to be issued to themselves, in the manner to be hereafter referred to, as paid up stock, shares in the company to the amount of $100,000 each, and to McGiverin $250,000. The last was in pursuance of the agreement and in accordance with the provisions of the charter—the others were without consideration, and the persons named were guilty of a fraud upon the company of which they were the directors and trustees. By this time they had, no doubt, conceived the idea and formed the plan of procuring the whole amount of available capital stock of the Canadaian company in exchange for the machinery of the Detroit company

It is now time to go back a little. It is asserted by the defendants that, after the decision of the Detroit company (of which they were members and directors) that the company would not carry out the agreement of 17th June, 1904, Rothschild, Murphy, and an attorney, Leitner by name, also a director, were appointed by the directors of the Detroit company to go to Ottawa and see if an arrangement could not be made with Boyle in reference to his concession—and it is asserted that the 5 persons who became applicants for the charter were acting throughout for the Detroit company. No entry is to be found, as is admitted, in the books of the Detroit company of any such appointment; and I do not consider it important whether the fact be as alleged.

However that may be, on 5th December, 1904, what was done in fact was this—the 5 were credited with $100,000 as paid up stock in the books of the company, but the certificates of stock were issued to the shareholders of the Detroit company pro rata. Nothing had then nor has since been paid upon this stock; and I find that it was and is wholly unpaid. The defendants, being directors and trustees of the company, are liable for this breach of trust. I have not, therefore, expressly to decide whether they are liable as original subscribers for stock, and whether they may not successfully plead that they are relieved from personal liability as being trustees under sec. 32 of 2 Edw. VII. ch. 15, being the Act then in force (R. S. C. 1906 ch. 79, sec. 31.)

As at present advised, I do not think that the defendants can avail themselves of that section. See the cases cited in Masten on Joint Stock Companies, pp. 135, 136. I, therefore, think that the Court has power to order the defendants to pay to the company the amount of their subscription. But, in the view I take of this case, it is not necessary to so direct. As I am of opinion that the defendants are liable for a breach of trust, it necessarily follows that each is liable for the whole damage—and in this case I think each must be liable to pay to the company the whole amount of the face value of the shares he caused or assisted in causing to be issued.

All this is trite law—it depends on elementary propositions of jurisprudence, and authorities need not be quoted—the text books are full of cases bearing on the matter.

To any one having even from perusal of decided cases but a slight acquaintance with the methods of "high finance," what followed might have been prophesied with reasonable certainty and accuracy. Slightly modifying them, I apply here the words of Lord Macnaghten in Gluckstein v. Barnes, [1900] A. C. at p. 248: "For my part, I cannot see any ingenuity or any novelty in the trick which" the defendants "practised on the" plaintiff, who held one-third of the stock in the company. "It is the old story. It has been done over and over again."

Given that these defendants were directors and large shareholders in the Detroit company, given that the Detroit company had machinery that they may not have been too anxious to retain, given that a new company had been formed which might need this machinery, and did undoubtedly need like machinery, given that these defendants were also the

governing and controlling body in the new company, given a want of appreciation on their part of the demands of common honesty towards the new company, and it must follow as the night the day that they will try to turn over to the new company the machinery of the old company at the price of all the available stock in the new. . . . .

All these conditions were fulfilled, and the result followed. It is true that the plaintiff was turning in property for which he was at one time to get $750,000, for $250,000 of the same stock and $250,000 in cash, but what difference did that make? They had the power and they used it. On 4th January, 1905, a bill of sale was made by the Detroit company to the Canadian company for the sale to the latter of the machinery already referred to for the pretended consideration of $500,000. McGiverin had on 25th October, 1904, ceased to be trustee for the plaintiff, and he was consulted by Mr. Smylie, secretary of both companies, as to the form of instrument which should pass between the Detroit company and the Canadian company for the transfer of the machinery. "I know," says Mr. Smylie, "the Detroit-Yukon is to sell the machinery to the Canadian Klondyke for $500,000, and I know that a cheque is to pass, but is there any other form of legal document necessary to make a perfect transfer? If so, what?" To which McGiverin replied that "it might perhaps be wisest to have a bill of sale transferring the machinery from the one company to the other company for whatever consideration has been agreed upon. I therefore enclose herewith draft form of transfer, which may be subject to some slight difference according to the facts as better understood by the directors." And accordingly the bill of sale was drawn, executed, and duly registered.

There never was any agreement that this machinery should be taken for $500,000 in cash or in stock—the acting directors of the Canadian company were all directors of the Detroit company, and the pretended sale was in fraud and designedly in fraud of the Canadian company and of the plaintiff, its largest shareholder. It may be that those guilty of this fraud would be shocked to hear the transaction thus bluntly described, but that is the name that fits.

The plaintiff did not know of this transaction till long after. Though he saw a copy of the bill of sale, he did not know that it was intended to turn in the machinery at the price of $500,000. Even now his only objection, and the only objection of the Canadian company, is the price—and,

no doubt, this objection is a most righteous one. I do not find in any of the subsequent proceedings anything to prevent the Canadian company recovering from these defendants —whether the action brought by the plaintiff and discontinued or the alleged resolution of the company ratifying the fraud of the directors. If there were no other reason, the resolution was passed by those who had no right to vote; there were no shareholders (see 2 Edw. VII. ch. 15, sec. 72 (D.)); unless, indeed, it could be considered that my holding that the directors are liable as for a breach of trust in having the stock issued, made those to whom it was issued shareholders. But, even then, such a resolution would be and is in fraud of the company and of the plaintiff.

I should not omit to state that 2 placer mining claims, Nos. 19 and 20, were also on 26th June, 1905, assigned by the Detroit company to the Canadian company for "$1 of lawful money and other valuable considerations." The value of these was respectively $5,000 and $10,000, in all $15,000; and it is alleged that these also were assigned to the Canadian company in part satisfaction of the $500,000. This makes the fraud a little less glaring, but not much. The Detroit company turn over machinery worth $50,000 and claims worth $15,000, in all $65,000, in payment for stock of $500,000. . . .

In arriving at my conclusions of fact, I have been able to rely wholly upon the knowledge, the accuracy, and the truthfulness of the plaintiff, the witness McGiverin, and the witness Treadgold. Judging these by their demeanour in the box, I say their evidence should be given the fullest credence, and the same remark applies to Mr. Hayden and Mr. Barwell. In the case of some at least of the witnesses for the defence, I fear that "the wish was father to the thought"—at all events I prefer, for the reason I have given, the evidence of those already named.

There will be a declaration that at no time before the incorporation of the Canadian company was there any contract or arrangement that the machinery, etc., of the Detroit company should be taken in exchange for $500,000 in stock of the Canadian company, or should be bought by the latter company for $500,000 or any other sum; that the value of the machinery at the time of the transfer to the Canadian company was $50,000 and that of the placer claims $15,000; that the stock of the Canadian company, with the exception of that issued to McGiverin, is wholly unpaid;

that the defendants other than the Detroit company are liable to the company as for a breach of trust in the sum of $500,000; that the alleged sale to the Canadian company for $500,000 was in fraud of the said company, and the defendants (other than the Detroit company) are liable therefor to the company; that there was an actual conveyance to the Canadian company by the Detroit company of the said machinery, claims, etc., but that the price to be paid therefor was not fixed; that the Canadian company should pay to the Detroit company the fair value of the said property fixed as above (upon consent of both parties the value may be fixed by the Master, or I may be spoken to); that the defendants should pay the costs so far incurred. If a reference be had, I reserve to myself all questions of further costs and further directions. . . .

MULOCK, C.J. NOVEMBER 2ND, 1907.

TRIAL.

KELLY v. ELECTRICAL CONSTRUCTION CO.

Company—Election of Directors—General Meeting of Shareholders—Proxies—Rejection — By-law — Invalidity — Companies Act—Voting — Majority — Evidence — New Election.

Action to set aside the election of the board of directors of defendant company and for other relief.

T. G. Meredith, K.C., and J. W. G. Winnett, London, for plaintiffs.

G. C. Gibbons, K.C., and G. S. Gibbons, London, for defendants.

MULOCK, C.J.:—The company were incorporated by letters patent issued on 17th March, 1897, under the authority of the Act respecting the Incorporation of Joint Stock Companies by letters patent, R. S. O. 1887 ch. 157, and now, by virtue of sec. 5 of the Ontario Companies Act, are subject to the provisions of secs. 17 to 105 of that Act.

On 5th February, 1907, the annual meeting of the shareholders of the company was held, for, amongst other purposes, the election of a board of 5 directors A poll was opened, and on the conclusion of the voting the chairman declared Messrs. Campbell, Workman, Gorman, Heman, and Thomas elected, and they have ever since acted as members of the board.

The plaintiffs contend that they and C. W. Sifton, and not Workman, Gorman, Heman, and Thomas, were elected, and they bring this action on behalf of themselves and all other shareholders, except the individual defendants, and ask to have the election set aside, and that defendant Campbell, who was chairman at the meeting, be ordered to declare the plaintiffs and C. W. Sifton to have been elected directors, or for a declaration that the plaintiffs and C. W. Sifton were duly elected in the place of the other individual defendants.

The defendants, including the defendant company, by their statement of defence contend that plaintiffs are not entitled to maintain this action, and that the election was conducted in accordance with the requirements of the by-laws of the company.

The substance of the plaintiffs' complaint is that the individual defendants are usurping the office of directors, to the exclusion therefrom of the plaintiffs and C. W. Sifton. . . . The evidence does not, I think, shew that a majority of votes was tendered in support of the plaintiffs and Sifton, and therefore the case is narrowed down to the one point, whether the election should be set aside at the instance of these plaintiffs.

If the directors were not duly elected, their usurpation of office is an invasion of the rights of the corporation to manage their own internal affairs.

The election of directors is a matter under control of a majority of the shareholders. If the majority are satisfied that the present board should remain in office until the expiration of the statutory term of office, no useful purpose would be served by unseating them, for it would at once be in the power of the majority to restore them to office.

In the management of a company's domestic affairs the board may frequently err as to the manner of doing what the company are entitled to do, as, for example, by doing irregularly or illegally what they have the right to do in a regular or legal manner. In any such case, the majority of the shareholders may waive such irregularity or illegality, and

it would be purposeless for the Court to entertain an action at the instance of individual shareholders and set aside a transaction of the company, when the next moment the majority of the shareholders might in substance repeat their former action, though in a manner not open to objection. For instance, what purpose would be served by the Court setting aside an election of a board of directors if the majority of the shareholders were opposed to such action, and could at once render it nugatory by re-electing the unseated members?

To avoid such fruitless litigation, the rule as laid down in Foss v. Harbottle, 2 Hare 461, Mozley v. Alston, 1 Ph. 790, and later cases, is well established, that in respect of acts within the powers of the company, and thus capable of confirmation by the majority of the shareholders, the Court will not interfere at the instance of individual shareholders. Therefore, I think that, unless the plaintiffs obtain the consent of the company to sue in the company's name, the action should be dismissed. It is, I think, a case in which they should be given an opportunity for obtaining, if possible, such consent. The board might give it, or it might be obtained from the shareholders in some manner, as, for example, at a special general meeting convened under the provisions of sec. 52 et seq. of the Companies Act.

The company are at present parties defendants, and all necessary parties either as plaintiffs or as defendants are now before the Court, and have taken part in the real issue of the case. Therefore, it is advisable, I think, that instead of giving effect at this stage to the defendants' objection, and dismissing the action, I should, conditional upon the record being amended as above indicated, dispose of the case upon the merits. . .

It appears that the dispute as to the result of the election has arisen in consequence of 4 absent shareholders, represented at the meeting by proxy, not having been allowed to vote. If they had been, the plaintiffs contend that they and C. W. Sifton would have been elected. The 4 absent shareholders were E. Holden, the holder of 20 shares, Charles Sifton, the holder of one share, C. W. Sifton, the holder of 13 shares, and G. Gerrard, the holder of 44 shares.

It was shewn that J. B. Campbell, without authority, voted on 7 shares owned by Messrs. Olmstead and Macpherson; and that Thomas Dealy was the holder of 20 shares which he had pledged to the Dominion Bank, and it was contended

by the plaintiffs that under sec. 36 of the Ontario Companies Act Dealy was entitled to vote in respect of these 20 shares without any proxy.

The votes cast for the different candidates, not counting those represented by the 4 proxies hereafter referred to, were as follows: for D. J. Campbell, 177 votes; for Workman, Gorman, Heman, and Thomas, 121 votes each; and for each of the plaintiffs and C. W. Sifton, 56 votes. Deducting the 7 votes improperly counted for Campbell, Workman, Gorman, Heman, and Thomas, there would still remain in their support 170 votes for Campbell and 114 votes for each of the other 4, leaving these 4 in a majority of 58, and the plaintiffs cannot overcome this majority without counting the 44 votes of Gerrard and at least 14 additional votes.

In the determination, therefore, of the question, it is unnecessary to deal with any special question growing out of the cases of Thomas Dealy or Charles Sifton.

The following are the circumstances in which the votes of the 4 absent shareholders were disallowed. E. J. Sifton, having in his possession the written proxies of the 4 absent shareholders, took them to the company's office the day before the election for the purpose of registering them, and he there made known to Mr. Reeve, the company's bookkeeper and accountant, who appeared to be in charge of the office, his desire to register the proxies, and for that purpose he handed them to Mr. Reeve. The latter not appearing to know what to do with them, Sifton told him to stamp them with the company's stamp, to date the transaction, and to mark them as registered. Reeve did as desired, and then handed them back to Sifton, who, placing them in his pocket, took them away. At the election the next day Sifton produced the 4 proxies and handed them to the chairman of the meeting, contending that the persons in whose favour they were drawn were thereby entitled to vote for the absentees. The chairman undertook to rule otherwise, on the ground that the proxies should have been deposited with the company the day before the election, as required by an alleged by-law of the company, which is in the following words: "All instruments appointing proxies shall be deposited at the head office of the company at least one day before the date at which they are to be used."

By their statement of claim plaintiffs contend that, inasmuch as this by-law seeks to restrict the unqualified right to vote by proxy, conferred on the stareholders by sec. 63 of the Ontario Companies Act, it is ultra vires and void.

At the trial the minute book of the company, pp. 5 to 10 inclusive, was put in, shewing certain by-laws, including one in the words of that in question, passed by the board of directors on 13th May, 1897, and the defendants also put in what purport to be certain by-laws adopted by the shareholders at the adjourned annual meeting held on 16th May, 1905, which include in their number one in the precise words of the by-law above quoted, respecting voting by proxy.

Before the close of the evidence, I called the attention of counsel to the provisions of sec. 47 of the Companies Act, which, as regards voting by proxy, seem to empower the shareholders to adopt only such by-laws respecting proxies as had been passed by the board of directors since the annual meeting of shareholders held next before that of 16th May, 1905, and counsel for the defendants thereupon searched in the directors' minute book for such by-law, but failed to produce any.

Section 77 of the Companies Act requires directors to cause proper books to be kept, containing minutes of all the proceedings of the board of directors and the by-laws of the company duly authenticated. This implies that such by-laws must be in writing. If, therefore, there exists any directors' by-law passed since the annual meeting of shareholders immediately preceding that of 16th May, 1905, the defendants, being in control of the company's books, should have had no difficulty in producing it, and from its non-production I assume that none such exists.

The first question to determine is whether the by-law respecting proxies passed by the board of directors on 13th May, 1897, or any by-law, was in force at the election of directors held on 5th February, 1907.

Section 47 of the Companies Act declares that the directors may from time to time make by-laws . . . to regulate (e) "the requirements as to proxies" . . . but every such by-law . . . unless in the meantime confirmed at a general meeting of the company duly called for that purpose, shall only have force until the next annual meeting of the company, and in default of confirmation thereat shall, at and from that time only, cease to have force, and in that case no new by-law to the same or the like effect shall have any force until confirmed at the general meeting of the company.

The directors' by-law of 13th May, 1897, was not confirmed at the next annual meeting after its passage, and thus it ceased "to have force." The only kind of by-law capable of

confirmation by the shareholders under the provisions of sec. 47 is one in force at the time of such annual meeting. Thus the by-law in question not being in force at the time of the annual meeting of 16th May, 1905, was not capable of confirmation, but the shareholders at their annual meeting of 16th May, 1905, purported to pass a by-law in the exact language of that of 13th February, 1897, respecting proxies; and it was contended that if the shareholders' by-law did not operate as a confirmation of the directors' by-law, it could be supported as a by-law originating in the first instance at a shareholders' meeting; and that, irrespective of the statute, the shareholders had inherent power to pass it, as a piece of domestic legislation necessary for the proper carrying on of the affairs of the company.

This contention, I think, cannot prevail. The presumption that a corporation have implied power to pass by-laws necessary for the proper management of their affairs arises only in the absence of express power. Here the Companies Act declares what powers, in respect of proxies, shall be enjoyed by a corporation subject to its provisions, and therefore the question here is not what powers arise by implication, but what are the powers of the corporation having regard to their express statutory powers.

Section 63 of the Companies Act enacts that "at all general meetings of the company every shareholder shall be entitled to as many votes as he holds shares in the company, and may vote by proxy;" and sec. 47 declares that the board of directors may pass by-laws regulating the requirements as to proxies. These two sections must be read together, their effect being that each shareholder is entitled to the right to vote by proxy, subject to one qualification, namely, compliance with the requirements of a directors' by-law, which, if not confirmed within the time limited for that purpose, ceases to exist.

Section 47, empowering directors to pass by-laws respecting proxies, impliedly withholds such power from the general body of shareholders. As stated by Vaughan, B., in Rex v. Westwood, 7 Bing. 1, "wherever a charter confers an express power of making by-laws, as to a particular subject, on a certain part of the corporation, more especially as in this case those terms are very general and comprehensive, there is no ground on which a presumption can be raised of an implied power existing in the body at large, but that such power is expressly taken from that body according to the rule

expressum facit cessare tacitum." Were the rule otherwise, there might in the present case be in existence at the same time previous to the election two inconsistent by-laws, one passed by the board of directors, the other by the shareholders, prescribing conflicting regulations respecting proxies. It cannot, I think, be seriously argued that the statute contemplated such a possibility. I am, therefore, of opinion that the express power conferred by sec. 47 upon the board of directors to pass by-laws respecting proxies deprives the body at large of any inherent power to deal with that subject, and therefore the shareholders' by-law of 16th May, 1905, if regarded as originating with that body, is null and void. Then the directors' by-law of 13th May, 1897, not having been confirmed by the shareholders within the time fixed by sec. 47, also became null and void. The plaintiffs did not by their statement of claim attack the by-law on the ground that it was merely a shareholders' by-law. Nevertheless this point came up for consideration at the trial, and the defendants unsuccessfully endeavoured to discover a directors' by-law to serve as foundation for the shareholders' by-law.

I, therefore, see no reason why the plaintiffs should not be allowed the benefit of the point, and think they should be entitled to raise it formally by amendment to their statement of claim.

It would thus seem that when the election of 5th February, 1907, was held, there existed no by-law of the company regulating the requirements as to proxies, and those produced at the meeting being in themselves sufficient authorizations, entitled the holders to vote on behalf of the constituents thereof. This they were not permitted to do. The votes which they represented were sufficient to have defeated the 4 directors whose elections are now challenged, and if it was clear from the evidence that these votes were tendered and for whom, it would be possible to declare the true result of the election. The evidence, however, does not with reasonable certainty indicate for whom these votes would have been cast, and I therefore have no sufficient material upon which to amend the election return. All that the evidence discloses is that the holders of proxies were present at the meeting for the purpose of voting, but, the chairman having ruled that the proxies would not be recognized, and having instructed the scrutineers not to accept votes tendered by the holders thereof, such action resulted in their assuming that it would be useless to press further their right to vote. Had

this right not been denied them, they would in all probability have voted, and the result of the election might have been different. In such a case the election should be set aside: Regina ex rel. Davis v. Wilson, 3 U. C. L. J. O. S. 165; Regina ex rel. McManus v. Ferguson, 2 U. C. L. J. N. S. 19. Therefore, conditional on the plaintiffs obtaining authority to use the name of the company as parties plaintiffs, and within a reasonable time amending their statement of claim by making the company plaintiffs instead of defendants, and making the formal amendments to the statement of claim consequent on such change, the election of the defendants Workman, Gorman, Heman, and Thomas should be set aside, and a new election had.

It would, I think, be expedient that the 4 directors in question should continue in office until the election of their successors. The parties may be able to agree upon a convenient date for holding the election, the same to be stated in the judgment, otherwise I shall have to name the date. If the plaintiffs fail, within a reasonable time, to obtain authority to sue in the company's name and to make the necessary amendment, the defendants may, on 24 hours' notice, bring the fact of such failure before me on affidavit or other evidence, and in the meantime no formal judgment to be entered. It is not a case calling for any order as to costs.

NOVEMBER 2ND, 1907.

C. A.

RE BECK MANUFACTURING CO.

Water and Watercourses—Logs Floated over Stream—Tolls —Summary Order Fixing — Past Tolls — Mandamus— County Court Judge—Refusal to Entertain Application to Fix Tolls.

Appeal by the Beck Manufacturing Co. from order of a Divisional Court (9 O. W. R. 193), dismissing their appeal from order of MABEE, J. (9 O. W. R. 99), dismissing a motion for a mandamus requiring the Judge of the District Court of Nipissing to hear evidence on behalf of the appellants for the purpose of fixing tolls which the appellants

might charge in respect of logs driven on Post creek in the township of Nipissing, in 1902 and 1903, and to make an order fixing such tolls under R. S. O. 1897 ch. 142. MABEE, J., and the Divisional Court felt bound by the decision of a Divisional Court in Re Beck Manufacturing Co. and Ontario Lumber Co., 3 O. W. R. 333.

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

A. B. Morine, for the appellants, contended that the decision of a Divisional Court in 3 O. W. R. 333 was overruled by Beck Manufacturing Co. v. Ontario Lumber Co. (C.A.), 12 O. L. R. 163, 8 O. W. R. 35, or should now be overruled.

G. F. Shepley, K.C., and A. G. F. Lawrence, for the District Court Judge and the Ontario Lumber Co., contra.

MEREDITH, J.A.:—No new light has been thrown upon the main question involved in this case; and I have nothing to add to it that is in any sense new; but desire to repeat that that which the statute confers is a toll, and that it is surely too late to make and enforce a toll a day after the fair, not to speak of a week, a month, a year, or years unlimited, after; and that a fair toll is a toll-traverse, that is, a toll paid to the owner of land for the use of it; whilst the toll in question is a toll-thorough only, that is, a toll in respect of improvements made in a highway, and so a toll against common right.

It is, of course, right to say that the proper answer to the main question depends upon a proper interpretation of the enactment. But that is merely taking a step backward, which must be immediately retraced, for the enactment confers a "toll," and we must at least give the legislature credit for knowing the meaning of the word and for meaning what it said in using it, just as we should if they had used the word "compensation" instead, which word the appellants desire us to substitute for it, without any sort of reason or excuse, for the whole provisions of the Act are entirely inconsistent with the creation and enforcement of a right of compensation in the ordinary sense. And the toll which the Act confers is obviously a toll-thorough and not a toll-traverse. Of all tolls which were ever granted, or created by Act of Parliament—innumerable though they have been—has any one ever heard of such a claim as is made in this case having been made in regard to it—to give it force and effect before it was fixed, before it existed?

Does not this very claim prove itself without the meaning of a toll such as the enactment covers? The Act contemplates the logs in respect of which the tolls are claimed being seizable to enforce payment, and makes elaborate provisions accordingly. Here they are not, but have long since ceased to exist; and, indeed, if such a claim as the plaintiffs make be given effect to, there is nothing to prevent it being enforced, that is, the tolls fixed and actions maintained, not only after the logs have passed away, but even after they and the improvements in respect of which the tolls are claimed have long since rotted away, and the means of fixing the tolls have been lost or become obscured.

It is true that the Act gives a lumberman a right to have the tolls fixed, but it does not require him to thus disturb sleeping dogs. That provision is for his benefit, not to impose a duty on him. There may be hundreds or thousands of instances in which no claim to a toll is intended to be made, or has been ever thought of, and rightly so. Is he to stir up all such and in effect insist upon them taking a toll? . . . It is not difficult to suggest a case in which the provision would be beneficial if not indeed necessary to him. Take, for instance, a costly improvement on which it was known that tolls would be claimed; it might be necessary to know in the autumn at latest what the tolls would be. The lumberman's whole prospects might depend upon that. The maker of the improvements might purposely delay having them fixed, either to prevent others, by reason of the uncertainty, competing in the purchase of logs in the district, or to encourage the purchase by appearing to have no desire to exact tolls in order to be able to exact the more; and then, before the freshets of the following year, have them fixed and exacted at the highest rate, to the upsetting of the lumberman's calculations and to his great loss. In such a case he could apply early or abandon the field. To let him go on for years and then come down upon him is to make something like a trap of the enactment.

The appellants' position is precisely the same as if they had made improvements in a highway of the ordinary kind which gave them a right to a toll-thorough. What would be thought of an attempt to enforce by action "tolls" for the use of that improvement before—not to mention years before—the tolls were fixed and without any sort of notice of any intention ever to demand a toll or have a toll fixed?

I need not again refer to the language and provisions of the Act directly indicating the future character of the toll—that is, its existence only when fixed.

I would dismiss the appeal.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

GARROW, J.A. (dissenting):—. . . Acting apparently upon, or at all events in accordance with, a suggestion contained in the judgment of one of my learned brethren, and with a view to making this application, the appellants since applied to the County Court Judge for an appointment to fix a rate of toll which would be applicable to the years 1902 and 1903. This the County Court Judge refused in these terms: "In view of the decision of the Divisional Court overruling my previous order of 25th January, 1904, for tolls on Post creek, I do not feel justified in granting an appointment to the Beck Manufacturing Company Limited, contrary to such decision of the Divisional Court."

From this it is apparent that he did not deal with the application at all on the merits, but simply deferred to that part of the judgment of the Divisional Court which held that there is no jurisdiction to fix a rate except as to the future. If he had entertained the application, and had refused it on the merits, we should of course have had, on an application such as this or otherwise, no jurisdiction. But, he having refused to enter upon the application at all, solely in deference to the judgment of the Divisional Court, it appears to me that this application is well founded and should succeed.

To put the simplest case, if there had been no order or judgment at all by the Divisional Court, and the County Court Judge had, of his own motion, taken the same position, i.e., refused to entertain the application on the ground of want of jurisdiction, his course would certainly have been questioned on an application such as this for mandamus, and a writ would have been granted. See Regina v. Judge of Southampton County Court, 65 L. T. N. S. 320; Re Ratcliffe v Crescent Mill and Timber Co., 1 O. L. R. 331.

How then does the order or judgment of the Divisional Court affect the matter, if I was right in my former judgment that that Court acted without jurisdiction in limiting or attempting to limit any order the County Court Judge might make to the future?

Everything, of course, depends upon my construction of the statute being accepted, for, if it is not, if it is the proper conclusion that the Divisional Court had jurisdiction to so limit the order, that is an end of the matter. But, assuming as I do that the Divisional Court acted without jurisdiction, it is, I think, clear that the order is no answer. It could only be, on the footing that the matter is res judicata, and it was really so put on the argument before us. But it is surely elementary, if anything can safely be called so in law, that in order that a matter should become res judicata the Court must have jurisdiction to make the order or give the judgment in question: Regina v. Hutchings, 6 Q. B. D. 300; Attorney-General for Trinidad v. Eiché, [1893] A. C. 518.

The Divisional Court had, as I have said before, simply the power in appeal to alter, vary, or set aside the toll fixed by the County Court Judge. No one but him could in the first instance fix a toll at all, applicable either to the past, the present, or the future. And neither he nor the Divisional Court had anything to do with the *liability* of any one to pay such toll, or indeed with anything else than the mere rate. When the application goes back to him, if it does, he may, after hearing the matter on the merits, refuse the application altogether, or may fix the rate too high or too low. And an appeal will, of course, lie from what he does to a Divisional Court.

I think the appeal should be allowed and the application granted, the whole with costs.

NOVEMBER 7TH, 1907.

C. A.

BARBEAU v. PIGGOTT.

Bailment — Machine — Repairs — Lien for — Contract— Rental of Machine—Reasonable Sum for—Possession— Implied Contract of Letting—Implied Contract to Pay for Value of Use—Amount Expended in Repairs.

Appeal by defendant from judgment of a Divisional Court (9 O. W. R. 234) affirming judgment of MULOCK,

C.J., at the trial, in favour of plaintiffs. Plaintiffs alleged that while engaged in the construction of the Guelph and Goderich Railway in May, 1906, defendant wrongfully took possession of a certain steam shovel, the property of plaintiffs; and they sued in trover. Defendant alleged that by agreement the shovel was leased to him, and by him put in repair, and he claimed a lien thereon. The shovel was seized by plaintiffs under a replevin order. Judgment was given declaring defendant entitled to a lien for $204.91, less a reasonable sum for the use of the shovel, fixed at $180, and that upon payment of the difference, plaintiffs should be entitled to possession of the shovel.

The appeal was heard by Moss, C.J.O., Osler, Garrow, Maclaren, Meredith, JJ.A.

W. M. Douglas, K.C., for defendant.

W. M. German, K.C., for plaintiff.

Meredith, J.A.:—Both at the trial and in the Divisional Court it was found that there was no completed expressed agreement for the hiring of the steam shovel, that the transaction never got beyond the stage of negotiation; but in the meantime the defendant had been given possession of the shovel and had been authorized to have it repaired at the cost of plaintiffs. All this was done in a confident anticipation that a completed agreement would be reached.

The findings to which I have referred are quite in accord with the evidence; the bargain such as the parties expected to make was never consummated. The plaintiffs were, therefore, entitled to the possession of their shovel when the negotiations ended, and the only question remaining is as to their respective money rights.

One of the Judges of the Divisional Court was of opinion that there was an implied contract of hiring to continue until the hire would amount to as much as the cost of the repairs to the shovel. But I can find no warrant for that, however convenient it might be. It is quite certain that none of the parties ever intended to enter into such a contract; and contracts are to be implied according to, not contrary to, the intention of the parties.

The trial Judge was of opinion that defendant was entitled to a lien upon the shovel for the amount properly ex-

pended by him for the repair of it; but I am unable to perceive how that can be.

The position of the parties according to law seems to me, however, to be simple, and their several rights plain. The plaintiffs are entitled to be paid for the value of the use which the defendant had of the shovel, upon an implied contract to pay for it what its use was worth during the time he had the use of it. The defendant was not to have the use of it for nothing, he was to pay the hire of it, and, no sum or time being agreed upon, he must be held to have impliedly agreed to pay a reasonable sum for the time during which he had the use and benefit of the machine. On the other hand, the plaintiffs are liable to the defendant for the amount properly expended by the defendant in the repairs, as money paid by him for the use of the plaintiffs at the plaintiffs' request.

The result, in a money sense, based upon such legal rights, is just the same as the result, in the same sense, arrived at in the Divisional Court and at the trial; and so this appeal should be dismissed.

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

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

NOVEMBER 2ND, 1907.

C.A.

BARTHELMES v. CONDIE.

Bankruptcy and Insolvency — Assignment for Benefit of Creditors—Right of Creditor to Rank on Estate—Owner or Chattel Mortgagee of Insolvent's Business—Evidence —Representations—Conduct—Estoppel.

Appeal by plaintiffs from judgment of a Divisional Court (8 O. W. R. 806) reversing the judgment of the trial Judge, and dismissing the action with costs. The action was brought for a declaration that defendant was not entitled to rank upon the insolvent estate of George Dodds, trading under the name

of the Prince Piano Co., in respect of a claim upon a chattel mortgage for $4,530. The trial Judge reached the conclusion that one Cockburn was the actual owner of the business of the Prince Piano Co.; that defendant was merely the agent or representative of Cockburn; and that the claim of defendant was invalid and void. The Divisional Court held that by the evidence of Cockburn, supported as it was by the conduct of all the persons who were from time to time in actual possession of the property, and having regard to the books kept by them and all the recorded acts of ownership, and to the entire absence of the element of estoppel, the case made by plaintiffs was completely displaced.

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

W. D. McPherson and F. D. Byers, for plaintiffs.

J. Bicknell, K.C., and W. Assheton Smith, for defendant.

MEREDITH, J.A.:—There is no solution of the question of the ownership of the business at all as consistent with the whole evidence as that adopted and given effect to by the Divisional Court.

Cockburn's interest in it and all his acts respecting it are consistent with such a solution, or else explicable through his interest in Dodds, who is his wife's father, and who is a piano maker, and who is said to sometimes incapacitate himself from carrying on the business in the most careful manner.

The trial Judge seems to me to have fallen into the error of treating the case as the ordinary one of an insolvent person carrying on business in the name of another in order to save it from his creditors. In such a case the motive, amounting almost to need, has much weight. In this case it was entirely wanting. Cockburn was in good financial standing, and could, to better financial advantage as far as credit goes, have carried it on in his own name. Of course it can be said that the avoidance of the debts of the concern, if it proved unsuccessful, was a sufficient motive for putting it in the name of others, even at the risk of these holding it as their own if it proved successful. But such a motive is quite inconsistent with Cockburn's conduct respecting the business, which was such as to lead some to understand that the business was really his. There was no attempt to conceal his interest in it.

The documents, which are not a few, and some of which are of a very formal character, the books and all the writings, without any slip or exception, are consistent with the story told by Cockburn, which is in no sense an improbable one, and are absolutely and entirely inconsistent with the claim of the plaintiffs, supported, as it substantially is, by the testimony of the husband of Prince, the partner; and, besides this, there was a quite sufficient motive, honest motive, for all that was done by Cockburn, which strongly supports his story.

On the weight of evidence, it seems to me to be quite impossible to properly reverse the findings of the Divisional Court.

But, if that were not so, I am unable to perceive how the plaintiffs could succeed in this action, how it is open to them to assert in this action that the business was not that of Prince & Dodds. To them they gave credit, and they always treated them as their debtors. They never made any claim upon Cockburn, though they knew of Cockburn's interest in and actions concerning the business; and, finally, they sued and recovered judgment against Prince & Dodds, and their whole rights in this action are based upon that judgment. If the business were Cockburn's, they had no right to rank upon the estate of Prince & Dodds; they had no interest in it. If Cockburn were their debtor, there would be no need of proving on any estate; the debt could be recovered from him. The plaintiffs have made no effort to vacate their judgment against Prince & Dodds and proceed against Cockburn; and, if they had, it would, doubtless, have been held to be too late: see Keating v. Graham, 26 O. R. 361, and the cases there referred to. They cannot be permitted to blow hot and cold; to say, for the purpose of getting their dividend, that the business was that of Prince & Dodds, and then, for the purpose of preventing Cockburn sharing in the estate as a creditor of the same persons, urge that the business was not that of Prince & Dodds, but was that of Cockburn.

If the business was that of Prince & Dodds, then unquestionably Cockburn's claim is a valid one; it can be defeated only by shewing that it was not their business but was his; and that has not been shewn, nor is it, in my opinion, open to the plaintiffs to shew it.

There was nothing objectionable, in point of law, in the debt being made payable to the defendant in this action, substantially as trustee for Cockburn; nor in the defendant

proving the claim against the Prince & Dodds estate. Under some circumstances such a thing might be strong evidence against the good faith of the claim; but in this case that is out of the question. It was not an isolated case of such a trust, but was in accordance with Cockburn's practice in similar cases, and for his business convenience. Putting the claim in the defendant's name would not allay, but would be likely to create, suspicion. Nothing turns upon it; the claim is good or bad according to whether the business was or was not that of Cockburn.

I would dismiss the appeal.

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

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

NOVEMBER 2ND, 1907.

C.A.

STEEN v. STEEN.

Execution—Sale of Land by Sheriff under — Purchase by Person who has Acquired Rights of Execution Creditor—Irregularities—Lis Pendens—Advertisement — Description of Land—Sale at Undervalue—No Interference in Conduct of Sale — Ratification of Sale by Execution Debtor—Participation in Proceeds.

Appeal by plaintiff from judgment of RIDDELL, J., 9 O. W. R. 65, dismissing with costs an action to set aside a sale to defendant of certain land by the sheriff of Cornwall, Dundas, and Glengarry, under an execution against the lands of plaintiff. The action was brought on the 19th June, 1906; it was alleged by plaintiff that there were irregularities in the sale; that the sale was fictitious and at an undervalue; and plaintiff asked that the sale and the sheriff's deed should be set aside; and that it should be declared that defendant held the land simply as security for $3,500, and that plaintiff might be allowed to redeem.

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

D. B. Maclennan, K.C., for plaintiff.

R. Smith, Cornwall, for defendant.

MEREDITH, J.A.:—Through a series of errors and the exercise of some cunning the defendant has, I think, acquired a good title to the land in question against the plaintiff, her sister.

The plaintiff was unquestionably the owner of the lands in question, having acquired them under the will of her brother John. The suggestion that the defendant and other two of her sisters had some sort of right to or claim upon the lands under or through their said brother, is wholly unsupported by anything which appears in the evidence in this case; the contrary is indeed made plain enough.

In order to defeat or delay a creditor for a large amount —the Bank of Montreal—the plaintiff intended and endeavoured to convey the lands in question to the defendant and her two other sisters, but, through some unaccountable error, the parcels were so inaccurately described that the deed did not cover these lands at all, but covered only lands which the plaintiff did not own.

Again, through some unaccountable error, this creditor brought an action against the 4 sisters to set aside the deed, on account of that fraud, and to recover judgment against the plaintiff for the amount in which she was indebted to them, said to have been about $7,000.

A settlement of that action by the defendant in this action, "so far as she is concerned," was effected with the plaintiffs in it. Apparently yet in error as to the effect of the deed between the sisters, the creditors of the plaintiff, who were the plaintiffs in that action, accepted from the defendant in this action $3,500 in settlement of it, and agreed to assign to her the balance of their claim against the plaintiff in this action when they had disposed of some property they held as security for it and had applied the proceeds on the debt. They also agreed to allow the defendant in this action to prosecute that action to judgment against the plaintiff in this action in their name, and to assign such judgment to the defendant in this action when so recovered "for the balance that may remain owing thereunder." The words of the writing evidencing this settlement are not as

clear as they might be; but there seems to be no doubt that the defendant in this action was to take the assignment of the judgment for her own benefit; and I am unable to make out enough in the transaction to prove that the defendant became through it in any sense a trustee for the plaintiff in any respect.

The action was carried on and judgment was recovered in it against the plaintiff in this action for upwards of $7,000; and the claim to set aside the conveyance from the plaintiff in this action to her sisters was struck out of the pleadings "without costs and without prejudice to further proceedings by any party."

Writs of execution were issued, and eventually the lands in question were, in the usual course, sold at sheriff's sale under the writ against lands, and were bought by the defendant for a price which was not very unreasonable for such a sale, but was really considerably less than their actual value.

Several objections were made in regard to the conduct of the sale; and some of them, no doubt, covered things which might have been better done; but at present I am not prepared to say that any of them was such as would vitiate the sale, and it is not necessary to further consider them, for, upon sufficient evidence, the trial Judge has found that the plaintiff, with a full knowledge of all that she now complains of, acquiesced in that sale and received the surplus proceeds of it.

It is contended that the receipt of such proceeds was not by the plaintiff, but was by the solicitors who acted for her during the sale proceedings, and who then made all the objections to such proceedings which are now being made, and who are also her solicitors in this action, in their own interests and without the consent of the plaintiff; but the trial Judge has found to the contrary, upon evidence ample for he support of such finding; and upon this ground the action plainly failed, as this appeal also must.

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

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

NOVEMBER 2ND, 1907.

C.A.

BURNS v. CITY OF TORONTO

Highway—Non-repair — Open Excavation Unguarded—Injury to Person Crossing Highway—Liability of Municipal Corporation — Negligence—Lawful Obstruction—Substituted Crossing Provided—Injury Due to Negligence of Person Injured.

Appeal by defendants from an order of a Divisional Court (27th March, 1907), setting aside the judgment of RIDDELL, J., dismissing the action, and directing judgment to be entered for plaintiffs and directing a new trial for the purpose of assessing damages only. The action was brought to recover damages for injuries received by the plaintiff Ethel Burns (wife of her co-plaintiff William C. Burns) on 15th August, 1906, by falling into an open sewer in Queen street east, in the city of Toronto, near Kippendavie avenue. Plaintiffs charged negligence of defendants in not securely guarding the sewer. The trial Judge found that the whole cause of the accident was the neglect of the plaintiff Ethel Burns to see where she was standing and where she was going.

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

C. Millar, for defendants.

J. M. Godfrey, for plaintiffs.

OSLER, J.A.:—If the plank crossing or footway from the north sidewalk of Queen street leading to the west side of Kippendavie avenue was allowed to be in use by the public while the sewer was being constructed, for access to the north track of the street railway, so that people might there take the west-bound cars or go across Queen street to Kippendavie avenue, the fact that it was unguarded by a hand rail or some protection of that kind to prevent them from falling into the dangerous excavation beneath it, would have been some evi-

dence of negligence, and it would have been no excuse that the defendants had intrusted the work of constructing the sewer in the street to a contractor: Penny v. Wimbledon Urban District Council, [1898] 2 Q. B. 212, [1899] 2 Q. B. 72 (C. A.) But the evidence is quite opposed to that view of the facts, and shews that while the sewer was being made at this point people were not intended to take the west-bound cars there, the ordinary means of access thereto from the north sidewalk of Queen street being obstructed by the earth thrown out of the excavations, and another safe and barricaded or guarded crossing being provided at the Elmer street crossing a little further to the east, which indeed was the usual stopping place for cars approaching Kippendavie avenue from that direction. The plaintiff did not take the cars by crossing from the north sidewalk of Queen street, and probably could not have done so except at great inconvenience by climbing over the heap of earth already referred to. She crossed from the south side of Queen street in front of the approaching car, and then reached the footway beneath which the sewer had been carried, but which, at that stage of the work and in the condition which must have been apparent to every one, was lawfully obstructed and was not intended to be used by the public. The case is thus entirely within the cases already decided in this Court, Keachie v. City of Toronto, 22 A. R. 371, and Atkin v. City of Hamilton, 24 A. R. 389. On this ground, as well as on the ground of her own negligence, to which it must be said her accident rather seems to have been due, the plaintiff's action fails.

We have not the advantage of knowing the reasons which led the Divisional Court to reverse the judgment at the trial, but I am obliged to say that, in my opinion, that judgment was right, and that the appeal should be allowed and the judgment at the trial restored, and with costs if the defendants ask for them.

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

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

NOVEMBER 2ND, 1907.

C. A.

IREDALE v. LOUDON.

Limitation of Actions—Real Property Limitation Act—Title by Possession to Upper Storey of Building with outside Landing and Staircase—Declaratory Judgment—Injunction Restraining Defendants from Interfering with Possession of Portion of Building — Support and Means of Access—Easement.

Appeal by defendants from judgment of MABEE, J., 8 O. W. R. 963, in favour of plaintiff, in an action for a declaration that plaintiff was the owner in fee of "the workshop above the street" on the west side of Bay street, in the city of Toronto, known as street No. 186, together with the landing and staircase leading to the workshop, the same having a frontage of about 13 feet, 6 inches, on the west side of Bay street, and for an injunction restraining defendants from entering upon these premises, and removing or damaging the buildings thereon, and from wrongfully interfering with the premises to the detriment of plaintiff. MABEE, J., held that the possession of plaintiff was sufficient to extinguish the title of defendants to the upper floor of the building, as well as the space of ground at the foot of the stairs, being 3 feet on Bay street and 5 feet deep, and enjoined defendants from changing, altering, pulling down, or in any way dealing with their portion of the building in question in such a way that the possession, use, and enjoyment of the upper floor, staircase, and landing occupied by him should be interfered with or prejudicially affected.

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

W. D. McPherson, for defendants.

W. N. Tilley and R. H. Parmenter, for plaintiff.

GARROW, J.A.:— . . . It is not in dispute that, subject to the plaintiff's claim, if any, the defendants are the owners in fee simple in possession of the land in question, and that the plaintiff's only title is one acquired under the Statute of Limitations by length of possession.

The premises consist of an up-stairs shop used as a tin-shop, access to which is had by a door on the ground floor opening off the street, admitting to a small landing about 3 feet by 5 feet, from which ascends a staircase terminating in the workshop and affording the only means of access thereto. The landing is about a foot above the level of the sidewalk, and is enclosed by boards down to the level of the ground. There is no basement beneath the landing. The outer door has a lock and key, and the plaintiff has been in the habit when leaving the shop of locking this door and retaining the key. That door and the landing and stairway were only used in connection with the workshop. There is nothing above the workshop but the roof. Beneath it are sheds or store-houses, and throughout the plaintiff's possession the defendants by their tenants have occupied and used the lower storey, as well as the rest of the lot of which it forms part, and have always paid the taxes upon the whole.

At one time the plaintiff had an interest in the lands of which the workshop forms a part, as tenant in common with the defendants, but many years ago he sold and conveyed his interest to the defendants. And thereafter he remained in possession of the workshop, which before that he had occupied as a tin-shop, paying rent at irregular intervals to the defendants at the rate of $6 per month. The last payment was made in October, 1890.

It was contended by the defendants that, whatever may be the correct position as to the workshop, the landing and stairway must be regarded merely as a way, or, in other words, an easement. That view is not, in my opinion, entitled to prevail. Outer door, landing, stairway, and workshop, all, I think, formed part of one and the same parcel, the outer door which the plaintiff usually locked when leaving forming in fact the outer door of the shop, and his title to each and all should stand or fall together.

It was also contended by the defendants that the temporary absence of the plaintiff in July, 1899, for about 3 weeks, during which the defendant Thomas Iredale was in occupation, interrupted the running of the statute. I am also against this contention. Upon leaving on the occasion in question the plaintiff requested his brother, the defendant Thomas Iredale, to occupy the premises and to carry on his business for him during his absence, upon terms then agreed upon, to which that defendant agreed, and upon the plaintiff's return, the defendant Thomas Iredale retired from the

premises. His occupation during the 3 weeks could at most only have inured for his own benefit, and not for that of his tenants in common, the other defendants (R. S. O. 1897 ch. 133, sec. 11), and he would, under the circumstances, be estopped from claiming that his occupation was other than that of tenant, or at least of agent for the plaintiff.

But upon the main question I think the defendants are entitled to succeed. The plaintiff was tenant of the premises which he now claims down to the last payment of rent in October, 1890. At that time, if at all, the statute began to run in his favour: see R. S. O. 1897 ch. 133, sec. 6. The premises consisted of the room upstairs and the stairway and approaches, and also necessarily of the support afforded by the lower storey or ground floor. Without that there could be no upstairs room. And it is clear that unless the plaintiff is now able to make good his right, whatever it is, against the lower floor, or soil, as well as to the upper floor, his claim must wholly fail, for it would be absurd to hold that he has acquired a title to the upstairs room alone, which right the defendants might immediately destroy by pulling down the walls of the lower storey. A claim wholly "in the air" and without reference to the soil or surface could not be made under the statute.

Counsel for the plaintiff fully recognized this difficulty, for he very strenuously contended that the plaintiff had acquired a right not merely to the upstairs room, but to this right of support, as part of the parcel of which he had been tenant, and referred, among other authorities, in support of his contention to the well known case of Dalton v. Angus, 6 App. Cas. 740.

There are, however, at least two sufficient answers to the plaintiff's contention: (1) the right to support is at most an easement, and 20 years' possession would be required to bar the defendants; and (2), if not an easement but land, then there never was a moment since October, 1890, when the plaintiff can be said to have had anything in the nature of an exclusive possession of any part of the lower floor. The defendants, the owners, were in actual possession of the soil and lower storey during all the time, and therefore at the highest the plaintiff's possession was merely a joint possession with them. As said by Lindley, M.R., in Littledale v. Liverpool College, [1900] 1 Ch. at p. 21: "In order to acquire by the Statute of Limitations a title to land which has a known owner, that owner must mave lost his right to the

land either by being dispossessed of it or by having discontinued his possession of it." See also Sherren v. Pearson, 14 S. C. R. 551, 585; McIntyre v. Thompson, 1 O. L. R. 163; Smith v. Lloyd, 9 Ex. 562; Russell v. Romanes, 3 A. R. 635; McConnachy v. Denmark, 4 S. C. R. 609, 632. How can it be said that the defendants had been at any time dispossessed of or had discontinued possession of the lower storey or of any part of it? The supports of the upper floor were simply the walls and partition of the lower floor.

Dalton v. Angus was the case of adjoining owners, and can have no application unless we are prepared to place the plaintiff in the same favoured position as if he was a purchaser for value of the upper floor, in which case there might well be an implied covenant, or even possibly an implied grant of the necessary easement of support. No such implication can be made in the plaintiff's favour: see Wilkes v. Greenway, 6 Times L. R. 449. The question here is one of title, and not of rights which spring from an acknowledged or a proved title.

As said by Lord Chancellor Cranworth in Roddam v. Morley, 1 De G. & J. at p. 23, "I should be very unwilling to give encouragement to the notion that there is of necessity anything morally wrong in a defendant relying on a statute of limitation. It may often be a righteous defence. But it must be borne in mind that it is a defence the creature of positive law, and therefore not to be extended to cases which are not strictly within the enactment."

This is a case of a plaintiff asserting a right, and not merely defending himself from attack under the statute, and, applying Lord Cranworth's language, I am of opinion that the plaintiff has utterly failed to prove, with any degree of strictness whatever, that his possession, such as it is, of the premises in question, is of the kind or character contemplated by the statute, to operate as to bar to the legal title of the true owner.

Reliance was placed by counsel for the plaintiff upon the cases of Rains v. Buxton, 14 Ch. D. 537, and Midland R. W. Co. v. Wright, [1901] 1 Ch. 738. But these are decisions upon facts which in no way resemble those in question here. In Rains v. Buxton the land in question was a cellar of which the claimant or his predecessor in title had been in possession for over 60 years, and of which it was held upon the evidence the owners had discontinued possession. And in Midland R. W. Co. v. Wright the land in question was the surface

of railway land through which passed a tunnel occupied by the plaintiffs as part of their railway. The plaintiffs were in possession at least of the underground part occupied by the tunnel, and being in possession of part might well have been considered to be in possession of the whole. The decision is that of a single Judge only, upon the special facts then before him, and can have no overruling effect upon the numerous authorities both in England and Ontario, to some of which I have referred, that the possession required by the statute is an exclusive one. But, in any event, what was successfully claimed in that case, under special circumstances, was the surface, and therefore the claim was wholly unlike the one now in question.

Appeal allowed and action dismissed with costs.

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

MOSS, C.J.O., and OSLER, J.A., concurred.

NOVEMBER 2ND, 1907.

C. A.

BOWERMAN v. FRASER.

Vendor and Purchaser—Contract for Sale of Land—Condition — Representation — Agency—Non-compliance with Terms — Action for Specific Performance — Refusal of Court to Adjudge.

Appeal by defendant from judgment of BRITTON, J., ante 229, in favour of plaintiff in an action for specific performance of an agreement for the sale of land on the south side of Bloor street, in the city of Toronto, by defendant to plaintiff.

J. W. McCullough, for defendant.

S. H. Bradford and E. G. Morris, for plaintiff.

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

OSLER, J.A.:—. . . The plaintiff sues upon an agreement in the form of an offer to purchase the lands therein described, signed by him on 2nd February, 1907, in the presence of one McTaggart, a real estate agent, and an acceptance thereof signed by defendant on 4th February, 1907, in the presence of one Ponton, another real estate agent, afterwards delivered to the plaintiff by McTaggart. The defendant refused to carry out the agreement, on the ground that a condition or stipulation, on the performance of which only McTaggart was authorized to part with it, had not been complied with, and on the further ground that, time being by its terms of the essence of the agreement, plaintiff was in this respect also in default.

It appeared that Ponton was defendant's agent for the sale of the property in question. The business began by plaintiff going to McTaggart as his agent to procure it for him. McTaggart at first applied to a person who was, as he then supposed, the defendant's agent, but, learning from him that Ponton was the agent, he communicated with the latter by telephone, offering $40 per foot. Ponton wanted $50, and plaintiff told McTaggart he would go as high as $45. McTaggart then prepared the offer which plaintiff signed, offering that sum. Finding that it would not be accepted, plaintiff authorized McTaggart to advance it to $46, and Ponton, McTaggart, and the defendant on 4th February met at the latter's office, and in the course of the discussion which took place there McTaggart, on his own authority, added 25 cents per foot more. This the defendant agreed to, and the offer was then altered by McTaggart by substituting the sum agreed on for the sum which had been named therein, and the defendant signed the acceptance on the printed form at the foot. It is unnecessary, in the view I take of the case, to refer to the terms in detail. Plaintiff was purchasing the property for building purposes, and defendant, not being satisfied of his ability to carry out the agreement by making payments in accordance with its terms, stipulated that it was not to be handed over to him until he had given his undertaking that he would commence building operations not later than the middle of the following April. The agreement was then intrusted to McTaggart on these terms. McTaggart appears to have carried away a very inaccurate recollection of what was required, and told plaintiff that he wanted a letter stating that he would soon begin to build. On 5th February plaintiff handed

him a letter to that effect, which he sent to Ponton on the 6th, and handed over the agreement to plaintiff. Ponton at once informed McTaggart that the letter would not do, and that he would not shew it to defendant, as it was not the undertaking stipulated for. McTaggart said that he would see the plaintiff again, but that, as he had already given another person an option to purchase, which was likely to be accepted, . . . the undertaking would probably be unnecessary. Nothing further came of this. The condition was never in fact performed, and the defendant never waived it. The trial Judge held that McTaggart was defendant's agent, and that, as the agreement had been handed over to plaintiff, without accurately communicating to him the terms on which only it was to become binding, the plaintiff was entitled to rest upon it without more—treating, in short, the delivery by McTaggart as a delivery by the defendant himself.

Upon an examination of the evidence, I am, with respect, unable to adopt this view of McTaggart's position. It is quite possible that there was some understanding between Ponton and McTaggart by which they were to share in any commission which might become payable if the sale should be carried out, but neither that nor the fact that by the agreement the defendant was to pay the commission would make McTaggart his agent if he was not really so. Clearly McTaggart was employed by plaintiff to negotiate for the purchase on his behalf, and as clearly Ponton was employed by defendant to sell. There is no evidence that defendant ever employed McTaggart, or that Ponton was ever authorized to do or in fact did so. McTaggart was asked in what relationship he stood to Ponton, and answered, "a sub-agent, I suppose you would call me;" but, as plaintiff claimed him for his, and Fraser repudiated him, I certainly would not call him so. He probably derived his impression from the scandalous arrangement for dividing the commission, which could not affect the legal relation in which, as the evidence to my mind conclusively shews, he stood to plaintiff. He received the agreement as plaintiff's agent upon the express condition that it was not to be handed over to the principal except upon the specified terms. Of these terms the plaintiff through him had notice, and not having complied with them, he is not, in my opinion, entitled to enforce the agreement.

I think the appeal should be allowed and the action dismissed with costs.

NOVEMBER 2ND, 1907.

C. A.

BATTLE v. WILLOX.

Contract — Construction — Advances — Share of Profits— Breach — Damages—Measure of—Possible Profits—Evidence — Rejection of — Impossibility of Performance— Option—Partnership—Warranty—Judgment.

Appeal by defendant from order of a Divisional Court, 9 O. W. R. 48, reversing order of ANGLIN, J., 8 O. W. R. 4, allowing an appeal by defendant from the report of the Master at Welland in an action for damages for breach of contract, and directing a reference back to assess the damages upon a different basis.

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

F. W. Griffiths, Niagara Falls, for defendant.

W. M. German, K.C., and T. F. Battle, Niagara Falls, for plaintiff.

GARROW, J.A.:—The plaintiff and defendant entered into an agreement in writing dated 8th September, 1904, whereby the plaintiff agreed to indorse promissory notes for the accommodation of the defendant up to the sum of $5,000, the proceeds to be used in the development of a gravel pit owned by the defendant, in consideration of which the defendant, among other things, agreed to give to the plaintiff an interest in certain specified contracts which he then expected to make, but had not actually made, with the Canadian Niagara Construction Co., M. P. Davis, A. C. Douglass, H. D. Symmes, and the Electrical Development Company, 5 in all, for the supply of sand.

The defendant afterwards made contracts with two of the parties, namely, M. P. Davis and A. C. Douglass, but for some reason failed to obtain contracts with the other three parties.

The plaintiff duly indorsed as agreed, and the defendant received the proceeds.

In the following month of December the defendant sold the lands, and thus put it out of his power to perform the contracts of which the plaintiff was to receive the benefit. Out of the proceeds of the sale, however, the promissory notes upon which the plaintiff had become liable were taken up by the defendant; and the action was brought to recover damages by reason of the defendant's failure to procure and carry out the several contracts in the profits of which the plaintiff was to share.

The action was tried before Meredith, J., who found for the plaintiff, and directed a reference to the Master at Welland to assess the damages.

On the matter coming before the Master, the defendant, while not disputing his liability in respect of the two contracts which he had secured, tendered evidence to shew that he could not have secured the others, which evidence was rejected, and the Master proceeded to ascertain the damages upon the footing that the defendant was liable in respect of all 5 contracts.

An appeal from the Master's report was heard before Anglin, J., who held that the proper construction of the agreement was that the defendant would procure and carry out such of the named contracts as could be obtained, referring to Clifford v. Watts, L. R. 5 C. P. 577, and Howell v. Copeland, 1 Q. B. D. 258, and therefore that the evidence was improperly rejected, and he referred the matter back to the Master to proceed with the reference upon that construction of the agreement.

An appeal was taken to a Divisional Court, where the contrary conclusion was reached, Britton, J., with whom Falconbridge, C.J., concurred, giving it as his opinion that the question was concluded by the formal judgment as settled, and that in any event the defendant's covenant was absolute and unconditional. Mabee, J., reached the same conclusion upon the question of construction, although he was of opinion that the question was open so far as the formal judgment was concerned.

Two questions are thus presented: 1st, as to the effect of the form of the settled judgment; and 2nd, if it is open, the question of the proper construction of the agreement.

The only embarrassment in the form of the judgment arises from the preliminary declaration "that the defendant is guilty of a breach of the contract . . by reason of his having put it out of his power to perform the same by

selling the sand or gravel pit . . . " Then follows the reference in these words: "And this Court doth further order that it be referred to the Master of the Supreme Court of Judicature at Welland to assess the damages suffered by the plaintiff by reason of the said breach of the said contract by the defendant."

No larger consequences should follow from a refusal to perform by selling than from any other refusal. The measure of damages would remain the same. If, therefore, without selling, the defendant had simply said, "I will not perform," he would still have been entitled to ask that in assessing the damages the proper construction of the agreement should be adhered to. And that is now his position, properly assumed I think. He has failed to perform. He admits his liability as to the two completed contracts, but says as to the others, "I could not get them, and I never absolutely and unconditionally agreed that I would." And it is, I think, clear that the learned trial Judge had no intention that such a contention should be precluded before the Master. In the course of his reasons for judgment he says, in reply to a request from counsel for defendant upon this subject to make some special direction: "I think I must leave the whole question of damages to be dealt with by the proper officer. The defendant was to enter into contracts. It may very well be that if he could not enter into them there would be no loss. If he could have entered into them then comes the question of what the loss was."

The matter was, therefore, in my opinion, and as held by Anglin, J., and Mabee, J., open in the Master's office, and the evidence should have been received, unless the other view that the contract is absolute and unconditional can be maintained.

And upon this branch I also agree with the opinion of Anglin, J.

The whole agreement must, of course, be looked at. It begins by reciting that the defendant is the owner of the lands intended to be worked as a gravel pit, that he is about to enter into certain contracts hereinafter referred to for the supply to certain persons and corporations of sand from said gravel pit, that he had requested the plaintiff to assist him financially in the development of the pit, and in carrying out the said contracts, to which the plaintiff had agreed upon certain conditions. Then it is agreed: 1st, "that the said Willox is to enter into contracts as follows," namely,

the 5 before enumerated; 2nd, "that the plaintiff is to become indorser on promissory notes to the extent of $5,000, in consideration whereof he is given the right to elect within 60 days between taking a one-fourth interest in all the profits arising out of the before-mentioned contracts, and to purchase for $5,000 a one-third interest in the gravel pit, together with a one-third interest in all the business from the date of the agreement, his position in the latter event to be that of partner with a one-third interest;" 3rd, "plaintiff to have a lien upon the lands for all moneys he may be called upon to pay as such indorser, and any payment he may make to be allowed on purchase money in case he accepts the option to purchase a share;" 4th, "each of the parties to account to the other for all moneys received or expended in connection with the gravel pit during the currency of the agreement;" 5th, "if either party desires to sell his share or interest, the other to have the first option to buy;" and finally, 6th, "each of the parties hereto agrees to carry out this agreement, to the best of his ability, according to the true intent and meaning of the same and to do what he can of mutual benefit to the parties hereto."

The general rule, no doubt, is that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages, although in consequence of unforeseen circumstances the performance has become unexpectedly burdensome or even impossible. See Pollock on Contracts, 7th ed., p. 410, citing Taylor v. Caldwell, 3 B. & S. 826. That was the case of a music hall agreed to be let to the plaintiffs, but which before the day and without the fault of the party was destroyed by fire. The Court held the defendants excused, and laid down the following principle: "Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done, then in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but subject to the implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing, without default of the contractor."

That was the case of a thing in existence at the time of entering into the contract. But in Howell v. Coupland, L. R. 9 Q. B. 462, affirmed in 1 Q. B. D. 258, the principle was extended to the case of a thing expected to come into existence in time for the stipulated performance, namely, a crop of potatoes to be grown on a particular piece of land. The eminent Judge (Blackburn, J.), who delivered the judgment of the Court in Taylor v. Caldwell, was also a member of the Court and delivered one of the judgments in Howell v. Coupland when before the Queen's Bench; and in the course of his judgment said: "But here the crop failed entirely owing to the blight, which no skill, care, or diligence of the defendant could prevent; does that excuse the performance of the contract when the contract was to deliver only a portion of a specific thing? It seems to me that it makes no difference, and that the ruling in Taylor v. Caldwell applies, that is, that if from the nature of things the thing to be delivered is liable to perish, then there is an implied condition that if the delivery becomes impossible owing to the thing perishing without default of the seller, he is excused, and the same principle must apply where the contract is only for a portion of a specific thing." Archibald, J., in the same case, puts the principle even more succinctly, "that there is in such a contract an implied condition that when the time for delivery comes the article contracted for should be in existence, and the defendant is excused if he is prevented from delivering it by a cause over which he has no control."

In Clifford v. Watts, L. R. 5 C. P. 577, there was an absolute covenant to dig and remove from the land demised an aggregate amount of not less than 1,000 tons nor a larger quantity than 2,000 tons of pipe or potter's clay in each year of the term. In an action for damages for a breach of this covenant the defendant pleaded that there was not at the time of the demise nor since existing under the demised lands 1,000 tons of such clay, that the performance had always been impossible, and that such impossibility was unknown to the defendant at the time, and that he had no reasonable means of knowing or ascertaining the same. To this there was a demurrer, and the Court held the plea to be a good defence, being of the opinion that the covenant, although absolute in terms, was not intended to be a warranty by the defendant that he would take out the clay, or in any event pay the stipulated royalty, clay or no clay. A

similar principle was applied in Appleby v. Myers, L. R. 2 C. P. 651; and in Nickoll v. Ashton, [1901] 2 K. B. 126. In the latter case Vaughan Williams, L.J., dissented, but in his judgment said: "The fact is that the answer to the question whether the obligation of the contract is dependent on the existence of some thing or combination of things at the time for fulfilment, or whether one party to the contract warrants the existence at that time of that thing or combination of things, is always a question of intention of the parties, to be gathered from the contract as expressed, and the subject of it:" a quotation which, in my opinion, correctly indicates the point of view to be taken by the Court in construing such contracts. It is not enough to find a contract or covenant in absolute form, for in all the cases referred to that was the condition. But it must also be found that the defendant intended to warrant and did warrant expressly or by implication the happening of the event on which his liability is to depend, and that that was the intention of both parties to the contract. In the present case it was known to both parties that the contracts in question had not been entered into, and that without the concurrence of the other contracting parties no such contracts could be obtained. The defendant succeeded as to two of them, and upon these he does not dispute his liability, but as to the others he failed, it is to be assumed for the present after exercising due diligence in attempting to secure them, for if it appears in the Master's office that the failure was due to his own carelessness, his liability would be the same as if he had succeeded: see In re Arthur, 14 Ch. D. 603. Did he, under the circumstances, impliedly warrant, for there certainly is no express warranty, that he would succeed as to all, or pay damages in lieu of profits if he did not? The question is certainly one of some nicety. But, upon the whole, and after much consideration, I am of the opinion that no such warranty can or ought to be implied, and that the true construction is that contended for by the defendant, namely, that what was in the contemplation of the parties was that the defendant would obtain the contracts if reasonably possible.

There are two alternatives provided for in the agreement —one that the plaintiff was to be entitled to a one-fourth interest in the profits from the contracts; the other, at his option, to purchase a one-third interest in the gravel pit itself and in the business done or in prospect of being done

after the date of the agreement. In the latter event the plaintiff was to become a partner with a one-third share in all business done from the date of the agreement. In the first case he would have been entitled to one-fourth of the profits to arise from performing these contracts, and in the second, as a partner, to a one-third share in these and all other contracts and business from the date of the agreement. Whichever option was exercised, the defendant was equally bound, if at all, to obtain the contracts in question. And, as applied to the circumstances which would have existed if the plaintiff had exercised the second option instead of the first, and had become a partner with the defendant in the pit and the business, it seems to me that it would be clearly unreasonable to suppose that it could have been intended that the defendant should be chargeable with the profits upon these contracts, if no profits were earned through no fault of his. The effect of that would be to give the plaintiff the benefit at the expense of his partner, the defendant, of these unearned profits as damages, and also his share of the profits to arise from the sale of the same gravel to other purchasers, for probably equal amounts, for it nowhere appears that the price to be paid under the contracts in question was in any way exceptional. And if, as applied to the circumstances to exist if the second option had been exercised, the contract was not absolute in the sense contended for by the plaintiff, I fail to see how the same language can be otherwise construed when applied to the case of the first option.

Then what is the true meaning and application of the 6th clause of the agreement before set out? It follows after all the clauses to which I have referred, and it too must receive its due meed of attention and force. It is made in terms to apply to the whole agreement, and unless it was intended to limit in some degree the absolute language of (among others) the first clause, it has no meaning or use that I can see. The parties had in what had gone before agreed to certain things. The solicitor who drew the agreement knew that it was wholly unnecessary to repeat the obligations to perform already expressed. But he chose to do so, and in doing so introduced for the first time the limiting words "to the best of his ability." And if these words may be applied, and I see no reason why they may not, to the first clause, in which the defendant agreed to obtain the contracts in question, the result which, by construction, and

upon the authorities, I have reached, as already stated, would be reached in a more satisfactory manner upon the express language of the agreement itself.

The appeal in either view should, in my opinion, be allowed, and the matter remitted to the Master, as directed by Anglin, J. And the plaintiff should pay the costs of this appeal and of the appeals to Anglin, J., and the Divisional Court.

OSLER and MACLAREN, JJ.A., concurred with GARROW, J.A., for reasons stated by each in writing.

MOSS, C.J.O., and RIDDELL, J., dissented, for reasons stated by each in writing.

NOVEMBER 2ND, 1907.

C.A.

COOLEDGE v. TORONTO R. W. CO.

Street Railways—Injury to Passenger Alighting from Car—Negligence—Contributory Negligence—Findings of Jury—Nonsuit.

Appeal by defendants from order of a Divisional Court (9 O. W. R. 623) directing a new trial of an action tried before BRITTON, J., and a jury at Toronto, in which the jury made findings in favour of plaintiff, upon which judgment was entered for her (9 O. W. R. 222). Action by Alice Cooledge to recover damages for personal injuries sustained by her by reason of the alleged negligence of defendants in the operation of one of their cars, upon which she was a passenger on 7th September, 1906. She attempted to get off the car in Yonge street between King and Melinda streets, thinking it had stopped, and fell or was jerked off the step to the ground, and badly injured. The appeal was upon the ground that a new trial should not have been ordered, but that the action should have been dismissed.

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

H. S. Osler, K.C., for defendants.

H. Cassels, K.C., for plaintiff.

GARROW, J.A.:— . . . The negligence alleged in the statement of claim and relied upon at the trial was that the defendants' servants, while the plaintiff was in the act of alighting, caused the car to start forward, whereby the plaintiff was thrown to the ground and injured.

In answer to questions the jury found: (1) that the defendants were guilty of negligence causing the accident; (2) that such negligence consisted in a failure to tell the plaintiff when to get off.

In his reasons for judgment in favour of plaintiff upon these findings Britton, J., said the case was practically submitted to the jury upon the act of negligence alleged and set forth in the statement of claim, and that the case had not been argued upon any question of neglect on the part of the conductor when the car arrived at the north side of King street, where the plaintiff desired to get off. But, as the jury had found negligence causing the accident, and as there was, in his opinion, evidence of negligence which could not have been properly withdrawn from the jury, he considered it his duty to direct judgment for the plaintiff. This view does not appear to have commended itself to the Divisional Court, otherwise a new trial would not have been directed. But exactly what view was taken does not appear, as no written reasons were given. It cannot have been because of a belief that upon a second trial some new situation would develop, for it is quite apparent that every witness who could reasonably have been called was called and examined. And the essential facts are not really in dispute.

I am, with deference, unable to agree with either conclusion.

The effect of the first and second finding taken together, as they must be, is that the defendants are guilty of negligence because the conductor failed in his duty to inform the plaintiff when she should alight. But it is enough to say that no such duty was either alleged or proved.

It has long been regarded as a wholesome and necessary check upon ignorance and prejudice on the part of juries, so easily covered up in general terms, to put specific questions. In this case the mere finding generally of negligence in answer to the first question is in itself nothing if the specific act found does not support the general finding. Both must be read together, and, so reading them, it appears to me that the proper conclusion at the trial upon the findings was that plaintiff's action had wholly failed.

Nor do I think a new trial should have been ordered. I am, of course, loath to interfere with an order based upon the discretion of the Divisional Court, and I would not do so if it was not clear to me that to permit the order to stand would be an injustice to the defendants, and in effect no beneficial relief to the plaintiff in the final result. It is not suggested that there are any new facts to be brought forward at a second trial. The facts are all before us, and it is now quite clear upon the whole evidence that the plaintiff's unfortunate accident was entirely owing to her own mistaken attempt to alight from a moving car. That is the clear result of the testimony of the witnesses called by the defence. And it is not even clearly contradicted by the plaintiff herself, who says: "Well, it stopped as near as I could tell." "As far as I could tell." "It was slowing up, and I thought it had stopped." "It slowed up about like that you would not have thought it was going." "It stopped up to a certain extent that I thought it had completely stopped." "It stopped enough that I thought it had stopped." "To my best belief it had stopped." "Well, I seen the car had slowed down pretty well, then I made the raise to get off."

Contrast this hesitating and perhaps not quite candid account of the matter with the very distinct and positive statements of Reginald Waters, who says: "I saw the lady get off the car before it stopped, and when the car stopped she was near the tail end of it, and she kind of hollered and then the car stopped and the conductor got off." Q. "You are quite positive that the lady got off before the car stopped?" A. "Yes." Q. "Which way did she get off?" A. "Backwards." And of Thomas Funnell, who says he saw the plaintiff fall off a car. "When I first seen her she was standing up, and the next place I seen her was on the ground; she had got off the car." Q. "Was the car moving at the time?" A. "Yes." Q. "Was the car moving after you saw her on the ground?" A. "Not very much, just a little." And the other evidence called by the defence is to the same effect. In the face of such evidence no jury ought to find or probably would find in favour of the plaintiff, or, if they did so find, their finding should be set aside as contrary to the weight of evidence. That being the position, it appears to me that it is not in the interests of justice to permit a second trial. The plaintiff has had her chance, and has failed, and that should be an end of the matter.

The appeal should be allowed and the action dismissed with costs, if claimed.

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

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., concurred.

NOVEMBER 2ND, 1907.

C. A.

BANK OF NOVA SCOTIA v. DICKSON.

Promissory Note—Accommodation Note by Officers of Company to Secure Advances to Company—Consideration—Personal Liability—Guaranty.

Appeal by defendants from order of a Divisional Court affirming the judgment of ANGLIN, J., at the trial, in favour of plaintiffs for the recovery of $3,793.51 in an action upon a promissory note for $5,000, given by A. A. Dickson and John Ferguson, the defendants, as security for an advance to the Standard Bolt and Screw Co., of which they were president and treasurer respectively. The Divisional Court held that the note sued on was in substance an accommodation note for the ultimate amount due by the company.

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

J. Bicknell, K.C., for defendants.

C. A. Masten, for plaintiffs.

MEREDITH, J.A.:—The defendants gave to the plaintiffs the promissory note in question. Consideration was given by the plaintiffs to the defendants for it. The consideration was advances to be made by the plaintiffs to a company of which the defendants were chief officers, the ultimate balance of which advances, to the extent of the amount of the note, was to be the amount of the liability upon the note.

In these circumstances there can surely be no doubt as to the defendants' liability to pay such balance to the extent of the amount of the note. But it is said that the defendants did not give the note in consideration of anything more

than $2,000, which was agreed to be advanced at the time, and which was subsequently advanced, but has been repaid.

It may very well be that the defendants as individuals are not bound by the document signed by them as officers of the company; yet it must be very cogent evidence against them, and it must be found as a fact that they were as individuals assenting to all that was done by them as such officers in respect of the promissory note; so that the result is that they gave the note in question for the purposes indicated in the agreement, and that, upon the security of that note so given for that very purpose, the money in question was advanced by the plaintiffs to the company—these defendants being all along its chief officers—and is now unpaid and overdue. How can the defendants then escape liability? Prima facie they are liable upon the promissory note, for the amount of it; that prima facie liability may be reduced upon a defence shewing that the amount due in respect of advances made on the faith of it is less.

There is no encroachment upon the statutory provisions of the Statute of Frauds. The plaintiffs are not seeking to enforce a parol promise to answer for the debt, default, or miscarriage of another; they are seeking to enforce the defendants' written promise to pay; it is the defendants who, in order to reduce their prima facie liability, set up the guaranty.

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

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

NOVEMBER 2ND, 1907.

C.A.

RE NORFOLK VOTERS' LISTS.

Parliamentary Elections — Ontario Voters' Lists Act—Case Stated by County Court Judge—"General Question"—Specific Cases—Refusal of Court to Answer Questions.

Case stated by the Judge of the County Court of Norfolk under sec. 39 of the Ontario Voters' Lists Act.

Three questions arose:—

1. An unmarried man, a farmer's son, has a residence at his father's house. On 1st March he enters into an agreement with a farmer living in an adjoining electoral district to work for him during the farming season of from 6 to 8 months. During the currency of this agreement he boards and lodges with his employer, but leaves part of his clothing at his father's house, which he frequently visits, and to which he intends to return on the completion of his engagement. He is so engaged in the adjoining electoral district on the last day upon which an appeal could be made to put him upon the voters' list in the electoral district in which his father resides. The question is, was he then in good faith a resident of and domiciled in such last mentioned electoral district, within the meaning of sec. 8 of the Ontario Election Act.

2. An unmarried man resides with his father. He secures a position as teacher in a public school situated in an electoral district other than that in which his father resides. During the regular school terms he lodges and boards in the district in which the school is situated, and at other times he stays at his father's house, where he leaves part of his clothing while engaged at his school. He has been teaching for over a year. The assessor assesses him with his father, and his name appears upon the voters' list. Question: Has this teacher such a residence in the electoral district in which his father resides as entitles him to have his name retained in the voters' list when a proper appeal has been entered to strike it off?

3. An unmarried man resided with his father until he attained his majority. Since then he has maintained himself by his own labour in various places outside the electoral district in which his father resides. He occasionally returns to his father's home for a visit. He was, on the last day for filing an appeal to the Court of Revision, so maintaining himself at some place other than the electoral district in which his father resides. There is no evidence before the Court other than the above to shew whether he has or has not established a residence other than that he formerly had with his father. His name appears on the voters' list, and an appeal is regularly lodged to have it struck off. Question: Should the appeal be allowed?

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

J. R. Cartwright, K.C., for the Attorney-General.

MEREDITH, J.A.:—Section 39 of the Ontario Voters' Lists Act—7 Edw. VII. ch. 4 (O.)—provides that "in order to facilitate uniformity of decision, without the delay and expense of appeals, (a) a Judge may state a case on a general question arising or likely to arise . . ." The Act does not specify the character of such a general question, but what must be meant is any general question which has arisen, or is likely to arise, in the performance of the Judge's duties under the Act. However, one thing is expressly made plain, and that is that the question must be a general, not a particular, one: the words "general question" are twice used in the section, once in the provision for the Judge stating a case, and once in the provision for the Lieutenant-Governor in council doing so; and the purpose is to insure uniformity of decisions throughout the province, and the opinion of the Court upon the case stated is to be forthwith published in the Ontario Gazette, and a copy of it is to be sent to every County Court Judge in the province.

None of the questions stated in this case is one of the character mentioned in the enactment, none of them has any of the features of a general question, each is a specific case depending upon its own particular facts, facts which may never be precisely the same in any other case; so that an opinion must be given upon each separately, and it can hardly serve any useful purpose to make it known that schoolmaster Jones, or farm labourer Smith, is, or is not, a voter, upon the facts peculiar to his own case.

It is not competent for a County Court Judge to ask, in effect, this Court to determine simple questions of fact arising in any particular case, nor within the competence of this Court to relieve him of his duty to find, in such particular cases as these, whether, at the times necessary to confer a right to vote, a particular person was in good faith a resident of and domiciled in some particular municipality, and had continuously resided in the electoral district, as the Ontario Election Act requires.

If these cases may be properly made the subject of a stated case, it is difficult to suggest any case, or question, which can arise in the discharge of the Judge's duty under

the Voters' Lists Act, which would not be; and so an appeal, in effect, might be given in any particular or favoured case, although the Act provides that "the decision of the Judge in regard to the right of any person to vote . . . shall be final."

In the case of Re Voters' Lists of the Township of Sydenham, 2 Ont. Elec. Cas. 69, this point was not considered or raised. Unfortunately such cases as that and this are not generally contested in this Court, but are heard practically ex parte. And in this matter, though each particular case was stated upon its peculiar facts, it might perhaps have been thought that it really related to a large class of persons—"Manitoba harvesters"—whose cases were, generally speaking, practically alike.

For more than one reason I cannot think that—as was suggested by Mr. Cartwright—these cases, or any other cases, must be ruled by the Sydenham case, but so much light is thrown upon the subject, by many cases, that the learned County Court Judge ought not to experience any very great difficulty in coming to a proper conclusion in those which he has stated, or indeed in any others, though the facts must differ in most if not all of them: see Ford v. Drew, 5 C. P. D. 59; Ford v. Hart, L. R. 9 C. P. 273; Ford v. Pye, ib. 269; Torish v. Clark, [1897] W. N. 102; Bond v. Overseers of St. George, Hanover Square, L. R. 6 C. P. 312; Beal v. Town Clerk of Exeter, 20 Q. B. D. 300; In re Craignish, Craignish v. Hewitt, [1892] 3 Ch. 180; Winans v. Attorney-General, [1904] A. C. 287.

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

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

NOVEMBER 2ND, 1907.

C.A.

RE SOUTH FREDERICKSBURGH VOTERS' LISTS.

Parliamentary Elections—Ontario Voters' Lists Act—Status of Appellant—Residence—Forms in Schedule to Act—Effect of.

Case stated by the Judge of the County Court of Lennox and Addington under the Ontario Voters' Lists Act, 7

Edw. VII. ch. 4, sec. 39. Question: Is a resident of and a voter in a municipality in an electoral district who appeals against the voters' list of another municipality in the same electoral district, prepared by the municipal clerk under the Ontario Voters' Lists Act, but on which said last mentioned list the appellant is not entered nor entitled to be entered as a voter, entitled to be an appellant against persons entered on the last mentioned list under the Ontario Voters' Lists Act?

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

J. R. Cartwright, K.C., and E. Bayly, for the Attorney-General.

H. M. Mowat, K.C., for the voter interested.

OSLER, J.A.:—. . . Section 14 (1) of the Voters' Lists Act enacts that the list, that is to say, the voters' list for the municipality posted up by the clerk of the municipality, shall be subject to revision by the Judge at the instance of any voter who complains that the names of voters have been omitted from the list or wrongly stated therein, or that the names of persons who are not entitled to be voters have been entered on the list; and sec. 15 (1) enacts that any voter whose name is entered on, or who is entitled to have his name entered on, the list for the municipality, shall have the right for all purposes of the Act, upon giving notice in writing (form 5) within 30 days after the clerk has posted up the list in his office, to apply, complain, or appeal to have his own name or the name of any other person corrected in, entered on, or removed from the list for the municipality.

Section 17 prescribes the procedure to be followed by "the voter making the complaint," and refers also to form 5 as the form of the notice to be given by him.

Turning to form 5, voter's notice of complaint, the imaginary complainant is there described as "I. S., a voter (or person entitled to be entered on the voters' list) for the electoral district of in which the said municipality is situated." The question is whether this enlarges the provisions of sec. 15 (1) so that the complainant may be a person who is a voter, &c., in any municipality in the electoral district, instead of, as the section in terms enacts, one

who is a voter in the particular municipality the voters' list of which he desires to have corrected.

Section 4 of the Act enacts that in carrying into effect the provisions of the Act, the forms set forth in the schedule or forms to the like effect may be used.

And sec. 7, sub-sec. 35, of the Interpretation Act, 7 Edw. VII. ch. 2, enacts that where forms are prescribed, deviations therefrom not affecting the substance or calculated to mislead shall not vitiate them.

In the former Voters' Lists Act, R. S. O. 1897 ch. 7, repealed by the Act of the present year, it was enacted (sec. 13 (1)) that the list should be subject to revision by the County Court Judge "at the instance of any voter or person entitled to be a voter in the municipality for which the list is made, or in the electoral district in which the municipality is situate;" and form 4 describes the complainant as "a voter or person entitled to be a voter in the said municipality (or for the electoral district in which the said municipality is situated.)"

In Truax v. Dixon, 17 O. R. 366, Armour, C.J., referring to many decisions on the subject of the effect to be given to forms or schedules given by an Act of Parliament, said (p. 374): "Whether forms given in the schedule to an Act of Parliament or in the Act itself 'are made to suit rather the generality of cases than all cases;' or 'are inserted merely as examples, and are only to be implicitly followed, so far as the circumstances of each case may admit;' or 'whether they may or may not be followed, and if followed, may be safely followed—must always be a question of the proper construction to be placed upon the Act of Parliament."

In the case before us it is manifest from the language of the enacting clause that the legislature has deliberately changed the law as it stood in the former Act, and has restricted the class of persons who may be appellants in respect of the voters' lists of a municipality to those who are, or are entitled to be, on that list. A slip has inadvertently occurred, such as Lord Campbell referred to in Regina v. Epsom, 4 E. & B. 1003, in fitting the form to the new section, and the old form in substance has been allowed to remain without making the necessary change, with the result that there is a contradiction between the enacting clause and

the form. In In re Baines, 1 Cr. & Ph. 31, Lord Cottenham said: "If the enactment and the form cannot be made to correspond, the latter must yield to the former." In Dean v. Green, 8 P. D. 79, Lord Penzance refused to allow the operation of the enacting clause to be restrained by the words of the form, and conversely in Laird & Sons v. Clyde Navigation Trustees, 8 Rettie 756, the Court refused to enlarge the words of the clause by applying the language of the schedule.

In Regina v. Lake, 7 P. R. 215, 230, it was held by Wilson, C.J., that the form of conviction given in a schedule, purporting to impose a penalty of three months' imprisonment, with hard labour, did not warrant the imposition of hard labour in addition to imprisonment, where the section of the Act providing for the punishment declared that the offender should be liable to imprisonment for three months, saying nothing about hard labour, though the Act which provided the forms declared that forms in the schedule should be sufficient for the cases thereby respectively provided for.

Here, the words of the form, so far as they describe the status of the appellant, are merely descriptive, and the form must be regarded as illustrative or exemplary only of what it should contain by way of information to the clerk and person appealed against, particularly as its use is, by the 4th section, permissive. It is intended that it shall shew, among other things, the status of the appellant, and for the express enactment or declaration defining who may be appellants, we must go to the section itself, rejecting the inconsistent description which is given in the form.

Our answer to the question submitted must, therefore, be that the person mentioned in the case is not entitled to be an appellant against persons entered on the voters' list for the township of South Fredericksburg.

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

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

CARTWRIGHT, MASTER. NOVEMBER 4TH, 1907.

CHAMBERS.

BROOM v. TOWN OF TORONTO JUNCTION.

Parties — Joinder of Defendants — Joint Cause of Action — Pleading — Conversion — Negligence.

Motion by defendants the Corporation of the Town of Toronto Junction for an order requiring the plaintiff to elect against which of the 3 defendants he would proceed.

R. L. Gray, Toronto Junction, for the applicants.

Ross (McCarthy, Osler, & Co.,), for defendants the Grand Trunk R. W. Co.

C. Kappele, for the widow of Reuben Armstrong.

The plaintiff in person.

THE MASTER:—This action is brought by the plaintiff in person, alleging a joint conversion by the Town of Toronto Junction, the Grand Trunk Railway Company and "the estate of Reuben Armstrong, mayor (now deceased)" of Toronto Junction.

As might be expected, it is not in the usual form. . . .

The executrix of Armstrong has appeared, and also moves, in effect, that the action may be dismissed as against her . . . .

The facts as set out in the statement of claim are shortly these. In October, 1902, the Corporation of the Town of Toronto Junction, in consideration of services rendered by him to the corporation, took certain goods of plaintiff to store for safe-keeping in their municipal building until called for: this taking over was done by the mayor with the consent and approval of the council: they so continued until August, 1905, when plaintiff was notified by the town solicitor to take away his goods: before he could do so the mayor and council had them taken to the Grand Trunk Railway freight shed; they were then conveyed to Belleville: the Grand Trunk Railway Company refused to give them up to the plaintiff, and they are now in the possession of the railway company in such a condition as to be valueless to the plaintiff, which in the 9th paragraph of the statement of

claim it is said is "due solely to the gross negligence, omissions, and commissions of all three of the defendants in this action."

Whatever may be the result of the action (unless it is settled), I think it is clear that the 9th paragraph sets up a perfectly good and intelligible cause of action against the defendants jointly, and that the plaintiff cannot be required to elect. It might have been more regular to have made Mrs. Armstrong, as executrix, a defendant, instead of the estate, but that is a matter of no great consequence, and it can easily be done. As is said in Tate v. Natural Gas Co., 18 P. R. 82, why should the plaintiff not be allowed to try the question whether he has a right to recover against these defendants jointly, if he can shew them to have been joint tort-feasors?

Probably the Grand Trunk Railway Company can secure themselves under the provisions of Rule 215, and Mrs. Armstrong may also have the same remedy, or it may ultimately be held that it is against the town corporation only that plaintiff is entitled to proceed.

The present action brings before the Court all those against whom the plaintiff can possibly proceed. And it is really better for them that this should be done than that the plaintiff should bring a first, a second, and a third action. This, no doubt, is no ground for refusing a motion which should properly be allowed, but it is a consideration which often deters these motions from being made when the plaintiff is not thought to be financially strong.

I think the motion should be dismissed without costs, and that the defendants should plead in a week.

CARTWRIGHT, MASTER. NOVEMBER 4TH, 1907.

CHAMBERS.

BOISSEAU v. R. G. DUN & CO.

Discovery—Examination of Parties — Failure to Acquaint themselves with Facts—Motion for Re-examination—Substitution of Agent for Examination—Costs.

Motion by plaintiff for an order requiring two of the defendants to attend for re-examination for discovery, in the circumstances stated in the judgment.

K. F. Mackenzie, for plaintiff.

T. P. Galt, for defendants.

THE MASTER:—On 4th October an order was made for examination for discovery of two of the defendants at New York, where they reside.

It was urged then that the defendants had no personal knowledge of the matters in question, but it was pointed out that under Bolckow v. Fisher, 10 Q. B. D. 161, they were bound to obtain all necessary information from their agents or servants.

The examination was fixed for Saturday 19th October, and plaintiff's solicitor went with the commissioner to New York, and, at the request of the defendants themselves, the examination was proceeded with on Friday the 18th, without awaiting the arrival of their solicitor, who was then on his way with all necessary documents, in company with Matthews, who is the agent acquainted with the facts in this case, and who had previously gone to New York, and, as he says, instructed the defendants in the matter. They, however, on being examined, said they knew nothing of these facts, nor had they any documents.

The plaintiff is now moving for an order that defendants attend again for examination, but is willing to accede to evidence being given by Matthews. This was offered before by defendants, but refused by plaintiff.

The only question now is as to the disposition of the costs. As the examination was rendered abortive by the act of the defendants, the costs of it should be to plaintiff in any event.

The order will further provide that Matthews be examined for discovery just as if he was a defendant, and that the defendants be bound by his evidence.

(Affirmed by CLUTE, J., 12th November, 1907.)

CARTWRIGHT, MASTER. NOVEMBER 4TH, 1907.

CHAMBERS.

BASSETT v. CLARKE STANDARD MINING CO.

Mining Commissioner—Award of, under Mines Act—Action to Enforce—Jurisdiction of Commissioner to Enforce—No Necessity for Action—Dismissal of Motion for Summary Judgment.

Motion by plaintiff for summary judgment under Rule 603 in an action to recover $365, the amount due on an

award made by the Mining Commissioner on 30th May, 1907, under sec. 119 of the Mines Act of 1906, as amended in 1907.

Gideon Grant, for plaintiff.

H. F. Brown, for defendants.

THE MASTER:—It was contended that the whole policy of the Mines Act, as evidenced by sec. 9, was to give the Commissioner exclusive jurisdiction in all matters "which may come or be brought before him under the provisions of this Act." For this purpose that section provides that he "shall have all the powers of a Judge of the High Court . . . so as to do complete justice between the parties;" he may also "grant an injunction or mandamus in any matter before him under this Act."

And by sec. 119, sub-sec. (3), the Mining Commissioner may, in cases of the kind under consideration, "make such order by way of injunction, or otherwise, as he may deem just, for the enforcement of payment or security of the amount awarded."

Under sec. 15 the Commissioner has power to award costs, which "shall be recoverable as may be ordered by him."

The high status of the Mining Commissioner and the extent of his authority are evidenced by sec. 43, which directs that appeals from his decisions go to the Divisional Court direct.

From all this it is plain that the Mining Commissioner has powers and authority far in excess of those which are exercised even by a Judge of the High Court in Chambers. He has full and complete jurisdiction over the subject matter of the present action, and the jurisdiction of the High Court seems to have been transferred to him.

I notice in the affidavit of the defendants that it is alleged that the award is ultra vires. But, while I do not concur in that suggestion, it would still be open to raise this before the Commissioner on any application made by the plaintiff to enforce the award.

The motion, in my opinion, must be dismissed, with costs in the cause, the point being now raised, as I understand, for the first time.

Moss, C.J.O. NOVEMBER 4TH, 1907.

C.A.—CHAMBERS.

KIRTON v. BRITISH AMERICA ASSURANCE CO.

Appeal to Court of Appeal—Leave to Appeal to Court of Appeal from Order of Divisional Court — Important Questions—Special Reasons for Treating Case as Exceptional.

Motion by defendants for leave to appeal from an order of a Divisional Court (ante 498) setting aside the judgment of MABEE, J., dismissing the plaintiff's action.

H. D. Gamble, for defendants.

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

MOSS, C.J.O.:—The action is upon a policy of insurance against fire effected on farm buildings, the property of the plaintiff. The amount sought to be recovered was $550, that being the full amount of the insurance on the buildings, but it was proved or admitted that their value was $1,225 or $1,250.

The defendants maintain that they are not liable to pay any sum in this action, which they allege was brought and is being maintained by and for the benefit of a railway company, one of whose engines caused the destruction of the insured buildings, the railway company having effected some kind of a settlement with the plaintiff; and this contention was upheld by the trial Judge.

The case presents some unusual features, and raises one or two somewhat nice and rather important questions. In the course which it took before the Divisional Court these were not dealt with. The judgment of dismissal was set aside, and the plaintiff was awarded judgment for $250, but upon terms which may leave him in some jeopardy as to the recovery of the remainder of his claim, and with which, as I gather, he is not well satisfied. He still claims to be entitled to judgment for the full amount for which he sued, without any of the conditions imposed by the Divisional Court.

I have formed the opinion that there are special reasons for treating the case as exceptional and allowing a further appeal. I also give the plaintiff liberty to cross-appeal in the usual way, as he may be advised.

The costs will be as usual.

NOVEMBER 5TH, 1907.

DIVISIONAL COURT.

REX v. LOWERY.

Habeas Corpus — Order of Judge Discharging Defendant from Custody under Informal Conviction—Term that no Action be Brought against Magistrate—No Power to Impose—Jurisdiction of Divisional Court to Remove.

Appeal by defendant from order of FALCONBRIDGE, C.J., in Chambers, when discharging defendant from custody on habeas corpus, providing that no action should be brought against the magistrate or other person in respect of the conviction or anything done thereunder.

D. O. Cameron, for defendant.

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

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

BOYD, C.:—Lowery was discharged under habeas corpus because no offence was disclosed on the papers under which he was committed; and the Judge also ordered that he should bring no action against the magistrate or other person in respect of the conviction. Everything was of the most informal character, and no conviction was drawn up, and none was quashed. Upon the materials the defendant was not charged with any criminal offence, but only with taking a horse, and he was put in prison because he had "committed a breach of law." He was entitled as of right to be discharged without any condition as to not bringing an action because of illegal detention. There is no provision of law enabling the Judge who discharges ex debito justitiæ upon habeas corpus to protect the magistrate from action. This was a direction depriving the prisoner of a civil right. Indeed, so far as appears, he might have bought an action for illegal imprisonment without making any application for a habeas corpus. The rule is laid down in a book of authority that the Court has no power to impose conditions when the discharge is ex debito justitiæ: see Paley on Convictions, p. 480, note, and Downey's case, 7 Q. B. 283, where the Lord Chief Justice says that where the Court is bound to grant a discharge it can impose no terms. The provisions as

to protecting magistrates found in the Criminal Code and in the Ontario statute which were referred to in the argument do not apply to habeas corpus, where everything is left as it stands when the prisoner is discharged.

As the case is shaped, the proceedings appear to be of a civil and not of a criminal character, and the particular direction complained of is one relating to civil rights, and I think we have jurisdiction to declare that the term of the order of discharge complained of is nugatory. No costs.

CARTWRIGHT, MASTER. NOVEMBER 6TH, 1907.

CHAMBERS.

BROCK v. CRAWFORD.

Lis Pendens—Motion to Vacate—Cause of Action—Pleading—Statement of Claim—Guaranty—Payment into Court.

Motion by defendants to strike out part of the amended statement of claim, and for other relief.

W. N. Tilley, for defendants.

H. Cassels, K.C., for plaintiffs.

THE MASTER:—After the order made on 11th October, reported in 10 O. W. R. 587, where the facts are given, the statement of claim was amended by striking out the claim to have the transfers to Sutcliffe set aside.

The defendants are not yet satisfied, and move to strike out those paragraphs of the statement of claim which relate to the transfers of the assets to Sutcliffe, as not disclosing any cause of action in respect of such transfers, or to require plaintiffs again to elect whether they will proceed under the guaranty or under the trust deed, and to vacate the certificate of lis pendens. . . .

The chief object of the defendants is to have the lis pendens removed. As to this I am bound to exercise caution, as a refusal to vacate is final: see Hodge v. Hallamore, 18 P. R. 447, on an appeal to Meredith, C.J.

Before that question arises, it is necessary to decide whether the other branch of the motion should succeed.

The plaintiffs only set up one cause of action, which is to be paid the $10,000 secured by the defendants' guarantee. They submit that the trust deed of 27th May last gives them a lien or charge on the assets transferred thereby,

and ask for a declaration to that effect, and to have the assets realized and their claim satisfied. If they are so entitled, then it does not appear that the statement of claim is objectionable, whatever may be the result after the case has been heard. As was said in Evans v. Jaffray, 1 O. L. R. 621, "there is such unity in the matters complained of as between all the parties as justifies the retention of (all) the defendants." See, too, Andrews v. Forsythe, 7 O. L. R. 188, 3 O. W. R. 307. At present it must be assumed that the statements of the plaintiffs are sustainable. They may turn out not to be so—just as in Evans v. Jaffray, supra, the action was dismissed as against the defendants other than Jaffray: see 3 O. W. R. 877.

The trust deed has been put in with the other material. It does not contain any express charge in respect of the guaranty given to the plaintiffs by the defendants, but I cannot say that it may not have that effect. It assumes to convey all the joint assets of the defendants; and it may be that under the whole facts it may be held to have that result.

The defendants have paid into Court $5,500. If at any time they wish to dispose of any of their properties, on payment into Court of a further sum of $4,500 it would be fair to remove the lis pendens. At present it does not seem just to order its removal. I cannot say that its registration is frivolous or vexatious. If the litigation is not proceeding rapidly, the plaintiffs are not to blame.

The motion will therefore be dismissed with costs to the plaintiffs in the cause.

MULOCK, C.J. NOVEMBER 6TH, 1907.

TRIAL.

BURNS v. HEWITT.

Costs—Scale of—Trespass—Title to Land—Pleading—Division Court Jurisdiction—Rule 1132—Set-off.

Action for trespass to land and for cutting down and removing timber therefrom.

G. F. Henderson, Ottawa, for plaintiff.

J. A. Hutcheson, K.C., for defendant.

MULOCK, C.J.:—The action was tried with a jury at Brockville, and resulted in a verdict for the plaintiff for $35, and the only question for determination is that of costs,

it being contended on behalf of the plaintiff that the title to land was involved. Reference, however, to the pleadings shews that the only issue between the parties was the amount of damages to which the plaintiff might be entitled. By his statement of claim he claims to be owner of the land from which the defendant cut and removed the timber, and he asks for damages to the extent of $100 in respect of the timber and $50 for the trespass to the freehold.

The defendant admits the plaintiff's ownership of the land, and says that he was tenant of the farm adjoining the plaintiff's land at the time of the cutting complained of; that no division fence marked the boundary between the plaintiff's land and that occupied by the defendant; and that, in ignorance of the location of the boundary line, he encroached on the land of the plaintiff and cut and removed therefrom a small quantity of wood, and pays into Court $30, which he says is sufficient to satisfy any damage sustained by the plaintiff by reason of the defendant's trespass. Thus the defendant expressly admits the plaintiff's title, the case was within the proper competence of the Division Court, and the costs should be dealt with as provided under Rule 1132, that is, the plaintiff should recover Division Court costs only, and the defendant be entitled to tax his costs of suit as between solicitor and client, and to set off against the plaintiff's costs and verdict the excess of the defendant's taxable costs of defence above what would have been incurred if the case had been in the Division Court, and if such excess exceeds the amount of the verdict and the plaintiff's taxed costs, the defendant to be entitled to execution against the plaintiff for such excess.

NOVEMBER 6TH, 1907.

DIVISIONAL COURT.

VIVIAN v. CLERGUE.

Vendor and Purchaser—Contract for Sale of Mining Property—Action to Recover Instalments of Purchase Money—Land not Conveyed to Purchaser but Possession Given—Terms of Agreement—Effect of Subsequent Agreement—Rectification—Action for Damages—Election to Treat Contract as Rescinded.

Appeal by defendant from judgment of BRITTON, J., ante 186.

W. E. Middleton, for defendant.

W. M. Douglas, K.C., and A. H. F. Lefroy, for plaintiffs.

THE COURT (BOYD, C., MAGEE, J., MABEE, J.), dismissed the appeal with costs.

NOVEMBER 8TH, 1907.

DIVISIONAL COURT.

WOODS v. PLUMMER.

Defamation—Privileged Occasion—Evidence of Malice—Contradictory Statements—Evidence for Jury—Setting aside Nonsuit—New Trial.

Motion by plaintiff to set aside the nonsuit entered by ANGLIN, J., at the trial of an action for slander, and for a new trial. The plaintiff was a car examiner, and the alleged slanderous statement was to the effect that he had broken the seal off a car and taken out and concealed a bundle of handles.

The motion was heard by BOYD, C., MAGEE, J., MABEE, J.

R. S. Robertson, Stratford, for plaintiff.

R. T. Harding, Stratford, for defendant.

BOYD, C.:—The trial Judge rightly ruled that the statements complained of were made upon an occasion of qualified privilege. He rightly held that it then lay upon the plaintiff to displace the protection afforded by the occasion by some evidence of ill intent or malice, and that therein he had failed, and so dismissed the action.

To shew bad faith or ill intent it is not enough for the plaintiff to prove that the statements were untrue; he must go further and shew that they were untrue to the knowledge of the person who uttered them. Some evidence must be given which reflects upon the defendant's candour or honesty, proper to be submitted to the jury.

Now, here the plaintiff swore that the charge made by defendant to his superiors was not true in fact, and he also swore that almost contemporaneously with the occasion when

the alleged defamation was uttered, the defendant said to him that he did not know or recognize who the person was that broke into the car. This conjunction of statements of contradictory character, one to the plaintiff and the other to railway officers, appears to be enough, if believed, to shew ill intent or recklessness in making the defamatory charge. It depends on what view the jury will take; if they believe the plaintiff's version, that defendant told him he did not know the person who broke into the cars, and shortly afterwards told the railway officers that it was the plaintiff who broke in, they may find that defendant stated as true to the railway people what he did not know or believe to be true —which is malice in law; or the jury may disbelieve the plaintiff's interview with the defendant, and give credit to the defendant, in which case the plaintiff fails.

Altogether, though this aspect of the evidence was not presented to the trial Judge, I think the case was not one to be withdrawn from the jury, and that it must go down to be tried. Costs will follow the result of the trial, if not otherwise disposed of by the Judge who presides.

MAGEE, J.:—I agree in the result, but, apart from the alleged statement of the defendant to the plaintiff, I think the alleged slanderous statement being made by the defendant as of his own knowledge, the matter should have gone to the jury.

MABEE, J., gave reasons in writing for the same conclusion.