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APPELLATE DIVISION.

FEBRUARY 8TH, 1915.

HARRISON v. SCHULTZ.

Limitation of Actions—Possessory Title to Land—Evidence—Building—Encroachment—Retention of Land Encroached upon—Improvements under Mistake of Title—Conveyancing and Law of Property Act, R.S.O. 1914 *ch.* 109, *sec.* 37 *—Compensation—Damages for Trespass—Costs.*

Appeal by the defendant from the judgment of MIDDLETON, J., ante 131.

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

F. C. Kerby, for the appellant.

F. D. Davis, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

FEBRUARY 8TH, 1915.

*LEUSHNER v. LINDEN.

Practice—Affidavit Filed with Appearance to Specially Endorsed Writ—Rule 56 (1), (4)—*"Good Defence upon the Merits"—Defective Affidavit—Motion for Summary Judgment under Rule* 57—*Leave to Move Substantively for Permission to File Proper Affidavit—Duty of Officer of Court Receiving Affidavit.*

Appeal by the defendant from the order of RIDDELL, J., ante 456.

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

G. F. Dyke, for the appellant.

J. R. Roaf, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

*To be reported in the Ontario Law Reports.

FEBRUARY 11TH, 1915.

*SHORT v. FIELD.

Infant—Agreement for Purchase of Land—Payment of Sum as Deposit—Right to Recover—Absence of Fraud—Consideration.

Appeal by the plaintiff from the judgment of BOYD, C., ante 400.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

J. Cowan, K.C., for the appellant.

D. S. McMillan, for the defendant, respondent.

THE COURT dismissed the appeal with costs, agreeing with the opinion of the Chancellor.

RIDDELL, J., IN CHAMBERS. FEBRUARY 10TH, 1915.

WIRTA v. VICK.

Unincorporated Society—Election of Directors and Officers—Persons Entitled to Vote—Determination by Returning Officer—Absence of Fraud—Rules of Society—Irregularity—Breach of Trust—Costs.

Motion by the plaintiffs for further directions after the report upon the election of directors of the Copper Cliff Young People's Society, held pursuant to the order of a Divisional Court of the Appellate Division, ante 384; and motion by the defendants to set aside the election.

W. T. J. Lee, for the plaintiffs.

J. H. Clary, for the defendants.

RIDDELL, J.:—In an appeal from the judgment of the Chancellor herein (1914), 6 O.W.N. 599, all parties most sensibly agreed upon an order which was made by a Divisional Court of the Appellate Division as follows:—

"By consent it is ordered that at the Finlanders' Hall, in the

*To be reported in the Ontario Law Reports.

town of Copper Cliff, on the 27th December, 1914, beginning at 2 p.m., an election be had of seven directors; and out of these an election of a chairman, vice-chairman, and manager; also the members to elect an amusement committee, auditor, and other officials of the Copper Cliff Young People's Society: that David Marr Brodie, Police Magistrate for the Town of Sudbury, act as returning officer, and as such he shall preside at such election and determine who is entitled to vote; and he shall, forthwith after such election, certify to this Court the result of the election: also it is ordered the said hall shall not, nor shall any of its furnishings, equipment, or any funds or other assets of the society, be used for any purposes except those provided in the general rules of the society; that the costs of the returning officer, to be fixed by the Registrar of this Court, shall be paid out of the funds now to the credit of this cause; and that further directions as to disposition of the money in Court, and the costs of this appeal, and the costs below, be determined by Mr. Justice Riddell.

"If Mr. Brodie is unable to act, then Mr. Sheriff Irving of Sudbury is appointed in his place as such returning officer, with the same powers, duties, etc., as are conferred on Mr. Brodie.

"Each party shall deposit with the returning officer on or before the 15th December, 1914, any minutes, books, or papers, in their custody or control, having any entries therein as to the membership of the society; and the Registrar of this Court will also within such period deliver to him the copy of the constitution, exhibit 15, and a copy of this memorandum."

Mr. Brodie acted as returning officer, held an election, and reported: the plaintiffs move for further directions, and at the same time the defendants move to set aside the election. As I have no jurisdiction under the order to deal with the latter motion, both counsel requested that I should take jurisdiction and dispose of the whole matter—I do so.

As to the election, the parties selected the returning officer, and gave him power to "determine who is entitled to vote." I consider this as a selection of Mr. Brodie as *personam designatam*, and that (at least in the absence of fraud, all suggestion of which is earnestly repudiated by Mr. Clary) his decision is consequently final.

But, if it be open to me to consider the merits, I hold that his manner of selecting the properly-entitled voters is unexceptionable.

The judgment of an appellate Court in Vick v. Toivonen

(1913), 4 O.W.N. 1542, binding on him as on me, decided that those elected up to the 7th January, 1912, were duly elected and were members of the society. After that time, the society split into two factions, which I may call the Wirta and the Vick factions: the Vick faction held semi-private meetings from time to time and took in members—but by no stretch of charity could these meetings be called meetings of the society. Still less, if possible, could that character be ascribed to the meetings of the Wirta faction—they held socialist and not temperance meetings. From the evidence before the returning office—and before me—he was perfectly right in ruling, as he did, to allow to vote only those who were members in January, 1912. It is to be noted that non-payment of dues does not destroy membership *ipso facto*.

On that basis, admittedly, there is no objection to the general conduct of the election.

It is, however, objected that the election of manager was irregular—and no doubt that is so.

The general rules of the society are in Finnish, but we have been furnished with a translation in what is represented and apparently believed to be English. They are somewhat incoherent and apparently inconsistent—it would seem, however (rule 22), that the board of directors are to be elected at the last regular meeting in December and June (rule 15) "composed of 7 persons." At least 15 days before the meeting, the board is to "advertise the situation of manager vacant," "applications shall be with the board of directors at least 7 days before the election," and the board "shall select three or less if there is not so many of the applicants of which the . . . meeting . . . will elect a manager"—the society at the meeting "will independently elect a manager of the candidates selected by the board of directors." This complicated and (I venture to say) unique proceeding may have some good object and be of some advantage. However that may be, it was impracticable to carry it out, all parties having agreed and the Court having ordered the election to be held on the day specified.

The chairman and vice-chairman are also to be elected independently; and it is said that that was not done.

But all these matters are of a very minor significance—and when, admittedly, the present board has a very great majority, it would be absurd to order a new election, which would undoubtedly have the same result. The internal regulations for election, etc., were intended to bring out the sense of the society, and that has been done.

In the result, the society has been found to favour the Wirta section very largely; and the board elected should be confirmed. There is to be another election in June; and no harm can accrue in the meantime—the injunction ordered by the Divisional Court (on consent) will still stand.

It has been represented that the section now in the saddle for some time, in their control of the hall, use of the funds, etc., considered the advantage of the socialist lodge or body and were guilty of breach of trust toward the society. Leave should be reserved for any member or members of the society to bring an action against any and all persons alleged to be thus derelict in their duty, for an account, etc. The action should be in the name of the society—it would, of course, be idle to ask the present directors to bring an action against themselves or their associates.

The matter of costs has given me some trouble; but, under all the circumstances, the costs of both parties will be paid out of the fund in Court. These costs will be taxed by the taxing officer at Toronto, who may consult me as to the quantum.

The costs and expenses of the returning officer, the Registrar with my approval has fixed at $61.66; and that sum will be paid out to him.

The balance of the fund in Court will be paid to the directors elected jointly.

Upon the argument I pointed out the right to join this society given to all (properly qualified) by rule 4: and counsel for the plaintiffs undertook that no improper obstacle should be put in the way of those desiring to join. It seems to me that the society, having now got rid of any fear that its funds and other property will be diverted to serve Socialism, should live in harmony: it would be well for all parties to consider that they are brethren and should have no strife one with the other.

HIGH COURT DIVISION.

CLUTE, J. FEBRUARY 8TH, 1915.

DAVIDSON v. FORSYTHE.

Fraudulent Conveyance—Action by Judgment Creditor to Set aside—Evidence—Absence of Intent to Defraud—Estoppel —Unregistered Reconveyance to Debtor — Cancellation— Dismissal of Action.

Action by the plaintiff, as a judgment creditor of William L. Cheeseworth, deceased, for a declaration that certain land conveyed by one Armstrong to the defendant James Forsythe was in fact purchased by the deceased and was conveyed to Forsythe with intent to defraud the creditors of the deceased, and for relief by way of equitable execution against the land.

The action was tried without a jury at Toronto on the 13th and 14th January, 1915.

J. T. White, for the plaintiff.

J. C. McRuer, for the defendants.

CLUTE, J.:—The plaintiff brings this action as a creditor of the late William L. Cheeseworth, and sues the defendant James Forsythe, and Mary Forsythe, administratrix of the estate of William L. Cheeseworth. The claim of the plaintiff arose out of a suit, and is for costs. At the time the transaction impugned took place the plaintiff had succeeded in an action in the Court below, but an appeal was made, and judgment had not yet been given. Subsequent to the transaction complained of . . . the costs were taxed, and it is upon these costs that the plaintiff claims as creditor.

I find as a fact that the defendants in the transaction were not guilty of any fraud; that the transfer of the land from Armstrong to the defendant James Forsythe was for a valuable consideration, and bona fide; and that at that time they had no knowledge of any indebtedness of any kind, or any outstanding debts against William L. Cheeseworth. In the purchase of this land, $700 was advanced by Cheeseworth, and it is now contended that, to that extent at all events, the land should be held responsible to his creditors.

I find as a fact that Cheeseworth was indebted to the defendants for his board and lodging, and for moneys paid by them

to him at various times and for various purposes, in an amount exceeding $700. In the transaction in question, the defendants became the purchasers and assumed the mortgage, and they gave a mortgage for the balance, after deducting the $700 and the mortgage then upon the lands. Since that time the defendants have made and placed valuable improvements on the property, in the neighbourhood of $800 or $1,000, and they have occupied the property ever since. So that, if that were all, there could be no question that the defendants were bona fide purchasers and entitled to hold this property against the plaintiff. But there is a deed now produced, not registered, bearing date the 23rd May, 1912, from the defendant James Forsythe to William L. Cheeseworth in his lifetime. It will be observed that that deed is dated prior to the conveyance to the defendant James Forsythe. Both of the defendants swore that they had no knowledge of having executed that deed, that they supposed that any papers they executed had relation to the purchase of their property. That, at first sight, was rather a startling proposition—that they should have signed this deed without knowing what it was; but, having regard to their conduct in the box, and their conduct throughout the whole transaction, I am satisfied that their statements in that regard are true, and that they did not know at any time, until after the transaction was completed as between Armstrong and them, that they had signed this deed before that transaction was completed. It is necessary here, in order to understand how this occurred, to refer to Cheeseworth. He was a man of some education and refinement, and when not under the influence of liquor he was a well-conducted man, but, as a matter of fact, he was addicted to drink to such excess that at times he really did not seem to know what he was doing, his excesses finally ending with an attack of delirium tremens.

From the evidence and from the whole transaction, I think it a fair inference, and I find, that the deed was prepared at his instance without letting the defendants know what it was that they were signing; and, on the representation that it was a part of the transaction, he obtained and held that deed as security for himself for a home. The first time he spoke of it was when he was finding fault with the repairs that were placed on the property, and when asked what he had to say about the matter, he then declared that he could and would put them out. Now, it must be remembered that he stood by and actively promoted the completion of the transaction which placed this property in the defendant James Forsythe. He did not pretend at that time

that he had any claim whatever. He allowed the defendant Forsythe to assume the mortgage and to make another mortgage. He paid his money to the extent of $700, and in doing so was in fact paying off a debt which he had long promised to pay; and I find as a fact that he advanced it with that intention, and that he is estopped from denying their right to take that propery. I do not think that he had any bona fide interest in that property; and the deed now put forward of the 23rd May, 1912, is null and void as against the defendants, and should be delivered up to be cancelled; and the action should be dismissed with costs.

LENNOX, J. FEBRUARY 8TH, 1915.

TAYLOR v. MULLEN COAL CO.

Nuisance—Smoke, Dust, and Noise from Industrial Works—Interference with Enjoyment of Neighbouring Dwelling-houses—Direct and Peculiar Injury to Individuals—Evidence—Sunday Work—Damages—Injunction—Temporary Stay of Operation—Opportunity to Abate Nuisance.

Action for damages and an injunction in respect of an alleged nuisance.

The action was tried without a jury at Sandwich.

T. Mercer Morton, for the plaintiffs.

A. R. Bartlet, for the defendant company.

LENNOX, J.:—The disposition of this action has given me a great deal of anxious thought. I should be careful, on the one hand, that industrial enterprise and the company's business is not unnecessarily obstructed, and, on the other, that the reasonable comfort and enjoyment, quiet and happiness, of the plaintiffs' homes are not unlawfully or wantonly sacrificed or set at naught. The acts complained of may constitute a public nuisance; I am not sure that they do; but, however this may be, the plaintiffs have shewn their right to maintain this action—they have clearly shewn that they have suffered damage different in character and distinct from any injury, inconvenience, or annoyance occasioned to the public—direct actual injuries to their

properties, as well by depreciation in marketable values as by sensible diminution in their enjoyment, comfort, and utility for owners and occupants.

The inconvenience complained of is not in any sense fanciful, nor are the complaints to be attributed to mere delicacy, fastidiousness, or supersensitiveness.

The nuisances shewn to exist are of a character to interfere "with the ordinary physical comfort of human existence, not merely according to dainty modes and habits of living, but according to plain and sober and simple motions obtaining among the English people," as defined in Walter v. Selfe (1851), 4 DeG. & Sm. 315, and the principles enunciated in Fleming v. Hislop (1886), 11 App. Cas. 686; Halsbury's Laws of England, vol. 21, pp. 530, 531.

For recognition in our own Courts of the same principles of determination, and distinguishing mere public nuisances from actionable wrongs causing direct special and peculiar injury to one or more persons, of a long line of uniform decisions, Ireson v. Holt Timber Co. (1913), 30 O.L.R. 209, Drysdale v. Dugas (1896), 26 S.C.R. 20, Rainy River Navigation Co. v. Ontario and Minnesota Power Co. (1914), 6 O.W.N. 533, and Appleby v. Erie Tobacco Co. (1910), 22 O.L.R. 533, may be referred to.

After sufficient evidence had been given last May to establish an actionable wrong on the part of the company, the case was adjourned to enable the company if possible to abate the nuisances; and the trial was resumed on the 9th January, 1915. Very little had been accomplished. In the interval the workmen were less noisy, the creaking of the machinery was diminished, there was a little less Sunday work; perhaps there may have been some improvement effected—not very much, I think—in the method of navigating the lighters to and from the wharf; and I think it might be said that the ground of complaint as to exhaust steam was pretty well eliminated. This was all.

The chief cause of complaint—smoke enveloping and entering the residences of the plaintiffs, the deposit of dust and coal cinders in the dwellings and upon the lawns and gardens, and the continuous disturbance caused by the loading, unloading, and shifting coal—is as it was before the opening of the trial.

It was shewn that after the adjournment the company gave orders for the occasional use of Pocahontas coal for firing. The method adopted was peculiar. If the fireman noticed that the wind was carrying the smoke upon the plaintiffs' residences, he was to use a little of this coal. But there was no supply of it

kept in the derrick-house, and the floor of this building is 8 or 10 feet above the level of the wharf. The special coal was 12 or 15 rods away. To get it by day or by night, he had to climb down a ladder, make way across this space—which is very uneven—bring the coal back over this rugged way, and elevate it in some manner to a height of 8 or 10 feet through a doorway at the south side of the derrick, then come round to the other side, climb the ladder again, and put in just the right quantity, in just the right way: an operation which is said to be one of very great nicety and judgment; and so from time to time, by day and by night, as occasion might require. It is impossible to believe that such a method would work out as a practical remedy; and it did not; and it is also impossible to believe that the company expected that it would.

However, the evidence, as I remember it, only went to the colour of the smoke. It was not shewn that Pocahontas coal does not make cinders, or that the great body of ordinary coal beneath it would not continue to throw out cinders as before. It is shewn by the plaintiffs that the smoke nuisance was not even partially abated. In any case, it leaves the question of dust and cinders from coal-heaving untouched.

As to all the nuisances complained of, the company devoted a lot of effort to shewing that a remedy or further improvement is impossible. This does not meet the issue; for, if actionable wrongs exist, and a remedy is impossible, then an injunction must be granted; and, if I believed this, I should feel compelled to order an immediate, perpetual injunction restraining the defendant company from operating its plant.

But I have come to the conclusion that there is a means open to the company to get rid of some of the wrongs complained of; and possibly all of them, although I am not sure. The smoke, and its cinders, from the stack of the company's stationary plant, can be got rid of, either by the application of electricity to operate the plant or by an apparatus to consume the smoke. As to the smoke from the lighters and other craft I do not know. As to the dust and cinders carried by the wind from the coal as it is being handled—and that is, I believe, the most potent cause of injury to the plaintiffs—and the noise occasioned by these operations, I have nothing to enable me to judge except the company's contention that nothing more can be done. It may be so; and, if so, it will force a very unfortunate alternative. The existing condition of things is not to be tolerated.

The unloading of coal on Sunday is also made ground of complaint. There is a right to quiet and rest on the seventh

day, which the plaintiffs should not be deprived of except for works of necessity: Dewar v. City and Suburban Racecourse Co., [1899] 1 I.R. 345; Attorney-General for Ontario v. Hamilton Street R.W. Co., [1903] A.C. 524. The unloading of the large carriers, whether directly upon the dock or wharf, or indirectly into the chutes, on Sundays, must be discontinued.

The plaintiffs ask for a reference to assess damages already accrued. It is not a case for heavy damages, and it is better that I should assess them than that the heavy costs of a reference should be incurred.

There will be judgment for the plaintiffs for $1,000 damages; and, if they cannot agree upon an apportionment, a reference to the Local Master at Sandwich, at the cost of the plaintiffs, to apportion the damages between them, these costs to be borne by each party in proportion to his share. If, however, either the plaintiffs or the defendant company desire a reference as to the whole question, I may be spoken to; and, if this is done, it should be done promptly.

I have not overlooked what is said about alleged statements of Doctor Cruickshanks. This cannot affect the maintenance of the action or the right to an injunction. For this purpose one plaintiff is as effective as a score.

There will be an injunction restraining the defendant company from so operating its plant and works as to cause a nuisance to the plaintiffs or any of them by reason of smoke or dust or cinders, or by reason of noise in the loading, unloading, handling, or dumping of coal, or the operation of the machinery or plant, and from unloading coal in any way from vessels upon Sunday; but the operation of this injunction will be stayed for four months to allow the company to abate the nuisances if it can do so, or to make other arrangements. Should the company, acting diligently and in good faith, be unable, within this time, completely to abate the nuisances, or to locate their plant elsewhere, an application by the company for an extension of time will be considered.

I do not think it is advisable to decide now as to nuisance alleged to be caused by lighters and vessels operating in conjunction with the operations of the company's plant and the carrying on of its business. This question may never have to be dealt with, and I reserve its consideration during the four months' delay, and will deal with it later if necessary.

Upon consideration I have not thought it advisable to engage an expert.

The plaintiffs are entitled to costs.

LENNOX, J. FEBRUARY 8TH, 1915.

RE LUTON.

Will—Execution of Trusts—Surviving Executor—Trustee Act, R.S.O. 1914 *ch.* 121—*Sale of Land Charged with Payment of Legacies — Caution — Registration — Devolution of Estates Act, R.S.O.* 1914 *ch.* 119, *sec.* 14—*Transfer of Interests—Interest on Legacies.*

Motion by the surviving executor of the will of William Luton, deceased, for an order determining certain questions arising in the administration of the estate of the testator.

C. F. Maxwell, for the executor and a legatee.

A. A. Ingram, for Mrs. Alma Luton.

J. S. Robertson, for the representatives of Robert Luton and others.

LENNOX, J.:—The debts and funeral and testamentary expenses have been paid. The only remaining estate of the testator is the land—a farm, I think. The legacies, amounting to $3,200, are unpaid. There is no means of paying them except out of the land—the proceeds of a sale of the land. The legacies are a charge upon the land. The deceased executrix and the surviving executor were constituted trustees for the purpose of carrying out the terms of the will. It is clear that the testator intended that some of the trusts should be executed after the death of his wife, the executrix, and that the surviving trustee would then act alone. Execution of the trusts by a surviving trustee is expressly provided for by sec. 27 of the Trustee Act, R.S.O. 1914 ch. 121. The real estate is, therefore, clearly vested in the executor, the surviving trustee, for the purpose of sale and distribution, and he has power to sell and convey: Anthony v. Rees (1831), 2 Cr. & J. 75, 83; Davies to Jones and Evans (1883), 24 Ch. D. 190, 194.

There does not appear to be any necessity for registering a caution: sec. 14 of R.S.O. 1914 ch. 119, the Devolution of Estates Act; but the executor can have an order to file or register a caution under the Act if he desires it; and it may be more satisfactory to a purchaser if this is done. The transfers or assignments of interests do not affect this question, as they are all subject to the terms of the will.

The legacies became payable after the death of the testator's wife, and will bear interest from that time: In re Waters, Waters v. Boxer (1889), 42 Ch. D. 517, where Turner v. Buck (1874), L.R. 18 Eq. 301, is considered and not followed.

Some of the parties interested desired that the property should be handed over without sale; others prefer a sale by the executor. I see no reason why the executor should not sell.

Costs will be out of the residuary estate—to the executor as between solicitor and client.

SUTHERLAND, J. FEBRUARY 10TH, 1915.

KENNEDY v. DICKSON.

Municipal Election — Disqualification of Councillor — Liability for Arrears of Taxes—Municipal Act, R.S.O. 1914 *ch.* 192, *secs.* 53(1)(*s*), 242(1), *and Form* 2—*Declaration of Qualification — Issue of Warrant for New Election — Motion for Injunction.*

Motion by the plaintiff for an interim injunction restraining the defendants from excluding the plaintiff from meetings of the council of the township of Tisdale, he having been elected a councillor at the municipal election held on the 4th January, 1915, and restraining the defendants from holding a new election.

The motion was heard in the Weekly Court.

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

McGregor Young, K.C., for the defendants.

SUTHERLAND, J.:—The plaintiff was a candidate at the municipal elections for the township of Tisdale, in the district of Temiskaming, held on the 4th January, 1915, and having obtained sufficient votes was declared elected by the returning officer, the clerk of the municipality. He filed a declaration of qualification, or perhaps two declarations, which were apparently admittedly defective, and finally, on the 18th January, 1915, filed a further one which on this application he relies on as sufficient, but which is said by the defendants not to be so.

In consequence, he has begun this action against the reeve and other members of the council and the clerk, asking for a declaration that he was duly elected councillor; that he duly

made and filed the prescribed declaration of office; that he is a duly qualified member of the council and entitled to exercise all the rights and privileges of a councillor; and for an order that the defendants Dickson and Wilson, the reeve and clerk of the council, do allow him to exercise all rights and privileges he is entitled to as a member of the council; for an injunction restraining the defendants, and each of them, from excluding him from meetings of the council or from taking his seat at the council board, and from preventing him from exercising his rights and privileges as a member of the council; and for an injunction restraining the defendant Dickson, as reeve, from issuing a warrant for the holding of a new election to fill the place of the plaintiff in the council, or, in case the warrant has issued, restraining the defendant Wilson, as clerk and returning officer, from proceeding with the election.

The qualification of a member of a township council is found in the Municipal Act, R.S.O. 1914 ch. 192, sec. 52; and sec. 53 indicates those who are ineligible to be elected as members of the council. Section 53(1), clause (*s*), provides that "a person who at the time of the election is liable for any arrears of taxes to the corporation of the municipality" is not eligible.

Section 242(1) provides that "every person elected as a member of the council of a township . . . before he takes the declaration of office or enters upon his duties, shall make and subscribe a declaration of qualification, Form 2."

In Form 2 there are certain affirmative statements as to qualification provided for, and certain negative statements rendering it impossible for one who is disqualified to make the declaration. Paragraph 5 is as follows: "I am not liable for any arrears of taxes to the corporation of this municipality."

In the case of an urban municipality, it is provided by sec. 69(4) that "every candidate for any municipal office shall on nomination day, or before nine o'clock in the afternoon of the following day, or if that day is a holiday before noon of the succeeding day, file in the office of clerk a declaration, Form 2."

A candidate in an urban municipality, therefore, is obliged in his declaration of qualification to make the statement before his election that he is not liable to the corporation for any arrears of taxes. Form 2 is found at p. 2534, vol. 2, of the Revised Statutes of Ontario, and has a foot-note (*d*) as follows: "In the case of a person elected as a member of a township council substitute for the words 'for which I am a candidate'

the words 'to which I was elected,' and change paragraphs 2, 6 and 7 so as to refer *to the time of the election.*''

In the form itself there are only 6 paragraphs, and the reference to a 7th is unmeaning, unless upon the assumption that by a clerical error the figures ''6'' and ''7'' have been used for ''5'' and ''6,'' or some other reason not apparent.

At the date of the election the plaintiff was owing $13.10 for arrears of taxes for 1914, claimed by the municipality as on an assessment of the defendant for a business tax. His claim as against the municipality is that no notice of any assessment for such business tax was ever delivered to him or left at his place of business, and that, moreover, the hotel property in connection with which the tax was levied was exempt from business tax under the Act.

Between the date of the election and the 18th January following, he paid this tax under protest. A certified copy of the assessment roll is produced, by which it appears that he was assessed for $500 ''business tax.''

What happened on the 18th January is thus set out in an affidavit of the clerk:—

''(5) That, as the council was being called to order at the first regular meeting held on the 18th January last, Mr. Kennedy presented to me still another declaration of qualification. He was requested by the reeve to wait until the meeting had been opened, and thereupon tendered his declaration of qualification and declaration of office.

''(6) That, before taking his declaration, I pointed out to him that the declaration of qualification was not in accordance with the requirements of the Municipal Act, inasmuch as paragraph 5 thereof did not refer to the date of the election, as required by clause (*s*) of sub-sec. (1) of sec. 53 of the Municipal Act, and as required by Form 2 in the schedule of forms.

''(7) That I tendered Mr. Kennedy a declaration of qualification which I had prepared in conformity with the Act, and this he refused to take.

''(8) That I thereupon, upon the demand of his solicitor, took Mr. Kennedy's declarations of qualification and office on the forms he had tendered, and reported to the council verbally that he had refused to take the prescribed form of declaration of qualification before taking his declaration of office, and that his declaration of qualification was not in accordance with the Act.''

Extracts from the minutes of the council dealing with the matter are as follows:—

"Mr. Kennedy submitted a declaration of qualification and declaration of office. The clerk reported that the former was not in complete accordance with the requirements of the Municipal Act, sec. 53, sub-sec. 1, clause (*s*). The point was thoroughly discussed, and Mr. Kennedy did not take his seat.

"Moved by Councillor Thompson, seconded by Councillor Culbert, that the reeve be instructed to issue a warrant under his hand for the holding of a new election for councillor to fill the vacancy at present existing on the council. Carried."

The members of the council were at the time acting under the advice of their solicitor in the matter. The making of the prescribed declaration is a statutory prerequisite to a member of the council taking a declaration of office or entering upon his duties: Rex ex rel. Morton v. Roberts (1912), 26 O.L.R. 263.

Reading the declaration with sec. 53(1), clause (*s*), I think it is clear that the figures "6" and "7" in foot-note (*d*) are clerical errors for "5" and "6." I think it is necessary in the case of a declaration of qualification of a township councillor that clause 5 of the declaration should read, "I was not liable at the time of the election for any arrears of taxes to the corporation of the municipality," or to that effect.

The plaintiff could not truthfully make such a declaration if the roll must be taken as conclusive against him, because at the time of the election he was owing the taxes referred to. He refused to take it.

This is a motion following substantially the claims endorsed on the writ, and asking for an injunction restraining the defendants from excluding the plaintiff from the council and holding the election, and the like.

I am unable to see that I can make the order asked, and must therefore dismiss the motion with costs.

RIDDELL, J., IN CHAMBERS. FEBRUARY 10TH, 1915.

*TRUSTS AND GUARANTEE CO. v. SMITH.

Discovery—Examination of Person for whose Immediate Benefit Action Prosecuted—Rule 334—Affidavit of Defendant—Action by Administrators of Estate of Intestate—Interest of Next of Kin.

Appeal by the plaintiffs from an order of a Local Judge of the Supreme Court, under Rule 334, allowing the defendant to examine one Mary Ann Elizabeth Morton for discovery.

H. S. White, for the plaintiffs.

G. M. Willoughby, for the defendant.

RIDDELL, J.:—This is an action by the plaintiffs as administrators of the estate of William Webb, late of the township of Chatham. The plaintiffs by their statement of claim allege that the defendant, a farmer of the same township, received from Webb, as custodian for him, a cheque for $3,650, a sum of money amounting to $3,600, in all (after deducting discount on the cheque when cashed) $7,247.45—and that the defendant, after the death of Webb, took possession of a considerable amount of property which Webb owned at the time of his death. They claim judgment for the sum of $7,247.45 and interest and an accounting for the other property, etc. The defendant claims a gift of the $7,247,45, and expresses willingness to account for such property as he admits came to his hands. He also sets up, but apparently claims no relief from, an agreement by Webb to pay for board, etc.—the plaintiffs are willing to pay.

The case being at issue, the defendant made an application before the Local Judge at Chatham for an order, under Rule 334, to examine May Ann Elizabeth Morton for discovery. He supports the motion by an affidavit of his own wherein he sets out that Mrs. Morton appears by the papers filed by the plaintiffs (I presume, in the Surrogate Court) to be a sister of the deceased; "that the defendant . . . would derive material advantage from the examination *vivâ voce* of the said Mary Ann Elizabeth Morton, who, if the plaintiffs were to succeed, would derive material advantage from the plaintiffs' success;" and that the plaintiffs' solicitor refused to produce her for such examination.

On this material the learned Local Judge made an order accordingly—and the plaintiffs appeal.

*To be reported in the Ontario Law Reports.

There are several grounds of objection to this order, but I deal with only those which will now be referred to.

The Rule says: "A person for whose immediate benefit an action is prosecuted . . . may without order be examined for discovery"—so that an order for such examination is not necessary in a case coming within the Rule.

But the person so made examinable is one for whose immediate benefit the action is prosecuted—here the affidavit says only that Mrs. Morton "would derive material advantage from the plaintiffs' success."

In Leushner v. Linden (1914), ante 456, affirmed in the Appellate Division on the 8th February, 1915 (ante 757), attention was called to the necessity of using in an affidavit the language of the Rule. If the defendant had intended to swear that the action was prosecuted for Mrs. Morton's immediate benefit he should have done so. Material advantage may or may not be immediate benefit. If Mrs. Morton were the endorser for the deceased on a note outstanding and unpaid, she would derive material advantage from the plaintiffs' receiving in this action money to pay the note and so relieve her—but no one could say that the benefit was immediate. She seems to have a nephew and some nieces, children of Benjamin Webb, a brother (now deceased) of hers and of the decedent. If they get some money from the success of the plaintiffs in this action, they may give her some or pay for her support—a material advantage but not an immediate benefit.

It is argued, however, that, even if the affidavit be defective, it is perfected by the affidavit filed in behalf of the plaintiffs in the Surrogate Court on application for the letters of administration. That sets out in exhibit C that Mrs. Morton, as sister of the deceased, will be entitled to one-third of the estate.

As to this *non constat* that she will receive anything—the deceased may have had debts to the amount of all the money received. She may have assigned any claim she might have had, etc., etc.

But I desire to put the judgment upon the broad ground that she is not, in any event, one for whose immediate benefit the action is prosecuted.

In Macdonald v. Norwich Union Insurance Co. (1884), 10 P.R. 462, Mr. Justice Rose held, under a similar rule, that the assignor for the benefit of creditors was examinable in an action by the assignee. In Garland v. Clarkson (1905), 9 O.L.R. 281, it was said by the Chancellor (p. 282) that this decision was

given by Rose, J., "after conference with his colleagues," and the Divisional Court followed the previous decision (Meredith, J., dissenting). It is not open to me to reverse that Divisional Court decision, nor is it necessary to express an opinion as to its correctness. It must, however, be plain that the assignor must derive a benefit from the money obtained in litigation by his assignee, either by payment of his debts (wholly or *pro tanto*) or by receiving the money himself. Either may perhaps be fairly called immediate benefit—the estate is immediately benefited, and the estate is his.

The case of a beneficiary in intestacy is quite different—the estate is the estate of the deceased: that indeed is immediately benefited, but the next of kin receives no immediate benefit. All the benefit the next of kin receives is received mediately and not immediately. This was the opinion of the Chief Justice of the Exchequer in Stow v. Currie (1909), 14 O.W.R. 223, at p. 224, where he mentioned the case of an action brought by an executor for the benefit of an estate, and it is sought to examine a third person who is to share in the fruits of the action. It is true that he also places in the same category an action by an assignee for the benefit of creditors, but the class of persons he considers as non-examinable under the Rule includes the creditors, but clearly not the assignor. There is no inconsistency between this case and those already cited.

I do not think that Mrs. Morton is one for whose immediate benefit the action is prosecuted: and allow the appeal with costs here and below to the plaintiffs in any event.

SUTHERLAND, J., IN CHAMBERS. FEBRUARY 12TH, 1915.

MOODY v. HAWKINS.

Discovery—Examination of Parties — Company — Directors—Breaches of Trust—Fraud—Questions as to Sums Paid out of Treasury of Company to Directors—General Manager of Company Bound to Answer.

Motion by the plaintiff for an order to commit the defendant Hawkins for refusal to answer certain questions upon his examination for discovery as a defendant and as an officer (general manager) of the defendant company, the Dominion Power and Transmission Company Limited.

The action was brought by a shareholder of the defendant company, suing on behalf of himself and all other shareholders, against the company and certain individual defendants, chiefly directors of the company, alleging breaches of trust, negligence, fraud, etc., and claiming relief on behalf of the company. Paragraph 10 of the statement of claim was as follows: "The defendants the directors, and each of them, acting as directors of the defendant company and in breach of their trust as such directors, have caused to be paid to themselves fees and salaries, either as directors of the defendant company or as officers thereof, or as directors or officers of some other company or companies controlled or in part owned by the defendant company, or otherwise, the said fees and salaries being fraudulent and excessive."

The defendant Hawkins, on the advice of counsel, refused to answer questions put to him by counsel for the plaintiff in relation to payments made by directors; and this motion was made in consequence of that refusal.

A. M. Stewart, for the plaintiff.
A. W. Anglin, K.C., for the defendant Hawkins.
I. F. Hellmuth, K.C., for the defendant company.

SUTHERLAND, J. (after setting out the facts):—The short contention on behalf of the plaintiff . . . is, that, the action being one for fraud, as the counsel for the plaintiff put it, it is no answer to allege a by-law confirming the transactions and refuse to disclose the particulars of the payments. He contends that, the fraud charged being the receipt of fraudulent and excessive payments by the directors, the amounts paid and the times when paid are important and necessary to be ascertained, and that he is entitled to discovery as to the same.

One object of discovery is to enable an opposite party to obtain information on oath relating to the questions of fact in dispute between the parties for the purpose of preparing for the trial of the cause. It extends to "any relevant facts material to the question in issue" and "where such facts are required as evidence or in aid of proof or to avoid the expense and delay of proving them in some other way."

It may, in some cases, be that the facts sought to be obtained will prove the whole cause of action.

The position taken on behalf of the defendant company, represented by an independent counsel, upon the motion, is, that particulars of what has been done under an alleged breach of

trust cannot be obtained on an examination for discovery until the breach of trust has been proved. It is also contended on its behalf that the plaintiff's action is a prying one, and, if allowed, the discovery might result in all the affairs of the company being spread out at the instance of any shareholder suing for an alleged breach of trust.

The position taken on behalf of the defendant Hawkins is substantially the same as that taken on behalf of the defendant company. His counsel also suggests that in the action one shareholder, for his own private reasons, is seeking to get into a position that he is not entitled to, and that Hawkins desires to know what his duty is in respect to answering the questions.

It is also suggested by his counsel that the policy of the law is, that the company is the plaintiff, and that a discovery such as is suggested from the questions would be unreasonable and oppressive in its interests.

I was referred to the case of Bedell v. Ryckman (1903), 5 O.L.R. 670, as being conclusive against the plaintiff's right to succeed on this motion. In that case it was held that "discovery as to the details of the expenditure made by the individual defendants in acquiring the businesses, should be postponed until their liability to account had been established." I do not see that that case is in point. . . .

In the present case there is no question as to whether the defendants are directors of the defendant company or not. They are admittedly so, and, as such, in a fiduciary relation towards the shareholders of the company.

The case of Leitch v. Abbott (1886), 31 Ch.D. 374, appears to me to be more analogous. In that case it was held "that, though there were no particulars of the frauds alleged, the plaintiff was entitled to discovery in order to enable him to give details of the frauds alleged." . . .

Again, while it is true in a sense that the action is brought for the benefit of the company, and that the Court has no jurisdiction to interfere with the internal management of companies acting within their powers; Burland v. Earle, [1902] A.C. 83; Dominion Cotton Mills Co. Limited v. Amyot, [1912] A.C. 546; Normandy v. Ind Coope & Co. Limited, [1908] 1 Ch. 84; it is also true that, "where a majority of a company propose to benefit themselves at the expense of the minority, the Court may interfere to protect the minority. In such a case, the bill is rightly filed by one shareholder on behalf of the others and against the company;" Menier v. Hooper's Telegraph Works

(1874), L.R. 9 Ch. 350. See also the head-note in Burland v. Earle. . . .

In this case there was a fiduciary relation existing between the individual defendants, directors of the company, and the shareholders thereof, inclusive of the plaintiff. He alleges that improper and excessive sums have been appropriated by these directors in breach of their obligation to him. It is necessary for him to obtain particulars thereof. He cannot obtain these at present except through discovery from the defendants. They are expressly in issue in the action, and I am of opinion that he is entitled to the disclosure sought in the questions which are involved in this motion.

An order will, therefore, go directing the defendant Hawkins to attend for re-examination, at his own expense, and answer the questions referred to in the notice of motion; or otherwise that his defence be struck out.

The costs of the motion will be costs to the plaintiff in the cause.

BRITTON, J. FEBRUARY 12TH, 1915.

RE BATTRIM.

Assignments and Preferences—Assignment for Benefit of Creditors—Claim of Assignee to Mortgage upon Land of Insolvent—Security for Maintenance of Imbecile—Originating Notice—Rule 600—*Scope of.*

Application by William T. Uhlens, assignee for the benefit of creditors of Henry Battrim, upon an originating notice under Rule 600, for an order determining the right of the applicant to a certain mortgage, in the circumstances set forth below.

The motion was heard at the London Weekly Court.

S. Cuddy, for the applicant and for Henry Battrim.

F. P. Betts, K.C., for the Official Guardian, representing Charles Battrim, a person of unsound mind, not so found.

BRITTON, J.:—On the 8th April, 1896, John Battrim was the owner of lot 18 in the 22nd concession of the township of Stephen, county of Huron. He had two sons, Henry and

Charles. Henry seems to have been regarded as one to be trusted to work this farm and support the family.

On the day last-mentioned, and on the occasion of his getting the conveyance of the farm and as part of the same transaction, he, and his wife to bar her dower, made a mortgage for $4,000 upon the land conveyed to him. This mortgage was to his father, John Battrim. The proviso for repayment is substantially as follows: that the said mortgage should be void on payment of the sum of $4,000, with interest thereon at 5 per cent. per annum, as follows: the said sum of $4,000 to be cancelled at the death of the said John Battrim, his wife Louise Battrim, and his son Charles Battrim, with interest at 5 per cent. per annum, payable yearly on the 1st day of April in each year, during the life of John Battrim, Louise Battrim, and Charles Battrim, the first payment of interest to become due on the 1st day of April, 1897. The mortgagor was to perform statute labour. The mortgagor, Henry Battrim, covenanted that he would pay the mortgage-money and interest and observe the said proviso. The mortgage is in the usual form, and contains the usual covenants and provisoes as in the short form of mortgage. All four of those mentioned in the mortgage resided upon the farm when the mortgage was made, and continued to reside there until the death of the father, John Battrim, which occurred in 1901. The mother and sons resided upon the farm until the mother's death in 1909. The two sons still reside there. Charles is an imbecile —absolutely incompetent to transact business or to understand his rights. He is cared for and supported by his brother Henry.

Henry became insolvent, and made an assignment for the benefit of his creditors to William T. Uhlens, who, as such assignee, is the present applicant.

An order was made for service upon the Official Guardian of a notice of the present application. Mr. Cuddy appeared for both the assignee and Henry. Henry is not consenting to or opposing any order I may make, but is in the position of one submitting his rights to the Court.

There is no doubt that Charles Battrim is a person of unsound mind, although not so found—his imbecility and incompetency were proved to the hilt. The order appointing the Official Guardian to represent Charles was made on the 30th January last.

It was not so stated, but I assume that John Battrim died intestate, and that the mortgage in question is now in the possession of the mortgagor, Henry Battrim—and that the possession of it, if of any importance, may be obtained by the assignee.

The motion before me is for a declaration of the rights of the assignee in and to the said mortgage—which was made to the deceased John Battrim.

I am of opinion that the assignee has no rights under the said mortgage that he can enforce against Henry Battrim or the land mortgage. The assignee does not represent John Battrim's estate. What has been accepted in lieu of interest has presumably been paid. Charles must be provided for, and the mortgaged land must be security for that provision. It will cost more than the $200 a year interest for such maintenance. Upon the death of Charles, the mortgage will be cancelled. The plan adopted by John Battrim was one for the support of himself, his wife, and Charles. That being secured during their lives, the interest at the death of all of the three should be cancelled. I express no opinion as to what Henry and his assignee may do with the equity of redemption. If by a sale of that, complete provision for the care of Charles can be made, the Court might approve.

Wide as is the jurisdiction conferred by Rule 600 to deal with matters upon originating notice, I am not free from doubt about its being wide enough to cover such an application as the present.

As the application was made in good faith and in the supposed interest of the creditors of Henry Battrim, the costs of the motion for the appointment of a guardian and the costs of this motion should be paid by the estate of Henry Battrim.

CLUTE, J. FEBRUARY 12TH, 1915.

DOYLE v. FOLEY-O'BRIEN LIMITED.

Mines and Minerals—Injury to Miner—Explosion of Charge in Drilled Hole—Master and Servant—Negligence—Defective System—Evidence—Contributory Negligence—Findings of Trial Judge—Statutory Duty of Mine-owners—Mining Act of Ontario, R.S.O. 1914 *ch.* 32, *sec.* 164.

Action for damages for personal injuries sustained by the plaintiff while in the employment of the defendants in their mine.

The action was tried without a jury at Toronto.

F. J. Foley, for the plaintiff.

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

CLUTE, J.:—The plaintiff's action is to recover damages for injuries received by him while in the employ of the defendants in their mine. His work was that of assisting the driller. On the preceding Saturday, the accident having occurred on Monday the 16th November, he had worked in the mine in the forenoon but not in the afternoon or evening. When the night shift went off on Saturday night at 12 o'clock, they had intended to fire the holes that had been charged. Counting those fired, it appeared that there was one missing. A blackboard was provided upon which the driller wrote down the fact when a hole had missed fire, in order that the men of the incoming shift might know that there was a charged hole that had not exploded. On this occasion this precaution was not taken. It is said that there was no chalk with which to write down the notice. The evidence is that the driller said it would make no difference, because he would return to this particular work himself. For some reason he did not do so. The plaintiff took the next shift. There was thus a hole left charged that had not been fired; and the plaintiff, while discharging his ordinary work in clearing away the refuse—muck, as it is called—from the face of the drift, struck a small ledge of rock that protruded by the side, and there was an immediate explosion, which caused the injuries complained of.

The plaintiff claims that this was owing to the neglect of duty on the part of the mine-owners in not advising him that there was an unfired hole, and that there was negligence in the system, in this regard, of carrying on the work in the mine by the defendants.

The Mining Act of Ontario, R.S.O. 1914 ch. 32, has provisions to guard against an accident of this kind.

Rule 40 of sec. 164 provides that the manager or captain or other competent officer of every mine shall examine at least once every day all working shafts, levels, stopes, tunnels, drifts, crosscuts, raises, signal apparatus, pulleys and timbering in order to ascertain that they are in a safe and efficient working condition, and he shall inspect and scale, or cause to be inspected and scaled, the walls and roofs of all stopes or other working places at least once every week.

No attempt was made to comply with this rule nor was it in fact complied with.

Rule 14 provides that when a miner fires a round of holes he shall count the number of shots exploding. If there are any reports missing, he shall report the same to the mine captain or

shift boss. If a missed hole has not been fired at the end of a shift, that fact, together with the position of the hole, shall be reported to the mine captain or shift boss in charge of the next relay of miners, before work is commenced by them.

Here there was no mine captain or shift boss, and on the occasion in question no report was made to any one; nor was there any system established in the mine to carry out the provisions of this rule.

Rule 15 provides that a charge which has missed fire shall not be withdrawn, but shall be blasted, and no drilling shall be done in the working place where there is a missed hole or cut-off hole containing explosive until it has been blasted.

There was no attempt here to comply with this rule, nor any mine captain or shift boss to see that it was carried out. So far as the evidence discloses, there was no reasonable effort made on the part of the company to give effect to this provision of the statute, the disregard of which was the immediate and proximate cause of the accident.

Rule 98 of the same section provides that there shall always be enforced and observed by the owner and the agent of a mine, and by every manager, superintendent, contractor, foreman, workman, and other person engaged in or about the mine, such care and precaution for the avoidance of accident or injury to any person in or about the mine as the particular circumstances of the case require; and the machinery, plant, appliances and equipment and the manner of carrying on operations shall always, and according to the particular circumstances of the case, conform to the strictest considerations of safety.

See Danis v. Hudson Bay Mines Limited (1914), 7 O.W.N. 365, 32 O.L.R. 335, where it was held that under the Mining Act the duty of seeing that the provisions of the Act in its application to mining be carried out is imposed upon the mine-owners, as well as upon others. In the present case, as in the case referred to, there was no official mine captain or boss; there was no superintendent or shift boss. There was neglect on the occasion in question to provide against the danger expressly guarded against by the statute; and I find that there was negligence on the part of the defendants in this regard and in the system carried on by them in the working of the mine.

It was suggested that the plaintiff might not have been injured from the explosion of an undischarged hole. I find as a fact that he was. About this, I think, there is no doubt. The plaintiff struck a projecting ledge from the top, and immediately

when struck the explosion took place. He knew where it came from. What seems to have happened, which it is said is not unusual, is this. The stick of explosive was cut in two, the part remaining in the rock did not explode, the remainder did explode, but not so as to ignite the cap, which was afterwards found intact. I find that the plaintiff took reasonable care upon his part, and was not guilty of contributory negligence. He had no reason to suspect that there was an undischarged hole, because there was no notice given to him to that effect. He was sent to where he was working, and was in the discharge of his duty at the time of the explosion. The plaintiff is entitled to recover.

The injuries that he received were very serious. For a time he lost the sight of both eyes. By degrees he partly recovered the sight in the left eye. The right eye after a time began to affect the left. It was useless and dangerous, and was removed. The plaintiff has not yet recovered fully the use of the remaining eye. He has attempted on several occasions to do the work at which he was employed at the time of the accident or similar work, but has been unable to continue it, and the evidence is that he never will be able to do that kind of work. There is danger of his losing the remaining eye, but the probability, according to medical expert evidence, is, that he will not lose it. The defendants paid part of the plaintiff's expenses while he was in the hospital, but not the fees of the doctor who removed the eye. After making all just allowances, I assess the damages at $5,200. The regular wages for the kind of work which was being done by the plaintiff in that locality where he worked was from $3 to $3.50 per day. If he were not entitled to recover at common law, as, in my opinion, he is, he would be entitled under the statute to three years' earnings, which I fix at $1,000 a year, in all $3,000.

The plaintiff is entitled to judgment for $5,200 and costs of the action.

BRITTON, J. FEBRUARY 13TH, 1915.

McGILLIVRAY v. O'TOOLE.

Partnership—Account—Allowance for Use by Firm of Plant of Individual Partner—Judgment—Construction — Reference —Report—Evidence—Appeal.

Appeal by the defendant from the interim report of the Local Master at Ottawa.

G. H. Watson, K.C., for the appellant.
G. F. Henderson, K.C., for the plaintiff, respondent.

BRITTON, J.:—The parties to this action were partners, and this action was for the termination of the partnership and for settling the accounts.

The judgment of the learned trial Judge was, *inter alia*, that the profits of the business, carried on between the parties hereto under the firm name of O'Toole & McGillivray, are to be divided between the said parties in equal portions, and that the partnership be dissolved; and a reference was ordered to the Master at Ottawa to make inquiries and to take the accounts necessary for winding up the affairs of the said partnership, and for the distribution of the profits and assets of the said firm.

From this judgment the defendant appealed; and the Second Divisional Court of the Appellate Division, while dismissing the appeal, made the following a part of their judgment: "This Court doth further order and adjudge that it shall be open to the said Master upon the said reference to make such reasonable allowances to each party as may be just and proper according to law in respect of the plant of each used for the purposes of the partnership undertaking in the pleadings mentioned."

The learned Master entered upon the inquiry and pursued it, and upon the matter now in question made an interim report as follows: "That the parties are not entitled to any allowance in respect of the plant of each used for the purposes of the partnership."

From this interim report the defendant now appeals, upon grounds fully set forth in the notice of appeal.

I have carefully read the reasons given by the Master for his judgment embodied in this interim report, and the evidence

taken before the Master; and I am not able to say that the Master is wrong.

It is important to notice that the defendant did not at first put forward his claim as one for the use of his plant. He called his plant part of his capital; and, as it exceeded in value the plant of the plaintiff, his contention was that he should be entitled to the larger proportion of profits. In order to compel the firm to pay a rental for its use, there should have been, as between the partners, an agreement, either expressed or implied, to pay. When these partners entered upon their partnership work, each was to put in his plant for partnership use. Nothing was said about the defendant being allowed for use or for wear and tear, but each was to give his time in planning and supervision, and in whatever work was necessary as partnership work for the benefit of the firm; so each was to put in the plant he had. No doubt, if any part of the plant was worn out or broken, in the absence of anything else to the contrary, the repairs, if done, would be paid for by the firm.

The Master says that the parties are not by law entitled to any allowance for use of the plant. I understand that, in the absence of any agreement between the parties, the defendant would not by law be entitled to such allowance. If the judgment of the appellate Court is to be interpreted as meaning that it is not only open to the Master to make such reasonable allowance, but that he must make such, the appeal should succeed; but I do not so interpret it.

There is what may be called a rule of law to the effect that one partner cannot claim from the firm for extra work, whether in effort put forth, or in time expended, or for extra skill or effectiveness. That rule is not generally applied to the use by the firm of the property or plant of the individual member for the benefit of the firm.

It is, however, in each case, as I have said, a matter of contract, express or implied. If a promise by the firm to pay is to be implied from the mere use of the property, that may be rebutted by the circumstances.

The undisputed facts do not at all convince me that there was any implied promise by the firm to pay.

I do not attach as much importance as does the plaintiff to the fact that the defendant at first treated his plant as capital. It is a fact not to be lost sight of, and is in favour of the plaintiff's contention; but it shews that the defendant in some way expected from the firm compensation for the use of his plant for

the benefit of the firm. The plaintiff did not think as the defendant did; and there does not appear to be any reason why the plaintiff should have expected that the firm should pay. The defendant made no claim during the progress of the work, and not until long after did he claim as rental or for use.

The plaintiff at first, and until after the work was done, did not understand that he or the defendant was to make any claim upon the firm for the use of individual plant. The defendant did not do or say anything to cause the plaintiff to understand otherwise; so the defendant ought not to succeed upon the alleged implied promise.

Counsel for the defendant laid great stress upon and criticised the statement of the Master that the defendant was not entitled by law to any allowance, etc.

That was simply a statement by the Master that, applying the law to the facts as found by him, the defendant was not by law entitled to recover; and the Master merely repeated the words of the judgment. That judgment was, that it was to be open to the Master, upon the reference, to make such reasonable allowance to each party as might be just and proper according to law. It was open to the Master to find that allowance should be made as asked. He received evidence and adjudicated thereon; applying the law. His finding is that neither party is entitled to be paid by the firm for the use of individual plants in the partnership work. Upon reading the evidence, I am unable to say that the Master erred.

The appeal will be dismissed. Costs of the plaintiff in this appeal will be costs in the cause, payable out of the partnership assets.

TILBURY TOWN GAS CO. LIMITED v. MAPLE CITY OIL AND GAS CO. LIMITED—MAPLE CITY OIL AND GAS CO. LIMITED v. TILBURY TOWN GAS CO. LIMITED—LENNOX, J.—FEB. 10.

Contract — Agreement between Natural Gas Companies — Breach—Injunction—Costs.]—The two actions were tried together, without a jury. The actions arose out of an agreement between the two above-named companies, made on the 22nd July, 1912, in respect to the operation of natural gas wells and the delivery of gas. The Tilbury Company's complaint was, that the Maple City company determined to break its contract and to deplete the gas field from which the Tilbury company was

to get a continuous supply of gas, so as to make it impossible for the Tilbury company to extend the sphere of its operations, as contemplated by the agreement, and that to this end the Maple City company, in conjunction with its co-defendant, the Glenwood Natural Gas Company Limited, set about to obtain collusive forfeiture or surrender of certain gas-leases, and to divert the gas which should be available for the Tilbury company. This claim, the learned Judge finds, is made not upon the evidence. Judgment in the first action in favour of the plaintiff company, in the terms of the prayer of the statement of claim, with costs, including all costs over which the trial Judge has a disposing power, and dismissing the counterclaims with costs. The defendants in the first action will be perpetually enjoined from operating the wells in reference to which complaint was made, except for the supply of gas to the plaintiff company, upon the plaintiff company amending its statement of claim, but reserving to the defendants the right to apply to the Court hereafter to have the injunction modified or dissolved, upon shewing sufficient ground therefor, under conditions subsequently arising. Judgment dismissing the second action with costs, including costs, if any, reserved for the trial Judge. I. F. Hellmuth, K.C., W. M. Douglas, K.C., and J. G. Kerr, for the Tilbury Town Gas Company Limited. O. L. Lewis, K.C., and W. G. Richards, for the Maple City Oil and Gas Company Limited. J. W. Bain, K.C., Christopher C. Robinson, and M. L. Gordon, for the Glenwood Natural Gas Company Limited.

CANADIAN MALLEABLE IRON CO. v. ASBESTOS MANUFACTURING CO. LIMITED AND CREEPER & GRIFFIN LIMITED—BRITTON, J.—FEB. 10.

Contract—Agreements for Supply of Roofing Material and Construction and Placing of Roof—Defective Material—Defective Workmanship—Breach of Contract—Guaranty—Damages—Costs.]—In 1912, the plaintiffs erected a large building at Owen Sound. They made inquiries, and were favourably impressed with the asbestos corrugated roof sheeting manufactured by the defendants the Asbestos Manufacturing Company, and decided to use that roofing in their building, if it should be guaranteed. Two agreements were made in writing—one between the plaintiffs and the defendants Creeper & Griffin Limited and the other between the plaintiffs and the defendants the Asbestos

Manufacturing Company. By the agreement with the Asbestos company, dated the 13th November, 1912, that company agreed to guarantee to the plaintiffs that the asbestos corrugated sheeting to be furnished by them for the construction of the plaintiffs' proposed building should be free from any defects in its material or manufacture, and to guarantee the plaintiffs from and against deterioration from climatic conditions for a period of 10 years. On the 20th November, 1912, the plaintiffs entered into an agreement with the defendants Creeper & Griffin Limited, by which the latter agreed to furnish all the material and do all necessary work in connection with the construction and placing the roof on the building, for $8,000—it being understood that the roofing material should be procured by Creeper & Griffin Limited from the Asbestos company. Accordingly, the roofing material was furnished by the Asbestos company to Creeper & Griffin Limited, and used by the latter company in roofing the plaintiffs' building. The plaintiffs complained that the roofing was defective, that it did not answer the representations and guaranty, and that it was not properly put on; and the plaintiffs claimed damages against both defendants. The action was tried without a jury at Owen Sound. The learned Judge finds, upon the evidence, that the material furnished was at least in part defective and unfit for the purpose intended. The evidence was not clear as to what caused the defective condition, but it was from a cause or causes within the meaning of the guaranty. He also finds that the defendants Creeper & Griffin Limited were guilty of neglect in the construction and placing of the roof, so that rain and snow got into the building, to the damage of the plaintiffs. The Asbestos company contended that their liability, if any, was limited to replacing, free of charge, any of the material found defective. The learned Judge said that the Asbestos company did two things—they guaranteed as above stated, and they agreed to replace defective material. He was of opinion that the plaintiffs were not confined to the latter remedy, but were entitled to damages. Damages for loss of profits were too remote and could not be allowed. Damages against both defendants for defective material assessed at $500; and damages against the defendants Creeper & Griffin Limited for defective workmanship, at $150. Judgment for the plaintiffs for these sums with costs on the Supreme Court scale. If any of the parties desire a reference as to the amount of damages only, it will be ordered at the risk as to costs of the party or parties so electing—election to be within 10 days. In the event of a refer-

ence, it will be to the Local Master at Owen Sound. Costs of the reference and further directions will be reserved. The judgment will be without prejudice to the rights of Creeper & Griffin Limited against the Asbestos company. W. H. Wright, for the plaintiffs. H. E. Rose, K.C., and J. W. Pickup, for the defendants the Asbestos Manufacturing Company Limited. W. S. Middlebro, K.C., for the defendants Creeper & Griffin Limited.

RYMAL v. MCGILL—LENNOX, J.—FEB. 11.

Partnership—Dissolution by Death of Partner—Account—Reference—Winding-up—Costs.]—Action to recover $2,482, alleged to be the share of the plaintiff as a partner in the Mutual Stationery Company; for a declaration that the partnership was dissolved on the 5th April, 1914, by the death of W. B. Newsome; for an injunction restraining the defendants from carrying on the business and distributing the partnership assets; and for an accounting and winding-up. The learned Judge said that the partnership between the deceased William Baker Newsome and the plaintiff was not dissolved in Newsome's lifetime, as contended for by the defendants, but continued until his death, and was dissolved by his death on the 5th April, 1914. Judgment declaring this accordingly, and directing a reference to the Master in Ordinary at Toronto to take an account of the partnership assets, including any profits made by the defendants out of the business since the 5th April, and for winding-up the partnership affairs, in the usual terms. The plaintiff was entitled to costs out of the share of the deceased and against his estate generally down to the trial. L. E. Awrey and H. B. Daw, for the plaintff. G. Grant, for the defendants.

RE GOLDENBERG—RIDDELL, J., IN CHAMBERS—FEB. 12.

Costs—Taxed Costs in Lieu of Commission—Administration Proceeding—Rule 653.]—In a proceeding for the administration of the estate of Leon Goldenberg, deceased, the solicitor for the applicant, having the conduct of the proceeding, moved for an order for payment out of the estate of taxed costs in lieu of the commission allowed by Rule 653. RIDDELL, J., said that, in the very particular circumstances of the case, the solicitor might tax his costs and be paid the same instead of commission under the Rule. C. W. Plaxton, for the solicitor.

ROGERS v. WYLIE—LENNOX, J.—FEB. 13.

Fraud and Misrepresentation—Sale of Animal—Evidence—Failure to Prove Fraud.]—On the 4th April, 1913, the plaintiff purchased from the defendant a black Pomeranian dog, "Cairndhu Masterpiece," for $1,000 paid in cash. The plaintiff alleged fraudulent misrepresentation and breach of warranty, and asked rescission of the contract of sale, return of the consideration money, and $500 damages. The plaintiff charged that the dog had been painted or stained to resemble a black Pomeranian. The learned Judge said that, after a careful examination and consideration of the evidence, he found nothing to suggest, even remotely, that the defendant acted otherwise than honestly, conscientiously, and in good faith. He finds that the plaintiff has not substantiated her allegations of fraud, and dismisses the action with costs. Gideon Grant, for the plaintiff. J. M. Ferguson, for the defendant.

FIRST DIVISION COURT IN THE COUNTY OF WATERLOO.

READE, JUN.CO.C.J. FEBRUARY 8TH, 1915.

CITY OF BERLIN v. ANDERSON.

Assessment and Taxes—Income Tax—Non-resident—Adoption of Assessment Roll of Previous Year — Assessment Act, R.S.O. 1914 *ch.* 195, *secs.* 12, 56—*Collector's Roll—Sec.* 99 *of Act—Omission of Particulars—Nullity—Inaccuracies in Roll, Oath, and Certificate.*

Action to recover $44.88 alleged to be due and owing by the defendant to the plaintiffs as taxes for 1914.

H. J. Sims, for the plaintiffs.
P. Kerwin, for the defendant.

READE, JUN.CO.C.J.:—In this action the plaintiffs seek to recover from the defendant $44.88 as municipal taxes owing by him for the year 1914 on his income; and the defendant contends that, at the time the assessment was made, in 1914, in re-

spect of which the taxes are claimed, he was not a resident of the city of Berlin, and so not liable for any assessment on his income; and further that the collector's roll on which the taxes are charged was not made according to the provisions of the statute, and so a tax founded thereon is invalid.

The defendant resided in the city of Berlin in the year 1913, but removed therefrom and became a resident of the city of Guelph on the 15th November, 1913, and thereafter and during the year 1914 resided in the last named city.

An assessment roll for the city of Berlin was made in the year 1913, and finally revised and certified at the end of that year, pursuant to by-law No. 755 of the consolidated by-laws of said city, sub-sec. 163, passed pursuant to the provisions of sec. 53 of the Assessment Act then in force (now R.S.O. 1914 ch. 195, sec. 56), and in and by the same the defendant's income to the amount of $1,800 was assessed; and in the following year (1914), by-law No. 1312 was passed by the city council adopting such assessment as the assessment on which the rate of taxation for the said year (1914) should be fixed and levied, and a collector's roll was thereupon made out upon the basis of the said assessment, and the defendant charged thereon as indebted to the plaintiffs in the amount now sued for.

Ordinarily, under the provisions of the Assessment Act, the assessor is obliged to begin to make his roll in the month of February, and to complete the same and deliver it to the clerk of the municipality by the 30th April in each year, and thereupon it must be finally revised by the Court of Revision and the County Court Judge, or as the case may be, by the 1st August in the said year, and such roll, so finally revised and certified by the clerk of the municipality, then becomes and is the last revised assessment roll to be used and taken as a basis for taxes to be levied and collected for the year in which it is made, and is valid and binding upon the parties concerned, except that the jurisdiction of Courts of Revision and of Courts exercising statutory jurisdiction as such is confined to the question whether the assessments are too low or too high, and cannot cause a roll finally revised by them to be conclusive in respect to whether or not property in any case is liable at all for assessment and taxes, such being always open to further revision and question in the proper forum: City of Brantford v. Ontario Investment Co. (1888), 15 A.R. 605; Nickle v. Douglas (1875), 37 U.C.R. 51.

By sec. 56 of the present Act, R.S.O. 1914 ch. 195, and sec. 53 of the old Act, it is provided specially that in cities, towns, and

villages, the council, instead of being bound by the periods before-mentioned for taking the assessment, and by the periods named for the revision of the rolls by the Court of Revision, and by the County Court Judge, may pass by-laws for taking the assessment between the 1st July and the 30th September, and for delivery thereof to the clerk on or before the 1st October, so that the same may be finally revised by the 15th December in any year, and that the assessment so made and concluded may be adopted by the council of the following year as the assessment on which the rate of taxation for the said following year shall be fixed and levied; and such taxes shall be so fixed and levied, and such assessment as finally revised will be valid and binding upon all parties concerned, except as to any question as to property therein being liable to assessment and taxation at all, as before mentioned.

The assessment under this provision is clearly made for the purposes of the following year. It is not intended for and could not be made available for the collection of taxes for the year in which it is made, although finally revised in that year to be ready and available for the next when the by-law for that purpose shall be passed adopting it; and, where it is so adopted, it becomes the assessment for that year in which and for which it is adopted, to all intents and purposes the same as if a new assessment were then made instead of passing the by-law for adoption; and such assessment, when so adopted, can only operate as would a new assessment, then made under the other and general provisions of the Act, upon property then available for assessment and taxation, and cannot be available to assess or tax the income of a person at such time not residing in the city; and, for the purposes and objects of the by-law of adoption passed in the beginning of a year, the assessment then adopted was not until then a complete and available assessment, although already finally revised, and must bear date as an assessment the same as the by-law of adoption: Regina ex rel. Clancy v. McIntosh (1881), 46 U.C.R. 98; Re Dwyer and Town of Port Arthur (1891), 21 O.R. 175.

Under the Assessment Act, the income of a person assessable in respect of income shall, with certain exceptions not of interest here, be so assessed in the municipality in which he resides: R.S.O. 1914, ch. 195, sec. 12.

When it has been decided in any municipality to change the mode of assessment and adopt the provisions of sec. 56 of the Act, the course pursued is to have a second assessment made in the

same year, the earlier assessment being for use in respect of taxes to be collected in the same year in which it is made, and the second assessment for adoption and use in the following year, and I take it that sub-sec. 3 of sec. 56 refers to such a position of affairs, and provides that in such case, instead of making the second assessment in the same year, the council may adopt the earlier assessment in lieu of such second one, and then such assessment would again be adopted by the council of the following year; but, in the case of such earlier assessment being adopted in the same year, provision is made for a new revision of the same, whereas none is provided in respect of an assessment made in the fall and adopted in the spring. All these regulations seem to shew that an assessment made so by adoption only becomes a complete and final assessment ready to be used and acted on when it is actually adopted, and as of the date of the by-law of adoption, even although finally revised before that time.

It would seem, therefore, that, inasmuch as the assessment in respect of which the defendant's income is charged and taxed was only adopted and so made a complete assessment for purposes of taxation on the 16th March, 1914, when the by-law of adoption was passed, and inasmuch as at such date the defendant was not a resident of the city of Berlin, his income could not be bound or governed thereby, and the plaintiffs in this action could not recover for taxes levied thereon against him.

As to the second objection made on behalf of the defendant, namely, that the collector's roll, made by the clerk of the municipality from the assessment roll on which the defendant is assessed, is not properly made in pursuance of the provisions of sec. 99 of the Act, inasmuch as it does not contain the information and particulars as to separate rates and charges required to be given therein, I may say that, although, in view of my finding on the other point taken, this may be unimportant to the decision of this case, it may be well to deal with that also. I find, therefore, that there is no column in said roll headed "County Rates," nor under any other columns are there separately set down the sums chargeable for school rates, local improvement rates or otherwise, as required by the said section of the Act; the omission is fatal to the validity of the said roll and renders it a nullity, so that collections cannot be enforced thereunder: Love v. Webster (1895), 26 O.R. 453; McKinnon v. McTague (1901), 1 O.L.R. 233.

It may also be profitable to point out that the collector has

not caused to be entered in the roll the date of demand or notice for payment of taxes with the initials of the person so entering the same appended thereto, and that the oath of the collector attached to the roll is inaccurate, as it refers to sections of an old statute and not to the one now in force. I also point out that the certificate of the clerk attached to the roll is inaccurate, in that it does not state for what year the said roll is prepared, as provided by the form given in the Act. The form of certificate he used would probably have been held sufficient under the old law, when no form was provided; but, now that a form is given, the omission to comply therewith might have serious consequences: Town of Trenton v. Dyer (1895), 24 S.C.R. 474; Love v. Webster, 26 O.R. 453.

This action must be dismissed with costs.