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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JUNE 9TH, 1916.

*MITCHELL v. FIDELITY AND CASUALTY CO. OF NEW YORK.

Insurance—Accident Insurance—Bodily Injury—Accidental Means—Sprained Wrist—Recovery Delayed by Presence of Disease in System—Warranty of Health—Disability Caused Exclusively by Accident—"Total Disability"—Findings of Fact of Trial Judge—Appeal.

Appeal by the defendants from the judgment of MIDDLETON, J., 35 O.L.R. 280, 9 O.W.N. 341.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

R. McKay, K.C., for the appellants.

A. C. McMaster and J. H. Fraser, for the plaintiff, respondent.

MEREDITH, C.J.C.P., read a judgment, in which he said that the plaintiff fell from a sleeping-berth in a railway carriage, and so sprained his wrist; that was the only immediate effect of the accident, and was an injury which ordinarily should have been quite recovered from in not many months; but the plaintiff's health and strength were at the time and had been for a long time before in such a condition that, instead of making a rapid recovery, he was yet, and might be for life, in ill-health, and unable to practise his profession.

The exact character of the latent physical weakness was of no great consequence; it was there, and it was started into activity

*This case and all others so marked to be reported in the Ontario Law Reports.

by the accident. The case seemed to depend wholly upon three questions of fact: (1) Was the existence of that weakness a breach of the plaintiff's warranty that he was in sound condition physically? (2) Was the accident the cause of the plaintiff's injury now existing? (3) Is the injury total disability?

The findings of the trial Judge on these three questions, in favour of the plaintiff, could not be disturbed; and the appeal should be dismissed.

RIDDELL, J., read a judgment in which he discussed the evidence and the grounds of defence urged, and referred to some cases. He agreed with the views of the trial Judge.

LENNOX, J., in a short written opinion, stated that he agreed with the reasons of the trial Judge.

MASTEN, J., concurred.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. JUNE 9TH, 1916.

*SHARKEY v. YORKSHIRE INSURANCE CO.

Insurance—Live Stock Insurance—Construction of Policy—Commencement of Period of Liability—Death Occurring after Delivery of Policy and Payment of Premium—Disease Contracted Earlier on same Day.

Appeal by the defendants from the judgment of LATCHFORD, J., ante 108.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

W. N. Tilley, K.C., and Oscar H. King, for the appellants.

Sir George Gibbons, K.C., for the plaintiff, respondent.

RIDDELL, J., read a judgment, in which he said that, in his view, there was no need to consider anything except what appeared in black and white on the face of the documents.

What was insured was "any animal . . . (which) shall during that period die from any . . . disease . . . contracted after the commencement of the company's liability hereunder" —"that period" being "up to noon on the date of expiry of this

policy," and the "date of expiry" being stated as "7th September, 1915."

The animal contracted the fatal disease after the policy was signed for the defendants at their office in Montreal, but before delivery to the plaintiff, and there was no previous payment of premium, interim receipt, etc., to affect the question.

The fallacy in the contention of the plaintiff was the hypothesis that she, by her application, offered a contract to the defendants, which was accepted by the defendants by their writing and signing a policy of insurance—therefore, the contract was formed and the defendants' liability commenced with the signing of the policy. That was not the legal position. The application was not an offer, but a request to the defendants to offer a policy. The company may decline altogether or may accede to the request. If they accede, they write a policy and tender it to the proposed assured as the contract they are willing to enter into. If the assured accept the policy tendered, then, and only then, the contract is complete, and that is the "commencement of the company's liability" (the premium being paid or other arrangements satisfactory to the company being made.)

Reference to Provident Savings Life Assurance Co. of New York v. Mowat (1902), 32 S.C.R. 147, 156; Canning v. Farquhar (1886), 16 Q.B.D. 727, 730, 731; May on Insurance, 4th ed., para. 43 H.; North American Life Assurance Co. v. Elson (1903), 33 S.C.R. 383.

The liability of the defendants did not begin (if at all) until after the fatal disease had been contracted.

Moreover, the material alteration in the subject of insurance, known to the plaintiff, was fatal to her claim. May, op. cit., para. 43G.; Canning v. Farquhar, supra.

The appeal should be allowed.

MEREDITH, C.J.C.P., read a judgment in which he discussed the provisions of the contract, and said that, where the parties had agreed, as they had in this case, that "the company's liability commences after payment of the premium and receipt of policy or protection note by the insured," and that the company shall be liable only "in case of death from disease contracted" after the "commencement of the company's liability," there could not be liability for death from disease contracted before the company's liability so began.

The appeal should be allowed.

LENNOX, J., agreed that the plaintiff could not recover. There was, in his opinion, a completed contract when the plaintiff

accepted the policy; but she accepted on the terms therein set out, and those terms precluded her from recovery in respect of a disease contracted before the time of acceptance—the commencement of the company's liability.

MASTEN, J., agreed in the result, basing his conclusion exclusively on the interpretation of the words of the policy, which, he thought, attached.

Appeal allowed.

SECOND DIVISIONAL COURT. JUNE 9TH, 1916.

*RE NEWCOMBE v. EVANS.

Surrogate Courts—Removal of Testamentary Cause into Supreme Court of Ontario—Difficulty and Importance of Case—Surrogate Courts Act, R.S.O. 1914 ch. 62, sec. 33 (3)—Value of "Property of the Deceased"—Assets in Foreign Country Included—Law of Foreign Country.

Appeal by the defendant from the order of LATCHFORD, J., in Chambers, ante 221.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

A. W. Langmuir and A. H. Foster, for the appellant.

H. S. White, for the plaintiff, respondent.

RIDDELL, J., in a written opinion, said that John A. Newcomb, domiciled in Ontario, died, having made what was alleged to be his last will and testament. Upon probate being applied for in the Surrogate Court of the County of Essex, it was made to appear that he had within Ontario $105.25, but in Massachusetts $900 in personal property and about $24,000 in real property. His sister, the appellant here, opposed the grant of probate; and a real dispute, "a fair case of difficulty," arose; and so "the case should be removed if the amount of the estate brings the case within the statute:" Re Pattison v. Elliott (1912), 3 O.W.N. 1327. Section 33 (3) of the Surrogate Courts Act, R.S.O. 1914 ch. 62, provides that a case shall not be removed "unless the property of the deceased exceeds $2,000 in value." Property which cannot be affected by the will is not to be considered in determining the amount of the property of the deceased under

sec. 33 (3). The affidavit before Latchford, J., was defective in not setting out definitely the result in Massachusetts of a grant of probate in Ontario; and accordingly he dismissed the application. Upon the argument of the appeal, the Court allowed a further affidavit to be put in; and it was satisfactorily shewn that a grant of letters probate by the Court of the domicile of the decedent is accepted by the Massachusetts Court.

Such being the fact, the property in Massachusetts will be affected by probate in Ontario, and should be considered in determining the value of the property of the deceased.

The appeal should be allowed and the case removed into the Supreme Court of Ontario; costs here and below to be costs in the cause.

LENNOX and MASTEN, JJ., concurred in the result of and in the reasons for the judgment of RIDDELL, J.

MEREDITH, C.J.C.P., also agreed in the result, for reasons stated in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. JUNE 9TH, 1916.

CRANSTON v. TOWN OF OAKVILLE.

Highway—Nonrepair—Injury to Traveller Thrown from Cutter—Snow-road—Evidence of Dangerous Condition—Dangerous Vehicle—Negligence—Contributory Negligence—Liability of Municipality—Findings of Fact of Trial Judge—Appeal—Divided Court.

Appeal by the defendants from the judgment of HODGINS, J.A., ante 175.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

H. J. Scott, K.C., for the appellants.

J. S. Fullerton, K.C., and J. E. Lawson, for the plaintiff, respondent.

MEREDITH, C.J.C.P., read a judgment in which he said, among other things, that before the plaintiff could recover in this action it should have been proved that the pitch-hole in the snow-road which caused the jolt of the cutter in which he

was seated, in itself proved neglect of the defendants' duty to repair the road, when out of repair, and that the plaintiff's injury was caused by that negligence. The evidence was not sufficient to satisfy the onus, which was upon the plaintiff, in either respect.

The plaintiff, a very bulky man, was sitting in the back seat of a back-to-back-seated sleigh, and was sitting sideways, so that a jolt of even a mild character might have thrown him out, and was likely to do so. The jolt was not a severe one.

There was no evidence of any conveyance having upset at this particular spot nor of any other accident of any kind there.

A higher degree of repair should not be required from a town municipality than from a township municipality. In all cases, the question should be: is the road in a reasonable state of repair, having regard to the needs of the traffic over it and the means at the disposal of the municipality for the repair of all its roads?

The learned Chief Justice was unable to find that the defendants were negligent; nor was he able to find that the seven-inch depression in the snow-road at the place where the plaintiff fell out of the sleigh was, and that his own want of care was not, the cause of his injury.

The appeal should be allowed and the action dismissed.

RIDDELL, J., reached the same conclusion, for reasons stated in writing.

LENNOX, J., in a written opinion, said that the only question upon which he had felt any hesitation was as to whether the plaintiff could, by the exercise of reasonable care, have avoided the injury, or, admitting the want of repair, the possible question, seldom arising, was it the cause of the accident? These were questions of fact for the learned trial Judge; they were carefully considered; and it could not be said that he came to a wrong conclusion.

There was evidence, of a kind, to shew that the highway was in a reasonable state of repair, evidence which it was possible to accept and act upon; but LENNOX, J., entirely agreed with the trial Judge as to its weight and effect.

The appeal should be dismissed.

MASTEN, J., was also of opinion, for reasons stated in writing, that the appeal should be dismissed.

The Court being divided, appeal dismissed.

SECOND DIVISIONAL COURT. JUNE 9TH, 1916.

*MONCUR v. IDEAL MANUFACTURING CO.

Company—Subscription for Shares—False and Misleading Statements—Action by Liquidator for Declaration of Invalidity of Mortgage Made by Company—Fraud Practised upon Individual Shareholders—Inability to Make Restitution—Rescission—Damages for Deceit—Incorporated Company—Liability in Action for Deceit.

Appeal by the plaintiff from the judgment of MIDDLETON, J., ante 37, dismissing an action brought to obtain a declaration that a certain mortgage was invalid on account of fraud, for an injunction retraining the defendant company from assigning the mortgage, replacement of a sum of $15,000 paid and interest, and for indemnity.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

C. W. Bell and T. B. McQuesten, for the appellant.

M. J. O'Reilly, K.C., for the defendants, respondents.

RIDDELL, J., set out the facts in a written opinion. He said that one Welsh, in August, 1913, procured from the defendants, an incorporated company of manufacturers, an option on their property, land, buildings, etc., for $25,000. He formed a company called the Nagrella Manufacturing Company Limited, and had it incorporated on the 6th September, 1913, with the intention of acquiring the defendants' business. The capital stock was 2,500 shares of $100 each. On the 12th September, Welsh obtained from the defendants an option for $5,000 upon certain patent rights. On the same day, the new company held an organisation meeting and adopted by-laws, one of them making 1,125 shares preferred stock. The new company then took an assignment of Welsh's options, giving therefor the 1,373 shares remaining common stock. A prospectus of the new company was filed, on the 18th October, in the office of the Provincial Secretary. On the 26th August, Welsh had procured letters from Fletcher, the president and general manager of the defendants, and Main, their auditor, which contained statements concerning the business of the defendants that were misleading. These letters were incorporated by Welsh in the prospectus, copies of

which were sent out. By means of the prospectus Welsh sold some of his shares. The Nagrella company failed, and a winding-up order was made. The plaintiff, as liquidator of the company, sued the defendants substantially for rescission of the contracts entered into in pursuance of the acceptance of the options, and for other relief.

The learned Judge said that rescission was impossible, as there could be no restitutio in integrum; and the only question open was, whether the plaintiff could maintain a common law action for deceit.

Assuming that the defendants would be liable for the fraud of their agent Fletcher, the fraud, so far as the evidence shewed, was practised on the persons who purchased stock from Welsh; and their right of action must be asserted by them individually.

There was no evidence that the Nagrella company or Welsh were misled, or were the victims of any fraud; and on that ground the appeal should be dismissed.

The learned Judge did not agree that "an incorporated company cannot in its corporate character be called on to answer in an action for deceit." This supposed proposition of law rests on a dictum of Lord Cranworth, partly supported by Lord Chelmsford, in Western Bank of Scotland v. Addie (1867), L.R. 1 H.L. Sc. 145, 166, 167; but this overlooked Denton v. Great Northern R.W. Co. (1856), 5 E.&B. 860, and cannot be considered law in the light of such cases as Barwick v. English Joint Stock Bank (1867), L.R. 2 Ex. 259; Mackay v. Commercial Bank of New Brunswick (1874), L.R. 5 P.C. 394; Swire v. Francis (1877), 3 App. Cas. 106; Houldsworth v. City of Glasgow Bank (1880), 5 App. Cas. 317; S. Pearson & Son Limited v. Dublin Corporation, [1907] A.C. 351; cf. Bowstead on Agency, 5th ed., pp. 353, 354; Halsbury's Laws of England, vol. 1, p. 214, para. 454; Pollock on Torts, 9th ed., pp. 305, 314, 315.

LENNOX, J., agreed with RIDDELL, J.

MASTEN, J., agreed in the result, for reasons briefly stated in writing.

MEREDITH, C.J.C.P., dissented, for reasons stated in writing.

Appeal dismissed; MEREDITH, C.J.C.P., *dissenting.*

SECOND DIVISIONAL COURT. JUNE 9TH, 1916.

RE LOGAN AND CITY OF TORONTO.

Municipal Corporations—Expropriation of Land—Compensation —Arbitration and Award—Municipal Act, R.S.O. 1914 ch. 192, sec. 325—Manufacturing Business Carried on upon Land—Rearrangement of Buildings—Plan—Alleged Mistake of Arbitrator—Explanation—Compensation Based on Cost of Rearrangement, Value of Land Taken, and Injurious Effect on Lands not Taken.

Appeal by John Logan, claimant, from an award of the Official Arbitrator for the City of Toronto fixing at $18,632 the compensation to be paid to the appellant in respect of land taken by the city corporation for the purpose of widening Greenwood avenue.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

M. K. Cowan, K.C., and S. W. McKeown, for the appellant.

C. M. Colquhoun, for the city corporation, respondents.

The judgment of the Court was read by MEREDITH, C.J.C.P., who said that the appeal was brought with the object substantially of having the matter sent back to the Official Arbitrator for reconsideration, on the ground that his award was made under a misapprehension on his part.

The land-owner should have the fair value of the land taken "beyond any advantage the owner may derive" from the work: Municipal Act, R.S.O. 1914 ch. 192, sec. 325. The owner here contended, and the arbitrator found, that this was not an ordinary case; that the owner had already little enough land for the carrying on and proposed extension of his business of a brick-maker; and this aspect of the case was fully inquired into on the arbitration.

The arbitrator's conclusion was, that, if the appellants' buildings were rearranged according to a plan made, in accordance with his findings on the whole evidence, the appellant would have enough room for his present business and for his projected enlargement of it.

It was contended by the appellant that the plan shewed buildings partly upon "made land," and that, as the arbitrator had expressly found that buildings could not safely be erected on

"made land," the case was a plain one of mistake on the part of the arbitrator. It turned out, however, that the inconsistency arose from a clerical error in the omission of the word "and" before "made land;" the arbitrator's conclusion really was, that the buildings shewn in his plan could with safety be placed where indicated, because, although in some spots "made land," it was old "made land," quite capable of bearing all the strain which buildings of the character indicated could put upon it; and the evidence was sufficient to support the arbitrator's findings.

That which the arbitrator had done was to devise a scheme out of the evidence, and to give a plan of it, which will give to the appellant quite enough buildings and room for all his present and projected business, and give it in more compact and convenient arrangement than at present exists; and he had allowed to the appellant, as compensation for the land taken, its price, and for injurious effect upon his other landed rights and interests a sum quite sufficient to pay for all the changes needed to bring the buildings and yards into conformity with the plan.

Appeal dismissed.

SECOND DIVISIONAL COURT. JUNE 9TH, 1916.

TROWERN v. DOMINION PERMANENT LOAN CO.

Vendor and Purchaser—Agreement for Sale of Land—Payment of Part of Purchase-money to Vendor—Assignment of Remainder by Vendor to Creditor—Payment Made by Purchaser to Assignee—Action by Purchaser against Assignee to Recover Payments Made because Vendor Unable to Convey—Vendor's Interest in Land not Conveyed to Assignee—Purchaser's Contract with Vendor only.

Appeal by the defendants and cross-appeal by the plaintiff from the judgment of the County Court of the County of York in an action to recover instalments of purchase-money of land contracted to be sold by the defendants to the plaintiff, the plaintiff alleging that the defendants were unable to make title to the land. The judgment of the County Court was in favour of the plaintiff for the recovery of $117.52, part of his claim.

The appeal and cross-appeal were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

J. F. Boland, for the defendants.
Gideon Grant and F. J. Hughes, for the plaintiff.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the vendor, having received from his purchaser part of the purchase-money of land sold, assigned to a creditor the rest of it. The purchaser made the next payment to the creditor; and now, the vendor being unable to convey the land in accordance with the terms of this contract, this action was brought to recover all the payments thus made; not to recover them from the vendor, but to recover them from the assignee of the balance of them, who had received but one intermediate payment; to recover them as money payable by the assignee to the purchaser or money received by the assignee for the use of the purchaser. How, the learned Chief Justice asked, could any such action lie; what legal or equitable right in disposition of them could the purchaser have against the assignee?

The case was one of a bare assignment of the money; there was no transfer of the land or any interest in it, nor any obligation imposed or intended to be imposed upon the assignee in respect of the contract of sale or of the land which was the subject-matter of it. The position of the parties was not different from that which it would have been if the money had been paid to the vendor, and had been paid over by him to his creditor, without any prior assignment of or agreement to assign it.

It was true that the vendor did not confer upon his assignee any greater right against the purchaser than he himself had; but, on the other hand, he did not confer upon the purchaser any right against the assignee. So the cases which decide that an assignee takes subject to the obligation of the assignor do not help the purchaser; there was no obligation arising out of the payment of the instalment paid to the assignee; if there had been, it would not have been paid until that obligation had been fulfilled. The purchaser was in no better position than if he had paid to the assignee a bill of exchange of the purchaser upon him in favour of the assignee for the amount of the payment in question.

The purchaser's contract was with the vendor alone; and, for damages for the breach of that contract, he could look to the vendor only.

The appeal should be allowed and the action dismissed.

Appeal allowed.

SECOND DIVISIONAL COURT. JUNE 9TH, 1916.

*CITY OF TORONTO v. MORSON.

Courts—Jurisdiction—Judicature Act, R.S.O. 1914 ch. 56, secs. (2), (3), 119—County Court Action—Power of County Court Judge to Refer Case to Divisional Court of Appellate Division —"Prior Known Decision"—"Judge of Co-ordinate Authority"—Decision of County Court Judge in Division Court not Binding on Judge in County Court—Assessment and Taxes—Taxation of Salaries of Judges—Powers of Provincial Legislature—Exemption—Assessment Act, R.S.O. 1914 ch. 195, sec. 5 (15)—Omission of Word "Imperial."

Motion by the plaintiffs for judgment in an action brought in the County Court of the County of Ontario, and referred by the County Court Judge to a Divisional Court of the Appellate Division.

The action was brought to recover municipal taxes in respect of the income of the defendant—the salary derived from his office as one of the Junior Judges of the County Court of the County of York; and the question raised was, whether Judges and other federal officers could legally be assessed in respect of their incomes.

The motion was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

Irving S. Fairty, for the plaintiffs.

R. A. Reid, for the defendant, raised a preliminary objection, which is dealt with by the Court.

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RIDDELL, J., in a written opinion, said that the Judges of this Court would consider themselves disqualified were it not a case of necessity; there being no Judges not in like position, the Court would, if the case called for decision, follow Dimes v. Grand Junction Canal Co. (1852), 3 H.L.C. 759, and Boulton v. Church Society of the Diocese of Toronto (1868), 15 Gr. 450, and hear it.

But the defendant raised an objection to the hearing of the motion—that the case was not properly before the Court.

The powers of the Court were purely the creature of the statute; the Court had no power to decide the question submitted, unless the statute gave that power.

Section 119 of the Judicature Act, R.S.O. 1914 ch. 56, made applicable to County Courts mutatis mutandis the provisions of

sec. 32, which are: "(2) It shall not be competent for any Judge of the High Court Division in any case before him to disregard or depart from a prior known decision of any other Judge of co-ordinate authority on any question of law or practice without his concurrence. (3) If a Judge deems a decision previously given to be wrong and of sufficient importance to be considered in a higher Court, he may refer the case before him to a Divisional Court."

The Judge of the County Court of the County of Ontario deemed the decision of the Judge of the County Court of the County of Peel in a previous action between the same parties, in respect of the taxes for another year, where the same question was raised, to be wrong, and so referred the case to a Divisional Court. But it appeared that the decision of the Peel Judge was given in a Division Court plaint; and, in the opinion of RIDDELL, J., after a full examination of the provisions of the County Courts and Division Courts Acts, the decision of the Peel Judge was not a "decision of any other Judge of co-ordinate authority:" and the Ontario Judge should give his own decision upon the case in his Court.

The case was, therefore, not properly before the Court, and the motion for judgment should be dismissed—the plaintiffs to pay the costs.

LENNOX, J., with some doubt, agreed in the result, for reasons briefly stated in writing.

MASTEN, J., was of the same opinion, for reasons stated in writing. He said that the application should be dismissed and the case remitted to the County Court for determination. In the circumstances, it was not a case in which to award costs.

MEREDITH, C.J.C.P., read a dissenting judgment. Dealing with the preliminary objection, he said that it was not one going to the jurisdiction of the Court, but was an objection only in respect of the form in which the jurisdiction should be exercised. But there was no irregularity; the two County Court Judges were "of co-ordinate authority."

Upon the merits of the case, there were but two questions involved: (1) Has the Province power to tax the salaries of the Judges of its Courts? (2) If so, has it authorised the taxation of them?

Both questions should be answered in the affirmative; and the plaintiffs should have judgment for the amount claimed without costs.

The learned Chief Justice referred to the curious omission from clause 15 of sec. 5 of the Assessment Act, R.S.O. 1914 ch. 195, of the word "Imperial." The clause exempts from municipal taxes, among other things, "any pension, salary, gratuity or stipend derived by any person from His Majesty's Treasury." The corresponding clause in the Assessment Act of 1904 had the word "Imperial" before "Treasury;" but the Chief Justice thought that the dropping of the word had no significance; it was merely the dropping by the Revision Commission of an unnecessary word —the context making it plain that "Treasury" meant "Imperial Treasury."

RIDDELL, J., referring to the same enactment, said that he had learned that the omission of "Imperial" was a printer's error.

Motion dismissed; MEREDITH, C.J.C.P., *dissenting.*

SECOND DIVISIONAL COURT. JUNE 9TH, 1916.

*KIDD v. NATIONAL RAILWAY ASSOCIATION.

Judgment—Mistake in Judgment as Entered—Appeal from Judgment—Order on Consent Dismissing Appeal—Re-opening—Making Judgment as Entered Conform to Judgment as Pronounced—Application after Lapse of 22 Months—Position of Parties Unchanged—Solicitor's Slip—Order Relieving from—Terms—Costs.

MOTION by the defendants to amend the order of a Divisional Court of the Appellate Division, pronounced on the 5th November, 1914, dismissing, by consent of all parties, the defendants' appeal from the judgment of HODGINS, J.A., 6 O.W.N. 710.

The object of the motion was to amend the judgment of HODGINS, J.A., as drawn up and issued, by striking out the word "higher" in reference to the rate of commission ordered to be paid to the plaintiff. The word "higher" was not in the judgment as pronounced.

On the 11th December, 1914, the defendants moved before HODGINS, J.A., to have that word struck out. The motion was refused; and the order refusing it was not appealed from. On the 11th April, 1915, an application to amend the judgment was dismissed by MIDDLETON, J., without prejudice to an application to a Divisional Court.

The defendants asked to have the consent order amended by adding a clause correcting the judgment by striking out "higher," and asked, also, for leave to appeal from the orders of HODGINS, J.A., and MIDDLETON, J., refusing to amend.

The motion was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

R. McKay, K.C., and R. D. Moorhead, for the defendants.

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

MEREDITH, C.J.C.P., in a written opinion, said that nothing had been done or left undone, in the 22 months which had elapsed since the trial-judgment was pronounced, to alter the position of the parties, substantially, in respect of the matter now in question. The appeal upon which the consent order was made raised no such question as that involved in this application; the appeal was in fact launched some time before the form of the judgment was settled; if such question had been involved in the appeal, the Court should have sent the parties to the trial Judge to have it settled; and the slip or mistake of solicitor or counsel in itself was no ground for a denial of justice. The trial Judge was not functus officio; the Court always has power to correct such slips or mistakes; and in such a case as this the trial Judge is the most competent Judge to do it: Prevost v. Bedard (1915), 51 S.C.R. 629; Oxley v. Link, [1914] 2 K.B. 734; Pearson v. Calder (1916), 10 O.W.N. 93.

The trial Judge should entertain the application to correct the slip, and should make the formal judgment accord with that which he pronounced, upon payment of all costs lost through the slip of the applicants' solicitor; and an order of this Court may go accordingly—the plaintiff having consented to this application being treated also as an appeal from the refusal of the trial Judge to entertain such a motion.

If there should be any substantial variation in the judgment, the right to appeal against it, to that extent, will run from the time the change is made; and, in order to prevent any discussion over the point in the future, the order now made is subject to that term.

LENNOX and MASTEN, JJ., agreed in the result; the latter giving written reasons.

RIDDELL, J., dissented, for reasons stated in writing.

Motion granted on terms; RIDDELL, J., *dissenting*

SECOND DIVISIONAL COURT. JUNE 9TH, 1916.

*BIRCH v. PUBLIC SCHOOL BOARD OF SECTION 15 IN THE TOWNSHIP OF YORK.

Public Schools—Purchase of Site and Erection of School-house—Meetings of Public School Supporters—Approval of Proposals of Board—Complaint to Inspector—Public Schools Act, R.S.O. 1914 ch. 266, sec. 54 (11)—Finality of Inspector's Decision—Contract for Erection of School-house—Board of School Trustees, Powers of—Funds not Provided by Township Council—Issue of Debentures—Sec. 44 of Act—Injunction.

Motion by the plaintiffs for judgment in the action, which was brought to restrain the defendants from proceeding with the purchase of a school-site and the erection of a school-building.

The motion was referred by MIDDLETON, J., to a Divisional Court of the Appellate Division: see ante 219.

The motion was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

R. McKay, K.C., for the plaintiffs.

W. D. McPherson, K.C., for the defendant School Board.

R. G. Smythe, F. H. Barlow, and H. A. Newman, for the other defendants.

MEREDITH, C.J.C.P., read a judgment in which he said, after stating the facts, that the new school was not to be paid for out of the rates of one year, but out of moneys to be raised upon debentures, under sec. 44 of the Public Schools Act, R.S.O. 1914 ch. 266; and so it was necessary that the steps provided for in that section should be taken before the defendant School Board could have the required means for the purchase of the site and erection of the school.

In 1893, it was plainly adjudged in Smith v. Fort William School Board, 24 O.R. 366, that the trustees could not make a binding or unconditional contract to purchase or build until they were assured of the means to pay, through the issue of debentures; and that decision, having been followed ever since, notwithstanding many changes in the statute and two revisions of the whole statute law of the Province, should not now be overruled.

But, quite apart from that case and other cases, and the general practice following it, the learned Chief Justice would now reach a like conclusion. That decision was in respect of urban schools,

but the principle applies equally to rural schools: see sec. 44(1) of the Act, sub fin.

Neither the action heretofore taken nor the opinion pronounced by the Inspector precluded the Court from granting relief to the following extent. Judgment should go restraining the defendants and each of them from taking any action in pursuance of the resolution complained of, or otherwise proceeding towards the proposed purchase, unless and until the proposal for the loan has been submitted to and sanctioned at a further special meeting of the ratepayers, and until, in pursuance thereof, debentures shall have been duly issued.

The trustees, however, are not precluded from procuring options on sites or from making contracts to buy, conditioned upon obtaining the sanction of the ratepayers and procuring the issue of the debentures.

The other questions raised in the action should not now be determined, and in regard to them the action should be dismissed, without prejudice to any action which may hereafter be taken with respect to such questions after the meeting of ratepayers.

There should be no costs.

The provisions of sec. 54(11) of the Act do not oust the jurisdiction of the Court in such a case as this. See Arthur Roman Catholic Separate School Trustees v. Township of Arthur (1891), 21 O.R. 60—a case which must have been forgotten when Forbes v. Grimsby Public School Board (1903), 6 O.L.R. 539, was decided.

LENNOX and MASTEN, JJ., concurred.

RIDDELL, J., read a dissenting judgment. After setting out the facts, he referred to Smith v. Fort William School Board, 24 O.R. 366, and Forbes v. Grimsby Public School Board, 6 O.L.R. 539, and explained the meaning and effect of the two decisions. The present case, he said, was widely different from the Smith case. The ratepayers (the final authority) had directed the School Board to procure options; the Board had done so, and had called the ratepayers to a special meeting to consider these options; the ratepayers had decided the matter and given express directions to carry out the purchase proposed. Instead of a breach of trust being imputable to the Board in their accepting the option, it would have been a breach of trust for them to have acted otherwise; they were doing their simple duty, and there was no reason for considering that they had not the power to enter into these contracts. There was no authority binding this Court

so to hold. If the ability of the Board to pay for the school-site is to be considered a test, it must not be forgotten that the Board may, without any mandate or approval of a school-meeting, require the council to raise the money by one yearly rate: sec. 45 of the Public Schools Act.

The express duty is cast upon the Board by sec. 13 (e) of the Act; and, when the choice of the Board is ratified by a special meeting under the provisions of sec. 11, the Board can make a binding contract.

It is not open to any one now to complain of the resolution to apply to the township council for $22,500.

The action should be dismissed with costs.

It was not necessary, in the learned Judge's view, to express any opinion as to the finality of the Inspector's decision.

Judgment for the plaintiffs; RIDDELL, J., *dissenting.*

HIGH COURT DIVISION.

MIDDLETON, J. JUNE 5TH, 1916.

ASSINIBOIA LAND CO. v. ACRES.

Company—Extra-provincial Company without License to Transact Business in Ontario—Action by—Dismissal—Judgment Obtained in Saskatchewan Court—Authority of Solicitor—Attornment to Jurisdiction — Fraud — Judgment Based on Statute of Saskatchewan—Effect as to Person not Subject to Jurisdiction—Defence to Action on Judgment.

Action to recover $6,681.33, the amount of a judgment obtained by the plaintiffs against the defendant in the Supreme Court of Saskatchewan and certain costs of an appeal therefrom.

The action was tried without a jury at Brockville.

H. A. Stewart, K.C., for the plaintiffs.

I. Hilliard, K.C., for the defendant.

MIDDLETON, J., in a written opinion, said that the plaintiffs were a loan company carrying on business in Saskatchewan, where a son of the defendant also resided. The son made a mortgage which was assigned to the plaintiffs. The defendant, a widow, lived in Ontario; the son, without her knowledge, conveyed to her

the equity of redemption in the mortgaged land, and procured her to be registered as the owner of the land. The first knowledge the defendant had of the matter was when an action was brought upon the mortgage in the Supreme Court of Saskatchewan against her and her son, and she was served with the writ of summons at her home in Ontario.

By a provision of the Saskatchewan Land Titles Act, in every instrument transferring land subject to a mortgage "there shall be implied a covenant by the transferee . . . that (he or she) will pay the principal money, interest," etc.

The defendant sent the writ to her son, but gave him no authority to act for her or to instruct any solicitor on her behalf. The son, however, consulted a solicitor, who undertook to file a defence for her in the action. The defence set up was a denial of ownership, and it was held at the trial that this was not sufficient to raise the defences upon which the defendant might have succeeded—that there was not, in the circumstances, an implied covenant on her part nor any real ultimate liability to pay the mortgage-debt. The trial Judge refused to permit the necessary amendment except on terms to pay the costs, which terms the counsel purporting to act for the defendant refused, and the trial proceeded. Judgment was given against the defendant for the full debt and costs. An appeal on behalf of the defendant to the Full Court of Saskatchewan was launched by the same solicitor; but this action on the judgment was begun in Ontario before the appeal was heard.

When the plaintiff was served with the writ in this action, she took advice, repudiated her liability, but affirmed the authority of the solicitor who had acted on her behalf in Saskatchewan. The appeal was then heard, and dismissed, solely upon the ground that the defendant, having refused to accept the leave to amend upon the terms offered by the trial Judge, had no locus pœnitentiæ.

It was argued that in the present action, the Court had the right to relieve the defendant from the consequences of her attornment to the jurisdiction of the Supreme Court of Saskatchewan, because that attornment was brought about by the fraud of the solicitor representing the plaintiff. The alleged fraud was the failure of the solicitor to disclose to the defendant or her representative the position in which the case stood in Saskatchewan. The defendant, when she affirmed the solicitor's authority, did not know and was not told of the refusal to amend, and believed that there was nothing to prevent her real defences being raised before the appellate Court in Saskatchewan.

As to this, the learned Judge said that there was no express intention to mislead, and a case of fraud had not been made out.

An aspect of the case not discussed by counsel was this. The liability of the defendant was not based upon any actual contract on her part, but upon a liability arising from the statute of Saskatchewan, which had no extra-territorial effect. It might be that the Ontario Courts would refuse to enforce a judgment based upon the statute alone. But this was not argued; and the present judgment is not based upon it.

The plaintiffs, being an extra-provincial company, not having a license to transact business within Ontario, cannot maintain the action; and on this ground it should be dismissed; but, possibly, the obtaining of a license even now might reinstate the action; and the finding of fact against the defendant upon the defence of fraud may, in case of an appeal, be reviewed by the appellate Court.

Action dismissed with costs.

MIDDLETON, J. JUNE 5TH, 1916.

*KELLY v. O'BRIAN.

Infants—Money Legacy to Infants Domiciled in Quebec by Testator Domiciled in Ontario—Tutor of Infants Appointed by Quebec Court—Right to Payment of Legacy—Law of Quebec—Inter-provincial Comity—Action against Executors—Costs.

Action by the tutor (appointed by a Quebec court) of the infant defendants to recover from the defendants the executors of John Butler, deceased, the sum of $8,000, which, by his will, the testator directed to be divided equally among the children of his late nephew Daniel Murphy, the infant defendants.

Butler resided at L'Orignal, in Ontario, and died there on the 18th October, 1914. The infants were domiciled and resident in the Province of Quebec.

The action was tried without a jury at Ottawa.

M. J. Gorman, K.C., for the plaintiff.

C. G. O'Brian, K.C., for the defendants the executors.

J. F. Smellie, for the Official Guardian, representing the infant defendants.

MIDDLETON, J., in a written judgment, said that, according to the law of Quebec, the tutor of an infant is authorised and bound to get in and collect all the infant's property, whether in or out of Quebec.

Hanrahan v. Hanrahan (1890), 19 O.R. 396, is on all fours with this case, save that in that case the fund originated from the estate of a testator domiciled in Quebec. The fact that the testator in this case was domiciled here made no difference. The rights of the tutor depended entirely upon the law of the infants' domicile—the Province of Quebec. Inter-provincial comity demands that our Courts should give full effect to the law of Quebec.

Reference to Re Berryman (1897), 17 P.R. 573; Thiery v. Chalmers Guthrie & Co., [1900] 1 Ch. 80; In re Chatard's Settlement, [1899] 1 Ch. 712; Didisheim v. London and Westminister Bank, [1900] 2 Ch. 15, 50, 51; Re Lloyd (1914), 31 O.L.R. 476; New York Security and Trust Co. v. Keyser, [1901] 1 Ch. 666; Fletcher v. Rodgers (1878), 27 W.R. 97.

The tendency of legislation is entirely in favour of throwing the responsibility upon each country to care for its own citizens: see the Ontario Act 4 Geo. V. ch. 21, sec. 67.

Judgment for the plaintiff for the recovery of the money in question, out of which he may pay his own costs and those of the Official Guardian. The executors should pay their costs out of the general estate of the testator.

FALCONBRIDGE, C.J.K.B. JUNE 5TH, 1916.

RE TORONTO GENERAL HOSPITAL TRUSTEES AND SABISTON.

Arbitration and Award—Motion to Set aside Award Fixing Amount of Rent on Renewal of Lease—Conduct of Third Arbitrator — Splitting Difference between Sums Named by Colleagues—Overvaluation—Evidence—Mortgagees—Parties to Arbitration.

Motion on behalf of Sabiston to set aside an award of arbitrators fixing the renewal rent to be paid annually by the applicant for lands in the city of Toronto leased to him by the trustees.

The motion was heard in the Weekly Court at Toronto.

W. Laidlaw, K.C., for Sabiston.

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

FALCONBRIDGE, C.J.K.B., in a written opinion, said that the first ground seriously argued was the alleged improper settlement of the amount of the award by the third arbitrator, by the splitting of the difference between the sums named by the other arbitrators. The evidence of the third arbitrator (His Honour Judge McGibbon) entirely displaced and exploded any such theory. If what was done here was within the mischief aimed at in Grand Trunk R.W. Co. v. Coupal (1898), 28 S.C.R. 531, and Fairman v. City of Montreal (1901), 31 S.C.R. 210, then it would not be permissible for any judge or board of arbitrators to fix any figure between the highest and the lowest ones given in evidence.

The next ground seriously argued was that the award was improper by reason of a gross and palpable overvaluation of the renewal rent. This ground was not tenable. The motion was not an appeal from the award. And, if it was meant as an appeal, by way of makeweight, to the conscience of the Court, so far from shocking the conscience of the Court, the Court, using the highest intelligence it was gifted with, was of opinion that the award was a very reasonable one. One well-known expert valued the property at $61,000—another one, not so well known, but apparently qualified by experience, put it at $90,000—4 per cent. on these sums would be $2,440 and $3,600 respectively. The award was $1,400 per annum.

It was argued that the award was bad because the mortgagees were not parties to the arbitration. Notice was given to the Toronto General Trusts Corporation, who did not attend, and disclaimed any interest in the matter. The arbitration proceeded without any suggestion from Sabiston that he wanted the mortgagees before the Court. Jameson v. London and Canadian Loan and Agency Co. (1897), 27 S.C.R. 435, was not in point. There was no question here of making the mortgagees pay anything. It was merely a question between the Hospital Trust and Sabiston.

Motion dismissed with costs.

KELLY, J., IN CHAMBERS. JUNE 6TH, 1916.

RE PATTERSON v. ROYAL WHOLESALE TAILORS.

Division Courts—Territorial Jurisdiction—Cause of Action, where Arising—Conflict of Evidence—Defendants not Appearing at Trial—No Finding as to Place of Contract—Motion for Prohibition.

Motion by the defendants for prohibition to the First Division Court in the County of Frontenac.

The plaint was begun in that Court, the plaintiff residing within its territory, against defendants residing and carrying on business in the city of Toronto. The defendants disputed the claim and also the jurisdiction of the Court. The plaintiff appeared at the trial, but the defendants did not appear, and judgment was given against them.

S. M. Mehr, for the defendants.
W. H. Cook, for the plaintiff.

KELLY, J., in a written opinion, said that in In re Thompson v. Hay (1893), 20 A.R. 379, an order for prohibition was upheld because the Court was satisfied that the cause of action did not wholly arise within the territory of the Division Court in which the action was brought. The affidavits filed on the present motion were contradictory on the question where the contract sued upon was made and where it was to be performed.

The question whether the elements necessary to give the inferior Court jurisdiction were lacking, was a question of fact to be determined by the Judge below; it was not determined; and KELLY, J., said that he was unable to conclude that there really was not jurisdiction: Re Rex v. Hamlink (1912), 26 O.L.R. 381.

The defendants did not explain why they were not present and not represented at the trial; and did not disclose a good defence on the merits; and, no injustice having been done, prohibition ought not to be granted: Re Canadian Oil Companies v. McConnell (1912), 27 O.L.R. 549.

Motion dismissed with costs.

MIDDLETON, J. JUNE 6TH, 1916.

HEPBURN v. CONNAUGHT PARK JOCKEY CLUB OF OTTAWA.

Company—Incorporated Racing Association—Letters Patent under Dominion Companies Act Issued in 1903—Criminal Code, sec. 235 (2)—Amending Act, 2 Geo. V. ch. 19—Association Incorporated before March, 1912—Powers—"Operations throughout the Dominion and elsewhere"—Supplementary Letters Patent—"Use of the Charter"—Establishment of Race-course—Forfeiture.

Action to recover $10,000 paid by the plaintiffs on account of the purchase of the charter rights of the Western Racing Asso-

ciation Limited. The plaintiffs alleged that they had agreed to purchase the rights upon the footing that the association had the right to establish a race-track at or near Windsor or Niagara Falls, and hold race-meetings thereat, where private bets might be made; whereas, by reason of the provisions of the Criminal Code, sec. 235 (2), as enacted in 1912 by 2 Geo. V. ch. 19, the association had not in fact such right; and, further, that, prior to the issue of certain supplementary letters patent, the association had not used its charter for a period of three years, and in fact had not gone into operation within three years from the date of the granting of the charter, and that the charter had become and was forfeited and void, and that the supplementary letters patent were also void and of no effect.

The action was tried without a jury at Ottawa.
McGregor Young, K.C., for the plaintiffs.
N. A. Belcourt, K.C., for the defendants.

MIDDLETON, J., in a written opinion, said that the Ottawa Racing Association Limited, which afterwards became the Western Racing Association Limited, was incorporated, by letters patent issued under the Dominion Companies Act, on the 27th November, 1903, and by the letters patent was empowered to acquire real estate at Ottawa for the purpose of constructing and maintaining a race-course and its accessories and the establishing and maintaining a racing association, etc. This statement of the objects of incorporation was followed by the words, "the operations of the company to be carried on throughout the Dominion of Canada and elsewhere." These words did not confer upon the association the right to establish a race-course elsewhere than at the place named: O'Neill v. London Jockey Club (1915), 8 O.W.N. 602.

Supplementary letters patent were granted on the 19th December, 1914, changing the name of the association and authorising the association to hold race-meetings and to construct and maintain race-courses at certain named cities in Canada "and other cities in the Dominion of Canada."

The Criminal Code, sec. 235 (2), as it now stands, prohibits betting upon race-courses save "upon the race-course of any association incorporated in any manner before the 30th day of March, 1912."

The association has not yet established any race-course; but the charter has been purchased by the plaintiffs for the purpose of establishing a race-course elsewhere than in Ottawa. It might well be, as contended, that the intention of Parliament was to

protect only existing race-courses; but that was not what the statute said; the date of incorporation had been made the sole criterion.

It was clear that the association did go into operation within three years after its charter, and that its charter was not left unused for a period of three consecutive years. The "use of the charter" did not mean the construction of a race-track or the establishment of a racing association. It was sufficient that the association was organised and stock was allotted.

Action dismissed with costs.

MIDDLETON, J. JUNE 7TH, 1916.

*BANK OF OTTAWA v. CHRISTIE.

Promissory Note—Demand Note—Accommodation Endorsers—Advances by Bank—Defence to Action on Note—Unreasonable Delay in Presentation for Payment—Bills of Exchange Act, R.S.C. 1906 ch. 119, sec. 181—"Continuing Security"—Agreement for Payment out of Moneys Deposited to Credit of Maker—Evidence.

ACTION upon a promissory note for $3,000, dated the 21st June, 1912, made by the Schwab Boiler Heating Company Limited in favour of the defendants Christie and Staples and of Edward Kidd (since deceased and represented by the defendants Craig and another, administrators of his estate), and endorsed by the payees to the plaintiffs, payable on demand, with interest at 6 per cent. per annum from the date of the note until payment. The endorsers were directors of the company, and endorsed for the accommodation of the company.

The action was tried without a jury at Ottawa.
Wentworth Greene, for the plaintiffs.
T. A. Beament, for the defendant Christie.
W. B. Northrup, K.C., for the defendant Staples.
G. E. Kidd, K.C., for the defendants Craig et al.

MIDDLETON, J., in a written opinion, said that the note was not presented for payment until the 19th January, 1916, when it was duly presented and protested.

The main defence was, that the note, being payable on demand, ought to have been presented for payment and protested within a reasonable time, that the time which elapsed was

entirely unreasonable, and that the endorsers were, therefore, discharged. As to this, the plaintiffs relied on sec. 181 of the Bills of Exchange Act: "If a promissory note payable on demand, which has been endorsed, is not presented for payment within a reasonable time the endorser is discharged, provided that if it has, with the assent of the endorser, been delivered as a collateral or continuing security, it need not be presented for payment so long as it is held as such security."

The learned Judge was of the opinion that the endorsers were sureties, and that the note was held by the plaintiffs as a continuing security, within the meaning of the proviso. There was no obligation to present it when the company made an assignment for the benefit of creditors.

Reference to Merchants Bank of Canada v. Whitfield (1881), 2 Dorion (Que.) 157; Chartered Mercantile Bank of India London and China v. Dickson (1871), L.R. 3 P.C. 574.

The defendants Staples and Craig et al. also set up that there was, at the time of the deposit of the note with the plaintiffs and the making of the advances thereon, an agreement that the note should be paid by the first money of the company deposited with the plaintiffs, to whom it was known that the endorsers were endorsers for accommodation merely; and that the note was paid because on two certain occasions there was a balance exceeding $3,000 to the credit of the company in its current account with the plaintiffs.

In the opinion of the learned Judge, this defence was not sustained by the evidence.

Judgment for the plaintiffs for the amount of the note, with interest and costs.

CLUTE, J. JUNE 9TH, 1916.

*CADWELL & FLEMING v. CANADIAN PACIFIC R.W. CO.

Railway—Embankment in Bed of River—Changing Course of River—Injury to Riparian Lands by Erosion—Injury Partly Caused by Government Breakwater—Powers of Railway Company—Railway Act, R.S.C. 1906 ch. 37, secs. 151-156—Order of Board of Railway Commissioners—Findings of Fact—Assessment of Damages—Damages for Future Injury in Lieu of Mandatory Injunction to Restore Stream—Judicature Act, R.S.O. 1897 ch. 51, sec. 58(10)—Assessment—Reference—Costs.

Action for damages and an injunction in respect of injury to the plaintiffs' lands on the north side of the river Maitland, at

its mouth, opposite the town of Goderich. The plaintiffs acquired the lands for the purpose of taking sand and gravel therefrom for use in building and in paving streets; and they complained that the defendants, in the building of the Guelph and Goderich line of railway across the river, at a point on the eastern line of the plaintiffs' property, through and across the river, constructed an embankment, narrowing the stream, and throwing the waters of the river with great force against the bank on the plaintiffs' lands; that, in consequence of such diversion, the waters of the river have been year by year washing out into Lake Huron large quantitites of sand and gravel from the plaintiffs' lands, to their serious loss and damage.

The defendants alleged that their embankment and bridge were constructed and maintained under their Acts of incorporation and under the Railway Act of Canada; and they denied that the embankment had the effect alleged by the plaintiffs.

The action was tried without a jury at Goderich.

J. H. Rodd, for the plaintiffs.

Angus MacMurchy, K.C., C. Garrow, and J. D. Spence, for the defendants.

CLUTE, J., set out the facts in a written opinion. He said that the defendants contended that the building of the Government breakwater, shutting off the river from the harbour, had caused all the change in the river, and had thrown the channel from the south bank to the north bank along the plaintiffs' property, and that this change was complete before the railway embankment was built. The plaintiffs asserted that the damage to their property was caused at times of high water and freshets, and that the conditions must be considered as they existed at such times.

The learned Judge found that the breakwater caused a great change in the flow of the water, throwing more to the north channel and tending to make that the main channel.

It was suggested that, even although the embankment had caused the injuries complained of, the defendants were not liable, as what they had done was authorised by statute and by order of the Dominion Board of Railway Commissioners. Reference to secs. 151 to 156 of the Railway Act, R.S.C. 1906 ch. 37.

In the learned Judge's opinion, the obstruction in this case amounted to a continuing nuisance; and the plaintiffs were peculiarly injured thereby, in a way different from that which affected the general public, by reason of the erosion and destruction of the gravel-bank.

There was no occasion for blocking up the south channel; according to the witness Newman, the damage caused by the obstruction could have been almost entirely prevented, and could even now be largely abated, by opening the south channel.

So far as the evidence shewed, the embankment was built entirely without the authority or sanction of the Board.

From the evidence and a view of the locus, the learned Judge found that the effect of the embankment was to turn much larger quantities of water, at times of high water, to the north shore than had previously flowed there; that, while the breakwater had greatly modified the form of the river, and was tending to create a channel to the north, and erosion had taken place, the flow of the water to the north and the deepening of the north channel and the erosion of the north shore were all accelerated and increased by the building of the embankment; that at least one-half the loss suffered by the plaintiffs was due to the embankment; and that the plaintiffs' damages from the date of their purchase to the date of judgment should be assessed at $600.

Prior to Lord Cairns's Act (in Ontario, Judicature Act, R.S.O. 1897 ch. 51, sec. 58, sub-sec. 10), a mandatory injunction would have issued in a case like the present: Imperial Gas Light and Coke Co. v. Broadbent (1859), 7 H.L.C. 600. See, as to the effect of the Act, Shelfer v. City of London Electric Lighting Co., [1895] 1 Ch. 287; Ramsay v. Barnes (1913), 5 O.W.N. 322; Gage v. Barnes (1914), 6 O.W.N. 232.

In view of all the circumstances, although with much doubt, the learned Judge concluded that future damages should be awarded instead of a mandatory injunction to restore the south channel. The owners of the land had full knowledge of what was being done in the erection of the embankment, and, so far as appeared, made no protest; there had been laches in applying for the remedy now sought; the railway was a great public utility, and the restoration of the south channel might cause, temporarily at least, inconvenience to the public; the probable expense of restoration would be very much greater than the payment of damages; the damages are capable of being estimated in money and adequately compensated for; and it would to a certain extent be oppressive to the defendants to grant the injunction.

The future damages should be asssesed at $3,500, with leave to either party, if dissatisfied, to have a reference to the Master at Goderich to assess the damages.

The plaintiffs should have their costs down to and including judgment. In case of a reference, further directions and costs reserved.

BRITTON, J. JUNE 9TH, 1916.

OAKLEY v. WEBB.

Nuisance—Noise and Dust from Stone-cutting Yard—Annoyance to Persons Dwelling in same City Street—Evidence—Permit from Municipal Authority—Area not Exclusively Residential—Evidence—Onus—Injury to Health.

Action for an injunction to restrain the defendant from carrying on the business of a stone-cutter and stone-crusher upon two lots in Summerhill avenue, in the city of Toronto, and for damages.

The plaintiff, the owner and occupier of a house and lot in the same street, complained that the business of the defendant was carried on in such a way as to occasion great annoyance and to make it dangerous to the health and comfort of the plaintiff and his family.

The action was tried without a jury at Toronto.

W. N. Tilley, K.C., and J. E. Day, for the plaintiff.

G. H. Watson, K.C., and S. J. Birnbaum, for the defendant.

BRITTON, J., read a judgment in which he said that the defendant, on the 4th September, 1913, applied for and obtained a permit to erect upon his premises a shed for stone-cutting; and, on the 11th November, 1914, applied for and obtained a permit to erect, and afterwards erected, an office-building. The defendant also ascertained, upon inquiry and investigation, that his lots were not within an area in which manufacturing establishments were prohibited or restricted.

The facts that the street was not an exclusively residential one and that the defendant had obtained a permit or license to build would not authorise an owner or occupier to carry on a business that would be a nuisance; but, in view of other facts, these things were important. After the defendant got his permit, and before any work was done by him in his business, he was warned by the solicitor for the plaintiff and others, and an effort was made by petition to the city council to have the defendant's permit revoked. The petitioners or some of them attended at the city-hall and voiced their complaint to the council; the complaint was not so much as to noise as to the degradation of the street as a residential street by the establishment of a manufacturing business.

The defendant's business was not that of stone-crushing, but

stone-cutting, done by planing and sawing; no such noise was made as is made by a stone-crusher.

The complaint, so far as it was supported by evidence, was of noise and dust. The alleged injury to health was only that of the daughter of the plaintiff, who was an invalid, and whose complaint practically was, that "the noise got upon her nerves." There was no reasonable evidence that either the plaintiff or any other person suffered in the slightest degree in health by reason of the stone-cutting done by the defendant.

The onus of establishing discomfort from the noise was on the plaintiff, and he had not satisfied that onus. "When it is a question of noise, it is emphatically one of degree," as was said by Lord Selborne in Gaunt v. Fynney (1872), L.R. 8 Ch. 8.

The evidence shewed satisfactorily that no dust that could reasonably be complained of was occasioned by the defendant in carrying on his business.

Action dismissed with costs.

KELLY, J. JUNE 10TH, 1916.

RE HENDERSON AND HILL.

Will—Construction—Power of Executor to Sell Lands of Testator—Time-limit—Best Interest of Estate—Delay in Selling—Power of Sale still Preserved—Title to Land—Vendor and Purchaser.

Application by a vendor, under the Vendors and Purchasers Act, for an order declaring his ability to make a good title to land contracted to be sold to a purchaser, the respondent.

The objection to the title was that, under the terms of the will of John Bull Bagwell, deceased, a conveyance by the vendor, as executrix of the will, will not vest a good title in the purchaser.

By one of the provisions of the will, the testator empowered his "executors to sell the vacant lot number 23 Park street north, adjoining my residence, also the premises number 90 King street west . . . as soon after my decease as my executors may consider for the best interest of my estate and pay the proceeds thereof into my general estate." The premises No. 90 King street west was the property in question.

By a later clause in the will, the testator gave his executors full power to sell and give title to "all the real estate of which I may be possessed at the date of my decease as soon as the

same can be disposed of and sold for the best interest of my estate within three years, for the purpose of fully carrying into effect the true intent and meaning of this my will."

The testator died on the 7th November, 1894, and probate was soon afterwards granted to Lucy Emma Henderson, the present vendor, the other executor named in the will having predeceased the testator.

The question for determination was, whether, by reason of the later provision in the will, the time for the exercise of the power of sale was limited to three years from the testator's death.

The motion was heard in the Weekly Court at Toronto.

J. L. Counsell, for the vendor and the daughters of the testator.

Shirley Denison, K.C., for the purchaser.

F. W. Harcourt, K.C., for Annie L. Finch and others in her class and for unborn persons possibly interested.

KELLY, J., referred to Scott v. Scott (1858), 6 Gr. 366; Peace v. Gardner (1852), 10 Hare 287; Re Kaye and Hoyle's Contract (1909), 53 Sol. J. 520; Peters v. Lewes and East Grinstead R.W. Co. (1881), 18 Ch.D. 429; In re Tweedie and Miles (1884), 27 Ch.D. 315; Edwards v. Edmunds (1876), 34 L.T.R. 522; Dart on Vendors and Purchasers, 7th ed., p. 65; Jarman on Wills, 6th ed., p. 613; Halsbury's Laws of England, vol. 28, p. 149, note (*p*); and said that, reading the whole will and considering the purposes for which the power was evidently intended to be given, he was of opinion that the power was not exhausted or extinguished at the end of the three years mentioned in the later clause of the will; that the mention of the three years was directory rather than imperative—shewing the desire of the testator with reference to a sale, which must be considered along with the direction as to the best interest of the estate. He was further of opinion that, in the circumstances of the case, the delay in selling was not unreasonable, in any event to such extent as to affect the power of sale in the executrix; and that there was still in the executrix the power to sell and make title to the purchaser.

Order declaring accordingly; no costs as between vendor and purchaser; costs of the vendor and of the parties other than the purchaser to be paid out of the estate, those of the vendor as between solicitor and client.

RE COOPER v. HENNING—KELLY, J., IN CHAMBERS—JUNE 5.

County Courts—Jurisdiction—County Courts Act, R.S.O. 1914 ch. 59, secs. 22, 23—Excessive Amount of Claim—Counterclaim—Motion for Transfer to Supreme Court of Ontario—Abandonment of Part of Claim—Admission as to Counterclaim.]—The plaintiff, as executrix of Emily Jane Law, deceased, sued in the County Court of the County of York for arrears of rent, moneys due on a promissory note, and other moneys, the total amount claimed being beyond the jurisdiction of the County Court. In his statement of defence the defendant disputed the jurisdiction and counterclaimed for a direction that, as against the plaintiff, he was entitled to certain lands devised to him on conditions set forth in the will, and for a conveyance to him. The defendant applied for an order transferring the action to the Supreme Court of Ontario, urging the two grounds available to him under secs. 22 and 23 of the County Courts Act, R.S.O. 1914 ch. 59. At the close of the argument, the plaintiff submitted in writing an abandonment of the amount of the claim beyond the jurisdiction of the County Court; and put on record a letter saying that "if the plaintiff fails to prove at the trial of the action that the defendant has not paid the rent up to the end of the year preceding the death of the testatrix, the plaintiff, as executrix, cannot and would not dispute his right to the property referred to." The learned Judge (in a written opinion) said that, if the decision on the plaintiff's claim should finally be in the defendant's favour, then, giving effect to this position of the plaintiff, that would, as between the parties to this action (and the defendant's claim was expressly put as between them), be binding upon the plaintiff in favour of the defendant in respect of the lands referred to. This being the position, there was no reason why the action should not proceed in the County Court for the amount of the claim as reduced by the abandonment made by the plaintiff, on condition that the plaintiff should remain bound by the terms of the letter. But for the abandonment and the letter, the defendant would have been entitled to have his application granted. Costs of the motion to be costs in the cause. G. W. Adams, for the defendant. Grayson Smith, for the plaintiff.

RE GREENWOOD—BRITTON, J.—JUNE 7.

Will—Codicil—Family Settlement — Judgment — Effect of—Charge on Land Devised.]—Application by Jane Flynn, upon originating notice, for an order determining her rights under the will of Elizabeth Greenwood, deceased, and a codicil thereto, and under a judgment of the High Court of Justice, Chancery Division, in 1883, in an action of Greenwood v. Greenwood, in which Elizabeth Greenwood was defendant. The application was heard at Kingston. BRITTON, J., in a written opinion, set out the facts. Edward Greenwood predeceased his mother (Elizabeth), and she had the right to devise to Francis Greenwood (as she did by a new will) the land which she had devised to Edward by the will made pursuant to the judgment (which was in effect a family settlement). The land so devised was not subject to any legacy, payment, or charge other than such (if any) as was expressly mentioned in the will or codicil; and Jane Flynn had not, by reason of the death of Edward Greenwood, a right to any part of the estate of Francis Greenwood other than such (if any) as was charged upon that estate by Elizabeth Greenwood. Declaration accordingly. No costs. T. J. Rigney, for Jane Flynn. J. L. Whiting, K.C., for Francis Greenwood.

C. v. C.—MIDDLETON, J., IN CHAMBERS—JUNE 10.

Evidence—Application for Foreign Commission—Admissions and Undertakings Avoiding Necessity for Evidence Sought—Application Refused, but without Prejudice to Right of Trial Judge to Delay Judgment until Evidence Obtained.]—Appeal by the plaintiff from an order of the Master in Chambers refusing to direct the issue of a commission for the examination of witnesses on behalf of the plaintiff in England. The action was for alimony. The plaintiff alleged adultery. The defendant, although married many years, alleged that at the time of the marriage the plaintiff was already married to another man, and that a divorce, on the strength of which he married her, was void owing to the lack of any jurisdiction in the Court which granted the divorce over the plaintiff or her husband. The defendant, on his examination for discovery, denied adultery. The evidence sought to be taken on commission was for the purpose of establishing adultery. The defendant was now ready to admit the

plaintiff's right to alimony, and to alimony assessed on the basis of adultery on his part, if he could not succeed upon his defence as to the supposed invalidity of the marriage; and contended that a commission to establish his adultery was unnecessary. The plaintiff's contention was that, even so, she was entitled to prove the adultery to discredit the defendant. The only issue of fact on which the defendant could give evidence was that relating to the plaintiff's domicile, and he was ready to undertake that he would not give his own testimony upon that issue. In this situation, the learned Judge said, it would not be proper to grant the commission; but, for the protection of the plaintiff, the order should provide distinctly that, in addition to the admissions and undertakings as to evidence indicated, it should be open to the trial Judge, if he should deem it desirable, to refrain from giving judgment until the plaintiff has had an opportunity to have the English evidence taken.—If other commissions are required, they should be issued at once, and delay in issuing them ought not to prejudice any application which may be made for an earlier hearing. Order below varied accordingly; costs in the cause. J. W. Bain, K.C., for the plaintiff. Gideon Grant, for the defendant.

SMITH v. MILLER—KELLY, J.—JUNE 10.

Landlord and Tenant—"Oil-lease"—Husband and Wife—Lease Made by Wife—Non-acquiescence of Husband—Failure of Lessees to Comply with Provisions of Lease—Forfeiture—Counterclaim—Recovery of Possession of Land—Damages by Oil-operations—Removal of Machinery—Sale on Default.]—Action for an injunction restraining the defendant Frank D. Miller from interfering with the plaintiffs' oil operations on ten lots in the village of Belle River, of which the defendant Philomene Miller, wife of her co-defendant, purported to give an "oil-lease;" for damages against Frank D. Miller for interference and trespass; and for damages against Philomene Miller for any loss that may result to the plaintiff by reason of the assertion by her co-defendant of any rights inconsistent with the covenants and warranties in the lease. Eight of the ten lots belonged to the husband and two to the wife. Both defendants counterclaimed for possession of the lands; the wife also counterclaimed for the removal of all erections, incumbrances, and obstructions on the lands; and the husband counterclaimed for damages. The action and counter-

claim were tried without a jury at Sandwich. The learned Judge stated the facts and discussed the evidence in a written opinion, and said that he had reached the following conclusions: the defendant Philomene Miller had no power to grant rights over her husband's property; the husband did not adopt, affirm, or acquiesce in the lease; even if the lease had been valid, the plaintiffs neglected to pay the rent agreed upon and otherwise failed to comply with the terms of the lease, thereby forfeiting it; the effect of which was to negative the claim against the wife for damages as above. The plaintiffs' several claims failed, and the action should be dismissed and the interim injunction obtained by the plaintiffs dissolved. As to the counterclaim, the defendant Frank D. Miller should have $350 damages for injury to his land by the plaintiffs' operations; the defendants were also entitled to possession and costs of the action and counterclaim. On payment of the amount of the judgment and costs within 60 days from judgment, the plaintiffs will be entitled, within that time, to remove their machinery and erections and the oil pumped up and stored on the lands, doing no damage by such removal. On the plaintiffs' failure to pay and remove within 60 days, the defendants will be entitled to sell the machinery, erections, and oil and the receptacles in which it is contained, and apply the proceeds, after payment of the expenses of sale, on the judgment; the balance, if any, to be paid to the plaintiffs. F. D. Davis, for the plaintiffs. J. H. Rodd, for the defendants.