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COURT OF APPEAL.

JANUARY 17TH, 1910.

RE BRUCE MINES LIMITED AND TOWN OF BRUCE MINES.

Assessment and Taxes — Assessable Property — Buildings on Mineral Lands—Assessment Act, sec. 36—Appeal from Decision of Ontario Railway and Municipal Board—Question of Law.

Appeal by the Bruce Mines Limited, a mining company carrying on business at the town of Bruce Mines, against an order of the Ontario Railway and Municipal Board, made on an appeal to the Board from the local Court of Revision, in an assessment matter.

The original assessment of $37,650 was reduced by the Board to $35,000, and the appellants contended that this sum should be still further reduced, because certain buildings upon the lands (the lands being what are called in the Assessment Act "mineral lands"), used for mining purposes, should not have been assessed. The Board held that these buildings were properly assessed.

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

J. A. McPhail, for the appellants.

G. H. Watson, K.C., and N. H. Peterson, for the town corporation.

GARROW, J.A.:—The question presented is one of law, depending upon the proper construction of the Assessment Act, 4 Edw. VII. ch. 23, and therefore a proper subject of appeal to this Court under sec. 51 of the Ontario Railway and Municipal Board Act, 1906.

The appellants' contention that the buildings are not the proper subject of assessment is supported by the judgment of a Divisional Court, reversing that of the Chancellor, in Canadian Oil Fields Co. v. Village of Oil Springs, 13 O. L. R. 405; but, having regard to all the circumstances, I incline to agree with the construction placed upon sec. 36 by the learned Chancellor rather than with that arrived at by the Divisional Court. Nothing in that case turns, I think, upon the fact that the property there in question is called "plant" rather than "buildings," for the "plant" was, as pointed out by the Chancellor, within the definition of "land" in the Assessment Act: see sec. 2, sub-sec. 7. . . .

It is, I think, the plain intention of the Assessment Act, as a whole, that all land and all buildings upon land not expressly declared to be exempt shall be assessed. The assessor's duty in making the assessment is prescribed in sec. 22 et seq. . . . Section 36 . . . makes provision for the nature of the valuation to be placed upon lands and buildings. Sub-section 1 provides that, except in the case of mineral lands, real property (which includes buildings) shall be assessed at its actual value. Sub-section 2 provides that, in assessing land having buildings thereon, the value of the land and buildings shall be ascertained and stated separately, and the assessment shall be the sum of such values; and the value of the buildings shall be the amount by which the value of the land is thereby increased. Sub-section 3 provides that in estimating the value of mineral lands such lands *and the buildings thereon* shall be valued and estimated at the value of the other lands in the neighbourhood for agricultural purposes, but the income derived from any mine or mineral work shall be subject to taxation in the same manner as other incomes under the Act. Sub-section 3 has been in the statutes unchanged for about 40 years; but sub-sec. 2 was introduced only in the year 1904, as were also the provisions for separate columns and valuations for land and buildings. And both of these new provisions, in my opinion, apply to all lands, including mineral lands, notwithstanding the continued and apparently unnecessary presence in sub-sec. 3 of the words "and the buildings thereon." The new provisions certainly apply to agricultural lands, the buildings upon which must be separately valued as the Act directs. And this would include buildings upon agricultural lands not useful only for agricultural purposes. . . . And I am quite at a loss to see any reasonable ground for a different construction in the case of mineral lands.

There is nothing in the Act to indicate that such lands were intended to be specially favoured. There is, indeed, at least as

much ground for the view that the statutory comparison of such lands with neighbouring agricultural lands was intended to prevent them from being assessed too low, as for the opposite opinion.

Sub-section 3, even as it stands, expressly says the land *and the buildings* are to be assessed. This must mean all buildings which add to the value of the land for any purpose, and not merely buildings which add to its agricultural value. That is the sole statutory test, applicable, in my opinion, to all lands and to all buildings thereon.

For these reasons, I agree with the Board that the buildings in question were properly assessable. With the amount we have nothing to do, that being a pure question of fact.

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

MEREDITH, J.A., agreed in dismissing the appeal, for reasons stated in writing.

JANUARY 17TH, 1910.

RE CONIAGAS MINES LIMITED AND TOWN OF COBALT.

Assessment and Taxes — Properties Assessed at over $20,000 — Reduction by Court of Revision to Less than $20,000—Right of Appeal to Ontario Railway and Municipal Board—Buildings on Mineral Lands—Value—Question of Fact—Leave to Appeal to Court of Appeal.

Motion by the Coniagas Mines Limited for leave to appeal to the Court of Appeal from a decision of the Ontario Railway and Municipal Board, pronounced upon an appeal from the ruling of the Court of Revision of the town of Cobalt, in respect of the assessment of certain properties belonging to the applicants.

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

H. H. Collier, K.C., for the applicants.

W. J. Clark, for the town corporation.

MOSS, C.J.O.:—The properties consist of a number of lots laid out upon the town-site of Cobalt, some being vacant and some having dwelling-houses and other erections thereon. They are laid out on part of mining locations J.B.6. The applicants

acquired the title of the original grantees by patent of the mines, minerals, and mining rights in this location, the surface rights in the lots in question being at the time of the applicants' acquisition vested in various purchasers thereof. Subsequently the applicants acquired the title of the purchasers.

The situation is concisely stated by the learned Chairman of the Railway and Municipal Board: "The company first bought the mineral rights and afterwards acquired the surface rights. There are about 20 houses on these lots. They are rented to workmen in the mine."

The properties were assessed by the assessor at $21,475. Upon appeal the Court of Revision reduced the amount to $17,700. The applicants, not being satisfied, appealed to the Railway and Municipal Board, as provided by sec. 51 of the Ontario Railway and Municipal Board Act, 1906, and the appeal was dismissed.

On behalf of the town of Cobalt objection was taken before the Board, and again upon the application to this Court, that the appeal was not competent, on the ground that to entitle a person to appeal to the Railway and Municipal Board under the combined effect of sec. 51 of the Ontario Railway and Municipal Board Act, 1906, and sec. 76 of the Assessment Act, the amount of the assessment fixed by the Court of Revision on one or more of such person's properties must aggregate $20,000.

I am of opinion that the Board, in holding that the amount of the assessment made by the assessor is the determining factor, took the correct view. Looking at the various provisions of the Assessment Act dealing with appeals, it seems apparent that, even upon the final appeal, whether to a County Court Judge under sec. 68 et seq., or to the Board under sec. 76, as affected by sec. 51 of the Ontario Railway and Municipal Board Act, 1906, the whole question is open, and that it is competent to the tribunal not merely to reduce the amount fixed by the Court of Revision, but to restore or perhaps increase the amount fixed by the assessor: see sec. 65 (especially sub-secs. 16, 19, 21, and 22), 66, 68, 69, 70, 75, and 76 of the Assessment Act, and sec. 51 (2) of the Ontario Railway and Municipal Board Act, 1906.

The right of a person whose properties, notwithstanding an appeal to the Court of Revision, remains assessed at an aggregate of $20,000, to avail himself of the provisions of sec. 76 and so obtain a different tribunal to that open to him under sec. 68, is undoubted. But is there any good reason why, where from the original action of the assessor the properties are still exposed to the possibility of the final assessment amounting to or even exceeding $20,000, the person so assessed should not have the same right?

Suppose that in this case the town had appealed from the decision of the Court of Revision under sec. 68, with a view to restoring the amount fixed by the assessor, ought the applicants to be deprived of the opportunity of obtaining the judgment of the Board, instead of that of the County Court Judge, as to whether $21,475 or $17,700 was the proper amount?

I think the words of sec. 76, "a person desiring to appeal has been assessed . . ." are capable of and should receive this construction.

It is possible that, as was argued, this view will give rise to some anomalies, but anomalies are likely to arise, whichever view be taken, and the view of the Board seems to me to be freer than the opposite from that danger.

As regards the merits of the application, the conclusion to which we have come in the case of Re Bruce Mines Limited and Town of Bruce Mines, ante, govern this case.

Buildings upon the lands in question, whether they are to be treated as "mineral lands" or otherwise, are subject to be valued and assessed against the owners, and the question of the value is simply a question of fact, as to which no appeal lies to this Court under sec. 51 of the Ontario Railway and Municipal Board Act, 1906, or otherwise.

The application must therefore be refused.

OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., concurred; MEREDITH J.A. stating reasons in writing.

JANUARY 17TH, 1910.

KIMBALL v. BUTLER.

Master and Servant—Injury to and Consequent Death of Servant —Negligence—Servant not Acting in Course of Duty—Voluntary Incurring of Risk — No Duty Owing by Master — Contributory Negligence.

Appeal by the plaintiff from the order of a Divisional Court, 14 O. W. R. 360, dismissing an appeal by the plaintiff from the judgment of TEETZEL, J., at the trial, dismissing the action, which was brought by the widow of Wallace Kimball deceased, to recover damages for the death of her husband while in the employment of the defendants, under circumstances of alleged negligence on the part of the defendants.

The work upon which the deceased was employed at the time of his death was that of constructing a tunnel under the Detroit river, and, being a civil engineer, his position was that of superintendent of shaft No. 2.

On the night of the 14th September, 1908, a fire occurred in shaft No. 4, which, it was supposed, was caused by the use of candles in the hands of some of the defendants' workmen engaged in making repairs to a bulkhead containing compressed air, which was leaking. The place where the fire occurred was about 2,000 feet distant from shaft No. 2, where the deceased was employed, and was territorially quite beyond any place in the tunnel where his duty to the defendants required him to be.

At the time of the fire there were workmen in the tunnel, and the deceased, attracted to shaft No. 2 by the fire, went, with others, down that shaft for the purpose of assisting to extinguish the fire and in the rescue of the workmen in the tunnel; and, while in the tunnel, was suffocated by the smoke, which was very dense, although the fire itself was not otherwise of a serious nature.

Negligence was charged by the statement of claim in not providing and maintaining proper supervision of the work, in leaving timber or paper exposed, in permitting the improper use of fire, and otherwise conducting the work in a negligent manner, negligence in the person having superintendence, absence of proper appliances to put out fires, and insufficient modes of egress from the shaft in which the fire occurred.

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

J. H. Coburn, for the plaintiff.

J. H. Rodd and E. C. Kenning, for the defendants.

Garrow, J.A. (after setting out the facts as above):—It is perfectly plain . . . that in doing as he did the unfortunate deceased was acting not at all as the servant of the defendants, or under any orders or commands, directly or indirectly, from them, but solely as a volunteer. And it is also equally beyond question that in venturing into the shaft for the second time as he did, he did so with a full comprehension of the danger of so doing, and indeed after a warning not to do so from Mr. Wheeler, who was acting as the defendants' first aid physician. In such circumstances, and in view of the reservation made by consent at the trial that the Court might deal with the issue of contributory negligence upon the evidence, the case for the plaintiff, notwith-

standing the able and earnest argument of Mr. Coburn, seems upon both grounds absolutely hopeless.

Appeal dismissed.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

OSLER, J.A., agreed, for reasons to be stated.

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

JANUARY 17TH, 1910.

WADE v. LIVINGSTONE.

Promissory Note—Liability of Indorser—Release of Security — Discharge of Indorser—Evidence.

Appeal by the plaintiff from the order of a Divisional Court, 14 O. W. R. 549, reversing the judgment of MACMAHON, J., 13 O. W. R. 708, and dismissing the action.

The trial before MACMAHON, J., was the second trial. The action was first tried before LATCHFORD, J., who also gave judgment for the plaintiff; but a Divisional Court directed a new trial: 12 O. W. R. 1211.

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

R. S. Robertson and J. A. Scellen, for the plaintiff.

W. M. Reade, K.C., for the defendant.

OSLER, J.A.:—The plaintiff is the assignee, under the Assignments and Preferences Act, of Aaron Erb, who was the indorsee of the defendant Livingston, the payee of the note sued on, and stands in the position of Erb, and is entitled to enforce such rights as his assignor was entitled to, and no other. That the note was indorsed for the accommodation of Boehmer, the maker, there can be little, if any, doubt, though this fact, of course, would not of itself affect Erb's title as a holder in due course, which he undoubtedly was, having taken the note upon its maturity as security on account of the maker's debt to him. The onus is on the de-

fendant to shew that in some way it has been paid or discharged. The chief contention was that it had been so paid or discharged in the course of the dealings which afterwards took place between Boehmer and Erb.

The case was twice tried, and after the first trial a new trial was granted in order that, if possible, this might be made clear, the evidence having been led in an extremely confused and fragmentary way. The evidence at the second trial was not much, if at all, clearer, and, however much one may suspect that the whole truth respecting the transaction has not been brought out, I am unable to convince myself that enough has been shewn to defeat the prima facie title of the plaintiff. As the defendant had an opportunity of bettering his case, I must assume that he has offered all the evidence he could find, and, as that, in my opinion, is not sufficient to entitle him to succeed, the appeal must be allowed. There is nothing in any of the other grounds of defence which have been suggested, rather than argued.

Appeal allowed with costs, and judgment of MacMahon, J., restored.

Moss, C.J.O., Garrow, Maclaren, and Meredith, JJ.A., concurred; Maclaren and Meredith, JJ.A., stating reasons in writing.

HIGH COURT OF JUSTICE.

Divisional Court. January 10th, 1910.

PEARLMAN v. SUTCLIFFE.

Promissory Note—Failure of Consideration—Note Given for First Premium for Life Insurance—Policy not Corresponding with that Applied for—Payment of Part of Premium without Prejudice.

Appeal by the plaintiff from the judgment of the Junior Judge of the County Court of Victoria dismissing an application for a new trial of an action in the 5th Division Court in that county, and thereby affirming the judgment at the trial dismissing the action.

The action was brought to recover $182.37, being the balance alleged to be due on a promissory note for $336, dated the 18th June, 1908, made by the defendant, payable to the order of the plaintiff, 6 months after date.

The plaintiff, being general agent of the Great West Life Insurance Co., called upon the defendant and solicited from him an application for an insurance on his life in that company. The plaintiff made certain explanations to the defendant as to the nature of the policy to be issued, producing and explaining to him a sample policy. Following these explanations, the plaintiff prepared a written application for the defendant's signature. This, without perusing it, the defendant signed and handed to the plaintiff, at the same time delivering to him the promissory note in question in payment of the first year's premium on the insurance. The application was for $10,000 insurance upon the "Ord. Life Special Plan . . . return of all premiums paid if death occurs during the first 15 years; the principal sum of $10,000 is payable at the rate of $500 per annum for 15 consecutive years, and $2,500 at the end of 15 years, or the commuted amount of $7,452 in cash."

On the 18th November, 1908, the defendant wrote to the company's managing director complaining of certain provisions in the policy, which he said were not in accordance with the representations said to have been made to him by the plaintiff. The defendant refused to accept the policy, and on the 16th December, 1908, sent it with his cheque for $168 to the company—the $168 being to cover the period for which he was insured up to that date.

The defence was that the defendant received no consideration for the note.

The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ.

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

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

MULOCK, C.J.:— . . . I think the proper inference from the evidence is, that the plaintiff did not intend to deceive the defendant by explaining to him the terms of the sample policy in order to induce him to make an application, and then to secure his signature to an application for a different kind of policy. The fair deduction from his evidence is that the sample policy is a policy upon the Ordinary Life Special Plan, or, in other words, a policy corresponding in terms with those of the sample policy exhibited and explained to him.

The question then is whether the company tendered to the defendant such a policy. It is sufficient for me to point out that in comparing the two policies there is at least one material difference between them; for example, according to the terms of

the sample policy, the insured, after payment of three full years' premiums, is entitled either to a paid up life insurance for a certain amount, or to an old age annuity for a certain amount, or to the cash value of the policy, as the company may determine, whilst under the terms of the policy tendered to him he is entitled either to a paid up life insurance, or to extended insurance or to the cash value, as the company may determine, the difference being that the provision for the old age annuity contained in the sample policy is omitted from the policy tendered to the defendant, and extended insurance is substituted therefor. Thus, the company may discharge its liability in respect of the policy offered the defendant after payment of three years' premiums by giving to him extended insurance. This they were not entitled to do by the terms of the sample policy. The difference between an annuity and an extended insurance is substantial—an annuity meaning actual payment to the defendant during his life, whilst an extended insurance evidently means the keeping alive of the policy for a certain time. Such a difference is substantial, and it cannot be contended that the policy tendered to the defendant corresponds in terms with those of the sample policy; and the defendant was therefore not bound to accept it. The company, not having tendered to the defendant such a policy as he was entitled to, has failed to give consideration for the note, and the defence of failure of consideration would have been an effectual defence if this action had been brought by the company. The plaintiff became the holder of the note with full notice of all the circumstances connected with its issue, and is in no better position than the company itself. The payment by the defendant of $168 to the company was without prejudice. It was not made in discharge of a legal liability and may be treated as a gift by the defendant, and his action in this respect cannot affect his legal position. Thus the company, not having given consideration for the note, could not recover thereon, and the plaintiff, having taken it with notice, is not entitled to recover. Therefore, this appeal should be dismissed with costs.

CLUTE, J., gave reasons in writing for the same conclusion. He referred to Anson on Contracts, 11th ed., p. 447; Canning v. Farquhar, 16 Q. B. D. 727; Victoria Mutual Fire Insurance Co. v. Home Life Insurance Co., 35 S. C. R. 308, [1907] A. C. 59; Provident Savings Life Assurance Society v. Mowat, 32 S. C. R. 147; Mutual Reserve Insurance Co. v. Foster, 20 Times L. R. 717; Marin v. Mutual Reserve Insurance Co., 21 Times L.

R. 167; Tross v. Mutual Reserve Insurance Co., ib. 15; Henderson v. State Life Insurance Co., 9 O. L. R. 540; Kettlewell v. Refuge Insurance Co., [1908] 1 K. B. 545, [1909] A. C. 243.

SUTHERLAND, J., concurred.

TEETZEL, J. JANUARY 14TH, 1910.

A. E. THOMAS LIMITED v. STANDARD BANK OF CANADA.

STANDARD BANK OF CANADA v. A. E. THOMAS LIMITED.

Company—Guaranty—Powers of Trading Company—Authority of President—Seal—Abbreviation of Word "Limited"—Statute of Frauds—Chattel Mortgage—Affidavit of Bona Fides—Mistake in Statement of Amount Advanced—Limitation of Security—Security under sec. 88 of Bank Act—After-acquired Goods—Description of Premises—Assignment of Book Debts—Notice—Conversion.

The plaintiffs in the first action, a company incorporated under the Ontario Companies Act, A. E. Thomas being president, were wholesale dealers in matches, with their chief place of business at St. Thomas, but with a branch business in Toronto, managed by one Kindree, who in March, 1909, purchased and took over the stock in trade of the branch business, and continued to carry it on under the name of the Toronto Match Co. To secure the purchase price he gave a chattel mortgage to the plaintiffs, dated the 26th March, 1909, expressed to be in consideration of $5,066.74, upon all the goods and chattels (particularly mentioned in the schedule) situate in his premises (described), with the usual provision that the mortgage should extend to all goods and chattels of a like or similar description to or different from those mentioned in the schedule which should thereafter be brought into stock during the currency of the mortgage. The schedule described the property as the stock in trade, fixtures, etc., and all book debts due and owing or hereafter to become due and owing to the mortgagor, etc.

The affidavit of bona fides attached to the mortgage was made by the president of the plaintiffs, and stated "that the mortgagor in the foregoing bill of sale by way of mortgage named is justly

indebted to the mortgagee therein named in the sum of $5,000 mentioned therein," etc., instead of $5,066.74, as stated in the mortgage.

On the 23rd April, 1909, Kindree applied to the bank, the defendants in the first action, for a loan of $2,500, the chief purpose of which was to pay for a car-load of matches ordered from the manufacturer by the plaintiffs for their Toronto branch business, and which Kindree was to take over and pay for. The bank agreed to make the advance, upon Kindree giving the bank a guaranty signed by A. E. Thomas Limited and A. E. Thomas, which was done. The guaranty was signed "A. E. Thomas" and "A. E. Thomas Ltd.—A. E. Thomas, Pres." It was also agreed by Kindree at the time of the advance that he should use the proceeds of the sale of the matches in payment of the advance.

Afterwards, on the 28th April, 1909, as further security, Kindree assigned to the bank all his book debts, and on the 25th May, 1909, as a still further security, he gave to the bank a document purporting to be under sec. 88 of the Bank Act, covering 230 cases of matches then in his warehouse, being a portion of the car-load to pay for which the advance was made. On the same day the bank took possession of the matches.

Up to this time the bank had no notice of the chattel mortgage, but, at or shortly before the time that Kindree signed the document purporting to be under sec. 88 of the Bank Act, he informed the bank's solicitor about the chattel mortgage.

After getting the assignment of book debts, the bank proceeded to collect the accounts, and collected the greater part of them, and applied the proceeds on the advance.

On the 27th July, 1909, $1,366.71 remained due on the advance. The bank retained possession of the matches, but did not realise thereon.

In the first action, begun on the 28th July, 1909, the plaintiffs claimed damages for conversion of the matches and book accounts. The second action, begun on the 31st August, 1909, was upon the guaranty, the bank claiming payment of the balance of $1,366.71 and interest, and the company counterclaiming for the conversion—the relief prayed by the counterclaim being the same as that sued for in the first action.

C. St. Clair Leitch, for the company.

G. H. Kilmer, K.C., for the bank.

TEETZEL, J.:— . . . I think the actions should have been consolidated, and an order that they shall now be consolidated will be embodied in the judgment. . . .

Mr. Leitch contended that the guaranty did not bind the company, because it was beyond the power of the company to enter into such a guaranty, and because it was not under seal, and no authority is shewn in the president to sign it, and also because the company's proper name was not affixed. . .

[Reference to A. R. Williams Machinery Co. v. Crawford Tug Co., 16 O. L. R. 245, distinguishing it.]

The evidence here shews that A. E. Thomas Limited had ordered the car of matches for their Toronto branch, and, being liable for its price, were turning it over to Kindree upon his paying what the company would be liable to pay, and not only by the advance therefor were the company getting rid of a liability, but, assuming that the chattel mortgage . . . was binding, that security would be increased by the value of the car-load as soon as it reached Kindree's warehouse. . . .

[Reference to Encyc. of the Laws of England, 2nd ed., vol. 3, p. 259; Attorney-General v. Great Eastern R. W. Co., 5 App. Cas. 478; Brice on Ultra Vires, 3rd ed., p. 126; Attorney-General v. North Eastern R. W. Co., [1906] 1 Ch. 310, [1906] 2 Ch. 676.]

I think, under the facts of this case, the power of the company to give the guaranty must be implied, if not as a potential necessity in reference to their business, certainly as connected with or incidental to the purpose of their business, as wholesale dealers.

As to the authority of the president and the necessity for the seal, it is to be observed that the by-laws of the company provide, inter alia, that the affairs of the company shall be managed by a board of directors; that the president shall preside at meetings of the company and shall advise with and render such assistance to the manager as may be in his power; but the by-laws make no provision for the appointment of a manager.

By-law 16 provides that all contracts and engagements on behalf of the company involving more than $100 shall have the corporate seal attached, and shall be entered into only under authority of a resolution of the directors passed in a duly called directors' meeting, and all such contracts or engagements shall be signed by the president and secretary or treasurer, and the seal affixed. . . .

[Reference to National Malleable Castings Co. v. Smith's Falls Malleable Castings Co., 14 O. L. R. 22, 28.]

I must hold that, the transaction being in good faith and with no notice of the by-law or restricted authority of the president, the bank were entitled to assume that he had been duly clothed with the authority which he was assuming to exercise when he signed the guaranty.

As to the abbrevation "Ltd." instead of the word "Limited," at the end of the name, I am unable to follow Mr. Leitch's argument that such signature is not binding under the Statute of Frauds, or entitles the company to escape liability by reason of the provisions of sec. 27 of the Ontario Companies Act, which requires that the word "Limited" shall be written in full in the name of every company, and provides penalties for non-compliance.

In cases where the initials only of a part are signed to an agreement, under the Statute of Frauds it is quite clear that parol evidence may be admitted as to them and the signature held valid. See Brown on the Statute of Frauds, 5th ed., p. 494, and De Colyar on Guaranties, 3rd ed., p. 191, and the cases there cited. On the same principle, if it were necessary, parol evidence could be admitted to identify the company where the abbreviation "Ltd." is used instead of the word "Limited." . . .

Counsel for the bank, in support of his objection to the sufficiency of the affidavit in the chattel mortgage, cited Midland Loan and Savings Co. v. Cowieson, 20 O. R. 583. . . . The basis of that decision is the entire absence from the affidavit of the statutory requirements. In the present case, however, the affidavit contains in words what the statute requires, but, in stating the amount of indebtedness, by some mistake or oversight omits a fractional part of the sum. From the evidence it would appear that $5,066.74 was the correct amount. . . . The mortgage was bona fide and was intended to secure $5,066.74 actually advanced; I think the utmost objection that can be taken to it is to limit the mortgage as a security for $5,000 instead of $5,066.74; on the principle of Mader v. McKinnon, 21 S. C. R. 645, 652; . . . Hamilton v. Harrison, 46 U. C. R. 627; Marthinson v. Patterson, 19 A. R. 188.

Being of opinion that the chattel mortgage to the extent of $5,000 and interest cannot be impeached by the bank, for the reasons stated, it is not necessary to consider whether the document asserted by the bank to be a security under sec. 88 of the Bank Act is of any value, in view of sec. 90 of the same Act. If it should be held to be in contravention of that section, the bank, as simple contract creditors, would have no status to attack the mortgage. See Parkes v. St. George, 10 A. R. 496.

I am not able to follow Mr. Kilmer in his argument that the company were affected by the agreement of Kindree that the advance would be paid out of the proceeds of the car-load of matches. I am also unable to adopt his objection that the mortgage is not sufficiently worded to cover the matches in question as goods subsequently acquired. The premises in which the goods

are or may be are specifically located, which distinguishes the case from Wilson v. Kerr, 17 U. C. R. 168, 18 U. C. R. 470, and other cases cited. See Hovey v. Whiting, 14 S. C. R. 515, and Thompson v. Quirk, Cameron's S. C. Cas. 436.

I am of opinion that the assignment of the book debts by Kindree to the bank, without notice of the assignment of the same to the company under the chattel mortgage, followed by notices to and collections from the debtors, vests the debts and the proceeds thereof in the bank against the claim of the company.

Under sec. 58, sub-sec. 5, of the Judicature Act, it is necessary for an assignee of a debt, in order to make his assignment effectual in law to pass and transfer the right to such debt, to give notice in writing to the debtor. A subsequent assignee, without notice of a prior assignment, who gives notice to a debtor, prevails over a prior assignee who has not given notice: Marchant v. Morton, [1901] 2 K. B. 829. It is not pretended here that the company gave any notice to the debtors; so I must hold that the assignment to the bank prevails against the claim of the company.

Judgment in favour of the bank against the company and Thomas for the balance due upon the guaranty, and in favour of the company against the bank for the conversion of the matches. The bank may retain the matches, subject to accounting with Kindree, upon paying the company the amount due upon the mortgage. Reference to the Master in Ordinary to take all necessary accounts. All questions of costs and further directions reserved to be dealt with after the Master's report

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DIVISIONAL COURT. JANUARY 17TH, 1910.

DOMINION EXPRESS CO. v. MAUGHAN.

Partnership—Holding out—Estoppel — Representation—Evidence —Liability of Person Permitting Name to be Used.

Appeal by the plaintiffs from the judgment of RIDDELL, J., dismissing the action as against the defendant John Maughan.

The plaintiffs sued for $1,395.13 and interest, being the amount of certain money orders alleged to have been drawn by John Maughan & Son, as agents for the plaintiffs, and for indemnity in respect of another order not accounted for. The defendant John Maughan denied any agency either by him or his firm for

the plaintiffs, and asserted that the agency, if any, was the defendant Harry Maughan's individually, and also denied that Harry Maughan was a member of the firm of John Maughan & Son, and denied that Harry Maughan had any right to sign the name of John Maughan & Son.

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

Shirley Denison, for the plaintiffs.

W. J. Boland, for the defendant John Maughan.

BOYD, C.:—Apart from the question of actual partnership between John Maughan and his son, which need not now be resolved, it is unquestionable that John Maughan and his son gave themselves out to the public as doing insurance business in company, and so became liable as partners to those who dealt with them on that footing. To fix John Maughan with the consequences of his son's acts in the name of the firm, it does not seem to be essential that John Maughan should have himself made any representations to the plaintiffs; it is enough if the person sought to be charged has held out the one who acts, as his partner, under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be an agent or partner of the other: Dickinson v. Valpy, 10 B. & C. 128, 140. . . .

[Reference also to Greenleaf on Evidence, sec. 207; Fox v. Clifton, 6 Bing. 776, 794; Rogers v. Murray, 18 N. E. Repr. 261.]

Briefly, the father and son were ostensible partners; the father held out the son as doing insurance business with him as a principal; upon this foundation the son represents by conduct and signature that he is authorised to use the father's name; that is believed and acted on by the plaintiffs. Having given evidence of a partnership even by holding out, a foundation is laid for the admissibility of the son's representation against the father as competent evidence: Nicholls v. Dowding, 1 Stark. 81, 18 R. R. 796. The case appears to be within the rule that if a person is by his own permission held out as a partner, that is enough to involve him when acted upon: Pott v. Eyton, 3 C. B. 32, 38. . . .

Appeal allowed and judgment to be entered for the plaintiffs against both defendants with costs.

LATCHFORD, J., concurred.

MAGEE, J., to give judgment later.

DIVISIONAL COURT. JANUARY 17TH, 1910.

BROOKS-SANFORD CO. v. THEODORE TELIER CONSTRUCTION CO.

Mechanics' Liens—Preservation of Lien—Time—Last Delivery of Materials—Bolts Used for Experimental Purposes — Effect of Taking and Discounting Promissory Note—Mechanics' Lien Act, sec. 28.

Appeal by the plaintiffs in proceedings under the Mechanics' Lien Act, R. S. O. 1897 ch. 153, from the judgment of J. A. Cameron, an official referee, dismissing the action as agianst the defendants Frankel Brothers.

The plaintiffs supplied the defendants the Telier Co. with certain hardware for use in the construction of a building for the defendants Frankel Brothers. The last delivery was on the 1st April, 1908, within 30 days of the filing of the lien. It was of expansion bolts, to the value of 84 cents, required for use in connection with guards to an elevator shaft. The elevator was installed without gates, but otherwise it was completed in October, 1907. After January, 1908, little remained to be done by the Telier Co. under their contract. Frankel Brothers insisted that defective concrete should be replaced or repaired, and that the elevator should be properly safeguarded. There were structural difficulties preventing, it was thought, the installation of gates; and Wolff, the Telier Co.'s superintendent, was endeavouring to provide guards that would serve the same purpose. In installing a working model of the proposed device, he required four bolts to secure to a brick wall a plate to which one of the guards was attached. The bolts were delivered to him at the building, and used by him there.

The Referee considered that the contract did not call for gates, and that, as the bolts were used but for a temporary or experimental purpose, the supplying of them by the plaintiffs had not the effect of keeping alive the plaintiffs' lien.

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

R. G. Smythe, for the plaintiffs.

Casey Wood, for the defendants Frankel Brothers.

LATCHFORD, J. (after setting out the facts as above):—With these conclusions I find myself unable to agree. The specifications

which form part of the contract provide for an elevator "according to laws, elevator underwriters, and city authorities." Mr. Leo Frankel insisted that gates or guards should be provided in accordance with the contract, and as required by a by-law of the city of Toronto. The goods supplied by the plaintiffs were not furnished by them in connection with a separate contract as in Rathbone v. Michael, 19 O. L. R. 428; but to be used in the carrying out of the original contract between the Telier Co. and Frankel Brothers. I do not consider it material that the bolts may have been used for a temporary or experimental purpose. They were "furnished . . . to be used" in the building of Frankel Brothers, and were actually used therein: Larkin v. Larkin, 32 O. R. 80, 97; and a lien attaches under sec. 4 of the Act.

But it is argued upon the authority of Edmonds v. Tiernan, 21 S. C. R. 406, that the plaintiffs lost their lien by accepting from the Telier Co., in part payment of their account, a promissory note which they discounted with their bankers, and which had come back into their hands unpaid prior to the registration of their claim of lien. . . .

[Reference to R. S. O. 1897, ch. 153, sec. 28; National Supply Co. v. Horrobin, 16 Man. L. R. 472; Arbuthnot v. Winnipeg Manufacturing Co., 16 Man. L. R. 401; Wallace on Mechanics' Liens in Canada, p. 150; Coughlin v. National Construction Co., 11 W. L. R. 491; Swanson v. Mollison, 6 W. L. R. 678; Clarke v. Moore, 8 W. L. R. 405, 411; Gorman v. Archibald, 8 W. L. R. 916.]

It seems to me that if the British Columbia statute under which Edmonds v. Tiernan was decided had contained, as the statutes of that Province now contain, provisions similar to those of sec. 28 of the Ontario Act, the decision of the Supreme Court of Canada would have been different. The case has not been followed by the Supreme Court of British Columbia, and has no application in this Province owing to the provisions of sec. 28 of the Ontario Act. The plaintiffs' lien was not prejudiced or destroyed by the taking of the Telier Co.'s note and the discounting of it. When the note was returned to them unpaid by their bank, they were entitled to rely on their original account, and to file a lien for that and the goods afterwards supplied.

Appeal allowed with costs.

BOYD, C., in a written opinion, stated that he agreed with the conclusions both of fact and law of LATCHFORD, J. Upon the question of the effect of the note, he expressed the view that a mechanics' lien should stand at least as high as a vendor's lien on goods

sold, and referred to Bunney v. Poyntz, 2 B. & Ad. 573; Gunn v. Bolckow, L. R. 10 Ch. 491; In re J. Defries & Sons Limited, [1909] 2 Ch. 429.

MAGEE, J., dissented in part, for reasons to be stated in writing.

BRITTON, J. JANUARY 18TH, 1910.

CAMPBELL v. COMMUNITY GENERAL HOSPITAL ALMSHOUSE AND SEMINARY OF LEARNING OF THE SISTERS OF CHARITY, OTTAWA.

Contract—Charitable Corporation—Absence of Seal and Writing —Partly Executed Contract—Powers of Corporation —Work and Lobour—Damages for Interference—Measure of Damages.

Action for the price of work done by the plaintiff for the defendants.

The defendants, for the purposes of their charity and work, owned a farm. The plaintiffs were well-drillers. The Procurator-General or general manager of the defendants, desiring, if it could be done at a moderate expense, to have an additional well upon the farm, made an agreement, not in writing, with the plaintiffs.

The plaintiff Argue stated that the agreement was that the plaintiffs should bring on their plant and proceed to drill for water, and get water, and that the defendants were to board the plaintiffs' men during the work, furnish fuel for the plaintiffs' engine, and, upon water being found, pay $2 per foot for the distance drilled.

The general manager, Sister Rosalie, said that it was a term of the contract that the plaintiffs should find water in 3 or 4 days, or, if not, they would get no pay other than board of men and fuel for engine.

The trial Judge left to the jury the question, "Was it a term of the contract that the plaintiffs should get water in 3 or 4 days, or get no pay other than board of men and fuel for the engine?" The jury answered, "No."

After the plaintiffs had drilled for 4 days without finding water, Sister Rosalie did not insist upon the work being stopped; but on the 8th day she ordered the men to stop work. A hole had then been drilled to the depth of 154 feet, for which the plaintiffs claimed $2 per foot, or $308, and $6 for 8 ft. 4½ in. of pipe.

The defendants pleaded that the contract was not valid and binding upon them, being beyond the scope of the authority of Sister Rosalie, and that the contract was otherwise invalid as not

in writing and not in any way authenticated by the defendants' corporate seal.

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

M. J. Gorman, K.C., and A. E. Lussier, for the defendants.

BRITTON, J.:— . . . The defendants were incorporated by 12 Vict. ch. 108. The amending Act, 24 Vict. ch. 116, gave to the defendants their present corporate name. They were incorporated and established as an hospital for the reception and care and education of indigent and infirm sick persons of both sexes and of orphans of both sexes. They are in no sense a trading corporation. They are entitled "to purchase, acquire, hold, possess, and enjoy . . . lands," within this province, "not exceeding in yearly value £2,000 currency."

I am of opinion that it was quite within the power of the defendants to incur the expense of an additional well upon the farm of their institution. Such a well would probably be useful, conducive to the saving of labour, to the health and convenience of the inmates and servants and staff of the institution; but the contract sought to be made was a very special one; and—unless I am prepared to say that in no case, where the consideration for payment is partly executed, and where the contract itself is intra vires, can the objection of want of writing and want of corporate seal prevail—I must give effect to the objection in this case. . .

[Reference to Lawford v. Billericay Rural District Council, [1903] 1 K. B. 772.]

The purposes of the defendant's corporation in this case did not render it necessary that the work sued for should be done. The defendants have got along without such well as was contracted for. The contract was one which, if completely performed, might have involved the defendants in expense far beyond the reasonable value of any well obtained. The consideration for payment has not been fully executed, and the work of the plaintiffs has not been accepted in any other way than that the hole formed by drilling is on their land. It is of no use to the defendants, and, so far as appears, cannot be made of any value to them. That is sufficient for my decision against the plaintiffs' right to recover. But I may add that, if the plaintiffs are entitled to recover at all in this action, the measure of damages, in my opinion, is not necessarily the $2 per foot for the depth of the drilling, but it is rather the damages for wrongful interference by the defendants with the work. That may be difficult to determine, as it is quite possible that the plaintiffs might not have found water at any such depth,

if at all, that they could profitably reach. The reasonable damages of the plaintiffs are, as I view the case, the loss of men's wages, the cost of transportation of and setting up and taking down and use of plant—in all not to exceed $175. . . .

Upon the question of seal, this case is clearly distinguishable from National Malleable Castings Co. v. Smith's Falls Malleable Castings Co., 14 O. L. R. 22. See Leslie v. Township of Malahide, 15 O. L. R. 4.

I must dismiss the action, but it will be without costs.

DIVISIONAL COURT. JANUARY 18TH, 1910.

McDONALD v. CURRAN.

Fraudulent Conveyance—Intent to Defeat Execution—R. S. O. 1897, chs. 115, 147—Amendment—Unjust Preference—Following Notes or Proceeds—Disposition — Consideration—Bar of Dower—Husband and Wife — Transactions between — Bona Fides.

Appeal by the plaintiff from the judgment of BOYD, C., ante 121. (On that page by a clerical error it is stated that the action was tried by BOYD, C., and a jury; it was tried without a jury.)

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

G. C. Campbell, for the plaintiff.

The defendant Elizabeth Curran, in person.

RIDDELL, J.:—In 1906 the plaintiff brought an action for trespass, &c., against John Curran, and recovered judgment on the 13th March, 1907, for $525 and costs. Upon appeal to this Court, on the 29th May, 1907, we affirmed the judgment.

The defendant John Curran disposed of his farm and chattels to Eugene Horan, his wife's brother, almost immediately after the trial, having, as the plaintiff swears, threatened her that he never would pay the judgment, but would get out of paying it. There were two mortgages on the farm, it having been subject to mortgage when John Curran got it from his father, and he having made another mortgage of the land himself before marriage.

The land was sold for about $2,400 over and above the mortgages, and the chattels for $993, leaving John Curran without

property except the purchase money. The deed of the land is dated the 23rd March, and the bill of sale of the chattels the 26th March, 1907; and the defendant Elizabeth Curran joins in the deed to bar her dower as the wife of John Curran.

An action was brought by the present plaintiff against John Curran and Eugene Horan to set aside the sales; this was tried before the Chancellor on the 26th November, 1908, at Toronto, and that learned Judge, while thinking the transaction full of suspicion, and saying, "So far as Curran was concerned, I have no manner of doubt . . that Curran intended to beat this execution creditor," adds, "I cannot say upon this evidence that that was shared by Horan." He finds that it was not proved that Horan took part in a conspiracy or that he did not buy or pay the purchase money in good faith. That action was accordingly dismissed. The plaintiff then brought this action against John and Elizabeth Curran and Horan, claiming that Elizabeth Curran received from Horan part of the purchase price, three notes of $200 each, and one of $100; that this was done to defeat the plaintiff, &c., and was in pursuance of a corrupt compact, &c., for this purpose; that Elizabeth Curran gave no consideration for the notes; and claimed that the notes should be applied to pay the plaintiff's claim. This action (being discontinued as against Horan) was also tried before the Chancellor, and he on the 30th October, 1909, gave judgment dismissing the action, but without costs.

The plaintiff now appeals.

The learned Chancellor, upon evidence which impressed him and which was sufficient to justify his finding, has found that Elizabeth Curran advanced to her husband in 1902 or 1903 $200 and again $100; that she toiled hard outside and in upon the farm; that all parties believed (including the conveyancer) that she had dower in the farm; and that she positively refused to sign the deed to Hiram unless her claims were recognized. He considers that, while $300 of the $700 was a debt of the husband to the wife and the $400 the estimated value of the dower, the making of notes for $700 by Horan to Elizabeth Curran was in reality a payment by Horan to Elizabeth Curran of $400 for barring her dower, and a payment by John Curran, through Hogan, of the $300 which he owed his wife. Of this sum, it is said, $200 was not an unjust preference, as it went to relieve a mortgage on the land, leaving $100 which might be impeached under the statute R. S. O. 1897 ch. 147, sec. 2 (2). As regards this sum, the Chancellor says that this action is not framed on the ground of fraudulent or unjust preference, and he refuses an amendment.

I agree that an amendment ought not to be allowed; if such an amendment were to be made, it might result in the taking of further evidence; and all the advantage the plaintiff could receive from such a course can be had by bringing a new action, which is still open to her. If she desires, the judgment will so expressly state.

Then as to the $400, the argument is that, as Elizabeth Curran had in reality no dower in the land, she cannot be allowed to retain against this creditor of her husband the amount given her for her supposed dower.

I do not think this argument is entitled to prevail.

Forrest v. Laycock, 18 Gr. 611, cited by the Chancellor, is conclusive that where a wife in good faith claims to be entitled to dower, and refuses to join in the conveyance without a reasonable compensation being made to her, the payment made to her by the purchaser to induce her so to join in the conveyance is valid against the creditors of the husband.

In Drewry v. Percival, 19 O. L. R. 463, we considered a question not unlike this: see p. 470.

The appeal should be dismissed. There will be no costs (except disbursements, if any), the defendant appearing in person.

FALCONBRIDGE, C.J., and LATCHFORD, J., agreed.

DIVISIONAL COURT. JANUARY 19TH, 1910.

GORDON v. GOODWIN.

Landlord and Tenant—Unsanitary Condition of Dwelling-house—Right of Tenant to Repudiate Tenancy—Remedying Defects—Findings of Fact of Trial Judge—Reversal on Appeal.

Appeal by the defendant from the judgment of CLUTE, J., in favour of the plaintiff in an action for rent or damages for breach of covenant in lease.

The plaintiff was the owner of a house in Ottawa, which, by an indenture of lease, dated the 1st February, 1909, she let furnished to the defendant for 6 months at a rental of $125 per month in advance. The defendant covenanted to leave the premises in good repair; and the plaintiff, that the premises and property were "now in good and substantial repair."

In the negotiation for the letting the plaintiff told the defendant that the sewerage and plumbing in the house were in perfect order.

The defendant took possession, and about two weeks thereafter became ill; a bad smell had been noticed; and a plumber who was sent for reported that there were defects in the plumbing. The defendant left the house, deeming it in an unsanitary condition.

The plaintiff sued for $1,000, and obtained a verdict for $640.

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

Travers Lewis, K.C., and J. W. Bain, K.C., for the defendant.

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

RIDDELL, J.:— . . . There is no doubt as to the law. Upon the letting of a furnished house there is an implied undertaking that the house is reasonably fit for habitation, and if from any cause this is not the case, the tenant is justified in repudiating the tenancy: Wilson v. Finch-Hatton, 2 Ex. D. 336. This is quite irrespective of any representation by the lessor; if the lessor makes a representation that the house is fit for habitation, etc., he is not relieved from the effect of such representation by the fact that he honestly believed in the truth of his representation: Chaisley v. Jones, 53 J. P. 280. And the house must be so reasonably fit for habitation at the time of the beginning of the term, and the lessor has no right to be allowed after that time to put the house in the condition it should have been in. Of course, there is no need for the tenement answering every whim of a finical tenant; but common sense should be applied in determining whether it does fulfil the required conditions. This state of the law was present to the mind of the learned trial Judge, and the whole question is one of fact.

My brother Clute at the trial found against the defendant; and it becomes now a matter for consideration whether his findings of fact can be supported.

In Beal v. Michigan Central R. R. Co., 19 O. L. R. 502, ante 86, and Ryan v. McIntosh, 20 O. L. R. 31, ante 229, we have recently considered the principles to be adopted upon an appeal from the findings of fact made by a trial Judge. . . .

Here it seems to me that my learned brother has failed to give what I consider due weight to the evidence of the condition of the house in general, and confined his attention to three physical defects—two of which he considers slight and trifling and remediable in a short time. The evidence is, to my mind, clear that the house was in an unsanitary condition: it probably, from the evidence, would have been unsanitary even if the two defects found by the learned trial Judge had been remedied; while the

third defect, viz., that in the cellar, which seems to be proved by satisfactory evidence, can, I venture to think, not fairly be described as "a very slight defect." Supposing, however, all the defects to be slight, the case for the plaintiff is not bettered; for, in the first place, it is not the extent of the defect which is material, but the result of such defect in producing an unsanitary condition; and, second, the plaintiff has not the right either herself to correct these defects now, after the beginning of the term, or to call upon the defendant himself to repair.

Much was made of the fact that it was not proved that the sickness resulted from the condition of the house. It is quite likely, in accordance with Beal v. Michigan Central R. R. Co. and the cases there cited, that the defendant would have failed had he claimed damages from the plaintiff for causing the sickness: but it is not necessary to go that far—it is not necessary to prove that the condition of the house was such that it did cause sickness; it is abundantly sufficient to prove, as was done in this case, that it might have such effect—that is (to repeat) that the house was unsanitary.

Appeal allowed with costs and action dismissed with costs.

LATCHFORD, J.:—I agree.

FALCONBRIDGE, C.J.:—And I agree in the result.

HANNA v. HANNA—FALCONBRIDGE, C.J.K.B.—JAN. 14.

Judgment—Terms of—Claim for Chattels.]—Motion by the plaintiff to vary the minutes of a consent judgment. The minutes said that the plaintiff was to "realease all claims on farm and chattels upon new agreement being executed." The Chief Justice held that no exception could be made in favour of the plaintiff as to household furniture claimed by him. Featherston Aylesworth, for the plaintiff. A. H. F. Lefroy, K.C., for the defendant.

GREAT WEST LIFE ASSURANCE CO. v. SHIELDS—MASTER IN CHAMBERS—JAN. 15.

Summary Judgment—Affidavit in Support of Motion.]—Motion by the plaintiffs for summary judgment under Rule 603 in an action on a judgment recovered in Manitoba. The Master held that the affidavit in support of the motion, being that of one of the

Ontario solicitors for the plaintiffs, deposing to his information and belief derived from letters and telegrams received from the plaintiffs' Manitoba solicitors, was insufficient: Lagos v. Grunwaldt, [1909] W. N. 216; In re J. L. Young, [1900] 2 Ch. 753. This affidavit was fortified by an affidavit of one of the Manitoba solicitors, but that, too, was deemed insufficient, as no reasons were given for the belief that nothing had been paid on the judgment and that there was no defence to the action. Motion dismissed with costs to the defendant in the cause. J. D. Falconbridge, for the plaintiffs. M. Lockhart Gordon, for the defendant.

WHITE v. KEEGAN—BRITTON, J.—JAN. 15.

Way—Private Way—Evidence—Obstructions.]—The plaintiff was the owner of the south-west quarter and the defendant of the north-west quarter of a lot in the township of Montague. A well-defined road led to the concession road from the plaintiff's land across the defendant's land. This was opened long ago, and had been used and travelled for many years. Recently the defendant placed a gate across the north end of this road. This action was brought for its removal, and to prevent any obstruction by gate or fence, and for a declaration as to the plaintiff's rights. The plaintiff contended that the road or way was really a public highway. BRITTON, J., held, upon the evidence, that the road was not a highway, but that the plaintiff was entitled to use it as a way to the concession road, without obstruction by any gate, and made a declaration accordingly, and ordered the removal of the gate. No costs. H. A. Lavell, for the plaintiff. C. J. Foy, for the defendant.

ANDERSON v. ROSS—RIDDELL, J.—JAN. 17.

Damages—Covenant—Restraint of Trade.]—Appeal by the plaintiff from a report of a referee finding the defendant entitled to $2,500 damages for breach of a covenant in restraint of trade. Previous decisions are reported in 11 O. W. R. 852 and 13 O. W. R. 625. RIDDELL, J., said that, as in Dewey and O'Heir Co. v. Dewey, ante 329, "nothing like mathematical accuracy can be attained, nor is it desirable, nor are the damages to be measured in apothecaries' scales." Appeal allowed with costs and damages reduced to $500. J. E. Jones, for the plaintiff. H. Cassels, K.C., for the defendant.

LAMB V. FRANKLIN—FALCONBRIDGE, C.J.K.B.—JAN. 17.

Deed—Action to Set aside—Laches—Acquiescence.]—Action to set aside a conveyance of land to the defendant Franklin. The Chief Justice found the facts in favour of the defendants, and that there had been laches and acquiescence on the part of the plaintiff. Action dismissed without costs. H. L. Drayton, K.C., and G. Y. Smith, for the plaintiff. J. E. Farewell, K.C., and W. H. Harris, for the defendants.

MACDONALD V. WALKERTON AND LUCKNOW R. W. CO.—BOYD, C.—JAN. 17.

Contract—Railway Construction—Unpacked Frog—Compensation to Family of Person Killed—Default of Contractor—Indemnity.]—Action to recover $5,655.45, balance alleged to be due on a contract to build a railway for the defendants. The defendants set up that under the contract it was the duty of the plaintiff to fill with standard wooden blocks the narrow places between rails at switches, etc., and that, owing to the plaintiff's neglect to perform his duty, one Clarke, a conductor of a train of the defendants, had his foot caught in an unpacked frog and was run over by a car and killed, whereby the defendants incurred legal liability to and paid Clark's representatives $5,250, which they claimed to deduct from the amount due to the plaintiff, and they brought $405.45 into Court, and asked to have the action dismissed. The Chancellor finds that the proximate cause of the conductor's death was the absence of the packing required by the Railway Act, R. S. C. 1906 ch. 37, sec. 288, and by the contract; that the amount of compensation paid was such as should be accepted as fair and reasonable, and so binding on the contractor; that there was a sufficient supply of available material provided by the defendants to pack the dangerous gaps; and that the contract covered such a case of indemnity as was presented. Action dismissed with costs; money in Court to be paid out to the plaintiff, unless the defendants seek to have it impounded to answer the costs. G. H. Kilmer, K.C., and J. A. McAndrew, for the plaintiff. I. F. Hellmuth, K.C., and G. A. Walker, for the defendants.

MCBAIN V. TORONTO R. W. CO.—DIVISIONAL COURT—JAN. 17.

Negligence—Street Railway—Damages—Joint Negligence of two Defendants—Costs.]—Upon appeal by the defendants the To-

ronto Railway Company from the judgment of MacMahon, J., ante 185, a Divisional Court (Boyd, C., Magee and Latchford, JJ.), affirmed the judgment with costs. H. H. Dewart, K.C., for the appellants. J. M. Godfrey, for the plaintiffs.

Gibson v. Van Dyke—Falconbridge, C.J.K.B.—Jan. 18.

Trustee—Conveyance of Land—Costs.]—Action for a declaration of the plaintiff's interest in certain land and to compel a conveyance thereof. The plaintiff was a married woman; she had a sister, Joan Van Dyke, not a party to the action. The defendant was their uncle, and had, since the commencement of this action, conveyed the property in question to Joan Van Dyke. The Chief Justice directed that if Joan Van Dyke should within three weeks execute and deliver a conveyance to the plaintiff of an undivided half interest in the lands and premises in question, this action should be dismissed without costs. If Joan Van Dyke should neglect or refuse to do so, she should be added as a defendant, and she and the original defendant ordered to execute and deliver the same conveyance, without any order as to costs. G. Lynch-Staunton, K.C., and G. H. Levy, for the plaintiff. P. D. Crerar, K.C., for the defendant.

Heatherly v. Knight—Divisional Court—Jan. 19.

Fraud and Misrepresentation—Amendment.]—Appeal by the plaintiff from the judgment of Riddell, J., 14 O. W. R. 338, dismissing the action. The Court (Mulock, C.J.Ex.D., Magee and Latchford, JJ.) dismissed the appeal with costs. W. L. Payne, K.C., for the plaintiff. F. D. Boggs and A. R. Clute, for the defendant.

Elwell v. Crate—Britton, J.—Jan. 20.

Trust—Action for Declaration—Fraudulent Mortgages.]—Action by an execution creditor of Hiram A. Crate to have the defendant Elizabeth F. Crate declared a trustee for him of certain lands in Smith's Falls, and to set aside as fraudulent against the plaintiff and the other creditors of Hiram A. Crate two mortgages made by the defendant Elizabeth F. Crate to the defendant Frederick A. Crate. The learned Judge found the facts in favour of the defendants, and dismissed the action with costs. G. F. Henderson, K.C., and W. McCue, for the plaintiff. A. E Fripp, K.C., and H. A. Lavell, for the defendants.