The
# Ontario Weekly Notes

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## COURT OF APPEAL.

DECEMBER 30TH, 1911.

## *SHARPE v. WHITE.

*Damages—Breach of Contract to Take and Pay for Shares—Measure of Damages—Ascertainment of Market-price of Shares at Date of Breach or Breaches—Difference between Contract-price and Market-price.*

Appeal by the defendants from the order of CLUTE, J., 2 O.W.N. 849, dismissing the defendants' appeal from the report of an Official Referee, and directing judgment to be entered for the plaintiff for $66,106.65, the damages assessed by the Referee, and interest.

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

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

C. A. Moss, for the plaintiff.

GARROW, J.A.:—The defendants agreed to purchase from the plaintiff 1,000,000 shares of . . . Cobalt Merger Limited, at the price of $150,000, payable $5,000 down, $25,000 on the 30th June, 1907, $25,000 on the 25th June, 1907, $50,000 on the 25th July, 1907, and $45,000 on the 25th August, 1907. The $5,000 payment was duly made.

On the 1st June, 1907, the plaintiff was notified by the defendants that they did not intend to carry out the contract; and this action was commenced on the 6th June, 1907, in which the plaintiff asked for specific performance, or, in the alternative, for damages. At the trial he was put to his election, and elected to take damages, whereupon the reference was directed. The judgment is dated the 18th June, 1908.

*To be reported in the Ontario Law Reports.

The learned Referee found the plaintiff to be entitled; (1) in respect of certain items not disputed, to $3,000; (2) 637,867 shares at 5 cents, to $31,893.35; (3) 362,133 shares at 10 cents, to $36,213.30: in all, $71,106.65, less down payment of $5,000, making $66,106.65, and interest on this sum at 5 per cent. from the 27th August, 1908.

It appears that, at the date of the contract, the plaintiff held 362,132 shares in his own right, and had an option . . . upon 637,867 shares, making together the 1,000,000 shares which he contracted to sell to the defendants. The price fixed in the option was 10 cents per share, and it expired on the 1st July, 1907, but was extended upon very special terms, in consideration of $2,000, which the plaintiff paid in order to be prepared to deliver the stock, if demanded as the result of his action, in which, as before mentioned, he had asked for specific performance.

The defendants' appeals from the judgment delayed proceedings until October, 1910. In the meantime, namely, in the month of September, 1909, the plaintiff and those interested with him, after many and complicated negotiations, disposed of their belongings in Cobalt Merger stock by trading it for stock in another company . . . and . . . $5,500 in cash, out of which had to come certain disbursements. This, again, was in part used in trade for real estate in the cities of Ottawa and Montreal—some, if not all, of it subject to mortgages—and in part is still retained by the plaintiff. And the defendants' contention is, that they are entitled to the benefit of these transactions, subsequent to the judgment, by which, as they further contend, the plaintiff has been fully recouped. And, in support of this rather singular proposition, their counsel cites the recent cases before the Privy Council, Wertheimer v. Chicoutimi Co., [1911] A.C. 301, and Erie County Natural Gas and Fuel Co. v. Carroll, [1911] A.C. 105.

I have looked at these cases with care, and I am quite unable to see that they assist the defendants' contention. Neither of them lays down or professes to lay down any new rule for the assessment of damages. . . .

The difficulty does not lie in any obscurity concerning the law, but in the application of the law to the facts in each particular case. And the real difficulty here seems to me to be in the assertion that the plaintiff has been actually recouped at all. Mining stocks are, as appears by the evidence, a somewhat unstable commodity. So is city real estate covered by mortgages. At the time of the breach, the Cobalt Merger shares had no

actual market-value, and were, as the evidence shews, unsaleable, for such a large block, at practically any price. There was, therefore, no means then at hand whereby the plaintiff, acting reasonably, could have performed the defendants' contract by a then sale of the shares. And this condition of things continued for a very long period. And, indeed, but for the exertions of the plaintiff and his associates, involving the expenditure of much time and money in making new arrangements, including the assumption of new obligations, would have, so far as appears, still continued. Why should the defendants, having assumed none of the risks, get all the benefit of these protracted, and still, so far as actual realisation in money is concerned, incomplete, negotiations? Nothing in the cases to which I have referred, nor in any of the others which I have looked into, would give them such a right. If they had performed their contract, the plaintiff would have had $145,000, in addition to the down-payment of $5,000 in cash, by the middle of 1907. And, so far as I can gather from all the evidence, it is very doubtful if he will in the end, as the fruit of all his subsequent exertions and negotiations, even with the amount of damages assessed by the learned Referee, be made as well-off in money as if the contract had been duly performed at the proper time. . . .

Appeal dismissed with costs.

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

MOSS, MACLAREN, and MAGEE, JJ.A., also concurred.

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DECEMBER 30TH, 1911.

## BEATH v. TOWNSEND.

*Contract—Mining Shares—Evidence—Findings of Trial Judge —Appeal.*

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., 2 O.W.N. 1273.

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

F. E. Hodgins, K.C., and W. R. Wadsworth, for the defendant.

R. R. McKessock, K.C., and W. N. Tilley, for the plaintiff.

MOSS, C.J.O.:—There is nothing involved in this appeal but a question of fact. The plaintiff alleges an agreement on the part of the defendant, which, if true, has in it no element of illegality. The claim is that the defendant, the owner of the greater proportion of the shares in a mining company, and greatly interested in its properties being proved to be productive and valuable, desired to make a test by submitting a mill run of ore for reduction at the Kingston School of Mines, and, being unable to procure or advance the moneys needed for that purpose, applied to the plaintiff and two other persons to advance the necessary funds, and by way of consideration offered and agreed to make over 10,000 shares of the capital stock of the company belonging to him to the plaintiff, and that the plaintiff and his two associates advanced the moneys, and the mill run of ore was got out and sent to the School of Mines.

The plaintiff now claims that he performed his part of the agreement; and the learned trial Judge has found the agreement and the plaintiff's performance of his part of it to be proved as alleged by the plaintiff. There is a direct conflict of testimony; but clearly the preponderance, not only of verbal evidence, but of the probabilities, supports the plaintiff's case. Taking the whole case together, there appears to be no good reason for interfering with the finding of the learned trial Judge. There is not any doubt that the defendant wished to obtain the submission of the mill run of ore to the School of Mines, and that he was without funds with which to procure it to be done.

It is equally clear that, as a fact, the funds were actually advanced by the plaintiff and his associates, and the result was obtained which the defendant was desirous of bringing about. His version of the means by which the funds were procured or rendered available, and the plaintiff and his associates recouped, he failed to establish by satisfactory proof.

The result is, that the judgment appealed from should stand and the appeal be dismissed with costs.

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

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

DECEMBER 30TH, 1911.

## *SHEAHEN v. TORONTO R.W. CO.

*Damages—Personal Injuries—Assessment by Trial Judge—New Evidence on Appeal—Reduction of Damages—Principle of Assessment.*

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., who tried the action without a jury, in favour of the plaintiff, in an action for personal injuries alleged to have been caused to the plaintiff by negligence in the operation of a street-car of the defendants upon which she was a passenger.

The only question was as to the amount of the damages, which were assessed by FALCONBRIDGE, C.J., at $10,000. An earlier assessment, at which the defendants were not represented, was had before LATCHFORD, J., who fixed the amount at $15,000: but that assessment was set aside and a new trial granted (2 O.W.N. 1263.)

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

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

M. K. Cowan, K.C., and T. P. Galt, K.C., for the plaintiff.

GARROW, J.A.:—In addition to the evidence which was before Falconbridge, C.J., further evidence was given before us, touching a cheque for $1,355.27, which, at the trial, the plaintiff asserted was paid to her as part of her earnings, but which, by the new evidence, was clearly paid upon a wholly different account—a circumstance well-calculated, in the case of a witness so well-informed and so little likely to be mistaken as the plaintiff is shewn to be, to suggest that there may have been other exaggerations, not discovered, in the account which she gave of her earnings outside of her regular salary.

But the undoubted fact remains that the plaintiff's injuries were of a very serious nature; and that her damages should, upon the evidence, be quite substantial. She was evidently an unusually clever, capable, young woman, in receipt of a fair income from her own exertions, which has been and will for some time be interfered with as the consequence of her accident. In addition, the nature of the injuries required a very large expenditure for nursing and medical attendance, amounting, it is said, to over $2,000. We were unfortunately not favoured with

*To be reported in the Ontario Law Reports.

the reasons upon which Falconbridge, C.J., proceeded; but it may be assumed that, in the absence of the new evidence, he accepted the plaintiff's evidence as to the $1,355.27 cheque. That having now been explained, and the whole matter carefully considered, I have reached the conclusion that a fair sum to award the plaintiff would be $7,000, to which sum the present judgment should, I think, be reduced, and the appeal to that extent allowed.

Under the circumstances, there should be no costs of the appeal.

MEREDITH, J.A.:—This is not an application for a new trial, upon the ground that the damages assessed are excessive, or that they are inadequate: the damages were not assessed by a jury, but by a trial Judge; and so may be increased or reduced here without a new trial or new assessment: and, in another very material matter, the case is not the ordinary one of a motion to reduce or to increase the damages, because additional evidence, of a very material character, has been adduced upon the subject in this Court; evidence which, if it had been adduced before the trial Judge, might have very materially affected his conclusions upon the subject; so that one is really obliged to make a new assessment of the damages in the light of the new evidence: and, in view of the way in which this appeal was argued, it seems to me needful again to state the now well-settled principles on which damages are to be assessed in such a case as this.

The plaintiff's injuries arose out of an unfortunate accident —none the less unfortunate because caused by the negligence of the defendants' servants—in which the defendants and others, as well as the plaintiff, sustained very considerable loss; so that it is nothing like a case in which exemplary damages could be, properly, awarded: but is one in which the rule that, in estimating damages, recoverable for personal injury by negligence, the jury must not attempt to award the full amount of a perfect compensation, for the pecuniary injury, but must take a reasonable view of the case and give what they consider, under all the circumstances, a fair compensation, very plainly applies: and, it need hardly be added, that the same rule applies to Judges as well as to jurors. . . .

I would reduce the damages to $7,000: which, I feel quite sure, is, to say the least of it, "a fair compensation."

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

*Order varying judgment by reducing damages to* $7,000; *no costs of appeal.*

DECEMBER 30TH, 1911.

## *FLEMING v. TORONTO R.W. CO.

*Negligence—Street Railway—Injury to Passenger—Electric Explosion in Car—Negligence of Motorman—Findings of Jury—Failure to Apply Brakes—No Reasonable Evidence to Support Finding—Finding of Incompetence—Immateriality—Failure of Company to Discover and Remedy Defect—Evidence of Inspection—Recollection of Witness—Written Report—Rejection of Testimony—New Trial.*

Appeal by the defendants from the judgment of MIDDLETON, J., upon the findings of a jury, in favour of the plaintiff for the recovery of $1,200 damages, in an action for injury sustained by the plaintiff from an electric explosion in one of the defendants' street-cars in which he was a passenger on the 10th August, 1910.

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

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

H. D. Gamble, K.C., for the plaintiff.

MEREDITH, J.A.:—There are really but two questions for consideration upon this appeal, because there are really findings of negligence in two respects only, failure to apply the brakes, and failure to discover and remedy the defect which was the cause of the accident: the finding as to the incompetence of the motorman affords in itself no cause of action; the incompetence of the man might have had some bearing upon the question of failure to apply the brakes, but otherwise it was immaterial, because, competent or incompetent, he was the defendants' servant, for whose conduct, in the course of his employment, the defendants are answerable; if the case had been one coming under the rule as to "common employment," the question might have been quite material; in this case it is not possible that it alone can be made a cause of action.

The first question, then, is whether there was any reasonable evidence of negligence on the part of the motorman in failing to apply the brakes before seeking to reassure the passengers and to have the electric current cut off by the removal of the pole from the wire. And this question is not to be looked at

*To be reported in the Ontario Law Reports.

as it may now appear, looking back upon the event and having days for considering what might have been done to have prevented the panic, on the part of the passengers in the car, which was the cause of the plaintiff's injury.

The explosion caused by the electricity was an unusually violent one; and the motorman got the brunt of it; and was somewhat stunned by it. His first act was to turn off the power, obviously the proper thing to do. Finding that that did not cut off the electricity, which would, if not cut off, burn up the car, and the quickest and best means of cutting it off being by detachment of the pole at the other end of the car, and the passengers being panic-stricken, not knowing what had happened or what might happen next, he immediately turned to the body of the car and called to the conductor to detach the pole, and then to the passengers to keep their seats, and then back to his motor in the vestibule of the car, from which he had to be carried, owing to the injury which he had sustained.

In the imminent danger, there were three things which the man might have done, disregarding his own interests and safety in the interests and for the safety of his passengers: (1) get the power cut off; (2) reassure the passengers, who in their panic might injure one another; and (3) apply the brakes so that there might be less danger in a panic: the man, in the instant, deemed the first two the most important, and left the third until he had done what he could to effect the other two; and it seems plain to me that no reasonable man could conscientiously say that in doing so he was guilty of negligence. That which was most urgent of all things was the cutting off of the power; unfortunately the passengers, in their panic, threw the conductor twice off the car before the motorman's injunction to remove the pole from the wire could be obeyed; but he did not know, he could not tell, that it would not be immediately complied with; his reassurance of the passengers was next in importance; if it had succeeded, no one would have been injured; there would have been no need to stop the car, to prevent injury if the pole were removed and the passengers remained in their seats; these things failing, it was important to stop the car as soon as possible to prevent the additional danger to panic-stricken passengers alighting from a car, moving at a slow rate of speed over a car being stopped by the immediate application of the brakes. If the man had stopped to apply the brakes first, and then had turned to reassure the passengers and to call for the disconnection of the current, he might, must better, have been

found fault with; but, whichever he did first, in the moment of the explosion and consequent fire, he could hardly be accused, reasonably, of negligence. In my opinion, there is no reasonable evidence to support this finding; and I desire to add that I hope all "competent" men may act in as courageous a manner upon such an extraordinary occasion of—if judged by the panic of the passengers— very considerable cause for alarm, as this man, found by the jury to be "incompetent," did.

On the other branch, as well, there must, I think, be a new trial, because of the improper rejection of evidence. The plaintiff made a primâ facie case of neglect on the part of the defendants to take reasonable care that the car was road-worthy and free from the defect which caused the accident. The defendants then proceeded to meet that case by testimony as to examinations to ensure road-worthiness and freedom from such defect; but, upon objection made on the plaintiff's behalf, the evidence in question was rejected, and rejected upon an erroneous ground, as is now generally admitted. The witness could not from memory alone testify to an inspection shortly before the accident, it would hardly be possible that he could; it was then proposed to put into his hand a report, signed by him in the usual course of his work, shewing that the car had been examined at that time, but, upon such objection, that was prevented. If, looking at the report, the witness could have said: "That is my report, it refers to the car in question, and shews that it was examined at that time, and, though I cannot from memory say that it was then examined, I can now swear that it was, because I signed no report that was untrue, and at the time I signed this report I knew that it was true," that would, of course, be very good evidence, but the defendants were not allowed to get that far; and so the defendants are entitled to a new trial.

MACLAREN, J.A., agreed that there should be a new trial, for reasons stated in writing. He considered that it would not be in the interests of justice that the case should be finally determined on the evidence admitted; there should be a re-trial in order that the tendered evidence might be received. He referred to Phipson on Evidence, 5th ed., pp. 466, 467.

MOSS, C.J.O., GARROW and MAGEE, JJ.A., agreed in the result.

Appeal allowed and a new trial directed; costs of the appeal to be costs to the defendants in any event; costs of the former trial to be costs in the action.

DECEMBER 30TH, 1911.

## *TORONTO CLUB v. DOMINION BANK. *TORONTO CLUB v. IMPERIAL BANK OF CANADA. *TORONTO CLUB v. IMPERIAL TRUSTS CO. OF CANADA.

*Cheques—Incorporated Club—Members' Cheques Payable to Club—Authority of Secretary to Indorse—Restrictions—Cheques Cashed by Banks and Proceeds Misapplied by Secretary—Cheques Deposited with Trusts Company to Credit of Secretary—Liability to Refund Club—Restitution Cheques—Reduction of Liability.*

Appeal by the plaintiffs from the judgment of BOYD, C., 14 O.W.R. 261, dismissing the actions.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

A. W. Anglin, K.C., for the plaintiffs.

J. Bicknell, K.C., and G. B. Strathy, for the defendants the Imperial Bank of Canada.

I. F. Hellmuth, K.C., and G. H. D. Lee, for the defendants the Dominion Bank.

A. C. Macdonell, K.C., for the defendants the Imperial Trusts Company of Canada.

GARROW, J.A.:—The actions were brought claiming damages, and in the alternative as for moneys had and received, for the conversion of a large number of cheques, payable to the plaintiffs' order, which had come to the hands of the plaintiffs' secretary, Mr. Colin C. Harbottle, and been by him indorsed to the defendants, in the plaintiffs' name, "per pro.," and the proceeds received, and it is said dishonestly retained, by him. In all three cases, the main question was as to the authority of Harbottle so to deal with the cheques, although there were also minor differences in the circumstances of each case, such as the fact that the defendants the Dominion Bank were also the plaintiffs' bankers, and in the case of the defendants the Imperial Trusts Company that the cheques received by that company had been placed to Harbottle's own credit in a running or investment account, and the proceeds subsequently withdrawn by him.

*To be reported in the Ontario Law Reports.

The learned Chancellor found that Harbottle's authority was general; that he had power both to indorse and receive the proceeds; and that the minor circumstances to which I have referred were insufficient, under the circumstances, to justify making a distinction between any of the three cases and the others; and he accordingly found for the defendants in all three.

There is, in my opinion, nothing in the plaintiffs' contention that the provisions of 41 Vict. ch. 67(O.) restricted or were intended to restrict the plaintiffs' power. On the contrary, its plain intention seems to me to have been one of enlargement. Section 2 was inserted to aid the borrowing power authorised by sec. 1, and has, I think, no application to the circumstances with which we have here to deal.

Nor does there appear to be any other principle or question of law seriously involved or in dispute between the parties. The defendants do not dispute that the fact that the indorsements are all "per pro." places the onus upon them: see Bryant v. Quebec Bank, [1893] A.C. 170.

It is not alleged that any specific instructions were ever given to the secretary upon the subject of indorsing and dealing with such cheques. Nor is it disputed that from the beginning it had been the custom for the secretary to indorse them, usually but not invariably, for deposit with the plaintiffs' bank, which was, of course, their proper destination. Under these circumstances, Mr. Anglin admitted that the secretary had authority to indorse for the purpose of deposit in the bank, but for no other purpose.

Harbottle does not appear to have presented any of the cheques to the defendants the Dominion Bank or the Imperial Bank in person. They were sent to the banks by the hands of other employees of the club, and the proceeds brought back to him. In the case of the Imperial Trusts Company, he had his private account there, and the cheques of the plaintiffs which passed through the hands of that company were simply indorsed and then deposited to his credit. . . .

There was no rule, order, or direction of any kind whatever from any one in authority upon the subject of the indorsement of cheques. During the life of the club, beginning as far back as 1864, many thousands of them had passed through the hands of the various secretaries, all of which had been indorsed by the secretary. Former secretaries, who were honest men, did not abuse their power. They deposited the cheques received with the club's bankers, and, at least in the later years, in so doing, used a rubber stamp with the words "for deposit only." But there

is nothing to shew that such a stamp was ever prescribed by the plaintiffs or by any one having authority on their behalf. . . .

Upon the whole, I am of the opinion that there was reasonable evidence to justify the learned Chancellor's finding that Harbottle's authority was general; and that, in so far as the defendants the banks are concerned, we have not been shewn on this appeal any sufficient reason for arriving at a contrary conclusion.

But, even granting Harbottle's authority to indorse and receive the proceeds, the situation of the defendants the Imperial Trusts Company is, I think, substantially different. To begin with, they are not a bank, but a trust company, organised, I assume, in the absence of evidence to the contrary, under the provisions of the Ontario statutes in that behalf: see R.S.O. 1897 ch. 206, the schedule to which indicates the general powers which may be exercised by such a company. The agreement . . . upon the terms of which, it is said, the account was opened, provides for an investment by the company of the moneys to be deposited repayable, with any additions thereto, upon demand, or upon thirty days' notice, at the option of the company, with interest thereon at 4 per cent. half-yearly. The company were to take all interest and profits over the 4 per cent. as their remuneration for the guarantee and management. The transaction was, therefore, one in which both were interested, and from which, presumably, both expected to derive a profit.

The account began in December, 1906, the year in which Harbottle became secretary, but the first deposit of the club's cheques, so far as appears, was made . . . in September, 1907. In that month he deposited the club's cheques to the amount of $274.45; in October, to the amount of $1,117.60; and in November, to the amount of $1,327.40: or, in all, to the amount of $2,719.45 in these three months.

That in doing as he did Harbottle was committing a palpable fraud and breach of trust, no one can doubt. And it seems to me impossible to escape from the conclusion that the trust company were, in the circumstances, negligent in receiving such cheques, plainly the property of the club, and in placing the proceeds, either before or after collection, for I see no difference, to the credit of Harbottle in his own personal account. . . .

[Reference to Gray v. Johnston, L.R. 3 H.L. 1, 11; Bailey v. Jellett, 9 A.R. 187; Clench v. Consolidated Bank of Canada, 31 C.P. 169, 173; Coleman v. Bucks, etc., Bank, [1897] 2 Ch. 243.]

The circumstances are not at all like those in the recent case of Ross v. Chandler, 19 O.L.R. 584, affirmed in the Supreme Court of Canada, which was regarded as very near the line. . .

The result is to make the defendants the Imperial Trusts Company a party or privy to Harbottle's breach of trust, and, therefore, accountable to the plaintiffs in respect of the cheques so received by the company, amounting in all to $2,719.45, but from which should, I think, be deducted the sum of $2,167.10, the proceeds of the four cheques drawn by Harbottle and deposited to the plaintiffs' credit in the plaintiffs' bank. These deposits were made while Harbottle was still secretary, and ought, under the circumstances, to be ascribed to an intention on his part to refund to the plaintiffs so much of the proceeds of their cheques which he had wrongfully deposited with these defendants, and not to a repayment generally upon account. If he had withdrawn from these defendants the whole $2,719.45, and had deposited it in the Dominion Bank to the plaintiffs' credit, I do not see how any question could have been successfully raised. The wrong would, in that case, so far as these defendants are concerned, have been fully repaired; and the same result should, I think, follow pro tanto, upon the partial reparation effected by the repayments in question.

The actions should, therefore, stand dismissed as against the defendants the Imperial Bank and the Dominion Bank, with costs, including the costs of the appeal; and the plaintiffs should have judgment against the Imperial Trusts Company for $552.35, with interest from the 15th November, 1907; and, of course, with costs of the action and of this appeal, in so far as those defendants are concerned.

The costs in appeal will, of course, include those of the former hearing (when there was a disagreement of the Court, and a reargument was ordered.)

MACLAREN, J.A., was of opinion, for reasons stated in writing, that all three defendants should be held liable for all the cheques received by them irregularly. He agreed, with some hesitation, that the amount of the restitution cheques should be deducted from the amount of the cheques improperly deposited by the secretary with the Imperial Trusts Company.

MEREDITH, J.A., was of opinion, for reasons stated in writing, that the action was properly dismissed as against all three defendants.

MAGEE, J.A., agreed in the conclusions of GARROW, J.A., for reasons stated in writing.

In the result, the appeal as against the banks was dismissed, MACLAREN, J.A., dissenting; and the appeal as against the trusts company allowed, MEREDITH, J.A., dissenting.

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## HIGH COURT OF JUSTICE.

MIDDLETON, J. DECEMBER 29TH, 1911.

### RE LEYS.

*Will—Legacies Payable out of Income of Estate—Investment in Shares of Trading Company—Profits of Business of Company—Apportionment between Income and Capital—Dividends Paid not Representing Income.*

Petition by nephews and nieces of John Leys, deceased, beneficiaries under his will, for a direction that the profits of the business, in the petition referred to, earned since the testator's death, but not distributed, be declared income, and that the amount thereof be paid to the petitioners, subject to any arrears due to the testator's widow and to Harriet Geddes.

T. P. Galt, K.C., for the petitioners.
H. S. Osler, K.C., for the Official Guardian.

MIDDLETON, J.:—The testator died on the 29th January, 1892. By his will he gave certain annuities during the life of his wife, payable out of income, and directed that the residue of income should be divided among his nephews and nieces. Upon the wife's death, the estate is to be divided (after setting apart a certain sum) between the nephews and nieces then living and the child or children of any then deceased; and, if all die without leaving issue, then the estate is to be divided among the next of kin living at the wife's death.

At the time of the death, the testator held $140,000 of the capital stock of a certain company—$310,000 represented the total paid-up capital. The assets of this company were nominally $762,292, and outside liabilities $351,289, leaving a surplus of $374,902, or $64,902 more than the capital. The real situation of this company was such that the stock could not be sold; and the directors deemed it prudent to reduce the liabilities. Accordingly, with the concurrence of the executors, no dividends were declared, save on four occasions, from the date of the death till 1908, when the business was sold, the purchaser paying par for the stock.

In the meantime net profits had been earned of $259,315, the larger portion of which had not been divided. This was a little more than five per cent. per annum upon the par value of the stock.

The position of the business at the time of the sale was as follows: assets, $740,475; outside liabilities, $239,557; surplus, $500,917—shewing an improvement, attributable to the absorbed earnings, of $126,015. This having realised $310,000 at a sale, which all admit was a good sale, $190,917 must be taken to be the difference between the real and nominal value of the assets. Adding the absorbed earnings, the result, $316,932, deducted from the nominal surplus at the testator's death, $374,902, leaves about $58,000 as the actual value of the whole stock at that date.

The nephews and nieces now ask that they may be in some way compensated for the income so absorbed, and that the whole $140,000 should not be treated as capital.

The will contemplated investment in authorised securities, but gave the trustees power to refrain from calling in any investments made by the testator.

The general rule undoubtedly is, that the action of the directors binds those claiming under the shareholders. The dividends declared upon the stock are income and the only income from the stock: Bouch v. Sproule, 12 App. Cas. 385. But there is another principle that may be invoked in this case, that, when the executors delay realising so as to nurse a doubtful asset, and this operates to deprive the life tenant of his income in the meantime, the whole loss cannot be thrown either upon capital or income, but must be distributed between capital and income: In re Atkinson, [1904] 2 Ch. 160; Hibbert v. Cooke, 1 Sim. & Stu. 552; In re Bird, [1901] 1 Ch. 916.

The $140,000 and the amounts received from dividends should be apportioned between capital and income in the proportion the capital, $140,000, bears to the income which would have been earned at 5 per cent. in these 16 years, i.e., $112,000. That is to say 100/180 of $140,000 and the dividends, is capital, and the balance is income. The income, having received these dividends, must, of course, give credit for the amount received. If there is any difficulty in working the matter out, I may be spoken to again.

Costs out of the estate.

(NOTE.—I understand that an order has been already made appointing the Official Guardian to represent the unascertained class. If not, an order should issue.)

MIDDLETON, J. DECEMBER 29TH, 1911.

## PLUMMER v. DAVIES.

*Way—Dedication—Evidence—User — Interruption — Prescription—Easement.*

Action by J. H. Plummer and E. B. Osler to restrain the defendant, Robert Davies, the owner of the Don Valley Brick Works, from using a road known as "the Milkman's road" for the purpose of carrying bricks, etc., from his works.

E. D. Armour, K.C., I. F. Hellmuth, K.C., and H. D. Gamble, K.C., for the plaintiffs.

E. F. B. Johnston, K.C., and A. W. Ballantyne, for the defendant.

MIDDLETON, J.:—The easterly part of lot 19 in the 2nd concession, York, and 10 acres of lot 18, were conveyed to Thomas Helliwell and John Helliwell on the 17th May, 1826, and remained in the Helliwell family till the 17th December, 1874, when Thomas Helliwell conveyed these lands to Edgar J. Jarvis. The intermediate conveyancing is not in any way material. This parcel of some 110 acres was enclosed, and was used by the Helliwells as a farm and residence. The land so enclosed extended from the north and south line, dividing the east and west halves of lot 19 (a little east of Sherbourne street) to the river Don, and was crossed by the second Rosedale ravine, which entered the property at the north-west angle, and ended in the Don flats, near the centre of the lot.

The whole eastern part of the lot consists of the low-lying Don flats. At the western end there is some high land. The entrance to the farm was from the west. There was a lodge and a gate; a man named Bird was for many years resident in the lodge, and was caretaker for the Helliwells.

At a very early period, a road was made down the bank of the ravine, and a small bridge was placed across the creek flowing down the ravine. This road was constructed as a mode of access to the flats from the high land and for the convenient use of the farm itself.

Some revenue was derived by the Helliwells from the leasing of pasturage on the flats to milkmen, and the milkmen were permitted to use this road to draw milk from the flats—hence its name.

While the property was held by the Helliwells, nothing was done which could be in any way regarded as a dedication of this road.

Mr. Jarvis, had, prior to 1874, been much interested in the opening up of Rosedale as a residential district; and, no doubt, purchased this land with a view to its subdivision.

Between 1874 and 1877, he had erected a residence on the high land south of the road in question; and, on the 23rd April, 1877, he sold this parcel to Mr. Osler. The parcel conveyed is described by metes and bounds, and makes no mention of the road. A plan is attached shewing the parcel outlined in red. Upon this plan, Beau street, Glen road, and Elm avenue are shewn in outline, but not named; and this road is shewn by dotted lines running from the west boundary of the Helliwell farm (marked rail fence) along the line of Hill street, down the ravine bank, across the stream, and to a rail fence some 150 feet beyond. This plan is, no doubt, an accurate representation of the situation at that date. No right was given to Mr. Osler with respect to this road. Access to his residence was by Beau street and Elm avenue to Sherbourne street—the road along Hill street being on the bank of the ravine and much lower than his entrance.

In November, 1877, a plan was laid out by Jarvis of part of the lands. This plan extends from the west limit of Mr. Osler's parcel to the west limit of the Helliwell estate, and includes also other lands to the south.

Hill street is shewn extending easterly along the line of this road to a point opposite the west boundary of Mr. Osler's lot, where it terminates in a dotted line, and the brown colour of the road allowance also terminates. Lots 33 and 34 on the plan, afterwards acquired by Mr. Plummer, are carried east of this. This leaves a narrow strip between Mr. Osler's land and these lots, down which this road extends. No doubt, this was retained by Jarvis with the idea that it might at some future time be to his advantage to use it as a continuation of Hill street.

In 1881, Jarvis conveyed the lands north of the ravine, and including the flats, to the Scottish Ontario and Manitoba Land Company, and with it "the right of way and power of ingress, egress, regress, and way" over certain streets, "and a road leading down the bank into the valley along the northerly limit of land conveyed to Mr. E. B. Osler."

This is the first indication of anything done by the owners of this parcel or strip of land in any way cutting down the absolute title to it.

Up to this time, Jarvis had held this as a convenient site for a road to the flats, and now he did not convey it. Nor did he in any way dedicate it to the public; but, when he sold the flats, he granted a private right of way over it. Recently the plaintiffs have acquired Jarvis's title to this strip, subject to this right of way.

When, in 1875-8, the land to the west was being opened up, the gate that had been in the original fence was removed and re-erected at the place shewn on the plan by the dotted line at the end of Hill street, and this gate was from time to time removed. All this goes to shew that Jarvis was quite aware of the importance of indicating his intention to preserve this as a private way.

Much evidence was given to shew a continuous user as of right for the 20 years prior to the action; this evidence was given not only to raise a presumption of dedication, but also in support of a claim set up by the defendant that he had acquired a presumptive right of way over the lands.

"It is clear law that a dedication must be made with an intention to dedicate, and that the mere acting so as to lead persons into the supposition that a way is dedicated to the public does not of itself amount to dedication:" per Lord Macnaghten, Simpson v. Attorney-General, [1904] A.C. at p. 493; Barraclough v. Johnson, 8 A. & E. 99.

Upon the whole evidence, I find that there never was any intention to dedicate this road. Jarvis, I am satisfied, always regarded it as an asset; and, after the sale to the land company, hoped that some day the city would take it as a street.

Then the claim by prescription fails because this way is in no sense appurtenant to Davies's lands. These lands cannot be regarded as a "dominant tenement" in any sense. Nor is the way set up an "easement." An easement is a privilege without profit which the owner of one neighbouring tenement hath of another existing in respect of their several tenements: Termes de la Ley; Ackroyd v. Smith, 10 C.B. 164.

What Davies really asserts is, that this road is a convenient link in a chain of roads over which his teams have drawn brick for many years without interference. If the claim cannot be sustained upon the ground of dedication to the public as a way, it must fail, for it certainly is not an easement.

This renders it unnecessary to consider the evidence of user in detail. I may say that I regard the evidence of the McCarthys as satisfactory, and I accept the statement of Young McCarthy

that the gate was locked and the user of the way interrupted for more than a year. There may have been some surreptitious use during that time, but I doubt even this.

Davies acquired a small parcel of the land sold to the land company. This cannot give him any right, save in so far as this use is appurtenant to this parcel. Counsel agreed that this should be excepted from any injunction awarded, and said I need not attempt to define the user which would be lawful.

In the view taken, I need not consider the question of Jarvis's agency for his wife, nor whether the road passed to her by the conveyance of the 8th July, 1895.

The injunction sought must be granted, with costs.

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DIVISIONAL COURT. DECEMBER 29TH, 1911.

## SHEPARD v. SHEPARD.

*Executors—Leave to Mortgage Lands of Testator—R.S.O.* 1897 *ch.* 71*—Powers of Court—Application Made in Action—Practice—Parties—Authority to Mortgage—Order Directing one Executor to Execute Mortgage—Disagreement of Executors—Costs.*

An appeal by the plaintiff Thomas Shepard from an order of LATCHFORD, J., of the 13th November, 1911, directing the appellant to execute a mortgage in favour of one Sarah Ann Harris, and dismissing his application for an order approving of an arrangement made by the appellant to execute a mortgage in favour of the defendant Elizabeth Shepard.

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

W. E. Raney, K.C., for the appellant and the adult defendants.

A. G. F. Lawrence, for the other plaintiffs.

E. C. Cattanach, for the infant defendant.

RIDDELL, J.:—Michael Shepard, owning part of lot 17, concession 1, township of York, made a will devising the north half to his son Joseph and the south half to his son Albert James.

Joseph made a will wherein he appointed Thomas Shepard, J. S. Jackson, and J. W. Boyle, executors, and he died before 1910, leaving an infant child, Ann Elizabeth Shepard, and a widow, Helen Shepard.

Some question arose in 1910 as to the exact amount of land devised to each son by Michael Shepard, and there were some negotiations looking towards a settlement. These did not result successfully; and on the 21st January, 1911, the executors of Joseph issued a writ to determine the land, and at the same time "to be authorised and empowered to raise by way of mortgage on the said real estate devised . . . to . . . Joseph . . . Shepard a sum sufficient to liquidate and discharge the present liabilities of the said Joseph . . . Shepard estate, together with the costs," etc., etc.

To this action were made defendants Albert James Shepard, Helen Shepard, and the infant already named, and also Ann J. Holmes and Elizabeth Shepard, daughters of Michael Shepard; and the relief sought was as indicated in the indorsement on the writ.

On the 25th January, 1911, Mr. Raney's firm wrote Mr. Lawrence's firm: "We are desired by the defendants and the plaintiff Thomas Shepard to protest against this action, so far as the contention is set up that Michael Shepard did not intend by his will that the part of lot 17 which he owned should be equally divided . . ." But the said Thomas Shepard took no steps to have his name removed as plaintiff, nor did the solicitors; and a statement of claim was filed and delivered on the 28th January. The action proceeded without any change of parties and without protest from Thomas, and he cannot be heard to say that he was not properly a party to the proceedings throughout.

The matter came on before my brother Latchford, and he decided as to the land in favour of the estate of Joseph, and gave leave to mortgage as asked: 2 O.W.N. 1012. The former part of the judgment was appealed, and a Divisional Court reversed the judgment of Mr. Justice Latchford: 2 O.W.N. 1274. The latter part of the judgment, that is, that giving leave to the executors of Joseph to mortgage, was not appealed, and it did not come before the Divisional Court at all. But, in drawing the formal judgment of the Divisional Court, a clause was introduced ordering that the executors of Joseph "be at liberty to mortgage the lands, etc., etc., for a sum not exceeding $1,303, bearing interest at a rate not exceeding 6 per cent. per annum, payable half-yearly, the said principal sum to be repayable in five years from the date of the said mortgage, and that the said mortgage be

made with the privity of the Official Guardian . . . which they are hereby authorised and directed to execute, etc., etc., etc."

No order was ever made as to this matter by the Divisional Court at all; and it was irregular and improper to insert in the Divisional Court order such a clause without that Court being consulted. And no order was in fact asked—nor was any order in fact made by the learned Judge of first instance directing the executors to make a mortgage. All that was done was to grant leave so to do.

The statute conferring power upon the Court to make an order authorising trustees to mortgage, etc., land, is R.S.O. 1897 ch. 71, which was originally in the Court of Chancery Act, and then was made specific by statute (1895) 58 Vict. (Ont.) ch. 20, taken from the Imperial Act, 1877, 40 & 41 Vict. ch. 18, which itself repealed the former Acts 19 & 20 Vict. ch. 120, 21 & 22 Vict. ch. 77, 27 & 28 Vict. ch. 45, 37 & 38 Vict. ch. 33, and 39 & 40 Vict. ch. 30.

Neither the Imperial nor the Provincial Act gives the Court power to order a mortgage, etc., but only to authorise a mortgage, etc.

The forms of decree given in Seton, vol. 2, may perhaps be thought to be directory and mandatory, but they are not so.

Re Barrs-Haden's Settled Estates, 32 W.R. 194, 49 L.T.N.S. 661: "No doubt, it is in form an order for a sale . . . but it is not a positive order that the estates should be sold; it is only an authority to the trustees to sell" (per Kay, J., at p. 662.)

The judgment as issued, however, contains a direction to execute the mortgage—this is under sec. 21 of R.S.O. 1897 ch. 71, which says: "The Court may direct what person or persons shall execute . . . the mortgage." All that it means is that, if the executors make up their mind to mortgage on the terms, etc., set out, they are the persons to execute. If it meant any less or more, the clause should be struck out. The judgment should not regularly, and in the ordinary case, have been issued unless the executors had decided to mortgage, had made arrangements for the money, arranged the terms, etc., etc.—then the Court should have been asked to approve of the specific arrangement. If issued before, care must be taken not even to seem to hamper the trustees in obtaining the best terms for their estate.

After the judgment of the Divisional Court, Mr. Lawrence's firm took steps to procure the money; so did Thomas Shepard. A mortgage was drawn, but Thomas Shepard refused to sign, contending that he had made better terms. Then an application was made for an order compelling Thomas Shepard to execute

the mortgage; and a cross-motion made for the Court to approve of the arrangement Thomas had made. The Official Guardian had approved of the former mortgage, and declined to withdraw his approval; but it does not appear that he disapproved of the arrangement made by Thomas more than would appear from his favouring the carrying out of the other arrangement, and his judgment that, in case of such a conflict, the mortgage should not be taken by a member of the family, who apparently sided with one of the contending parties. Mr. Justice Latchford dismissed the application of Thomas Shepard with costs, and made an order, on the first named application, that he execute the mortgage he had refused to execute. He now appeals.

I think that no power exists in the Court to compel a trustee to act upon an authority given him by the Court under the Act; and that, the order of the Divisional Court being interpreted as it should be, the appeal should be allowed. And I think that, when two trustees cannot agree as to the arrangement to be made, it is not for the Court to decide between them in such a manner as is asked here. If they cannot agree upon how to act upon the authority given them, they would be well advised either to give up the trust or ask the Court for advice. If there be no other way of settling the difficulties, an application should be made to remove one or the other or both.

As at present advised, I should consider the arrangement made by Thomas the more advantageous; but I do not think that, upon the application of him alone, as in the present case, and under the circumstances of the present case, we are called upon to express any decided opinion—and I do not. But the application was rightly refused.

The irregularity of the proceedings and the conduct of all concerned induce me to say that there should be no costs of any party of the present appeal or of the application before my brother Latchford—except those of the Official Guardian, half of which should be paid by each of the two contending parties personally. And they should not be allowed any of these costs, their own or otherwise, out of the estate.

It would be well for these executors to consider how their wrangling is likely to result and to lay aside personal feelings in the endeavour to do the best for the estate.

Under the present state of the legislation, I do not think the rule in Peareth v. Marriott, [1866] W. N. 48, need necessarily be followed; the practice followed in the present case of asking leave to mortgage the estate, in an action to determine what the estate is, saves costs and is not objectionable.

SUTHERLAND, J., agreed.

FALCONBRIDGE, C.J., agreed in the result.

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MIDDLETON, J., IN CHAMBERS. DECEMBER 30TH, 1911.

## RE HUDSON'S BAY CO. AND TOWN OF KENORA. RE KEEWATIN CO. AND TOWN OF KENORA.

*Interest—Award—Agreement—Time of Payment—Method of Computation—Compound Interest.*

Applications by the two companies for orders to enforce awards.

C. A. Moss, for the Hudson's Bay Company.
J. Jennings, for the Keewatin Power Company.
G. Wilkie, for the Corporation of the Town of Kenora.

MIDDLETON, J.:—The question I am asked to determine upon this application arises upon an agreement of the 14th July, 1906.

A reference to arbitration was to be had to fix the value of certain property taken by the town corporation. The town corporation agreed to pay the amount awarded and interest from the date of the expropriation notice, the 7th June, 1904, on the amount to be so ascertained.

The award was not made until the 29th January, 1910; and the sums awarded are large.

By an agreement of the 1st August, 1911, a question as to the way in which interest should be computed is to be determined upon a motion to enforce the award. This question is thus stated: "Should the interest payable by the town to the companies under the agreement of 14th July, 1906, be calculated as simple interest from the date of the expropriation notices until July 10th, 1911, the date of tender, or should such interest be calculated to the date of the award, and a rest be then taken and interest calculated on the amount so ascertained at the date of the award to the 1st day of August, 1911, the date of payment?"

Upon the argument before me no distinction was made between the date of tender and the date of payment, but the sole question discussed was, whether there should be a rest at

the date of the award. The difference in the modes of computation is about $1,500. Under the agreement, the amount of the award with interest became payable immediately the award was made; and the correspondence shews that the delay is attributable to the town; and, as the town ought then to have paid the amount then due, it is clearly just that the interest awarded as damages for the delay should be based upon the amount due, i.e., the whole sum, including interest, then payable. The case was excellently argued, and many cases cited, but none are precisely in point.

Lord Chancellor Thurlow, long ago, stated what, I fear, is the true situation to-day: "My opinion is in favour of interest upon interest; because I do not see any reason, if a man does not pay interest, when he ought, why he should not pay interest for that also. But I have found the Court in a constant habit of thinking the contrary; and I must overturn all the proceedings of the Court if I give it:" Waring v. Cunliffe (1790), 1 Ves. at p. 99.

It is well settled that in mortgage actions, when a sum has been found due, which includes interest, and a subsequent computation is necessary, the interest is computed "upon the whole compound sum due;" but this is everywhere regarded as an exception to the general rule, and the Court has invariably refused to extend the principle to other cases.

In Creuze v. Hunter (1793), 2 Ves. 159, Lord Chancellor Loughborough declined to apply the principle to an action to enforce an annuity, which had been referred, and an amount found due, including interest; and subsequent interest was claimed on the amount reported. "No doubt, in the case of a mortgage, but I am unable to apply that case to that of a simple contract debt which does not carry interest. In the case of a mortgage the ground is plain. The estate belongs to the mortgagee; it is forfeited; the owner comes here to redeem; the Court orders payment on such a day, and that then he shall redeem; he lets that time elapse; of course he must pay interest."

Where, in Turner v. Turner (1819), 1 J. & W. 47, a bond debt had been found due with interest, and on further directions interest had been computed on the whole sum, the Master of the Rolls said: "It has been endeavoured to assimilate this to the case of a mortgage where the Master has found the sum due, and interest is converted into principal. But the ground of the practice there is, that the party comes for the favour of the Court. He is ordered to pay a given sum on a given day; and, if he does not, he is put under terms of paying what will

indemnify the other party completely. This was all discussed in Creuze v. Hunter, and the distinction from the case of mortgages is pointed out."

See, also, Elton v. Cuvilier (1881), 19 Ch. D. 49.

Here there is the one debt. By agreement, the money to be paid for its detention has been fixed by the parties up to the award, and from that time on interest is allowed as damages; but I can find no warrant for the compounding of the interest or for the allowing of interest upon the money which was payable as interest at the date of the award.

In The Queen v. Grand Trunk R.W. Co., 2 Ex. C.R. 132, interest post diem allowed as damages was assessed at 5 per cent. on the principal sum, and not upon the principal sum and the interest payable by contract. The amounts there involved were large, and, the controversy being as to the mode of computation, I cannot assume that this point was overlooked, though not discussed.

My answer to the question is, that the interest is to be computed as simple interest without a rest.

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

## CHEFF v. MARTIN.

*Will—Devise—Complete Restraint on Alienation—Invalidity, in Spite of Time-limit—Conditions—Absence of Demand of Fulfilment—Absence of Gift over.*

Action for a declaration that the will of Joseph Martin was void and ineffectual to pass an estate in the land devised to the defendant Dosithée Martin.

M. Wilson, K.C., for the plaintiff.

O. L. Lewis, K.C., and W. G. Richards, for the defendant Dosithée Martin.

J. M. Pike, K.C., for the other defendants.

FALCONBRIDGE, C.J.:—This case involves the consideration of the same will as was in part construed in Martin v. Martin, 8 O.L.R. 462. The clauses now in question are the last two on p. 463 and the first three on p. 464, which contain the devise to Joseph Martin.

Joseph was born in 1877, and died on the 25th January, 1906. He had made a will on the 22nd March, 1901, whereby he left all his estate to the defendant Dosithée Martin and appointed her sole executrix. This will was duly proved in the Surrogate Court by Dosithée, who went into possession of the land.

This action is brought to declare the will to be void and ineffectual to pass the estate in the land to Dosithée.

Charges of undue influence were made in the statement of claim, but these were abandoned at the trial; and the sole question is the construction of the will of Moïse Martin (the testator whose will was in part construed in Martin v. Martin) and the question whether the prohibition or restriction against Joseph selling or mortgaging the land before attaining the age of thirty-five years, is valid.

Counsel cited a large number of cases, which are set out in the extension of their arguments in the reporter's notes of the trial.

But I think the case is completely governed by Blackburn v. McCallum, 33 S.C.R. 65. The restraint is general and void, apart from the time-limit, and does not become valid on account of the limitation as to time. As to this case, Mr. Armour says (Theobald, 7th ed. (Can.), p. 646, note (*e*)): "All the cases as to time must, since Blackburn v. McCallum, be subject to the decision in that case, viz., that, if the restraint is complete, it will not be valid merely because limited as to time. In other words, limitation as to time is not partial restraint." See, also, Hutt v. Hutt, 24 O.L.R. 574 (C.A.)

The duties imposed on Joseph as regards his unmarried sisters and his mother are mere conditions, and no demand of fulfilment was ever made by any of them.

There is no gift over in the will.

The action will be dismissed with costs to be paid by the plaintiff to the defendant Dosithée—no costs as between the plaintiff and the other defendants, who are all in the same interest as the plaintiff.

DIVISIONAL COURT. DECEMBER 30TH, 1911.

## *LESLIE v. PERE MARQUETTE R.W. CO.

*Railway—Severance of Farm—Undergrade Crossing—Conveyance of Right of Way by Land-owner—Consideration—Agreement—Maintenance of Crossing—Right to Continuance—User for Twenty Years—Easement—Finding of Trial Judge—Appeal.*

Appeal by the defendants from the judgment of CLUTE, J., 24 O.L.R. 206, 2 O.W.N. 1316.

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

R. J. Towers, for the defendants.

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

The judgment of the Court was delivered by BRITTON, J. (after setting out the facts):—At the trial and upon the argument the plaintiffs contended that, apart from any express agreement at the time of the agreement for sale of the right of way, they, the plaintiffs, had, subsequently to the sale of the right of way, and prior to 1906, acquired this undergrade right of way by prescription. If that claim has been established, it will not be necessary to consider the other branches of the case.

The learned trial Judge found as a fact that the plaintiff has acquired an easement in what is called the undergrade pass. . . . "While I desire my judgment to proceed mainly on the principle laid down in the McKenzie case (McKenzie v. Grand Trunk R.W. Co., 14 O.L.R. 671), I am also of opinion that the plaintiffs have established an easement by continuous user as of right for over twenty years:" 24 O.L.R. at p. 213.

There is evidence to warrant that finding. The Judge discarded the evidence of some of the witnesses and accepted the evidence given by others. He, having seen and heard the witnesses, was in a better position than we are in appeal. But, apart from that, if asked to find upon the notes of evidence in our possession, my conclusion would be that the easement has been established. Let it be granted that the farm was entitled to a crossing at the time when the railway was constructed and after: an underpass would seem more reasonable and economical from the railway standpoint. If, in the long past, it was

*To be reported in the Ontario Law Reports.

better for all parties, they would naturally have an understanding and agreement in reference to the pass, and act upon it.

Upon my reading of the evidence, I am of opinion that the Leslies, as of right, used the underpass, and the predecessors of the defendants and the defendants knew that this pass was being used by the owners and occupants of the farm, as of right, and the defendants did not attempt to interfere to prevent its user until 1906.

The appeal should be dismissed with costs.

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MIDDLETON, J., IN CHAMBERS. JANUARY 2ND, 1912.

## RE WEST NISSOURI CONTINUATION SCHOOL.

*Schools—Continuation School in Township—Erection of Schoolhouse—Powers of Board—Powers of Township Council—Approval of Application for Funds—By-law—Right to Repeal—Issue of Debentures—Funds for Maintenance of School—Duty of Council to Levy—Continuation Schools Act, 9 Edw. VII. ch. 90—Mandamus—To whom Directed—Practice—Affidavits—Irregular Filing—Waiver—Filing nunc pro tunc.*

Motion by the Trustees of the West Nissouri Continuation School for (1) a mandamus to compel the Council of the Township of West Nissouri to raise the sum of $7,000 and pay the same to the school treasurer, or to issue debentures for that amount under township by-law 208 and pay the proceeds to the treasurer; and (2) for a mandamus to compel the council to pay $1,000 for maintenance of the school.

The motion was heard at the London Weekly Court.

W. R. Meredith, for the applicants.

Sir George C. Gibbons, for the township corporation.

MIDDLETON, J.:—This is an unfortunate contest between a municipal council and a school board, in which the council, quite forgetting the limitation of its sphere, seeks to review the action of the school board and to protect the ratepayers from the action of that board. As put by the Reeve: "A very large proportion of the ratepayers of the township are opposed to the establishment or maintenance of a continuation

school in the said township, as I verily believe, and myself and other councillors opposed to the establishment of such school were elected by a large majority on that issue. . . . Knowing the feeling of the ratepayers in this regard, the majority of the councillors felt it to be their duty to prevent, if possible, the establishment of the said school against the will of the people who have to maintain the same."

Nothing can be more improper than this attitude on the part of the township council. In our complicated system of municipal government, each subordinate body is supreme within its own limits, and municipal government cannot be carried on if one of these subordinate bodies, not content with its own supremacy within the ambit of its own jurisdiction, seeks to interfere with matters outside its jurisdiction, and, sitting as a self-constituted court of review, to render nugatory the action of other representative bodies with which it, in its wisdom, does not agree.

The Reeve and his associates are quite wrong in seeking to answer this application by the assertion that they and the ratepayers do not approve of a continuation school. That question is one over which they have no voice or control. "The council of a county with the approval of the Minister may establish in any township, town or village in the county one or more continuation schools:" sec. 5 of the Continuation Schools Act, 9 Edw. VII. ch. 90; and this action cannot be reviewed by the township.

It is the duty of the Court to prevent this invasion by one municipal body of the legislative territory assigned to another, and to compel the discharge by one municipal body of any duties which it may be called upon to discharge which are merely ministerial and ancillary in their nature.

The legislature has seen fit to provide that school affairs shall be in the hands of the school boards, and shall not be in the hands of the municipal council; and at the same time has provided that the municipal council shall be the hand by which the money required for school purposes shall be raised. "The council shall levy and collect in each year such amount as the board may deem necessary for the maintenance of the school:" sec. 7 (9 Edw. VII. ch. 90). "Where the sum required by a board for permanent improvements" (which includes the erection of a school house, sec. 2 (1) (k)) "the same shall be raised on the application of the board" (9 Edw. VII. ch. 91, sec. 38, made applicable to continuation schools by sec. 7 (3) of the Continuation Schools Act), unless the council exercise the special limited statutory rights given by sub-sec. 3 et seq. At

the first meeting after the receipt of the requisition or so soon thereafter as possible, the council shall "consider and approve or disapprove the same;" and, if it disapproves, it shall, on the request of the board, submit the question to the ratepayers.

The question was considered by the council, and the council approved of the application, and it then became the duty of the council to pass a by-law in accordance with the requirements of sec. 38, and to issue and sell the debentures and pay over the proceeds to the school board.

In compliance with this duty, the by-law 208 was passed. On the attack upon its validity, the council properly enough did nothing pending the litigation. In August last, a change having taken place in the views of the council, by-law No. 216 was passed, by which 208 was repealed. It is now said that this destroys the rights of the board. I think not. The right to approve or disapprove was one which the municipality was called on to exercise, once and for all, immediately after the receipt of the requisition, and, when approved, the council was bound then to do all necessary for the raising of the money. It may well be that by-law 208 does not contain provisions that are now suitable, and that its repeal is necessary to enable the financial problems to be worked out; but, it seems to me, I am not concerned in this in any way.

I think a mandamus should go directing the township to discharge the duty devolving upon them under sec. 38, in view of the approval of the application of the board by the issue of debentures, and by the passing of the necessary by-law therefor, and to pay over the proceeds to the school board when the debentures shall have been sold. The mandamus should direct the doing of this forthwith, but no motion of a punitive character should be made if reasonable diligence is shewn, and the matter is taken up and proceeded with at the first meeting of the new council in 1912.

The mandamus should be directed to the corporate body, and not to the individuals, though the individuals were properly notified. See Re Bolton and County of Wentworth, 23 O.L.R. 390.

Another motion for a mandamus is made, based upon a requisition for $1,000 for maintenance. This motion has been pending for some time, owing to the litigation between Henderson and the township, and the township now says that it has no money with which to pay.

Section 7 (1) of 9 Edw. VII. ch. 90 makes it the duty of the council to levy the amount necessary for the maintenance of the school. The school year does not expire with the calendar year,

and I can see no reason which will prevent the council from levying the sum necessary to enable the board to carry on its work for the current school year.

I am not concerned with any difficulty the township may be in by reason of its default, and leave it to work out the situation as best it can. The school trustees had the right of determining without question the amount to be raised for school purposes within the municipal limits and of authoritatively calling upon the municipal authorities to collect and hand over that amount, and the municipal authorities are under an absolute obligation to obey the behests in that regard of the school trustees. See per Sedgewick, J., in Canadian Pacific R.W. Co. v. City of Winnipeg, 30 S.C.R. 563.

A preliminary objection was taken that the affidavits were not filed in the proper office. They were in fact filed and in the custody of the Court; copies were demanded, and they have been answered, and the motion was enlarged without any objection being taken. If this does not amount to a waiver (in my view it does), I think I have power to allow the affidavits to be marked by the proper officer *nunc pro tunc*.

The township must pay the costs of both motions.

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SUTHERLAND, J. JANUARY 2ND, 1912.

## STRONG v. CROWN FIRE INSURANCE CO.

*Fire Insurance—Action on Policy—Notice in Writing of Loss—Value of Goods Insured—Misrepresentation—Previous Fire in other Premises—Materiality—Additional Insurance—Delivery of Particulars of Loss—Proofs of Loss—Sufficiency—Time when Furnished—Further Proofs Required—Statutory Conditions—Action Brought within Sixty Days after Last Proofs Supplied—Premature Action—Insurance Act, sec.* 172*—Relief from Effect of Imperfect Compliance with Conditions—New Action Brought—Consolidation with Premature Action—Costs—Amendment of Defence at Trial.*

Action upon a fire insurance policy. The plaintiffs were Charles G. Strong, assignee for the benefit of creditors of Charles A. Jeffrey, who effected the insurance, and Gault Brothers Limited, to whom the insurance money was made payable in the event of loss. The insurance was upon a stock of goods in a store

at Dresden. The defendants' policy was for $5,000, and was dated the 29th April, 1910. The fire occurred on the 25th December, 1910, and totally destroyed the stock in question.

N. W. Rowell, K.C., and George Kerr, for the plaintiffs.

G. T. Blackstock, K.C., and H. E. Rose, K.C., for the defendants.

SUTHERLAND, J. (after setting out the facts):—The defendants, in their statement of defence, plead . . . that they did not consent to any assignment to the plaintiff Strong, and do not admit the right of either of the plaintiffs to maintain the action. This objection was not pressed at the trial; and the plaintiffs are, I think, clearly entitled to maintain the action.

The defendants also . . . plead that Jeffrey did not, forthwith after loss, give notice in writing to the company. I think the notice given by Gault Brothers Limited was sufficient.

The defendants also plead that Jeffrey did not deliver, as soon after the fire as practicable, as particular an account of the loss as the nature of the case permitted; and, further, that he did not, as required, in support of the claim produce, as it was practicable for him to do, books of account, warehouse receipts, stock lists, etc.; but neglected and refused so to do; and that, in consequence, the 13th statutory condition is a bar to the claim.

They also allege that no sufficient proofs of loss were delivered; and that, in consequence, the 17th statutory condition is a bar to the action.

They further allege that the action was commenced less than sixty days after completion of the proofs of loss, wherefore, and by virtue of the 17th statutory condition, the same is premature, and . . . ought to be dismissed.

At the opening of the trial, the defendants made an application to amend their statement of defence in certain respects, which application . . . was, at the conclusion of the evidence, allowed, and the following amendments made:—

"8. Charles A. Jeffrey . . . made application in writing to the defendants for the policy . . . and in his said application omitted to communicate to the defendants a circumstance material to be made known to the defendants in order to enable them to judge of the risk they undertook, to wit, the circumstance that . . . Jeffrey had previously had a stock of goods . . . destroyed or damaged by fire, wherefore, by virtue of the 1st statutory condition, the insurance in respect of which this action is brought is of no force.

"9. In the said application . . . Jeffrey misrepresented a further circumstance material to be made known . . . that the value of the stock to be insured was $25,000, whereas it was in fact of much less value, wherefore, and by virtue of the 1st statutory condition, the insurance . . . is of no force.

"10. The said . . . Jeffrey furnished to the defendants proofs of loss and a statutory declaration in support thereof, in which he declared that the property insured by the policy . . . amounted in value, at the time of the fire, to $25,056.74, whereas in fact the said property was of much less value, wherefore, and by virtue of the 15th statutory condition, the claim of the plaintiffs upon the policy . . . was vitiated." . . .

[Reference to parts of the evidence.]

While the evidence is not, perhaps, in all respects as satisfactory as it might be, or as it could have been made if some of the books and papers had not been destroyed in the fire, I have come to the conclusion that the stock-taking in August, 1910, was well and accurately done, and its results carried honestly and carefully into the . . . books . . . . It seems to me, therefore, that it furnishes a proper and fairly safe point from which to start.

I have also come to the conclusion that, following the business down from that date . . . it is reasonably established that, at the time of the fire . . . there was in the store approximately $25,000 worth of goods, estimated at cost prices. . . . But . . . it is contended on behalf of the defendants, first, that some substantial allowance should be made for depreciation . . . ; and, second, that the representation of Jeffrey was, that the $25,000 was cash value or present cash value. As to the first of these contentions, it may be said that, allowing a fairly liberal reduction of 10 or 12 per cent. on the $25,000, there would still be stock to the full value of the aggregate sums mentioned in the various policies, viz., $22,000. As to the second, it is clear that the agent of the companies understood it as a valuation of the stock at cost prices. . . .

It is fairly clear from the evidence of Jeffrey that all he understood he was representing or intended to represent was, that his average stock, taken at cost prices, amounted approximately to $25,000. Upon the whole evidence, I do not think it will be possible to find that there was any misrepresentation on his part as to the value of the stock. See remarks of Meredith, C.J., in Perth Mutual Fire Insurance Co. v. Eacrett, Printed Cases in Appeal, vol. 145, at p. 50.

I have also come to the conclusion, on the whole evidence, that Jeffrey and the plaintiffs furnished the defendant company

with every reasonable facility for investigating the facts as to the amount of the stock at the time of the fire, and supplied to them every book, paper, and document in their possession or which, under the circumstances, it was reasonable to ask for.

The defendants laid much stress in argument upon the fact that Jeffrey had, in the applications for insurance, made the statement that he had had no previous fire. . . . They rely upon Western Assurance Co. v. Harrison, 33 S.C.R. 473. . . .

It seems altogether likely that such a small fire or "smudge" as Jeffrey speaks of, if it had been known to the companies at the time the insurance was being effected, would not have led them to refuse to grant the insurance. . . .

The former fire occurred in different premises. . . . Each of the four applications . . . has a clause somewhat similar to that dealt with in Stott v. London and Lancashire Fire Insurance Co., 21 O.R. 312. . . . In the present case, in the printed clause at the foot of the application, there is in each case, the reference to "the property to be insured," etc. Upon this authority, I think I should hold that the question as to the former fire, under the circumstances, is not one material to the risk. . . .

In the application of Jeffrey to the Rimouski Fire Insurance Company, dated the 20th December, 1909, and that to the defendant company on which the policy in question in this action was issued, there appears the following statement: "The applicant covenants and agrees that the property or articles described shall not be insured to more than two-thirds of their actual value." Attached to the first of these applications is a memorandum to the effect that there was further insurance on Jeffrey's stock to the extent of $13,000. The application itself is for an additional $5,000, making in all $18,000. In the application to the defendant company, which was for $5,000, there is the statement that there is further concurrent insurance amounting to $15,600. It is apparent, therefore, that in each case the company itself, when issuing the policy, was ignoring this feature of the applications and putting on additional insurance which carried the total amount of insurance up to an amount in excess of two-thirds of the estimated cash value or present cash value of the stock at $25,000.

I have come to the conclusion that the plaintiffs did deliver, as soon as practicable, such particulars and account of the loss as the nature of the case reasonably permitted and were necessary. I have also come to the conclusion that the plaintiffs submitted reasonably satisfactory proofs of loss. . . . The initial

proofs were furnished by the plaintiffs to the defendant company on the 4th February, 1911. One week later, the defendant company served a notice upon the plaintiff company demanding, among other things, invoices of goods purchased by Jeffrey from the wholesale firms with which he was dealing, and the production of a certificate . . . under statutory condition No. 13(d) and (e). It was not until the 17th March, 1911, apparently, that the requisition was complied with. . . .

The plaintiffs rely upon Rice v. Provincial Insurance Co., 17 C.P. 548, for the proposition that the sixty days referred to in statutory condition 17 . . . are to be computed from the 4th February, 1911, when they furnished the proofs upon which they rely. I was at first disposed to think that that case has application to the present case, but have, somewhat reluctantly, come to the conclusion that it has not. The defendant company seems, under statutory condition 13(d) and (e), to have a right to demand the proofs therein set out, and the plaintiffs are required reasonably to satisfy the demand. In some cases, this might, under the statute, work a serious inconvenience to a plaintiff. . . . In the present instance, however, the defendant company with reasonable promptness made their demand; and, though that demand was dated on the 11th February, 1911, it was not complied with by the plaintiffs until the 17th March following. I am inclined to think, therefore, that the action was brought by the plaintiffs prematurely, and in strictness should not have been commenced until at least sixty days subsequent to the 17th March, 1911.

I think, however, this is a case in which I should give the plaintiff company the benefit of sec. 172 of the Insurance Act, if it is properly applicable, as I think it is. In part, that section is as follows: "Or where for any other reason the Court or Judge before whom a question relating to such insurance is tried . . . considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement or proof, . . . shall in any of such cases be allowed as a discharge of the liability of the company on such contract of insurance . . . ."

The plaintiffs, within a year from the date of the fire, namely, on the 20th December, 1911, issued new writs against the defendant company and the other companies, and applied to me to consolidate the present actions and the new actions. It seems to me that, under Con. Rule 435 and Martin v. Martin, [1897] 1 Q.B. 149, I have power to make such order of consolidation.

I think it is proper, in my view of the case and in the light of the findings I have made, to do so, and I make an order . . . accordingly.

But this brings up the question of what, under the circumstances, should be done about costs. The plaintiff brought the present action, as I have already indicated and held, prematurely; and, under ordinary circumstances, and following such cases as Dodge Manufacturing Co. v. Hortop Milling Co., 14 O.W.R. 3, 115, 265, and National Stationery Co. v. British America Assurance Co., ib. 281, I should have been disposed to require them to pay the defendants' costs of the action. I permitted, however, as already indicated, amendments to be made at a late date to enable the defendant company to set up defences which otherwise, under their statement of defence . . . , they could not have raised. The defence as to the action having been brought prematurely is also a rather technical one; and, under all the circumstances, the best conclusion I have been able to come to on the question of costs is to make no order as to the same.

The plaintiffs will, therefore, have judgment for the full amount of the policy as against the defendant company in this action.

[The learned Judge also gave judgment for the plaintiffs against the companies made defendants in three other actions.]

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MASTER IN CHAMBERS. JANUARY 3RD, 1912.

## LINDSEY v. LeSUEUR.

*Discovery—Examination of Defendant—Production of Documents—Relevancy—Scope of Discovery—Information to be Procured.*

Motion by the plaintiff for an order requiring the defendant to make further production and answer questions which he refused to answer upon his examination for discovery.

I. F. Hellmuth, K.C., for the plaintiff.
G. F. Shepley, K.C., for the defendant.

THE MASTER:—The gist of the action is to restrain the defendant from making use of original papers and other materials furnished to him by the plaintiff and his late father, to enable

the defendant to write a life of the late William Lyon Mackenzie, to form one of a series published by Morang & Co., and intituled "The Makers of Canada."

The plaintiff, by the statement of claim, alleges that such materials were furnished only on the assurance of the defendant that he was "in sympathy with the character he was to depict as one of 'The Makers of Canada,' but that he concealed from the plaintiff the fact that he had previously been instrumental in having Morang & Co. reject a life of Mr. Mackenzie, written by another author for 'The Makers of Canada,' as being too favourable."

The statement of defence asserts that the defendant was given permission to make such use of the material as he might deem proper, without any limitations, restrictions, or terms whatever.

The plaintiff rests his case on the foregoing alleged representations of the defendant and on the facts set out in the statement of claim, and particularly on the alleged concealment of his having induced Morang & Co. to reject the previous life of William Lyon Mackenzie as being too favourable.

Everything, therefore, that is relevant to these allegations of the plaintiff and tends to prove their truth must be disclosed by the defendant, as well by production of documents as by answering questions. The production will also shew whether, to use the technical term, any of the material was garbled, so as to shew the defendant's animus.

As has lately been pointed out, discovery extends not only to the knowledge and recollection of the adverse party but also to his information and belief. See Vanhorn v. Verral, ante 337, 439. Counsel seem too often to forget not only this rule, but also that the chief object of examination for discovery is to obtain all possible admissions from the party examined so as to limit as far as possible the points on which evidence must be given at the trial.

Here the defendant is alleged to have obtained access to the materials in possession of the plaintiff and his father, on the understanding that he would write a life of the plaintiff's maternal grandfather which would justify his being given a place among "The Makers of Canada;" but that, instead of doing so, he produced a work of such an opposite character that the Morang Co. refused to publish it—a fact which has been the subject of a long course of litigation between them and the defendant.

As the plaintiff asks a return of all extracts and copies, they should all (if required) be deposited in Court, and should certainly be produced on the further examination of the defendant, which should be at his own expense. The costs of this motion will be to the plaintiff in the cause in any event.

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MIDDLETON, J. JANUARY 3RD, 1912.

## MANN v. FITZGERALD.

*Crown Grant—Patents for Land—Construction—Broken Front Lots—Peninsula Physically Connected with one Lot but Lying in Front of Adjoining Lot—Unpatented Land—Title—Possession—Plan—Survey—Ejectment.*

This was an action of ejectment, in which the plaintiffs sought to recover a parcel of land known as Deihl's point, a peninsula extending into Cameron Lake, physically connected with lot No. 26, 10th concession, Fenelon, but lying in front of lot 25.

E. D. Armour, K.C., and A. D. Armour, for the plaintiffs.

R. J. McLaughlin, K.C., and J. A. Peel, for the defendant.

MIDDLETON, J.:—Fenelon was surveyed in 1824, by James Kirkpatrick, and his instructions called for a traverse of all lakes in the township. His plan shews that the shores of the lake were very inaccurately surveyed, as the peninsula in question is not shewn at all.

There is an allowance for road between lots 25 and 26, and this, if extended across the bay behind the peninsula, will cross it at a narrow portage.

On the 31st March, 1825, the Crown patented lot 25 to Kirkpatrick (the surveyor), giving the waters of Cameron Lake as the west boundary of the lot. This, I think, is the east side of the bay, and does not include the peninsula.

On the 27th September, 1839, the Crown patented lot 26. The north boundary is described as running to Cameron Lake, thence southerly, westerly, and southerly to the southern limit of said broken lot 26, otherwise to the allowance for road between broken lots 26 and 25. This is very easy to understand when the plan of 1824 is looked at, but it is difficult to apply to the actual survey.

The plaintiffs contend that the water line must be followed quite regardless of directions, and thus the whole peninsula is included.

I think the more natural thing to do is to follow the water's edge to where the road allowance, extended across the bay, intersects the shores of Cameron Lake at the western side of this peninsula, and then turn easterly.

The effect of this is, that this peninsula, situate in front of lot 25, and partly in concession 9 and partly in concession 10, is not patented.

The owners of lots 25 and 26 always assumed that this road allowance should be continued across this bay, and that the portage across the isthmus, where the extended road would cross it, formed the true boundary between lots 25 and 26. In 1868, they had this line run to enable timber to be cut and removed, upon the assumption that this was the true boundary; and from that time down to the present the owners of these lots, by word and conduct, have always treated this as the established line between the two lots. . .

The point in front of lot 25 has long been known as Deihl's point, from the fact that in 1833 Kirkpatrick sold this lot to one Peter Deihl, and from that time on Deihl and his grantees have used this point as though it was their own. There has not been any enclosure or physical occupation of the point; the land was not suited for cultivation; but the use has been just such as would be expected had this been, as it was assumed to be, part of 25.

This assumption of ownership was acquiesced in, in the fullest manner, by the owner of lot 26 from time to time; and, when the owner of lot 26 sold the water front of that lot, he recognised the portage as the boundary of his lot.

The plaintiffs claim title under a conveyance made by Eades on the 9th October, 1909. Eades had, he thought, conveyed his whole water front, and had no idea that he had any claim to this point, and intended selling the rear part of the land only.

The conveyance, as prepared by the purchasers' solicitor, covered "all those parts of 26 in the 10th concession, Fenelon, not heretofore sold and conveyed by metes and bounds by conveyances duly registered." This description is quite adequate to carry Deihl's point if it formed part of lot 26, and if the title was vested in Eades; even though he was quite ignorant of the fact, this deed would convey to the plaintiffs. The plaintiffs may have perpetrated a fraud upon Eades in obtaining his signature to this deed, but he alone can complain of the fraud, and this cannot aid the defendant, even if proved.

Taking the view I do as to what passed by the patent, I do not think that the plaintiffs have any paper title to the lands in question. Nor has the defendant any title.

Mr. Armour argues that, this being the case, the plaintiffs must succeed, because they took possession of the land and were ousted.

No doubt, possession implies ownership and casts upon one who seeks to disturb possession the onus of shewing title in himself. The kind of possession interfered with is a matter of importance. Here it was the mere placing of a tent on this sandy point. The defendant has shewn a better title; he has shewn the same kind or a better kind of possession, extending over many years, and that the persons through whom the plaintiffs purport to claim title have acknowledged his claim. All this would be of little value if the plaintiffs had a conveyance and were entitled to the protection of the Registry Act; but it seems to me of the greatest value when the contest is treated as one between two parties, neither of whom has the paper title.

If I am right in assuming that the title is still in the Crown, no doubt, on the facts being placed before the Minister, he will direct a patent to issue to the defendant. There can be no doubt, upon the evidence as placed before me, that the defendant's claim has been recognised for many years, and the plaintiffs are seeking to avail themselves of a dishonest advantage in the way the deed from Eades to them is drawn. Eades, as I have said, did not intend to sell this parcel, and would not have done anything to interfere with Fitzgerald's position. I do not think the form of the description was, at the time, intended to be tricky, but the plaintiffs now seek to avail themselves of the situation created, and to acquire this point without paying for it. This land is said to be worth $1,000 as a site for a summer residence.

Action dismissed with costs.

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MIDDLETON, J. JANUARY 3RD, 1912.

## CROWTHER v. TOWN OF COBOURG.

*Water and Watercourses—Polluting Stream with Sewage—Drainage of Part of Town—Property Right in Stream—Riparian Owners—Nuisance—Liability of Municipal Corporation—Injunction—Damages.*

Action to restrain the defendants from draining sewage or offensive matter into a stream flowing through the plaintiff's land, and for damages.

H. M. East, for the plaintiff.
F. M. Field, K.C., and F. F. Hall, for the defendants.

MIDDLETON, J.:—The plaintiff owns a large hotel. The hotel grounds extend on both side of a stream and pond, commonly called "Factory Creek." The defendants have recently constructed an 8-inch title drain, some 2,000 ft. long, along King street, with a branch on Stuart street, for the purpose of draining that part of the town west of the creek.

The by-law was passed in pursuance of a recommendation of the Local Board of Health, who, being "impressed with the unsanitary conditions" of that portion of the town to be drained, "recommend the counsel to construct what sewers are necessary to put the locality into sanitary condition." The drain directed to be constructed is by the by-law said "to be exclusively used for carrying off water from cellars, baths, and sinks."

The drain thus constructed empties into the creek a little south of King street.

Some nine houses are permitted to use this sewer or drain, and, in some instances at any rate, these houses are equipped with water-closets which discharge into the drain and the creek by its means.

I am inclined to think that it was always intended that this sewer should be used in this way. Unless it is to be so used, the requirement of the Local Board of Health is not being met. That Board did not desire a mere drain to carry away water from cellars, but required a sewer sufficient to place the district in a sanitary condition. And it seems to me that the council, from the outset, laboured under the mistaken idea that, so long as the by-law did not expressly permit the discharge of sewage, the individuals and not the municipality must answer to the plaintiff. The situation is, that the municipality bring by this drain this filth and deposit it in the stream. I do not think I am in any way concerned with how it reaches the drain—the municipality must take steps to protect the drain from wrongful use, if the use is wrongful, and cannot shift the burden upon the plaintiff.

In the last edition (1908) of Garrett on Nuisances, p. 127, the law is thus stated: "Whereas a riparian owner has, subject to the corresponding rights of his fellow riparian owners, the

right to the temporary use of the water as it passes his land for the ordinary purposes of life, it cannot be suggested that he has any right, apart from prescription, as against other riparian owners, to pollute it in the smallest degree. It follows that, if a riparian owner or other person, not having acquired a prescriptive right to do so as against other riparian owners, prejudicially affects the condition of the water so as sensibly to injure the riparian owner lower down, the latter has his remedy by action."

In this case the defendants sought to shew that the amount of sewage discharged into this water at its normal flow would not create a nuisance, in the sense that it would not cause a noxious smell to arise or would not be apt to produce disease. I do not think there is at the present time any serious danger of the stream being so defiled as to become an offence to the eye or the nose, but there is nevertheless a danger, quite real and measurable, that in the hot summer months the stream may become, because of this defilement, a source both of annoyance and danger, and, in the event of disease in the houses draining into the stream, this danger might become very acute. I do not think the action is in any sense premature or unjustified, quite apart from the danger of prescriptive rights being acquired or the right to complain being lost by laches or acquiescence.

But, I think, the law places the plaintiff's rights upon a higher plane, and that the statement quoted from Garrett is justified by the cases. The defendants have "no right to pollute this stream in the smallest degree." I do not think they can call upon the plaintiff to enter into a discussion as to the degree of dilution up to which sewage is to be regarded as innocuous and beyond which it is dangerous.

It is said that, so long as no real harm is done the plaintiff, it would be a hardship to restrain the municipality from using this natural stream to convey the sewage to the lake; but this ignores the fact that the plaintiff's right to this stream is a property right, and the municipality have no right to take or destroy the property of an individual without compensation. Many an individual has had to suffer from a failure to recognise this elementary ethical principle, and the only difference in the case of a municipality is, that it is given the power to expropriate.

Young v. Bankier, [1893] A.C. 691, is a good illustration. According to the head-note, taken from the judgment of Lord Macnaghten: "Every riparian proprietor is entitled to have the natural water of the stream transmitted to him without sensible alteration in its character or quality. Any invasion of this

right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the Court." What was there done was to discharge water pumped from a mine into a soft water stream. The added water was pure, but hard in quality, and made the water of the stream hard. This shews that nuisance or no nuisance is not the question, but the right to the water in its natural condition.

The same view was taken in Attorney-General v. Corporation of Birmingham, 4 K. & J. 528, where Sir W. Page Wood, V.-C., said of the plaintiff (p. 540): "He has a clear right to enjoy the river which before the defendants' operations flowed unpolluted—or at all events so far unpolluted that fish could live in the stream and cattle would drink of it—through his grounds for three miles and upwards, in exactly the same condition in which it flowed formerly."

This case also affords an answer to the objection that it will be a serious thing to deprive those now using this drain of this means of getting rid of their drainage. As put in the head-note: "In deciding on the right of a single proprietor to an injunction to restrain such interference, the circumstance that a vast population will suffer (e.g., by remaining undrained), unless his rights are invaded, is one which this Court cannot take into consideration." As said by Lindley, M.R., in Roberts v. Gwyrfai District Council, [1899] 2 Ch. 608: "I know of no duty of the Court which it is more important to observe and no power of the Court which it is more important to enforce than its power of keeping public bodies within their rights. The moment public bodies exceed their rights, they do so to the injury and oppression of private individuals, and those persons are entitled to be protected from injury arising from the operations of public bodies."

The earlier case of Embrey v. Owen, 6 Ex. 353, places the plaintiff's right upon the same high plane. Parke, B., says, p. 369: "The right to have the stream flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes." And (p. 368): "Actual perceptible damage is not indispensable as the foundation of an action. It is sufficient to shew the violation of a right, in which case the law will presume damage."

To the same effect is Crossley v. Lightowler, L.R. 2 Ch. 478. As stated in the head-note, this case determines that "the owner of lands on the banks of a river can maintain a suit to restrain

the fouling of the water of the river without shewing that the fouling is actually injurious to him." See also Wood v. Waud, 3 Ex. 748.

I have dealt with the case as though the town was a riparian proprietor. No doubt, it is in one sense, as the stream crosses King street, but what is complained of is, the bringing of filth from the lands of those who are not riparian proprietors and depositing this in the stream. No riparian proprietor could justify this: Ormerod v. Todmorden Joint Stock Mill Co., 11 Q.B.D. 155.

Then it is said others foul this stream. This affords no answer: Crossley v. Lightowler, L.R. 2 Ch. 478. No case was made on the evidence for more than nominal damages, so I award $1 damages and an injunction restraining the defendants from in any way polluting the stream in question by discharging or permitting to be discharged through the drain in question any sewage or other foul or noxious matter.

The defendants must also pay the costs.

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STONESS v. ANGLO-AMERICAN INSURANCE CO.—RIDDELL, J.—DEC. 29.

*Fire Insurance—Interim Receipt—Issue by Agent—Company not Declining Risk and not Issuing Policy—Insurance in Force until Determination of Head Office Notified—Loss Payable to Mortgagee—Assignment of Mortgagee's Claim—Negligence of Agent—Indemnity—No Damage Shewn.*]—Action on a fire insurance contract. The property (a building) alleged to be insured was destroyed by fire on the 21st April, 1911. There was no formal application for the insurance. The Westport Manufacturing Company, lessees of the building from the plaintiff, corresponded with the defendants' agent at Kingston, and that agent received from the company $40, and signed and issued a receipt therefor, to the plaintiff, as for an insurance for 12 months from the 23rd December, 1910, stating that, "subject to approval at the head office and to the conditions of the policies of the company," the plaintiff "is insured until the determination of the head office is notified." The loss, if any, was made payable to Clara Galbraith, mortgagee. The agent was solicitor for the mortgagee, and as such retained the receipt. The agent informed the defendants of what he had done. The defendants did not refuse the risk, nor did they issue a policy. The

contention of the defendants was, that they were not liable; and, if they were, that they were entitled to indemnity over against their agent, who was brought in as a third party. The two issues, as to the liability of the defendants, and as to the agent's liability to indemnify the defendants, were tried together. RIDDELL, J., said that the Westport company applied for insurance; and, had the insurance issued to them, they would have been trustees for the plaintiff: Greer v. Citizens Insurance Co., 5 A.R. 596. Both the persons effecting the insurance and the person actually named as the person insured were notified that the insurance was effected; so were the company insuring; the money was paid; it made no difference that the insurance money was made payable to the plaintiff's mortgagee; and she had, since the fire, made an assignment to the plaintiff; it signified nothing that the interim receipt did not actually leave the agent's custody—he held it as solicitor for the plaintiff or his mortgagee. It was clear that the insurance continued under the receipt, and that it could come to an end only (1) by the efflux of the 12 months, or (2) by notification of the head office's adverse determination, or (3) by consent, or (4) by the statutory mode. The case was even stronger against the company than Coulter v. Equity Fire Insurance Co., 7 O.L.R. 180, 9 O.L.R. 35. With the internal arrangements and regulations of the insurance company, the insured had nothing to do—the "policy" had been issued, and it would have been a fraud for the agent to have cancelled or destroyed it. It was urged that the insurance was expressly "subject to approval at the head office," and this approval never was obtained; but this contention lost sight of the express provision that the plaintiff "is insured until the determination of the head office is notified." Judgment for the plaintiff, for the amount sued for and costs. As to the third party, the agent, he was guilty of inexcusable negligence towards his principals, but it could not be found that any damage had accrued from this negligence. The learned Judge did not believe that, had the agent made the fullest disclosure of all the facts of the case, the defendants would either have cancelled the insurance or reinsured. This conclusion the learned Judge arrived at from having seen the witnesses and heard their evidence given in the witness-box. Claim for indemnity dismissed, but without costs. J. L. Whiting, K.C., for the plaintiff and third party. F. E. Hodgins, K.C., for the defendants.

LAFEX v. LAFEX—MASTER IN CHAMBERS—JAN. 3.

*Venue—Change—Proper Place for Trial—Convenience—Witnesses.*]—Motion by the defendant to change the venue from Toronto to Parry Sound. The action was by husband against wife to recover damages for the sale by the wife, four years ago, of certain chattels left on a farm in the Parry Sound district, then owned by the plaintiff. The defendant swore to eight or ten witnesses, besides herself, all resident at or near Parry Sound. The plaintiff, in answer, swore to three witnesses, one at Toronto, one at Peterborough, and one at Rosseau, which is only four or five miles from Parry Sound. The Master said that "the home of the action" (Macdonald v. Park, 2 O.W.R. 972) was certainly at Parry Sound. The sittings at Parry Sound will be held on the 6th May, and the plaintiff cannot now be heard to complain of a delay of four months after waiting for four years. On all grounds, the order changing the venue should be made Costs in the cause. D. Inglis Grant, for the defendant. John MacGregor, for the plaintiff.

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MILLER FRANKLIN AND STEVENSON v. WINN—MASTER IN CHAMBERS—JAN. 3.

*Security for Costs—Plaintiffs out of the Jurisdiction—No Substantial Assets in the Jurisdiction.*]—Motion by the plaintiffs to set aside a praecipe order for security for costs. In the writ of summons the plaintiffs were said to "carry on business at New York, Toronto, and elsewhere," and they were also said by their solicitors to be "incorporated under the laws of the State of New York and to have been carrying on a large business in Ontario for some years, with head offices at Toronto." To a demand by the defendants' solicitors, dated the 22nd November, for a statement of the assets of the plaintiffs in this province, no reply was sent, and on the 11th December the defendants took out the order in question. The plaintiffs thereupon launched the present motion, supporting it only by the affidavit of a gentleman described therein as "Canadian manager of the plaintiffs," who described the plaintiffs' assets as consisting of their office furniture, worth $300, and accounts receivable of over $2,400, and of current contracts to over $3,500. The Master said that, upon this state of facts, which were not in any way in doubt, the defendants were entitled to have security. The plaintiffs

were certainly a foreign corporation, and their residence was at New York, so far as such a plaintiff can have a residence. This was shewn by their having no substantial assets here—nothing immediately exigible in execution except the furniture, and on it the landlord would always have a preferential lien. If the plaintiffs were in as large a way of business as their Canadian manager asserted, it would be easy for them to comply with the order, and they could have no difficulty in giving the usual security, either by bond or payment into Court. Motion to vacate the order dismissed with costs to the defendants in the cause. S. G. Crowell, for the plaintiffs. T. N. Phelan, for the defendants.