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SPOONER v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

CORRECTION.

In the report of this case, ante pp. 566-7, it is stated as part of the judgment of ROBERTSON, J., that "the plaintiff is entitled to recover, but her dealings were not altogether fair in their character, and consequently she will have to pay costs."

This is incorrect.

The following extracts from the written opinion shew what the learned Judge really decided as to costs:—

"On the whole case, the plaintiff is entitled to recover, although I think her dealings with the Home Life were of a character not strictly fair, but that should only affect the question of costs, and I do not feel that I would be justified on that account to deprive her of them. . . . The defendants will pay all the costs of the action and of the reference, if any."

SEPTEMBER 15TH, 1902.

C. A.

MASON v. LINDSAY.

Appeal—Court of Appeal—Leave to Appeal—Important Question of Law—Construction of Statute—Small Amount in Controversy.

Motion by defendant for leave to appeal from order of a Divisional Court (ante 561), dismissing an appeal from the judgment of LOUNT, J., in favour of the plaintiffs in an action to recover possession of a piano. The principal question in the action was whether the plaintiffs were prevented from setting up their title to the piano as against defendant by reason of the Conditional Sales Act, R. S. O. ch. 149.

Joseph Montgomery, for defendant.

Strachan Johnston, for plaintiffs.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A.—The amount in question, i.e., of the defendant's interest in the piano, is small, less than $100, and, although the point upon the construction of the Conditional Sales Act is an important one, and possibly still capable of argument, it does not seem reasonable that a further appeal should be permitted for the purpose of settling it at the possible expense of the plaintiff, who has already obtained the judgment of two Courts in his favour, although on different grounds. If the amount at stake had been more substantial, that might have been a reason for further argument, but, as the case stands, under all the circumstances, justice to both parties will best be done by holding that litigation is at an end. Motion refused with costs.

SEPTEMBER 17TH, 1902.

DIVISIONAL COURT.

MERCHANTS BANK OF CANADA v. SUSSEX.

Arrest—Ca. Sa.—Concurrent Writ—Expiry of Original Writ—Invalid Arrest—Application for New Writ—Concealment of Material Facts—Setting aside Order.

Appeal by defendant from order of FALCONBRIDGE, C.J., in Chambers, ante 572, dismissing defendant's motion to set aside an order made by the Chief Justice on the 21st May, 1902, under sec. 8 of R. S. O. ch. 8, for the issue of a writ of ca. sa. to the sheriff of Kent, and one or more concurrent writs, and another order made by the Chief Justice on the 21st August, 1902, for the issue of a writ of ca. sa. to the sheriff of Lambton, and also to set aside the writs issued pursuant to such orders, and for the discharge of the defendant from custody.

J. E. Jones, for defendant.

J. H. Moss, for plaintiffs.

The judgment of the Court (STREET and BRITTON, JJ.) was delivered by

STREET, J.—The concurrent writ of ca. sa. to the sheriff of Lambton issued on the 16th August, 1902, under which the defendant was arrested, was improperly issued, as it was issued more than two months after the original writ with which it was concurrent had been issued. The original writ had expired by lapse of time under Rule 874, and a concurrent writ could not thereafter be issued.

The defendant, besides appealing, moved the Divisional Court for his discharge from custody upon the merits and upon the ground of concealment by the plaintiffs of material facts in making the ex parte applications for the orders. The right to make such a motion is entirely founded upon Rule 1047, which is confined to the case of an order for arrest before judgment, and does not extend to a ca. sa: Kidd v. O'Connor, 43 U. C. R. 193; Bank of Montreal v. Campbell, 2 U. C. L. J. N. S. 18; Gossling v. McBride, 17 O. R. 585.

As to the motion to set aside the order of 21st May, it was not pressed.

As to the motion to set aside the order of 21st August, upon the ground that plaintiffs, upon the application for it, suppressed and misrepresented facts which it was their duty to have fully and fairly disclosed, the following facts appeared. The plaintiffs' solicitor knew that defendant had been arrested on the evening of the 18th August under the expired concurrent writ by the sheriff of Lambton; he had had a conversation with the sheriff upon the subject over the telephone, and a further conversation with the sheriff's solicitor upon the same subject on the morning of the 19th August; the sheriff on the evening of the 18th August said he would free the defendant unless indemnified, and the plaintiffs' solicitor refused to indemnify him, but he abstained from stating that he supposed the defendant had been freed by the sheriff. With all these facts in his mind, he prepared an affidavit for the manager of the plaintiffs' office in Bothwell, and had it sworn by him on the 19th August, in which it was stated: "That in the month of May last I ascertained that the said defendant was in the neighborhood of Bothwell, in the county of Kent, but was keeping secreted, visiting relatives; that a ca. sa. for his apprehension was issued to the sheriff of Kent, but the defendant evaded arrest, and left for parts unknown to me; that within the last few days I ascertained that the said defendant is in the neighborhood of Sarnia, in the county of Lambton; that I have not the slightest doubt that the said defendant is about to, and will, unless he be forthwith apprehended, quit Ontario with intent to defraud the plaintiffs." The manager stated in a later affidavit that when he swore to this he was not aware that the defendant was under arrest, but believed he was still at large.

The solicitor who drew and procured the manager to swear to the affidavit above quoted, was guilty of an inexcusable breach of his duty to his clients and to the Court in concealing from them the true facts existing at the time the affidavit was sworn.

It was his duty to lay before the Court the material facts that the defendant had been arrested the evening before on an invalid writ; that he had been in illegal custody down to that day, at all events, at the suit of the plaintiffs, and that he might still be so. The Court would then have been in a position to deal with the application with the same knowledge as that possessed by the solicitor, and would probably have followed Eggington's Case, 2 E. & B. 717, in holding that defendant must first be absolutely discharged from his illegal custody before he could be arrested under new process at the suit of the same plaintiffs. The application should not be treated as an appeal upon new material from the discretion of the Chief Justice in making the order of the 21st August. The application is really one to the undoubted jurisdiction of the Court to set aside, in its discretion, orders which have been obtained by the wilful concealment or perversion of material facts. A clear case has been made out for the exercise of that discretion; and therefore the order of the 21st August and the writ issued under it should be set aside, and the prisoner discharged, upon condition that no action be brought against the sheriff for the arrest or detention or for anything done under either of them.

Appeal allowed with costs here and below.

STREET, J. SEPTEMBER 17TH, 1902.

CHAMBERS.

RE SHORE.

Will—Construction — Legacies — Conditions — Defeasance—Payment before Period Mentioned in Will.

Application under Rule 938 by two children of the testator, legatees under his will, for an order declaring them entitled to immediate payment of their legacies and of their shares of the residuary estate.

A. Hoskin, K.C., for the applicants.

A. E. Hoskin, for the widow.

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

STREET, J.—The applicants are not entitled to what they ask, and the executors cannot properly pay the money to them, even with the consent of the widow and of the other children. By the terms of the will a legacy was given to each of the four sons of the testator of $17,000, to be paid as follows: $3,000 on attaining 21; $6,000 on attaining 24;

and $8,000 on attaining 27; and to each of the three daughters of the testator, $7,000, to be paid as follows: $1,500 on marriage or at 21; $2,500 at 24; and the balance at 30. Each of the children was to be paid the interest upon the unpaid portion after attaining 21, and until payment of the principal. These bequests were followed by a provision that in case of the death of any son or daughter without issue surviving, so much of his or her legacy as was not already paid should form part of the residuary estate, but in case of there being lawful issue, such issue should take the parent's share. In my opinion, the bequests were all subject to this provision, and its effect was to prevent the children from taking vested indefeasible interests in the various instalments of their legacies until the time for payment fixed by the will arrives: O'Mahoney v. Burdett, L. R. 7 H. L. 393; In re Schnadhorst, [1902] 2 Ch. 234; Saunders v. Vautier, 4 Beav. 115; and Wharton v. Masterman, [1895] A. C. 186.

The bequests of the residuary estate are in a different position. The testator directed that his residuary estate was to be divided in 15 years from the date of his will amongst his children so that each son should receive $9 for every $3 each daughter should receive; those children who have then attained 27 to receive their shares at once upon the expiration of the 15 years; those who have not attained that age to receive interest only after attaining the age of 21 until they attain 27, and then to receive the principal. But this, as well as the gift of the legacies, was subject to a power given to the widow in certain events to direct the trustees to pay to any child only the income of any portion remaining unpaid of any legacy or bequest to each child, with a gift over in such case to the children of such child.

In my opinion, this provision renders the gifts to each child defeasible until they are actually payable according to the terms of the will. The applicants, not having attained the age at which the legacies and shares of the residue are payable, are not entitled to either.

Motion dismissed with costs.

SEPTEMBER 18TH, 1902.

C. A.

REX v. TREVANNE.

Criminal Law—Evidence—Deposition Taken at Preliminary Inquiry—Admissibility at Trial—Incomplete Cross-examination—Waiver.

Crown case reserved by the Judge of the County Court of Lambton. The prisoner was charged on the 25th Febru-

ary, 1902, before a magistrate with having committed an indecent assault upon a female. The preliminary inquiry was begun at the house of the girl's father, where she was residing. The prisoner was represented by counsel, but before the girl's cross-examination was concluded, it became necessary, owing to her illness, to adjourn the proceedings, and they were adjourned till the 27th February. In the meantime the magistrate consulted the County Crown Attorney with reference to the charge, and on hearing from him telegraphed to the prisoner's counsel that he had got the official's opinion, and the case would have to go to Sarnia, and asked counsel to telegraph in reply whether he would come up or not. Counsel, taking this as an intimation that the accused would be committed for trial, telephoned the magistrate that, if he intended to send the prisoner to Sarnia at any rate, there would be no use in his coming, and accordingly he did not appear on the subsequent proceedings. On the morning of the 27th the magistrate went out to where the girl was residing, and obtained her signature to her deposition as it had then been taken down, the prisoner not being present or represented, and in the afternoon resumed the inquiry at his own office in Alvinston. The accused was present, but not the witness whose examination had been interrupted at the first meeting. Prisoner was asked if he had anything to say. He replied "nothing," and on the evidence as already taken was committed for trial. At the trial it was proved that the girl was so ill as not to be able to travel, and her deposition taken and signed as above mentioned was tendered by the Crown and admitted in evidence, contrary to objection. The County Judge reported that he considered that the prisoner's counsel had waived his right to further cross-examination, and that in any case the certificate on the depositions governed. By sec. 687 of the Criminal Code it is enacted that "if upon the trial of an accused person such facts are proved upon oath or affirmation of any credible witness that it can be reasonably inferred therefrom that any person whose deposition has been theretofore taken in the investigation of the charge against such person is . . . so ill as not to be able to travel . . . and if it is proved that such deposition was taken in the presence of the person accused, and that his counsel or solicitor had a full opportunity of cross-examining the witness, then, if the deposition purports to be signed by the Judge or justice before whom the same purports to have been taken, it shall be read as evidence in the prosecution without further proof thereof, unless it is proved that

such deposition was not in fact signed by the Judge or person purporting to have signed the same."

W. J. Treemear, for prisoner.

Frank Ford, for the Crown.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A.—The cross-examination never was in fact completed. It had been interrupted at the most critical and important stage of it, and the witness and accused were never brought face to face together again. The magistrate most irregularly obtained the signature of the witness to her incomplete deposition, in the absence of the prisoner, and afterwards, on this incomplete deposition, the witness not being present, committed him for trial. It is impossible to say that the prisoner's counsel, not to say the prisoner himself, ever had a full opportunity of cross-examining the witness. There is no pretence for saying that he waived it. Even if the inquiry had closed on the first day, the deposition disclosed on its face that there had not been a full opportunity of cross-examining the witness, as the magistrate interfered with the counsel and prevented questions being asked which, however painful to all parties concerned, were entirely pertinent and necessary to elucidate the vital point of the defence. The deposition was, therefore, not properly received in evidence, and, as there was no other evidence on which the conviction could be supported, it must be set aside and the prisoner discharged.

WINCHESTER, MASTER. SEPTEMBER 18TH, 1902.

CHAMBERS.

GLOBE PRINTING CO. v. SUTHERLAND.

Summary Judgment—Rule 603—Liability of Defendants—Finding of Fact on Correspondence, Affidavits, and Depositions.

Motion by plaintiffs for summary judgment under Rule 603 in an action to recover the amount of an advertising account. The defendants did not dispute the amount, but their liability. They were brokers, and the advertisements published by the plaintiffs were in connection with the floating of the Atlantic Pulp and Paper Company, upon whom, or upon the Poole Publishing Company, the liability was alleged to be. A statement of claim had (by mistake of a clerk of the plaintiffs' solicitors) been delivered by plaintiffs before

the motion was made, and the defendants had served a third party notice on the Atlantic Pulp and Paper Company.

F. E. Hodgins, K.C., for plaintiffs.

W. E. Raney, for defendants.

W. R. P. Parker, for third parties.

THE MASTER held, on the correspondence between plaintiffs and defendants and the affidavits filed and the depositions of deponents on cross-examination, that the defendants had made themselves responsible to plaintiffs for payment of the account, and ordered judgment for the amount claimed with costs, but not to include the costs occasioned by the delivery of the statement of claim. He also made an order setting aside the third party notice without costs to the defendants or the third parties.

WINCHESTER, MASTER. SEPTEMBER 18TH, 1902.

CHAMBERS.

REX EX REL. ROBERTS v. PONSFORD.

Municipal Elections — Irregularities at Polls—Aldermen of City — Election by General Vote—Voters Voting more than Once—Affecting Result.

Application by relator to set aside the election of eleven persons as aldermen for the city of St. Thomas, at the general election held on the 6th January, 1902, upon the ground that the election was not conducted according to law.

On 6th February, 1900, the city council passed a by-law providing for the election of the council by general vote, instead of by wards. The first election pursuant to the statutes and this by-law took place in 1901, when, under the Municipal Amendment Act, 62 Vict. ch. 26, sec. 13, every elector was permitted to vote in each ward in which he had been rated for the necessary property qualification for councillors or aldermen. On the 15th April, 1901, the Act 1 Edw. VII. ch. 26, sec. 9, was passed, adding to sec. 158 of the Municipal Act the following section:—"158a. In towns and cities where the councillors or aldermen are elected by general vote, every elector shall be limited to one vote for the mayor and one vote for each councillor or alderman to be elected for the town or city, and shall vote at the polling place of the polling sub-division in which he is a resident, if qualified to vote therein; or when he is a non-resident or is not entitled to vote in the polling sub-division where he resides, then where he first votes, and there only. . . ."

As to the election now in question, more than 100 witnesses were examined on behalf of the relator in support of this application, the greater number being examined as to the number of times they voted for aldermen. It was shewn by these witnesses that there were at least 90 votes polled which should not have been polled, according to the Act of 1901.

J. M. McEvoy, London, for relator.

E. E. A. DuVernet and W. K. Cameron, St. Thomas, for respondents.

THE MASTER held that the evidence wholly failed to support the allegation that these votes were cast by the deliberate corrupt and wilful connivance and arrangement of the defendants; but, on the contrary, these votes were cast in the honest belief of the voters that they had the right to cast such votes, and without any instruction from any of the candidates to vote for them more than once. The casting of such ballots was wholly irregular, and they should not have been allowed by the deputy returning officers, if they were aware that the voters had already voted. Rex ex rel. Tolmie v. Campbell, 4 O. L. R. 25, referred to. Even if the 90 votes improperly polled were struck off, that would not necessarily interfere with the result of the election, owing to the large majorities of at least 10 of the candidates elected over the first unsuccessful candidate. The election of the successful candidates was not affected by the improper votes being counted, and in other respects there was no such irregularity in the carrying out of the election as to affect the result.

Motion refused with costs.

WINCHESTER, MASTER. SEPTEMBER 19TH, 1902.

CHAMBERS.

SLATER SHOE CO v. WILKINSON.

Discovery—Production of Documents — Correspondence after Action Begun—Information for Defence—Privilege—Examination for Discovery—Undertaking to Produce Documents—Particulars.

Motion by plaintiffs for a better affidavit on production from defendant and for particulars. The action was for an injunction restraining defendant from advertising, selling, or exposing for sale boots or shoes as "Slater shoes," "Slater goods," or "The Slater shoe," or under any name or description of which the name "Slater" forms part, without clearly

distinguishing the boots or shoes so advertised, sold, or offered from those made or sold by plaintiffs.

M. H. Ludwig, for plaintiffs.

J. H. Moss, for defendant.

THE MASTER.—The defendant, upon being served with the writ of summons, communicated with George A. Slater, the vendor of the goods in question, with a view of obtaining information to aid him in the defence of this action, and certain letters and telegrams passed between them, which, on his examination for discovery, defendant refused to produce on the ground of privilege. In my opinion, under Donahue v. Johnston, 14 P. R. 476, and cases therein referred to, defendant is not bound to produce these documents.

As to the stock-book shewing stock in trade of defendant, as the defendant on his examination promised to "send it down," it should be produced. So also as to an account of one Richardson for printing hand bills.

As to the motion for particulars of the words "under the circumstances" in the 10th paragraph of the defence, I think the particulars of "the circumstances" are sufficiently set out in the preceding paragraph of the defence, and, besides, further particulars were given in the defendant's examination.

Order made for production of stock book and Richardson account for inspection. No further affidavit or examination necessary. Costs in cause.

STREET, J. SEPTEMBER 19TH, 1902.

CHAMBERS.

MACKAY v. COLONIAL INVESTMENT AND LOAN CO.

Writ of Summons—Service out of Jurisdiction—Foreign Company—Transfer of Assets in Ontario to Ontario Company—Action to Set aside.

An appeal by the defendants from the order of the Master in Chambers, ante 569.

W. M. Douglas, K.C., and A. McLean Macdonell, for appellants.

C. D. Scott, for plaintiffs.

STREET, J., at the conclusion of the argument, dismissed the appeal with costs, and affirmed the order of the Master.

MACMAHON, J. SEPTEMBER 19TH, 1902.

TRIAL.

MIDLAND NAVIGATION CO. v. DOMINION ELEVATOR CO.

Ship—Charterparty—Breach—Time—"Load," Meaning of—Measure of Damages.

Action to recover $4,950 for alleged breach by defendants of an agreement to furnish the plaintiffs' steamer "Midland Queen" a cargo of grain to be carried from Fort William to Goderich. The defendants denied liability and counterclaimed for $7,500 damages for alleged breach of agreement to carry the cargo between the two places.

The correspondence forming the contract was carried on by A. F. Read of Montreal, representing plaintiffs, and G. R. Crowe of Winnipeg, representing defendants.

November 22, 1901. Crowe wired Read "to load Midland Queen last trip at Fort William at 4½ cents to discharge at Georgian Bay or Goderich."

November 23. Read wired Crowe: "Playfair (plaintiffs' manager) confirms charter Queen Fort William to Goderich, loading about Dec. 2, weather, ice, permitting, 4½ cents bushel."

November 23. Crowe wired Read: "We confirm Midland Queen 4½ Goderich, *load* Fort William *on or before noon 5th December.*"

The steamer reached Fort William on the 3rd December, and left at noon on the 5th December, without the cargo. The steamer was obliged to leave, because the insurance would have expired if the return voyage had not then commenced.

There was a dispute as to which party was in default.

C. Robinson, K.C., and F. E. Hodgins, K.C., for plaintiffs.

A. B. Aylesworth, K.C., and C. A. Moss, for defendants.

MACMAHON, J., found upon the evidence that the defendants were in default; that the loading of the cargo could have been commenced at seven o'clock on the evening of the 4th December and the whole or the greater part of the cargo

could have been put on board before eleven o'clock on the morning of the following day; and that the plaintiffs did all that could be done to carry out the terms of the charter.

He then proceeded to discuss the meaning of the words "load on or before noon 5th December," and referred to Bowes v. Shand, 2 App. Cas. 455. . . . He continued:

According to my reading of the contract in this case, the words in their natural sense have a definite meaning, which is, that the vessel was to be *completely* loaded by noon on the 5th December. "To ship" and "to load" are synonymous terms, and each means the completion of putting the cargo on board. See judgment of Lord Selborne in Grant v. Coverdale, 9 App. Cas. 475.

There was, however, evidence given on behalf of plaintiffs as to what is the meaning amongst shippers of "to load," that it means that the whole cargo is to be in the vessel at the time stated in the contract. Evidence was given on behalf of the defendants that the contract would be complied with if the charterer had commenced loading at the time named.

There is no provision in the contract for "lay days" and "demurrage days." Where a fixed time is provided in the contract for loading a vessel, it is the duty of the charterer to load within that time, whatever may be the nature of the impediments which prevent him from performing it: Postlethwaite v. Freeland, 5 App. Cas. 599; Abbott on Shipping, 5th ed., p. 180, 14th ed., pp. 394, 396; Randall v. Lynch, 2 Camp. 352; Budgett v. Binnington, [1891] 1 Q. B. 35; Davies v. McVeagh, 4 Ex. D. 265; Tapscott v. Balfour, L. R. 8 C. P. 46; Pyman v. Dreyfus, 24 Q. B. D. 152; Scrutten on Charterparties, 4th ed., p. 96; Dahl v. Nelson, 6 App. Cas. 38. . . .

The defendants are liable to the plaintiffs for not loading this cargo by the time named, and the measure of damages is the amount of freight which would have been earned after deducting the expenses of the vessel: Smith v. McGuire, 3 H. & N. 54. The vessel could have taken on board 102,000 bushels, which at 4½ cents per bushel would amount to $4,590. There will be judgment for plaintiffs for this amount (less the expenses of the vessel from the time it left Fort William until it could have reached Goderich, which can be agreed upon between the parties), together with interest from the 15th December, 1901, and the costs of suit.

The defendants' counterclaim is dismissed with costs.

SEPTEMBER 19TH, 1902.

C. A.

NELSON COKE AND GAS CO. v. PELLATT.

Company—Subscription for Shares—Preference Shares—Validity of —Contract by Deed—Issue and Allotment—Necessity for—Calls—Resolutions and Letters—Sufficiency of.

An appeal by plaintiffs from judgment of LOUNT, J. (2 O. L. R. 390) dismissing action to recover amount alleged to be due by defendant in respect of shares in the plaintiff company subscribed for by defendant.

G. H. Watson, K.C., for plaintiffs.

H. J. Scott, K.C., and H. H. Macrae, for defendant.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, and MOSS, JJ.A.—LISTER, J.A., having died since the hearing) was delivered by

MACLENNAN, J.A.:—Provision was made for preference shares in the memorandum and articles of association, sec. 5 of the memorandum and sec. 3 of the articles. . . . That these provisions are legal and valid features of the constitution of the company is clear: Ashbury v. Riche, L. R. 7 H. L. 653; In re South Durham Brewery Co., 31 Ch. D. 261.

There is, therefore, no distinction between the two classes of shares in question, and if the defendant is liable upon the one class, he is equally liable on the other.

The company was incorporated under the Companies Act of British Columbia, R. S. B. C. ch. 44, on the 26th August, 1899, and the first document signed and sealed by the defendant is dated 1st September, 1899. The second document was also under seal, and bore date the same day and was contained in a stock subscription book. (Both are set out in the report in 2 O. L. R.) . . . The legal effect of both is the same. In both the appellant covenants with the company to become a shareholder, to take 200 shares of each class, when issued and allotted, and to pay for them at par when calls should be made.

The evidence shews that when the appellant executed the agreement he was in constant communication with Dr. Doolittle, a director of the company, and that they were associated together in obtaining subscriptions for shares on behalf of the company. The contract in question is, therefore, one entered into by the appellant with the company, at the request of one of its directors, acting for and on behalf of the company.

[Citations from Hebb's Case, L. R. 4 Eq. 11, and Gunn's Case, L. R. 3 Ch. 40.]

Treating this instrument, then, like an ordinary contract, what is its proper legal effect? The company was duly incorporated, and had $250,000 of capital stock to dispose of, divided into shares of $25 each, 3,000 shares being preference shares, and 7,000 common. One of the directors applies to the appellant to assist him in disposing of the shares. They find a number of purchasers, who agree to purchase shares, and who execute the deed of subscription prepared for the purpose. The appellant witnessed the first three signatures, and afterwards executed the deed himself, agreeing to take the shares now in question. . . . It is something more than an application or request. It has all the elements of a completed contract, and that by deed, and for valuable consideration. . . . There is no time limited within which the purchase is to be completed. It is not pretended that the deed was delivered in escrow, or was not intended to take effect immediately. It was delivered to the company through its agent. It is said that this deed was revocable, and that the appellant could have revoked it and withdrawn from it the next day or the next moment. I do not understand such to be the law. No doubt, a mere offer or proposal, either by parol or by mere writing, to take shares, is revocable before acceptance, like any other similar offer or proposal to buy or sell any other commodity: Kelso's Case, 4 Ch. D. 774. But it is otherwise when it is a contract by deed. [Citations from Pollock on Contracts, 6th ed., p. 48; Anson on Contracts, 9th ed., p. 34; Xenos v. Wickham, L. R. 2 H. L. 296; Doe Garnons v. Knight, 5 B. & C. 692; Moss v. Barton, L. R. 1 Eq. 474; Buckland v. Papillon, L. R. 2 Ch. 62.] The present case is even stronger than Xenos v. Wickham, for this deed was prepared on behalf of the company and remained in its possession after execution.

Now, if this deed was binding upon the appellant, and irrevocable by him, as I think it was, it has never been repudiated by the company, but, on the contrary, the company has always treated it as valid and binding on both parties.

* * * * * * * * * *

Numerous cases were cited laying it down that when an offer to take shares is made, it must be accepted by the company in a reasonable time, an allotment must be made, and notice communicated to the party, and that he may withdraw his offer at any time before allotment. That is undoubtedly so in the case of a mere offer not under seal. What we have

here, however, is a contract, and the substance of it is to purchase from the company the shares in question, and to pay for them at par when a call or calls are made. The purchase is of a definite number of shares, and not of so many as the company might allot, and, I take it, the appellant would not be bound to take any less number than 200 of each class. The covenant is to take them when issued and allotted. As applied to a fixed quantity of anything, or a fixed number of shares, the word "allot" can mean nothing more than to give, to assign, to set apart, to appropriate. The word has all these meanings. Nor does the word "issue" in the present case mean the doing of any particular act, and I think "issue" and "allot," taken together, mean no more than some signification by the company of its assent that the appellant now was or had become the owner of the number of shares which he agreed to take. [Citations from Pellatt's Case, L. R. 2 Ch. 527; Bird's Case, 4 De G. J. & S. 201; Richards v. Home Assurance Co., L. R. 6 C. P. 591.]

The appellant's subscription was made in September, and on the 14th December the board passed a resolution that the subscribed for preferred stock of the company be called up in full, and that the treasurer notify all subscribers to pay the amount of their subscriptions on or before 18th January, 1900. On the 26th December the treasurer wrote to the appellant that a call had been made for the whole amount of the stock subscribed, mentioning the number of shares and the amount due. . . . The resolution of the company and the letters of the treasurer, having regard to the appellant's contract, can have but one meaning, namely, that the company had appropriated to him 200 preference shares and had called for payment in full. I think it impossible to say that the resolution was not a most unequivocal act issuing and allotting to him those shares.

On the 13th March following the board passed a similar resolution with respect to the shares of common stock which had been subscribed for, and calling for payment in full on or before the 12th April, and thereupon on the 21st March letters in the same terms as the former were written to the appellant by the treasurer. I am of opinion that these resolutions and letters were a sufficient issue and allotment of the shares which the appellant had agreed to take, and that he thereupon became bound to accept and pay for them.

It was not until long afterwards that the appellant repudiated his subscription and his liability as a shareholder, namely, some time in November following. When, in November, he assumed to withdraw his offer, the company went

through the form of making an allotment of the shares to him, and the present action was commenced on the 9th January, 1901.

While I think the resolutions of 14th December and 13th March were a sufficient issue and allotment within the contract, if that were otherwise, the formal allotment in November was in time. I do not see how the appellant could get rid of the obligation of his deed by any mere notice of repudiation and withdrawal. . . . [Nasmith v. Manning, 5 A. R. 126, 5 S. C. R. 440, distinguished.]

Appeal allowed with costs.

SEPTEMBER 19TH, 1902.

C. A.

SMITH v. HUNT.

Mortgage — Pretended Sale under Power — Fraud — Purchasers for Value without Notice—Knowledge of Agent—Interest to Conceal—Redemption—Compensation.

An appeal by plaintiffs from judgment of MEREDITH, C.J. (2 O. L. R. 134) in so far as it was against the plaintiffs in an action to set aside certain assignments and conveyances and for redemption of mortgaged premises.

J. L. Murphy, Windsor, for appellants.

W. R. Riddell, K.C., and J. H. Rodd, Windsor, for defendants.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A.:—The appellants contend that the value of the land was much greater than the sum at which it was fixed by the trial Judge, and that the defendants Hunt and Dresskell, as well as the defendant Roberts, should have been condemned to pay the loss the appellants have sustained by reason of the improvident sale.

I see no ground on which the defendant Dresskell can be said to have incurred any personal liability to the plaintiffs. He committed no wrong in taking an assignment of the plaintiffs' mortgage, and the sale made by him to Hunt, in the exercise of the power of sale, wrought no change in the plaintiffs' rights. Hunt became trustee for Roberts, and the property when in his hands was redeemable as before, unaffected by Dresskell's sale, and so remained until, at the request of Roberts, he conveyed to the club syndicate. It was that sale and that act which prejudiced the plaintiffs, and for that

reason I think Hunt is in a different position from Dresskell and in the same boat with Roberts. He was not a mere stranger to the property, and was more than a mere agent or quasi-trustee. He was possessed of the legal title, and had the legal power and control over it, which he was exercising, no doubt, at the instance of Roberts, the beneficial mortgagee; but I cannot see how this relieved him from the duty of selling in a provident manner, having regard to the interests of mortgagor and mortgagee. Moreover, it appears from the evidence of the defendant Hunt himself that he knew that these proceedings were being taken in order to enable Roberts to acquire the title to the property and so to sell to the syndicate. There was no idea or intention of selling it at the highest and best price obtainable so as to pay off the mortgage and procure something over it for the mortgagor. Lord Selborne's judgment in Barnes v. Addy, L. R. 9 Ch. 244, may be referred to.

I think the evidence does not warrant us in interfering with the learned trial Judge's finding as to the value of the property.

The 3rd and 4th paragraphs of the judgment below must be varied in accordance with this opinion. In other respects the judgment is affirmed without costs of appeal to either party.

SEPTEMBER 19TH, 1902.

C. A.

BURTON v. PLAYFAIR.

Specific Performance—Contract for Sale of Timber Limits—Correspondence—Completed Contract—Statute of Frauds—Misunderstanding—Title—Judgment—Reference.

An appeal by defendant from judgment of BOYD, C., directing specific performance of a contract by defendant to purchase from plaintiffs, for $45,000, certain timber berths in the townships of Lount, Mills, and Pringle, in the district of Parry Sound.

A. B. Aylesworth, K.C., and W. Steers, Midland, for appellant.

W. Cassels, K.C., C. E. Hewson, K.C., and A. E. H. Creswicke, Barrie, for plaintiffs.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.—LISTER, J.A., having died after the argument) was delivered by

MOSS, J.A.—The plaintiffs' right to a specific performance was contested on the grounds that there never was any concluded contract, or at all events no such contract evidenced by writing sufficient to bind the defendant within the provisions of the Statute of Frauds; that if there was any contract it was not with the defendant, but with the firm of Playfair & White; and that, in any case, there was such a mistake or misunderstanding with regard to the subject-matter of the contract as to justify the withholding of the relief of specific performance. It was also contended that plaintiffs were unable to make title to or convey the property to defendant.

The evidence of the contract between the parties, so far as it is required to be in writing, is contained in correspondence, and it was, of course, a necessary part of the plaintiffs' case that they should shew, not only that there had been a final agreement come to between them and the defendant, but that the terms of it were evidenced in a manner to satisfy the Statute of Frauds.

[The learned Judge then stated and commented upon the facts shewing the course of dealing leading to the contract, and set out the letters which passed between the parties.]

The defendant first wrote to the plaintiffs: "Re your berths in Mills, Pringle, and Lount. Mr. Benson made a very careful estimate of them, and he is three millions less than you claimed, and then the pine is scattered, and will cost quite a lot extra to lumber. . . . Some of the pine of a very nice quality. Taking everything into account, very best I can give for outfit would be $45,000." The plaintiffs' answer was: "In reply to your letter of the 20th ult., in re the white pine timber on berths No. 4 Lount, No. 2 Mills, and 3 and 4 Pringle, and the spruce 12 inches and up in No. 4 Lount, district of Parry Sound, recently offered you and explored by your Mr. Benson, we hereby accept your offer of $45,000 cash, subject to Crown timber regulations." The defendant received this letter on 4th October, and wrote plaintiffs as follows: "Yours of the 3rd duly received. Note you say the spruce 12 inches and up in Lount, whereas the agreement is for all timber in this berth. Kindly have this fixed."

The matter rested until the 8th October, when a conversation took place over the telephone, the upshot of which was

that plaintiffs' conceded all the timber in Lount, and both parties wrote on the same day. Plaintiffs' letter (exhibit 5) was: "Your letter of the 4th duly received. We are surprised to hear you claim that the agreement was to include all the timber in berth 4 in Lount. . . . To close the matter at once, we will let the other timber on this berth go in. You will, therefore, please advise what day this week you will pay the money and complete the transaction." Defendant's letter (exhibit 6) was: "Sorry we had the wee discussion over the 'phone, but from the start I understood that Lount went in just as you had it, but only the pine in Mills and Pringle. As arranged this a.m., you transfer your license of Lount—which takes in all the timber—and the pine on the other two. Will advise you when to send papers in a few days."

Defendant deposed as follows on examination for discovery: "I received the letter, exhibit 5, in reply to my letter of the 4th October. I asked him to kindly have it fixed about the spruce. He assented to everything, and put in exhibit 5 as regards the timber. I would think I had not received the letter of the 8th October (exhibit 5) when I wrote exhibit 6. Before writing 6 I had a conversation with Mr. Burton over the 'phone; it was with reference to the timber in Lount. He was trying to hold out the spruce under 12 inches and other timbers. I think he said over the telephone that he would let everything go. . . . After that conversation I wrote him the letter of 8th October (exhibit 6). That part of our conversation was reduced to writing by these two letters."

The defendant's own statement and the two letters establish a completed bargain and agreement between the parties, evidenced in writing under the hand of the defendant.

The next question is, a binding contract between the parties being established, has the defendant shewn any reason why he should not perform it?

The point suggested at the trial that the agreement was conditional upon the defendant being able to make satisfactory financial arrangements was not pressed in this Court, and is not sustainable on the evidence.

The contention that the contract was not with the defendant, but with Playfair & White, also fails. The defendant was dealing as a principal with the plaintiffs, and conducted all the correspondence in his own name, and as if the transaction was wholly on his own behalf, and the plaintiffs were dealing with and looking to him in the affair. White

was not recognized as a party by the plaintiffs, and was neither a party to the agreement nor to the writings evidencing it.

It cannot be found upon the evidence that there was any such mistake or misapprehension with regard to what was being purchased as should prevent specific performance. There were no representations as to the limits or the presence or absence of settlers made by the plaintiffs, and Benson was fully aware of the facts with regard to settlers, and set them forth in his report. There was also a reference to them during the discussion on the 2nd October, and the defendant then made no objection, but went on with the negotiations, and finally closed the bargain with full knowledge of the facts or with such knowledge as should have put him on further inquiry. He must be taken to have decided to accept the limits as they then were, if he could get them for $45,000.

The objection to the plaintiffs' want of title is disposed of by the form of the judgment, which only compels the defendant to take the property in case a good title is made. It is not a valid objection to an action by a vendor that at the time of the contract he has not the legal estate or title to the property vested in him, provided he is in a position to procure it to be vested in the purchaser. And, as a general rule, questions of title are not disposed of at the trial of an action for specific performance, but are properly the subject of a reference. Furthermore, if the defendant desires the question of the plaintiffs' title to be dealt with at the trial, he must see that the defect or supposed defect is prominently put forward in the pleadings: Lucas v. James, 7 Ha. at p. 425. See also Harris v. Robinson, 21 S. C. R. at p. 400. Here the question of title was not raised by the statement of defence, and it was properly made the subject of a reference to the Master.

The judgment should be affirmed with costs.

SEPTEMBER 19TH, 1902.

C. A.

LEWIS v. DEMPSTER.

Contract—Furnishing and Erecting Monument—Dispute as to Design Selected—Performance of Work—Assignment of Contract—Action by Assignees—Appeal—Reversal of Judgment on Questions of Fact.

Appeal by plaintiffs from judgment of BOYD, C., dismissing the action with costs.

The plaintiffs alleged that in March, 1900, the defendant gave to a firm of McIntyre & Gardiner an order in writing for a grave stone or monument of red Scotch granite of the kind known as "Hill o' Fair," to be delivered and set up in a cemetery, for $1,500, and that the order was duly executed; that McIntyre & Gardiner duly assigned to plaintiffs all claim against defendant in respect of such order, and that the defendant was duly notified in writing of the assignment; and the plaintiffs sought to recover $1,500, less $54, the expense of putting in the foundation for the monument, which was paid by defendant.

There were several defences, but the main contest at the trial was in reference to one which was added at the trial, viz., that the monument erected by McIntyre & Gardiner was made and erected according to an entirely different design from the one selected by defendant.

The plaintiffs proved the execution of and put in an instrument in writing signed by McIntyre & Gardiner, by which they purported to assign to plaintiffs all their claim against defendant, amounting to $1,446 and interest, for goods supplied under contract dated 8th March, 1900, or otherwise howsoever; and also proved notice thereof to defendant. They also proved the signature of defendant to two documents, the first of which was an order for red granite grave-stones "design No. E. M. Lewis Reporter Design," and the second an order for "one set of Hill o' Fair Scotch granite grave-stones."

The monument furnished and put up in defendant's plot in the cemetery was of "Hill o' Fair" red Scotch granite, substantially answering in appearance and design to the design produced by plaintiffs.

The defendant did not dispute his signature, but swore that the design specified in the first of the papers, viz., "E. M. Lewis Reporter Design," was not in the paper when he signed it, and that the design produced by plaintiffs as the one he selected was never shewn to or seen or selected by him, but, on the contrary, an entirely different design was shewn to and selected by him.

The Chancellor found upon the evidence, a great deal of which was contradictory, that credit was to be given to that of defendant; that the monument erected in the cemetery was not what defendant contracted for or expected to get; that it was different in colour and design; that defendant had had no opportunity of seeing the monument until he saw it for the first time in the cemetery, and that he then condemned it both as to colour and design — the pillars and

panels not being as ordered; that it had not been explained to defendant that the greater part of the granite would be so treated by the process of fine axing as to present a white or light appearance, and only the polished tablets be dark in colour; and therefore that defendant was not bound to accept or pay for the monument.

A. B. Aylesworth, K.C., and J. N. Fish, Orangeville, for appellants, plaintiffs.

T. Hislop, for defendant.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.—LISTER, J.A., having died after the argument) was delivered by

MOSS, J.A., who, after setting out the facts and the evidence, and disposing in favour of plaintiffs of the question whether, assuming the monument to be of the design selected, it so corresponded in workmanship and detail with the design as to justify plaintiffs in maintaining that the contract had been so performed as to entitle them to be paid for it, proceeded as follows:—

The next objection is that the assignment to the plaintiffs does not entitle them to maintain this action in their own names.

It is said that the instrument is not an absolute assignment and that it is shewn that the plaintiffs are not the beneficial owners of the claim. But it purports to be an absolute assignment and does operate to pass the legal interest. It is not necessary for this purpose to use the word "assign" or any particular words, so long as the effect of the writing is to transfer the interest to the assignees. The intention was to transfer the interest so as to enable the assignees to sue. The fact that the fruits will be held by them in trust does not the less make it an absolute assignment under the Judicature Act, there being an assignment which purports to be absolute, and which the parties intended to be so: Warren, Choses in Action, 2nd ed., p. 164, and cases cited. The case of Mercantile Bank of London v. Evans, [1899] 2 Q. B. 613, on which reliance was placed, does not govern this case. There, as was pointed out by the Court of Appeal, the instrument did not purport to be an absolute assignment, and was probably only an assignment by way of charge. The case of Comfort v. Betts, [1891] 1 Q. B. 737, is in point, and shews that the assignment in question here is an absolute assignment within the Judicature Act. It is to be noted that when this point was under discussion at the trial, the learned

Chancellor expressed the opinion that there was nothing in it, and said that, if necessary, he would allow McIntyre (meaning no doubt McIntyre & Gardiner) to be made a party. There is no reason why the leave thus given should not be extended by this Court if the plaintiffs desire to avail themselves of it.

To return to the main issue of whether the monument is of the design selected and ordered by defendant. The first question to be determined is whether when the defendant signed the paper dated the 8th March, 1900, it contained the words "E. M. Lewis Reporter Design," which now appear written therein, in the handwriting of E. J. Ramsay, the foreman in McIntyre & Gardiner's shop. It was he who procured the order for the monument and handed it to McIntyre on the same day within three hours of the time it was signed. When McIntyre received it, it was in the same condition as it is now. The defendant's case is that the words in question were inserted after he signed it. It being undoubtedly signed by him, and it being produced in its present condition, the onus is on him to establish conclusively that it was altered after he attached his signature. His contention involves a charge of a very serious offence against Ramsay, and no motive is suggested. The learned Chanceller has made no express finding on this important question. . . . General statements ought not to be permitted to displace the weighty consideration that if the order of 8th March was in its present condition when the defendant signed it, he had then selected an E. M. Lewis Reporter Design, and that at the trial he utterly failed to shew any E. M. Lewis Reporter Design corresponding in the least degree with the design which he alleges he selected. . . . An attempt was made at the trial to raise an inference that the ink with which the words in question are written is not the same as the rest of the writing. An inspection of the paper does not lead to that conclusion. On the contrary, it leads to the conviction that all the writing was done at the same time. . . . The defendant deliberately charged Ramsay with forgery. The latter denies in the most emphatic way that he touched the paper with a pen or made any alteration after it was signed, and the circumstances, as well as the probabilities, are in his favour. . . . Upon the whole case, I think the defendant has failed to establish that when he signed the order of 8th March the words "E. M. Lewis Reporter Design" were not in it, and that the finding of fact ought to be that the order was in the condition it is now in when the defendant put his signature to it, and that the E. M. Lewis Reporter Design

therein mentioned is the design produced by the appellants and sworn to by Ramsay as the one selected by the defendant.

. . . . . .

I have not overlooked the argument that to allow the appeal is to overrule the findings of the trial Judge upon conflicting testimony. I have already shewn that there are no specific findings upon the material questions in issue between the parties. But the rule invoked has no application save where there is a direct conflict of testimony on some material point, and there are no circumstances one way or the other. This was pointed out in Morrison v. Robinson, 19 Gr. 480, by the present Chief Justice of Canada, then Vice-Chancellor Strong, at p. 487. See, also, Coghlan v. Cumberland, [1898] 1 Ch. 704. In the present case there are circumstances which, in my judgment, are quite sufficient to outweigh the statements of the defendant and his witnesses where they are in conflict with the documents and the testimony of the appellants' witnesses.

I would allow the appeal.

SEPTEMBER 19TH, 1902.

C. A.

GABY v. CITY OF TORONTO.

Indemnity—Contract—Construction of Works for Municipal Corporation—Liability for Injuries to Persons—Provisions of Contract—Agreement with Another Contractor—Want of Privity—Costs of Defending Action—Third Party.

An appeal by one Crang, a third party, from the judgment of MACMAHON, J., at the trial, was heard at the same time as the defendants' appeal, the result of which is reported ante 440.

The plaintiff sued defendants for negligently allowing a certain street in their municipality to be out of repair by leaving an open or uncovered pit or excavation therein, into which one Levi Gaby, the plaintiff's husband, while lawfully using the street, fell, and thereby met with the injury which caused his death. The defendants brought the appellant, James Crang, into the action as a third party in the usual way, alleging that the disrepair of the street was occasioned by his negligence, and that they were by statute or by the terms of some contract between them entitled to be indemnified by him against any damages the plaintiff might recover in the action. The action against the city corporation and the claim against the third party were tried at the same

time before MACMAHON, J. The plaintiff obtained judgment against the corporation, and the appellant was held liable to indemnify the latter against plaintiff's judgment and costs. From the judgment in favour of plaintiff, defendants and third party appealed, contending that no actionable negligence had been proved against the corporation, and that the deceased had been guilty of contributory negligence. The third party also appealed generally from the judgment awarding indemnity to the defendants. The latter is the appeal now in question.

The appellant by deed contracted with defendants to perform all the excavation, filling, masonry, and brick work required in the erection and completion of the new St. Lawrence market in the city of Toronto. Excavations were made by the appellant, and into one of them, which had been negligently left uncovered, as found by the Court, the plaintiff's husband fell.

The appellant was required, by general condition 1 of his contract, to "properly protect his work during progress." By clause 13 it was provided that defendants should not in any manner be answerable for injury to any person or persons, either workmen or the public, " against all which injuries to persons or property the contractor will properly guard, and make good all damage which may arise or be occasioned by any cause connected with this contract or the work done by the contractor, and will indemnify and keep indemnified the corporation against the same until the completion of all the works." And by his bond the appellant was bound to indemnify the defendants against loss or damage by reason of the execution of the works.

An agreement was also made between one Macintosh and defendants for the performance of the carpenter and joiner work of the new market, by one of the general conditions of which it was provided that "the carpenter shall erect and maintain the hoarding of Front and West Market and Jarvis streets. . . . This hoarding shall be constructed according to the building by-laws and to the satisfaction of the architect." The architect, under the authority of another clause of the contract, thought proper to waive and dispense with the construction of the hoarding. Macintosh's contract was not referred to in or made a part of the appellant's contract, and there was no evidence that the appellant knew that he had agreed to erect a hoarding or that the defendants' architect had absolved them from doing so.

J. Bicknell, K.C., and J. W. Bain, for the appellant.

A. F. Lobb and W. C. Chisholm, for defendants.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A., who, after setting out the facts, continued:—

Either or both of these provisions (clause 13 of the appellant's contract and his bond) prima facie warrant, in one form or another, a judgment for indemnification of the respondents, and that has hardly been contested. But the appellant urges that under the agreement with Macintosh a duty was cast upon the respondents to fence off or picket by a hoarding or other guard that part of the street within which his work was being done, and that it was owing to their neglect of this obligation that the locus in quo was left open to access by the deceased. . . .

Under the circumstances, it must, in my opinion, be held that the appellant is not in privity with Macintosh's contract. The two contracts are separate and distinct. His own contract is absolute, and by the terms of it he must abide.

I notice Mr. Bicknell's contention that his client should not have been ordered to pay the costs incurred by the city in defending the action. In doing this their course was not unreasonable; the appellant did not offer to assume the burden of the defence, and the appellant's liability under such circumstances may well be rested on his contract.

We can only dismiss the appeal.

SEPTEMBER 19TH, 1902.

C. A.

THORNE v. PARSONS.

Will—Construction—Gift—Intention to Include Choses in Action—Reference—Appeal from Report—Looking at Original Will—Costs.

An appeal by defendants H. Thorne, A. M. Thorne, and C. Thorne from an order of a Divisional Court reversing the finding of the Master in Ordinary upon a reference in an action involving the construction of the will of William Thorne.

The appeal was heard by MEREDITH, C.J., OSLER, MACLENNAN, MOSS, LISTER, JJ.A.

D. O. Cameron and T. J. Blain, Brampton, for appellants.

S. H. Blake, K.C., for respondents J. M. Thorne and W. H. Parsons.

W. T. J. Lee, for respondent W. H. Thorne.

D. W. Saunders, for respondents P. M. A. Thorne and others.

Moss, J.A.:—The original judgment in this action contained, amongst other provisions, a reference to the Master in Ordinary to pass the accounts of the dealings of the executors and trustees named in the will of the testator, William Thorne, with the estate which came to their hands, and to fix their compensation.

In proceeding with the reference, the Master in Ordinary found that certain persons, including Horace Thorne, Anna Maria Thorne, and Catherine Thorne, should be enabled to attend the proceedings, and he therefore caused them to be served, and thereafter they were treated and named as parties defendants in accordance with the Con. Rules.

Horace Thorne, Anna Maria Thorne, and Catherine Thorne did thereafter attend the proceedings in the Master's office; and filed surcharges and objections to the accounts filed by the executors and trustees. Among other objections, they sought to surcharge the executors and trustees with the amount of certain moneys said to have been received on account of an indebtedness owing to the testator by the partnership firm of W. H. & B. J. Thorne, which consisted of William Henry Thorne and Benjamin J. Thorne, who at the time of the making of the will and of the testator's death were carrying on business at Holland Landing as tanners and otherwise, on premises owned by the testator.

The surcharging parties are the persons now entitled to certain annuities, the payment of which was charged upon that part of the property of the testator at Holland Landing which passed under the will to William Henry Thorne; and the contention of the surcharging parties before the Master was that the indebtedness of the firm of W. H. & B. J. Thorne was part of the testator's property which did pass to W. H. Thorne. Their contention was upheld by the Master, but, upon appeal to a Divisional Court by the plaintiff John Mills Thorne and the defendants adverse in interest to the surcharging parties, the Master's ruling was reversed. . . .

From this judgment the surcharging parties appealed to this Court. The plaintiff W. H. Thorne, who did not join in the appeal to the Divisional Court, and was therefore made a respondent, and was included with the other respondents in the order of the Divisional Court for payment of the costs of that appeal, appeared on the argument of the appeal to this Court, and complained that he was improperly charged with such costs.

Upon the main question I see no reason to differ from the Divisional Court. The words of gift to W. H. Thorne are: "My mill, tannery, houses, lands, and all my real estate and property whatsoever and of what nature or kind soever at Holland Landing." Undoubtedly these words, if left to their ordinary signification, are wide enough to include personal property and effects, and even a debt owing to the testator in respect of property owned by him at Holland Landing.

The question in a case of this kind is, whether it was the intention of the testator to include book debts in the gift, and this must be discovered by reading the whole will.

[Reference to Horsefield v. Ashton, 2 Jur. N. S. at p. 195; In re Prater, Designe v. Beare, 37 Ch. D. at p. 486; Earl Tyrone v. Marquis of Waterford, 1 De G. F. & J. at p. 631.]

But in the will before us there is much in the context to control the ordinarily extensive signification of the words employed in the gift to W. H. Thorne, and to shew that it was not the testator's intention to give him more than the real property and property savouring of realty. Much stress has been laid on the many general words following the descriptive words in the devise, and it was argued that the doctrine of ejusdem generis is not to be applied. But the cases shew that where there is found the intention to deal with property referred to as being in a particular locality, the necessity is no longer felt of giving effect to all those general words which follow the enumeration of the particulars. This was pronounced by Kekewich, J., in Northey v. Paxton, 60 L. T. at p. 31, to be the real principle, and to be equally applicable whether the enumeration is slender or otherwise, provided, of course, that the context and the circumstances generally allow of the application.

The provisions which follow the words of gift to W. H. Thorne contain more than one reference to the testator's property at Holland Landing, which might be considered as equally applicable whether the testator intended both real and personal property, or only the former, to be included. But, as pointed out by Street, J., the clause which he has termed the 3rd paragraph of the will, makes a distinct separation between the two kinds of property, and plainly indicates that the personal estate, money and securities for money, were not given to W. H. Thorne. In that paragraph the testator was making a provision for an annuity to his wife to be

charged upon his general estate, except his property at Holland Landing. And if he intended or supposed that it had been all given to W. H. Thorne by what Street, J., terms the 2nd paragraph of the will, it would have been sufficient for him to have said: "But I hereby except my said property at Holland Landing aforesaid from the payment of any portion of such last mentioned annuity to my said wife:" and stopped there. But he proceeds, "as well as my personal estate, money and securities for money, also at Holland Landing aforesaid." This makes it plain that by the words "my said property at Holland Landing aforesaid," he did not intend to include his personal estate, money and securities for money, at Holland Landing.

Referring again to what has been termed the 2nd paragraph, it is manifest that the testator intended to charge the property he was giving to W. H. Thorne, with the payment of certain annuities and legacies. He says, "I hereby charge the said Holland Landing property," that is, the Holland Landing property he had just given to W. H. Thorne. Then in the exception in what has been termed the 3rd paragraph, he uses not quite but substantially the same expression, viz., "my said property at Holland Landing aforesaid," and so again indicates the property he had given to W. H. Thorne. Then follow the words already quoted which interpret the foregoing words as not including the personal estate, money and securities for money, at Holland Landing. And this construction leads to the exclusion of any claim of W. H. Thorne to the book debts in question.

I have arrived at this conclusion without reference to the appearance of the original will. If we are at liberty to look at it for the purposes of construction—as to which see Child v. Ellsworth, 2 DeG. M. & G. 683; Manning v. Purcell, 7 DeG. M. & G. 55; Gauntlett v. Carter, 17 Beav. 590; Turner v. Hellard, 30 Ch. D. 390—an inspection of what has been termed the 2nd paragraph lends support to the view that the testator's intention was not to include in the gift to W. H. Thorne the personal estate, moneys and securities for money, at Holland Landing.

As to the order for costs against the plaintiff W. H. Thorne, counsel appeared for him before the Divisional Court and was heard in opposition to the appeal. He appears not to have contented himself with submitting his rights as a trustee, but to have actively intervened as a contestant. He seems to have made common cause with the other respon-

dents, and for this reason was included with them in the order for costs.

The appeal should be dismissed.

MACLENNAN, J.A., wrote an opinion concurring.

MEREDITH, C.J., and OSLER, J.A., also concurred.

LISTER, J.A., died while the case was sub judice.

SEPTEMBER 19TH, 1902.

C. A.

ARMSTRONG v. CANADA ATLANTIC R. W. CO.

Master and Servant—Injury to Servant—Death—Workmen's Compensation Act—Notice of Injury—Excuse for Want of—Evidence—Statement of Deceased—Negligence—Cause of Injury—Jury.

An appeal by defendants from the order of a Divisional Court (2 O. L. R. 219) setting aside nonsuit entered by MACMAHON, J., in an action by the widow and infant child of Charles Armstrong to recover damages for his death alleged to have been caused by the defendants' negligence, and directing a new trial.

F. H. Chrysler, K.C., for appellants.

A. E. Fripp, Ottawa, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., OSLER, MACLENNAN, MOSS, JJ.A.—LISTER, J.A., having died after the argument) was delivered by

OSLER, J.A., who, after stating the facts, continued:—The first question raised is as to the failure of the plaintiffs to give the notice required by sec. 9 of the Workmen's Compensation for Injuries Act, R. S. O. ch. 160. It is contended by counsel for the defendants that the finding of the learned trial Judge that no notice that the injury had been sustained was given within twelve weeks from the occurrence of the accident causing the death of the deceased, as required by sec. 9, and that no reasonable excuse for the want of such notice was offered or proved, being findings of fact, should not have been interfered with by the Court. That section is in these words: "Subject to the provisions of sections 13 and 14, an action for the recovery, under this Act, of compensation for an injury shall not be maintainable against

the employer of the workman, unless notice that injury has been sustained is given within twelve weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or in case of death within twelve months from the time of injury; provided always that in case of death the want of such notice shall be no bar to the maintenance of such action, if the Judge shall be of opinion that there was reasonable excuse for such want of notice." Then sec. 13 (5) enacts as follows: "The want or insufficiency of the notice required by this section, or by sec. 9 of this Act, shall not be a bar to the maintenance of an action for the recovery of compensation for the injury if the Court or Judge before whom such action is tried, or, in case of appeal, if the Court hearing the appeal is of opinion that there was reasonable excuse for such want or insufficiency, and that the defendant has not been thereby prejudiced in his defence."

Section 14 goes still further, enacting that if the defendant "intends to rely for a defence on the want of notice or the insufficiency of notice . . . he shall, not less than seven days before the hearing of the action, or such other time as may be fixed by rules regulating the practice . . . give notice to the plaintiff of his intention to rely on that defence, and the Court may, in its discretion, and upon such terms and conditions as may be just in that behalf, order and allow an adjournment of the case for the purpose of enabling such notice to be given; and, subject to any such terms and conditions, any notice given pursuant to and in compliance with the order in that behalf, shall, as to any such action and for all purposes thereof, be held to be a notice given pursuant to and in conformity with secs. 9 and 13 of this Act."

The object of the notice is to protect the employer against stale or manufactured or imaginary claims and to give him an opportunity while the facts are recent of making inquiry into the cause and circumstances of the accident. The several clauses which bear upon the subject are very loosely fitted together, but the stringency of the original provision has been much relaxed, and the injured workman is evidently the first object of the Legislature's care: cf. R. S. O. 1887 ch. 141, secs. 7, 10 (5); 52 Vict. ch. 23, secs. 12, 13; and 55 Vict. ch. 30, secs. 9, 13 (5), 14, which is now found as R. S. O. 1897 ch. 160.

In order to justify the exercise of the power to dispense with the notice of injury, etc., prescribed by sec. 9, it should

appear (1) that there was some reasonable excuse for not having given notice; and (2) that the want of it has not prejudiced the defendants in their defence.

What may constitute reasonable excuse for not giving notice is not defined, and must depend very much upon the circumstances of the particular case.

The notoriety of the accident is one element, and the employer's knowledge of it and that the workman or his representative is in fact making a claim upon him in respect of it, is another. Both these circumstances concur in the present case, and there is the additional fact that the employers took the claim into consideration, but never gave the plaintiff a final answer.

Altogether, I think it might very properly have been held at the trial that there was reasonable excuse for the want of notice, and also, as the defendants had all the knowledge of the accident and claim that the most formal notice could have given them, that the want of it had not prejudiced them in their defence. I therefore agree with the judgment of the Divisional Court on this point. I cannot but think that reasonable excuse for want of notice may be very slight indeed, where the occurrence of the accident appears to have been well known to the employer, and a bona fide claim for compensation therefor has been made, inasmuch as the Judge has power under sec. 14, in the alternative, and simply in his discretion, and on such terms as he may think proper, to adjourn the trial of the action to enable notice to be given.

But, though the plaintiff has surmounted this initial difficulty in her case, there remains the question whether there was any reasonable evidence for the jury that the death of the deceased was caused by the negligence of the defendants, and on that point I feel myself compelled to take a different view from that which prevailed in the Court below.

It was conceded that the space between the tracks Nos. 4 and 5 was a "way" within the meaning of the Workmen's Compensation Act, sec. 3 (1), intended for or to be used in the business of the employers, and the sole ground of negligence relied on was that its condition was defective by reason of snow and ice having been allowed to accumulate thereon so as to render it unsafe and difficult to walk upon. If the deceased was using that way, and walking between the tracks and slipped from them into track No. 5, and was then run over by the cars, it is hardly denied that there was evidence for the jury of the defective condition of the

way. If, on the other hand, he was walking along No. 5 track when he was struck, the case falls to the ground, as there is no evidence of negligence in the condition of the track or the management of the engine. If deceased had reached the space between tracks 4 and 5, he must have done so by crossing in front of the cars, which had just been or were just being shunted into the latter after he had set the switch; in other words, he must have passed to that place from the switch on the other side of that track. He is found just behind the front wheels of the truck of the second car, the first car having been entirely derailed. No other cause for this circumstance is suggested, except that the car had passed over the deceased, and it appears to me equally consistent with all the facts in evidence that he was struck while just crossing the track in front of that car, as that he was walking along the space between the tracks and slipped into the track and under the first or second car. If the first car had not been derailed, there would be little or no room for doubt that deceased was walking between the tracks, but that fact removes the vital question, whether he was walking along the track or between the tracks, into the region of conjecture. The position in which deceased's body was found cannot assist us, as the learned trial Judge observed, for the sudden collision with the car might have thrown it into any imaginable position. The Court below has assumed that the place where he slipped was between the tracks. This, however, assumes the very question in issue. Upon that theory a new trial would be right, because, as I have said, there was evidence that the place was in a slippery and dangerous condition. It would in that case be quite unnecessary to lay stress on the deceased's answer to the question as to how the accident happened. That was an answer to a question put some minutes after the happening of the accident, and, even if it was properly admitted as being part of the res gestæ, I do not see how it aids the plaintiff in proving where deceased was when he was struck. It is quite as consistent with one theory as with the other. He may have slipped on the track or between the tracks, but unless it points to the latter it carries the case no further.

The learned trial Judge's opinion evidently was that there was no case for the jury. And as that, after a careful examination of the evidence, is my own view, I think that the appeal should be allowed.

SEPTEMBER 19TH, 1902

C. A.

BEAM v. BEATTY.

BUNTING v. BEATTY.

Infant—Bond with Penalty—Void or Voidable.

Appeal by defendant from judgment of FERGUSON, J. (3 O. L. R. 345, ante 54) in favour of the respective plaintiffs for damages upon bonds given by defendant in connection with the sale of stock in a company, the defence being that the defendant was an infant at the time of making the bond, which was therefore not enforceable and incapable of ratification.

C. A. Masten and F. C. McBurney, Niagara Falls, for appellant.

G. Lynch-Staunton, K.C., and A. W. Marquis, St. Catharines, for plaintiffs.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

GARROW, J.A.:—There are two points, both questions of law, namely, (1) whether a bond with a penalty given by an infant is void or only voidable, and (2), if voidable, is there evidence of ratification ?

Mr. Masten, counsel for the appellant, in an able and exhaustive argument, referred us to a number of authorities to establish his main proposition, that such a bond is wholly void, and therefore incapable of ratification, and, after an examination of these and of such other cases as I could find, my opinion is that his contention is well founded.

The opposing view is based very largely, apparently, upon some expressions to be found in Pollock on Contracts, 5th ed., p. 59, quoted by FERGUSON, J. This opinion is apparently also approved by another learned author—Anson on Contracts, 9th ed., p. 113.

On the other hand it is stated as the law in Addison on Contracts, 9th ed., p. 379, that "no penal obligations entered into by infants are enforceable, as it is not necessary for them, nor can it be for their benefit and advantage, to subject themselves to a penalty." While Leake on Contracts,

3rd ed., p. 466, says that such an obligation "is absolutely void."

No authority is cited by either Pollock or Anson for their proposition, and it is somewhat remarkable that the exact point has not, apparently, been before determined. It has, however, in my opinion, been so approached and surrounded, so to speak, by what I must regard as high authority, that I feel myself unable to adopt the opinions of these learned authors. . . .

[Reference to and quotations from Keane v. Boycot (1785), 2 H. Bl. 511; Baylis v. Dineley, 3 M. & S. 477; Cerpe v. Overton, 10 Bing. 252; Leslie v. Fitzpatrick, 3 Q. B. D. 232; Meakin v. Morris, 12 Q. B. D. 352; Corn v. Matthews, [1893] 1 Q. B. 310; Viditz v. O'Hagan, [1900] 2 Ch. at p. 97.]

So that in these quotations, extending over a period of 115 years, we have a constant, and I think clear, expression of judicial opinion in favour of the proposition that the bond with a penalty of an infant is not merely voidable, but absolutely void, while not a single authority in the shape of a decided case can be found to the contrary. Lord Coleridge, in the case of Meakin v. Morris, speaks of it as a well settled rule, and Lush, J., in the earlier case of Leslie v. Fitzpatrick, uses similar language, while Lindley, M.R., as recently as the year 1900, in the case of Viditz v. O'Hagan, uses language equally explicit, although somewhat differently expressed.

The rule itself may perhaps be expressed thus, that, generally, all contracts of an infant are voidable, not void, but to this rule there are exceptions in which the contract is not merely voidable but void, and among these exceptions is the case of a bond with a penalty, and again, another class of exceptions in which the contract is neither voidable nor void, but valid and binding on the infant, such as simple contracts respecting necessaries. The exception before stated in the case of a bond with a penalty may not be logical, but the question is, is it the law of the land, and, after giving the matter most careful consideration, I am clearly of opinion that it is.

Having reached this conclusion, I have not considered it necessary to discuss the question of ratification.

I, therefore, think the appeals should be allowed and the actions dismissed, but, under the circumstances, without costs, and there should be no costs of the appeals.

SEPTEMBER 19TH, 1902.

C. A.

PROVIDENT CHEMICAL WORKS v. CANADA CHEMICAL MFG. CO.

Trade Mark—Descriptive Letters—Registration—Secondary Meaning—Proof of Acquisition of — Fraud — Deception—Infringement—Delay and Acquiescence—Injunction—Damages—Inquiry.

Appeal by plaintiffs from judgment of MEREDITH, C.J. (2 O. L. R. 182), dismissing action for an injunction and damages and other relief in respect of the alleged infringement by defendants of a trade mark registered by plaintiffs.

F. P. Betts, London, and H. Cronyn, London, for appellants.

G. F. Shepley, K.C., and E. W. M. Flock, London, for defendants.

The judgment of the Court (ARMOUR, C.J.O., OSLER, MOSS, JJ.A.—LISTER, J.A., having died after the argument) was delivered by

MOSS, J.A.—The appellants' first contention is, that the Chief Justice erroneously held that it was open to defendants to impeach the plaintiffs' title as registered proprietors of the trade mark; that Partlo v. Todd, 12 O. R. 175, 14 A. R. 444, 17 S. C. R. 196, no longer governs owing to subsequent legislation; that defendants are not now entitled to attack, by way of defence, the plaintiffs' right to register or put forward as a trade mark the letters in question; that the effect of 54 & 55 Vict. ch. 26, sec. 4, and 54 & 55 Vict. ch. 35, sec. 1, amending R. S. C. ch. 63, is to vest in the Exchequer Court of Canada the sole jurisdiction to adjudicate upon the validity of a trade mark, and so the Provincial Courts have no longer jurisdiction to entertain, in an action for infringement of a registered trade mark, a defence to the effect that plaintiff is not the proprietor of the trade mark, or that it is not one capable of registration.

[Discussion of the case and statutes just cited.]

The provisions of these two Acts, while extending the jurisdiction of the Exchequer Court so as to enable it to deal with doubtful or conflicting applications for registration, and with suits or applications to make, expunge, vary, or rectify

entries on the register, and even to entertain actions for injunctions or damages for infringement, do not extend or enlarge, or assume to extend or enlarge, the effect of registration or the certificate thereof. The certificate is still only prima facie evidence of the facts stated therein, and there is nothing in the legislation depriving a defendant of the right to shew that the facts were not truly stated, and that in truth there were no good or valid grounds for registering the alleged trade mark. This may lead to the somewhat anomalous result that a Provincial Court, in an action for infringement, may decide as to the validity of a trade mark in one way, while the Exchequer Court, on an application to expunge or rectify the register, may decide the contrary. But if the proprietor chooses to invoke the aid of the Provincial Court, instead of resorting, as he may do in the first instance, to the Exchequer Court, the defendant is entitled to the judgment of the tribunal upon the question of the plaintiff's title if he desires to raise it. The Exchequer Court is not expressly given exclusive original jurisdiction in regard to the classes of cases enumerated in sec. 4, but by sec. 5 it is given exclusive jurisdiction in cases of claims to public lands. I think, therefore, that it was open to the defendants in this case to impeach the plaintiffs' right to the trade mark which they put forward as the foundation of the action.

But, with much deference, I am unable to agree with the learned Chief Justice's conclusion against the trade mark. I agree that under our law, as under the English law, a merely descriptive word or name, that is, a word or name which merely denotes the goods or articles, or some quality attributed to them, is not capable of acquisition or proprietorship as a trade mark. But I fail to see how the three letters claimed by plaintiffs fall within this category. By themselves they do not describe any kind or quality of goods or articles. And they could only acquire any significance in the trade or upon the market by being so applied or attached to goods for sale in the market, as to distinguish them from similar goods, and to identify them with a particular manufacturer or trader, as made, produced, or sold by him: Kerly on Trade Marks, 2nd ed., p. 24. And if these letters have been shewn to fall within the definition, they were capable of registration as a trade mark under sec. 2 of R. S. C. ch. 63. The words of this section are much more general than the definition of trade mark under the Imperial Acts; and the decisions of the English Courts since 1875, except in respect of cases falling within the provisions of sec. 64 (3), (11),

of the Imp. Act 46 & 47 Vict. ch. 57, as amended by 51 & 52 Vict. ch. 50, are not to be too readily accepted as authorities. I think it is shewn that the letters in question were applied by the plaintiffs to a special kind of acid phosphate produced by them as early as the year 1884 or 1885; that they have ever since been used by the plaintiffs in connection with the same kind of acid phosphate; that acid phosphate has been ordered of and supplied by them under the designation "C.A.P.," and has become known by reference to these letters as the plaintiffs' product, and the letters "C.A.P." have become identified with the plaintiffs' acid phosphate. As early as 1886 they were deemed entitled to be registered as a trade mark in the United States; and since 1890 or 1891, at least, the plaintiffs' acid phosphate has been ordered and sold extensively in Canada by reference to these letters; and the plaintiffs' product has been distinguished from others by reference to these letters among traders and others dealing in acid phosphate as an ingredient for use in making baking powder. . . .

In my opinion, therefore, the plaintiffs had a good trade mark which they validly registered on the 24th July, 1900.

The defendants have used, and are using, the letters "C. A. P." in connection with the sale of acid phosphate made by them. Before the year 1897 they had made and sold acid phosphate, but had designated it acid phosphate of calcium or calcium acid phosphate. But in 1897 they began to use the letters "C. A. P.," and to connect them in such a way in the sale of acid phosphate as to be, in fact, a copy of the plaintiffs' trade mark. . . . The defendants deny intention to copy or imitate the plaintiffs' mark, and argue that no person has been deceived. But where the plaintiffs shew an actual copying of their registered trade mark, they are not required to go further. The act gives them the exclusive right to use the trade mark to designate the article manufactured or sold by them; and the defendants cannot, either knowingly or innocently, infringe upon that right. Under the English Act the same rule prevails: Edwards v. Dennis, 30 Ch. D. at p. 171; Lambert v. Goodbody, 18 Times L. R. 394.

It was objected that the plaintiffs were guilty of delay, or that they acquiesced in the defendants' use of the letters. But it is shewn that they only became aware of the defendants' user of them in the early part of 1900, when they immediately wrote protesting and requesting a discontinuance. This was followed by interviews between the solicitors and

parties, and further correspondence, during which the defendants asked the plaintiffs for delay. On the 5th October, 1900, the defendants' solicitors wrote that their clients declined to abandon the use of the letters "C. A. P.," and claimed that they had a right to use them, notwithstanding the plaintiffs' registration of their mark; and on the 25th October, 1900, this action commenced. The plaintiffs seem to have actively asserted their rights from the time they became aware that they were being infringed. It could not be pretended that there was such delay or acquiescence as to deprive the plaintiffs of their rights. In any case, it could only bear on the question of the nature and extent of the relief to be given. But I think there is nothing in this case to deprive the plaintiffs of their right to the usual judgment for an injunction. Ordinarily they would also be entitled to an inquiry as to damages or profits, at their election. But, inasmuch as it does appear from the evidence that no purchaser has been misled into buying the defendants' product instead of the plaintiffs', I think we may adopt the course taken by Romer, J., in Hodgson v. Kynoch, 15 R. P. C. 465, and restrict the plaintiffs to an inquiry as to damages, if they insist upon more than nominal damages, reserving the costs of the inquiry.

The appeal should be allowed with costs.

SEPTEMBER 19TH, 1902.

C. A.

STEVENS v. DALY.

Chattel Mortgage—Possession of Goods till Default—Absence of Redemise Clause—Seizure without Default—Collateral Security—Covenant to Keep up Stock in Trade to Value of Amount Secured—Arrears—Unpaid Interest—Issue of Writ of Summons—Condition against Selling—Damages.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., in favour of plaintiff for $200 damages and costs in an action for maliciously and without reasonable and probable cause issuing a writ of summons against plaintiff, and falsely and maliciously and without reasonable and probable cause seizing and taking the plaintiff's goods under a chattel mortgage. The chattel mortgage was collateral to a land mortgage made by plaintiff to defendant, and the writ was indorsed with a claim to recover the moneys secured by the land mortgage.

The appeal was heard by ARMOUR, C.J.O., OSLER, MOSS, LISTER, JJ.A.

W. R. Riddell, K.C., and T. B. German, Napanee, for appellant.

A. B. Aylesworth, K.C., and G. F. Ruttan, Napanee, for plaintiff.

MOSS, J.A.:—The defendant seeks to justify the entry upon the plaintiff's premises and the seizure of his goods upon several grounds, but, in my opinion, none of them is tenable.

First, he relies upon the terms of the chattel mortgage from the plaintiff to him as entitling him to take immediate possession without default, there being no re-demise clause. The chattel mortgage does contain, however, a provision enabling the mortgagee to take possession and sell under certain specified circumstances, and this provision is in terms almost identical with that contained in the chattel mortgage in question in Dedrick v. Ashdown, 15 S. C. R. 227. Furthermore, it was given as collateral security to a mortgage upon real estate from the plaintiff to the defendant, securing an advance from the latter of $2,500, payable in instalments extending over a number of years, and it is expressed on its face that it is given as collateral. The nature of the goods and chattels mortgaged and the purposes for which they were employed by the plaintiff also lead to the conclusion that the intention of the parties was that the mortgagor was to retain possession until default. And upon the principles affirmed by the majority of the Supreme Court of Canada in Dedrick v. Ashdown (supra), wherein the views expressed in Bingham v. Bettinson, 30 C. P. 438, were affirmed, and the decisions in the earlier cases were not approved, it is proper to hold in this case that there was by implication a right in the plaintiff to retain possession of the mortgaged goods until default.

Secondly, the defendant relies upon the clause in the chattel mortgage requiring the plaintiff to keep up the amount of the "stock in trade" in the premises so that at no time shall it be of less than the actual cash value of $2,500. It is difficult to make this covenant fit the condition of things existing when the chattel mortgage was executed. The goods and chattels mortgaged do not partake at all of the character of what is usually known and understood as stock in trade. It is to be observed that the mort-

gage is in a printed form, and this provision, which is not applicable to the circumstances, was allowed to stand. But, if it is to be applied to the goods and chattels embraced in the mortgage, it should be applied in the view which the parties evidently contemplated, viz., that for the purposes of the mortgage the goods and chattels should be treated as of the cash value of $2,500. The evidence shews that they were kept up to the condition and value they possessed at the time of the execution of the mortgage, and there was therefore no breach of this covenant or term of the mortgage.

Thirdly, the defendant relies upon the provision enabling him to take possession upon the interest payable by the plaintiff upon any of his real estate mortgages becoming in arrear, and asserts that, although at the time he entered into possession and seized the goods there was as a matter of fact no interest unpaid upon any of the plaintiff's real estate mortgages, yet the payments were made after the dates on which they fell due, and therefore the interest had become in arrear. But this is not the meaning of the covenant. Its purpose was to protect the defendant against demands by mortgagees holding mortgages prior to his on the plaintiff's real estate in respect of unpaid interest, and "arrears" means unpaid arrears. The defendant had in his hands the receipts for all interest due on the real estate mortgages when he took his proceedings.

Fourthly, the defendant relies upon a provision of the chattel mortgage enabling him to take possession upon the issue of a writ of summons for a money demand against the plaintiff, and claims to be entitled to exercise the right under this provision because of a writ issued at his own suit to enforce payment of the amount of the advance by action on the covenant for payment contained in the mortgage of real estate. There has been much discussion with regard to the circumstances under which this writ was issued. But I do not deem it necessary to consider this branch of the argument, for I think that the provision does not extend to the issue of a writ by the defendant for the same money demand as the chattel mortgage is given to secure. I think it should be read as meaning the issue of a writ for a money demand other than the defendant's demand under the mortgage. The object was to enable him to take steps to protect himself, if, while there was no default in respect of his own claim, another claim was pressed by the issue of a writ against the plaintiff. The other provisions of the chattel mortgage afford ample protection to the defendant in the case of the

plaintiff's default in making payment of the secured debt or the interest or any part thereof.

Fifthly, the defendant sought at the trial to be permitted to set up and rely upon an alleged breach by the plaintiff of the condition against selling or attempting to sell the goods without the defendant's consent. The learned Chief Justice refused to allow the defence, being of opinion that the proof given in support of the alleged selling or attempting to sell was insufficient to support the charge, and there is no reason for differing with him.

Lastly, the defendant contended that the damages were excessive; but the sum awarded is quite reasonable under the circumstances. This is not a case of the mere issue of a writ of summons for an unfounded claim, and a seizure in good faith under the belief that the proceedings were proper. The defendant having through his own neglect allowed the time for renewal of his chattel mortgage to go by, and being irritated with the plaintiff's desire to rectify what he believed to be a mistake in the chattel mortgage, cast about for some method by which he could gain an advantage or put the defendant at a disadvantage. He adopted the plan of issuing a writ of summons for a money demand, and made that the pretext for seizing the goods under the chattel mortgage, and thereby put the plaintiff to considerable trouble, inconvenience, expense, and loss.

There is no ground for interfering with the adjudication as to damages or the costs of the action.

The judgment should be affirmed with costs.

OSLER, J.A., wrote a concurring opinion.

ARMOUR, C.J.O., expressed no opinion.

LISTER, J.A., died while the case was sub judice.

SEPTEMBER 19TH, 1902.

C. A.

RITCHIE v. VERMILLION MINING CO.

Company—Mining Company—Directors—Power to Sell Lands—Irregularity — Shareholders — Directors—Qualification—Injunction Restraining Sale.

Appeal by plaintiffs from judgment of STREET, J. (1 O. L. R. 654) dismissing action to restrain the defendant company from selling their mining lands, under the circumstances set out in the judgment below as reported.

The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, LISTER, JJ.A.

A. B. Aylesworth, K.C., and N. F. Davidson, for appellants.

Wallace Nesbitt, K.C., for defendant company.

W. R. Riddell, K.C., and R. McKay, for individual defendants.

MACLENNAN, J.A.:—The first question on the appeal is whether the company has power to make the sale sought to be restrained. . . . The Companies Act restricts the power of a company to acquire lands to what is necessary for the carrying on of its undertaking; and the Mining Act confines it to what is necessary for the company's mining, milling, reduction, and development operations. And in neither case is there any express qualification of the power of alienation.

I am unable to see that any restriction upon the express power of alienation can be implied. The company is not limited to the purchase, for their purposes, of any particular parcel or parcels of land, except perhaps that they are confined to the district of Algoma. They might buy land for a mine and find it unsuitable, or not so suitable as other land. Why should they not have the same liberty as a private person to act from time to time as they deem to be for their interest, and to sell and buy as their interest seemed to require? It is said that the sale of this land is a sale of the company's business, and so is ultra vires. I do not think so. There is nothing to prevent the business being continued by the purchase of other mines, or mining lands, afterwards; and it is for the company to determine what shall be done afterwards. Wilson v. Miers, 10 C. B. N. S. 348, cited in the judgment below, appears to me to be a distinct and satisfactory authority on this point, and a case which I have not found doubted anywhere. I also refer to Hovey v. Whiting, 13 A. R. 7, and 14 S. C. R. 515.

The next ground taken by the appellants is, that a sale would be injurious to plaintiffs. The answer to that is, that the affairs of a company must be managed according to the judgment of the majority of shares, by which the directors, the executive body, are elected; and so long as what is done is legal, it cannot be prevented, or undone, merely because it may be disadvantageous to a minority of the members. It is said that defendants, who control 2,383 shares out of a total

number of 2,400, are selling this property not so much in the interest of the defendant company as in the interest of the Canada Copper Company, another mining company operating in the neighbourhood of the defendant company's lands, in which they are large shareholders; and not only so, but that their action is or will be ruinous to the defendant company. That may even be so, and yet, if the company has the legal power to make this sale, as I think it has, the plaintiffs are without remedy. [Reference to Pender v. Lushington, 6 Ch. D. at p. 75 et seq.; North-West Transportation Co. v. Beatty, 12 App. Cas. 589.] . . .

It is clear that the Court could not compel the company, or its directors, to proceed with the development of the property, or to work its mines; and if it chose to suspend for a long time, or even to abandon, all mining operations, the Court could afford plaintiffs no assistance, and the motives of such conduct would be immaterial. It appears also that the shares were ultimately paid for with the money of the rival company, and have been since the commencement of the action divided ratably among the shareholders of the other company.

It was further contended that the proceedings by which the sale was authorized were irregular and void, and that the company were not bound by them; that the meetings of the shareholders and directors respectively were not properly called; and that the directors were not only not duly elected, but that they were not legally qualified.

But whether the meetings of shareholders were regularly called or not, there is no doubt that only a small portion of the shares were unrepresented at any of them. And at the meeting of shareholders on the 16th July, 1897, at which the sale of the property was authorized, 2,296 shares were represented, of which 2,289 voted in favour of the sale, and only 7 against it.

The same observation may be made as to the annual election of directors. Whatever irregularity there may have been, or want of qualification, everything that was done by the directors was approved of by the vast majority of the shares.

With regard to the objection to the qualification of the directors, which is, that they held their shares as trustees for the rival company, and not absolutely in their own right, as required by sec. 42 of the Companies Act, I think it by no means clear that the shares were held in trust. There was no express trust, and the 7 shares excepted from the resolution of 26th August, 1890, were intended as a qualification of the

directors, and may have been a transfer to them, in advance of the ultimate distribution of the shares among the shareholders of the other company. If the shares held by the directors or any of them were actually held in trust, and not beneficially, I do not think, having regard to Pulbrook v. Richmond, 9 Ch. D. 610, Cooper v. Griffin, [1892] 1 Q. B. 740, and Howard v. Sadler, [1893] 1 Q. B. 1, we could hold them qualified. The language of our Act is much stronger than that of the English Act, by reason of the use of the word "absolutely," and I think we ought to hold it to mean a beneficial holding. That difficulty, however, was got over shortly after the commencement of this action by the transfer to each of the defendants of a considerable number of shares beneficially.

But I am of opinion that the company having power to do what is sought to be restrained, the plaintiffs cannot succeed on any ground of mere irregularity. The company is made a defendant, and is here on the face of the record ratifying and confirming what has been done, and insisting upon what has been begun being proceeded with.

I think the appeal must be dismissed.

Moss, J.A. (after discussing the statutes and the evidence) :—It seems to me impossible to say that the company has not the power to sell the real estate in question, if in good faith the majority of the shareholders decide to do so.

I do not say that if upon the face of the letters patent it plainly appeared that the main purpose of the company was the acquisition of and working the mines upon the properties in question, and that this purpose formed the foundation of the company, it might not even yet be held that it was not within the power of the company to put an end to that purpose by a sale of the properties without the consent of all the shareholders. But this does not and cannot be made to appear. The sale of these properties need not disable the company from carrying on its operations as a mining company within the District of Algoma. It does not work a dissolution of the corporation nor put an end to its powers.

I agree, therefore, that the company has power to make sale of the properties in question. I think the objections to the status of the directors have been properly disposed of, and that it was competent for them to proceed with a sale under proper conditions.

But I am of opinion that the proposed sale on the 14th May, 1901, ought not to have been allowed to proceed, and that, while as to all other matters the action was rightly dismissed, it ought to have been retained for the purpose of enjoining that sale.

The attempt to sell without having put the properties into a condition in which they might be properly inspected and examined by intending purchasers, and fixing the date of the sale at a time which rendered any inspection or examination before it was held a matter of extreme difficulty, if not an impossibility, was not a compliance with, but, on the contrary, a violation of, the spirit of the order of the 21st August, 1897, in pursuance of which the defendants were professing to make the sale. . . .

Under the circumstances, if the sale had taken place as intended, it could not have failed either to have proved wholly abortive for want of bidders or to have resulted in the properties falling into the hands of the Canada Copper Company, as the plaintiffs allege the defendants designed they should, at an inadequate price.

The proceedings in Court arrested the sale, and there is now an opportunity of bringing the properties into the market in such manner as to secure the most favourable terms of sale and protect the interests of all the shareholders.

It is not now necessary to retain the action, but I think that, inasmuch as the plaintiffs were right in their contention on this branch of the case, though they failed in the others, there ought to have been no costs of the action and there should be no costs of this appeal.

ARMOUR, C.J.O., and OSLER, J.A., concurred.

LISTER, J.A., died while the case was sub judice.