The
Ontario Weekly Notes

Vol. I. TORONTO, JUNE 29, 1910. No. 40.

COURT OF APPEAL.

JUNE 15TH, 1910.

*BURMAN v. OTTAWA ELECTRIC R. W. CO.

Street Railways—Injury to Passenger—Negligence—Cause of Injury—Sudden Jerk in Starting Car—Withdrawal from Jury by Charge—Premature Starting of Car—Misdirection—Finding of Jury—New Trial—Objection not Taken at Trial—Real Question not Passed upon.

Appeal by the defendants from the judgment of BRITTON, J., upon the findings of a jury, in favour of the plaintiff.

The action was brought to recover damages said to have been caused to the plaintiff while a passenger on the defendants' street railway by the negligent operation of the car.

On the 2nd May, 1909, the plaintiff, an elderly but active woman, with her daughter-in-law, entered a car, and before she had reached a seat was thrown down backwards and seriously injured.

The cause of the fall alleged in the statement of claim was "the sudden jerking forward of the car;" and this was supported by the evidence of the plaintiff herself, of her daughter-in-law, and of Mrs. Theresa Smith, who was standing in the street and saw the car starting.

Evidence was called for the defence to shew that the car was new and in good condition, that only the lowest notch was used in putting on the power, and that there was no unusual jerk.

The learned Judge in charging the jury practically withdrew from them the question whether there was negligence of the motorman in starting the car with a jerk, but left it to the jury to say whether there was negligence of the conductor in giving the signal to start too soon.

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

No questions were submitted to the jury; they found in favour of the plaintiff, the finding being in writing as follows: "We find the company's servants negligent in starting the car before the plaintiff was in a position to save herself from falling; damages $1,882." Judgment for that amount was entered in favour of the plaintiff.

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

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

A. E. Fripp, K.C., for the plaintiff.

GARROW, J.A.:— . . . The defendants now complain that the finding ignores and in effect denies the cause of action first put forward in the pleadings and which formed the main features of the evidence, namely, the jerk, and is based upon something entirely insufficient and in any event quite different, namely, the premature starting of the car, a subject to which their attention had in no way been directed until it was put forward so prominently in the charge.

This would, I think, have been a serious objection if the defendants had objected to the charge . . . the real cause of complaint being not so much the time at which the car was started as the mode of starting.

Another objection which might, I think, have been taken to the charge, this time by the plaintiff, was the practical withdrawal from the jury of the question of the jerk. In doing so the learned Judge evidently proceeded on the basis of the motorman's evidence being true, which was, I think, entirely a question for the jury. The evidence on the plaintiff's side . . . distinctly shewed that the car was started with a jerk of more or less violence; and the nature and violence of the plaintiff's fall, which was backward and with sufficient force to break her thigh-bone, in itself supports this evidence. . . .

I cannot understand why it was deemed advisable to divide the case into two branches. There was in fact but one incident, made up of the conduct of the conductor in giving the signal and that of the motorman in obeying it. The first, alone, would probably have been quite harmless if the car had been started properly, and the second would also probably have been harmless if a moment more had been allowed for the plaintiff to reach a seat or something to hold by. In these circumstances, the proper course, in my opinion, with deference, was to have left the whole question to the jury, and not merely that of the conduct of the conductor.

Of course, if the finding had been simply, as it might have been, in favour of the plaintiff without reasons, we could not have interfered, for then the result might, notwithstanding the learned Judge's remarks about the jerk, have been attributed to either or to both causes.

And, if the evidence was reasonably sufficient to support the finding actually made, no objection having been taken at the trial, our proper course would probably be not to interfere. I incline to think, however, that if the jerk is excluded what is left of the plaintiff's case is too weak and insufficient to justfy a verdict of negligence against the defendants. And yet it would, in all the circumstances, be unfair to permit the defendants to take advantage of this view, in the face of the other objection to the charge to which I have referred.

The question, therefore, really becomes one of whether, in the circumstances, a new trial should not be granted. As has been recently pointed out, in this Court, the circumstance that an objection was not taken at the proper time is not necessarily fatal: see Brenner v. Toronto R. W. Co., 15 O. L. R. at p. 198; Woolsey v. Canadian Northern R. W. Co., 11 O. W. R. 1036. And upon the question of granting a new trial where the real question in issue has been imperfectly submitted to or has not been apparently passed upon by the jury, see . . Jones v. Spencer, 77 L. T. R. 536. . . .

It seems to me that the proper conclusion is, that, taking the remarks of the learned Judge as a practical withdrawal from them of the question of the jerk, the jury did not consider the evidence upon that question, and consequently, in bringing in the finding which they did, did not intend to imply that they found upon the other question in favour of the defendants.

I would, therefore, in all the circumstances, allow the appeal and direct a new trial; the costs of the last trial and of this appeal to be in the cause to the successful party.

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

MEREDITH, J.A., was of opinion that the case on the jury's findings, and apart from them, was one of an accident for which no one could be justly blamed—a thing seldom but sometimes happening, and that the defendants' appeal should be allowed and the action dismissed. He was unable to agree that there should be a new trial, and thought the Court had no power to grant one.

JUNE 15TH, 1910.

SMITH v. ELGINFIELD OIL AND GAS DEVELOPING CO.

Deed—Construction—"Oil Lease"—Lease or License—Dominion Petroleum Bounty Act, 1904 — Right of Lessor to Share in Bounty—"Producer."

Appeal by the defendants from an order of a Divisional Court, ante 147, affirming the judgment of CLUTE, J., at the trial.

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

Shirley Denison, for the defendants.

W. H. Barnum, for the plaintiff.

MOSS, C.J.O.:—The sole question is, to which party, the plaintiff or the defendants, belongs the bounty paid by the Government of the Dominion in respect of the one-eighth part of the oil which, under the agreement between the plaintiff and defendants, contained in the instrument of the 11th November, 1907, was to be delivered by the defendants to the plaintiff?

The trial Judge and the Divisional Court answered this question in favour of the plaintiff, and, in my opinion, that is the proper conclusion.

Upon the appeal there was much argument as to whether, upon the proper construction of the instrument, it is a demise of the lands from which the oil is obtained or merely a license to enter upon them by drilling, boring, digging, or excavating, and, operating by the means specified, gain or obtain the oil and other substances enumerated in it.

The instrument is framed very inartificially, and, although there are many terms and expressions employed that are apt for the purposes of a demise of the land, there are also many that consist with an intention to confer a license.

None of these is conclusive one way or the other, and, if the question had to be determined, other considerations would necessarily enter into the question: Oberlin v. McGregor, 26 C. P. 460; Daly v. Edwards, 82 L. T. R. 372, 83 L. T. R. 548, 85 L. T. R. 650.

It is, of course, undoubted law that an instrument is not a demise or lease, though it contain the usual words of demise, if its contents shew that such was not the intention of the parties: Woodfall on Landlord and Tenant, 18th ed., p. 144 et seq.

And in this case the peculiar frame of the instrument and the nature of the interests dealt with make it essentially a case where, in construing it, careful reference should be had to every part.

But, for the purpose of ascertaining the plaintiff's position with reference to his aliquot part of the oil gained or obtained through the medium of the processes which the defendants are authorised to adopt, it is not essential whether the instrument be regarded as a demise or a license. So far as these operations are concerned, the plaintiff is an actor, in that, by the very terms of the instrument, they take place with his authority and by his leave. The object was to extract for marketing and consumption the oil lying beneath the surface of the plaintiff's lands. The plaintiff desired this to be done, but, not being able or willing to adopt measures by means of which he might obtain all the oil for his own purposes, he arranged with the defendants to carry on the operations, giving or rather reserving to the plaintiff a certain aliquot part of the oil produced by means thereof which is to be delivered to him in specie. Why is he not the producer of this aliquot part which comes to him as his share of the work done under and in pursuance of the agreement?

The word "procedure," as remarked by Meredith, C.J., is not a technical one. It is of wide signification, capable of many meanings.

The Act 4 Edw. VII. ch. 28 contains no definition of the term as therein used, and it should be read as expressive of that sense in which it was most likely to have been understood by Parliament, that is, as applied to persons engaged in bringing forth the oil from lands under which they lay and so converting it into an article of commerce.

In order that an owner of land under which there is oil or gas or similar substance may become a producer thereof, it cannot be essential that he should labour with his own hands in order to bring it to the surface. It is surely sufficient if he puts, or is instrumental in putting, into operation the agencies by which the result is accomplished.

In this case the plaintiff by the means adopted by him secures the bringing to the surface of quantities of oil, a one-eighth part of which he is entitled to receive as his own property. This part the defendants were not entitled to, nor at liberty to deal with except with the plaintiff's consent.

Obviously this was the intent of the parties, and I find nothing in the instrument to prevent that effect being given to it. Nor do I see any good reason why the plaintiff is not to be considered the

producer of the oil so allotted and secured to him by the terms of the instrument.

In my opinion, the appeal fails and should be dismissed.

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

MEREDITH, J.A., dissenting, was of opinion that the appeal should be allowed and the action dismissed, for reasons stated in writing.

JUNE 15TH, 1910.

FELKER v McGUIGAN CONSTRUCTION CO.

Statutes—7 Edw. VII. ch. 19, secs, 8, 9 (O.)—9 Edw. VII. c. 18, sec. 10 (O.)—Hydro-Electric Power Commission—Erection of Transmission Line — Power to Enter upon Private Lands against Will of Owner and without Payment of Compensation —"Acquire"—Authority of Lieutenant-Governor in Council.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., at the trial, dismissing the action with costs.

The action was for trespass to land. The defendants justified their entry upon the plaintiff's land under the legislation respecting the Hydro-Electric Power Commission, 7 Edw. VII. ch. 19 and 9 Edw. VII. ch. 18, sec. 10.

No question of fact was involved. Before action the plaintiff was offered $500 as payment for the right to erect a tower upon her land and the right of passage over it of the transmission line, the attempted construction of which constituted the trespass complained of.

The sole question in the action was, whether the above statutes, or either of them, authorised an entry, under the direction of the Commission, upon private lands, against the will of the owner, before payment of compensation.

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

J. H. Moss, K.C., for the plaintiff.

C. H. Ritchie, K.C., and S. A. Johnston, for the defendants.

MOSS, C.J.O.:—The statutory provisions under which the defendants justify their acts in relation to the plaintiff's land of which she complains in this action cannot be said to be models of

accuracy or precision, and it is not at all surprising that their real meaning and full extent have been the subject of more or less difference of opinion. The learned Chief Justice seems to have felt himself almost driven to place a construction upon them which ascribed to the legislature not merely the legislative competency but the actual intent to empower the Hydro-Electric Power Commission to take and use the land and property of private persons without making any compensation therefor. A construction which renders possible such a proceeding should, according to all the canons, be resorted to only when the language of the enactment leaves open no other reasonable construction.

And it is satisfactory to know that, by the Act 10 Edw. VII. ch. 16, the legislature has now declared for the future the intention of the previous legislation and removed the doubts surrounding it.

If, at the time of the defendants' entry upon the plaintiff's lands, the enactments then in force did not authorise the proceeding, or if they did, but the proper preliminary steps were not taken to enable the authority to be exercised, the plaintiff is properly here in defence of her property rights.

If sec. 10 of the Act 9 Edw. VII. ch. 18, upon which the defendants mainly rely, stood by itself, there might be difficulty in concluding that it warranted the defendants' proceedings But it must be read in connection with the provisions of secs. 8 and 9 of the Act 7 Edw. VII. ch. 19. Speaking in a general way of these provisions, sub-head (a) of sec. 8 deals with the acquisition of the means of generating and developing electrical power or energy; sub-head (b), with the conduct, transmission, and distribution of the same; and sub-head (c), with the supply thereof to the users.

The defendants' proceedings which are the subject of attack in this action were taken in furtherance of some of the purposes specified in sub-head (b) of sec. 8, and, as that section is expressed, they could only be taken upon the authority of the Lieutenant-Governor in council.

But in aid comes sec. 10 of 9 Edw. VII. ch. 18, which does not expressly, but seems by necessary inference to, dispense with the authority of the Lieutenant-Governor in council to take the proceedings and do the acts therein specified. Amongst other authorities is included permission to do certain things without the consent, or, in other words, against the will, of owners or others interested. The language implies an application made to such owners or others to consent and a refusal to give it. Thereupon arises and may follow the exercise by the Commission of the power to acquire, that is, to get for themselves, and in the meantime, and without wait-

ing for the ascertainment or payment of compensation, to enter upon, take possession of, and use the necessary right or easement. The word "acquire" is, no doubt, capable of being read as meaning, "to get without payment or other consideration, as by way of gift," but, as used here, ought to be read as meaning obtaining or getting by paying or compensating therefor.

And, though it is by no means very clear, it may properly receive the extended meaning of obtaining or getting in the manner provided by secs. 8 and 9 of 7 Edw. VII. ch. 19. But for the Act 10 Edw. VII. ch. 16, this final proceeding might yet involve the obtaining of the authority of the Lieutenant-Governor in council, though it would not prevent the acts of entering upon, taking possession of, and using the right in the meantime.

The defendants, though somewhat informally, performed all that was called for on their part to entitle them to enter and do the acts upon the plaintiff's land of which she complains, and her action to restrain them and for damages fails. As the defendants at the trial and again on the appeal undertook and agreed to compensate the plaintiff, it may not be necessary for either party to take further proceedings. In any case the defendants, and, if necessary, the Hydro-Electric Commission, under whom they justify, should undertake that the plaintiff's position, as respects her right to compensation and to take proceedings therefor, should remain as it was at the time of the commencement of the litigation.

The appeal should be dismissed.

GARROW and MEREDITH, JJ.A., agreed, for reasons stated by each in writing.

OSLER and MACLAREN, JJ.A., also agreed.

JUNE 15TH, 1910.

RE CITY OF HAMILTON AND HAMILTON STREET R. W. CO.

Street Railways—Contract with City Corporation—Construction—Repair of Portion of Roadway Outside of Rails—Duty of Company—Order of Railway and Municipal Board.

An appeal by the street railway company under 6 Edw. VII. ch. 31, sec. 43, from the order or judgment of the Ontario Railway and Municipal Board of the 15th November, 1909, whereby the

board ordered and adjudged that the appellants should forthwith put in good repair, according to the provisions of by-law No. 624 of the city corporation, that portion of the pavement for two feet outside of the outer rails of the street railway company's tracks laid on King street from James street to Bay street, in the city of Hamilton.

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

W. W. Osborne, for the appellants.

H. E. Rose, K.C., and F. R. Waddell, for the city corporation.

MAGEE, J.A.:—The company by the agreement of the 26th March, 1892, covenanted to perform, observe, and comply with all the agreements, obligations, terms, and conditions contained in the city's by-law No. 624, of that date. . . .

Clause 5 provides that the space between the rails to be laid for the railway on any paved or macadamized street and for two feet outside of such rails shall be by the company, and under the direction of and as required by the Board of Works in and for the city, constructed and kept in repair with such suitable material as the Board of Works may from time to time direct, the materials to be supplied by the city. Perhaps the intention was that, as the pavement or macadamizing would necessarily be torn up for the construction of the railway, it should be reconstructed over the width specified by the company, which should also keep it in repair over that width. There is in the clause no abandonment of the right of the city elsewhere reserved, as already mentioned, to make changes and improvements in the streets, for this clause 5 declares that the construction and repair are to be as required by the Board of Works and with such suitable material as the Board may from time to time direct. This would seem to point clearly to changes in the material and class of pavement if the Board of Works so thought proper. Bearing in mind this right to change, the city supplying the material, the contention of the company that they are only bound to repair so long as the pavement existing when their new road was constructed should remain, or at the most only to incur the cost of repairing that sort of pavement, has much less force. If we turn . . . to clauses 6 and 11, we find that the former, as to streets which are neither paved nor macadamized, directs the company to macadamize the space between the rails and place a plank properly sloped for an approach outside the rails, and this macadamizing and planking is to be continually kept up by the company.

Clause 11, it will be noticed, makes no provision for macadamizing a street, but only for paving, and the city is "in the first instance" to pave between the tracks. If this clause is, as I think it is, complementary to clause 6, and intended only for those streets not paved or macadamized at the time of the laying of the tracks, the reason for the omission of provision for macadamizing is obvious—as clause 6 had already required the company to macadamize. Why the company should not keep in repair the two-feet strip outside the rails on such streets, as well as on those provided for by clause 5, is difficult to see. . . .

Now here in question is a street which was paved with blocks at the time the rails were laid, and which, therefore, came under clause 5, and as to which it was thereby agreed that the space between the rails and for two feet outside "shall be by the same company . . . constructed and kept in repair with such suitable material as the said Board of Works may from time to time direct (the materials therefor to be supplied by or at the expense of the said corporation)." That a new pavement was necessary was not disputed, and the evidence indeed is that the block pavement was worn out. If the new pavement were of the same sort of material, would there have been any question as to the company being bound to pay the cost of laying the blocks provided by the city? But, it being decided that an asphalt pavement will be better, the city is willing to provide that material. Is the company any less bound to bear the cost of laying that material, merely because it is different from the wooden blocks? The same argument which would lead to that conclusion would relieve the company from the cost even as to the space between the rails, and I see no reason for such a contention. And the company here do not dispute their liability for that, and by their letter of the 17th June, 1909, seem to have assented to being charged with the cost. Some force must be given to the words "such material as the Board of Works may from time to time direct."

It seems to me clear that the case is governed solely by clause 5, and not clause 11, and that under clause 5 it was the duty of the company to do what the order appealed from directs. The case of Re Medland and City of Toronto, 31 O. R. 243, is inapplicable, owing to the provisions of the agreement between these parties. The company expressly covenanted to perform, observe, and comply with all the terms of the by-law. The mere fact that the city is given a further right, on the company's default to do the work and charge the company, does not take away the effect of the positive undertaking to do it, and the city is not driven to undertake the outlay; and the Ontario Railway and Municipal Board

has, under sec. 63 (1) of 6 Edw. VII. ch. 31, authority to direct the fulfilment of the agreement.

The formal preliminaries of directions by the Board of Works and by the City Council were not disputed before the Board, but seem to have been taken for granted, and no objection as to want of proof should now be allowed. Indeed, the form of the order does not require it. The practical question in dispute was as to the liability in respect of the two feet outside the rails.

Appeal dismissed with costs.

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

MEREDITH, J.A., dissented, for reasons stated in writing.

JUNE 15TH, 1910.

McLEOD v. CANADIAN STEWART CO.

Master and Servant—Injury to Servant—Negligence — Tramway — Workmen's Compensation for Injuries Act — Persons Intrusted with Superintendence—Findings of Jury—Insufficiency —New Trial.

Appeal by the defendants from the judgment of SUTHERLAND, J., in favour of the plaintiff for the recovery of $1,500, upon the findings of a jury, in an action for damages for bodily injury sustained by the plaintiff while in the employment of the defendants, through the negligence of the defendants or their employees, as alleged.

The defendants were contractors and were engaged in erecting an elevator for a railway company, and the plaintiff and another workman named Mockridge were sent with and under the charge of one O'Brien, also an employee of the defendants, to bring a wire cable 250 feet long from the west side of the elevator to the east side. A tramway track ran along each side, and the two tracks united in a single track at a switch some 1,000 feet or more to the north. On these tracks ran a small or "dinkey" locomotive engine and low cars. It was intended to have the cable drawn along the tracks by means of this engine to the east side of the elevator. The plaintiff and the other two men went to where the cable lay coiled upon the ground. The engine, with a flat car attached to and north of it, came alongside the cable, one end of which was

then attached to the end of the car, so that, when the train moved away, drawn out to its full length, the cable would be dragging the car and cable past the switch, the intention being for the engine to go back over the cable to its southerly end and to attach that end to the engine, which would drag it south down to the eastern side of the elevator. Before doing so, it was decided to separate the car from the engine, and leave it on the track running west of the building, and to do so the conductor or engineer decided to "kick" the car, that is, to disengage it from the engine, push it along southerly towards the switch, and, before reaching the switch, slacken the speed of the engine, so that the car would go on down the west track of its own momentum, separate from the engine, and leaving the latter free to go down the eastern track so soon as the cable would be attached by O'Brien's special directions; and both engine and car proceeded southerly over the cable. The plaintiff, with Mockridge and O'Brien, after paying out the coiled cable as it was being straightened out by the engine, followed up the train, which stopped for them before going on past the switch, and they got upon it, the plaintiff and Mockridge going on the flat car and O'Brien getting on the engine. When the cable was all drawn north of the switch, the plaintiff got off and unhitched from the car, and got on the car again. The plaintiff said that he was not made aware of the intention to "kick" the car or separate it from the engine, and he did not know that it was uncoupled, and that, just before the engine slackened to effect the separation, O'Brien called to him to come on the engine, and he was in the act of doing so, the car being close up against the engine, and had put out his foot so that he was unable to recover his balance, when the separation of the car and engine occurred, and he came down between them and was injured.

The questions put to the jury and their answers were as follows:—

1. Was the accident the result of the negligence of the defendant company? A. Yes.

2. If so, in what did such negligence consist? A. Answered by answer to question 7.

3. Was the plaintiff at the time of the accident acting under the orders of a co-employee whose orders he was bound to obey? A. Yes.

4. Was he at the time of the accident acting contrary to orders? A. No.

5. Did the plaintiff contribute to the accident by negligence on his part? A. No.

6. If so, in what did such negligence on his part consist?

6a. Could the plaintiff by the exercise of ordinary care have avoided the accident? A. No.

7. In case you find the defendants liable, at what sum do you assess the damages? A. $1,500.

8. Did the injury result by reason of the negligence of any person in the service of the defendants who had charge or control of the points, signals, engine or cars in use on the tramway being operated at the time of the accident? A. Yes.

9. If so, by whose negligence and wherein did that negligence consist? A. Negligence by person or persons of company:—

1st. By superintendent, in not exercising proper supervision in preventing his sub-foreman from using this engine and cars for conveyance of men about his work, which act was contrary to his own orders.

2nd. By engineer in charge, for not acquainting men employed on this particular job of his intention of making a "kick of car."

3rd. Or, if engineer did acquaint foreman of such intention, then the foreman not communicating such intention to men under him.

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

G. M. Clark, for the defendants.

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

MAGEE, J.A. (after setting out the facts):—It is manifest from the jury's answers that but for the Workmen's Compensation for Injuries Act the plaintiff could not succeed, as the only negligence found is that of other employees of the defendaints. Then do the jury's answers bring the case within that Act? . . .

The answers to questions 3 and 4 fall short of proving what is required by the 5th clause of sec. 3 of the Act, as they do not establish that the injury was caused by the negligence of the plaintiff's superior to whose orders he conformed, and that the injury resulted from his so conforming. Throughout the answers there is no finding from which can be gathered the jury's opinion that O'Brien gave him any such orders as he alleges. Then for the only negligence the jury find against the company, we are referred by them to the answer to question 7. Question 7 relates only to the amount of damages, and, no doubt, the jury intended to refer either to question 8 or question 9 or both. If they intend question 8, then there is no evidence to substantiate it. . . . If we look to question 9 . . . the only negligence alleged is of the superintendent, the engineer, and the foreman. It cannot be said that

allowing their employees to use their cars for the company's business was negligence. . . . Then the negligence alleged against the engineer is that he did not acquaint the men engaged of his intention to kick the car. . . . What was there appearing in the evidence to shew negligence in not making known what he was about to do? . . . There remains only the foreman O'Brien as the possibly negligent person. But the jury do not say he was. They only find that, if he was made acquainted with the engineer's intention to "kick" the car, he did not communicate it to the plaintiff and Mockridge. There is, therefore, no finding that he know of that intention. And, if the jury cannot find that, what becomes of the plaintiff's assertion that O'Brien told him to come on the engine? The plaintiff's whole case was based on that. . . .

There is, then, no satisfactory finding under clause 5 of sec. 3, and . . . none under clause 3, and in no other way is the case brought under the Act. . . .

The findings being insufficient and unsatisfactory, and the jury's opinion being apparently, if anything, against the allegation on which the plaintiff's case was founded, there should be a new trial; the costs of the former trial and of this appeal to be costs in the cause . . .

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

MEREDITH, J.A., dissented, stating reasons in writing. He was of opinion that the findings of the jury were sufficient to support the judgment, and that there was some evidence upon which reasonable men could make such findings.

JUNE 20TH, 1910.

*REX v. WILLIAMS.

Criminal Law—Theft of Fowl—Penalty—Criminal Code, sec. 370—Imprisonment—Excessive Term—Appeal — Stated Case—"Such Sentence as ought to have been Passed" — Criminal Code, sec. 1018—Discharge of Prisoner.

Case reserved from the County Court Judge's Criminal Court of the County of Lambton.

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

The prisoner, having elected speedy trial without a jury, pleaded guilty to each of three charges of theft at different times of turkeys and chickens belonging to different owners. They were not included in one charge. The value of the stolen property was not stated in any of the cases. The prisoner was convicted and sentenced on each charge to three years 'imprisonment—the terms to run concurrently.

Under sec. 370 of the Criminal Code, such a theft is, if the value of the property stolen exceeds $20, an indictable offence and punishable by a pecuniary penalty or two years' imprisonment, and, if the value does not exceed $20, is an offence and punishable on summary conviction by a pecuniary penalty or one month's imprisonment with hard labour.

The question reserved was whether there was power to impose the sentence of three years' imprisonment.

The case was heard by Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A.

J. B. Mackenzie, for the prisoner.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

Magee, J.A.:— . . . The County Court Judge's Criminal Court, as it is called in . . . R. S. O. 1897 ch. 57 . . . by the Criminal Code, secs. 824, 825, has power to try persons committed to gaol or bound over to appear for trial for offences mentioned in sec. 582 as being within the jurisdiction of the General Sessions. Its authority thus applies to indictable offences.

The sentence of three years in the present cases could only be warranted if there were a right to indict for the theft of fowl of less value than $20, and if the value was so stated on the record. Such theft was indictable at common law. It is not necessary here to decide whether the right to proceed by indictment has been taken away by the provisions of sec. 370 or elsewhere in the Code. Even if such procedure now exist, the Court would have no right to assume that when the property stolen was of less value than $20, it could impose a greater punishment than if the value exceeded that sum. In any view . . . the Court had no right to impose the sentence which it did, and the prisoner is entitled to have some relief.

Under sec. 1018 the Court, upon the hearing of an appeal, may pass such sentence as ought to have been passed or make such other order as justice requires. . . .

[Reference to Regina v. Dupont, 4 Can. Crim. Cas. 566; Rex v. Ettridge, [1909] 2 K. B. 24.]

By the words "such sentence as ought to have been passed" I do not understand that we are bound to impose the maximum authorised, but such as it is considered the circumstances call for.

Looking at the number of fowl alleged to have been stolen, it does not seem probable that they exceeded $20 in any one case. Even if the right of inflicting greater punishment upon indictment exists, it is proper to have regard to the limits imposed upon Justices of the Peace in respect of convictions in such cases; and this prisoner, if he had been summarily convicted, could only have had one month's imprisonment in each case or three months in all. Different sections of the Code provide for different punishments on indictment and summary conviction for the same offence (e.g., secs. 82, 208, 291, 430, 435, 438-440, and 781.) But, having in view the maximum punishment under sec. 370, even when the value is greater, I think the prisoner has been confined long enough, and that the order which justice requires is that he should be discharged.

The question reserved for the Court should, I think, be answered as follows: that the County Court Judge's Criminal Court had not jurisdiction, in the circumstances, to impose the sentences which it did.

MEREDITH, J.A., gave written reasons for the same conclusion.

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

JUNE 20TH, 1910.

REX v. SMITH AND LUTHER.

Criminal Law—Usury—Conviction—Money Lenders Act, R. S. C. 1906 ch. 122—Evidence—Evasion of Statute—Leave to Appeal Refused.

The defendants were tried before DENTON, one of the Junior Judges of the County Court of York, under the provisions of the Criminal Code for the speedy trials of indictable offences, upon a charge of lending money at a greater rate of interest than that authorised by the Money Lenders Act, R. S. C. 1906 ch. 122, and were convicted.

Counsel for the defendants applied to the Judge to reserve a case for the opinion of this Court, and, upon his refusal, applied to this Court for leave to appeal.

The motion was heard by Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A.

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

J. R. Roaf, for the defendant Luther.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

Moss, C.J.O.:—The questions of law sought to be raised for the opinion of the Court are, whether certain evidence admitted by the learned Judge was properly receivable in evidence against the defendants, and whether, in any event, there was evidence upon which the learned Judge could properly convict.

For the purposes of this application it is not necessary to determine whether all the evidence objected to was or was not properly receivable.

There was no jury, and the case really resolved itself into a question whether there is evidence properly receivable upon which the learned Judge could find the defendants guilty of the offence charged.

Having examined the evidence and proceedings, we do not think there is any reasonable ground for calling for a stated case.

The matter to be decided by the learned Judge was one of fact, whether the defendants were, notwithstanding the methods adopted and the forms practised, engaged in money-lending in contravention of the Money Lenders Act, or were aiders or abettors of persons engaged in such illegal money-lending, and so guilty as principals under sec. 69 of the Criminal Code.

It appears to us that there was evidence to which no objection could be taken to justify the learned Judge's conclusion.

The methods adopted and the forms practised by which an incorporated company is made to appear to act as agent for the borrower for a liberal commission, the amount of which is first added to the loan and then deducted from the whole sum advanced, and for which security is taken, the company being represented in the procuring of the loan by the same person who at the same time is acting under a power of attorney from an individual personally unknown to the attorney, but whose money the attorney says he advances to the borrower, or the professed ignorance of the defendants of the nature of these dealings, cannot cloak the real transaction or the obvious design of exacting from the borrower a rate of interest upon the advance greatly exceeding that authorised by the Act.

We must refuse the application.

MEREDITH, J.A., for reasons stated in writing, agreed that the application should be refused.

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

JUNE 20TH, 1910.

REX v. LEYS.

Criminal Law — Magistrate's Conviction — Inability of Accused to Conduct Defence by Reason of Insanity — Committal to Lunatic Asylum — Failure of Magistrate to Inquire as to Sanity—Invalidity of Conviction—Habeas Corpus—Discharge.

Appeal by the defendants from an order of MEREDITH, C.J. C.P., in Chambers, dismissing a motion for the discharge of the prisoner, upon the return of a habeas corpus.

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

A. B. Cunningham, for the prisoner.

E. Bayly, K.C., for the Crown.

The judgment of the Court was delivered by MEREDITH, J.A.:—No person can be rightly tried, sentenced, or executed while insane.

If there be sufficient reason to doubt whether an accused person is unable, on account of insanity, to conduct his defence, the question whether, by reason of such insanity, he is unfit to take his trial, should first be tried: see the Criminal Code, sec. 967, and The Queen v. Berry, 1 Q. B. D. 447.

In this case the accused, to the knowledge of the Magistrate, had been declared to be insane, by competent professional gentlemen; and was, in accordance with the laws of this province, committed to a lunatic asylum, as an insane person, about the time that he was tried, convicted, and sentenced; and it appears that no trial of mental capacity to conduct his defence was had. Upon the evidence now before us, it must, I think, be considered that, at the time of his trial, conviction, and sentence, the man was not so capable; otherwise he ought not to have been committed to the asylum, as he was.

If this were not so, the Crown could readily shew it; but no evidence of any kind was offered to the contrary; and the sugges-

tion of the Court that such evidence might yet be given was not acted upon, but in truth rejected.

No one doubts the absolute integrity of the Police Magistrate, or that all he did was done with the best of intentions, or indeed that he did that which was best for the accused, his family, and the community in which he lived; but it was not regularly done according to law, and cannot stand.

I would allow the appeal and direct that the prisoner be discharged.

JUNE 20TH, 1910.

REX v. GARRETT.

Criminal Law — Magistrate's Conviction — Leave to Appeal — Stated Case.

Motion by the defendant for leave to appeal from a conviction by the Police Magistrate for Port Arthur.

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

E. W. Wright, for the defendant.

J. E. Jones, for the private prosecutor.

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

The judgment of the Court was delivered by MOSS, C.J.O.:— We direct that a case be stated for the opinion of the Court, confined to the questions following or to the like purport, viz.:—

1. Whether it was within the power of the Police Magistrate by whom the accused Thomas L. Garrett was tried and convicted, to refuse to adjourn the trial in order to enable the accused to procure counsel and prepare for his defence, and to proceed with the trial notwithstanding the accused's application for such adjournment?

2. Whether the said Police Magistrate was right in imposing a fine exceeding, with the costs in the case, the sum of $100?

The case to be brought on for hearing at the next regular sittings of the Court.

The parties will take care to see that the original and all necessary papers are deposited in good time before the sitting of the Court.

JUNE 20TH, 1910.

REX v. BARBER.

Criminal Law—Sale of Mineral Ore by Unauthorised Person — Criminal Code, sec. 424 (b)—Evidence of Sale—Fixed Price —Payment for Metal in Ore.

The accused was found guilty by a jury at the Toronto Sessions of the Peace of a violation of clause (b) of sec. 424 of the Criminal Code, as amended by ch. 9 of the statutes of 1909, which reads as follows: "Every one is guilty of an indictable offence and liable to two years' imprisonment who . . . (b) not being the owner or agent of the owner of mining claims then being worked, and not being thereunto authorised in writing by the proper officer in that behalf named in any Act relating to mines in force in the province in which the offence is alleged to have been committed, sells or purchases, except to or from such owner or authorised person, any rock, ore, mineral, stone, quartz or other substance containing gold or silver or any unsmelted or untreated, or unmanufactured, or partly smelted, partly treated or partly manufactured gold or silver."

After conviction, the Junior County Court Judge who presided reserved for the consideration of the Court of Appeal the following question: "Was there any evidence upon which the jury could properly find that the prisoner sold any ore containing silver or any unsmelted or untreated or unmanufactured or partly smelted or partly treated or partly manufactured silver, within the meaning of sec. 424 (b) of the Criminal Code, as amended by the Criminal Code Amendment Act, 1909."

According to the stated case, the evidence shewed that the accused was a saloon keeper in Cobalt, and that, after his arrest, he stated to the detective, after being duly cautioned, that he was not a mine-owner and had no authority from any mine-owner to sell ore and that he was not agent of a mine-owner; that he took this ore over his counter; brought it down to Toronto, took it to the office of one Wilkinson there, and, after a couple of weeks or so, he returned and was paid for the value of the silver in the ore. Payment was made by cheques payable to the order of Neilson (the assumed name of the accused), the aggregate amounting to about $10,000.

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

T. C. Robinette, K.C., for the defendant.

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

MACLAREN, J.A.:—It was argued before us that there was here no evidence of a sale of ore; that the price was not fixed when the ore was delivered; and that the accused was not paid for the ore, but for the silver in the ore.

In order to constitute a sale it is not necessary that the price should be fixed by the contract; it is sufficient that it be left to be fixed in the manner thereby agreed. The maxim id certum est quod certum reddi potest applies. The ore on delivery became the property of Wilkinson, and payment according to the amount of silver found by refining was simply the method adopted of determining the precise amount to be paid. It does not appear that the property in any part of the ore or in any of the component parts remained vested in the accused. The Crown gave evidence that the accused was not authorised in writing or otherwise to dispose of silver ore, by the proper officer in that behalf.

In these circumstances, there was ample evidence upon which the jury could properly find that the accused had sold ore containing silver, and the question reserved for this Court should consequently be answered in the affirmative.

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

MEREDITH, J.A., was of opinion, for reasons stated in writing, that the Court could not interfere, nothing but questions of fact being involved.

JUNE 20TH, 1910.

REX v. VENTRICINI.

Criminal Law—Murder—Evidence—Finding of Weapons in Prisoner's Possession—Judge's Charge—Circumstances Justifying Finding of Manslaughter—Provocation—Self-defence—Judge Giving Jury his Version of Facts—Intention—Intoxication—Remarks of Judge to Jury as to Agreeing within a Short Time and as to Recommendation to Mercy.

Pasquale Ventricini, the prisoner, was tried before RIDDELL, J., and a jury, upon an indictment charging him with the murder of one Raffaelle Fabbio. The jury found him guilty, with a strong recommendation to mercy. At the request of the prisoner's coun-

sel the trial Judge reserved a case in which he set out certain of the facts and parts of his charge to the jury, and by which seven specific questions and one general question were submitted for the opinion of the Court of Appeal, as follows:—

(1) Was I right in admitting in evidence the fact that four knives were found in the trunk of the prisoner at his boarding-house?

(2) Was I right in that part of the charge set out in paragraph 8? (The Judge charged the jury that they had a right to consider provocation by Fabbio and others in connection with all that took place, and that, if that provocation was of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, and if the prisoner was actually deprived of the power of self-control by the provocation, then they should not find murder, but at most manslaughter.)

(3) Did I exceed my powers as a Judge when in my charge I used the words set out in paragraph 9? (The Judge in his charge told the jury that they were the judges of the facts, but it would not astonish him if the jury "found these to be the facts"—and he then gave a summary of what occurred, according to his view of the evidence, and added: "If that is so, the Crown has established a case of murder, unless you are satisfied that it was not murder but manslaughter, for some of the reasons I have told you of, or . . that the man had the right to do it in self-defence. All culpable homicide which is not murder is manslaughter.")

(4) Did I exceed my powers as a Judge when I used the words set out in paragraph 10? (" . . . I am only telling you the conclusion I draw from the witnesses. But you are not at all bound by that. I am only saying that in order to enable you to direct your minds to what the witnesses said. . . . Apparently this man had been warned by two of his friends not to go near that place or he would get into trouble, or something like that.")

(5) Was I right in my charge as to the spasms or fits, set out in paragraph 12? (Evidence was called for the prisoner to shew that when he had been drinking he was excitable and quarrelsome, and sometimes had spasms or fits in which he would twitch about and try to bite his hands and legs. The Judge charged the jury that they might consider the fact (if it was a fact) that the prisoner sometimes had those spasms, on intention, in the same way as drunkenness and with the same effect.)

(6) Was I right in my charge to the jury on the question of drunkenness? (There was some evidence that the prisoner

had been drinking, and the charge dealt with the effect of that, the Judge saying, among other things: "He was seen shortly afterwards as well as shortly before, and there were no signs of great inebriation. Do you think he was so drunk that he could not and did not intend anything. If you can find that he was so drunk that he did not intend to kill, then that is sufficient for his defence. . . . A man may be so drunk as not to know that what he did was dangerous or likely to cause death. . . . The only object of saying anything to you about drunkenness is, perhaps, to bring it within the exceptions I have just been speaking to you about, so as to reduce the crime to manslaughter. You can say, when you are figuring it up, whether he intended to do something which he ought to have known would cause death. You may consider, I say, his drinking. But do you think, on your consciences and oaths, that a man who was in the condition in which he was seen shortly afterwards was not exactly like that of hundreds of people you have seen, who had been drinking more than was good for them, and had become excited? All that is for you.")

(7) Did I exceed my powers as a Judge in telling the jury that they might, if they saw fit, make any recommendation recommending mercy, or in asking the jury to go and see if they could agree in five minutes, under the circumstances set out in paragraph 15? (The jury retired at 4.23 p.m.; when it was 6.40 the Judge was desirous of seeing whether the jury would probably agree in a short time, in order to find whether it was necessary to supply them with food, and also to provide for the refreshment of the officials of the Court, if necessary. The Judge, therefore, sent for the jury, and asked them if they had been able to agree. The foreman said they had not. The Judge asked if there was any likelihood of their agreeing. The foreman said, "We stand eleven for conviction"—. The Judge: "You ought not to tell that. Unless there is a chance of you agreeing immediately, I shall have to leave you here for some time, but if you are likely to agree soon, I will wait. I may say that if you find him guilty, you may make any recommendation you think fit, recommending mercy. If you think in a few minutes you will be able to agree, I will wait for you, but, if not, I will have to leave you there for some time. Go and see if you can do it in five minutes." The jury retired and returned again at 6.45 p.m. with a verdict of "guilty, with a strong recommendation to mercy."

(8) Upon the above grounds, or any of them, should there be a new trial?

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

T. C. Robinette, K.C., for the prisoner.

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

Moss, C.J.O.:—Of the questions reserved, numbers 2 and 6 were not dwelt upon by counsel for the prisoner in his argument before us, and it is sufficient to say that there are no good grounds for holding otherwise than that they should be answered in the affirmative.

Of the remaining five specific questions, number 1 raises a question as to alleged improper reception of evidence; the other four relate to alleged misdirection.

As to number 1, we think there was no valid objection to the reception of the evidence. It was not denied that the prisoner inflicted the wounds which caused Fabbio's death. The evidence was that they were caused by some sharp instrument, possibly with both edges sharpened or perhaps only one. When the prisoner was searched, no weapon capable of inflicting the wounds was found upon his person. Between the time of the stabbing and his arrest he had gone to his room, and in his trunk there were found four knives, of which two were of a size and shape likely to produce wounds of the kind that the deceased received. There was no pretence that they did not belong to the prisoner. It may be that, in the circumstances, it was not absolutely incumbent upon the Crown to produce the lethal weapon; but, nevertheless, it was not improper to submit this evidence in connection with the evidence of the prisoner's movements immediately following the stabbing and ending with his arrest in his own room. This question must, therefore, be answered in the affirmative.

As to the other four questions, we find no error in law in the instructions to the jury. As regards the comments upon the evidence, a Judge is under no obligation to refrain from doing so. It has been more than once said that in the conduct of a trial and in charging the jury the Judge is not a mere automaton. He is at liberty to state his own impressions of the evidence, provided he is careful to make the jury understand that in the matter of deciding upon the evidence and finding what they deem to be the facts they are the sole judges. And this the learned Judge fully and emphatically impressed upon the jury in this case. There is no reason to suppose that the jury were under any misapprehension as to their functions or duty in that respect or in regard to the quarter in which in cases of this character a re-

commendation to mercy can have effect. They would quite understand that it could not affect the sentence to be pronounced by the trial Judge, and that it was and is an appeal to the clemency of the Executive. And, doubtless, as may be gathered from the record of the proceedings, they were moved by a hope and belief that it would, as, no doubt, such recommendations always do, receive careful consideration in the proper quarter.

An appeal to the Executive is the appropriate, and indeed only, course, for here the result must be to answer all the questions except the 3rd, 4th, and 7th in the affirmative and the 7th in the negative. The formal question No. 8 is answered by the foregoing answers.

The other members of the Court concurred; GARROW and MEREDITH, JJ.A., each stating reasons in writing.

JUNE 20TH, 1910.

NEWTON v. CITY OF BRANTFORD.

Negligence — Unguarded Hole in Floor of Building — Duty of Owners to Person Invited on Premises—Knowledge of Danger —Evidence—Nonsuit.

Appeal by the defendants from the order of a Divisional Court, setting aside the judgment of LATCHFORD, J., who dismissed the action at the trial, and directing a new trial.

The action was brought to recover damages for injuries sustained by the plaintiff through the alleged negligence of the defendants in leaving unguarded an opening in the floor of a fire-hall, used by the firemen to reach the lower floor, into which hole the plaintiff fell and was injured.

The plaintiff was in the employment of one Cave, who had contracted with the defendants to paint the fire-hall. On the 15th May, 1909, the plaintiff was at work painting on the second floor, and to reach a part of his work was using a step-ladder which he placed near the opening, and in coming down from the ladder he inadvertently stepped into the opening and fell to the floor below, a distance of about 16 feet.

LATCHFORD, J., at the close of the plaintiff's case, held that no evidence had been given from which an inference of negligence

could be drawn. He also was of the opinion that in any event the plaintiff had, upon the uncontradicted evidence, been guilty of contributory negligence, and accordingly dismissed the action.

The Divisional Court (SUTHERLAND, J., dubitante) considered that there was some evidence of negligence on the part of the defendants in the failure properly to guard the opening, and it was for the jury to say whether the plaintiff had voluntarily assumed the risk; and a new trial was directed.

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

W. T. Henderson, for the defendants.

W. S. Brewster, K.C., for the plaintiff.

GARROW, J.A. (after stating the facts as above):—The measure of duty imposed by law in such a case has, I think, been clearly defined . . . . A leading case appears still to be Indermaur v. Dames, L. R. 1 C. P. 274, L. R. 2 C. P. 311, in which the position of such an one as the plaintiff is defined to be that of a person invited upon the premises by the owner for the transaction of business in which both are interested. And the duty owing in such a case is there said to be to take reasonable means to guard the invitee from dangers which are not visible and of which he does not know. . . .

But the plaintiff here knew all about the opening. In the course of his examination he was asked these questions: "Q. Had you known about this hole from the time you went to work, nine days before the accident? A. Yes, sir. Q. Knew what it was used for? A. Yes, sir. Q. Knew its danger when you were up-stairs? Yes, sir, but really could not realise that I was to be called on to be so close."

No one told him how or where to place the step-ladder. That was entirely his own doing, just as stepping into the opening was his own mistake.

I therefore agree with Latchford, J., that there was no evidence of negligence on the part of the defendants, and that the appeal should be allowed and the action dismissed, both with costs if demanded.

The other members of the Court agreed; MEREDITH, J.A., also stating reasons in writing.

JUNE 20TH, 1910.

MACDONALD v. WALKERTON AND LUCKNOW R. W. CO.

Contract—Building of Railway—Payment to Contractor—Right to Deduct Moneys Paid as Compensation for Death of Person—Construction of Contract—Indemnity—"Prosecution of the said Work"—Payment Made by another Company.

Appeal by the plaintiffs from the judgment of BOYD, C., ante 395, dismissing the action, which was brought by the executors of the late Randolph MacDonald to recover the sum of $5,655.45 alleged to be due and owing to the deceased under a sealed agreement dated the 7th July, 1906, made between the deceased and the defendants, whereby the deceased agreed to build for the defendants a line of railway from Walkerton to Proton. The agreement provided that the work should be commenced immediately after the execution of the agreement, and should be proceeded with continuously and diligently until completed; that the work should be prosecuted in such manner and at such times and at such points or places as the defendants' engineer should from time to time direct, and to his satisfaction; and, if no direction were given, then in a careful, prompt, and workmanshiplike manner according to the agreement; and that the whole should be completed on or before the 1st July, 1907.

Paragraph 12 of the agreement was as follows: "The contractor and his agents, labourers, and all others in his employ or under his control, shall use due care that no person or property is injured or any rights infringed in the prosecution of the said work, and if any damage to any person or property occurs in or about the said work, or if any right is infringed by any act or neglect of the contractor or of his agents, labourers, or other employees, the damages or compensation therefor shall be paid by the contractor, and together with any costs or expenses incurred in adjusting the same may be deducted by the railway company from any moneys due or to become due to the contractor."

The work was not completed until December, 1908, when the final estimate was given and the work accepted. No explanation of the delay was made at the trial.

On the 12th November, 1906, the defendants executed a lease of the railway constructed and to be constructed to the Canadian Pacific Railway Company for 99 years from the 1st January, 1907, at the annual rental of a sum equal to the interest payable on the

bonds which the defendants might thereafter, with the consent of the lessees, issue, not exceeding $20,000 per mile, at a rate of interest not exceeding 4 per cent. per annum, payable half-yearly. And the lease contained a provision that the defendants would from time to time, at the request of the lessees, issue bonds carrying interest at a rate not exceeding 4 per cent., payable half-yearly, but the aggregate of such bonds and of all bonds which had then issued and were outstanding was not to exceed the limit which the defendants were by law authorised to issue, and that the defendants would apply the proceeds of all bonds which it should at any time have issued towards the construction or permanent improvement and equipment of the railway as the lessees might in writing direct, or, at the option of the lessees, the defendants agreed to pay over the whole or any part of such proceeds to the lessees in order that the lessees might, themselves, according to their own discretion, apply the same as aforesaid.

Then followed covenants by the lessees to pay the rent, to keep the premises in repair, to pay taxes, not to assign or sublet without leave, and a provision for forfeiture for non-payment or breach or non-performance of covenants.

No reference was made in the lease to the agreement between the defendants and Randolph MacDonald, under which, at the date of the lease, the work of construction was proceeding.

The defendants did not dispute the amount of the plaintiffs' claim; part of it was paid into Court, and the balance was retained in respect of a claim for $5,250 paid by the Canadian Pacific Railway Company to the representatives of one Clarke, in the following circumstances.

After the date of the lease, namely, on the 9th July, 1908, and the 6th August, 1908, orders were made by the Board of Railway Commissioners for Canada permitting portions of the railway (still unfinished) to be open for traffic, and upon such portions the Canadian Pacific company were operating trains. Clarke was a conductor in the employment of that company in charge of a train, and was on the 15th October, 1908, killed, through having his foot caught, in the course of his employment, in an unfilled frog. The defendants, however, paid no part of the claim, which was wholly paid by the Canadian Pacific company; the latter, in effect, sought in this action to set off the amount so paid against the plaintiffs' claim; and the judgment of the Chancellor gave effect to this contention.

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

G. H. Kilmer, K.C., and J. A. McAndrew, for the plaintiff.

I. F. Hellmuth, K.C., and G. A. Walker, for the defendants.

GARROW, J.A.:— . . . I am, with deference, unable to follow the Chancellor in either of his conclusions.

The agreement under seal between the defendants and the contractor should be given full effect to until, on some recognized legal principle, the other company can be admitted to the position under it occupied by the defendants. Novation, or an assignment, legal or equitable, of the defendants' interest, and an undertaking by the Canadian Pacific company of the defendants' obligations to the contractor, must in some shape appear. . . . The Canadian Pacific company can have no right to the indemnity if they are not also liable for the debt to the contractor. And there is not a particle of evidence of any such liability. . . . What is proved, and all that is proved, on this branch, is contained in the evidence of Mr. Darling, who said that he was a divisional engineer in the employment of the Canadian Pacific company; that he had charge of the work of construction under the contract in question; that he wrote letters to the contractor on the letter paper of the Canadian Pacific company; and that the payments for the work done were made by the cheques of that company. . . . The Canadian Pacific company, in doing as they did, were either acting under the power contained in the lease, and therefore not disbursing their own money, or they were acting under some other agreement, which could have been and should have been proved, but was not. And the proper inference, in my opinion, on the whole evidence, is that that company were acting on the powers contained in the lease, which, so far as appears, is the only agreement between the defendants and that company, and which certainly does not by any of its terms entitle the Canadian Pacific company either to charge the Clark claim to the defendants or to obtain reimbursement out of the contractor's estate.

The defendants have, of course, no defence in themselves. They paid nothing and are liable for nothing to the Canadian Pacific company. But, even if it were otherwise, if the Canadian Pacific company had succeeded on the first point, I should still be of the opinion that the claim now put forward must fail. I accept, of course, all the Chancellor's findings upon questions of disputed fact. But these appear to me to have little or nothing to do with the real question, which is, I think, mainly one of construction. . . . The claim . . . is based, both in the judgment and in the argument before us, upon paragraph 12 . . . .

And obviously that paragraph is clearly only intended to indemnify the defendants against claims which might otherwise come against them from the negligence of the contractor, his agents . . . "in the prosecution of the said work." . . . Such a clause is not unusual in contracts affecting property. See Hudson on Building Contracts, 2nd ed., at p. 300, for a more elaborate form of the same character. And the plain object is to protect the owner of the property from claims which might otherwise fall upon him as such owner, but which would certainly not, in my opinion, include such a purely collateral claim as that now in question, even if the defendants had been the operating company and had actually paid the claim.

For these reasons, I think the appeal should be allowed, and the plaintiffs should be given judgment for the amount of their claim, with interest and costs, including the costs of this appeal.

MEREDITH, J.A., also gave reasons in writing for allowing the appeal.

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

JUNE 20TH, 1910.

AGAR v. HOGATE.

Fraud and Misrepresentation — Promissory Notes — Contract — Breach of Warranty—Findings of Jury.

Appeal by the defendant from the judgment of MAGEE, J., upon the findings of a jury, in favour of the plaintiff in an action for damages for fraudulent misrepresentations made by the defendant to the plaintiff by which the plaintiff was induced to give value for two promissory notes.

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

E. F. B. Johnston, K.C., and G. Grant, for the defendant.
W. Proudfoot, K.C., and W. A. Skeans, for the plaintiff.

The judgment of the Court was delivered by MEREDITH, J.A.: —The manner in which the findings of the jury respecting the matters in question were elicited was not as satisfactory as if the

usual method of having their written answers to written questions had been adopted. But upon the defendant's own evidence, and some of the facts found—about which there can be no doubt—the plaintiff is entitled to the judgment he now has; and therefore we need not trouble ourselves much, if at all, with the many other questions so much discussed on this appeal.

The promissory notes were taken upon, among other things, the defendant's assertion that they were "good Ontario notes;" in truth, to his own knowledge and by his own dealing, they were really not promissory notes at all, as between him and the maker; they were not in reality unconditional promises to pay the amount of them, at the time provided for their payment in them; in truth they were subject to a condition that the horse, for the price of which they were given, should fulfil the terms of a warranty respecting it given to the maker of the notes by the defendant, or else that he, the defendant, would replace it with another horse that would.

Whether the case is looked upon as one in which there was no contract, by reason of that which the plaintiff was to receive being something different from that which was given to him, or as merely one in which there was a breach of warranty of the quality of the thing given, the result is the same, the judgment against the defendant is that which it should be.

But, if the case is to be treated as one founded upon fraud, I am quite unable to say that there was no reasonable evidence upon which the verdict can be supported; on the contrary, the jury's reasoning, eventually, as well as their findings, seems to me to be quite reasonable. The defendant, I think, knew that, in neither sense, were the notes good when he passed them off as "good Ontario notes," and the plaintiff, I think, accepted them on such assurance, and would not have done so but for it; certainly not if the whole truth had been told; and the defendant, having undertaken to say something as to the character of the notes, was bound to tell the whole truth.

I would dismiss the appeal.

MAGEE, J.A., IN CHAMBERS. JUNE 17TH, 1910.

RUSHTON v. GALLEY.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court Refused—Absence of Special Circumstances.

Motion by the plaintiff for leave to appeal to the Court of Appeal from the order of a Divisional Court, ante 754, affirming the judgment of LATCHFORD, J., at the trial, dismissing the action.

C. E. Macdonald, for the plaintiff.

F. J. Dunbar, for the defendant.

MAGEE, J.A.:—The action is for damages for injuries from an alleged defect in a plank walk constructed in front of the defendant's row of houses, and on ground the character of which is in dispute as being or not being the private property of the defendant or a public highway.

After findings of the jury as to negligence of the defendant, the action was dismissed by the learned trial Judge, on the ground that the locality was a public highway. He also considered that the particular occurrence was not one which, under the circumstances, it was the defendant's duty to guard against.

The Divisional Court on the plaintiff's appeal affirmed the judgment.

Both Britton, J., and Riddell, J., agreed with the learned trial Judge that the locality was a public highway, and both were of the opinion that, if it were so, then there was not liability, and if it were not so, then there was none. The learned Chief Justice agreed in the result. There is no difference of opinion between any of the four Judges before whom the case has come. I see no reason to question the decision arrived at. The plaintiff has had one appeal. The defendant, owing to the financial circumstances of the plaintiff, has to pay her own costs in any case. There is no general question of importance which would be conclusively settled by this action. I do not think it is a case for granting leave to appeal.

The application is dismissed with costs.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. JUNE 10TH, 1910.

*REX v. GRAVES.

Appeal—Habeas Corpus—Refusal to Discharge Prisoner—Jurisdiction of Divisional Court—Liquor License Act—Conviction for Second Offence—Proof of Previous Conviction.

Appeal by the defendant from the order of SUTHERLAND, J., ante 787, refusing an application, on the return of a writ of habeas corpus and certiorari in aid, to discharge the defendant from custody under a conviction for a second offence against the Liquor License Act.

The appeal came on for hearing before FALCONBRIDGE, C.J. K.B., BRITTON and RIDDELL, JJ.

J. B. Mackenzie, for the defendant.

J. R. Cartwright, K.C., for the Crown, objected that an appeal did not lie to a Divisional Court.

The appeal was heard subject to the objection.

RIDDELL, J., wrote an elaborate opinion in which, before dealing with the question of jurisdiction, he passed upon the various objections raised by the defendant. He was of opinion that the previous conviction was not proved, and that the conviction for a second offence could not stand. He then considered the question of jurisdiction, and came to the conclusion that a Divisional Court had no jurisdiction, and that the appeal should be dismissed without costs.

FALCONBRIDGE, C.J.:—For the reasons given by my brother Riddell, I agree that we ought to follow Re Harper, 23 O. R. 63. That case was, it appears, not cited to the Court which decided Rex v. Teasdale, 20 O. L. R. 382.

It is unnecessary for me, therefore, to express any opinion as to the other questions so elaborately discussed by my brother Riddell, but I do not wish to be understood as dissenting from his conclusions.

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

It is very unfortunate that the opinions of different Divisional Courts should be thus opposed toto cœlo the one to the other, and it is to be hoped that in a proper case an authoritative judgment may be obtained from the Court of Appeal.

The appeal will be dismissed without costs.

BRITTON, J., for reasons stated in writing, agreed that the previous conviction was not proved and that the conviction for a second offence could not stand; and was also of opinion, retaining the opinion expressed by him in Rex v. Teasdale, 20 O. L. R. 382, that the appeal lay. He was, therefore, in favour of allowing the appeal and discharging the defendant from custody.

Appeal dismissed for want of judisdiction, without costs; BRITTON, J., dissenting.

KAPPELE, OFFICIAL REFEREE. JUNE 11TH, 1910.

RE STANDARD MUTUAL FIRE INSURANCE CO.

MUSSON'S CASE.

Company—Insurance Company — Winding-up—Contributory — Holder of Unpaid Shares upon Acknowledged Trust—Liability —Ontario Insurance Act.

Application by the liquidator of the company, in winding-up proceedings, to place the name of T. C. Musson on the list of contributories in respect of the sum of $1,800, being the amount unpaid on 20 shares of stock standing in the name of Musson in trust for the United Fire Agencies Limited.

E. P. Brown, for the liquidator.

Shirley Denison, for Musson.

THE REFEREE:— . . . I find, upon the evidence, that T. C. Musson was a nominee of the United Fire Agencies Limited. who held a large number of shares of the company in liquidation, and that the shares were originally transferred to T. C. Musson as such nominee, and were always so held by him, and the 10 per cent paid on them was paid by the United Fire Agencies Limited.

They at one time stood in the name of "T. C. Musson in trust," but, either at his request or at the request of the company in liquidation (from whom the request came can, in my opinion, make no difference), the shares were transferred from "T. C. Musson in trust" to "T. C. Musson in trust for the United Fire Agencies Limited."

The president of the company in liquidation was also the president of the United Fire Agencies Limited, and was aware that Musson held the shares in the way mentioned. The manager of the company in liquidation was also the manager of the United Fire Agencies Limited, and on the 4th November, 1908, gave Mr. Musson, at his request, the following letter:— . . .

[The letter acknowledged that Musson held the 20 shares in trust for the United Fire Agencies Limited.]

Upon these facts Mr. Denison argues that Musson was simply the agent for the disclosed principal, the United Fire Agencies Limited, and that in law the principal . . . should be placed on the list of contributories, and not Musson; . . . that sec. 51 of the Winding-up Act does not create any liability against a shareholder, but only provides the machinery for working out such liability as in law may exist against him; . . . that there are no such provisions in the Ontario Insurance Act, R. S. O. 1897 ch. 203, which governs the company in liquidation, as are contained in the Ontario Companies Act, namely, secs. 66, 71, and 72; that the Insurance Act . . . leaves the question as to the real shareholder to be determined according to the usual principles of law; and that . . the disclosed principal should be held liable, the agency not being disputed.

On the other hand, it was contended by Mr. Brown, counsel for the liquidator, that at law the person who was the shareholder was liable, and that liability remained, no matter in what capacity he held the shares, unless it was in any way limited by any particular statute; that even under the Ontario Companies Act Musson would have to be placed on the list of contributories, as his case does not come within either sec. 71 or sec. 72, as he is neither a trustee, in the sense that he represents any estate, nor a pledgee.

In this case there is no trust estate, but Musson was simply the nominee of the United Fire Agencies Limited for the purpose of holding these shares and representing them as a director on the board of directors of the company in liquidation.

I have come to the conclusion that where, as in this case, A. holds shares in trust for B., in the absence of any statutory provision to the contrary, even although B. is named, A. must be put

on the list of contributories as the shareholder liable. B. is not the shareholder, but A. is.

This case is entirely governed by the Ontario Insurance Act, R. S. O. 1897 ch. 203. Section 21 of that Act provides that "every subscriber shall, on allotment of one or more shares to him, become a member of the company, with all incidental rights, privileges, and liabilities." This is, of course, simply a statement of general company law. A shareholder subscribing for shares was always liable, irrespective of any statute, for the amount of his subscription, and in the same way any transferee was always liable for the unpaid amount owing on any shares.

Company law never recognised any one but the actual shareholder, and the fact that he was a trustee made no difference. Different statutes have modified the general law, such as secs. 66, 71, and 72 of the Ontario Companies Act, and secs. 52, 53, 125, and 130 of the Bank Act; but there are no provisions under the Ontario Insurance Act . . . which in any way affect the common law liability of the holder of unpaid shares in a company.

The sole question before me is, who is legal owner of the shares? . . . I think to this there can be only one answer—Musson. Shares are personal property and governed by the same laws as chattels personal, and it is elementary that, if a chattel is delivered to A. in trust for B., A. has the legal ownership and B. the equitable.

It seems clear to me that Musson is the shareholder in respect of these shares, and is liable to contribute the amount unpaid thereon, viz., $1,800: Winding-up Act, R. S. C. 1906 ch. 144, sec. 51.

I do not think the law applicable to principal and agent in ordinary contracts . . . can be given effect to in determining the legal ownership of the shares. Whatever the rights as to the shares are as between Musson and the United Fire Agencies Limited, that is collateral to the direct question, who is the shareholder in law and liable to contribute? . . .

[Reference to Falconbridge on Banking and Bills of Exchange, p. 102, notes to sec. 53 of the Bank Act; Parker and Clark on Company Law, pp. 440, 468; Masten's Company Law, p. 136; Buckley on Companies, ed. of 1909, pp. 76, 77, 78; Lindley on Companies, 5th ed., pp. 80, 805; Muir v. City of Glasgow Bank, 4 App. Ca. 337, 355, 364; Hoare's Case, 2 J. & H. 229; In re National Finance Corporation, L. R. 3 Ch. 791; Massey's Case, [1907] 1 Ch. 582; Schimf v. Lehigh Valley Co., 86 Pa. St. 378;

McCord's Case, 21 O. R. 264; Re Central Bank, Henderson's Case, 17 O. R. 110.]

The result is, that Musson must be placed on the list of contributories for the sum of $1,800, being the amount unpaid on his shares, with costs.

RIDDELL, J. JUNE 16TH, 1910.

*PRICE v. PRICE.

Husband and Wife—Alimony—Wife Living in Husband's House and Being Supplied with Food—Refusal of Husband to Supply Clothing—Remedy.

Action for alimony.

G. F. Mahon, for the plaintiff.

J. W. Mitchell, for the defendant.

RIDDELL, J.:—The plaintiff sues her husband, alleging in the statement of claim that shortly after the marriage he began to exhibit a very bad temper, and she had to leave him . . . ; that he struck her frequently, tore her clothes, etc., neglected her, and at times has failed to provide her with proper food, fuel, clothing, and medical attendance.

In August, 1905, an agreement for separation was entered into, under which they lived apart for a year; but in August, 1906, they came together again. The defendant resumed his cruel treatment; in January, 1908, the plaintiff, the defendant, and family, removed to Cobalt; in April, 1909, he kicked her out of bed, and since that time they have been occupying separate beds; the defendant has neglected and refused to provide the plaintiff with sufficient money and clothing, and in January, 1910, notified the keepers of stores in Cobalt not to supply her with goods upon the defendant's credit. They are still occupying separate apartments, and she claims alimony. . . .

At the trial the plaintiff was called as a witness, and it appeared that she was living under her husband's roof, though not occupying the same bed, and she was supplied with food. She did not desire resumption of marital intercourse, but did want more than just her living, and I was asked to make an order that the defendant should pay her so much a month or so much a week, she living all the time under his roof, and never, since they came together after the temporary separation, having left his roof, as she had no means of clothing herself, and the defendant had notified the keepers of stores not to supply her with clothing.

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

Upon these facts appearing, and the nature of the claim being explained by the plaintiff's counsel with his client in the box, I refused to go on with the inquiry as to the alleged previous cruelty, etc. The right to grant alimony is found in the Ontario Judicature Act, sec. 34. . . . I can find no precedent for granting alimony in such circumstances. . . . .

[Reference to Lush on Husband and Wife, 3rd ed., p. 19.]

Divorce a vinculo could not be granted for such a cause, as that required adultery in the offending husband; but, on a proper case being made out, a divorce a mensa et thoro under the old practice would be adjudged, with alimony as an incident. But I can find no case in which such a decree has been awarded to a wife who has continued to occupy, with her husband, her husband's house.

I have in Forster v. Forster, ante 93, considered the law as to a decree for restitution of conjugal rights; and can find nothing in this case which would indicate that the plaintiff would, if in England, be entitled to such a decree.

And I can find no case either in England or Ontario in which a wife has been awarded alimony in such circumstances—and I shall not make a precedent.

In my view, the law, so long as a wife remains in her husband's house, enables her to enforce the marital obligation to supply her with clothing only by a circuitous route—by pledging the credit of her husband for necessaries: Schouler, sec. 61; . . . Debenham v. Melton, 5 Q .B. D. 394, 398.

The action should be dismissed, with costs payable as provided in Con. Rule 1145; the dismissal, of course, to be without prejudice to any action other than for alimony.

RIDDELL, J. JUNE 16TH, 1910.

*GRILLS v. FARAH.

Company — Judgment against — Action by Judgment Creditor against Shareholder—Unpaid Shares — Counterclaim against Company—Order Striking out—Ontario Companies Act, 7 Edw. VII. ch. 34, secs. 68, 69—Execution Returned Unsatisfied —Absence of Intention to Cause Sheriff to Seize—Defence—Set-off—Con. Rule 251—Claim Sounding in Damages—Dismissal of Action—Effect on Future Action.

The plaintiff on the 7th January, 1910, recovered a judgment against the National Mining and Development Co. (incorporated

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

under the Ontario Companies Act) for $674.08 damages and $22.54 costs. On the same day a writ of fi. fa. was sent to the sheriff of Nipissing with an intimation that the plaintiff's solicitor was desirous that the sheriff should make a return of nulla bona. The sheriff, without inquiring as to available assets, signed an indorsement on the writ: "I certify that there are no goods and chattels in my bailiwick that I can levy upon as I am commanded by said writ of fi. fa." The writ was not returned, but remained in the sheriff's office.

On the 11th February, 1910, this action was begun to recover $500 from the defendant as the holder of 500 shares, unpaid for, in the capital stock of the above-mentioned company.

The defendant delivered a statement of defence and counterclaim, styling the counterclaim between himself as plaintiff and the above-mentioned company as defendants — apparently not making the plaintiff in the action a defendant by counterclaim. The defence was a simple denial. By the counterclaim Farah alleged that he sold the company certain property for $2,468, and agreed to accept 2,468 shares of paid-up stock therefor; that he subscribed for 500 shares as part of the 2,468; that the company did not deliver the shares; that the shares had no market value; that the company owed him $2,468 as the purchase price of the property; that Grills and his father had not paid for their shares; and that Grills and the company were acting in collusion in the matter of the writ of fi. fa. and direction to the sheriff. Farah claimed $2,468 from the company; and submitted that the action of Grills should be dismissed with costs.

The plaintiff replied specially; and the company put in a defence to the counterclaim upon the merits.

A. G. Slaght, for the plaintiff.

F. L. Smiley, for the defendant.

M. G. V. Gould, for the company.

RIDDELL, J.:— . . . At the opening of the case at North Bay non-jury sittings, the company moved to strike out the counterclaim. It was made plain by statements of Farah's counsel that his real claim against the company was for the non-delivery of the 2,468 shares at a certain time at which, Farah contended, they were worth 60 to 80 cents on the dollar—the company retaining them until they had become worthless. I struck out the counterclaim, with costs as of a motion only.

We have recently in Thompson v. Big Cities Realty and Agency Co., ante 933, considered the case of a counterclaim. In the pre-

sent case it is quite clear . . . that the claim attempted to be set up . . . is not "relating to or connected with the original subject of the cause or matter" so as to come within the Ontario Judicature Act, sec. 57 (7)—it is a claim sounding in damages against the company only. I could have got over the irregularity of claiming simply against the company, and leaving out of the style of cause the name of the plaintiff in the action—but the facts are conclusive.

Farah appeals to the Ontario Companies Act of 1907, 7 Edw. VII. ch. 34, sec. 69, "Any shareholder may plead by way of defence . . any set-off which he could have set up against the company"—with certain exceptions. . . . For the purpose of the disposition of the counterclaim, it is sufficient to note that this section allows the set-off to be pleaded against the claim made in the action only, and not against any one other than the plaintiff. With that defence the company has nothing to do; it is between the plaintiff and defendant only.

At the trial I expressed great doubt whether the plaintiff had proved himself within sec. 68 of the Ontario Companies Act of 1907, which provides that in actions of this kind the "shareholder . . shall not be liable to an action . . before an execution against the company has been returned unsatisfied in whole or in part." Further consideration has convinced me that my doubt was well-founded.

The statutory provision for making a judgment against a company available against a holder of unpaid shares is in lieu of the common law practice by way of sic. fa. . . .

[Reference to Cross v. Law, 6 M. & W. 217, 223; Brice v. Munro, 12 A. R. 453, 459; 24 Vict. ch. 18, sec. 33 (C.); Gwatkin v. Harrison, 36 U. C. R. 478; Page v. Austin, 26 C. P. 110; Moore v. Kirkland, 5 C. P. 452, 457; Jenkins v. Wilcock, 11 C. P. 505, 508; Shaver v. Cotton, 23 A. R. 426, 431.].

I am not satisfied that there was no property exigible under the writ—but, even if such were the case, I do not think the plaintiff is advanced. "It may be that the company had no goods which were exigible under execution at the time the writ was placed in the sheriff's hands, but, if there were any, the sheriff was prevented from seizing and selling them by the plaintiff himself:" per Burton, J.A., in Shaver v. Cotton, 23 A. R. at p. 431. . . . In the present case the sheriff never was intended to seize any goods, if such there were.

If the plaintiff could get over this initial difficulty, I think he should recover. There is no necessity for calls upon the stock

having been made: Moore v. Kirkland, 5 C. P. 452. Nor do the facts as alleged in the so-called counterclaim, so far as they are proved, afford a defence. Although I dismissed the company from the action as improperly and irregularly brought in, I allowed evidence to be given of any allegations contained in the counterclaim, by way of defence to the action. . . .

The Act of 1885, 48 Vict. ch. 33 (O.), has (sec. 33) the still existing clause, "Any shareholder may plead by way of defence in whole or in part any set-off which he could set up against the company" (save as provided). This has come forward, and, as we have seen, is still law. But, while the statute put the shareholder in a better position in allowing him to plead as a defence any set-off he had against the company, it did not put him in the same position as though the company had been the party suing. . . .

[Reference to Chamberlain v. Chamberlin, 11 P. R. 501; Tidd's Practice, 8th ed., p. 715; 4 Anne ch. 17, sec. 1; Green v. Farmer, 4 Burr. 2220, 2221; 2 Geo. II. ch. 22, sec. 13; 8 Geo. II. ch. 24, sec. 24; Girardot v. Welton, 19 P. R. 162, 165; Stooke v. Taylor, 5 Q. B. D. 569; Bullen & Leake, Precedents, 3rd ed., p. 679; Rule 127, O.J.A., 1881; 48 Vict. ch. 33 (O.); 50 Vict. ch. 8 (O.); Rule 373 (1888); Con. Rule 251 (1897).]

Now no longer has a defendant the right to set up as a defence by way of set-off a claim sounding in damages—he must set it up by way of counterclaim.

In my opinion, the change in the Con. Rule (having . . the effect of a statute) has taken away the right formerly possessed by a defendant of pleading as a defence a claim sounding in damages. The Companies Act of 1907, having been passed with the law in this condition, I am of opinion that the shareholder, had the action been brought by the company, could not have pleaded by way of defence a set-off sounding in damages. But this is not conclusive. He might "set up" such a claim "against the company" if the company sued; and the Act says that he "may plead by way of defence . . any set-off which he could set up against the company." I see no reason why he cannot plead this set-off by way of defence in the present action, although he would need to take another proceeding to set it up had the company been plaintiffs. But, on the facts, the defendant cannot succeed (the 500 shares had nothing to do with the 2,468). There was no binding contract to give the defendant 2,468 or any paid-up shares—and, even if he had a right to receive any shares paid-up, he made no demand or request for them; and, in any event, I am not satisfied that any damage accrued to him.

But, for the reason first given, this action will be dismissed with costs. This dismissal will not prevent another action being brought, as in Barber v. McCuaig, 31 O. R. 593.

BOYD, C. JUNE 17TH, 1910.

*RE STOKES.

Will—Construction—Devise of Dwelling—Lands Enjoyed with—Addition of Buildings after Date of Will—Con. Rule 938—Scope.

Motion by the executors of the will of James Henry Stokes, deceased, for an order, under Con. Rule 938, determining the construction of the will as to the disposition of the testator's property.

To Mrs. Anderson, his adopted daughter, the testator devised (subject to the life estate of his widow) "the dwelling on the south side of Banfield street in which we now reside in the town of Paris."

At the date of the will, October, 1907, the testator and his wife lived in his house in Banfield street. He died in December, 1909, and in the interval he had added two rooms to the original house and removed a barn which was on the rear of the lot to the front, and improved it into another habitable house.

W. M. Charlton, for the executors.

Grayson Smith, for Mrs. Stokes and Mrs. Anderson.

J. E. Jones, for Mrs. Ayres, representing the next of kin.

BOYD, C.:—Rule 938 should be liberally construed so as to include any and every question which may arise in the administration of an estate and such as might be included under the usual administration order as to real or personal property: Re Whitty, 30 O. R. 300: and specifically any question affecting the rights of persons claiming to be devisees or heirs-at-law (sub-div. a).

The question here is whether Mrs. Anderson is devisee of the whole of the lot in Banfield street, or whether there is an intestacy as to part of the lot. . . . I think jurisdiction attaches under the Rule to construe this will and to take such evidence as may assist to understand the situation at the date of the will and the date of the death. The testator intends to deal

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

with all his real and personal estate, and all has vested in his executors, subject to the rights of beneficiaries and creditors, and they may properly as trustees ask in this summary way to have the will construed by the Court. . . .

The structural changes do not, I think, change the area of the benefit intended by the testator in the property described and identified in the will. . . . I should frustrate the will were I to hold that there was an intestacy as to the parts of the lot occupied by the addition of the two rooms and the site of the improved and removed barn.

I declare, therefore, against an intestacy, and am of opinion that the devisee takes the whole premises in Banfield street.

The cases cited by Mr. Grayson Smith, In re Alexander, [1910] W.N. 36, and In re Champion, [1893] 1 Ch. 101, cover both points argued. And as to the scope of the grant or devise of a dwelling or house, I would quote the language of Page Wood, V.-C., in Governors of St. Thomas Hospital v. Charing Cross R. W. Co., 1 J. & H. 400, at p. 404—"It includes not only the curtilage but also a garden attached to the house; and a fortiori any buildings forming part of or appertaining to the messuage would also be included."

Costs out of the estate.

MIDDLETON, J., IN CHAMBERS. JUNE 18TH, 1910.

REX v. PRESTON CO-OPERATIVE ASSOCIATION.

Municipal Corporations—Transient Traders—By-law—Municipal Act, sec. 583—Absence of Evidence that Premises Occupied for Temporary Period—Conviction—Quashing—Costs—Terms.

Motion by the defendants to quash their conviction for an alleged offence against a transient traders by-law of a town.

H. Guthrie, K.C., for the defendants.

A. H. F. Lefroy, K.C., for the informant.

MIDDLETON, J.:—Sub-sections 30-33 of sec. 583 of the Municipal Act, dealing with transient traders, are an ill-digested conglomerate; the original provision, with some modification, is found in sub-sec. 30; the remaining clauses have been from time to time added and modified. It may be that sub-secs. 30 and 31 in some respects overlap, but in their origin and effect they were,

and I think still are, independent enactments. The draftsman who prepared the by-law in question, apparently fearing that otherwise the task of the Court might be too easy, mixed and intermingled these two sub-sections into one composite section of his by-law, and then added to this compound, municipal legislation based upon sub-sec. 14 relating to hawkers and petty chapmen.

Mr. Lefroy admitted that unless the conviction could be supported under sub-sec. 30 it must be quashed. Assuming for this purpose that the by-law is in conformity with the statute, I think he fails.

The by-law may require a license from "transient traders and other persons who occupy premises . . for temporary periods."

The words "who occupies premises . . for temporary periods" apply to "transient traders," as well as to "other persons:" Regina v. Caton, 16 O. R. 11.

In this case there is no evidence whatever that the defendants occupied the premises in question for a temporary period only. It has not been shewn that the defendants are "transient traders." No attempt was made to shew that "the company" had not resided continuously within the municipality, &c., under clause 31 (b). Mr. Lefroy's admission was probably based upon an acceptance of this view.

I am, therefore, relieved from considering the other questions argued, some of which appear formidable.

The conviction will be quashed with costs against the informant. No action to be brought against the magistrates or any one acting on the conviction, and, if the costs are paid, no action against the informant or town.

MIDDLETON, J., IN CHAMBERS. JUNE 18TH, 1910.

RE HARRIS MAXWELL LARDER LAKE GOLD MINING CO. LIMITED.

Company — Winding-up—Petition for—Grounds — "Just and Equitable"—Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 199, sub-sec. 3—Meeting of Shareholders—Proxies—Enlargement—Mismanagement of Company — Substratum — Dissension.

A petition by three shareholders to wind up the company under the Ontario statute 7 Edw. VII. ch. 34, sec. 199, sub-sec.

3, upon the ground that it was "just and equitable that the corporation should be wound up."

F. E. Hodgins, K.C., for the petitioners.

E. P. Brown, for the company.

W. M. Douglas, K.C., for certain shareholders.

MIDDLETON, J.:—The petitioners ask that the petition stand, and that a meeting of shareholders of the company should be called to consider the question.

This is resisted by the company and by a large body of shareholders.

A meeting of shareholders is to be held on Monday to consider the question of an arrangement proposed by the majority of the directors, which, if approved, will enable the company to make one more attempt to conduct operations on a paying basis. The minority of the directors, the petitioners in this matter, do not approve of this scheme and prefer a liquidation. While the petitioners are ready to abide by the verdict of a shareholders' meeting called under sec. 197, they are not willing to accept the finding of the meeting already called, because the majority of the directorate, they say, have proxies which will enable them to control this meeting, and they suggest that these proxies or some of them were obtained by misrepresentation as to the exact nature of the proposed agreement. The petitioners do not represent those from whom the proxies were so obtained, but desire to place the facts before such shareholders, so that they may, if they so desire, revoke the proxies in question.

This enlargement is resisted by the company, upon the ground that the petition does not disclose any case for a winding-up order.

Other objections are also taken, but it is only necessary to deal with this wide and large question.

There have not been many cases under this statute in Ontario, but in England the provision has been in force for many years, and the scope of the statute is fairly well defined.

Any suspicion that the company is being mismanaged is insufficient. "Profit or loss, prudence or imprudence, are matters with which this Court has nothing whatever to do:" James, V.-C., in Re European Co., L. R. 9 Eq. 131.

Then it is said that "the whole substratum of the company is gone." This is not so when the cases in which that expression is used are looked at. This company has its mining property; the question is, shall the agreement for its operation contemplated be entered into. When a company is incorporated to work a pat-

ent, and the patent is found to be void, then the "substratum is gone:" In re German R. Co., 20 Ch. D. 169; but so long as the property acquired under the charter exists, and there is a means of working it, no order can be made on this ground: see In re Suburban Hotel Co., L. R. 2 Ch. 737: Re Red Rock Mining Co., 61 L. T. R. 785.

A winding-up petition cannot be resorted to merely because there is dissension within the company. The majority must govern. If they act in such a way as to give the minority any actionable grievance, redress must be sought in an action in the Courts, not by the staying of the company by means of the winding-up clauses of the Companies Act: see Re Dewey, 13 O. W. R. at p. 38.

Petition dismissed with costs to the company. No costs to intervening shareholders.

RIDDELL, J. JUNE 18TH, 1910.

ASSELIN v. AUBAIN.

Free Grants and Homesteads Act—Agreement by Locatee to Sell Free Grant Land—Wife not Executing Agreement, though a Party to Negotiations—R. S. O. 1897 ch. 29, sec. 20—Enforcement of Agreement—Misrepresentations—Failure of Proof.

The plaintiffs, husband and wife, on and before the 1st September, 1909, were living and carrying on farming on land in the township of Caldwell, the husband being a free grant locatee. They entered into negotiations with the defendant, a storekeeper in the village of Kerner, and an agreement was made between the husband and the defendant whereby the husband sold his land for $2,000 and his stock and implements for $500, taking in part payment property of the defendant in the village for $2,300, $50 cash, and $150 "when I deliver him the contract in one month," etc. The contract was in writing (in French) and signed by Asselin and Aubain. Forthwith thereafter the parties acted under the agreement, each taking possession of the property exchanged. Within a few days the plaintiff wife insisted that a team of horses should be taken by the defendant at the price of $200 so that the "boot" became $400 instead of $200. This extra $200 was paid, as was the $50 cash.

On the 15th October, 1909, Asselin got a free grant patent, and a certificate of ownership was issued based upon this patent, 3rd November, 1909.

The plaintiffs went into possession of the Kerner property, bought the stock in trade of the defendant, and the wife carried on business as a grocer for some time.

On the 18th November, 1909, the plaintiffs brought this action, alleging that the agreement was obtained by misrepresentation, fraud, and duress; that the wife was not a party to it; that the land was located within 20 years, and specially pleading R. S. O. 1897 ch. 29, sec. 20. They asked that the agreement be set aside as fraudulent; that possession of the land and chattels be ordered and an account taken of the chattels received by the defendant; mesne profits; and damages for misrepresentation.

The defendant set up the contract as modified in respect of the "boot;" that he had, with the knowledge of the plaintiffs, sold some of the chattels received by him; that he was willing and ready to pay the $150 still unpaid and to deliver a deed of the Kerner lot; and counterclaimed for specific performance of the contract. The Statute of Frauds was not pleaded.

M. G. V. Gould, for the plaintiffs.

C. McCrea, for the defendant.

RIDDELL, J.:— . . . I find as a fact, upon the evidence, that the negotiations were conducted in an open and honest manner; there was no deception or fraud, undue or any influence, on the part of the defendant, who was not, I find, anxious for the transaction to go through, but both the plaintiffs, and especially the female plaintiff, were. The plaintiffs thoroughly understood the whole transaction and the effect of the agreement ultimately signed—and the agreement was the deliberate and fully considered and approved act of the parties thereto—the female plaintiff being in the same state of mind as the parties. The defendant's account is wholly to be accepted. . . .

The plaintiffs wholly fail and the defendant wholly succeeds as to the facts; but the plaintiffs rely upon the statute R. S. O. 1897 ch. 29, sec. 20, and the fact that the female plaintiff did not sign the agreement. She did not sign any agreement, but she took part in making the bargain, and was in everything but form a party to it—indeed the bargain may more properly be considered hers than her husband's. . . .

The statute referred to by the plaintiffs, R. S. O. 1897 ch. 29, sec. 19, is totidem verbis R. S. O. 1887 ch. 25, sec. 16, and this has been considered in Meek v. Parsons, 31 O. R. 529. . . . If Chaprewski v. Campbell, 29 O. R. 343, is opposed to this decision, it must be considered overruled. At all events, Meek v. Par-

sons standing unreversed and not overruled, I am bound by that decision. . . .

The female plaintiff is in no letter position than the wife in Hoig v. Gordon, 17 Gr. 599: she allowed her husband to deal with this land as though he could dispose of it without her concurrence in the document—indeed the fact is that she herself did the bargaining, and should be held to have agreed that the whole property should be disposed of. Her husband was the only person to take out the patent: Rogers v. Lowthian, 27 Gr. 559: and I think that he took it as trustee for the defendant.

The same order should be made as in Meek v. Parsons, 31 O. R. at p. 536: the defendant to pay the $150 still unpaid, and make a conveyance of the Kerner property, and the plaintiffs to pay the costs—the defendant may, instead of paying the $150, apply it pro tanto upon his costs. . . .

RIDDELL, J. JUNE 20TH, 1910.

DEVLIN v. RADKEY.

Vendor and Purchaser—Contract for Sale of Land—Possession Taken by Purchaser—Vendor without Patent for Land—Purchaser Failing to Make Payments—Time—Right of Vendor to Rescind—Purchaser Treating Contract as in Force—Right of Vendor to Regain Possession — Improvements Made by Purchaser—Lien for—Damages—Default—Costs.

The plaintiff, being the owner of some interest in the north half of lot 19 in the 13th concession of the township of Widdifield, on the 17th January, 1906, entered into an agreement to sell that half lot to the defendants for $600, covenanting to convey and assure to them "by a good and sufficient deed Crown land assignment all her interest in the said lands and premises." The purchase money was to be paid by instalments; time was to be of the essence of the agreement; and, unless the payments were punctually made, the plaintiff was to be at liberty to resell.

The defendant Rowe went into possession and made improvements of a permanent value. Up to the 5th March, 1907, $320 had been paid under the agreement. Rowe, at the time the contract was made, believed that the plaintiff had obtained a patent for the land, and that she intended to sell him and his co-purchaser the fee simple. The plaintiff had not the patent, but represented that she had, intending to get it before giving a deed.

After the defendant Rowe had made a payment on the 5th March, 1907, he found that the plaintiff had not the patent for the land, and, apparently to save himself, he tried to be located for the land, stopping payment of any further amount to the plaintiff. He did not stop improving the land. He could and would have raised the money at any time to pay if the plaintiff had had the land to give him.

The plaintiff obtained a patent in April, 1908, but this was set aside, and the land was not patented at the time of this action.

Radkey transferred his interest to Rowe on the 17th July, 1906.

This action was begun in December, 1908, against both Radkey and Rowe, but was discontinued against Radkey. Judgment for possession was granted by a Local Judge against Rowe on the 19th February, 1909; but this was set aside on the 27th April, 1910, and, upon the defendant paying $470.70 into Court, he was allowed to retain possession until the trial.

The plaintiff asked possession of the land, an account of the profits, damages, and an injunction; she did not offer back the money she had received nor offer to pay for the improvements.

The defendant claimed specific performance and damages for illegal ejection by the sheriff under the judgment afterwards set aside.

J. McCurry, for the plaintiff.

G. H. Kilmer, K.C., and J. M. McNamara, K.C., for the defendant Rowe.

RIDDELL, J.:— . . . The contract provides for the vendor allowing the purchaser to occupy and enjoy the land until default in payment of the purchase-price or interest on the days and times above mentioned; but the clause making time the essence of the contract makes no provision for the contract becoming void upon failure to pay. The whole contract, however, makes it plain, I think, that, upon non-payment of any of the purchase money, the vendor could re-enter and resell the land. If she had sold, with or without re-entry, it could not be contended that she had not the power to make a good title to the new purchaser. The provision just mentioned does not in terms put an end to the agreement and to the rights of the purchaser upon default, but it is clear law that, upon non-payment of any instalment, the vendor had the right to rescind. I do not find any such act of waiver as would deprive her of this right to rescind.

Now, as to the defendant. When he discovered, as he did in 1907 (and for certain in September, 1908, at the latest), that he had been deceived in the title of the vendor, he might then have repudiated the contract and received back his purchase money and obtained such damages as he was entitled to: Webb v. Roberts, 16 O. L. R. 279. If he did that, he must needs give up possession of the property, as, if the contract was voided, he must be a trespasser. He remained in possession, and now expressly affirms the contract and insists on its terms. The contract, then, must be considered as in full force, and, under such cases as Labelle v. O'Connor, 15 O. L. R. 519, and cases therein cited, I think effect must be given to the claim for possession. Under the same authority, the amounts paid must be returned to the defendant.

As to the value of his permanent improvements, I find as follows. The extent by which the value of the land was enhanced by lasting improvements made by Rowe under the belief that the land was his own, subject to the payment of the purchase-money still unpaid, and without notice or knowledge that the vendor had not the patent, I fix at $340. Since he knew the vendor had not the patent, he has made further improvements, under the belief that the land was his own subject to the payment of the purchase-money still unpaid, to the further amount of $280. I do not think, however, that he has any lien for these sums. He has lost the land by his own default. The damages he suffered by being put out by the sheriff are in the same position; it was his own fault; he should have paid the purchase-money, and at least have appeared and prevented the motion for judgment going as it did when unopposed. Had he pursued a different course, and offered at the proper time to complete with a reduction of the price, he might possibly have had some claim under the principle referred to in Tomlin v. Luce, 43 Ch. D. 191; but that is now out of the question.

The plaintiff's claim for damages by reason of the defendant not performing settlement duty, and thus preventing her retaining the patent, is equally baseless—the whole trouble was due to herself; and, had the defendant acted somewhat differently, she might have found herself in a difficulty. I do not give effect to this claim.

As to costs, neither party is without blame, and I shall, in the exercise of my discretion, give no costs.

Any benefit the defendant has received from possession of the premises is more than offset by the valuable improvements he has made.

There will be an order for possession, upon the money paid on the contract being repaid to the defendant with interest; the money in Court to be repaid out to the defendant.

MEREDITH, C.J.C.P. JUNE 20TH, 1910.

*CANADIAN RAILWAY ACCIDENT CO. v. WILLIAMS.

Execution—Sale of Interests in Oil Leases—Goods or Lands—Construction of Leases—Incorporeal Hereditaments—Profit à Prendre.

Motion by the defendants Williams and Aitkin to restrain the plaintiffs and the Sheriff of the County of Kent from selling under the plaintiffs' execution the applicants' interests in certain "oil leases" as being goods liable to seizure under execution. The leases were made by the owners of certain lands in the county of Kent to one Michael Egan, who had executed a declaration that he held certain undivided interests in them in trust for the applicants.

H. S. White, for the applicants.

J. M. Ferguson, for the plaintiffs and the Sheriff.

MEREDITH, C.J.:— . . . These oil leases are in substantially the same form as the instrument the effect of which was considered by the Chancellor in McIntosh v. Leckie, 13 O. L. R. 54, and the question is, whether they are saleable as goods under the execution. I am of opinion that they are not. . . .

[Reference to McIntosh v. Leckie, at p. 57 ("it is a profit à prendre"); Duke of Sutherland v. Heathcote, [1892] 1 Ch. 475, 483; Wickham v. Hunter, 7 M. & W. 62, 78; McLeod v. Lawson, 8 O. W. R. 213; Gowan v. Christie, L. R. 2 Sc. App. 273; Coltness Iron Co. v. Black, 6 App. Cas. 315.]

An order must, therefore, go directing the sheriff not to sell the interests in question except as interests in land and after compliance with the rules as to sales of land under execution.

The plaintiffs must pay the costs of the application.

DIVISIONAL COURT. JUNE 20TH, 1910.

*DAVIS v. SHAW.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Option—Withdrawal before Acceptance—Notice—Sale to Another—Construction of Contract—Consideration.

Appeal by the defendant from the judgment of SUTHERLAND, J., ante 358, in favour of the plaintiff in an action for specific

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

performance of the agreement contained in the following document:—

"I agree to purchase from James Shaw the brick house on Wortley road with feet to the south of the dwelling, making a roadway to the back yard, that is, a line to the back fence where there is a jog and from that to Wortley road—the price being $2,850. Evans Davis" (the plaintiff).

"I, James Shaw, agree to sell the above property for the above stated sum. I also promise to give the purchaser the option of purchasing the vacant lot to the south of this lot for the sum of $1,000, providing this offer be accepted within one year from date. Dated at London, May 8th, 1908. James Shaw" (the defendant).

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

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

I. F. Hellmuth, K.C., and J. H. A. Beattie, for the plaintiff.

FALCONBRIDGE, C.J.:— . . . Regarding the latter part of the memorandum signed by the defendant as a mere offer or option, it is quite clear that it might be withdrawn before acceptance without any formal notice to the plaintiff, and that it is sufficient that the plaintiff had actual knowledge that the defendant had done an act inconsistent with the continuance of the offer, i.e., selling part of the "vacant lot" to Smith: Dickinson v. Dodds, 2 Ch. D. 463, referred to in Savereux v. Tourangeau, 16 O. L. R. at p. 610.

But it is contended that the offer is an integral part of the agreement for the sale of the land and premises referred to in the first part of the memorandum, so as to supply a consideration sufficient to support the "promise" made in the latter part.

I am unable to accede to this view. The transaction relating to the brick house and premises was a matter by itself. It was carried out by the payment of the purchase-money and delivery and registration of the conveyance. I cannot consider the option granted to have been a part of the other contract in such a manner as to justify our regarding the consideration of the latter as supporting the option.

No Canadian or English authority was cited on the point. I have looked at all the cases in the United States Courts (except one in 27 Ind., that volume not being on the shelf) referred to by the learned author of the article in 36 C. L. J. at p. 529, note (g). They are one and all cases of options to purchase contained

in leases—it being held that the rent reserved in a lease is a sufficient consideration for an agreement by the landlord therein contained to convey the land to the tenant upon the expiration of the term and upon payment of an agreed purchase-price. I think these are all cases of covenants under seal, but at any rate they have no application to the point now under consideration.

In my opinion, the judgment . . . must be set aside, and judgment entered for the defendant with costs of the appeal only.

The action will stand dismissed without costs.

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

RIDDELL, J., agreed in the result.

MEREDITH, C.J.C.P. JUNE 21ST, 1910.

*STEPHENS v. RIDDELL.

Company—Assignment of Amount Due by Subscriber for Shares—Security—Validity—Action by Assignee — Defence—Misrepresentations—Winding-up Order Made before Repudiation—Subscriber Escaping Liability as Contributory by Reason of Assignment—Approbation—Election.

Action to recover $1,000. The plaintiff claimed under an assignment dated the 16th July, 1907, made by an incorporated company, Shortells Limited, to him, of $1,000 alleged to be due by the defendant in respect of 20 shares of the capital stock of that company, for which the defendant was a subscriber, and of which he appeared on the books of the company as the registered owner.

The defendant set up: (1) that he was induced to subscribe for the shares by the fraudulent misrepresentations of the agent of the company who obtained his subscription; (2) that (as was the fact) the assignment to the plaintiff was a security only for $1,000 which the company had borrowed from him, and that the directors had no authority to borrow, and the assignment was, therefore, invalid.

F. W. Carey, for the plaintiff.

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

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

MEREDITH, C.J.:— . . . An order was made for the winding-up of the company under the Winding-up Act of Canada before any steps were taken by the defendant to repudiate the shares in question, on the ground of the misrepresentation . . . . or on any other ground; and, even if he had made out a case which would, before the commencement of the winding-up, have entitled him to rescission, as to which I express no opinion, it is not open to him to claim that relief now.

If he would have had no answer, on the ground I am considering, to an application by the liquidator to place him on the list of contributories—and it is clear that he would not—I see no reason why he should not be precluded in the same way from setting it up as an answer to the plaintiff's claim, for the effect of his succeeding—the unpaid calls being held by the plaintiff as security only for the $1,000 lent by him to the company—would be that the plaintiff's claim would be unsecured, and he would be entitled to rank with the other creditors on the assets in the liquidation, and so the fund which by the winding-up order became available for the payment of the creditors would be depleted to the extent of the amount of the unpaid calls.

If these be not an answer to the objection, there is another answer, not only to it, but to the defence based on the alleged invalidity of the assignment . . . which is fatal.

The liquidator sought in the winding-up to have the defendant placed on the list of contributories in respect of the shares in question, and the defendant succeeded in having his name removed from the list, on the ground that the unpaid calls had been assigned to the plaintiff—in other words, by establishing the assignment . . . .

Having escaped from liability as a contributory on that ground, it is not now open to him to attack the validity of the assignment. . . . .

[Reference to Lovitt v. The King, 43 S. C. R. 106, 140, per Duff, J.; Roe v. Mutual Loan Fund, 19 Q. B. D. 347; Smith v. Baker, L. R. 8 C. P. 350, 357; Gandy v. Gandy, 30 Ch. D. 57.]

The plaintiff is, therefore, entitled to judgment for $1,000 and interest thereon from the 1st June, 1907, with costs.

BRITTON, J. JUNE 22ND, 1910.

COUSINS v. COUSINS.

Judicial Sale—Report on Sale—Application to Set aside—Inadequacy of Price—Irregularities—Rights of Purchaser.

Appeal by Alice E. Cousins, Frank C. Cousins, and John B. Cousins from the report on sale of the Local Master at London, on the grounds: (1) that the price was inadequate; (2) that no opportunity was given to the appellants to put in a higher offer; (3) that the sale was in violation of the agreement between the plaintiff's solicitor and Frank C. Cousins, one of the appellants, that notice should be given of any offer; (4) that no notice was given of the time and place fixed by the Master for the consideration of any offer; (5) that the offer was accepted in the absence of the appellants and their solicitors.

P. H. Bartlett, for the appellants.

U. A. Buchner, for the plaintiff.

W. R. Meredith, for the purchaser.

BRITTON, J.:—The land was owned by Esther Cousins, who died in January, 1904. It was devised to Job Cousins for his life, and then proceeds to be divided $2,000 to the children of Walter Cousins, if then living, and $1,000 to John B. Cousins, and balance to be equally divided between Alice E., John B., and Frank C. Cousins.

Job died on the 31st December, 1904. The land should have been sold ere this. It is in the interest of all parties having anything to do with the estate that the long-delayed sale of the land in question should now be made. It is practically admitted that no notice was served on Mr. Scandrett, who was solicitor and was acting for the appellants.

It is true that now a responsible person named Ralph has said that he is prepared to buy the property at $4,000. The Local Master did not know, when he accepted the offer of $3,700, that Ralph would give $4,000, or that any higher offer than $3,700 could be obtained.

The Master, as it appears to me, acted fairly and took every precaution to get the highest price possible for the property. It had been offered at public auction on the 17th November last year. The sale was well advertised by posters and in the newspapers.

No such bid as $3,700 or anything like that sum was offered. Then he had an affidavit of Mr. Thomas Clark, who said that, in his opinion, the premises were worth $4,500, and an affidavit of A. B. Hunt, who thought the property worth $4,300, and an affidavit of David Porter that he thought the value $3,700. Having obtained this information, and not knowing that any one would give more, and it being desirable that the property should be sold, I think it cannot be said that he acted either in haste or that the sale was in any way improvident.

It is unfortunate that now Mr. Ralph comes forward and says he is willing to give $4,000 for the property. The difference is not a great deal, but still the difference of $300 is of importance to those entitled. Then the purchaser has to be considered. He has made his offer in good faith, paid part of the purchase money, has gone into possession, and he has now rights that must be respected. Following the line of cases to some of which I was referred on the argument, I ought not to interfere with the sale.

I have looked at many of the cases cited, and there have been much greater irregularities than are complained of here, without enabling the party dissatisfied to open up a sale. Here a stranger has purchased. He ought not to be affected with any slight irregularities in the conduct of the negotiation by the Master or carrying out the sale: Dickey v. Heron, 1 Ch. Ch. 149. This is still the leading case on this subject. It is said in substance that to open a sale because of irregularities may do a great deal of harm in deterring strangers from bidding at a sale of lands in winding up an estate and in sales in legal proceedings.

See also In re Jelly, Provincial Trusts Co. v. Gamon, 3 O. L. R. 72.

The motion must be dismissed. I will not compel the appellants to pay costs, but they should get no costs. The costs of the plaintiff and purchaser must be paid out of the estate.

GREENHOW v. WESLEY—MASTER IN CHAMBERS—JUNE 16.

Libel—Pleading—Statement of Claim—Plaintiff not Named in Newspaper Article Complained of—Name Supplied to Detective—Relevancy—Malice—Damages—Security for Costs—Publication not for Public Benefit.] — Motion by the defendants to strike out (as raising an immaterial issue), paragraph 6 of the statement of claim in an action for libel, and also for security for costs. The defendants were the publishers of a newspaper which

contained the article complained of as libellous. It appeared that Harry Wong, a Chinese laundryman, was wounded by a shot fired through the window of his shop in Walkerton, and that one Reburn, a provincial detective, had been employed to find who had fired the shot and to prosecute. The article was headed "A Girl's Confession," and stated that "a young lady of Walkerton claims she had a hand in the shooting of the Chinaman." The "young lady' 'was not named in the article, but was spoken of as having been a constant visitor at the laundry and on intimate terms with the Chinaman, and it was said that her visits became "odorous." In the 5th paragraph of the statement of claim the article was set out in extenso, with the innuendo "meaning thereby that the plaintiff had had improper relations with the said Harry Wong, and had been guilty of the indictable offence of having attempted to murder the said Harry Wong, or of having shot and wounded the said Harry Wong, and that she had admitted having done so, and that she was a person of loose, idle, and immoral habits." By paragraph 6 it was alleged that one copy of the newspaper came into the hands of Reburn, and, after having read the article, he went to the defendants and asked them to whom the words referred, and the defendants replied, "To Levi Greenhow's daughter—the one who goes to school." The Master said that the article clearly implied a criminal offence and also threw doubt on the good character of the girl referred to, whoever she was. On the question of relevancy, the Master referred to Major v. McGregor, 6 O. L. R. 528, Hulton v. Jones, [1910] A. C. 20, 24, 26, and Clark v. Cameron, 6 O. W. R. at p. 832, and said that the statement alleged in paragraph 6 to have been made by the defendants would not be evidence to shew that the plaintiff was the person referred to in the publication complained of—that would have to be proved by calling persons, resident in Walkerton, who knew the facts and were acquainted with the plaintiff. But paragraph 6 could not be struck out, because it was relevant as shewing malice, and also as to damages.—As to security for costs, the Master said that the defendants must bring themselves within the provisions of 9 Edw. VII. ch. 40, sec. 12, sub-sec. 2, as the alleged libel certainly involved a criminal charge of a serious nature, and it could not be said that the action was trivial or frivolous; and the defendants did not come within the enactment mentioned, for it could not be said that there was reasonable ground to believe that the publication was for the public benefit. G. H. Kilmer, K.C., for the defendants. M. C. Cameron, for the plaintiff.

CAMPBELL v. ELLMAN—MIDDLETON, J., IN CHAMBERS—JUNE 16.

Judgment Debtor—Examination — Concealment of Property —Unsatisfactory Answers—Committal—Leave to Apply for Discharge.]—Motion by the plaintiff to commit the defendant, his judgment debtor. It appearing from the examination of the judgment debtor that he had concealed and made away with his property in order to defeat and defraud the plaintiff, one of his creditors, and further that upon the examination he had refused to declare his property and had not made satisfactory answers concerning the same, he was ordered to be committed to the common gaol of the county in which he resided, for the term of 12 months; reserving to him liberty to apply for his discharge at any time after being taken into custody and before the expiry of the period for which he is committed; and he was also ordered to pay the costs of these proceedings. Shirley Denison, for the plaintiff. R. U. McPherson, for the defendant.

BUCOVETSKY v. COOK—RIDDELL, J.—JUNE 17.

Vendor and Purchaser—Contract for Sale of Land—Possession —Improvements—Fraudulent Transfer by Vendor to Another—Land Titles Act — Depriving Purchasers of Lien — Judgment against Vendor for Amount.]—Action to set aside a transfer of a lot of land in Elk City made by the defendant Cook to the defendant Henderson, "fraudulently and with intent to defeat the plaintiffs' claim . . . and deprive them of the lot." An agent of the defendant Cook on the 23rd March, 1908, sold the lot to the plaintiffs for $125; the plaintiffs paid $25. The sale was approved by Cook. The plaintiffs went into possession and erected a building on the lot at a cost of $1,200. The agent of Cook saw the building being put up, but raised no objection; he did ask for money, but was told that the money would be paid as soon as the deed of the lot was given. On the 14th June, 1909, Cook affected to cancel the sale to the plaintiffs, and on the 23rd July, 1909, made a transfer to the defendant Henderson, who obtained a certificate under the Land Titles Act. RIDDELL, J., found that the transfer had been made by Cook fraudulently and with the intent charged; but, while the transaction was suspicious, he was unable to find as a fact that Henderson was a party to the fraud intended by Cook; and, therefore, he was of opinion that the Land Titles certificate could not be vacated, and the result was

that Henderson had, by Cook's act, been enabled to hold the lot free from all claims of the plaintiffs—their lien not coming within the exception of the statute. The defendant Cook set up the Statute of Frauds; but the learned Judge said that it could not be successfully contended that, after the plaintiffs had taken possession of the lot, and, with the knowledge of and without objection by the defendant's agent, put up buildings of considerable value, such an objection could have weight. The plaintiffs, having been deprived of their lien by Cook's wrongful act, were entitled to a personal judgment against him. Action dismissed without costs as against the defendant Henderson. Judgment for the plaintiffs against Cook for $1,700 and costs. A. G. Slaght, for the plaintiffs. G. A. McGaughey, for the defendants.

RE HORTOP—MIDDLETON, J., IN CHAMBERS—JUNE 18.

Lunatic—Committee—Bond—Action to Recover Debt.]—Motion by the committee of a lunatic for leave to withdraw a bond. Order made for delivery up of bond, a new bond being filed, and also authorising the committee to sue for the two debts mentioned in the report, if he is of opinion that there is a good chance of realising upon judgment being obtained, and his solicitor advises that there is a reasonable ground of action. R. U. McPherson, for the committee.

RE MONTGOMERY—MEREDITH, C.J.C.P., IN CHAMBERS—JUNE 21.

Practice—Application for Approval of Lease—Devolution of Estates Act, sec. 25 (b) — "High Court or a Judge thereof" — Forum.]—Motion by an administratrix for "the approval of the High Court or a Judge thereof," under the Devolution of Estates Act, 10 Edw. VII. ch. 56, sec. 25 (b), of a lease of the real estate of the intestate for a term extending beyond the majority of the youngest of the infants entitled as heirs-at-law. Held, that the application should be made to the Court, and not to a Judge in Chambers. F. W. Harcourt, K.C., for the administratrix and the infants.

STRATI v. TORONTO CONSTRUCTION CO.—DIVISIONAL COURT—JUNE 22.

Dismissal of Action—Default in Payment of Costs of Day—Appeal—Extension of Time.]—After the decision of MIDDLETON, J., ante 877, refusing a motion by the plaintiff for an extension of time for payment of the defendants' costs of the day, the plaintiff appealed from the order of LATCHFORD, J., at the trial, requiring the plaintiff to pay the costs of the day as a condition of postponing the trial, and ordering that in default of payment the action should stand dismissed. A Divisional Court (FALCONBRIDGE, C.J.K.B., BRITTON and MIDDLETON, JJ.), allowed the appeal and extended the time for payment of costs for one week from the date of the present order. Costs of the appeal to be costs in the cause. H. S. White, for the plaintiff. Grayson Smith, for the defendants.