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COURT OF APPEAL.

MOSS, C.J.O., IN CHAMBERS. MAY 30TH, 1911.

COUNTY OF WENTWORTH v. TOWNSHIP OF WEST FLAMBOROUGH.

Highway—Township Boundary Line—Deviation—Motion for Leave to Appeal—Appeal Confined to Question whether Road is a Deviation—Municipal Act, 1903, *secs.* 617, 622-624, 641, 648-653.

Motion by the defendants for leave to appeal from a judgment of a Divisional Court, ante 1003, reversing the judgment of MIDDLETON, J., ante 360, dismissing the action.

G. Lynch-Staunton, K.C., for the defendants.
J. L. Counsell, for the plaintiffs.

MOSS, C.J.O.:—The plaintiffs' claim is to recover from the defendants the sum of $627.83, their share of the expense incurred by the plaintiffs in placing and maintaining in a fit and proper state of repair a road spoken of in the judgment of the Divisional Court as the Carroll or Guelph road. The questions in dispute at the trial were whether this road is now part of the town line between the townships of East and West Flamborough, as a deviation within the meaning of the Municipal Act, and whether, assuming it to be so, the plaintiffs complied with the provisions of the Municipal Act as to the proper preliminary proceedings necessary to entitle them to make the expenditure in question, and maintain this action for the recovery of a moiety thereof from the defendants.

The learned trial Judge did not finally deal with the latter question, but dismissed the action upon the ground that the road is not a deviation of the original town line road.

The Divisional Court differed from the learned Judge upon his view of the facts, and the law so far as a question of law

was involved on the question of deviation, and further held that there had been a substantial compliance with the statutory provisions, and that the plaintiffs were entitled to judgment.

The case, as to both questions, seems to have turned largely upon its own special circumstances. The question as to deviation was whether the manner of dealing with the road in its inception was such as to remove it from the joint jurisdiction of the two townships and make it a township road, subject to the sole jurisdiction of East Flamborough.

I am unable to say that there is anything in the circumstances to justify me in treating the case as so exceptional as to warrant a further appeal upon the question of compliance with the statutory preliminaries necessary to entitle the plaintiffs to maintain the action.

In view, however, of the consideration that the determination that the road is part of the town line between the two townships draws with it the further consequence of imposing upon the defendants a permanent liability or obligation in respect of its future maintenance and repair, I give the defendants, if they desire it, leave to appeal upon the sole question whether the road is a deviation of a town line road within the meaning of the Municipal Act.

The defendants to elect within two weeks. If they decide to appeal, the costs will be in the appeal. Otherwise the application is dismissed with costs.

MAY 31ST, 1911.

DOMINION IMPROVEMENT AND DEVELOPMENT CO. v. LALLY.

Limitation of Actions—Real Property Limitation Act—Occupation of Land by Permission of True Owner—Payment of Taxes—Evidence—Estoppel.

Appeal by the defendant from the judgment of BOYD, C., ante 155.

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

C. A. Moss, and H. A. Lavell, for the defendant.

G. H. Watson, K.C., and C. J. Foy, for the plaintiffs.

GARROW, J.A.:—The plaintiffs' paper title to the land in question is not disputed. The defendant never had, and never had any reason to believe that he had, any right or title whatever. The onus was of course wholly upon him to prove by satisfactory evidence such an occupation by him to the exclusion of the plaintiffs and their predecessors as would confer a title under the statute—an onus which in my opinion he has signally failed to satisfy.

In McIntyre v. Thompson, 1 O.L.R. 163, Osler, J.A., quotes with approval from the judgment in the Supreme Court in Sherrin v. Pierson, 14 S.C.R. 581, the following applicable to the facts in this case; "To enable the defendant to recover he must shew an actual possession, an occupation exclusive, continuous, open or visible, and notorious . . . it must not be equivocal, occasional, or for a special or temporary purpose." And Harris v. Mudie, 7 A.R. 414, determined that the doctrine of constructive possession has no application to the case of a mere trespasser such as the defendant originally was: see also Reynolds v. Trivett, 7 O.L.R. 623-632.

The defendant owns the adjoining lot upon which he resides with his family. The lot in question is of rough, uneven surface, cut into by marshes and a lake. It is unsuitable for ordinary agricultural purposes, its value consisting in its minerals for which alone it was purchased by the plaintiffs. There are some fences, but as I understand the evidence, no continuous fence enclosing the whole land. And the use made of the land by the defendant, according to his own testimony, was almost entirely for pasturage purposes. This occupation, originating in trespass, in its nature occasional and imperfect, would probably if it stood alone have been sufficient to confer a title by possession under the circumstances. But it is not necessary to so determine, because there are still greater and more decisive difficulties in the defendant's way.

This use of the land as pasturage, originating as I have said in mere trespass, seems to have been afterwards authorized and continued to the defendant by the owners. And it is even said that a written lease to that effect was executed, although the document itself was not produced. The defendant denied that there had been a lease, but he quite failed to give a reasonable explanation of his own letters, or of the very material circumstance that he had for a number of years paid the taxes and forwarded the receipts to the owners who resided at a distance. There are two of these letters produced, and that they were

written at the request of the defendant there can, from the circumstances in evidence, be no reasonable doubt.

The first dated Nov. 22nd, 1902, written by D. Glossop, says: "James Lally was here to-day and asked me to write you and get your lowest offer in cash for your half interest in Lot 13, in North Burgess, as the lot is convenient to him and he has had the pasture from you for a number of years for taxes and road work. He will purchase the lot," etc. The second is dated Decr. 31st, 1902, and is from the defendant himself, although as he is not a penman it must have been written for him. And in this he says he had received the reply to the above mentioned letter from Mr. Glossop—and after saying that the price quoted is too high, says, "I have been *in charge of the lot* for a long time and I trust you will give me as reasonable a chance as you can, and feel entitled to the first chance to purchase your interest."

These letters alone seem to put the case for the defendant quite out of Court. If, as he says and as the circumstances seem to indicate, "he had been in charge of the lot for a long time," (writing in 1902) he was not, while so in charge for the owners, acquiring title as against them. A caretaker's possession is that of the owner: see Heward v. O'Donohoe, 19 S.C.R. 341.

And there is the further ground that when Mr. Smith representing the plaintiffs went to the land with a view to purchasing, he saw the defendant at his house on his own lot, who shewed Mr. Smith over the property in question, and in answer to questions as to the ownership of it, said that the owner was Mr. McConnell of Ottawa. Acting upon this information Mr. Smith, still acting for the plaintiffs, purchased and obtained a conveyance from Mr. McConnell the owner of the paper title, and entered into possession and spent a large sum of money in mining developments and plant without the slightest objection being made by the defendant, whose only excuse is that he did not claim the mining rights but only the surface. But he did not venture to deny that he had referred Mr. Smith to Mr. McConnell as the owner, or even pretend that he had said anything to Mr. Smith about having an interest in the surface or otherwise in the lands. There are in these circumstances all the elements of an estoppel, it seems to me—in addition to which they also shed light upon the question of whether the defendant was or was not merely a caretaker of the property.

Under these circumstances the defendant's unrighteous attempt to claim the land in question fails, and his appeal should be dismissed with costs.

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

MOSS, C.J.O., and MACLAREN and MAGEE, JJ.A., concurred in dismissing the appeal.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. MAY 27TH, 1911.

RE STURMER AND BEAVERTON.

Municipal Corporations—Local Option By-law—Motion to Quash—Residence—Abandonment of, What Constitutes—Constructive Residence—Animus Revertendi—Irregularities not Affecting Result—Laches and Acquiescence—Curative Provisions of sec. 204 *of Municipal Act.*

Appeal by the applicant Henry Sturmer from the judgment of MIDDLETON, J., ante 1116, on a motion to quash a local option by-law.

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

J. B. Mackenzie, for the appellant.

W. E. Raney, K.C., for the respondent corporation.

BOYD, C.:—"Residence" is a word of flexible import, and as said in Naef v. Mutter, 12 C.B.N.S. 816, at p. 821, has a great variety of meanings according to the subject-matter and the objects and purposes of the legislature. In a poor-law case Blackburn, J., said: "I do not like the phrase 'constructive residence': when a person is physically absent for a time, if he has an *animus revertendi*, his residence continues; and the question in such a case is whether he continues to be resident, or has ceased to be resident by taking up his permanent residence elsewhere": Regina v. Abingdon, L.R. 5 Q.B. 406, at p. 409.

In a franchise case, Ford v. Hart, L.R. 9 C.P. 275, it is held that there may be a constructive residence where there is no actual residence, the person claiming in this way must have the liberty of returning, and also the intention of returning when-

ever he pleases. In a case of like character in the same volume, Brett, J., says: "It is true that when a person keeps the dominion over his house, and goes away for an indefinite time, with the intention of returning at an indefinite time, he may be considered as inhabitant of the house while he is not bodily within the house." That case also decides that "residence" and "inhabitancy" are practically synonymous terms; Durant v. Carter, L.R. 9 C.P. 261, at p. 268. In Beal v. Town Clerk of Exeter, 20 Q.B.D. 300, at p. 301, Coleridge, L.J., says: "Constructive residence may often be easily inferred, as in the case of a barrister on circuit, or a sailor at sea, when there is no doubt of both the power and the intention to return as soon as the circuit or the voyage is over." These observations, which are quite in accord with the view of residence in our election law as defined and held by Osler, J., in the case cited by my brother Middleton, Re Voters' List of Seymour, 2 Ont. El. Cas. 69, are ample authority for deciding that the voter Arthur Jones whose status is attacked (assuming that it is open to attack at this stage) could well claim to be, and swear that he was at the time of the voting, resident in the municipality for one month next before the election. The vote was taken on the 2nd January, 1911; he was then the tenant of his home at Beaverton held since the 7th April, 1909, of which he had been in actual occupation by himself and his family up to the 9th December, 1910. He was in that month called off to Whitby to take the place for a short time of an injured workman, employed as he was by the railway company. This was a temporary call and he did not expect that the removal would be at the outside for more than 2 or 3 months, and so he was told by the company. The tenure or terms of his employment are not in evidence, and there is no foothold for the argument that he had not the power to return at any time without the breach of a legal obligation—if that term is to be imported from the later English cases on the exercise of the parliamentary franchise. He had removed only enough furniture to fit up two rooms at Whitby for temporary occupation with his wife and child, and had left all the rest of his belongings (and some poultry) at his home, which he had locked up, and of which he kept on paying the rent. This is a controlling feature of the case, which, to my mind, shews that his real bona fide and continuing place of residence was where he cast his ballot. He was rightly on the list and rightly voted on that list.

John White's case was cleared up during and at the close

of the argument, and I see no ground for disturbing the finding on that vote.

As to the by-law altering the locus of the polling sub-divisions not being duly filed forthwith after the making thereof under sec. 536 (9), and the right of appeal being given within two months after the filing thereof, ib. (8), I think the objections raised have been properly dealt with in the judgment under appeal. It appears to me to be too late, after the matter has gone to vote on a local option question, to hark back to these preliminaries of procedure with a view of picking flaws, when there is no evidence that anyone has been misled, or that anyone has not had ample opportunity and knowledge of where his vote was to be cast. The greatest publicity is given as to the time and place of voting before the election, and everyone interested had the opportunity of doing his utmost to further or to oppose the success of this appeal to the electorate. This failure to observe the directions of the statute was no doubt an irregularity as to the taking of the poll, but it is not made to appear that it has in any sense affected the result of the election, and the curative section (204) applies to validate at this stage. Apart from the statute the doctrines of laches and acquiescence apply to protect the outcome of de facto elections, when the parties complaining have been aware of the irregularities and have concurred therein by taking part in the election: Regina v. Ward, L.R. 8 Q.B. 210. The cases against allowing parties to play fast and loose in their municipal contests are collected by Harrison, C.J., in Regina ex rel. Regis v. Cusac, 6 P.R. 303.

The other objections argued before us are of less moment and they were all satisfactorily dealt with in the judgment below.

The general result is that the appeal fails and should stand dismissed with costs.

TEETZEL, J.:—I agree in the result.

LATCHFORD, J.:—I agree.

RIDDELL, J. MAY 27TH, 1911.

WILSON v. DEACON.

Contract—Agency—Commission—Sale by Principal—Expressio Unius Exclusio Alterius—Mala Fides of Principal—Damages.

Action to recover commission on sales of patent rights.

G. S. Gibbons, for the plaintiff.
T. G. Meredith, K.C., for the defendant.

RIDDELL, J.:—The plaintiff was an agent for the sale of certain goods; the defendant is an inventor. The defendant had invented a carpet sweeper, and employed the plaintiff to sell the patent rights, even before the patent actually issued. The plaintiff took a good deal of trouble in the matter, and at length by the advice of one Waggoner in Hamilton he had the arrangement put into writing as follows:—

"London, Ont., July 21st, 1908.

Mr. George B. Deacon,
47 Stanley Street,
London, Ontario.

DEAR SIR:—With regard to our conversation concerning the selling of your patent right for Great Britain, Canada, and the United States of America, I am willing to accept twenty-five per cent. of the proceeds received for the sale or sales of said patent rights for carpet sweeper.

It being understood that no other agent will have any power to act in this matter without my instructions while I am acting in your behalf.

I am, Sir,
Yours truly,
(Sgd.) Wm. Wilson.

I agree to the above mentioned condition.
(Sgd.) Geo. B. Deacon."

I accept the plaintiff's evidence throughout, and am of opinion that there was no intention that this agency should be just for the particular occasion. The animus shewn by Edmunds was manifest, and neither his recollection, nor that of the defendant, is to be relied upon where opposed to that of the plaintiff.

Subsequently, and within a short time of the agreement just mentioned the defendant effected a sale to Herson for $5,500 (if indeed the sale was not actually brought about by Waggoner). I think that the defendant acted as he did with the intention and design *mala fide* of preventing the plaintiff from making a commission.

The contract reads that the plaintiff shall receive 25 per cent.

of the proceeds received, etc.; it is plain, however, from the conduct of the parties, and it is admitted by counsel for the plaintiff, that what was meant by this by both parties was that the plaintiff should receive 25 per cent. of the amount received by the defendant—that the total amount received should be divided, four parts to the defendant and one to the plaintiff—the plaintiff thus receiving 20 per cent. of the whole. The contract will bear this interpretation, and this interpretation should be placed upon it.

It is, however, argued that there is nothing in the contract to prevent the defendant selling himself and not through another agent—*expressio unius exclusio alterius.*

Simpson v. Lamb, 17 C.B.N.S. 603, does not go quite that length. There the defendant employed the plaintiffs to sell an advowson, upon an understanding that the plaintiffs should receive a commission of 5 per cent. upon the purchase money if a sale were effected through their agency. The defendant himself sold the advowson for some £15,000 and the plaintiffs claimed damages (equal to 5 per cent. commission) for wrongful revocation of authority. The trial Judge, Cresswell, J., held that the defendant was perfectly justified in selling the living himself. The full Court affirmed this ruling, considering it a case of the agent taking the chance of the large remuneration he would have received had he succeeded in obtaining a purchaser; and consequently the employment was accepted with the implied condition that the authority to sell might be revoked by the principal at pleasure.

It is obvious that such cases are quite different and distinguishable from those in which a commercial agent is appointed for the sale at some particular place of an article of commerce such as coal, etc., at a commission. If one be appointed sole agent in such a transaction, it is not open to the principal to sell himself, or by any agent other than him so appointed: Snelgrove v. Ellingham, 45 J.P. 408, *per* Mathew, J. And this rule is not changed by the addition of a clause in the contract that the principal would not employ another agent at that place: Rhodes v. Forwood, 1 App. Cas. 256. See *per* Lord Hatherley, at pp. 269, 270; Lord O'Hagan, at p. 275. This case is authority against the application of the maxim "*expressio unius,*" etc., to the present case.

The result then is that the addition of the provision not to employ another agent does not advance the position of the principal; but that even with such a clause, in the case of a contract of agency to sell some concrete article under such a contract as

the present, the principal himself is not disentitled to sell if his sale be in good faith, and not a mere trick to defraud the agent.

But this question of good faith is all-important. There was, and could be, no suggestion of bad faith in Simpson v. Lamb, or in a not wholly dissimilar case of Noah v. Owen, 2 Times L.R. 364. But if the principal does the selling himself, or goes through the form of himself selling, in bad faith, and as a trick to deprive the agent of his commission, it is clear from the last named case that an action lies, not for commission indeed, but for damages. See also Rhodes v. Forwood, at pp. 259, 269, 270, 271.

And such are the facts of the present case. The defendant had been brought into communication with Waggoner by the plaintiff—he went himself to see Waggoner when it looked as though a sale could be made, and himself conducted at least in form part of the negotiations. He obtained $500 more in this way than he had previously stipulated for, and I have no kind of doubt that he acted as he did to deprive (if he could) the plaintiff of his commission, and in bad faith. On this finding of fact, the plaintiff is entitled to damages, and these I assess at $1,100. The defendant cannot, I think, set up that Waggoner was to receive half of the plaintiff's commission. That was an arrangement between the plaintiff and Waggoner with which the defendant was not concerned, and it may be that it is not binding upon the plaintiff in the event which has happened.

The defendant must pay the costs.

MIDDLETON, J., IN CHAMBERS. MAY 29TH, 1911.

REX v. WELLS (Two Cases).

REX v. ALDEEN.

REX v. WALDOCK.

REX v. ROE.

Criminal Law—Lord's Day Act—C.S.U.C. ch. 104, *sec.* 1—*Sale of Cigars or Candies on Sunday by Restaurant Keeper—By Proprietor of News Stand in Hotel—By Druggist—"Merchant or Tradesman"—Exercise of Ordinary Calling—Cigar not a Drug—Works of Necessity—Ancillary Business—Differences between Ontario and English Act.*

The defendants in these cases were charged before the Police Magistrate of Toronto with violations of the Provincial Lord's

Day Act, C.S.U.C., ch 104, and acquitted. These decisions were questioned by the Crown, and at the instance of the Attorney-General for Ontario, a stated case in each instance was submitted by the magistrate under sec. 761 of the Criminal Code.

E. Bayly, K.C., and R. U. McPherson, for the Crown.
J. Haverson, K.C., for the defendants Wells and Aldeen.
T. C. Robinette, K.C., for the defendant Waldock.
H. C. Macdonald, for the defendant Roe.

MIDDLETON, J.:—These five cases, all arising under the same statute, C.S.U.C. ch. 104, were argued together and have much in common. In each case an offence is charged against what is commonly called the Provincial Lord's Day Act. I am not told why the Dominion statute is not relied upon, but counsel for the Crown based his case entirely on the Provincial Act.

In Attorney-General for Ontario v. Hamilton Street R.W. Co., [1903] A.C. 524, the Ontario statutes passed since Confederation were held ultra vires, and in Rex v. Yaldon, 17 O.L.R. 179, the Court of Appeal determined that this left the pre-confederation Act still standing, the attempted repeal by Ontario having been, for the same reason, abortive.

The Dominion statute, R.S.C. ch. 153, sec. 16, provides that "nothing herein shall be construed to repeal or in any way affect any of the provisions of any Act or law relating in any way to the observance of the Lord's Day in force in any Province of Canada."

The statute, though obviously derived from, is by no means identical with, the statute of 29 Charles II., still in force in England, and the differences must be kept in mind in considering the cases based upon the English Act. The only section to be considered is sec. 1:—

"It is not lawful for any merchant, tradesman, artificer, mechanic, workman, labourer or other person whatsoever on the Lord's Day to sell or publicly shew forth or expose or offer for sale or to purchase any goods, chattels or other personal property or any real estate whatsoever, or to do or exercise any worldly labour, business or work of his ordinary calling (conveying travellers or Her Majesty's mail by land or by water, selling drugs and medicines and other works of necessity, and works of charity, only excepted)."

The corresponding provisions of the English Act, 29 Car. II. ch. 7, form part of sec. 1, and are as follows:—

"No tradesman, artificer, workman, labourer, or other person

whatsoever shall do or exercise any worldly labour, business or work of their ordinary callings upon the Lord's Day or any part thereof (works of necessity and charity only excepted)"—then follows a penalty: "And that no person or persons whatsoever shall publicly cry, shew forth, or expose for sale any wares, merchandises, fruit, herbs, goods or chattels whatsoever upon the Lord's Day or any part thereof upon pain that any person so offending shall forfeit the same goods so cried or shewed forth or exposed to sale." The more important differences to be noticed are: (*a*) while the English Act makes it an offence for a tradesman, etc., to pursue his ordinary calling upon the Lord's Day, punishable by fine, the offering for sale of any goods on that day by any person whatsoever is punishable by the forfeiture of the goods. The Ontario Act makes it an offence for a merchant, etc., to sell goods or to pursue his ordinary calling, punishable by a fine; (*b*) the class of persons enumerated is wider, merchants and mechanics being included in the Ontario Act; (*c*) the exception is differently expressed. In the English Act it is "works of necessity and charity," in our Act "conveying travellers or Her Majesty's mail by land or by water, selling drugs and medicines and other works of necessity and works of charity"; (*d*) the English Act does not condemn the purchaser; ours does; (*e*) the English Act is confined to the sale of chattels; ours deals with the sale of real estate also; (*f*) in the English Act there is an exception in favour of cook shops.

In Regina v. Silvester, 33 L.J.M.C. 79, the Court of Queen's Bench determined that a farmer was not within the statute, Cockburn, C.J., saying: "The persons who are within this enactment may be divided into two classes, employers and employed. The only persons specifically named in the first class are "tradesmen," under the other are "artificers, workmen, and labourers" and then comes the general expression, "or any other person whatsoever," but according to the usual canon of interpretation these general terms are to be applied only to persons *ejusdem generis* with those specifically named in the preceding sentence. . . . This construction may be open to the inconvenience and scandal adverted to, that an agricultural labourer may be liable to be punished, while a farmer who employs him and stands by or actually takes part in the work is not liable, but we are not to legislate, but simply to interpret what the legislature has chosen to enact."

Upon precisely similar reasoning it has been held that a barber is not within the Act. He is not a tradesman, nor is he an artificer, workman, or labourer, nor is he *ejusdem generis* with any of these so as to be included in the expression "any other person": Palmer v. Snow, [1900] 1 Q.B. 725. Nor do I think the statute applies to an hotel keeper or a restaurant keeper. They are not "merchants or tradesmen" of the "employer" class, merchants and tradesmen are alone prohibited from selling goods and from exercising their ordinary calling.

A merchant is one who buys and sells commodities as a business and for profit; who has a place of sale and stock of goods and is generally a trader in a large way. The term "trader" is generally used in connection with a specialised mercantile business. The essential thing is the same in both cases, the purchase and sale of goods as a business. The goods bought in bulk are sold in retail, but save for breaking bulk are passed on unchanged to the customer. Although an hotel keeper and a restaurant keeper do purchase goods and do sell goods, this is not the essential thing. The services they render to their guests are in the nature of "work and labour" rather than in the "sale of goods." So long as on innkeeper confines his business to the true and legitimate business of an innkeeper, I do not think he is within the Act.

An innkeeper may think it a matter of convenience to his guests, and a source of profit to himself, to become to some extent a merchant. In many, if not all, large hotels there are stalls or stands where merchandise is sold. As to this the innkeeper has become a merchant or trader. He is, as to these adjuncts to his innkeeping, subject to all the laws applicable to merchants and traders and enjoys no immunity because he is also an innkeeper. It may not always be easy to draw the line. As innkeeper it is his business to provide his guests with food, refreshment and shelter. All that a guest, as guest, is entitled to demand and receive as "food and refreshment" he may supply, even though it involves a sale of goods, but the fact that the innkeeper is an innkeeper, must not be made the cloak for the sale of goods by the hotel keeper in his ancillary mercantile business, and *a fortiori* will not authorise him to sell his merchandise to one who is not a guest.

The innkeeper must at his peril keep his collateral mercantile undertakings and tradings within the general law. The privilege of the hotel keeper thus rests upon the fact that, *quoad* his own business, he is not within the Act at all, and not upon bringing his case within the exceptions.

The keeper of a restaurant or victualling house is for the same reason in a similar position. A restaurant is defined "as a place where refreshments and meals are provided to order, especially one not connected with an hotel. The dining-room of an hotel conducted on the European plan, an eating house or cafe." The restaurant keeper may supply meals and refreshments. The refreshments may be either food or drink or both, and I can see no reason why he may not sell a cigar as an incident to a meal, but it is of the essence of his calling that what he sells is sold for consumption on the premises. He may on week days have an ancillary or collateral business as a merchant and trader and sell as merchandise, candy, cigars, etc., etc., but as to this he is a merchant or trader, and must obey the Sunday laws which apply to all merchants and traders. He is none the less a merchant because he is also a restaurant keeper.

Duffell v. Curtis, 35 L.T.R. 853, is consistent with this view. It seems there to have been assumed that the business of refreshment house would fall within the statute of Charles, but for the fact of a license which took it out of the Act. The trading of which the appellant was convicted was the selling of articles to be consumed elsewhere, which it was held was "not part of the calling of a refreshment house keeper," and the privilege of the license must not be extended so as to make the business an ordinary trading one in articles used for refreshment.

In the Wells case (No. 1) this covers the matters argued. The cigars were sold by the accused as a merchant or tradesman, and not in the course of his business as keeper of a victualling house or restaurant, and this was an offence against the Act.

In the Wells case (No. 2) the lagerine was, as I understand the evidence, sold in bottles to be taken from the premises, and if this be the fact, for the same reason this was an offence against the Act. If sold for consumption on the premises, then the sale was within the scope of the business of a restaurant keeper and there was no offence.

As the Crown and the accused both ask me to determine the law on either aspect, I do so, but would otherwise find myself unable to answer the question owing to the ambiguity of the case.

The Waldock case appears to me to be simple. The accused is the proprietor of a news stand in the Imperial Hotel. He sells cigars as part of his ordinary calling. He is a merchant or tradesman and the sale of the cigars was part of his ordinary calling and is a violation of sec. 104.

The Aldeen case is covered by the above. Aldeen was a restaurant keeper and sold candies as a merchant or tradesman and not in the course of his business as a restaurant keeper.

The case of Samuel G. Roe was dismissed upon a different ground. He was a druggist and sold cigars to all comers on Sunday. He was acquitted upon the ground that a cigar is a drug. No doubt tobacco has some medicinal properties and may occasionally be used as a drug or medicine, but its normal use is as a luxury, more particularly when taken in the form of cigars. What the statute permits is the sale of "drugs and medicines," that is of articles which are in fact sold as drugs or medicines, and it was never intended to permit the sale of ordinary food and luxuries, by shewing, by an expert, that the thing sold or its main ingredient has some medicinal properties. Alcohol has some medicinal properties, but the proprietor of an ordinary bar does not regard his business as the sale of "drugs and medicines."

There was no evidence upon which it could be found that these cigars were sold as a "drug or medicine": State v. Ohmer, 34 Miss. App. 115; Commonwealth v. Marzyuski, 149 Mass. 68; Penniston v. Newman, 117 Ga. 700.

It was faintly suggested that a "cigar" was to some a necessity and was therefore within the exception, and this aspect is discussed in some of the cases just cited and also in "Anon.," 12 Abb. U.C. 458. I think this whole discussion is based upon an erroneous view of the meaning of the statute, and in addition a luxury is, even if much desired, not the kind of "necessity" referred to.

The exception is of "works of necessity and charity." These words were construed in Phillips v. Innes, 4 Cl. & F. 234, by the Lords: "The necessity contemplated by the exception in the statute was the necessity of the person who worked, and not of him who compelled the work." This is illustrated thus: "It was said in the Courts below, that unless working persons who do not themselves shave their beards, were allowed to resort to the barbers' shops on Sundays, many decently disposed men would be prevented from frequenting places of worship, and from associating with their families and friends from want of personal cleanliness. . . . It might be as well said that because a person could not decently resort to Church or associate with his family, unless he was decently clothed and fed, therefore the tailors' and butchers' and bakers' shops should be kept open on Sunday for the convenience of such persons."

In other words, what the legislature has in mind is that the merchant or tradesman might in some case of necessity be compelled to practice his calling, but that must be his necessity, and not the desire or need of the purchaser. Circumstances might arise in which the merchant might, as an act of mercy toward the one in need, do that which would bring him within the Act; this necessity of the purchaser would justify the conduct of the merchant as an act of mercy.

In each case it must be shewn that what was done was, under the peculiar facts, a work of necessity, or mercy, and even if it could be proved in any particular case that the sale of a cigar was either a work of necessity or mercy, it seems to me most improbable it ever could be either—it clearly cannot be asserted as a general proposition.

Carver v. State, 69 Ind. 61, seems to me to be in conflict with the cases binding upon me, and as entirely repugnant to common sense as to law. It was almost immediately disapproved in the same State in Mueller v. State, 76 Ind. 310.

I have read all the numerous cases cited and many others, but no good purpose can be served by discussing them in detail. . . .

In the result I think there should have been a conviction in each and all of the cases.

No costs.

RIDDELL, J. MAY 29TH, 1911.

BATEMAN v. COUNTY OF MIDDLESEX.

Accident to Practising Physician—Negligence—Injury to Kidney—Expert Medical Evidence—Refusal to Undergo Operation—When Justifiable—Neurasthenia as Result of Accident—Diminution of Earning Power—Damages.

Action for $25,000 damages by the plaintiff, a physician of Strathroy, for injuries by being thrown from his buggy while driving upon the highway known as "Adelaide Road," alleged to have been caused by obstructions through a pile of gravel and a large log being upon the travelled portion of the road.

T. G. Meredith, K.C., and J. M. McEvoy, for the plaintiff.

Sir George Gibbons, K.C., and J. C. Elliott, for the defendant corporation.

RIDDELL, J.:—The plaintiff is a medical man residing and practising his profession in Strathroy. The County of Middlesex had occasion to repair one of its highways, and placed a quantity of macadam along the road at the middle, leaving on each side sufficient space for a roadway or *via tuta*. The man in charge of the work wholly appreciated the fact that this road was much travelled, and as a culvert was under repair on the road, he barricaded it at each concession on either side of that part of it in which the culvert was. He should, of course, have placed a light upon or near the barricades at night; but he contented himself with asking the wife of a neighbouring farmer to ask her husband to put a light there. No light was in fact placed—the farmer and his man gave evidence that they did place a light as requested; but this I do not accept. In any case, even if the light was placed as they say, it was a wholly insufficient and inefficient warning. The plaintiff was driving early in the morning along the road, when his buggy came in contact with the barricade—a telegraph pole laid from the west side of the road upon the gravel, and about a foot or fourteen inches high. The plaintiff was thrown up and came down with his back on the edge of the seat—he was able to proceed and attend, in a manner, to his patient, but no long time after untoward symptoms made their appearance.

I find, as a fact, that before the accident he was a strong, athletic, well-preserved man of about 55 years of age and that as a result he has been somewhat seriously weakened. Since the accident he has not been able to do much—the accident caused a falling of the right kidney, an injury to the right pleura (not now of much moment), an infected gall bladder (colocystitis), and a milder form of neurasthenia.

The medical evidence was not more varied than was to be expected from perfectly honest and competent physicians upon a matter of opinion—perhaps the difference of temperament in those called, whether optimist or pessimist, would account for the difference in opinion as to the prognosis; and it may have been but a coincidence that the optimists were found on one side and the pessimists on the other.

The difficulty at the liver may, probably, be overcome by a surgical operation of a comparatively simple character; the neurasthenia may be expected to be fairly well overcome in about a year longer—but the prolapsed kidney is another story.

There is respectable authority for the proposition that an operation for such a trouble should not be attempted on a man over 50 years of age, although able and experienced surgeons

vigorously combat that proposition. Were I not warned by the maxim, *Ne sutor ultra crepidam*, I might express some mild astonishment at the fact that there still seem to linger some relics of the idea that there is some magic in the precise number of years a man has lived—that some exactly fixed age is the climacteric from one point of view or the other. But in the existing state of the authorities, and upon the evidence adduced, I cannot say that the plaintiff should submit to an operation for the kidney.

There are not many cases which are helpful in the consideration of the present one in this point of view. And those are upon the Workmen's Compensation Act; *e.g.*, Anderson v. Baird, 40 Sc. L.R. 269, and Dowds v. Bennie, 40 Sc. L.R. 239, are two Scottish cases; Rothwell v. Davies, 19 Times L.R. 423; Warncken v. Moreland, [1909] 1 K.B. 184; Tutton v. Majestic, [1909] 2 K.B. 54; and Marshall v. Orient, [1910] 1 K.B. 79, all English cases, in the Court of Appeal. The principle to be deduced from these is that if a patient refuses to submit to an operation which it was reasonable that he should submit to, the continuance of the malady or injury which such operation would cure is due to his refusal, and not to the original cause. Whether such refusal is reasonable or not, is a question to be decided from all the circumstances of the case. If the medical attendant of the injured man be competent, and no attack be made upon his honesty, the Tutton case is authority for saying that it is not unreasonable to refuse to submit to an operation against the advice of the attendant physician. And that is this case. Moreover, so far as the present condition of the plaintiff goes, it would appear that he should not be operated upon. Whether in case the prolapsus become exaggerated an operation should be made may be doubtful. Even in the present state the plaintiff should give up his country practice so far as that involves long driving. No one can prophesy for a general practitioner, over 55 years of age, whose practice has been largely country practice, that he could make much by setting up a consulting practice in city or town; and I think that the plaintiff must suffer much diminution in his earning power for the future, at least for some considerable time.

The neurasthenia is, of course, as truly an injury as a broken bone. "In my opinion nervous shock due to accident is as much 'personal injury by accident' as a broken leg, for the reasons . . . expressed . . . in . . . Eaves v. Blaenclydach, etc., [1909] 2 K.B. 73. In truth, I find it difficult, when the

medical evidence is that as a fact a workman is suffering from a known complaint arising from nervous shock, to draw any distinction between that case and the case of a broken limb:" *per* Farwell, L.J., in Yates v. South Kirkby, [1910] 2 K.B. 538, at p. 542.

I think that the plaintiff cannot be expected to be effective as a medical man for about a year—and that thereafter he cannot expect to have his full earning power. The pain has not been excessive; his intermittent attacks of jaundice due to the colocystitis may, however, in the absence of an operation, be expected to recur from time to time; and while the neurasthenia may not leave permanent effects of a dangerous character, it has already been a source of disability and annoyance. In consideration of all the circumstances I think the sum of $12,500 should be awarded the plaintiff, with full costs of suit.

In the case of Church v. City of Ottawa, 25 O.R. 298, 22 A.R. 348, in which a new trial was ordered, a verdict was upon the second trial given for the plaintiff for $6,000; but the injury in that case, while serious, was not so disabling as in the present case.

DIVISIONAL COURT. MAY 29TH, 1911.

WRIGHT v. RADCLIFFE.

Accident—Careless Driving—Negligence of Servant.

Appeal by the defendant from the judgment of the Senior Judge of the County of York, and cross-appeal by the plaintiff as to amount of damages.

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

W. A. Proudfoot, for the defendant.

W. M. Hall, for the plaintiff.

BRITTON, J.:—This case is in a nut-shell. The plaintiff on the 28th May, 1910, was at work as a labourer upon Yonge street in this city. He was "paving" alongside of the street railway track. He was on the west side of the track about 27 feet southerly from the corner of Scollard street. He was kneeling on one knee. The distance between the west rail and the curb at that point was 14 feet 6 inches. The plaintiff's foot projected westerly 3 feet, which left the space of 11 feet 6

inches between his foot and the west curb. The defendant's servant, Stanley J. Kemp, a young man of about 16 years of age, was driving a horse with light rig. He had just come out of the stable, drove easterly on Scollard to Yonge, turned down Yonge, and one wheel of the rig went over plaintiff's foot, causing the injury complained of. Kemp says he saw the plaintiff and he thought the plaintiff saw him. Kemp was experienced in driving and his horse was going, as he says, only at a slow walk. Under such circumstances there would be no excuse, if the plaintiff's story is correct, for the accident. The so-called excuse given by Kemp was "that in going around the corner, the back wheel caught the curb, and slung it over and it went over his leg."

The learned trial Judge did not accept as correct the explanation given by Kemp. There certainly was evidence of negligence, and the question was wholly for the trial Judge. Upon the evidence the conclusion would be warranted that Kemp, having seen the plaintiff, carelessly drove too close to him and seeing the danger turned the horse sharply to the west, but not in time to prevent one wheel going over the plaintiff's leg and causing the injury. All we need say is, that there was evidence of negligence, and we must so say. Had there been a jury, the case could not have been withdrawn from them, and a verdict for the plaintiff for $150 would not have been disturbed.

The appeal of the defendant should be dismissed with costs.

There is no reason for increasing the damages. There was no permanent injury. The plaintiff has had good, practically complete, recovery. The cross-appeal should be dismissed with costs.

FALCONBRIDGE, C.J.K.B., and RIDDELL, J., gave reasons in writing for arriving at the same conclusion.

FALCONBRIDGE, C.J.K.B. MAY 30TH, 1911.

BROWN v. BROWN.

Contract — Condition Precedent — Impossibility — Defendant's Conduct Precluding Performance.

Action for specific performance of an agreement to lease an hotel.

C. McCrea, for the plaintiff.
R. McKay, K.C., for the defendant.

FALCONBRIDGE, C.J.K.B.:—Plaintiff sues on an agreement in writing, dated 24th October, 1910, whereby the defendant agreed to lease to plaintiff certain hotel premises known as the Clifton House, in the town of Massey, and to sell the stock-in-trade and contents of said hotel premises on the terms and conditions in the agreement set forth. Defendant refused to perform said agreement, or to give up possession of the premises. The defendant manifestly rued his bargain and about a fortnight after the execution of the agreement pretended that there was an oversight in the agreement, in the omission of provision for a price for the license, business, and goodwill. This, I find, had no foundation in fact, but was a dishonest subterfuge devised by the defendant in order to get out of his bargain. He set up in pleading this and other matters, charging false representations on the part of the plaintiff, none of which he attempted to prove—in fact he did not venture to go into the witness-box at all. His counsel relies on certain technical objections, amongst others the sixth clause of the agreement, which provides that "these presents shall only come into force and effect provided the party of the second part obtains from the License Department a substantial assurance that he will obtain a license for the said premises." This was a matter which under the Liquor License Act it was impossible for the plaintiff to do. It is not, however, at all on the same plane as the old illustration, "Provided J.S. and I shall ride to Dover," when J. S. refuses to ride, for one reason, amongst others, that the defendant's conduct precluded the plaintiff from doing anything in the matter. In Hotham v. East India Company, 1 T.R. 638, it is said that "it is unnecessary to say whether the clause relative to the certificate be a condition precedent or not; for granting it to be a condition precedent, yet the plaintiffs having taken all proper steps to obtain the certificate, and it being rendered impossible to be performed by the neglect and default of the Company's agents, which the jury have found to be the case, it is equal to performance."

See also Chitty on Contracts, 15th ed., pp. 712-717; Pollock on Contract, 7th ed., p. 259.

Plaintiff has proved his contract and his willingness to perform. He has proved breach of contract by the defendant, preventing the plaintiff from completing it. There are some difficulties in the way of granting a decree of specific performance.

The plaintiff will have judgment on the issues joined, with costs on the High Court scale, and reference to the Master to ascertain the damages. Further directions and costs reserved until the Master shall have made his report.

MIDDLETON, J. MAY 31ST, 1911.

TORONTO GENERAL TRUSTS CORPORATION v. GOAD.

Will—Construction—Income to be Equally Divided among Children on Attaining Twenty-five—Guardian or Tutor of "Any Child" to Receive Smaller Amount in Meantime—Right of Present Wife to Receive Whole Income of Her Children under 25.

Action for construction of the will of Charles Edward Goad.

W. H. L. Gordon, for the plaintiffs.
I. F. Hellmuth, K.C., for Victor A. E., and J. L. Goad.
J. A. Paterson, K.C., for the widow, Agnes Goad.
M. Lash, for four children of the first marriage.
F. W. Harcourt, K.C., for the infants.

MIDDLETON, J.:—The clause of the will upon which difficulty now arises is by no means easy to construe. The clause in question deals with the income derived from the Canadian estate until the division of the corpus on the youngest living child attaining twenty-five years of age. The share of each child will be about $50,000, yielding an income of about $2,500, and the question is whether the widow (the second wife) takes the whole income from the shares of her unmarried children under 25 years of age, or $400 per annum each till they attain eighteen and $500 per annum each thereafter till they attain twenty-five or marry. As two of the children are young the matter is one of much importance to the mother.

The income from the Canadian estate, after providing an annuity for the mother, is to be equally divided among the children (there are four of the first marriage and four of the second marriage) and paid to the child on attaining twenty-five or marriage, but in the meantime the guardian or tutor of "any child" is to receive the smaller amounts I have named. Immediately following the provision is this clause, "The share

of such of my children by my present wife as may be under the age of twenty-five and unmarried to be paid to my said wife for the maintenance, support and education of such child or children, without her being bound to render any account of the expenditure, and on the death of my said wife my said trustees shall pay so much of the share of the income coming to my children by my said wife who are under the age of twenty-five and unmarried as may be necessary for the maintenance and support of the said children up to the amounts before mentioned, to the guardian or tutor of such children for their maintenance, education, and support."

I can attach no other meaning to this than that the testator intended the provision for payment to his widow of the entire income of the shares of his minor children to constitute an exception to, and to override the more general provision with respect to the limited amount to be paid to a guardian or tutor.

I am not to ignore a clearly expressed intention, upon any theory as to the probably intention of the testator, or by reason of the result being in some circumstances extraordinary.

If the mother, who receives the whole income, $2,500 for each child, dies, the guardian must then maintain on $500 each till the child attains twenty-five. The mother will no doubt so control the expenditure that these children, now seven and twelve years old, may not, in the event of her death before they attain twenty-five find themselves unable to live upon the much narrower income provided by their father, and she will no doubt make some provision against that possible event.

Costs of all parties out of the estate.

SIVEN v. TEMISKAMING MINING CO.—FALCONBRIDGE, C.J.K.B.—MAY 25.

Mining Company—Accident to Miner—Defective Condition of Works—"Pentice"—Proper Place for—Mining Act of Ontario, sec. 164, *sub-secs.* 17, 31.]—Action by a miner against the defendant company, claiming damages for injuries sustained by the falling of a large rock from the third level in the mine down the shaft or winze upon the plaintiff's left hand. It was alleged by the plaintiff that the injury was caused by a defective condition of the defendants' works, and, in particular, by their not sufficiently protecting the head of the shaft or winze from loose and falling rock, as required by the Mining Act of Ontario,

1908, sec. 164, sub-secs. 17 and 31. The jury found that the defendants were negligent in not providing a suitable "pentice" over the manhole, for the protection of workmen in the shaft in which the plaintiff was injured, as required by sub-sec. 17 above referred to. The argument of counsel was mainly directed to the definition of the term "pentice," the defendants claiming that it meant a structure in the shaft itself, or at its mouth, between the men working in the shaft and the level from which danger is to be expected, and supporting this view by quotations shewing the use of this word, or its later form, "pent-house," in this sense. The plaintiff, on the other hand, urged that the wording of sub-sec. 17 of sec. 164 of the Act was quite broad enough to cover the facts in this case, as it does not say where the pentice shall be provided, but leaves this to the common sense of the company, which should have made them place it, as the jury have found, over the manhole, and it is not required by the sub-section in question that it must be in the shaft. The learned Chief Justice, after considering written arguments of counsel for the parties, gave judgment for the plaintiff for $2,500 and costs, as follows: "The plaintiff proved, and the jury found failure by the defendants to comply with sub-secs. 17 and 31 of sec. 164 of the Mining Act of Ontario. I do not consider myself bound to accept the defendants' definition of a "pentice" as a covering erected within the shaft itself or at its mouth. To the quotations in the defendants' argument, I add:

> "Sleep shall neither night nor day
> Hang upon his pent-house lid."
> (Macbeth, Act i., sc. iii.)

"pent-house lid," *i.e.*, eye-lid—a projection or lean-to attached to the wall of the face." A. G. Slaght, and G. T. Ware, for the plaintiff. M. K. Cowan, K.C., and G. H. Sedgewick for the defendants.

NORTHERN CROWN BANK v. MOLSON—MASTER IN CHAMBERS—MAY 27.

Practice—Pleading—Parties—Motion by Defendant to Dismiss for Want of Prosecution—Motion by Plaintiffs to Add Defendant—Plaintiffs' Motion Granted on Terms—Amendment Before Trial—Costs.]—The defendant moved to dismiss for want of prosecution, while the plaintiffs asked leave to

amend by adding as defendant their own officer, under whose orders the defendant said he acted in the matters in question. The action began nearly two years ago and was brought to recover from the defendant a sum which with interest amounts to over $50,000. Judgment: It does not appear why the case has never gone to trial as the last of the examinations for discovery was finished in February of this year, nor does it appear why the motion to add Mr. Kirkwood was not made earlier. It seems difficult to understand how the plaintiffs can really hope to benefit by adding him as a defendant when he was put forward by them, and has been examined as their representative for discovery, and they may therefore be held to have confidence in his veracity. He most positively denies that Molson was in any way acting under his directions in this matter. The evidence of Street to whom the loan was made, has been taken on commission at Vancouver. He most emphatically contradicts Kirkwood and corroborates Molson on this question. . . . In view of the difficulty in which the plaintiffs are put by this evidence, and of the decision so lately given in McNabb v. Toronto Construction Co., 2 O.W.N. 1086, and yielding to that authority, I think the plaintiffs' motion must be allowed, and the defendant's motion dismissed. The trial should be expedited as much as possible and proceedings be taken in vacation if the defendant so desires. The costs of both motions, as well as those lost by reason of Kirkwood not having been a party in the first instance, will be to the defendant in any event. I make this disposition of the costs because I think the plaintiffs should have acted more promptly, though it is true that the defendant might have set the case down if anxious for its termination. But he is not bound to do so. The plaintiffs should amend the writ, and serve same and statement of claim in a week. A. C. McMaster, for the defendant. James Parker, for the plaintiffs.

GOODALL v. CLARKE—MOSS, C.J.O., IN CHAMBERS—MAY 30.

Leave to Appeal.]—In this case, leave to appeal direct to the Court of Appeal from the judgment of MIDDLETON, J., on hearing on further directions was allowed on the usual terms, costs in the appeal. W. H. Wallbridge, for the defendant. R. S. Cassels, K.C., for the plaintiff.

BOYLE v. MCCABE—MASTER IN CHAMBERS—MAY 31.

Security for Costs—Defendant out of Jurisdiction—Real Actor—Procedure under Land Titles Act Analogous to that under Quieting Titles Act.]—Motion by the defendant for security for costs. The defendant filed an application for her first registration as owner of land in Toronto. By direction of the Master of Titles notice was given to the plaintiff, who claims to be a brother of the defendant, and as such entitled to an interest in the land. Judgment: "The Master of Titles has found that the plaintiff is entitled to a one-sixth share, assuming that he can prove his relationship to the defendant. As the plaintiff has been for many years, and still is a resident of San Francisco, it will be necessary that a commission be issued to take evidence there on this point. It appears to be admitted that two actions brought by this plaintiff against the defendant in respect of his claim to share in this, which he alleges to have been his father's estate, have both been dismissed for default in giving security for costs. The motion is based on this latter ground, as bringing the case within Con. Rule 1198 (*d*), and also on the usual practice in this respect when either party to an interpleader issue resides out of the jurisdiction. In my opinion this case is not distinguishable in principle from Ward v. Benson, 2 O.L.R. 366. Here the defendant in the issue is nevertheless the real actor in the proceeding under the Land Titles Act. It is merely her interest and desire to have the pending application made by her to the Master of Titles disposed of. The only result of granting this motion for security would be to tie the matter up until after vacation. The procedure under the Land Titles Act seems more analogous to that for Quieting Titles than to an interpleader issue. In that view the decision of Spragge, V.-C., in Shepherd v. Hayball, 13 Grant 681, seems very much in point. If the plaintiff succeeds in proving his relationship, the defendant will be able to get the costs of the two abortive actions. But at present I think the motion cannot succeed, and must be dismissed with costs to the plaintiff, to be set off against the costs due by him on the former proceedings." R. G. Smyth, for the defendant. C. Kappele, for the plaintiff.